

Contempt of Court

CONSULTATION PAPER MAY 2019





Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

© Victorian Law Reform Commission 2019.

This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association *Australian Guide to Legal Citation* (4th ed., 2018).

This report reflects the law as at 11 April 2019.

Contempt of Court: Consultation Paper

ISBN: 978-0-9943725-0-5



ACTING CHAIR

Bruce Gardner PSM

COMMISSIONERS

Liana Buchanan
Dr Ian Hardingham QC
Prof. Bernadette McSherry
Dan Nicholson
Alison O'Brien
Gemma Varley PSM
The Hon. Frank Vincent AO QC

CHIEF EXECUTIVE OFFICER

Merrin Mason

ACTING CEO

Lindy Smith (11 Feb–12 Jul 2019)

REFERENCE TEAM

Anna Beesley (team leader)
Annie Blatchford (senior research and policy officer)
Helen Donovan (senior research and policy officer)
Mary Kozlovski (senior research and policy officer)
Octavian Simu (research assistant)

COVER DESIGN

Letterbox

TEXT LAYOUT

GH2 design

Contempt of Court

CONSULTATION PAPER MAY 2019



Victorian
Law Reform
Commission

Victorian Law
Reform Commission
GPO Box 4637
Melbourne
Victoria 3001
Australia
DX 144, Melbourne

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800
Freecall
1300 666 555
(within Victoria)
Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

Contents

Preface	viii
Call for submissions	x
Terms of reference	xii
Glossary	xiv
Questions	xix
PART ONE: GENERAL OVERVIEW	1
1. Introduction	2
Referral to the Commission	2
Why this review is needed	2
Key principles of law relevant to this inquiry	3
The proper administration of justice	3
Freedom of expression	4
Privacy	5
An underlying tension	6
A principles-based approach.....	6
Scope of this review	7
Contempt of court	7
The <i>Judicial Proceedings Reports Act 1958</i> (Vic)	8
The <i>Open Courts Act 2013</i> (Vic).....	8
Previous reviews and reforms	8
Reviews and reforms of contempt of court.....	8
Review of the Open Courts Act	9
Other reviews.....	9
Conduct of this reference.....	10
Commission Chair	10
Division	10
Advisory committee	10
Preliminary meetings.....	10
Consultation paper	10
Formal consultation process	11
How to use this consultation paper.....	11

2. Existing legal framework for contempt of court.....	14
Introduction	14
History and jurisdiction	14
Purpose	15
Unique features of contempt of court.....	16
The language of the law of contempt of court	16
The discretionary nature of the courts' powers.....	16
The standard of proof	17
Summary proceedings.....	17
Who can bring proceedings	17
The distinction between civil and criminal contempt.....	17
Manifestations of contempt of court.....	18
Contempt in the face of the court.....	19
Juror contempt	20
Disobedience contempt.....	20
Contempt by publication (1)—sub judice contempt.....	21
Contempt by publication (2)—contempt by scandalising the court.....	21
PART TWO: CONTEMPT OF COURT.....	23
3. General issues with the law of contempt of court.....	24
Introduction	24
Uncertainty of scope.....	24
Possible reforms.....	26
Procedural safeguards	26
Possible reforms	28
Overlap with criminal law	29
Possible reforms	30
Penalties.....	31
Apologies	32
<i>Sentencing Act 1991</i> (Vic)	32
Warnings.....	33
Pre-emptive warnings	34
Show cause warnings.....	35
Possible reforms	38
4. Contempt in the face of the court	42
Introduction	42
Defining contempt in the face of the court	43
The need for statutory provisions	44
Insulting or disrespectful behaviour	46
Defining 'in the face of the court'	47
Conduct covered by other criminal offences	49
The procedure for contempt in the face of the court.....	50
A consistent approach to disruptive conduct	55
The impact on certain groups of people	56

5. Juror contempt.....	60
Introduction	60
The importance of trial by jury	60
Jury trials in Victoria	61
The regulation of juror conduct.....	61
The <i>Juries Act 2000</i> (Vic) and the <i>Jury Directions Act 2015</i> (Vic).....	61
Forms of contempt by jurors.....	63
Jurors accessing information	63
Jurors disclosing information	64
Possible reforms to contempt by jurors.....	65
Amendments to the <i>Juries Act 2000</i> (Vic)	65
Education of jurors	65
The juror oath	66
Jury directions.....	66
6. Disobedience contempt	70
Introduction	70
Defining disobedience contempt	71
Jurisdiction.....	72
The elements of disobedience contempt	72
Penalties	73
Who brings proceedings?.....	73
Issues with disobedience contempt.....	74
The distinction between civil and criminal contempt	74
Are contempt proceedings necessary to enforce court orders?	75
Possible reforms to disobedience contempt.....	77
Australian Law Reform Commission recommendations.....	78
Law Reform Commission of Western Australia recommendations.....	78
New Zealand Law Commission recommendations	79
7. Contempt by publication (1)—sub judice contempt	82
Introduction	82
Issues with sub judice contempt	85
The tendency test	85
The definition of ‘publication’	87
The definition of ‘pending’	90
The strict liability standard.....	91
The public interest principle.....	93
The summary procedure for sub judice contempt	94
Penalties for sub judice contempt.....	96
Sub judice contempt and the fair trial	97
The influence on jurors	97
Can jurors be protected from prejudicial information in today’s media landscape?.....	101
Suppression orders and take-down orders.....	104

Possible reforms to sub judge contempt	105
A statutory offence of sub judge contempt.....	105
Other ways to manage jury behaviour.....	107
Legal education about social media and sub judge contempt.....	110
8. Contempt by publication (2)—scandalising the court	114
Introduction	114
Issues with the law of scandalising contempt	116
The uncertain test	116
Balancing scandalising contempt and fair criticism	117
Truth as a defence	117
Prosecution of high-profile individuals.....	118
The appropriateness of the summary procedure.....	119
Apologies and retractions	120
Is the law of scandalising contempt adaptable and relevant?.....	121
Criticism of the judiciary	122
Scandalising contempt and freedom of expression	123
Alternatives to scandalising contempt.....	124
Possible reforms to scandalising contempt.....	126
Abolition of scandalising contempt	126
Redefining scandalising contempt	127
PART THREE: THE JUDICIAL PROCEEDINGS REPORTS ACT	131
9. Prohibitions on publication under the Judicial Proceedings Reports Act	132
Introduction	132
A principles-based approach.....	133
Indecent matters and public morals.....	134
The option of repeal	134
Divorce and related proceedings.....	135
The option of repeal	135
Directions hearings and sentence indications	136
Possible reforms to prohibitions on reporting directions hearings and sentence indications	137
Victims of sexual offences.....	138
Possible reforms to prohibitions against identifying victims	140
A victim’s ability to speak.....	141
Consent to publication.....	141
Possible reforms—greater autonomy for victims.....	144
Temporary restrictions—sex offences and family violence	145
Possible reforms to restrictions in cases of sexual and family violence	146

PART FOUR: ENFORCEMENT	149
10. Enforcing laws that restrict publication	150
Introduction	150
Open Courts Act Review—recommendations	151
Implementation of recommendations	152
Data about enforcement	152
Orders under the Open Courts Act	152
Consent to prosecute under the <i>Judicial Proceedings Reports Act 1958 (Vic)</i>	153
Data about initiation of proceedings for contempt by the Director of Public Prosecutions	154
Access to data	154
Definitions of ‘publication’	155
Online publication	155
Definitions of ‘publication’	156
Definitions of ‘public’ and ‘a section of the public’	157
Duration of publication	157
Liability of online intermediaries	158
Possible reforms—laws concerning publication	159
Jurisdiction	161
Enforcement in Victoria	161
Enforcement in Australia	161
Enforcement in foreign jurisdictions	161
Possible reforms—enforcement outside Victoria	163
Awareness of prohibitions and restrictions	164
Court notification process	164
Possible reforms—notifying the public	165
Monitoring compliance with prohibitions and restrictions	167
Responsibility for instituting proceedings	169
The ‘prosecutorial gap’	169
Possible reforms—instituting proceedings	170
Fault elements to prove breach of prohibitions	170
Proving fault elements	171
Notification processes	171
Possible reforms—fault elements	171
Defences and exceptions	172
Statutory defences and exceptions	172
Defence of honest and reasonable mistake of fact	173
Possible reforms—defences and exceptions	173
Penalties and remedies	175
Injunctions	176

Legacy suppression orders	180
Access to data.....	181
Need for clarity in notification and compliance	182
Lack of provision for legacy suppression orders	183
Possible reforms—legacy suppression orders.....	184
11. Conclusion	186
Appendix A: Advisory committee members.....	188
Appendix B: Summary of other reviews of the law of contempt of court.....	189
Appendix C: Recommendations of the Open Courts Act Review	200
Appendix E: Common law contempt of court	204

Preface

It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. - Jessel, M.R., *In re Clements, Clements v. Erlanger* (1877), 46 L. J. Ch. 383.

As the observations of Lord Jessel more than 140 years ago confirm, the law has long been aware not only of the unique features of that sui generis branch of law broadly described as ‘contempt’, but also of the corresponding need to approach with caution attempts to define it, along with the desirability of employing less arbitrary and more certain means of addressing the wrongs which the law of contempt seeks to remedy.

As a subject for potential reform, contempt is a mine of possibilities, if for no other reason than that almost every aspect of the law of contempt, as it exists in Victoria at present, presents the researcher or practitioner with a web of uncertainties and exceptions to principles which collectively seem to remain in place more through inertia than design.

There are both civil and criminal contempts, but the distinction is unclear and has been described by the High Court as illusory. It has been said that contempt is a criminal offence but not a crime. When pursued as a criminal offence, a civil procedure is used to prosecute, and for some contempts, the court itself is the victim, witness, prosecutor, judge and jury.

A warning by the judge, or an apology from the potential contemnor, may avoid a finding of contempt, but if a common law contempt is proven, the penalty is ‘at large’, and the application of ‘criminal’ statutes, such as the *Sentencing Act 1991* (Vic), is unclear, as are the avenues of appeal.

Contempt may be pursued despite the existence of more certain statutory contempt-related offences which may be a fairer response to the impugned behaviour. The criteria which might be invoked by the court or others in deciding whether to proceed at all, and if so for what offence, may only partially overlap with the better-defined discretions which apply to prosecutorial decision-making for more conventional offences.

The balancing of competing legal principles is a common task for the judge, the prosecutor and the law reformer. Contempt does not disappoint in the array of competing principles underlying it; the obvious tension between the principles of ‘open justice’ and ‘fair trial’ is only one of many which are discussed in this Reference.

Along with many other areas of law, contempt is based largely on a series of assumptions, the validity of which might have been in issue anyway, but which have in any event been brought into sharp focus by the rapid emergence of technologies which have revolutionised human communication and information-sharing in ways unimaginable during the era when the law of contempt was established.

Much of the law of sub judice contempt appears to assume that jurors cannot be fully trusted to obey their oath, or the jury directions they receive. Is that assumption valid? Similarly, much of the law relating to suppression orders assumes that potential jurors can be successfully quarantined from material readily available to any person with a computer or a smartphone. The advent of ‘take-down’ orders is based partially on an assumption that a court order for the removal of material from the internet, whether first published before or after the case in issue became sub judice, can be effectively complied with. Are those assumptions valid?

The current law with respect to the breaching of suppression orders—or automatically-applying provisions—assumes that potentially affected parties have the means to readily discover whether such orders or provisions even exist. Is that assumption valid?

Some of the related statutory law in the *Judicial Proceedings Reports Act 1958* (Vic) assumes that it is in the best interests of victims of sexual assault that they should not have an unhindered right to publicly self-identify, if they wish to do so. Is that assumption valid?

This Reference will give close attention to those and other assumptions underlying the current law of contempt, and related provisions. It will also involve a careful identification of the competing legal principles and attempt to identify a point of balance which is consistent with immutable principles, while also being sustainable and defensible in the age of mass digital communication.

Throughout the Reference, careful attention will also be given to the developments and reforms in comparable jurisdictions, which offer valuable commentary about various models for possible reform in Victoria.

At the time of the commencement of this Reference, the Commission Chair was the Hon. Philip Cummins AM. Philip led the early stages of this Reference until his untimely passing in February. His leadership in this Reference, as with all of his other law reform work, was exemplary and an inspiration to all who worked with him. The Commission is striving to maintain the high standards which Philip set.

I thank the members of the Contempt reference team at the Commission for their tireless work, under sometimes difficult conditions, to produce this comprehensive consultation paper. I thank my fellow Commissioners, all of whom are members of the Contempt Reference Division. I also acknowledge the valuable contribution to date of the members of the Advisory Committee, who will continue to provide their expertise during the remainder of the review.

The Commission now looks forward to the very important formal consultation stage of this Reference, and I invite all interested parties to make submissions, every one of which will assist the Commission in formulating the recommendations which will be made in its report to the Attorney-General in December.



Bruce Gardner PSM

Acting Chair
Victorian Law Reform Commission

May 2019

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page xix, that seek to guide submissions.

You do not have to address all of the questions to make a submission.

You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out at the end of the consultation paper.

Submissions can be made by:

Completing the online form at www.lawreform.vic.gov.au

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

Confidential submissions are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline: 28 June 2019.

Terms of reference

[Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 12 October 2018].

Contempt of court, Judicial Proceedings Reports Act 1958 and enforcement processes

The Victorian Law Reform Commission is asked to review and report on the law relating to contempt of court, the possible reform of the *Judicial Proceedings Reports Act 1958* and the legal framework for enforcement of prohibitions or restrictions on the publication of information.

The Commission should consider whether, and how, the common law of contempt should be reformed, and whether and to what extent it should be replaced by statutory provisions.

The Commission should consider all types of contempt in its review, including:

- contempt in the face of the court;
- sub judice contempt;
- contempt by publication;
- juror contempt; and
- contempt by scandalising the court.

The Commission is asked to consider whether, and how, the *Judicial Proceedings Reports Act 1958* (JPRA) should be reformed, including whether the Act should be repealed and prohibitions against publication of certain information should instead be contained in subject-specific legislation or in the *Open Courts Act 2013*. As part of this review, the Commission should consider whether the JPRA, or alternative legislation, should be amended to temporarily restrict the publication of sensitive information in relation to alleged sexual or family violence criminal offences upon the laying of charges.

The Commission should also consider the underlying principles for enforcement of prohibitions or restrictions on the publication of information, with particular reference to the law relating to contempt, the JPRA and the Open Courts Act. It should recommend new procedural, administrative and legislative changes if appropriate to do so. The Commission should consider, in addition to any matters it considers relevant:

- the adequacy of existing penalties for breaches of orders;
- appropriateness of the fault elements that must be proven to establish an offence;
- relevant defences to the commission of an offence; and
- the process for bringing proceedings to enforce these laws, including who should be empowered to commence proceedings for breaches.

In considering enforcement of restrictions on the publication of information the Commission should also review and make recommendations in relation to existing suppression orders made before the commencement of the Open Courts Act which do not contain an end date.

In conducting this reference, the Commission should take into account the development of the internet and new media, and research on juror decision-making. It should also have regard to the recommendations of the Open Courts Act Review, published in March 2018.

The Commission is to report by 31 December 2019.

Glossary

Acquitted	Found not guilty of the charge or charges on the indictment .
Accused	Person charged with a criminal offence or offences but who has not been found guilty or pleaded guilty.
Balance of probabilities	The standard of proof in civil proceedings. Often described as 'more likely than not' or 'more probable than not'. This is a lesser standard than beyond reasonable doubt .
Beyond reasonable doubt	The standard of proof in criminal proceedings. This is a higher standard than the balance of probabilities .
Child	A person under the age of 18 years.
Civil jurisdiction	The procedures for hearing legal disputes other than criminal cases.
Committal for trial or sentence	The process of transferring a case against an accused from the Magistrates' Court to the Supreme Court or County Court.
Common law	Law that derives its authority from decisions of the courts rather than from legislation.
Complainant	Term used in the <i>Criminal Procedure Act 2009</i> (Vic) and other legislation to describe the person against whom a sexual offence is alleged to have been perpetrated.
Contemnor	A person who has been found to have committed a contempt of court .
Contempt by publication	Publishing material which has a real and definite tendency to interfere with, or is intended to interfere with, particular pending civil or criminal proceedings. Also referred to as sub judice contempt.
Contempt in the face of the court	Intentional acts of contempt that occur within, or in the precincts of, a court.
Contempt of court	Words or actions which interfere with the proper administration of justice or constitute a disregard for the authority of the court. Comprises both the physical disturbance of particular proceedings in a court that prevent a court from attending to its business and any interference with the authority of the court that impairs confidence and respect in the court and its judgments. Includes contempt in the face of the court and contempt by publication .

Contempt proceedings	Proceedings in which it is alleged that a contempt of court has been committed. Can be instituted by a court, the Attorney-General, a party or private person.
Criminal offence	A crime against the state. Most criminal offences are specified in the <i>Crimes Act 1958</i> (Vic). The main categories of criminal offence are indictable offences , indictable offences triable summarily , and summary offences .
Defence	The legal team representing the accused (in the lead-up to and before the determination of guilt), or the offender (after a determination of guilt).
Directions hearing	A brief hearing in front of a judicial officer in which orders are made about what should happen next in a case before a court or tribunal, such as how the case is to be managed and the timeframes that are to apply.
Director of Public Prosecutions (DPP)	The official who makes decisions about whether to prosecute serious criminal matters and is independent of government. The Victorian Director of Public Prosecutions is responsible for criminal offences under Victorian law. The Office of Public Prosecutions conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
Discharge	The situation where a magistrate determines that there is not enough evidence to justify sending an accused person to trial, thereby ending the prosecution.
Discharge a juror	To release a juror from the jury after the jury has been sworn in.
Empanelment of the jury/ empanelling the jury	The process of selecting the jury for a trial.
Family member	Includes a person's child, parent, spouse, domestic partner or relative, including grandparents, grandchildren, brothers, sisters, aunts, uncles, nieces and nephews, as well as a person who is regarded in Aboriginal or Torres Strait Islander tradition or custom as a family member.
Family violence	Has the meaning as defined in the <i>Family Violence Protection Act 2008</i> (Vic). Refers to behaviour by a person towards a family member that is physically abusive, sexually abusive, emotionally abusive, psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates the family member and causes them to fear for their safety or that of someone else.
Indictable offences	Serious crimes which attract higher maximum penalties. Prosecuted by the Office of Public Prosecutions . Usually triable before a judge and jury.
Indictable offences triable summarily	Less serious indictable offences which can be heard before a magistrate.
Indictment	The charge or charges against the accused that the Director of Public Prosecutions has filed in the Supreme or County Court.
Inferior court	Any court which is not a superior court. At common law this includes both the County Court of Victoria and the Magistrates' Court of Victoria.

Inherent jurisdiction	The authority to adjudicate vested in a court as a consequence of it being a court of a particular description, notably a superior court of unlimited jurisdiction. Inherent jurisdiction extends to matters necessary for proper administration of justice and includes the power to prevent abuse of process and to punish for contempt of court.
Judicial	Describes a system administered, or a decision made, by a judicial officer .
Judicial direction/ jury direction	Instructions provided by the judge to the jury . These directions guide the conduct of jurors and provide instructions on what they need to consider in deciding the case.
Judicial officer	Usually a judge or magistrate. Can also sometimes refer to a coroner or judicial registrar.
Juries Commissioner’s Office (JCO)	The office responsible for jury administration in Victoria.
Jurisdiction	The scope of a court’s power to examine and determine the facts, interpret and apply the law, make orders and declare judgment. Jurisdiction may be limited by geographic area, the type of parties who appear, the type of relief that can be sought, and the point to be decided.
Juror	A member of the jury .
Jury	The group of jurors selected to make findings of guilt or otherwise in criminal matters and findings of fault and damages in civil matters. The jury is selected in court from the jury panel .
Jury panel	The group of prospective jurors from which the selection of the jury is made in court. The jury panel is randomly selected from the jury pool .
Jury pool	The group of prospective jurors from which the jury panel is randomly selected.
Lawyer	Includes barristers (sometimes referred to as counsel) and solicitors.
Leave	The permission of a judge or magistrate.
New media	The use of digital technologies for mass communication, such as online news, blogs and social media. New media are easily accessible to a worldwide audience, publish content instantly, are interactive, and are an alternative to traditional media such as hard copy newspapers, television and radio broadcasts.
Offender	Used to describe a person who has been found guilty or who has pleaded guilty to a criminal offence . The term ‘alleged offender’ is used to describe a person who is alleged to have committed a criminal offence, but who may not have been charged with or convicted of that offence.
Office of Public Prosecution (OPP)	The independent statutory authority that institutes, prepares and conducts criminal prosecutions in the County and Supreme Courts on behalf of the Director of Public Prosecutions .
Order	A direction by a court or tribunal that is final and binding unless overturned on appeal.

Plea	An answer by the accused to a charge of an offence which usually takes the form of 'guilty' or 'not guilty'.
Practice Direction	A procedural guideline issued by a judicial officer to guide the practice of a court or tribunal.
Procedural fairness	The requirement that legal proceedings are conducted in a manner that is fair. In particular, procedural fairness requires that parties have the opportunity to be heard, and have their disputes determined by an impartial decision maker.
Prosecutorial body	In this paper, refers to either Victoria Police, which prosecutes less serious offences (summary offences) or the Victorian Office of Public Prosecutions , which prosecutes more serious offences (indictable offences). Other agencies are also empowered to initiate prosecutions and are therefore also prosecutorial bodies, for example the Environment Protection Authority, under the <i>Environment Protection Act 2017</i> (Vic), and WorkSafe Victoria, under the <i>Occupational Health and Safety Act 2004</i> (Vic) and other occupational health and safety laws and workers compensation laws.
Prosecutor	A lawyer who appears in court on behalf of the Director of Public Prosecutions
Prospective juror	A person who has been summoned to attend for jury service, but not yet selected for a jury.
Prothonotary	The principal registrar and chief administrative officer of the Supreme Court of Victoria.
Sentencing hearing	Sometimes referred to as a plea hearing. Matters relevant to imposing sentence, including matters personal to the accused and the victim impact statement, are presented to the judge.
Standard of proof	The degree of certainty required to prove something.
Sub judice	A Latin term meaning 'before a judge'. A matter that is still being considered by a court and is not yet decided.
Summary offences	Less serious offences heard by a magistrate without a jury.
Summary trial	A trial involving a judge or magistrate as the sole fact finder. Can also be described as a trial being heard 'summarily', that is without a jury.
Superior court	A higher court of record or general jurisdiction. The High Court of Australia, and the Supreme Court of Victoria are both superior courts with inherent jurisdiction .
Victim	A person who has suffered harm as a direct result of the action of the offender and includes a parent of a child victim, or a family member of a homicide victim. It applies to a person alleged by the prosecution to be a victim prior to a determination of guilt as well as a victim of an offence for which an offender has been found guilty.
Victim of family violence	A person who has experienced family violence .

Victims of Crime Assistance Tribunal (VOCAT) The tribunal established under the *Victims of Crime Assistance Act 1996* (Vic) to provide financial assistance to **victims** of violent crime committed in Victoria. It works through the Magistrates' Court of Victoria.

Victorian Civil and Administrative Tribunal (VCAT) The tribunal established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) that hears civil and administrative legal cases in the State of Victoria.

Questions

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?

Chapter 3: General issues with the law of contempt of court

Uncertainty of scope

- 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?

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?

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?

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?

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?

Chapter 4: Contempt in or near the courtroom—contempt in the face of the court

Definitional issues and possible reforms

The need for statutory provisions

- 12 Is there a need to retain the law of contempt in the face of the court?
- 13 If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?

Insulting or disrespectful behaviour

- 14 If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?

Defining ‘in the face of the court’

- 15 If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?

Conduct covered by other criminal offences

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

Procedural issues and possible reforms

The procedure for contempt in the face of the court

- 17 Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular:
 - (a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily?
 - (b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour?
 - (c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?

A consistent approach to disruptive conduct

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

The impact on certain groups of people

- 19 Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?

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?
- 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?

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 7: Contempt by publication (1)—sub judge contempt

- 27 Is there a need to retain the law of sub judge contempt?
- 28 If the law of sub judge 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 judge 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?

Chapter 8: Contempt by publication (2)—scandalising the court

- 32 Is there a need to retain the law of scandalising contempt?
- 33 If the law of scandalising contempt is to be retained, should the common law be replaced by statutory provisions? If so:
 - (a) How should the law and its constituent elements be described, including:
 - i. The ‘tendency’ test
 - ii. What constitutes ‘fair comment’?
 - (b) Should truth be a defence?
 - (c) What fault elements, if any, should be required?
 - (d) What weight, if any, should be given to an apology?
- 34 In stakeholders’ experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?
- 35 What other reforms, if any, should be made to this area of law?

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

A victim's ability to speak

- 40 How should the law accommodate a victim's ability to speak?
- 41 When should a victim be able to consent to publication of identifying material?
- (a) Should the court's supervision and permission also be required?
 - (b) What, if any, special provision should be made for child victims?

Temporary restrictions—sex offences and family violence

- 42 Is a statutory prohibition required to temporarily restrict reporting in cases where an accused has been charged with a sexual or family violence criminal offence? If so:
- (a) What information should be permitted to be published—should the court have discretion to order that additional or less information be published?
 - (b) When should the temporary prohibition apply?
 - (c) Should the temporary prohibition only apply to cases where the accused has been charged with a sexual or family violence criminal offence?

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?

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 ('take-down order')? If so:
- (a) Should the process for seeking and making such orders be embodied in legislation?
 - (b) Who should be responsible for monitoring the Internet (and social media) for potential 'take-down' material?
 - (c) Who should be responsible for making applications for take-down orders?
 - (d) Should such applications be conducted on an adversarial or ex parte basis?

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?

PART ONE: GENERAL OVERVIEW

Introduction

- 2 Referral to the Commission**
- 2 Why this review is needed**
- 3 Key principles of law relevant to this inquiry**
- 6 A principles-based approach**
- 7 Scope of this review**
- 8 Previous reviews and reforms**
- 9 Other reviews**
- 10 Conduct of this reference**
- 11 How to use this consultation paper**

1. Introduction

Referral to the Commission

- 1.1 The Victorian Law Reform Commission (the Commission) has been asked to review and report on the law relating to contempt of court, the possible reform of the *Judicial Proceedings Reports Act 1958* (Vic) and the legal framework for enforcement of prohibitions or restrictions on the publication of information.
- 1.2 The terms of reference are set out on page xii.
- 1.3 The referral was made by the then Attorney-General, the Hon. Martin Pakula MP by letter to the Commission dated 12 October 2018 and was publicly announced the same day.¹

Why this review is needed

- 1.4 The law of contempt of court is concerned with the protection of the proper administration of justice by empowering the courts at common law to punish conduct that interferes with the due administration of justice, either in a particular case or more generally as a continuing process.² Such conduct may be by a party to a proceeding, a person with official duties in connection with the proceeding, a member of the public attending the court, a person reporting or commenting on proceedings, or anyone else whose actions obstruct or undermine the administration of justice.
- 1.5 The purpose of the law of contempt is 'to uphold and preserve the undisturbed and orderly administration of justice in the courts according to law'.³
- 1.6 The courts have said that the 'legal principles concerning contempt of court are well known and uncontroversial'.⁴ However, as evidenced by other statements by the courts,⁵ extra-curial comment,⁶ and the number of reviews both in Australia and in other jurisdictions, there have long been concerns with the common law of contempt of court in terms of its nature, processes and enforcement.⁷

1 Attorney-General (Victoria), 'Major Review of Contempt of Court Laws' (Media release, 12 October 2018).

2 *A-G (UK) v Leveller* [1979] AC 440, 449.

3 *The Queen v Hinch (No 2)* [2013] VSC 554, [12]. See also *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107.

4 *R v Nationwide News Pty Ltd* [2018] VSC 572, [29].

5 See, eg *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, [222] where the court noted 'the discourse with respect to contempt is littered with language ... which is imprecise and potentially confusing'; *Hearne v Street* (2008) 235 CLR 125, [25] where Kirby J noted that the law of civil contempt 'lacks conceptual coherence and is replete with uncertainties, inadequacies and fictions'. In this context, in *A-G (UK) v British Broadcasting Corporation* [1980] 3 All ER 161, 169 Lord Salmon stated that '[t]his branch of our law is in urgent need of careful consideration by Parliament'.

6 See, eg Justice Emilios Kyrou, who noted that the law of contempt of court is a 'very complex topic': 'Courts: the Independent, Low Profile Third Arm of Government' (Speech, La Trobe Law Students' Association, 17 August 2017).

7 See, eg Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974); The Law Reform Commission, *Contempt* (Report No 35, December 1987); Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003); New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003); Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012); Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013); Law Commission (England and Wales), *Contempt of Court (2): Court Reporting* (Report No 344, 2014); Law Reform Commission (Ireland), *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper, 2016); Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report 140, 2017).

- 1.7 In addition, and as recognised by other reviews⁸ and commentators,⁹ the law of contempt of court is now facing new challenges with the emergence of the internet and the rise of social media platforms such as Facebook and Twitter. Technology is fundamentally changing the way people access and share information, providing a new and borderless vehicle for people to interpret, challenge, discuss and augment information published by the mainstream print and broadcast media.
- 1.8 At the same time, there is also a growing body of research on jurors which challenges traditional understandings of juror decision making.¹⁰
- 1.9 Accordingly, and as well as the long-standing technical issues noted above, these developments reinforce the need for a reconsideration of the law of contempt of court, in particular the law of sub judice contempt and the way in which jury trials are protected from potentially prejudicial material.
- 1.10 However, as discussed below, the terms of reference are broader than solely a focus on sub judice contempt.
- 1.11 The terms of reference require the Commission to consider all types of contempt, as well as the Judicial Proceedings Reports Act, the *Open Courts Act 2013* (Vic) and the legal framework for the enforcement of prohibitions or restrictions on the publication of information.
- 1.12 As such the reference is an opportunity for a thorough review of the measures available to the courts to ensure the proper administration of justice, and in particular a fair trial, with a view to ensuring such measures remain fit for the modern era. At its heart is the question of what measures are required by the courts to ensure the proper administration of justice. Are existing measures as provided for by the law of contempt of court, the Judicial Proceedings Reports Act and the Open Courts Act still appropriate or are they in need of reform? In this context, and if it is considered these laws are in need of reform, the question arises as to what extent should such laws, in particular the common law of contempt of court, be replaced by statutory provisions? Should such legislative reform be confined to minor technical amendments incorporated into existing legislation or alternatively should such legislative reform entail major change, for example by full codification of the common law of contempt of court.

Key principles of law relevant to this inquiry

The proper administration of justice

- 1.13 The proper administration of justice is a principle of fundamental importance in our society as an aspect of the integrity of the courts, and is the cornerstone of the Commission's review. As Lord Diplock has stated, the principle of the proper administration of justice requires that all citizens:
- have unhindered access to the courts for the determination of disputes as to their legal rights and liabilities;
 - be able to rely on obtaining in the courts a decision free from bias based on the facts proved in evidence properly adduced; and

8 See, eg Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report 140, 2017); Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013).

9 See, eg Ian Cram, *Borrie & Lowe: The Law of Contempt* (LexisNexis, 4th ed, 2010) Chapter 3: The Impact of Globalisation and New Technology.

10 See, eg Jacqueline Horan and Mark Israel, 'Beyond the Legal Barriers: Institutional Gatekeeping and Real Jury Research' (2016) 49(3) *Australian and New Zealand Journal of Criminology* 422; Annie Cossins et al, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016); Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013); Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012); Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century - Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103; Cheryl Thomas and Nigel Balmer, *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series No 2/07, 2007); Law Commission (New Zealand), *Juries in Criminal Trials Part Two - A summary of the research findings* (Preliminary Paper, 1999).

- once the dispute has been submitted to the court, be able to rely on there being no usurpation by any other person of the function of that court to decide the dispute according to law.¹¹
- 1.14 This principle is therefore broad and overarching.
- 1.15 However the principle of the proper administration of justice can sometimes be in tension with other constitutional, statutory or common law rights and principles. This includes at common law:
- the principle of open justice, which to maintain confidence in the integrity and independence of the courts requires that the administration of justice take place in open court¹²
 - the right of an accused to receive a fair trial according to law, or what the High Court has described as ‘a right not to be tried unfairly’, and which is ‘manifested in rules of law and practice designed to regulate the course of a trial’,¹³ including procedural fairness, natural justice, the right to be heard and the rule against bias
 - the recognition of the victims’ interests ‘as part of a modern conception of fairness and a fair trial’¹⁴
- 1.16 In support of these common law rights and principles, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) provides that:
- A person must not be subjected to arbitrary arrest or detention, and must not be deprived of their liberty except on grounds and in accordance with procedures established by law and must be promptly informed about any proceedings to be brought against them¹⁵
 - A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.¹⁶
 - A court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by law.¹⁷
 - All judgments or decisions made by a court or a tribunal in a criminal or civil proceeding must be made public unless the best interests of a child or otherwise requires or a law otherwise permits.¹⁸
 - A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law, to be informed promptly and in detail of the nature and reason for the charge and to have adequate time to prepare their defence.¹⁹

Freedom of expression

- 1.17 The Charter also provides that every person has the right to hold an opinion without interference and a right to freedom of expression.²⁰ These Charter rights are supported by the common law and rules of statutory interpretation which also provide ‘partial protection’ for freedom of expression.²¹

11 *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 309.

12 *Scott v Scott* [1913] AC 417, 435 (Viscount Haldane LC), 441 (Earl of Halsbury). However this principle is not absolute. See also *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21–22] (French CJ).

13 *Dietrich v The Queen* (1992) 177 CLR 292, 299–300 (Mason CJ, McHugh J).

14 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) 27. See also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 49–50 where Brennan J stated ‘the court must not forget those who, though not represented, have a legitimate interest in the court’s exercise of its jurisdiction.’

15 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 21(2)–(4).

16 *Ibid* s 24(1).

17 *Ibid* s 24(2).

18 *Ibid* s 24(3).

19 *Ibid* s 25(1) and (2)(a)–(b).

20 *Ibid* s 15. However the Charter also provides that this right is not absolute and may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality.

21 *Tajjour v NSW* (2014) 313 ALR 221, [28]; *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67, 76–7 (French J).

- 1.18 In addition, the Australian Constitution provides for the protection of freedom of communication about government or political matters, so as to enable people to make free and informed choices as electors.²² The effect of this implied freedom is to prevent Parliament and the executive government from exercising their powers to curtail the implied freedom. It does not confer personal rights on individuals.²³ It is a constitutional limit on both statute and the common law.²⁴ However it remains uncertain whether the implied freedom protects discussion about the exercise of federal and state judicial power and the workings of the courts and the judiciary.²⁵
- 1.19 As the courts have recognised, freedom of expression must sometimes be restrained to protect other aspects of the public interest, such as the administration of justice.²⁶ As Brennan J noted in *R v Glennon*:
- Free speech is not the only hallmark of a free society, and sometimes it must be restrained by laws designed to protect other aspects of the public interest. Thus the law of contempt of court seeks to strike a balance between the two competing public interests [in the integrity of the administration of justice and in freedom of expression] ... The integrity of the administration of justice in criminal proceedings is of fundamental importance in a free society. Freedom of public expression with respect to circumstances touching guilt or innocence is correspondingly limited.²⁷
- 1.20 However, as Justice Stephen has observed, while the administration of justice and freedom of expression can conflict, they can also sometimes complement each other:
- a fair and proper administration of justice provides the only available safeguard of the citizen when freedom of speech is unlawfully denied; and it is only in an open society, where freedom of scrutiny and expression prevails, that justice is likely to be fairly administered.²⁸

Privacy

- 1.21 As already noted, the principle of open justice is critical to the proper and effective administration of justice. However, such openness can come at the cost of a person's privacy.²⁹ Victims, witnesses and others, such as people who work in courts, may also be exposed to undue trauma or intimidation through their participation in the criminal justice process. For victims, giving evidence and being cross-examined about a traumatic event can be highly distressing due to the publicity of trials and the need for evidence to be properly tested in court.³⁰ Victims may also encounter accused persons and their family members and supporters in courtrooms and court precincts, which can expose them to intimidation.³¹
- 1.22 In this context, the *Victims Charter Act 2006* (Vic) provides that a victim's privacy is to be protected and that their personal information is not to be disclosed.³²
- 1.23 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) also provides that every person has the right not to have his or her privacy unlawfully or arbitrarily interfered with and not to have his or her reputation unlawfully attacked.³³

22 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018) 696 [10.237].

23 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

24 *Ibid* 568; *Wotton v Commonwealth* (2012) 246 CLR 1, 13 [20] (French CJ, Gummow J, Hayne J, Crennan and Bell JJ) citing *Coleman v Power* (2004) 220 CLR 1, 77 [195] (Gummow and Hayne JJ).

25 See, eg *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 360–1 [63]–[66], 439–40 [346]–[347] (Kirby J), citing; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298–9 (Mason CJ); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 8–11 [5]–[10] (Winneke ACJ), 51–53 [244]–[252] (Gillard AJA), 103 [499]–[500] (Warren AJA).

26 *R v Glennon* (1992) 173 CLR 592, 611–12 (Brennan J), citing *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 18 (Mason CJ).

27 *R v Glennon* (1992) 173 CLR 592, 611–12; See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

28 *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 74–5 (Stephen J).

29 Beverley McLachlin, 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' (2003) 8(1) *Deakin Law Review* 1, 3.

30 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 34 [3.78].

31 *Ibid* 34 [3.79].

32 *Victims Charter Act 2006* (Vic) s 14.

33 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

- 1.24 In this context and in relation to child victims, the Charter provides that every child has the right, without discrimination to such protection as is in his or her best interests and is needed by him or her by reason of being a child.³⁴

An underlying tension

- 1.25 Underlying this review is a tension between:
- the need to safeguard the proper and effective administration of justice³⁵
 - freedom of expression and freedom to criticise public institutions³⁶
 - the protection of a person's privacy and reputation.
- 1.26 As such, this review is fundamentally concerned with how the common law of contempt of court, the Judicial Proceedings Reports Act and the Open Courts Act should be reformed to better accommodate and balance these often competing and conflicting principles.
- 1.27 However, in considering options for reform and the impact on the principles noted above, the Commission must be mindful of the principle of legality, which rests on the assumption that 'unless clear words are used, the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms'.³⁷

Question

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

A principles-based approach

- 1.28 The principles identified above provide the framework for the Commission's consideration of the laws the subject of this review.
- 1.29 As will be discussed, the law of sub judice contempt and scandalising contempt, as well as the Open Courts Act and the Judicial Proceedings Reports Act, all limit freedom of expression and curtail the principle of open justice. They do this to ensure the proper and effective administration of justice, particularly as it applies in criminal proceedings, by seeking to protect the courts' decision-making process and to prevent jury access to extraneous materials.
- 1.30 In addition, both the Open Courts Act and the Judicial Proceedings Reports Act limit freedom of expression and curtail the principle of open justice for the purpose of protecting a person's privacy and reputation. However such laws can also operate to shield offenders from public accountability and prevent a victim who wishes to speak from doing so.
- 1.31 Finally, the common law of contempt in the face of the court, in seeking to ensure the proper administration of justice by enabling the judicial officer to immediately and summarily address any interference with proceedings, can also operate to deny an alleged contemnor a fair hearing before a competent, independent and impartial court, contrary to the principle of a fair trial.

34 Ibid s 17(2).

35 See, eg, *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 448 (Dixon J); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 56 (Gibbs CJ); *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 18–19, 22 (Mason CJ), citing; *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 249–50 (Jordan CJ); 57 (Deane J); 83 (Gaudron J); *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ) citing; *R v Dunbabin v Ex Parte Williams* [1935] 53 CLR 434, 447 (Dixon J); *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 294 (Lord Reid); 302 (Lord Borth-Y-Gest); 322 (Lord Cross of Chelsea).

36 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 34 (Mason CJ); *Gallagher v Durack* (1983) 152 CLR 238, 246 (Murphy J).

37 *Momcilovic v The Queen* (2011) 245 CLR 1 177–8 [444] (Heydon J)

- 1.32 These issues are explored further in following chapters.
- 1.33 Accordingly, in considering what reforms to the common law of contempt of court, the Judicial Proceedings Reports Act and the Open Courts Act are necessary to ensure the proper administration of justice, the Commission adopts a principles-based approach. The Commission does this by:
- considering each of the identified laws from the perspective of what is required for the proper administration of justice at the same time as balancing the need for open justice, the right to freedom of expression and the need to protect a person's privacy and reputation.
 - articulating some of the principles underlying each of the identified laws
 - identifying some of the assumptions which have informed the development and application of each of the identified laws
 - evaluating each of the identified laws in terms of how they operate to ensure the proper administration of justice
 - discussing options for reform from within that principled context, including whether there is a need for legislative reform to replace the common law of contempt of court with statutory provisions.

Scope of this review

- 1.34 The terms of reference ask the Commission to review and report on the law relating to contempt of court, the possible reform of the Judicial Proceedings Reports Act and the legal framework for the enforcement of prohibitions or restrictions on the publication of information. In considering this last issue the terms of reference also ask the Commission to look at the Open Courts Act.
- 1.35 The terms of reference therefore encompass three distinct but related sources of law:
- the common law of contempt of court
 - the Judicial Proceedings Reports Act
 - the Open Courts Act.

Contempt of court

- 1.36 The terms of reference ask the Commission to consider all types of contempt. In undertaking this review, the Commission focuses on the most common and problematic manifestations of the common law of contempt of court, namely:
- contempts in or near the courtroom—also known as contempt in the face of the court
 - juror contempt
 - disobedience contempts arising from non-compliance with court orders or undertakings
 - contempts by publication that interfere with or prejudice pending proceedings—also known as sub judice contempt
 - contempts by publication that interfere with the administration of justice as a continuing process—also known as contempt by scandalising the court.
- 1.37 Each of these manifestations of contempt is outlined in Chapter 2, together with an overview of some of the unique features of the law of contempt of court. Key issues in relation to each of the most common and problematic manifestations of contempt of court, together with some options for reform, are then set out in Chapters 4–8. Chapter 3 considers some general issues with the law of contempt of court.

- 1.38 Where relevant, other forms of contempt of court are noted by way of comparison but are not the focus of the Commission's review. These other forms of contempt are also briefly discussed in Chapter 2.
- 1.39 This review does not consider contempt arising in other contexts, such as contempt of parliament or contempt of tribunals or commissions of inquiry, as these types of contempt are outside the Commission's terms of reference.
- 1.40 However, tribunals such as the Victorian Civil and Administrative Tribunal are also regularly confronted with issues of contempt, in particular contempt in the face of the court and disobedience contempt, and are empowered to deal with such contempts under their constituting legislation.³⁸ Similarly, other bodies or persons with a quasi-judicial role, such as the Chief Examiner, are also confronted with issues of contempt, and have statutory powers to address such contempts.³⁹ Accordingly, the broader implications of any reforms to the common law of contempt of court for Victoria's court system as a whole, including tribunals and other bodies with a quasi-judicial role, will be considered by the Commission in undertaking this review.

The Judicial Proceedings Reports Act 1958 (Vic)

- 1.41 The terms of reference ask the Commission to consider whether there is a need to retain the provisions of the Judicial Proceedings Reports Act and if so, whether such provisions should instead be contained in subject-specific legislation or in the Open Courts Act. These issues are considered in Chapter 9.
- 1.42 The terms of reference also ask the Commission to consider the Judicial Proceedings Reports Act in the context of the enforcement of prohibitions and restrictions on publication. Accordingly, the Act is also considered as part of the broader consideration of the enforcement of prohibitions and restrictions on publication discussed in Chapter 10.

The Open Courts Act 2013 (Vic)

- 1.43 In considering the enforcement of prohibitions and restrictions on the publication of information, the terms of reference ask the Commission to consider the law relating to contempt of court, the Judicial Proceedings Reports Act and the Open Courts Act.
- 1.44 Accordingly, and given its recent comprehensive review by the Hon. Frank Vincent AO QC in the *Open Courts Act Review*, the Commission's consideration of the Open Courts Act is limited to the issues expressly identified in the terms of reference, which includes existing suppression orders made before the commencement of that Act which do not contain an end date. These issues are discussed in Chapter 10.
- 1.45 This review does not consider other legislation with prohibitions or restrictions on the publication of information, except as may be required by the terms of reference by way of comparison.

Previous reviews and reforms

Reviews and reforms of contempt of court

- 1.46 As noted above, there have been many reviews of the common law of contempt of court both in Australia and overseas. Indeed in the last 45 years, there have been at least 13 reviews of different aspects of the law of contempt of court, including four reviews each in Australia and the United Kingdom, and two reviews in Ireland. A summary of these other reviews including terms of reference, key recommendations and reform implementation status is set out at Appendix B.

- 1.47 As a result of these reviews there has been legislative change in the United Kingdom,⁴⁰ New South Wales,⁴¹ and in Australia to the *Family Law Act 1975* (Cth).⁴²
- 1.48 At the time of writing, New Zealand and Ireland each have Bills before their respective parliaments to reform aspects of their contempt of court laws.⁴³
- 1.49 In 1984 a Bill to reform the Canadian law of contempt of court was introduced to the Canadian parliament but was never passed.⁴⁴

Review of the Open Courts Act

- 1.50 As already noted, in March 2018 a report in relation to the Open Courts Act by the Hon. Frank Vincent AO QC, the *Open Courts Act Review*,⁴⁵ was published. The report made 18 recommendations to ensure that suppression orders are used only where absolutely necessary. These recommendations are set out at Appendix C.
- 1.51 The terms of reference require the Commission to have regard to the recommendations of the *Open Courts Act Review*. Accordingly, the recommendations of the *Open Courts Act Review* are considered in this consultation paper where relevant.
- 1.52 The Victorian Government has also committed to giving effect to the recommendations of the *Open Courts Act Review*.⁴⁶
- 1.53 On 2 May 2019, as a first stage of suppression order reforms, the Parliament of Victoria passed the *Open Courts and Other Acts Amendment Act 2019* (Vic).⁴⁷ This Act amends existing laws to reinforce the presumption in favour of open justice and the disclosure of information in Victorian courts. The Act requires suppression and closed court orders to be used only when necessary, such as where publication of information would be unfair or would risk harming victims or other parties.

Other reviews

- 1.54 A number of other reviews both in Australia and overseas are relevant and may have implications for the Commission's review. These include:
- the Victorian Department of Justice and Community Safety review into the use of judge-alone trials for criminal cases, currently underway⁴⁸
 - the New South Wales Law Reform Commission review on the operation of legislative prohibitions on the disclosure or publication of New South Wales court and tribunal information, New South Wales court suppression and non-publication orders, and tribunal orders restricting disclosure of information, and access to information in New South Wales courts and tribunals, announced in February 2019⁴⁹
 - the Senate Select Inquiry on the Future of Public Interest Journalism report tabled in the Australian Parliament in February 2018⁵⁰

40 *Contempt of Court Act 1981* (UK); *Criminal Justice and Courts Act 2015* (UK).

41 *Court Information Act 2010* (NSW).

42 *Family Law Amendment Act 1989* (Cth).

43 See Administration of Justice (Reform of Contempt of Court) Bill 2018 (NZ). This Bill has also been considered by the Justice Committee who recommended the Bill be passed with amendment. Justice Committee, *Administration of Justice (Reform of Contempt of Court) Bill* (Final Report, 5 April 2019); Contempt of Court Bill 2017 (Ireland).

44 Criminal Law Reform Act 1984, Bill C-19, 32nd Parl., 2d sess., 1983–84 (1st reading 7 February 1984) cited in Linda Faust 'Contempt of Court' [1984] 16 *Ottawa Law Review* 316.

45 Frank Vincent, *Open Courts Act Review* (2017) <<https://engage.vic.gov.au/open-courts-act-review>>.

46 Attorney-General (Victoria), 'First Stage of Suppression Order Overhaul Begins' (Media release, 19 February 2019).

47 *Open Courts and Other Acts Amendment 2019 Act* (Vic).

48 Farrah Tomazin and Sumeyya Ilanbey, 'Andrews Government Considers 'Judge-only' Trials for Criminal Cases', *The Age* (Web Page, 13 December 2018) <www.theage.com.au/national/victoria/andrews-government-considers-judge-only-trials-for-criminal-cases-20181213-p50m5u.html>.

49 Attorney-General (New South Wales), 'Open Justice Under Examination' (Media release, 28 February 2019).

50 Public Interest Journalism Committee, Parliament of Australia, *Future of Public Interest Journalism* (Final Report, February 2018, February 2018).

- the Australian Competition and Consumer Commission Digital Platforms Inquiry, the preliminary report and recommendations for which were published in December 2018⁵¹
- in the United Kingdom, the Cairncross Review on a sustainable future for journalism report published on 12 February 2019.⁵²

Conduct of this reference

Commission Chair

- 1.55 This reference was commenced under the leadership of the Hon. Philip Cummins AM, who was Chair of the Commission from 1 September 2012 until his death on 24 February 2019.
- 1.56 On 4 March 2019 Mr Bruce Gardner PSM was appointed Acting Chair of the Commission. Mr Gardner has continued to lead the conduct of the reference and the preparation of this consultation paper.

Division

- 1.57 In accordance with section 13(1)(b) of the Victorian Law Reform Commission Act a Division has been constituted to guide and oversee the conduct of the reference. All members of the Commission are members of the Division.

Advisory committee

- 1.58 Committees of experts often assist the Commission in identifying issues and exploring options for reform, although they are not involved in developing or voting on the Commission's recommendations. They are a valuable source of advice and the Commission appreciates the time and expertise that the members contribute.
- 1.59 Given the technical nature of many aspects of this reference, an advisory committee comprising experts on the law of contempt of court and in the understanding of juror decision making has been formed for this reference.
- 1.60 The first meeting of the advisory committee was held on 21 February 2019 to assist the Commission in identifying key issues. A further meeting will be held in the middle of the year to discuss reform options. The members of the advisory committee are listed at Appendix A.

Preliminary meetings

- 1.61 To help inform the development of this consultation paper and as part of its research, the Commission has conducted preliminary meetings with representatives of key stakeholders from the courts and the judiciary, and academics.
- 1.62 The purpose of these meetings was to enable the Commission to gain an understanding of some of the key issues, and to start identifying proposals and options for reform.
- 1.63 These preliminary meetings do not form part of the Commission's formal consultations for this reference. Formal consultations will be conducted in conjunction with the publication of this consultation paper, along with a call for public submissions.

Consultation paper

- 1.64 The Commission's preliminary consultations and other research form the basis of this consultation paper.
- 1.65 This consultation paper does not represent any final conclusions or views on the matters raised.

Formal consultation process

- 1.66 The next stage of the reference will involve consulting with a wide range of stakeholders, interested organisations and individuals to further examine the issues raised in this consultation paper, to identify additional issues and to develop and test options for reform.
- 1.67 The Commission also welcomes submissions from the broader community.
- 1.68 The feedback and information the Commission receives from submissions and consultations, combined with additional research, will inform its recommendations to the Attorney-General.
- 1.69 A report setting out the Commission's recommendations will be provided to the Attorney-General by the reporting date of 31 December 2019. Within 14 sitting days of receipt of the report, the Attorney-General must table the report in the Victorian Parliament. The Victorian Government will decide whether to implement the Commission's recommendations and if so whether to do so by legislative change.

How to use this consultation paper

- 1.70 The terms of reference and the law of contempt of court are such that this is necessarily an expansive consultation paper, encompassing many different aspects. However, it is also understood that some readers may wish to focus on a particular issue or type of contempt.
- 1.71 Accordingly, readers should note the following:
- Chapter 2 sets out the existing legal framework for contempt of court, outlining the law's purpose and identifies some of its unique features. It also provides a brief overview of the key manifestations of contempt which are discussed in detail in subsequent chapters. This chapter does not contain any questions.
 - Chapter 3 discusses general issues with the law of contempt of court, including the scope of the law and the procedures to be applied generally, the overlap with general criminal law, the penalties that may be imposed and the place of warnings. A number of options for reform are outlined together with some questions for consideration. This includes the broad question of whether the courts today still require a general power to punish any conduct that has a tendency to interfere with the proper administration of justice.
 - Chapter 4 discusses 'contempt in the face of the court', that is, a court's power to punish behaviour in the courtroom or, possibly, the vicinity of the courtroom which interferes with or tends to interfere with the proper administration of justice. This power is important for the efficient and fair conduct of proceedings and to maintain public confidence in those proceedings. This power is also important for the protection of witnesses, jurors and others with duties to the court, so that they can perform their duties effectively without fear or intimidation. However if this power is exercised arbitrarily it has the potential to jeopardise public confidence in the integrity and authority of the courts. Accordingly, this chapter considers and poses questions about whether there is an appropriate balance between the need for flexibility and the need for certainty in defining what constitutes contempt in the face of the court, and whether there is a need for this aspect of the law to be replaced by statutory provisions. In addition, this chapter considers more broadly whether there is a need for a more consistent approach to disruptive conduct and the potentially disproportionate impact of this area of the law on some groups of people.
 - Chapter 5 discusses what the terms of reference describe as 'juror contempt'. The chapter notes the broad range of behaviours relating to juries, and that these can be classified broadly as either misbehaviour by or interference with jurors. The chapter also notes that juror behaviour is regulated by the *Juries Act 2000* (Vic) and the *Jury Directions Act 2015* (Vic). The chapter then focuses on two issues: jurors accessing information about cases and jurors disclosing information. Questions are asked about

the need to reform the *Juries Act 2000* (Vic), and whether there is a need for courts to also retain the power to deal with common law contempt by jurors. In addition, this chapter considers the place of jury directions and whether there is a need for further education of jurors about their role, functions and duties.

- Chapter 6 discusses ‘disobedience contempt’, that is, the power of the court to deal with a person who fails to comply with a court order or undertaking. The distinction between civil and criminal contempt and the implications this has for proceedings and the procedures that are to be adopted is also considered. This chapter asks questions about whether there is a need to retain this aspect of the common law of contempt, particularly given the availability of other enforcement procedures to secure compliance, and, if it is to be retained, what reforms may be required to clarify its purpose and procedures.
- Chapter 7 discusses the law of ‘sub judge contempt’ which is concerned with ensuring a fair trial by protecting jurors from extraneous information by limiting the information which may be published when legal proceedings are pending. It discusses some of the assumptions underpinning this area of the law and asks the question of whether these assumptions remain valid and appropriate for the modern age, including whether this area of the law should be retained. In addition, this chapter considers some of the more technical issues and difficulties which are raised by this area of the law. To address these issues, a number of options for reform are then outlined together with some questions for consideration.
- Chapter 8 discusses ‘scandalising contempt’, that is, acts or publications which are calculated to impair public confidence in the judiciary and the courts. The purpose of this aspect of the law of contempt is to protect the courts and the judiciary from attacks and criticism in order to maintain the public’s confidence in the system. However, as this chapter discusses, there are a number of uncertainties in the operation and application of this area of the law, as well as in the underlying assumption on which this law is based. A number of options for reform are outlined together with some questions for consideration—this includes whether the law of scandalising contempt should be abolished, or alternatively if it were to be retained whether it should be replaced by statutory provisions.
- Chapter 9 discusses the four statutory prohibitions on publication in the Judicial Proceedings Reports Act. This chapter considers whether there is a need to retain these prohibitions and if so where they should best be located in the Victorian statute book. As required by the terms of reference, this chapter considers and poses questions about whether a further statutory prohibition is required to temporarily restrict the publication of sensitive information upon the laying of charges in relation to sexual and family violence criminal matters. In addition, this chapter considers and poses questions about how statutory prohibitions which are designed to protect the anonymity of victims can afford appropriate agency and choice to those victims who wish to speak about their experiences.
- Chapter 10 considers the enforcement of prohibitions and restrictions on the publication of information. This chapter involves consideration of the common law of contempt of court, the Judicial Proceedings Reports Act, and the Open Courts Act. It considers and asks questions in relation to issues of the definition of publication, the enforcement of Victorian laws outside of Victoria, the awareness of these laws and the notification of court orders, the monitoring of compliance with these laws, responsibility for bringing proceedings for breach of these laws, fault elements that must be proven to establish breach of these laws, and the adequacy of existing penalties and the defences to alleged breaches of these laws. In addition, and in accordance with the terms of reference this chapter also considers the enforcement of suppression orders with no end date that were made before the Open Courts Act commenced.

Existing legal framework for contempt of court

- 14** Introduction
- 14** History and jurisdiction
- 15** Purpose
- 16** Unique features of contempt of court
- 18** Manifestations of contempt of court

2. Existing legal framework for contempt of court

Introduction

- 2.1 This chapter provides a brief history of the common law of contempt of court, including jurisdiction to punish, a discussion of the law's purpose and an overview of its unique features and key manifestations.
- 2.2 The law of contempt of court has developed over many centuries to ensure that courts operate effectively and justice is administered properly without interference.¹
- 2.3 Traditionally, the law of contempt of court has been common law made by judges. Today the common law is supplemented by laws passed by parliaments. As a consequence, the law of contempt of court is a complex mix of statute and common law.
- 2.4 This creates challenges for the courts in seeking to apply the law and for legal practitioners and others in knowing what the law is, how to comply and when it may be applied against them.
- 2.5 General issues with the law of contempt of court are discussed in Chapter 3.

History and jurisdiction

- 2.6 Historically, the common law of contempt of court developed out of the King's power as a source of justice to punish abuses and affronts to the King's peace and the King's courts.² Subsequently this power was assumed by the superior courts of common law in England as part of their inherent jurisdiction.³
- 2.7 In Australia, this inherent jurisdiction has been described as deriving from a superior court's general responsibility for the administration of justice.⁴
- 2.8 In Victoria, the inherent jurisdiction to punish for contempt of court vests in the Supreme Court of Victoria as 'the superior Court of Victoria with unlimited jurisdiction'.⁵
- 2.9 At common law and as part of its inherent jurisdiction, the Supreme Court of Victoria can punish summarily for contempt of court 'wherever it may occur, whether inside or outside of the court'⁶ and can exercise its 'protective jurisdiction' to deal summarily with contempts of inferior courts.⁷

1 C J Miller and David Perry, *Miller on Contempt of Court* (Oxford University Press, 4th ed, 2017) 2.

2 Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper (2014) 6.

3 C J Miller and David Perry, *Miller on Contempt of Court* (Oxford University Press, 4th ed, 2017) 3–4.

4 *Grassby v R* (1989) 168 CLR 1, 16 (Dawson J, Mason CJ, Brennan, Deane and Toohey JJ agreeing); see also *R v Forbes*; *Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J, Barwick CJ, Stephen and Walsh JJ agreeing).

5 *Constitution Act 1975* (Vic) s 85(1).

6 *R v Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241 (Latham CJ), 254 (Dixon J); *R v Taylor*; *Ex parte Roach* (1951) 82 CLR 587, 598 (Dixon, Webb, Fullagar and Kitto J).

7 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.05(1)(c).

- 2.10 In contrast, as inferior courts of the common law, the powers of the County Court of Victoria and the Magistrates' Court of Victoria are limited to punishing for contempts committed in the face of that court.⁸ However, the County Court has been given by statute the same jurisdiction, powers and authority in respect of any contempt of the Court as the Supreme Court has in respect of a contempt of the Supreme Court.⁹
- 2.11 The common law jurisdiction of an inferior court to deal with contempt of court can also be supplemented by express legislative provisions restating the aspects of the common law of contempt of court that are to apply.¹⁰ A table setting out the jurisdiction and powers of the courts to deal with contempt of court is provided at Appendix D.
- 2.12 Tribunals such as the Victorian Civil and Administrative Tribunal (VCAT) are not courts. They do not have any inherent common law power to address conduct constituting a contempt of court. Instead, a tribunal's power to deal with conduct that may interfere with the proper administration of justice is limited to the powers expressly provided in that tribunal's constituting statute.¹¹
- 2.13 The Victorian Parliament can amend the jurisdiction and powers of the Victorian Supreme Court.¹² However, the High Court has held that there are constitutional limits to the exercise of this power. State parliaments cannot legislate to 'alter the constitution or character of their Supreme Court [so] that it ceases to meet the constitutional description' of a 'Supreme Court of a State'.¹³ State parliaments also cannot confer functions or powers on a Supreme Court that are incompatible with the court's institutional integrity as a repository of federal jurisdiction under the Australian Constitution.¹⁴ The 'defining characteristics' of a 'court' or 'Supreme Court' which 'mark a court apart from other decision-making bodies' must be maintained.¹⁵ However, there is no fixed set of defining characteristics, although courts have identified certain characteristics in case law.¹⁶ These constitutional limits may curtail the extent to which the common law of contempt of court can be reformed.

Purpose

- 2.14 The purpose of the law of contempt of court is to protect against any 'interference with the due administration of justice, either in a particular case or more generally as a continuing process'.¹⁷ As Lord Diplock has stated, it 'is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it'.¹⁸
- 2.15 The law of contempt of court is therefore 'based on the broadest of principles' and is universal in its application.¹⁹
- 2.16 However, as recognised by common law courts both in Australia and overseas, and as will be discussed in this consultation paper, the law of contempt of court is also 'fraught with difficulties and uncertainties'.²⁰

8 *Lane v Morrison* (2009) 239 CLR 230, 243 (French CJ and Gummow J) citing *Master Undertakers' Association of New South Wales v Crockett* (1907) 5 CLR 389, 392–3 (Griffith CJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 538 (Gummow, Heydon, Hayne, Crennan and Kiefel JJ).

9 *County Court Act 1958* (Vic) s 54.

10 See, eg, *Magistrates' Court Act 1989* (Vic) ss 133–135.

11 See, eg, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137.

12 *Constitution Act 1975* (Vic) s 85(4). For a discussion of this provision, see Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 496–509.

13 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

14 *Russell v Russell* (1976) 134 CLR 495, 517 (Gibbs J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 103–4 (Gaudron J), 115–9 (McHugh J), 127–8 (Gummow J); *A-G (NT) v Emmerson* (2014) 253 CLR 393, 424 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

15 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

16 *Ibid.*

17 *A-G (UK) v Levens Magazine Ltd* [1979] AC 440, 449.

18 *Ibid.*

19 *A-G (UK) v Newspaper Publishing* [1988] Ch 333, 368.

20 *Re Lonrho PLC* [1990] 2 AC 154, 201.

Unique features of contempt of court

- 2.17 In empowering the courts to punish for contempt of court, including by imprisonment, the law of contempt of court has a number of unique features which distinguish it from other types of court proceedings.
- 2.18 Some of these features are discussed below.

The language of the law of contempt of court

- 2.19 As recognised by the New Zealand Law Commission (NZ Commission), the legal terminology used to describe the law of contempt of court is ‘antiquated’ and out of step with common understandings.²¹ Terms such as ‘in the face of the court’ and ‘scandalise’ have technical legal meanings unfamiliar to the general public. Not only does this create confusion but many of these terms are also fraught with legal uncertainties, as is discussed in later chapters.
- 2.20 In addition, confusion is created by the way in which the law of contempt of court borrows the language of criminal proceedings, by describing proceedings as ‘summary proceedings’ and contempt as an ‘offence’.
- 2.21 Notwithstanding the linguistic barriers, legal uncertainties and confusion such terminology causes, it continues to be used by the courts. Accordingly, this consultation paper also uses this terminology.
- 2.22 However, in considering the reform of the law of contempt of court, consideration will also need to be given to the reform of its language so that the law of contempt of court is clear and readily understandable both by those who may be affected by it as well by those who practise the law and are familiar with its currently archaic language. Such reforms will help provide certainty to what is an uncertain and confusing area of law.

The discretionary nature of the courts’ powers

- 2.23 The exercise of a court’s power to punish for common law of contempt of court is entirely at the discretion of the court before which or in relation to which the alleged contempt arises. For the Supreme Court of Victoria, this power may be exercised whenever and wherever an alleged contempt may occur.²²
- 2.24 Although the case law provides examples of when the courts’ contempt powers have been exercised in the past, there is no certainty about the future circumstances in which a judicial officer may exercise their power in relation to contempt of court.
- 2.25 As the courts have recognised, the common law of contempt of court provides the courts with flexibility and enables the recognition of contemptuous behaviour in new situations.²³
- 2.26 In addition, there is no certainty that just because one judicial officer considers certain conduct to be contemptuous, another judicial officer will also consider the same conduct to be contemptuous.²⁴

21 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute*, Report No 140 (2017), 27.

22 *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241 (Latham CJ), 254 (Dixon J); *R v Taylor; Ex parte Roach* (1951) 82 CLR 587, 598 (Dixon, Webb, Fullagar and Kitto J).

23 *R v Douglass (No 3)* [2018] NSWSC 1939, [21]–[23] in which the presiding judge stated, ‘It does not follow from the fact that no earlier authority can be found which has dealt with such conduct, that [the conduct in question] could not involve contempt of the Court.’

24 Compare a case in a Queensland where a magistrate reportedly threatened a witness with contempt for wearing a t-shirt with the words ‘villain’ and another case in Victoria where the judge held ‘It may be offensive, but it is not contempt of court, for a person to describe a judge as a wanker.’: Monique Preston, ‘Villains Shirt nearly Lands Man in Trouble’, *Whitsunday Times* (Web Page, 16 November 2018) <www.whitsundaytimes.com.au/news/villains-shirt-lands-man-in-court-trouble/3578005/>; *Anissa Pty Ltd v Parsons* [1999] VSC [22] (Cummins J).

The standard of proof

- 2.27 All charges of contempt of court must be proved to the criminal standard of proof, that is, beyond all reasonable doubt.²⁵ However, proceedings for contempt of court do not constitute a trial of a criminal charge, although as already noted the language of a criminal trial is often adopted.

Summary proceedings

- 2.28 Common law contempt of court is an indictable offence. However, unlike other indictable offences, which ordinarily involve trial by jury, charges for contempt of court are heard summarily by a judicial officer alone, and in the case of contempt in the face of the court they can be actioned on the spot by the presiding judicial officer using what this consultation paper describes as a 'special summary procedure'.²⁶ This special summary procedure is discussed in this chapter further below.
- 2.29 As noted at the beginning of this chapter, the law of contempt of court is today a mix of statute and common law, with contempt-related offences arising not just at common law but also in statute. As a consequence, not only is the law of contempt of court fragmented and disparate but so are its offences and prosecution procedures. These issues are discussed further in subsequent chapters.
- 2.30 A comparative table illustrating the fragmented nature of contempt-related offences, penalties and prosecution procedures is provided at Appendix E. Many other statutes also contain contempt-related offences. However for the purposes of this consultation paper the Appendix is limited to the most major and frequently used.

Who can bring proceedings

- 2.31 In Victoria, proceedings for common law contempt of court are commenced by way of summons or originating motion in either the Supreme Court²⁷ or the County Court.²⁸
- 2.32 Depending on the type of contempt, the summons or originating motion may be filed by:
- a party to the proceedings in the event of a civil contempt
 - the Attorney-General²⁹
 - the Director of Public Prosecutions³⁰ or
 - the Court, which may direct the Prothonotary in the Supreme Court or the Registrar in the County Court to initiate proceedings.³¹
- 2.33 The Supreme Court and County Court may also adopt a special summary procedure where there is an alleged contempt in the face of the court. This procedure enables a judge to immediately punish the contempt summarily, rather than commencing separate formal proceedings by way of summons or originating motion.³² This summary procedure is discussed further in Chapter 4.

The distinction between civil and criminal contempt

- 2.34 Historically, contempts of court have been categorised as either civil or criminal, depending on whether the purpose was to enforce a court's process and orders, or to punish acts that interfere with the administration of justice, such as obstructing proceedings while court is sitting or publishing comments on a pending case.³³

25 *Witham v Holloway* (1995) 183 CLR 525, 534.

26 *Ibid* (Brennan, Deane, Toohey and Gaudron JJ) citing *Hinch v A-G (Vic)* (1987) 164 CLR 15, 49 (Deane J).

27 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.06.

28 *County Court Civil Procedure Rules 2018* (Vic) r 75.06.

29 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208.

30 *Public Prosecutions Act 1994* (Vic) s 22(1)(ba)(iii).

31 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.07; *County Court Civil Procedure Rules 2018* (Vic) r 75.07.

32 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75; *County Court Civil Procedure Rules 2018* (Vic) r 75.

33 *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106 (Gibbs CJ, Mason, Wilson and Deane JJ) citing *Ansah v Ansah* [1977] Fam 138, 144.

- 2.35 The primary basis for this distinction is that disobedience of court processes and orders in civil proceedings is a civil wrong and enforcement is coercive or remedial in the interests of private individuals, whereas interfering with the administration of justice is a public wrong and enforcement is punitive in the public interest.³⁴
- 2.36 Although this distinction is time-honoured,³⁵ it has also been the subject of various criticisms, including that:
- There is no real distinction between proceedings in the public interest and in the interest of the individual, as the underlying rationale of all contempt powers is ensuring the proper and effective administration of justice and vindicating a court's authority.³⁶
 - Contempts of court do not always fall neatly within either civil or criminal contempt, and often there may be a 'middle ground' where the two categories can overlap.³⁷
 - Punitive and remedial objects are 'inextricably intermixed'.³⁸ As the High Court has stated, 'punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes'.³⁹
 - There are some circumstances in which breach of an order in civil proceedings cannot be remedied, in which case the only effect of contempt proceedings is the vindication of judicial authority.⁴⁰
 - The purpose of contempt proceedings is not the same as the purpose of an individual bringing proceedings. When an individual brings proceedings it is to secure the benefit of an order or undertaking, whereas courts may exercise a 'penal or disciplinary jurisdiction' even when parties have settled their issues and do not wish to proceed further.⁴¹
- 2.37 Notwithstanding these criticisms, and statements by the High Court expressing concerns about the distinction,⁴² Victorian courts continue to distinguish between civil and criminal contempt.⁴³
- 2.38 The distinction between civil and criminal contempt is discussed further in Chapter 6, in the context of disobedience contempt.

Manifestations of contempt of court

- 2.39 At common law, the courts have long recognised different manifestations of contempt of court. The distinctions between them are not clear—people can interfere with the administration of justice in many ways,⁴⁴ and accordingly, the law of contempt of court can 'assum[e] an almost infinite diversity of forms'.⁴⁵ To add to this lack of certainty, as noted above, the common law of contempt of court has been supplemented by statutory

34 *Australian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106 (Gibbs CJ, Mason, Wilson and Deane JJ) citing *Ansah v Ansah* [1977] Fam 138, 144; *Witham v Holloway* (1995) 183 CLR 525, 531 (Brennan, Deane, Toohey and Gaudron JJ), 539 (McHugh J).

35 See, eg, *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 253 (Dixon J); *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 363–4 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Australian Consolidated Press Limited v Morgan* (1965) 112 CLR 483, 489 (Barwick CJ), 500 (Windeyer J).

36 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107 (Gibbs CJ, Mason, Wilson and Deane JJ); *Witham v Holloway* (1995) 183 CLR 525, 532–3 (Brennan, Deane, Toohey and Gaudron JJ).

37 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 253 (Dixon J); *Australian Consolidated Press Limited v Morgan* (1965) 112 CLR 483, 501 (Windeyer J).

38 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), 539 (McHugh J). See also *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 108 (Gibbs CJ, Mason, Wilson and Deane JJ).

39 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ).

40 *Ibid* 532–3 (Brennan, Deane, Toohey and Gaudron JJ).

41 *Ibid* 533–4 (Brennan, Deane, Toohey and Gaudron JJ); *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 108 (Gibbs CJ, Mason, Wilson and Deane JJ); *Australian Consolidated Press Limited v Morgan* (1965) 112 CLR 483, 489 (Barwick CJ), 500 (Windeyer J).

42 See, eg, *Hearne v Street* (2008) 235 CLR 125, 135 (Kirby J); *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107–8 (Gibbs CJ, Mason, Wilson and Deane JJ); *Witham v Holloway* (1995) 183 CLR 525, 532–4 (Brennan, Deane, Toohey and Gaudron JJ).

43 See, eg, *Moira Shire Council v Sidebottom Group Pty Ltd (No 3)* [2018] VSC 556 [19]–[29] (Zammit J) (citations omitted); *VICT v CFMMEU* [2018] VSC 794 [9]–[10] (McDonald J) (citations omitted).

44 Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 3 [3].

45 Joseph Moskowitz, 'Contempt of Injunctions, Civil and Criminal' (1943) 43 *Col. LR* 780.

restatement, particularly in terms of conduct amounting to contempt in the face of the court⁴⁶ and juror contempt.⁴⁷ Given this, the common law today provides only part of the picture of the type of conduct and the punishment available to a court to ensure the proper administration of justice.

- 2.40 In addition, there are different views about how the law of contempt of court is best described and classified.⁴⁸ The categories of contempt of court are thus uncertain.⁴⁹
- 2.41 In this context, and as noted above, the common law gives courts the flexibility to find conduct contemptuous in novel circumstances and to address the infinite variety of behaviours that may interfere with the administration of justice. However, this flexibility also makes the content and application of the law of contempt of court unclear and uncertain.
- 2.42 A key concern for the Commission, and a theme running through this consultation paper, is therefore the lack of certainty and clarity in the common law of contempt of court, and the effect of that uncertainty on the proper and effective administration of justice and public confidence in the work of the courts.
- 2.43 As noted in Chapter 1, in undertaking this reference the Commission's focus is on the most common manifestations of contempt, namely:
- contempt in or near the courtroom—contempt in the face of the court
 - juror contempt
 - non-compliance with court orders or undertakings—disobedience contempt
 - contempt by publication—publications that interfere with or prejudice pending proceedings—sub judge contempt
 - contempt by publication—publications that interfere with the administration of justice as an ongoing process—contempt by scandalising the court.
- 2.44 Each of these manifestations of contempt is outlined briefly below. They are discussed in detail in Chapters 4–8.
- 2.45 However, the manifestations of contempt are not discrete or fixed. In addition, and for completeness, it is noted that contempt of court can also arise where there is:
- interference with people who have duties to discharge in court proceedings, for example where a person improperly interferes with a witness by making threats
 - interference with persons over whom the courts exercise special jurisdiction, such as wards of the court
 - a breach of duty by persons who are officially connected with court proceedings
 - abuse of process.⁵⁰

Contempt in the face of the court

- 2.46 The essence of contempt in the face of the court is articulated in the same broad terms as criminal contempt more generally. It is described as:

action or inaction amounting to an interference with, or obstruction to, or having a tendency to interfere with or obstruct the due administration of justice.⁵¹

46 See, eg, *Coroners Act 2008* (Vic) s 103; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137.

47 *Juries Act 2000* (Vic) ss 68, 69, 70, 71, 72, 73 and 78A.

48 Compare Thomson Reuters, *The Laws of Australia* (Web Page, 25 September 2018) 10 Criminal Offences, '10.11 Administration of Law and Justice'; LexisNexis, *Halsbury's Laws of Australia* (online at 25 September 2018) 105 Contempt.

49 *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 294 (Lord Reid).

50 For a discussion of these manifestations of contempt, see LexisNexis, *Halsbury's Laws of Australia* (online at 25 September 2018) 105 Contempt.

51 John C Fox, *The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (Oxford University Press, 1927), 497; *DPP (Vic) v Johnson* [2002] VSC 583 [7]; *R v Slaveski* [2011] VSC 643 [17]; *R v Vasilio* [2012] VSC 216 [13]–[14].

- 2.47 Borrie and Lowe have described contempt in the face of the court, as ‘the unlawful disruption or obstruction of court proceedings’.⁵²
- 2.48 The distinguishing factor for this category of contempt is that the conduct must occur ‘in the face of the court’, an expression described by Justice Kirby in *European Asian Bank AG v Wentworth* as ‘ambiguous and antique’.⁵³
- 2.49 Today the common law of contempt in the face of the court has also been supplemented by statutory restatement.⁵⁴
- 2.50 The meaning of the term ‘in the face of the court,’⁵⁵ together with the issue of the courts’ power to punish it immediately and summarily, is discussed in Chapter 4.
- 2.51 In addition, Chapter 4 considers how the law of contempt in the face of the court can disproportionately impact certain groups such as unrepresented litigants or litigants with mental illness.

Juror contempt

- 2.52 At common law, contempt by jurors is any conduct by members of the jury that interferes with the proper administration of justice. Most significantly, and as discussed in Chapter 5, it includes jury members making their own inquiries and undertaking their own unauthorised research in relation to trial participants and events. However, contempt by jurors can include other forms of misbehaviour associated with a trial, such as a refusal to answer questions or give an oath or affirmation. It can therefore in some circumstances also constitute contempt in the face of the court, as well as constituting a breach of one or more of the offence provisions in the *Juries Act 2000* (Vic). Contempt by jurors can also be characterised as a manifestation of contempt by breach of duty by a person officially connected with court proceedings.⁵⁶
- 2.53 In addition to the common law, the duties and obligations of jury members are now also expressly stated in the *Juries Act*. These include a specific prohibition on jurors conducting research, among other things.⁵⁷

Disobedience contempt

- 2.54 Disobedience contempt arises when a person fails or refuses to comply with an order of the court or an undertaking given to the court. In these circumstances, contempt proceedings are one mechanism by which to compel compliance with the court order or undertaking given and may also provide a mechanism to punish the non-compliance, particularly where the non-compliance involves deliberate defiance of the court or where compliance is no longer possible.
- 2.55 However, the courts have held that such contempt proceedings should not be commenced where there are more appropriate civil remedies available to enforce an order of the court.⁵⁸ It is noted that there are many other such mechanisms available to enforce court orders.⁵⁹
- 2.56 In addition to the technical issues, which include consideration of the distinction between civil and criminal contempt and its effects, is a more fundamental question of whether there is a need to retain the common law of disobedience contempt, particularly given the availability of alternative enforcement mechanisms.
- 2.57 Disobedience contempt and these issues are discussed further in Chapter 6.

52 Ian Cram, *Borrie & Lowe: The Law of Contempt* (LexisNexis, 4th ed, 2010) 456.

53 *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 457.

54 See, eg, *Magistrates’ Court Act 1989* (Vic) s 133.

55 *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445; *DPP (NSW) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588; *Fraser v The Queen* (1984) 3 NSWLR 212.

56 LexisNexis, *Halsbury’s Laws of Australia* (online at 25 September 2018) 105 Contempt, ‘2 Criminal Contempt’ [105–70].

57 *Juries Act 2000* (Vic) s 78A (Panel member or juror must not make enquiries about trial matters).

58 *Morgan v State of Victoria* (2008) 22 VR 237, 269 [145].

59 For a discussion of alternative mechanisms, see the section of this paper beginning at [6.33].

Contempt by publication (1)—sub judice contempt

- 2.58 At common law, sub judice contempt arises where there is a ‘publication’ which has a ‘real and definite tendency’ as a ‘matter of practical reality’ to prejudice or embarrass particular legal proceedings.⁶⁰
- 2.59 There is no requirement to prove the actual effect of the publication or that the prejudice actually occurred.⁶¹ There is also no requirement that the contemnor had an intention to cause prejudice.⁶²
- 2.60 The tendency of a publication to prejudice proceedings is assessed at the time of publication, alongside a consideration of the nature of the publication and other circumstantial factors.⁶³
- 2.61 Publication of print or broadcast material is taken to occur at the time and place it was first made available to the public or a section of the public.⁶⁴
- 2.62 The courts have held that a publication will prejudice or interfere with proceedings where the publication:
- refers to an accused’s guilt or innocence⁶⁵
 - details prior convictions,⁶⁶ confessions or admissions by the accused,⁶⁷
 - makes statements about the character of the accused⁶⁸
 - gives opinions about the quality of the case.⁶⁹
- 2.63 As discussed in Chapter 7, there are technical issues with the law of sub judice contempt and the way in which the test is constructed. These issues have also been the subject of other reviews and inquiries.
- 2.64 However, also discussed in Chapter 7, the emergence of new media poses a fundamental challenge to the law of sub judice contempt. Unlike print or broadcast publications, publication in the new media is permanent,⁷⁰ without a specific location,⁷¹ easily accessible by searching,⁷² and can be readily copied and published in digital media outside Victoria.⁷³ The question therefore arises as to whether in this new media landscape there remains a role for the law of sub judice contempt in ensuring a fair trial, and whether the assumptions underpinning the law in terms of juror decision making are still valid. These questions are discussed further in Chapter 7.

Contempt by publication (2)—contempt by scandalising the court

- 2.65 Scandalising contempt is an interference with the course of justice arising from:
- publications which tend to detract from the authority and influence of judicial determinations; publications calculated to impair the confidence of the people in the Court’s judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.⁷⁴

60 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34.

61 *Bell v Stewart* (1920) 28 CLR 419, 432.

62 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 46.

63 *Ibid* 34; *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371–2.

64 *Viner v Australian Building Construction Employees’ and Builders Labourers Federation* (1963) 56 FLR 5, 22–3.

65 *DPP (NSW) v Wran* (1987) 7 NSWLR 616.

66 *R v Hinch (No 1)* [2013] VSC 520; *R v The Herald and Weekly Times Ltd* (2007) VR 248.

67 *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

68 *Hinch v A-G (Vic)* (1987) 164 CLR 15.

69 *Packer v Peacock* (1912) 13 CLR 577.

70 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 268 [76].

71 *Ibid* [77].

72 *Ibid* [78]–[83].

73 *Ibid* 270 [84].

74 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434.

2.66 As stated by the High Court in *Gallagher v Durack*:

The authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.⁷⁵

2.67 The law of scandalising contempt is therefore aimed at protecting the proper administration of justice as an ongoing process and at ensuring public confidence in the courts. The law of scandalising contempt is concerned with publications which comment on the courts and judges generally.⁷⁶ In this context the courts have held that the power to punish for scandalising contempt is not to be used to punish personal attacks on individuals or judges.⁷⁷

2.68 As discussed in Chapter 8 there is some controversy surrounding the use of this manifestation of contempt, which has also been the subject of recent reviews in both the United Kingdom and New Zealand. Significantly, while this manifestation of contempt has been abolished in the United Kingdom, the NZ Commission has recommended its retention and codification.

75 *Gallagher v Durack* (1983) 152 CLR 238, 238.

76 *R v Fletcher* (1935) 52 CLR 248, 257; *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442.

77 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442.

**PART TWO:
CONTEMPT OF COURT**

General issues with the law of contempt of court

- 24** Introduction
- 24** Uncertainty of scope
- 26** Procedural safeguards
- 29** Overlap with criminal law
- 31** Penalties
- 33** Warnings

3. General issues with the law of contempt of court

Introduction

- 3.1 This chapter identifies questions about a number of overarching issues with the law of contempt of court.
- 3.2 The offence of contempt of court is often described in case law as *sui generis*, which means that it belongs to a species all of its own and so is unique.¹
- 3.3 The consequences of this are twofold. First, there are many unusual features of the law of contempt of court which are not easily reconciled with community expectations about how a law—particularly a law which provides for the imposition of punitive sanctions—should operate.
- 3.4 Secondly, there is significant uncertainty about the scope of the law of contempt of court and the procedures to be applied in contempt proceedings.
- 3.5 Issues covered in this chapter include:
- whether the scope and elements of the offence of contempt of court are too broad and discretionary to enable people to know what conduct might be subject to punishment
 - whether the procedural safeguards which apply to contempt proceedings are sufficiently clear and adequate given the punitive nature of those proceedings
 - whether greater guidance is required about the relationship between statutory offence provisions and the courts' inherent contempt power
 - whether there should be a statutory maximum penalty for contempt of court and whether the *Sentencing Act 1991* (Vic) should directly apply to contempt proceedings
 - whether there is a need for greater clarity and certainty about the use and role of judicial warnings in deciding whether and how a person should be dealt with for contempt.

Uncertainty of scope

- 3.6 Under the common law, it is not possible to define with precision what conduct might be liable to punishment as a contempt of court.
- 3.7 In 1906, Justice Cussen in the Supreme Court set out a broad definition of contempt of court which has since been cited with approval many times, including by the High Court:²
- Its essence is action or inaction amounting to an interference with, or obstruction to, or having a tendency to interfere with or obstruct the due administration of justice, using that term in a broad sense.³

1 *Encyclopaedic Australian Legal Dictionary*, (Web Page, 9 April 2019) 'sui generis'.
2 *Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* (1981) 148 CLR 245, 257.
3 *Re Dunn* [1906] VLR 493, 497.

- 3.8 Following from this definition, Victorian courts have, in general terms, held that:
- The offence of contempt will be established if it can be proved beyond reasonable doubt that the alleged contemnor wilfully engaged in conduct and that conduct had a tendency to interfere with the administration of justice.
 - It is not necessary to prove that the alleged contemnor had an intention to interfere with the administration of justice.
 - It is not necessary to prove that the conduct did in fact interfere with the course of justice.⁴
- 3.9 Case law and academic texts list and describe general categories of contempt. However, these do not provide an exhaustive catalogue of the ‘many and varied’⁵ ways in which a person may be found to be in contempt of court. At its highest, a list of the categories of contempt is a list of thematically grouped *examples* of conduct which the courts have found, in the past, to be an interference with the proper administration of justice and therefore punishable as contempt. Conduct which constitutes contempt of court may fit within multiple categories or it may not fit within any established category but still be regarded as contempt.
- 3.10 The lack of precision in defining the offence of contempt affords the court the flexibility to deal with any conduct, however unforeseen or novel, which interferes with or has a tendency to interfere with the due administration of justice. In effect, the courts are able to take an approach of ‘we will know it when we see it’ to defining contempt of court.
- 3.11 However, the result is that members of the public are not able to know in advance what behaviour might be regarded as sufficiently unacceptable to warrant conviction and punishment for contempt.
- 3.12 A recent New South Wales case provides an illustrative example. A journalist, attending court to report on a murder trial, allegedly entered the jury room where she was found by the sheriff and removed before she had spoken to any jury members.⁶ The presiding judicial officer informed the journalist that she might be in contempt of court and gave the journalist an opportunity to show cause why she should not be dealt with for contempt.⁷ Evidence was provided to the court that the journalist was not an experienced court reporter, was unfamiliar with the layout of the particular court and had inadvertently attempted to enter the jury room, where she was stopped by the sheriff. There were no signs that prohibited her entry.⁸
- 3.13 At the ‘show cause’ hearing, the journalist apologised to the court for her actions and the disruption they caused.⁹ It was submitted on her behalf that her conduct did not require referral for contempt because she had not intended to influence or corrupt a juror or otherwise interfere with the administration of justice. It was submitted that what she had done was not the result of an attempt to interfere with the jury, but rather the result of a series of very unfortunate events. It was also noted that in the circumstances her actions had fortunately not in fact resulted in a serious interference with the due administration of justice.¹⁰
- 3.14 In view of the journalist’s apology and submissions, the presiding judicial officer decided not to refer her to the Prothonotary to be dealt with for contempt. However, she commented that:

4 See, eg, *R v Vasilioiu* [2012] VSC 216 [13]–[20]; *R v Slavetski* [2011] VSC 643 [17]–[20]; *R v The Age Co Ltd* [2006] VSC 479 [15]; *DPP (Vic) v Johnson* [2002] VSC 583 [7]–[9]; *DPP v Johnson & Yahoo!* [2016] VSC 699 [24]. In some cases, particularly those involving contempt by publication, the requisite tendency has been described as ‘a real and definite tendency as a matter of practical reality’ to interfere with the administration of justice.

5 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 561.

6 *R v Douglass (No 3)* [2018] NSWSC 1939 [2].

7 *Ibid* [1], [8].

8 *Ibid* [9]–[12].

9 *Ibid* [15].

10 *Ibid* [18]–[19].

I do not accept what was encompassed in the submission that a successful attempt by a journalist to gain entry to a jury room, or to speak to a juror there, is not “a recognised category of contempt”. It does not follow from the fact that no earlier authority can be found which has dealt with such conduct, that it could not involve contempt of the Court. That there is no previous case where such behaviour has arisen to be considered, simply reflects how extraordinary it is for a journalist to make any attempt to enter a jury room, during an ongoing trial. While, as in this case, relevant questions arise as to what the journalist intended, there can be no question, in my view, that such conduct can involve a contempt, given that it can undoubtedly have a real prospect of interfering with the administration of justice, during an ongoing trial.¹¹

- 3.15 The case raises a number of questions: Could an inadvertent but unauthorised entry into the jury room constitute a contempt? Or only if it is a journalist who gains entry? Or only if there is an attempt to talk to the jurors? Or only if there is an attempt to talk to the jurors about a matter related to the case?
- 3.16 Such questions are not readily answered by reference to the broad definition of contempt propounded by Justice Cussen and set out above. Such questions are also not readily answered in a context where it is accepted that conduct may constitute contempt of court even where there is no intention on the part of the contemnor to interfere with the proper administration of justice and no interference has in fact occurred.

Possible reforms

- 3.17 The power of the courts, particularly the inherent power of superior courts, to punish for contempt is not limited to specific classes of conduct. It is a power directed towards safeguarding the proper administration of justice rather than prohibiting any precisely identified mischief.
- 3.18 As currently expressed in case law, the power to punish for contempt gives the courts significant flexibility to address conduct that might represent a threat to the proper administration of justice. The price of this flexibility is a lack of certainty about the type and scope of conduct which will attract conviction and punishment.
- 3.19 The following chapters consider the implications of this uncertainty in the context of specific manifestations of contempt of court and pose questions about whether these different manifestations of contempt of court should be replaced by statutory provisions.

Question

- 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?

Procedural safeguards

- 3.20 The right of an accused person to a fair trial is a central pillar of the criminal justice system.¹² This is reflected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which establishes a framework for the protection and promotion of human rights in Victoria.

- 3.21 Section 24(1) of the Charter states:
- A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- 3.22 Section 25 sets out a more extensive list of fair trial rights which are described as ‘rights in criminal proceedings’.
- 3.23 Although a person found guilty of contempt of court may be convicted and imprisoned or fined, contempt proceedings are not conducted as criminal proceedings. Contempt proceedings are heard under the *Supreme Court (General Civil Procedure Rules) 2015* (Vic) and the *County Court Civil Procedure Rules 2018* (Vic) (General Civil Procedure Rules)¹³ by a judge sitting alone.
- 3.24 The unusual nature of contempt proceedings has given rise to considerable uncertainty about the laws, principles and procedures that apply.
- 3.25 In *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd (CFMEU v Boral)*¹⁴ the High Court confirmed that contempt proceedings commenced under Order 75 of the General Civil Procedure Rules are civil proceedings and cannot be regarded as the equivalent of a criminal trial.¹⁵ The High Court confirmed that Order 75 does not stand outside the General Civil Procedure Rules and that contempt proceedings are within the ordinary application of those Rules.¹⁶ In that context, Justice Nettle, in a concurring judgment, set out a number of general principles, all drawn from previous High Court cases, about the nature of contempt proceedings:¹⁷
- All proceedings for contempt must now realistically be seen as criminal in nature.
 - Not all contempts are criminal.
 - A failure to obey an injunction [court order] is not a criminal contempt unless the failure to comply is defiant or contumacious.
 - A proceeding for contempt is not a proceeding for criminal contempt if the proceeding appears clearly to be remedial or coercive in nature as opposed to punitive.
 - A criminal contempt is a common law offence, albeit not part of the ordinary common law.
 - Even a proceeding for criminal contempt is not a criminal proceeding.
 - Although proceedings for contempt of court are civil proceedings, some of the safeguards applicable to criminal proceedings also apply to a civil proceeding for criminal contempt.
- 3.26 Even if each of these statements of principle is accepted as settled law, there is still residual procedural uncertainty, especially about which of the procedural safeguards traditionally available to an accused facing a serious criminal charge can also be invoked by an alleged contemnor.¹⁸
- 3.27 *CFMEU v Boral* was an appeal from part of the Victorian Court of Appeal’s judgment in *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd (CFMEU v Grocon)*.¹⁹ In that case, the Court of Appeal had noted the difficulty that courts have faced in determining what statutory procedures apply to contempt proceedings

13 *County Court Civil Procedure Rules 2018* (Vic) Order 75; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75.

14 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375.

15 *Ibid*, 389–390.

16 *Ibid*, 386.

17 *Ibid*, 395–6 (citations omitted).

18 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 582. It should be noted that the Court of Appeal expressed this uncertainty as existing ‘before X7 and Lee’. However, later in their judgment, the Court of Appeal concluded that, at least for the purposes of the procedural questions before them, the law had not been relevantly changed or clarified by the X7 or Lee cases—see [341]–[350].

19 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527.

when the question so often turns on fitting those proceedings within a dichotomy that consists only of ‘civil’ and ‘criminal’ proceedings.²⁰

3.28 The Victorian Court of Appeal noted that particular ambiguity is created by the need to co-opt language from other contexts in order to describe contempt proceedings, which are otherwise unique:

‘the discourse with respect to contempt is littered with language — we have set out some of it at [126] above²¹ — which is imprecise and potentially confusing. No doubt that reflects the peculiar nature of contempt. The application of that language to a particular statutory context is, we consider, a fraught task. It is made more difficult still where the available statutory choice is between ‘civil proceedings’ and ‘criminal proceedings ... for an offence’.²²

3.29 The Victorian Court of Appeal outlined several examples of how contempt proceedings, because of their peculiar nature, have presented procedural questions for determination, such as:

- whether the rule against duplicity applies to the formulation of a contempt of court charge²³
- whether the principle in *Jones v Dunkel* applies in contempt proceedings²⁴
- whether and under what statutory regime an appeal from a final or interlocutory decision is available in contempt proceedings²⁵
- whether the *Evidence Act 2008* (Vic) applies to contempt proceedings as though the proceedings were criminal proceedings²⁶
- whether contumacy must be pleaded in a charge seeking punishment for a contempt arising from breach of an order or undertaking²⁷
- whether and in what circumstances discovery under civil procedure rules is available against an alleged contemnor.²⁸

3.30 The High Court, in *CFMEU v Boral*, affirmed the decision of the Victorian Court of Appeal in *CFMEU v Grocon* with respect to the last of these matters.²⁹ However, the broader observations of the Court of Appeal about the unique nature of contempt proceedings and the resultant procedural uncertainties remain pertinent.

3.31 In that context, consideration must be given to whether the current procedure guarantees an alleged contemnor, faced with the serious prospect of imprisonment and/or a fine, a fair process.

Possible reforms

3.32 The following chapters pose questions about the appropriateness of the current procedures for contempt proceedings in the context of specific manifestations of contempt. The issue of whether and how those procedures should be reformed and replaced by statutory provisions is discussed in light of the different circumstances in which particular types of contempt occur and the different purposes for which those contempts are punished.

20 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 575,577.

21 ‘offence’, ‘offence of a criminal character’, ‘criminal proceeding’, ‘criminal prosecution’, ‘criminal proceedings for an offence’ and ‘prosecution of an offence’: *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527,561 [126].

22 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 581.

23 Ibid 582–583. This rule prohibits the prosecution alleging two or more offences in a single charge on a charge-sheet or indictment. The case law indicates that the rule does not strictly apply to contempt proceedings.

24 Ibid 583. This principle provides that the unexplained failure of a party to call certain evidence may lead to an inference that the evidence would not have helped that party.

25 Ibid 572–574

26 Ibid 630–631.

27 Ibid 584–600

28 Ibid 634–639.

29 The High Court held that, because the General Civil Procedure Rules apply to contempt proceedings commenced under Order 75, discovery could be ordered against a respondent in such proceedings, or at the very least could be ordered against a corporate respondent in contempt proceedings brought by a private party and arising from the breach of an order made in civil proceedings.

Question

- 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?

Overlap with criminal law

- 3.33 Increasingly, conduct which may constitute contempt of court is also criminalised under specific statutory offence provisions. These provisions provide greater clarity and certainty about the type of conduct which will attract criminal sanction and the penalty that will apply. However, these provisions do not necessarily oust the broader contempt jurisdiction of the court. This adds to the potential confusion and complexity of this area of law.
- 3.34 There are also several common law offences which overlap and have a strong correlation with the law of contempt, such as the offence of embracery, attempting to pervert the course of justice, and perverting the course of justice. The existence of these offences is recognised by section 320 of the *Crimes Act 1958* (Vic), the purpose of which is to provide statutory penalties for some (but not all) common law offences.
- 3.35 Chapters 4 and 5 of this consultation paper list a number of statutory offences in the *Crimes Act*, *Juries Act 2000* (Vic), *Summary Offences Act 1966* (Vic) and *Court Security Act 1980* (Vic) that criminalise behaviour which is also punishable as a contempt in the face of the court or juror contempt.
- 3.36 However, the overlap is not confined to these manifestations of contempt. For example, in relation to contempt by interference with people who have particular roles or responsibilities in court proceedings, the Australian Law Reform Commission found that:
- In any case involving pressure or inducement brought to bear on a participant in proceedings (other than a party), the likelihood that the relevant conduct will be both an instance of contempt and a criminal offence (at common law or under statute) is very high indeed.³⁰
- 3.37 Good examples of this overlap with interference contempt from Victorian legislation are:
- section 257 of the *Crimes Act* under which it is an offence, punishable by 10 years imprisonment, to intimidate or to cause physical harm or detriment to a person (the victim) because of their involvement in a criminal investigation or a criminal proceeding³¹
 - section 52A of the *Summary Offences Act* under which it is an offence punishable by 12 months imprisonment or a fine of 120 penalty units to 'harass a person because that person has taken part, is about to take part or is taking part in a criminal proceeding in any court as a witness or in any other capacity'.³²
- 3.38 There is a common law maxim of statutory interpretation, *generalia specialibus non derogant*, which presumes that 'general things or words do not derogate from special things or words'.³³ The maxim was explained by Justice Deane in *Refrigerated Express Lines (A/Asia) v Australian Meat and Livestock Corporation*³⁴ as follows:

30 The Law Reform Commission, *Contempt* (Report No 35, 1987) 103 [186].

31 *Crimes Act 1958* (Vic) s 257(1).

32 *Summary Offences Act 1966* (Vic) s 52A. See, eg, *DPP (Vic) v Kelly* [2013] VCC 2030; *R v McLachlan* [1998] 2 VR 55, 59.

33 *Encyclopaedic Australian Legal Dictionary*, (Web Page, 9 April 2019) 'generalia specialibus non derogant'.

34 *Refrigerated Express Lines (A/Asia) v Australian Meat and Livestock Corporation* (1980) 29 ALR 333.

As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. ... Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter.³⁵

- 3.39 This maxim is usually applied by courts to determine the interaction between two potentially applicable statutory offence provisions. It may be that this maxim has application in determining the interaction between a specific statutory offence provision and a more general common law offence, like contempt of court. Another view is that the principle of legality operates to provide that only express words in a statute can abrogate the inherent jurisdiction of the Supreme Court to punish for contempt. Regardless of which principle or maxim is relied on, the policy effect is the same; that where for the same conduct there is both a statutory provision with a clear offence and a common law offence there should be a clear preference for invoking the statutory provision.
- 3.40 In the English case *Solicitor-General v Cox*,³⁶ two people were punished for contempt of court for taking photographs in court and publishing them online. The same conduct could also have been prosecuted under a specific statutory offence provision which criminalised conduct of that kind. The Court did not refer to the maxim *generalia specialibus non derogant* but held:

The fact that taking photographs in court and publishing them are criminal offences, does not prevent those acts being punishable as contempts of court as, for the reasons we have given, these actions pose serious risks to and interfere with the due administration of justice: the court obviously has power, as it needs, to deal immediately with anyone seen taking photographs, in order to maintain control over its proceedings, and to avoid it standing powerless while the law designed to protect the administration of justice is broken before it. ... Whilst the later publication of such photographs may not be a contempt in the face of the court, it is still a contempt, quite apart from the fact that it is a criminal offence, since publication for a variety of reasons may be the very purpose behind the taking of the photograph illegally. While a summary criminal charge may be the appropriate response to some illegal photography, there are other cases in which it will not be and needs either swifter or more condign action by the court to uphold the due administration of justice; this was such a case. It clearly required the Attorney General to bring proceedings for contempt, taking into account the gravity of the risks and of the interference with the due administration of justice.³⁷

Possible reforms

- 3.41 The intersection between statutory and common law offences and the courts' power to punish for contempt provides options for dealing with an alleged contempt. This in turn gives rise to the risk of inconsistency and unfairness. A person charged under a statutory offence provision or with a common law criminal offence will have the benefit of all the procedural safeguards which ordinarily apply to criminal proceedings. However, a person who is dealt with for the same behaviour under the common law of contempt will not have the benefit of some of those safeguards. For example, the offence will not be subject to a maximum penalty and will not be tried before a jury.

35
36
37

Ibid 347.
Solicitor-General v Cox [2016] 2 Cr App R 15 193.
Ibid 202.

- 3.42 However, there is limited guidance on when a person should be prosecuted for a statutory or common law offence, or dealt with under the law of contempt. Where the contempt occurs in the face of the court, the path which is adopted appears to be largely a matter for the discretion of the presiding judicial officer.

Question

- 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?

Penalties

- 3.43 Statutory limits are placed on the penalties that the Magistrates' Court,³⁸ Children's Court³⁹ and Coroners Court⁴⁰ may impose for contempt of court. There is no statutory limit on the maximum penalty that may be imposed for contempt of court by the County or Supreme Courts.⁴¹ Contempt of court is a common law offence and so, unless statute provides otherwise, the penalty is at large.⁴²
- 3.44 Punishment for contempt in the County and Supreme Courts is regulated by Part 4, Order 75 of the General Civil Procedure Rules.
- 3.45 In prescribing the penalties available for contempt, the General Civil Procedure Rules do not distinguish between types of contempt. The Rules afford the court considerable discretion to determine whether a punishment should be imposed for contempt and what form it should take. For example:
- Where the court finds a person guilty of contempt of court, the court may punish the contempt by committal to prison or fine or both.⁴³
 - Where the contemnor is a corporation, the court may punish for contempt by sequestration or fine or both.⁴⁴
 - Where the court imposes a fine, it may commit, or further commit, the contemnor to prison until the fine is paid.⁴⁵
 - The court may make an order for punishment on terms, including a suspension of punishment.⁴⁶
 - Where a person has been sentenced to a term of imprisonment for contempt, the court retains the discretion to order their discharge before the end of the term.⁴⁷

38 *Magistrates' Court Act 1989* (Vic) s 133(4). A person found guilty of contempt in the face of the court may be sentenced to imprisonment for up to six months, and fined up to 25 penalty units. *Magistrates' Court Act 1989* (Vic) s 134(3). A witness found guilty of failing to answer a summons, refusing to be sworn or affirmed, refusing to answer lawful questions, or refusing to follow a direction may be sentenced to imprisonment for up to one month or fined up to five penalty units.

39 *Children, Youth and Families Act 2005* (Vic) s 528. The Children's Court has the same powers to punish for contempt as the Magistrates' Court but a person under the age of 18 cannot be committed to prison for contempt, they may be committed to a youth justice or a youth residential centre instead.

40 *Coroners Act 2008* (Vic) s 103(7)(a). A person found guilty of contempt under section 103 of the Coroners Act may be sentenced to a term of imprisonment of no more than 12 months or fined up to 120 penalty units.

41 *DPP (Vic) v Johnson* [2002] VSC 583 [56].

42 *Allen v R* (2013) 36 VR 565, 574. The *Crimes Act 1958* (Vic) s 320 lists the maximum term of imprisonment for certain common law offences but the offence of contempt of court is not included on this list.

43 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(1); *County Court Civil Procedure Rules 2018* (Vic) r 75.11(1).

44 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(2); *County Court Civil Procedure Rules 2018* (Vic) r 75.11(2).

45 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(3); *County Court Civil Procedure Rules 2018* (Vic) r 75.11(3).

46 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(4); *County Court Civil Procedure Rules 2018* (Vic) r 75.11(4).

47 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.12; *County Court Civil Procedure Rules 2018* (Vic) r 75.12. See also *Magistrates' Court Act 1989* (Vic) s 133(5).

- 3.46 With respect to determining the sentence in any particular case, the Supreme Court has indicated that there is ‘little assistance is to be had ... by a minute comparison between the penalties imposed in other cases’ because ‘the circumstances are infinitely variable as is the impact of different contempts upon the court process’.⁴⁸
- 3.47 However, in sentencing appeals, superior courts do give consideration to sentences imposed in comparable contempt cases as one yardstick for evaluating the sentence under review.⁴⁹
- 3.48 The Supreme Court has stated that it is clear that the penalty for serious contempts may be substantial.⁵⁰ Nonetheless, it is widely accepted that the court should impose a term of imprisonment as a disciplinary sanction only in the most serious contempt cases and only as a sentence of last resort.⁵¹

Apologies

- 3.49 The courts also have a discretion not to impose a penalty for contempt— even where the court is satisfied that a contempt has been committed.⁵² A sincere and prompt apology proffered by the contemnor may be particularly relevant to the court’s decision to exercise this discretion.
- 3.50 Apologies can play an important role in contempt proceedings. An apology may not only mitigate the punishment imposed,⁵³ it may be regarded as ‘purging’ the contempt so that it is no longer necessary to impose any penalty or even commence contempt proceedings.⁵⁴
- 3.51 Both the Magistrates’ Court Act and the Coroners Act specifically provide that the court may accept an apology given for a contempt and decide to reduce or forego any punishment accordingly.⁵⁵

Sentencing Act 1991 (Vic)

- 3.52 It is uncertain and has not been clearly resolved by the courts whether and what provisions of the *Sentencing Act 1991 (Vic)* are relevant to contempt proceedings, and on what legal basis.⁵⁶ Section 1 of the Sentencing Act provides that the purpose of the Act is to have within the one Act all general provisions dealing with the powers of courts to sentence offenders. However the Act does not state clearly that it applies only to “criminal offences” and the terms “offence” and “crime” are not defined, although the Act does define offences as “category 1” and “category 2” offences.⁵⁷
- 3.53 Victorian courts often have regard to the Sentencing Act when imposing a punishment for contempt. For example, courts have held that the following provisions of the Sentencing Act are relevant to sentencing in contempt proceedings:
- If a person is guilty of an offence, the court may order the person to pay a fine, with or without recording a conviction (section 7(1)(f)).⁵⁸
 - In exercising its discretion over whether or not to record a conviction, the court must have regard to all the circumstances of the case (section 8(1)).⁵⁹
 - The court must not impose a custodial sentence where a non-custodial sentence would achieve the purposes for which the sentence is imposed (section 5(4)).⁶⁰

48 *A-G (Vic) v Rich* [1998] VSC 45 [13]; *DPP (Vic) v Johnson* [2002] VSC 583 [56].

49 *Allen v R* (2013) 36 VR 565, 575; *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596.

50 *DPP (Vic) v Johnson* [2002] VSC 583 [57].

51 *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596, 638–40.

52 *Re Perkins; Mesto v Galpin* [1998] 4 VR 505, 512–513 (Brooking JA).

53 See, eg, *R v The Age Co Ltd* [2008] VSC 305.

54 See, eg, *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296.

55 *Magistrates’ Court Act 1989* (Vic) s 133(6); *Coroners Act 2008* (Vic) s 103(9).

56 *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288; [2014] VSC 134 [75]–[78].

57 See *Sentencing Act 1991* (Vic) s 3.

58 *R v The Herald & Weekly Times Pty Ltd* [2008] VSC 251 [50].

59 *Ibid* [50]–[51].

60 *R v Hinch (No 2)* [2013] VSC 554 [44].

- 3.54 Other provisions of the Sentencing Act that have been relied upon in contempt proceedings include:
- fixing of non-parole periods (sections 11 to 14)⁶¹
 - order of service of sentences (section 15)⁶²
 - whether sentences are concurrent or cumulative (section 16).⁶³
- 3.55 However, the precise relevance of the Sentencing Act to the imposition of punishment in contempt proceedings is unclear. The balance of case law suggests that the Sentencing Act does not apply directly to contempt proceedings but that the Act is relevant by way of analogy and that courts should approach the question of penalty for criminal contempt, as far as possible, in a way which is consistent with that adopted when dealing with criminal conduct generally.⁶⁴

Questions

- 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?

Warnings

- 3.56 Contempt warnings play an important, although informal, role in addressing perceived or potential interferences with the proper administration of justice.
- 3.57 The term ‘contempt warnings’ is used here to refer to warnings given by a judicial officer in two different contexts:
- a warning given to a person that they are engaging in or are proposing to engage in conduct that the judicial officer considers might constitute contempt of court and for which, if they do not desist, they might be punished
 - a warning given to a person that the judicial officer has formed a preliminary view that they have committed a contempt of court and that, subject to any submissions made, they may be dealt with for contempt of court.
- 3.58 Contempt warnings assist the courts to navigate the space between two competing imperatives:
- a) The power to punish for contempt is an important one that the courts must be able to employ to safeguard and defend the proper administration of justice against interference.⁶⁵
 - b) The power to punish for contempt is to be used sparingly and should be invoked only when necessary.⁶⁶

61 *DPP (Vic) v Johnson* (2002) 6 VR 235, 237.

62 *Varnavides v Victorian Civil and Administrative Tribunal* (2005) 12 VR 1, 6.

63 *Law Institute of Victoria v Nagle* [2005] VSC 47 [37].

64 *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* (2014) 241 IR 288; [2014] VSC 134 [77]–[78].

65 See, eg, *Morris v Crown Office* [1970] 2 QB 114, 122 (Lord Denning).

66 See, eg, *Re Milburn* (1946) SC 301, 315.

- 3.59 Contempt warnings allow the courts to assert their authority without actual recourse to their considerable punitive powers.
- 3.60 The use of contempt warnings demonstrates the highly discretionary nature of the courts' contempt power. However, because contempt warnings do not represent a formal procedural step, they may also give rise to procedural uncertainty and even, in some circumstances, procedural unfairness.

Pre-emptive warnings

- 3.61 Giving a person a pre-emptive warning that if they do not cease certain conduct they might be punished for contempt of court serves a number of useful purposes.
- 3.62 The offence of contempt of court is broad and ill-defined. In this uncertain context, a judicial warning operates to put a person clearly on notice that their conduct, if persisted in, may expose them to criminal sanction.
- 3.63 In relation to contempts in the face of the court, the use of a warning acts as a reminder that the court possesses the power to punish for contempt and this may suffice to establish or confirm the authority of the court and address any disruption to proceedings.
- 3.64 This was recognised by the New Zealand Law Commission in its review of the law of contempt. The Commission noted:
- People do not expect judges to hold someone in contempt of court for low level interruptions. Most everyday low-level interruptions are and should be able to be managed by other means. In some situations, the judge may be able to deal with the disruptive behaviour with a warning or by taking a short adjournment. Indeed, sometimes the threat of contempt is enough to allow the judge to retain or regain authority over his or her court.⁶⁷
- 3.65 The Australian Law Reform Commission also acknowledged a role for warnings in dealing with contempt in the face of the court and noted that frequently a judge's power to issue a warning is 'effective against disruption, and a prosecution, with all its disadvantages in terms of expense and use of court time, is averted'.⁶⁸

Use of pre-emptive contempt warnings

- 3.66 Notwithstanding the recognised usefulness of contempt warnings, there is potential for them to be used improperly. For example, a judicial officer may use a contempt warning to pressure a person appearing before the court to abandon an application, submission or line of argument that the presiding judicial officer has pre-emptively determined is without merit.⁶⁹ Given that issuing a warning does not involve the exercise of a power and does not generate a court order or judgment, the improper use of contempt warnings will not necessarily be exposed to scrutiny.
- 3.67 In *Magistrates Court of Victoria (Heidelberg) v Robinson* a contempt warning was issued against a solicitor in response to an application that the presiding magistrate disqualify himself.
- 3.68 On review, Justice Brooking in the Victorian Court of Appeal stated:
- The magistrate behaved like a bully and, worst of all, threatened the solicitor with instant committal for contempt of court if he persisted in his application. What Martin, J. once called the immensity of the power to commit makes the abuse of that power in the present case deplorable ... He refused to hear a party, and moreover in a criminal proceeding, and did so by using his contempt power as an instrument of oppression.⁷⁰

67 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 59 [3.2].
68 The Law Reform Commission, *Contempt* (Report No 35, 1987) 83 [140].
69 *Magistrates' Court of Victoria at Heidelberg v Robinson* (2000) 2 VR 233.
70 *Ibid* 241.

- 3.69 Justice Charles also noted that a ‘threat to deal with an advocate for contempt is very serious matter’ and that it is particularly important that the power to punish for contempt ‘not be misused to prevent an advocate in good faith making proper submission to a court’.⁷¹

Pre-emptive warnings cannot substitute for a charge

- 3.70 In practice, warnings are often issued in the course of proceedings as events are unfolding. Issuing a warning is not a formal procedural step and the warning may be given in general terms without precisely identifying the conduct alleged to constitute a possible contempt of court. After a warning is given, the proceeding may continue, the impugned conduct may cease for a period and then resume or it may change in nature but continue to disrupt the proceeding.
- 3.71 There is a risk that where a presiding judicial officer proceeds to deal with a person for contempt in circumstances where they have already issued a warning, they may regard the earlier warning as a substitute for a formal articulation of the charge.
- 3.72 In *Coward v Stapleton*,⁷² the High Court explained that ‘no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him’. This was described by the High Court as a matter of ‘elementary justice’.⁷³
- 3.73 The role of warnings was considered by the Victorian Court of Appeal in *DPP v Green*.⁷⁴ In that case the DPP made submissions to the effect that:
- a failure to lay a charge can be remedied by the giving of a warning in advance (for example, that a refusal to answer carries a risk of contempt) so that if the conduct against which the warning has been given occurs, or is repeated, the laying of a charge is redundant and need not occur at all or only as a preliminary step before determining an appropriate penalty. On the DPP’s approach, a warning is to be treated as tantamount to a charge depending on the circumstances.⁷⁵
- 3.74 Justice Tate, with whom Justices Whelan and Kaye agreed, did not accept this submission and stated:
- without a formal charge there is a real risk of uncertainty attaching to the process, an uncertainty that taints the proceeding and the administration of criminal justice more generally.⁷⁶

Show cause warnings

- 3.75 The second context in which contempt warnings are given is where the court forms a view that a contempt of court may have been committed, and the alleged contemnor is asked to show cause why a contempt proceeding should not be initiated.⁷⁷
- 3.76 By affording an alleged contemnor an opportunity to be heard before deciding whether to deal with or refer them for contempt, the court will be in a better position to make a decision about how to exercise its discretion.
- 3.77 However, for an alleged contemnor, a contempt warning that is framed as an exercise in procedural fairness, can potentially be quite fraught. It may require them, at a stage where no clear charge has been formulated, to risk incriminating themselves⁷⁸ and to decide upon and commit to a de facto plea or defence.

71 Ibid 244.

72 *Coward v Stapleton* (1953) 90 CLR 573, 579–80. See also *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.03(a); *Magistrates’ Court Act 1989* (Vic) ss 133(2), 134(2) which all require the alleged contemnor to be informed of the contempt with which they are charged.

73 *Coward v Stapleton* (1953) 90 CLR 573, 580.

74 *DPP (Vic) v Green and Magistrates’ Court* [2013] VSCA 78.

75 *DPP (Vic) v Green and Magistrates’ Court* [2013] VSCA 78 [71].

76 Ibid [72].

77 *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* (2017) 52 VR 296.

78 See *Registrar of Court of Appeal v Maniam (No 1)* (1991) 25 NSWLR 459.

- 3.78 The amorphous nature of criminal contempt adds to the challenge of responding to a show cause contempt warning. To establish a charge of contempt, it is not necessary to prove either an intent to interfere with the administration of justice or actual interference with the administration of justice. Therefore, it will not help to rebut a contempt allegation to submit that the alleged contemnor's conduct was not intended to interfere with the administration of justice or did not result in any such an interference. Such a submission may actually constitute an admission.
- 3.79 At the same time, the court's discretion to decline to exercise its contempt jurisdiction is absolute and may well be influenced by a submission that an alleged contemnor lacked intent, especially if the submission is accompanied by an apology.⁷⁹ Therefore there is significant impetus for an alleged contemnor to engage with the show cause process and accept any allegation of contempt made by the court and to apologise.
- 3.80 The added impetus for an alleged contemnor to respond in this way is that failure to promptly acknowledge the court's concerns and apologise may, if the contempt is subsequently proven, be looked upon unfavourably by the court in determining whether to impose a penalty and if so, what penalty.⁸⁰

The case of *Besim*

- 3.81 The Victorian Court of Appeal case *DPP (Cth) v Besim; DPP (Cth) v MHK*⁸¹ (*Besim*) illustrates how show cause contempt warnings can be used in practice.
- 3.82 In that case, the Court of Appeal was considering appeals against sentence brought by the Commonwealth Director of Public Prosecutions in two terrorism cases. While the Court's decision was still reserved, *The Australian* newspaper published an article titled 'Judiciary Light on Terrorism' which related to the sentencing appeal and included statements attributed to three federal ministers.⁸² The Court was concerned that, among other things, the newspaper article and in particular the ministers' statements:
- were impermissible at law and improperly made in an attempt to influence the Court in its decision⁸³
 - purported to scandalise the court⁸⁴
 - on their face, breached the principle of sub judice.⁸⁵
- 3.83 The Court wrote to the possible contemnors and gave notice that it required the individuals or their legal representatives to appear and make any submissions as to why they should not be referred for prosecution for contempt.⁸⁶
- 3.84 A mention hearing was convened for this purpose. The Court described the purpose of the hearing as follows:

This morning is not an occasion to debate whether the court's concerns are justified at law. That is, it is not to debate whether contempt has been committed. That may be for another court to determine. Rather, it is an opportunity for those involved to inform the court of any relevant matters they wish before we determine whether to refer the publication for prosecution for contempt of court.⁸⁷

79 See, eg, *R v Douglass (No 3)* [2018] NSWSC 1939.

80 See *R v Sammut* [2008] VSC 189 [43]; *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45 [18]–[19] where an early apology was given but the contemnors went on to contest liability.

81 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296.

82 For a description of the facts leading up to the case, see Dyson Heydon, 'Does Political Criticism of Judges Damage Judicial Independence?' (Judicial Power Project Paper Policy Exchange, February 2018) 5–6.

83 Supreme Court of Victoria, *Statement of the Court of Appeal in Terrorism Cases* (Web Page, 16 June 2017) <www.supremecourt.vic.gov.au/news/statement-of-the-court-of-appeal-in-terrorism-cases>.

84 Ibid.

85 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 298.

86 Supreme Court of Victoria, *Statement of the Court of Appeal in Terrorism Cases* (Web Page, 16 June 2017) <www.supremecourt.vic.gov.au/news/statement-of-the-court-of-appeal-in-terrorism-cases>.

87 Ibid.

- 3.85 At the hearing, counsel for *The Australian* newspaper parties informed the Court that his clients apologised for and retracted the publication ‘sincerely and fully’.⁸⁸
- 3.86 The ministers admitted making the statements, but denied any intent to:
- undermine public confidence in the judiciary
 - suggest or imply that the Court would not apply the law in disposing of the matters before it
 - pressure the Court in relation to the manner in which it disposed of the appeal concerning Mr Besim.⁸⁹
- 3.87 They expressed regret that they had used language that was capable of conveying that meaning when no such meaning was intended, but initially no apology was given.⁹⁰
- 3.88 After the submissions were made, the Court reserved its decision. In the interim the ministers changed their position, the matter was relisted and the Solicitor-General made a full and unqualified apology for the statements on behalf of the ministers and retracted the statements in their entirety.⁹¹
- 3.89 The Court then issued a ruling in which it stated that but for those apologies and retractions, the parties would have been referred to the Prothonotary of the Supreme Court for prosecution for contempt.⁹²
- 3.90 The ruling of the Court of Appeal stated that the Court had formed the view that there was a ‘strong prima facie case’ against the ministers⁹³ and that, in the case of *The Australian* newspaper parties, the Court was satisfied that there was ‘a prima facie, serious breach of sub judice’.⁹⁴
- 3.91 However, the Court’s ruling also indicates that the respondents were able to avoid referral to the Prothonotary only by acknowledging, apologising for and ‘purging’ their contempt, which although never charged, was assumed to have been committed. For example, the Court stated:
- ‘The Court accepts *The Australian* parties’ full apology. It is sufficient acceptance by them of their contempt of Court and sufficient purging of the contempt.’⁹⁵
 - ‘The Court accepts that the Ministers have sufficiently acknowledged and accepted their contempt of Court and sufficiently purged their contempt.’⁹⁶
 - ‘On one view, it has only been after the stern discussion with the bench and commentary in the media that the Ministers have made their apologies and retractions. This delay is most regrettable and aggravated the contempt.’⁹⁷
- 3.92 Former Justice of the High Court Dyson Heydon considered the above statements and noted:
- The language of the Court even as it decided that there would be no prosecution for the contempt left the impression that the Ministers and the newspaper had been guilty of contempt despite the absence of the usual safeguards which a prosecution for that crime afforded.⁹⁸

88 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 300.

89 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 298–9.

90 *Ibid* 299.

91 *Ibid* 301.

92 *Ibid* 302.

93 *Ibid* 301.

94 *Ibid*.

95 *Ibid*.

96 *Ibid* 301–02.

97 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* (2017) 52 VR 296, 301.

98 Dyson Heydon, ‘Does Political Criticism of Judges Damage Judicial Independence?’ (Judicial Power Project Paper Policy Exchange, February 2018) 13.

- 3.93 The way *Besim* proceeded and was resolved suggests that the different stages of contempt proceedings are not always distinct and are sometimes collapsed into a more global discretionary exercise.⁹⁹ Whether there is a prima facie contempt, whether contempt proceedings should be commenced, whether the contempt is proven and whether the contempt should be punished are questions which are not always approached discretely and sequentially.
- 3.94 The result for an alleged contemnor faced with a show cause warning can be that, before a clear charge has been articulated and any evidence presented, they may be required to simultaneously try to defend the charge of contempt, make an admission and put a plea in mitigation.

Decision to charge and prosecute

- 3.95 The decision-making process undertaken by the court in determining whether and how to deal with a contempt is not unique. It is comparable to the process that the police or the DPP may respectively undertake in determining whether to file a charge or proceed with the prosecution, on indictment, of an offence. Both the police and the DPP have discretion not to proceed with charging or prosecuting an offender notwithstanding that there is sufficient evidence to indicate that an offence has been committed and that there are reasonable prospects of securing a conviction. Both the police and the DPP may receive submissions from alleged offenders before exercising that discretion.
- 3.96 On that analysis, it is possible to interpret the processes followed by the judicial officer in a contempt matter as being broadly analogous with the prosecutorial discretion processes followed by the police or the DPP, which may quite properly include a finding or conclusion that an offence has technically been committed, but that in the exercise of the prosecutorial discretion, an actual prosecution should not be instituted.
- 3.97 However, there are also important differences in these decision-making processes. First, the nature and extent of the discretion which is being exercised by the police or the DPP is clear. Both agencies are only tasked with the decision whether to file a charge or to prosecute on indictment. Given their comparatively limited mandates, there can be no confusion that they are determining whether a charge is proven or whether a penalty should be imposed.
- 3.98 There is also a policy framework within which the police and the DPP exercise their discretion. For example, the Policy of the Director of Public Prosecutions for Victoria provides that, if there is a reasonable prospect of conviction, the prosecution must proceed unless there are public interest factors tending against prosecution which outweigh those tending in favour.¹⁰⁰ The Policy then lists the relevant public interest factors. An alleged offender therefore has notice of the criteria which will govern the exercise of the discretion.

Possible reforms

- 3.99 Contempt warnings play a significant role in determining when and how courts exercise their discretion to punish for contempt of court. However, the use of contempt warnings is governed more by informal convention than established procedural rules.
- 3.100 In that context, the Commission seeks the views of the courts, legal profession, court users, media and the community on whether there is sufficient transparency, clarity and consistency surrounding the use contempt warning in contempt proceedings.

99
100

See, eg, *Re Perkins; Mesto v Galpin* [1998] 4 VR 505.
Office of Public Prosecutions Victoria (authorised by K Judd QC), 'Policy of the Director of Public Prosecutions for Victoria', (Policy, March 2019) 2.

Questions

- 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?

Contempt in the face of the court

- 42** Introduction
- 43** Defining contempt in the face of the court
- 50** The procedure for contempt in the face of the court
- 56** The impact on certain groups of people

4. Contempt in the face of the court

Introduction

- 4.1 This chapter considers contempt in the face of the court. This form of contempt is concerned with behaviour in the courtroom, or in the vicinity of the courtroom, which interferes with or tends to interfere with the proper administration of justice.
- 4.2 All Victorian courts have inherent jurisdiction and/or jurisdiction conferred by statute to punish this manifestation of contempt of court.¹ This power is one of the mechanisms that judicial officers use to control proceedings before them and, in particular, to address disruptive behaviour or refusals to comply with lawful directions.
- 4.3 The power of judicial officers to maintain order and authority in the courtroom, both in fact and appearance, is important to the efficient and fair conduct of proceedings and to public confidence in those proceedings.² Maintaining order and authority in the courtroom is also important to ensuring that witnesses, jurors and others with duties to the court are able to perform those duties effectively and without fear or intimidation.³ However, if judicial officers exercise this power arbitrarily, because it is not subject to defined limits or the requirement to observe fair procedure, it cannot serve the proper administration of justice. On the contrary, it has the potential to jeopardise public confidence in the authority and integrity of the courts.
- 4.4 In that context, this chapter considers and poses questions about whether there is an appropriate balance between the need for flexibility and the need for certainty in defining what constitutes contempt in the face of the court. In particular, the chapter considers whether the offence of contempt in the face of the court should be replaced by statutory provisions and if so, whether it should encompass:
- conduct which is insulting or disrespectful but does not disrupt proceedings
 - conduct which is already covered by other statutory criminal offences
 - conduct which is not directly seen or heard by the presiding judicial officer.
- 4.5 This chapter also considers and poses questions about whether there is an appropriate balance between empowering the court to deal promptly and effectively with courtroom disruptions and the requirement to afford alleged contemnors a fair and consistent process. In particular, the chapter considers and poses questions about whether:

1 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241–3, 254; *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117, 125, 137; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75 Part 2; *County Court Act 1958* (Vic) s 54; *County Court Civil Procedure Rules 2018* (Vic) Order 75 Part 2; *Magistrates' Court Act 1989* (Vic) s 133, 134; *Children, Youth and Families Act 2005* (Vic) s 528; *Coroners Act 2008* (Vic) s 103.

2 *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 170 (Barwick CJ).

3 *DPP (Vic) v Johnson* [2002] VSC 583 [13].

- the special summary procedure that may be adopted to deal with contempts committed in the face of the court should be reformed and replaced by statutory provisions
- measures are required to ensure a consistent approach between judicial officers to potential contempts
- the current law and procedure disproportionately or unfairly impact on particular groups.

Defining contempt in the face of the court

- 4.6 The power to punish for contempt in the face of the court is conferred by statute⁴ or regulated by court rules,⁵ but there is no exhaustive statutory definition as to what constitutes the offence. This remains a matter for the common law.
- 4.7 At common law, the essence of contempt in the face of the court is articulated in the same broad terms as criminal contempt more generally: ‘any action or inaction which interferes, or has a tendency to interfere, with the due administration of justice’.⁶
- 4.8 The distinguishing feature of this category of contempt is that the conduct must occur ‘in the face of the court’, an expression described by Justice Kirby in *European Bank AG v Wentworth* as ‘ambiguous and antique’.⁷
- 4.9 Contempt in the face of the court ‘is an offence that can be committed in a multitude of ways’⁸. Nonetheless, general categories of conduct which have been found to constitute contempt in the face of the court have been identified.⁹ These include:
- assaults or threats towards persons in court, including the presiding judicial officer, witnesses, jurors, counsel or other officers of the court¹⁰
 - insults or disrespectful behaviour directed towards the court, presiding judicial officer, witnesses, jurors, or other officers of the court, including swearing and insolent gestures¹¹
 - disruptions to the course of proceedings, including by yelling or protesting, engaging in outbursts of anger or abuse, repeatedly interrupting, or refusing to sit or stand when directed to do so¹²
 - contempts by witnesses, including refusing without lawful excuse to be sworn or affirmed, refusing to answer a question or engaging in prevarication¹³

4 *Magistrates’ Court Act 1989* (Vic) s 133; *Children, Youth and Families Act 2005* (Vic) s 528.

5 *County Court Civil Procedure Rules 2018* (Vic) Order 75 Part 2; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75 Part 2.

6 *Re Dunn* [1906] VLR 493, 497; *DPP (Vic) v Johnson* [2002] VSC 583 [7]; *R v Slaveski* [2011] VSC 643 [17]–[20]; *R v Vasilou* [2012] VSC 216 [13]–[15].

7 *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, 457.

8 *Allen v R* (2013) 36 VR 565, 574.

9 See, eg, LexisNexis, *Halsbury’s Laws of Australia* (online at 25 September 2018) 105 Contempt, ‘2 Criminal Contempt’ [105–30]; Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (Web Page, 26 February 2018) [8.5] <www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>; Law Reform Commission of Western Australia, *Contempt in the Face of the Court* (Discussion Paper, Project No 93(I), August 2001) 5.

10 See, eg, *A-G (Vic) v Rich* [1998] VSC 41, where an accused threatened to kill or seriously harm the prosecutor; *DPP (Vic) v Johnson* [2002] VSC 583 where an accused threw a bag of human excrement into the jury box hitting a juror and repeated, serious and graphic threats were made to harm a witness; *R v Slaveski* [2015] VSC 400, where the respondent made menacing threats to the magistrate to ‘go over your property’ and ‘come after your house’ if the magistrate ‘came after’ the respondent’s property.

11 See, eg, *R v Slaveski* [2011] VSC 643, where a party to civil proceedings made repeated allegations of impropriety, partiality and corruption and other abusive statements against the presiding judge; *DPP (Vic) v Johnson* [2002] VSC 583, where a number of accused exposed themselves, made repeated, disruptive noises and crudely abused the presiding judge, a witness, and a member of counsel; *Lewis v Ogden* (1984) 153 CLR 682, where counsel for the accused was convicted for insulting the judge in his address to the jury by suggesting that the judge had shown a strong disposition to the prosecution case, although the conviction was overturned on appeal; *Zukanovic v Magistrates’ Court of Victoria at Moorabbin* [2011] 32 VR 216, where the defendant was convicted for blowing and popping a bubble in court, although the conviction was later quashed because of the magistrate’s failure to observe procedural fairness.

12 See, eg, *R v Slaveski* [2011] VSC 643; *R v Ogawa* [2011] 2 Qd R 350, where a defendant interrupted proceedings by physically struggling with the correctional officers and screaming constantly and continually while in court; *Re Perkins; Mesto v Galpin* [1998] 4 VR 505, where counsel refused to resume his seat and continued to talk and press his submissions after the presiding judge had repeatedly directed him to sit.

13 See, eg, *Allen v R* (2013) 36 VR 565 where the witness, one of the victims of the alleged offence, refused to enter the witness box, be sworn or answer questions; *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, where the witness falsely and repeatedly asserted that he could not remember any of his evidence; *R v Garde-Wilson* (2005) 158 A Crim R 20; *DPP (Vic) v Garde-Wilson* (2006) 15 VR 640, where the witness refused to answer any questions due to fear for her safety.

- contempts by jurors, including refusing to be sworn or affirmed, impersonating a juror, attending court intoxicated or refusing to follow directions¹⁴
 - unauthorised recording of proceedings, by taking photographs, filming or otherwise recording in the courtroom¹⁵
 - contempts by legal practitioners.¹⁶
- 4.10 The lack of precision in defining contempt in the face of the court allows the court the flexibility to respond to varied and changing circumstances. However, it also gives rise to a lack of clarity about the type of conduct which might attract punishment for contempt.
- 4.11 The Australian Law Reform Commission (ALRC) in its review of the law of contempt noted that the proper administration of justice generally requires that criminal offences be defined with sufficient precision to enable all people to understand what they are.¹⁷
- 4.12 The lack of certainty and clarity about what conduct constitutes contempt in the face of the court conflicts with this principle.
- 4.13 In this context, the Law Reform Commission of Western Australia (WA Commission) has stated:
- similar to other contempt offences, liability for contempt in the face of the court is currently based on the general concept of interference with the due administration of justice. Such a broad and potentially discretionary test can no longer be justified in light of contemporary demands to make the application of the law more certain and consistent.¹⁸
- 4.14 The Law Reform Commission of Ireland (Irish Commission) has also noted that ‘the uncertainty of the law makes it difficult for persons to know what sort of conduct will place them in contempt and so arguably deprives them of standard due process rights’.¹⁹

The need for statutory provisions

- 4.15 Both the WA Commission and the ALRC recommended the offence of contempt in the face of the court be replaced with statutory provisions.²⁰
- 4.16 The ALRC recommended that the substantive law of contempt in the face of the court should be replaced by a series of offences. The recommended replacement offences were:
- acting so as to cause substantial disruption of a hearing
 - witness misconduct such as refusing to appear, to be sworn or make an affirmation or to answer a lawful question.²¹
- 4.17 The ALRC recommended that an accused person should only be liable for the offence of ‘substantial disruption’ if they intended to disrupt the relevant proceedings or were recklessly indifferent as to whether the conduct in question would have this effect.²²
- 4.18 The offences that the WA Commission recommended should replace the existing law of contempt in the face of the court were broader in scope and encompassed:

14 See, eg, *R v Tomlinson* (Unreported, Supreme Court of Victoria, Beach J, 16 January 1996) where, on the sixth day of a trial, a juror arrived late and affected by alcohol after spending the previous night celebrating his birthday.

15 See, eg, *Prothonotary of the Supreme Court of New South Wales v Rakete* (2011) 202 A Crim R 117, where a person attending court filmed on a digital camera a witness giving evidence in a criminal trial relating to violent offences allegedly committed by one chapter of a motorcycle gang against another.

16 It is recognised that legal practitioners must have freedom to present their client’s case, and must be able to do so robustly. However, legal practitioners have faced contempt proceedings when their conduct or submissions have been deemed by the presiding judicial officer to transgress the boundaries of legitimate advocacy to become insulting, disrespectful or disrupting. See, eg, *Lewis v Ogden* (1984) 153 CLR 682; *Re Perkins; Mesto v Galpin* [1998] 4 VR 505; *Magistrates’ Court of Prahran v Murphy* [1997] 2 VR 186; *A-G (Qld) v Di Carlo* [2017] QSC 171.

17 The Law Reform Commission, *Contempt* (Report No 35, 1987) 60 [93].

18 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 59.

19 Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper No 10, 2016) 26 [3.02].

20 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 61; The Law Reform Commission, *Contempt* (Report No 35, 1987) 71.

21 The Law Reform Commission, *Contempt* (Report No 35, 1987) ‘Summary of recommendations’, lxvii. Both the ALRC and the WA Commission also recommended that the offence provisions to replace contempt in the face of the court should include a provision relating to photographing, recording and broadcasting proceedings without permission. As the *Court Security Act 1980* (Vic) s4A already contains a statutory offence provision in relation to conduct of that type, those recommended provisions are not discussed here.

22 The Law Reform Commission, *Contempt* (Report No 35, 1987) 73 [116].

- wilfully insulting the presiding judicial officer or officer of a court acting in the course of his or her official duties
 - interrupting or disrupting proceedings of a court, not necessarily wilfully but without reasonable excuse
 - witness misconduct such as refusing to be sworn or make an affirmation or to answer a lawful question.²³
- 4.19 In New Zealand, statutory provisions already define the type of disruptive courtroom behaviour that is punishable as contempt of court. The relevant provisions encompass:
- wilfully insulting a judge, witness or counsel during proceedings or where they are going to or from the court
 - wilfully interrupting the proceedings of the court or otherwise misbehaving in court
 - wilfully and without lawful excuse disobey[ing] any order or direction of the court in the course of the hearing of any proceedings.²⁴
- 4.20 In Victoria, the statutory provisions which confer contempt jurisdiction on the Coroners Court and the Victorian Civil and Administrative Tribunal also define the types of courtroom conduct liable to be punished as contempt of court,²⁵ although neither provision is exhaustive.²⁶ For example, section 103(1) of the *Coroners Act 2008* (Vic) provides that a person is guilty of contempt of the Coroners Court if, among other things, the person:
- insults an officer of the Coroners Court while that officer is performing functions as an officer of the Coroners Court²⁷
 - insults, obstructs or hinders a person attending an inquest²⁸
 - misbehaves at or interrupts an inquest.²⁹
- 4.21 Section 134(1) of the *Magistrates' Court Act 1989* (Vic) also defines a number of contempt in the face of the court offences which relate specifically to witnesses. These include:
- refusing to be sworn or make an affirmation
 - refusing to answer lawful questions
 - wilfully disobeying an order to leave the Court and to remain beyond the hearing of the Court until required to give evidence
 - wilful prevarication.
- 4.22 The recommendations and statutory provisions set out above demonstrate that, beyond the threshold question of whether there should be a statutory definition of contempt in the face of the court, there are a number of subsidiary questions to be considered. These include whether the offence should be limited to:
- conduct which is wilful³⁰
 - conduct which is disruptive to proceedings³¹
 - conduct which is not already covered by other statutory criminal offences³²
 - conduct which occurs in the courtroom and before the presiding judicial officer.

23 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 63, 65.

24 *District Court Act 2016* (NZ) s 212(1); *Senior Courts Act 2016* (NZ) s 165(1). See also *Contempt of Court Act 1981* (UK), s 12(1).

25 *Coroners Act 2008* (Vic) s 103(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(1).

26 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137(1)(f); *Coroners Act 2008* (Vic) s 103(1)(f). In addition to the specific conduct set out, both sections define contempt to include 'any act, which if it occurred before the Supreme Court would constitute contempt of that court'.

27 *Coroners Act 2008* (Vic) s 103(1)(b).

28 *Ibid* s 103(1)(c).

29 *Ibid* s 103(1)(d).

30 See, eg, The Law Reform Commission, *Contempt* (Report No 35, 1987) 73; cf Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 63.

31 See, eg, The Law Reform Commission, *Contempt* (Report No 35, 1987) 71–3; cf Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 62.

32 See, eg, Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 58 [3.2]; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 63.

4.23 The last three of these questions are discussed further below.

Questions

- 12 Is there a need to retain the law of contempt in the face of the court?
- 13 If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?

Insulting or disrespectful behaviour

- 4.24 If the offence of contempt in the face of the court is replaced by statutory provisions, the question arises whether it should encompass insulting and disrespectful behaviour or whether it should focus on behaviour which disrupts or hinders proceedings. This is an issue on which past reviews of the law of contempt have diverged.³³
- 4.25 Where a person insults or expresses a lack of respect for the court through words or conduct, this will not necessarily disrupt or interfere with the proceedings. A person's behaviour may challenge or fail to recognise the authority of the court without affecting the fair and efficient conduct of proceedings. An example of such behaviour might include a refusal to stand when the presiding judicial officer enters the room.
- 4.26 The ALRC recommended that the 'fact that things said or done in a courtroom are disrespectful or insulting, or constitute an affront to the authority of the court in question or of courts generally, should not of itself be enough to attract criminal liability'.³⁴ The ALRC noted that 'criminal penalties are usually not an appropriate mechanism for attempting to maintain the dignity of a public institution such as a court, when nothing else but dignity is at stake'.³⁵
- 4.27 The ALRC explained that this did not mean that words or conduct which were insulting or offensive would never attract liability and suggested that, if persisted in, such words or conduct would most likely result in substantial disruption to proceedings and thus, *on that basis*, invite penalty.³⁶
- 4.28 However, more recently, both New South Wales and South Australia have adopted the opposite position and introduced statutory offences specifically criminalising disrespectful behaviour in the courtroom.³⁷
- 4.29 The statutory offence provisions introduced in New South Wales provide that an accused person, defendant, party to, or person called to give evidence in proceedings before the court is guilty of an offence if they intentionally engage in behaviour in the court during the proceedings and that behaviour is disrespectful to the court or presiding judge.³⁸ Whether 'behaviour', which includes both an act and a failure to act, is disrespectful to the court is determined according to established court practice and convention.³⁹ A judicial officer who opts not to deal with a person summarily for contempt can refer disrespectful behaviour in proceedings over which they have presided for prosecution. However, a prosecution may be commenced regardless of whether a referral has been received.⁴⁰

33 The Law Reform Commission, *Contempt* (Report No 35, 1987) 71–3; cf Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 62.

34 The Law Reform Commission, *Contempt* (Report No 35, 1987) 72 [115].

35 *Ibid* 73 [115].

36 *Ibid* 72–3 [115].

37 *Summary Offences (Disrespectful Conduct in Court) Amendment Act 2018* (SA); *Courts Legislation Amendment (Disrespectful Behaviour) Act 2016* (NSW).

38 *Supreme Court Act 1970* (NSW) s 131(1); *District Court Act 1973* (NSW) s 200A(1); *Local Court Act 2007* (NSW) s 24A(1).

39 *Supreme Court Act 1970* (NSW) s 131(1)(c); *District Court Act 1973* (NSW) s 200A(1)(c); *Local Court Act 2007* (NSW) s 24A(1)(c).

40 *Supreme Court Act 1970* (NSW) s 131(7)–(8); *District Court Act 1973* (NSW) s 200A(7)–(8); *Local Court Act 2007* (NSW) s 24A(7)–(8).

- 4.30 The South Australian provisions define disrespectful conduct to include refusing to stand up after being requested to do so by the court; using offensive or threatening language; and interfering with or undermining the authority, dignity or performance of the court.⁴¹ In South Australia, a person must first be warned by the court that their conduct may result in a charge.⁴² It is a defence to the charge if the person's conduct was due to a cognitive impairment (including mental illness) or a physical disability.⁴³ Likewise, a child cannot be charged.⁴⁴

Possible reforms

- 4.31 The ALRC's recommendations when contrasted with the New South Wales and South Australian statutory offence provisions demonstrate that there is a broad spectrum of opinions on what the proper and effective administration of justice requires. Is it sufficient to ensure that the efficient and fair conduct of the court's proceedings is not disrupted or interfered with? Alternatively, is there a need to preserve and vindicate the dignity and authority of the court even where there is no direct impact on the current proceedings?
- 4.32 Victoria has no statutory offence provisions equivalent to the legislation in New South Wales or South Australia discussed above.
- 4.33 It is not certain from case law where the line is drawn in Victoria. The courts have often emphasised that the contempt power 'is rarely, if ever, exercised to vindicate the personal dignity of a judge'⁴⁵ and does not serve to 'assuage the injured feelings of the judicial officer'.⁴⁶ Nonetheless, disrespectful or insulting conduct directed towards the judge may still be dealt with as contempt on the basis that it has the potential to diminish the authority of the court.⁴⁷

Question

- 14 If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?

Defining 'in the face of the court'

- 4.34 There is a divergence of views in case law about the meaning of the term 'in the face of the court' and its precise meaning remains unsettled at common law.⁴⁸
- 4.35 Determining the geographical and temporal boundaries of the offence of contempt in the face of the court is not merely a matter of academic classification—it has real practical implications.

41 *Summary Offences Act 1953* (SA) s 60(9).

42 *Ibid* s 60(2).

43 *Ibid* s 60(3).

44 *Ibid* s 60(8).

45 *Lewis v Ogden* (1984) 153 CLR 682, 693.

46 *Magistrates' Court of Prahran v Murphy* [1997] 2 VR 186, 216 (Callaway JA).

47 See, eg, *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] 32 VR 216, 218.

48 See, eg, *European Bank A-G v Wentworth* (1986) 5 NSWLR 445; *Registrar, Court of Appeal v Collins*; *Collins v Registrar, Court of Appeal* [1982] 1 NSWLR 682; *Fraser v The Queen* (1984) 3 NSWLR 212.

- 4.36 The jurisdiction of the Magistrates' Court to summarily punish a contempt under section 133 of the Magistrates' Court Act is limited to contempts 'committed in the face of the court'. Likewise, the County Court and Supreme Courts General Civil Procedure Rules provide for a judge to directly charge, try and punish a contempt themselves only where it is 'committed in the face of the court'.⁴⁹
- 4.37 On one view, expressed in obiter by Justice Kirby in *European Bank A-G v Wentworth*, contempt 'in the face of the court' should be limited to conduct that is seen, heard or otherwise sensed by the judge.⁵⁰ On that view, contempt in the face of the court would not, for example, include an alleged assault on a witness committed in the courtroom but after judgment had been delivered, the proceeding had been adjourned and the judge had left the room.⁵¹
- 4.38 Justice Kirby noted a number of policy reasons for adopting this interpretation. In particular he noted that confining the expression in this way had the 'appropriate' result of limiting both the contempt jurisdiction of inferior courts and the availability of the special summary procedure to try and punish the contempt. He also noted that this approach 'takes the summary procedure back to its historical origin where it was undoubtedly confined to things which the court actually saw, heard or otherwise sensed and did not need evidence precisely for that reason'.⁵²
- 4.39 The alternative view, expressed by Justice Moffitt in obiter in *Registrar, Court of Appeal v Collins*, is that contempt in the face of the court extends to conduct outside the courtroom which has not been directly heard or observed by the presiding judicial officer but which exhibits 'such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides a present confrontation to the trial then in progress'.⁵³
- 4.40 These are both New South Wales cases. The New South Wales legislation which regulates the courts' jurisdiction to deal with contempt refers to contempt in the face or *in the hearing* of the court.⁵⁴ The inclusion of these additional words, which do not appear in Victorian legislation, may mean that the New South Wales cases on this issue are distinguishable and need to be considered with some caution in Victoria.
- 4.41 The position in Victoria is equally unresolved. In the 1906 Victorian case *Re Dunn*,⁵⁵ Justice Cussen remarked in obiter that approaching a juror in the corridors of the court and seeking to influence their verdict would constitute a serious contempt, but not a contempt in the face of the court.
- 4.42 Conversely, in a 1989 Supreme Court case, an employer who sent a letter to the Sheriff of the Supreme Court claiming, falsely, that his employee would be interstate when required for jury duty, was found to have committed a contempt in the face of the court.⁵⁶
- 4.43 The Commission has been unable to find any more recent Victorian authorities in which the expression 'in the face of the court' has been given detailed consideration.

49 *County Court Civil Procedure Rules 2018* (Vic) Order 75, Part 2; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75, Part 2.

50 *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, 457–8. See also *Fraser v The Queen* (1984) 3 NSWLR 212, 229–32 (Kirby P and McHugh JA).

51 *European Bank A-G v Wentworth* (1986) 5 NSWLR 445. In that case Kirby P in obiter held that a party who struck a potential witness in the courtroom but after the judge had left could not be guilty of contempt in the face of court.

52 *European Bank A-G v Wentworth* (1986) 5 NSWLR 445, 457–8.

53 *Registrar, Court of Appeal v Collins; Collins v Registrar, Court of Appeal* [1982] 1 NSWLR 682, 708.

54 *Supreme Court Act 1970* (NSW) ss 48(2)(i) and 53(3)(a); *District Court Act 1973* (NSW) s 199; *Local Court Act 2007* (NSW) s 24(1).

55 *Re Dunn* [1906] VLR 493.

56 *Re Newton, Alan Henry* (Unreported, Supreme Court of Victoria, Nathan J, 24 July 1989) 2.

Question

- 15 If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?

Conduct covered by other criminal offences

- 4.44 Much of the conduct which is liable to be punished as a contempt in the face of the court under common law, can also be prosecuted under statutory offence provisions or as a common law criminal offence. For example:
- The *Summary Offences Act 1966* (Vic) prescribes statutory offences which include wilfully damaging property;⁵⁷ using profane, indecent or obscene language or threatening, abusive or insulting words;⁵⁸ behaving in a riotous, indecent, offensive or insulting manner, including by exposing oneself;⁵⁹ behaving in a disorderly manner;⁶⁰ common assault;⁶¹ and harassing a witness.⁶²
 - The *Crimes Act 1958* (Vic) prescribes statutory offences which include threats to kill;⁶³ threats to inflict serious injury;⁶⁴ extortion with threat to kill;⁶⁵ intimidating or causing harm or detriment to a person, including a witness or juror; because of their involvement in criminal proceedings;⁶⁶ and perjury.⁶⁷
 - The *Juries Act 2000* (Vic) prescribes a number of statutory offences with which a juror might be charged, including refusal to be sworn or affirmed;⁶⁸ failing to attend;⁶⁹ failing to answer questions;⁷⁰ and impersonating a juror.⁷¹
 - The *Court Security Act 1980* (Vic) prescribes a statutory offence in relation to making a recording of a proceeding in circumstances not authorised by the Act.⁷²
 - The *Court Security Act 1980* (Vic) empowers an authorised officer to give a person who wishes to enter court premises, or is on the court premises, a reasonable direction to do or not do a thing, for the purpose of maintaining or restoring the security, good order or management of the court premises.⁷³ The Act also prescribes a statutory offence in relation to refusing to comply with such a direction.⁷⁴
 - The offences of attempting to pervert the course of justice, perverting the course of justice, embracery and perjury are indictable common law offences in Victoria, specifically recognised by the *Crimes Act*.⁷⁵

57 *Summary Offences Act 1966* (Vic) s 9(1)(c).
 58 *Ibid* s 17(1)(c).
 59 *Ibid* s 17(1)(d).
 60 *Ibid* s 17A.
 61 *Ibid* s 23.
 62 *Ibid* s 52A.
 63 *Crimes Act 1958* (Vic) s 20.
 64 *Ibid* s 21.
 65 *Ibid* s 27.
 66 *Ibid* ss 256–7.
 67 *Ibid* s 314.
 68 *Juries Act 2000* (Vic) s 73.
 69 *Ibid* s 71.
 70 *Ibid* s 68.
 71 *Ibid* s 74.
 72 *Court Security Act 1980* (Vic) s 4A.
 73 *Ibid* s 3 (2A)(a).
 74 *Ibid* s 3(2B).
 75 *Crimes Act 1958* (Vic) s 320.

- 4.45 Where a person is charged under one of these statutory offence provisions or with a common law offence they are likely to have the benefit of greater procedural safeguards than a person who is dealt with for contempt, particularly under the special summary procedure. For example, they will receive a written charge or indictment which particularises the alleged offence, the offence will be subject to a maximum penalty, the offence will not be tried by the judicial officer before whom the alleged offence was committed, the ordinary rules of evidence will apply, they will have clearer rights of appeal and, if the offence is indictable, it may be tried before a jury.⁷⁶
- 4.46 Despite the differences in procedures and the interest the alleged offender may have in the matter being dealt with one way or the other, at present there is no statutory direction which determines, or even guides, whether a person is prosecuted for a statutory or common law offence, or dealt with, in the alternative, by way of the contempt procedure. The path which is adopted appears to be largely a matter for the discretion of the presiding judicial officer.⁷⁷
- 4.47 The common law maxim of statutory interpretation, *generalia specialibus non derogant*, states that ‘general things or words do not derogate from special things or words.’⁷⁸ In practice, it means that a general statutory provision is presumed, unless otherwise indicated, not to interfere with or override a specific statutory provision. The maxim may have relevance to how the overlap between potentially applicable offences should be resolved. This maxim is discussed in Chapter 3 at [3.38]–[3.40].

Question

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

The procedure for contempt in the face of the court

The special summary procedure

- 4.48 As with other forms of contempt, proceedings to punish contempt in the face of the court can be commenced in the Supreme or County Court by way of summons or originating motion under Part 3, Order 75 of the *Supreme Court (General Civil Procedure) Rules 2015* or the *County Court Civil Procedure Rules 2018* (the General Civil Procedure Rules).
- 4.49 In addition, there is an alternative, more direct procedure that may be adopted only in cases of contempt in the face of the court. This procedure is set out in Part 2, Order 75 of the General Civil Procedure Rules and it is truly summary in nature. To distinguish it from the summary procedure adopted in general contempt proceedings, it is referred to in this chapter as the ‘special summary procedure’.
- 4.50 Under the special summary procedure, where it is alleged or appears to the court that a person is guilty of contempt committed in the face of the court, the court, of its own motion and without any formal proceedings being instituted, may:

⁷⁶ See generally Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper No 36 (2014) 16 [3.5]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 58 [3.2].

⁷⁷ See *Solicitor-General v Cox* [2016] 2 Cr App R 15 193 for an example of where two people were found guilty of contempt of court for taking photographs of people in the courtroom, even though they could have been prosecuted under a statutory offence which criminalised taking photographs in court.

⁷⁸ *Encyclopaedic Australian Legal Dictionary*, (Web Page, 9 April 2019) ‘*generalia specialibus non derogant*’.

- by oral order or arrest warrant have the contemnor brought before the court⁷⁹
 - inform the contemnor either orally or in writing of the contempt with which they are charged⁸⁰
 - order that the contemnor be kept in custody or be released on terms (including the giving of security), until the charge is finalised⁸¹
 - adopt thereafter such procedure as in the circumstances the court thinks fit to try the charge.⁸²
- 4.51 Sections 133(1)–(2)⁸³ and 134(2)⁸⁴ of the Magistrates’ Court Act prescribe the same special summary procedure to try contempts in the face of the court or witness contempts in the Magistrates’ Court.⁸⁵
- 4.52 The special summary procedure enables the court to deal with a contempt swiftly and decisively and allows the presiding judicial officer to effectively place themselves in the position of prosecutor, witness, jury and judge.⁸⁶ The consequence is that the procedural safeguards adhered to in ordinary criminal proceedings are not expressly guaranteed.
- 4.53 Beyond providing the mechanism for a contemnor to be brought before the court, informed of the charge and if necessary detained, Part 2, Order 75 of the General Civil Procedure Rules and sections 133 and 134 of the Magistrates’ Court Act provide no further legislative guidance or limitations on the procedure to be adopted to determine the charge of contempt. This gap has been filled by the common law.
- 4.54 In *Zukanovic v Magistrates’ Court of Victoria at Moorabbin (Zukanovic)*, Justice Forrest set out the steps that a fair hearing requires must be followed prior to determining a charge of contempt in the face of the court under section 133 of the Magistrates’ Court Act. These steps are a synthesis of earlier authorities, including the decisions of the High Court in *Coward v Stapleton*⁸⁷ and *Witham v Holloway*.⁸⁸ They provide:
- The charge must be set out orally or in writing, so that the contemnor understands the charge being laid against them.
 - The contemnor must be afforded the opportunity to consider the charge, and if necessary, to seek further legal advice, an adjournment, or further particulars of the charge.
 - The contemnor must be given the opportunity to plead guilty or not guilty to the charge.
 - In the event the contemnor pleads not guilty, the contemnor must be given the opportunity to present evidence and make submissions relevant to the determination of the charge.
 - The judicial officer must carefully consider all of the evidence before deciding whether the court is satisfied beyond reasonable doubt that the accused is guilty of the charge, while being mindful of the unusual position the judicial officer is in having assumed the role of witness, prosecutor and judge.⁸⁹

79 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.02(1); *County Court Civil Procedure Rules 2018* (Vic) r 75.02(1).

80 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.03(a); *County Court Civil Procedure Rules 2018* (Vic) r 75.03(a).

81 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.04; *County Court Civil Procedure Rules 2018* (Vic) r 75.04.

82 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.03(b); *County Court Civil Procedure Rules 2018* (Vic) r 75.03(b).

83 *Magistrates’ Court Act 1989* (Vic) s 133(1)–(2).

84 *Ibid* s 134(2).

85 In the Magistrates’ Court, the Bail Act 1977 applies, with any necessary modifications, to a person brought before the Court under section 133 as if the person were accused of an offence and were being held in custody in relation to that offence: *Magistrates’ Court Act 1989* (Vic) s133(3).

86 See, eg, *Allen v The Queen* (2013) 36 VR 565, 576; *Clampett v A-G (Cth)* (2009) 260 ALR 462, 495; *Zukanovic v Magistrates’ Court of Victoria at Moorabbin* (2011) 32 VR 216, 224; *Fraser v The Queen* (1984) 3 NSWLR 212, 224.

87 (1953) 90 CLR 573.

88 (1995) 183 CLR 525.

89 *Zukanovic v Magistrates’ Court of Victoria at Moorabbin* (2011) 32 VR 216, 225.

- 4.55 The decision of Justice Forrest was considered and approved by the Court of Appeal in *Director of Public Prosecutions v Green*.⁹⁰ In that case Justice Tate noted, however, that the procedural steps set out in *Zukanovic* were not intended as ‘a set of rigid prescriptive rules that bore no capacity to adapt to the circumstances of the proceedings’.⁹¹
- 4.56 Further, Justice Whelan added the qualifying remark:
- this case and *Zukanovic* concern contempts governed by statutory provisions. The exercise of inherent jurisdiction to summarily deal with contempt may not necessarily be subject to the same requirements in every conceivable case.⁹²
- 4.57 Therefore, while the common law has supplied some content to the procedures to be observed by the court before summarily imposing a punishment for contempt in the face of the court, the court continues to reserve for itself a degree of flexibility.
- 4.58 Moreover, where the special summary procedure is adopted, the court has recognised that special measures may be permissible if circumstances demand their use. For example:
- The court may receive hearsay evidence.⁹³
 - The presiding judicial officer may rely on his or her own observations of the alleged contemnor’s conduct.⁹⁴
 - There is no requirement for sworn evidence.⁹⁵
 - The right of the alleged contemnor to cross-examine witnesses against him or her may be restricted.⁹⁶

A power to be used sparingly

- 4.59 Given its unusual nature, this special summary procedure has been described in case law as an ‘exceptional and very significant power which should be exercised sparingly and with great caution’.⁹⁷
- 4.60 Superior courts have stated that this procedure should only be used:
- ‘in those exceptional cases where the conduct is such that it cannot wait to be punished because it is urgent and imperative to act immediately to preserve the integrity of a trial in progress or about to start’⁹⁸
 - where the ‘swift resolution of comparatively simple and virtually indisputable fact situations’ call ‘for immediate action’.⁹⁹
- 4.61 Accordingly, superior courts have been critical of reliance on the special summary procedure where it was not evident that there was the requisite degree of urgency to justify its use.¹⁰⁰ For example, in *Allen v R*,¹⁰¹ Justice Priest noted that there was no urgency or other circumstances requiring that a witness, who refused to be sworn or give evidence in a County Court trial, be tried for contempt promptly and by the judge presiding over the trial.¹⁰² Although no miscarriage of justice occurred in that case, Justice Priest noted that it would have been preferable to proceed to deal with the contempt by way of originating motion or summons.¹⁰³

90 *DPP (Vic) v Green and Magistrates’ Court* [2013] VSCA 78.

91 *Ibid* [76].

92 *Ibid* [98].

93 *Kift v R* [1993] 1 VR 703, 707; *Fraser v The Queen* (1984) 3 NSWLR 212, 231.

94 *Foley v Herald-Sun TV Pty Ltd* [1981] VR 315, 316.

95 *Fraser v The Queen* (1984) 3 NSWLR 212, 227–8.

96 *Ibid* 227; *Kift v R* [1993] 1 VR 703, 707.

97 *Allen v R* (2013) 36 VR 565, 576. See also *Lewis v Ogden* (1984) 153 CLR 682, 693; *Zukanovic v Magistrates’ Court of Victoria at Moorabbin* (2011) 32 VR 216, 223; *Clampett v A-G (Cth)* (2009) 260 ALR 462, 469; *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 173–4.

98 *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 174.

99 *Fraser v The Queen* (1984) 3 NSWLR 212, 228.

100 *Clampett v A-G (Cth)* (2009) 260 ALR 462; *Allen v R* (2013) 36 VR 565.

101 (2013) 36 VR 565.

102 *Ibid* 575–8.

103 *Ibid* 578.

- 4.62 However, while it is clear from the case law that the special summary procedure should be used sparingly, the courts have not abandoned its use nor suggested that this should occur. In *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd*, the Victorian Court of Appeal referred to Justice Priest's remarks in *Allen* and emphasised that the facts of *Allen* were unusual and that 'the case does not stand for any general proposition to the effect that the use of summary procedures should, if possible, be avoided'.¹⁰⁴
- 4.63 As a practical example, in *Zukanovic*, where the alleged contempt involved a defendant in the Magistrates' Court blowing and then popping a bubble, the Supreme Court quashed the conviction on the grounds that the contemnor had not been afforded procedural fairness. However, as to the choice of procedure, Justice Forrest held:

it was appropriate for the Magistrate to deal with this matter himself and to exercise summary jurisdiction. It would appear that he was the only witness to the asserted contempt which was committed in the face of the Court. ... Given that the Magistrate in this case was the only person who appears to have perceived the "popping" of the bubble gum, I think, out of necessity, it was reasonable for him to determine the charge himself.¹⁰⁵

Consistency with the proper administration of justice

- 4.64 The power to punish for contempt in the face of the court is intended to address and deter conduct that interferes with the proper and effective administration of justice. Therefore, the exercise of the power must be itself consistent with this principle.¹⁰⁶
- 4.65 The summary procedure to initiate and try contempts committed in the face of the court does not provide the procedural safeguards usually observed in criminal proceedings. One significant departure is the multiple roles played by the presiding judicial officer (prosecutor, witness, jury and judge) and the resultant potential for the proceedings to appear weighted against the alleged contemnor.¹⁰⁷
- 4.66 A further problem explained by Chief Justice Black in *Clampett v Attorney-General of the Commonwealth of Australia* is that:
- Contempt in the face of the court is a criminal offence yet when a person is charged with such an offence in circumstances such as those in this case, the onus of proof is in effect reversed. Instead of a case for the prosecution being presented by a prosecutor and tested by or on behalf of the person accused in proceedings presided over by an independent judge or magistrate, in a case such as the present the accused stands charged and is required to justify or otherwise defend his or her conduct.¹⁰⁸
- 4.67 Given the unusual, and potentially unjust nature of the special summary power, Chief Justice Black warned:
- If fundamental principles of justice are to be departed from it must surely be for the reason that, quite exceptionally, the broader interests of justice so require. Indeed, this consideration is so strong that if the same person were to act as prosecutor, witness and judge when the broader interests of justice did not manifestly so require, proceedings intended to uphold the authority of the court would be seen to diminish that authority so that the process would, at best, be self-defeating.¹⁰⁹
- 4.68 This raises the question of when, if ever, the proper administration of justice will require and justify the use of the special summary procedure.

104 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 561–2 fn 37. See also *R v Slavenski* [2011] VSC 643 [24].

105 *Zukanovic v Magistrates' Court of Victoria at Moorabbin* (2011) 32 VR 216, 224.

106 The Law Reform Commission, *Contempt* (Report No 35, 1987) 70–1 [112].

107 *Keeley v Mr Justice Brooking* (1979) 143 CLR 162, 173 (Stephen J).

108 *Clampett v A-G (Cth)* (2009) 260 ALR 462, 470 (Black CJ).

109 *Ibid* 470.

- 4.69 Generally the case law suggests that the use of the special summary procedure is necessary and justified when it is urgent or imperative to act immediately to maintain the authority of the court, prevent disorder and to enable those with duties to the court to perform them free from fear.¹¹⁰
- 4.70 However, while the proper administration of justice may require immediate action in response to and to deal with certain disruptive or obstructive conduct, it does not necessarily follow that the proper administration of justice will require that the conduct be subject to immediate punishment.¹¹¹
- 4.71 For example, judicial officers have other powers available to them to address disruptions to proceedings including removing the person or persons responsible for the disruption from the courtroom. Likewise, under the Court Security Act, authorised officers have powers which allow them to issue directions to people within the court premises and, in certain circumstances, to remove them from court premises.¹¹²

Possible reforms

- 4.72 Given the potential for actual or perceived injustice in the use of the special summary procedure, recommendations for procedural reform have been made in other jurisdictions.¹¹³ These vary, in particular with respect to:
- whether and when the judicial officer before whom the contempt occurred is permitted to try the offence¹¹⁴
 - whether and when the process for dealing with a disruption in court is separated from the process of citing and trying the conduct alleged to constitute the offence.¹¹⁵
- 4.73 For example, the ALRC recommended that summary trial by the presiding judge should be retained, but only where the accused consents.¹¹⁶ The WA Commission recommended that a contempt offence may be tried by the presiding judicial officer either where the alleged offender consents to that procedure, or where:
- the impugned conduct occurred in the presence of the judicial officer, and
 - the judicial officer considers that the alleged contempt presents an immediate threat to the authority of the court or the integrity of the proceedings then in progress *unless dealt with in a summary manner*.¹¹⁷
- 4.74 The WA Commission also recommended that statutory procedural safeguards should exist for the benefit of the accused.
- 4.75 The New Zealand Law Commission recommended a new statutory procedure for dealing with disruptive behaviour in the courtroom which would separate out the citation for disruptive behaviour and removal from the courtroom from the hearing and punishment of any charge. It was recommended that the new statutory provisions dealing with disruptive behaviour in the court should, among other things:
- authorise the judge to deal with the immediate disruption by citing the person for disrupting the court and, if necessary, ordering the person to be taken into the court cells until the rising of the court that day

110 *Balogh v St Albans Crown Court* [1975] QB 73, 85 (Lord Denning MR).

111 See recommended reforms discussed in Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 63–4. See also *DPP (Vic) v Green and Magistrates' Court* [2013] VSCA 78 [60(1)] (Tate JA) and [99] (Whelan JA) for discussion of power to control the court and direct arrest.

112 *Court Security Act 1980* (Vic) s 3.

113 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 70; The Law Reform Commission, *Contempt* (Report No 35, 1987) 79–82; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 70.

114 See, eg, The Law Reform Commission, *Contempt* (Report No 35, 1987) 79–80 [130]; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 73–4.

115 See, eg, Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 63–8.

116 The Law Reform Commission, *Contempt* (Report No 35, 1987) 71, 79–80.

117 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 74.

- give the person the opportunity to exercise his or her right to consult and instruct a legal practitioner
- allow the person a reasonable opportunity to apologise to the court
- require the judge to review the matter before the rising of the court that day and decide whether he or she considers further punishment may be necessary by having the matter set down for determination
- if the matter is set down for determination, direct the judge to consider whether exceptional circumstances warrant a different judge hearing the case.¹¹⁸

Question

- 17 Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular:
- (a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily?
 - (b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour?
 - (c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?

A consistent approach to disruptive conduct

- 4.76 The offence of contempt in the face of the court intersects with other laws and powers. Often there will be multiple options for addressing conduct which might constitute contempt in the face of the court. The court has considerable discretion in choosing between these options based on its assessment of the seriousness of the conduct and the need for an immediate response. The path which is adopted has significant consequences for the alleged contemnor with respect to the potential liability that they are exposed to and the procedural safeguards which apply.¹¹⁹ However, there is no statutory guidance for the exercise of this discretion and no requirement for the presiding judicial officer to explain their choice to adopt a particular course. This may give rise to uncertainty and the potential for inconsistency and unfairness between cases involving similar conduct.
- 4.77 For example, the presiding judicial officer may:
- adjourn the proceedings to allow for a disruptive party to compose or remove themselves or reflect on their conduct
 - determine that a warning or reprimand is sufficient¹²⁰
 - accept an apology as sufficient to address the contempt and restore the authority of the court¹²¹
 - exercise their power to exclude a person from the court, and even to exclude the accused from the courtroom¹²²

118 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 67–8.

119 The Law Reform Commission, *Contempt* (Report No 35, 1987) 65 [103]–[104].

120 *Doughty-Cowell (Victoria Police) v Kyriazis* [2018] VSCA 216.

121 *Re Perkins; Mesto v Galpin* [1998] 4 VR 505.

122 *Roberts v Harkness* (2018) 85 MVR 314, 330; [2018] VSCA 215 [37]; *Boros v O'Keefe* [2017] VSC 560, [18]–[19]; *Ex parte Tubman; Re Lucas* [1970] 3 NSW 41.

- if the conduct involves a legal practitioner, refer the conduct to the Legal Services Commissioner for investigation
- refer the matter to the DPP or police to consider whether the person should be prosecuted for one of the statutory or common law offences discussed above at [4.44]
- refer the matter to the Prothonotary or Registrar and direct them to commence contempt proceedings to punish the contempt by way of originating motion or summons
- adopt the special summary procedure to try and punish the contempt.

Question

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

The impact on certain groups of people

- 4.78 The Commission is unaware of any empirical data on the number of proceedings commenced to punish for contempt in the face of the court, the procedure adopted and the penalties imposed, if any.
- 4.79 The Commission is also unaware of any empirical data on how often a contempt warning is issued in court proceedings by the presiding judicial officer as a means to secure greater cooperation and compliance from people in the courtroom regarded as disruptive or recalcitrant.¹²³
- 4.80 The variety of reported cases referred to in this chapter and media articles reporting on local court proceedings suggest that judicial officers do continue to use or threaten to use the power to punish for contempt in the face of the court to maintain order in proceedings and uphold the court's authority.¹²⁴
- 4.81 The case law suggests that there may be some groups of people who are disproportionately more likely to be subject to proceedings for contempt in the face of the court or to be warned about the possibility of such proceedings, including self-represented litigants,¹²⁵ and people who have mental health issues.¹²⁶
- 4.82 In her study on the offence of contempt in the face of the court and its impact on people with mental health issues, Dr Suzie O'Toole identified a number of aspects of the law and procedure in this area which may be particularly disadvantageous to people with mental health issues.¹²⁷

123 For an example of a rare case where the Victorian Court of Appeal was able to consider and comment, in this case critically, on the use of a warning to punish for contempt, see *Magistrates' Court of Victoria at Heidelberg v Robinson and Another* (2000) 2 VR 233.

124 See, eg, Monique Preston, 'Villains Shirt Lands Man in Court Trouble', *Whitsunday Times* (Web Page, 16 November 2018) <www.whitsundaytimes.com.au/news/villains-shirt-lands-man-in-court-trouble/3578005/>; Caroline Schelle, 'Family Outburst at Judge as Brain-damaged Shooter Jailed: 'Get f**ked'', *News.com.au* (Web Page, 19 December 2018) <www.news.com.au/national/victoria/courts-law/family-outburst-at-judge-as-braindamaged-shooter-jailed-get-fked/news-story/b8cf09c3916dfd3f9432fd52f76b4bcf>; Elizabeth Byrne, 'Woman Jailed for Hurling Water, Swearing at Canberra Magistrate in Court Outburst', *ABCNews* (Web Page, 1 August 2017) <www.abc.net.au/news/2017-08-01/jail-for-woman-who-swore-and-threw-water-in-court/8763930>

125 See, eg *Doughty-Cowell (Victoria Police) v Kyriazis* [2018] VSCA 216; *Clampett v A-G (Cth)* (2009) 260 ALR 462; *R v Ogawa* [2011] 2 Qd R 350; *R v Slaveski* [2011] VSC 643; *R v Vasiliou* [2012] VSC 216; *R v Slaveski* [2015] VSC 400.

126 See, eg, *Registrar of the Supreme Court of South Australia v Moore-McQuillan* [2007] SASC 447; *Moore-McQuillan v Registrar of the Supreme Court* [2009] SASC 265.

127 Suzie O'Toole, *I Find You in Contempt: Contempt in the Face of the Court in Australia* (Halstead Press, 2017) 123–5.

Question

- 19 Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?

Juror contempt

- 60** Introduction
- 60** The importance of trial by jury
- 63** Forms of contempt by jurors
- 65** Possible reforms to contempt by jurors

5. Juror contempt

Introduction

- 5.1 This chapter considers what the terms of reference describe as ‘juror contempt’.
- 5.2 As noted in Chapter 2, ‘juror contempt’ is not a discrete area of the law of contempt of court. Rather, juror contempt encompasses contempt in the face of the court by jurors, for example by refusing to answer questions or to be sworn or make an affirmation, as well as other conduct by jurors which may also constitute a breach of the *Juries Act 2000* (Vic). At common law, contempt by jurors can also be characterised as a manifestation of contempt by breach of duty by a person officially connected with court proceedings.¹
- 5.3 This chapter therefore describes the different manifestations of common law juror contempt as well as the statutory provisions regulating juries. It describes the use of jury trials in Victoria, identifies some of the current issues with the laws regulating jurors and identifies a number of reform options. A number of questions are then posed for consideration.
- 5.4 The chapter begins by noting the importance of Victoria’s jury trial system.

The importance of trial by jury

- 5.5 A jury is a group of citizens randomly selected from the Victorian electoral roll to determine questions of fact and apply the law to those facts to reach a verdict in criminal and civil trials.²
- 5.6 Trial by jury helps to ensure that an accused person receives a fair trial according to law and that members of the community are directly involved in the judicial process.³ Jury trials help to safeguard the rights of the accused by limiting the power of the state, and to ensure that justice is administered in accordance with community standards.⁴
- 5.7 Juries therefore play a critical role in the administration of justice in Victoria, particularly in the criminal justice system. Jurors take an oath or affirmation to faithfully and impartially try the issues before them and give a true verdict according to the evidence put before them in court.⁵

1 LexisNexis, *Halsbury’s Laws of Australia* (online at 25 September 2018) 105 Contempt, ‘2 Criminal Contempt’ [105–70]. See (E) ‘Breach of Duty by Persons Officially Connected with Court Proceedings’, in particular [105–170].

2 For an overview of the purposes, availability and laws of jury trials in Victoria, see Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8–17.

3 See, eg, *Alqudsi v R* (2016) 258 CLR 203, 208 [2] (French CJ).

4 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 (citations omitted).

5 *Juries Act 2000* (Vic) s 42, sch 3.

Jury trials in Victoria

- 5.8 Juries may be used in criminal cases to try parties accused of indictable offences and to help determine an accused person's fitness to stand trial.⁶ Juries may also be used in certain civil proceedings.⁷ Generally, criminal trials have 12 jurors and civil trials have six jurors.⁸
- 5.9 Jury trials are held in the Supreme Court of Victoria and County Court of Victoria.⁹
- 5.10 In 2016–17, 30 criminal jury trials were conducted in the Supreme Court and 371 criminal jury trials in the County Court of Victoria.¹⁰ During the same period, 50 civil jury trials were conducted in the Supreme Court of Victoria and 60 civil jury trials in the County Court of Victoria.¹¹

The regulation of juror conduct

- 5.11 The Victorian jury system is maintained and protected by statute, the law of contempt of court and other common law offences.¹²
- 5.12 The fundamental purpose of these laws is to preserve the integrity of the trial process by ensuring on the one hand that jury members are not interfered with, and on the other that jurors make decisions based solely on the evidence put before them in court. A suite of laws have developed to ensure that jurors are 'shielded' or 'quarantined' from extraneous information.
- 5.13 These laws address a range of behaviours relating to juries, which can be broadly classified as either misbehaviour by jurors or interference with jurors.
- 5.14 Significantly, particular conduct can at the same time constitute both a statutory and a common law offence, including contempt of court. The Juries Act expressly provides, however, that the courts cannot punish a person more than once for the same act or omission.¹³

The *Juries Act 2000 (Vic)* and the *Jury Directions Act 2015 (Vic)*

- 5.15 The two main statutes which regulate juries in Victoria are:
- the Juries Act which regulates the system of trial by jury
 - the Jury Directions Act which regulates the instructions, known as 'directions', given to juries during trials.
- 5.16 Under the Juries Act it is an offence for a juror to, among other things:
- fail to answer questions, fail to produce a document or to give an answer that is false or misleading¹⁴
 - fail to inform the Juries Commissioner of their disqualification or ineligibility for service¹⁵
 - supply false or misleading information¹⁶
 - fail to attend for jury service¹⁷

6 *Juries Act 2000 (Vic)* s 3 (definition of 'criminal trial'); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* ss 7(3), 11(2)–(6), 12, 16–18.

7 *Juries Act 2000 (Vic)* s 3 (definition of 'civil trial').

8 *Juries Act 2000 (Vic)* ss 22–3.

9 See *Juries Act 2000 (Vic)* s 3 (definition of 'court').

10 Supreme Court of Victoria, *Annual Report 2016–17 (2017)* 55. As at the time of writing, the Supreme Court of Victoria's annual report for 2017–18 had not been tabled in Parliament.

11 *Ibid.*

12 *Dupas v R* (2010) 241 CLR 237, 244 [16]. Common law offences include perversion of the course of justice and embracery.

13 *Juries Act 2000 (Vic)* s 86.

14 *Ibid* s 68.

15 *Ibid* s 69.

16 *Ibid* s 70.

17 *Ibid* ss 71 and 72.

- refuse to be sworn or make an affirmation¹⁸
 - make enquiries about trial matters.¹⁹
- 5.17 In addition, the Juries Act provides that it is an offence for a member of a jury to disclose their deliberations.²⁰
- 5.18 Significantly, the Juries Act preserves the power of a court to deal with a contempt of court summarily of its own motion.²¹ However, the Juries Act also protects against double jeopardy by providing that if an act or omission constitutes any two or more of the following:
- an offence against the Juries Act
 - an offence against the common law or
 - conduct that the court can deal with summarily under Division 2 of the Juries Act or
 - a contempt of the court
- the offender is liable to be prosecuted or dealt with in any or all of the applicable ways but is not liable to be punished more than once for the same act or omission.²²
- 5.19 In contrast with the Juries Act, the Jury Directions Act does not contain any offence provisions. Instead, the purpose of this Act is to regulate the instructions given to juries during trials.
- 5.20 As recommended by the Commission in its report on jury directions,²³ the Jury Directions Act includes guiding principles which note that Parliament recognises that, among other things:
- The law of jury directions in criminal trials has become increasingly complex in recent decades.
 - This development
 - has made jury directions increasingly complex, technical and lengthy
 - has made it increasingly difficult for trial judges to comply with the law of jury directions and avoid errors of law, and
 - has made it increasingly difficult for jurors to understand and apply jury directions.
 - Research indicates that jurors find complex, technical and lengthy jury directions difficult to follow.²⁴
- 5.21 The guiding principles also expressly provide that the Parliament intends that a trial judge, in giving directions to a jury in a criminal trial, should
- give directions on only so much of the law as the jury needs to know to determine the issues in the trial
 - avoid using technical legal language wherever possible
 - be as clear, brief, simple and comprehensible as possible.²⁵

18 Ibid s 73.

19 Ibid s 78A.

20 Ibid s 78.

21 Ibid s 84.

22 Ibid s 86.

23 Victorian Law Reform Commission, *Jury Directions*, Final Report (2009) 8, 13 and Recommendations 4 and 5.

24 *Jury Directions Act 2015* (Vic) s 5(1).

25 Ibid s 5(4).

Forms of contempt by jurors

- 5.22 There have been few Victorian cases involving contempt by jurors. Jurors who have attended jury service while intoxicated have been found in contempt.²⁶ However, a jury foreman who sent a letter to a judge in the County Court of Victoria in 2017 discussing trial matters and suggesting the judge could privately respond was not considered to be in contempt, although the judge would have referred the matter to the DPP for consideration of contempt if the letter had had a 'nefarious purpose'.²⁷ Similarly, a juror was held not to be in contempt for procuring signatures from other jurors on a petition to the Attorney-General which described jury deliberations after a trial, but would have been if the communications contained 'deliberate misstatements or threats, or otherwise displayed an intention to defeat the due course of justice'.²⁸
- 5.23 However, the Supreme Court of South Australia found two jurors in a criminal case guilty of contempt in 2016 after they contravened the trial judge's direction by researching trial matters online and discussing the information they found with other jurors.²⁹ In contrast, the New South Wales Court of Criminal Appeal made no finding of contempt in 2004 after two jurors visited a park relevant to the case during jury deliberations, but mentioned contempt 'to indicate, for the information of jurors in other trials, the potential seriousness with which the law views this type of misconduct'.³⁰

Jurors accessing information

- 5.24 Jurors take an oath to 'faithfully and impartially' try the issues before them and to 'give a true verdict according to the evidence' presented in the trial which has been found to be admissible.³¹ There is nevertheless a risk that jurors may independently access information about trials and may make decisions based on information that was not presented and tested in court. As a consequence, there remains a risk that an accused person may not receive a fair trial.
- 5.25 The internet has exacerbated existing difficulties with preventing juror research and exposure to prejudicial, and potentially inaccurate, material. Jurors can readily search for information about cases, and courts can struggle to shield jurors from material that is now so easy to access and share. Jurors may seek information about trials, or be unwittingly exposed to prejudicial material. This section focuses on jurors who actively seek information about trials.
- 5.26 Examples of jurors conducting research during trials in Victoria include jurors downloading material about the meaning of 'beyond reasonable doubt',³² downloading and printing descriptions of words from Wikipedia and Reference.com,³³ and using the *Concise Oxford Dictionary* to look up a word mentioned at trial.³⁴
- 5.27 Except for the reported decisions, there is limited information about the number of Victorian cases in which jurors have conducted research.³⁵
- 5.28 However, the Victorian Court of Appeal observed in 2008:

In recent years, there have been occasions when jurors have engaged in inappropriate conduct with the potential to compromise a trial. Internet searches relating to information that is both inadmissible at trial, and prejudicial to the accused, may necessitate a discharge of the jury or, failing that, on appeal an order for a new trial. In general, these cases have

26 *R v Allen* (1886) 12 VLR 341; *R v Tomlinson* (Supreme Court of Victoria, Beach J, 16 January 1996).

27 *In the matter of IH, a juror* [2017] VCC 2042 [25].

28 *Re Mann; Re King; Ex parte A-G (Vic)* [1911] VLR 171, 171.

29 *Registrar of Supreme Court of South Australia v S* [2016] SASC 93.

30 *R v Skaf* (2004) 60 NSWLR 86, 97 [239].

31 *Juries Act 2000* (Vic) s 42, sch 3.

32 *Martin v R* (2010) 28 VR 579, 579–80 [2]–[3], [57]–[58] (Ashley JA).

33 *Benbrika v R* (2010) 29 VR 593, 640 [194].

34 *Benbrika v R* (2010) 29 VR 593, 646 [226]–[228] (citations omitted); *R v Benbrika (Rulings No 35.01–35.11)* [2009] VSC 142 [118].

35 Data provided to the Commission by the County Court of Victoria indicates that in 2017 a jury was discharged because of juror investigations, and that in both 2016 and 2018 a jury was discharged because the jury saw inappropriate material.

involved internet searches of a kind that bear specifically upon the evidence in the trial, and the particular circumstances and history of the accused.³⁶

5.29 To address this issue a new section, section 78A, was inserted into the Juries Act in 2008. In introducing this amendment, the then Attorney-General for Victoria, the Hon. Mr Rob Hulls MP stated:

In light of advances in technology, there are ever-increasing opportunities for jurors to undertake research relating to trial participants and events. A number of appeals in New South Wales have emphasised the damage caused by undirected juror investigations, not only to the viability of public prosecutions, but also to the peace of mind of victims of crime. Such investigations can lead to jurors accessing potentially irrelevant and prejudicial material, which will affect the result of the trial. The bill prohibits jurors from undertaking investigations to ensure that a jury's decision is based solely on the evidence heard and seen in court.³⁷

5.30 Section 78A of the Juries Act provides that a juror in a trial, or panel member for a trial, must not make an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of their functions as a juror.³⁸ Making an enquiry includes:

- consulting with another person
- conducting any research by any means, such as using the internet to search an electronic database for information
- viewing or inspecting a place or object that is relevant to the trial
- conducting an experiment
- requesting another person to make an enquiry.³⁹

5.31 The penalty for this offence is 120 penalty units.⁴⁰

Jurors disclosing information

5.32 Like jurors seeking extraneous information about a trial, jurors disclosing information about deliberations to people outside of the jury is not a new concern. However, the internet, social media networks and modern technologies such as the smartphone expand the reach and impact of juror communications. A juror's Facebook post about a high-profile trial, for instance, could be communicated to the juror's Facebook friends, sent by the juror's friends to other people or seen by other people if the Facebook page is public, then screenshotted, reported in the media and communicated to larger audiences through a variety of media. In 2016, defence lawyers sought a mistrial in the Supreme Court of Queensland after a juror deliberating in a high-profile murder case made several Instagram posts about her role as a juror.⁴¹

5.33 It is unclear whether disclosure by jurors of deliberations after a trial in Victoria constitutes contempt of court, although the courts have expressed disapproval of such actions.⁴²

5.34 Under the Juries Act, a juror, or former juror, cannot disclose statements made, opinions expressed, arguments advanced or votes cast in jury deliberations if they have reason to believe the information will, or is likely to, be published to the public. The penalty for this offence is 600 penalty units or imprisonment for five years.⁴³ Disclosure offences are

36 *Benbrika v R* (2010) 29 VR 593, 644 [214]. However Maxwell P, Nettle and Weinberg JJA also stated that the case was not one where the internet searches bore specifically on the evidence in the trial, or the history and circumstances of the accused.

37 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 May 2008, 2064 (Rob Hulls, Attorney-General).

38 *Juries Act 2000* (Vic) s 78A.

39 *Ibid* s 78A(5).

40 *Ibid* s 78A(1).

41 Alexandra Blucher, 'Gable Tostee Juror's Instagram Posts a Sign Jury Act Must Roll with the Times, Legal Experts Say', *ABC News* (Web Page, 21 October 2016) <www.abc.net.au/news/2016-10-21/tostee-juror-instagram-posts-sign-jury-act-needs-review/7952550>.

42 See, eg, *Re Matthews & Ford* [1973] VR 199, 212–13; *R v Gallagher* [1986] VR 219, 249. A juror would have been in contempt if a petition with jurors' signatures sent to the Attorney-General and describing deliberations included 'deliberate misstatements or threats, or otherwise displayed an intention to defeat the due course of justice': *Re Mann*; *Re King*; *Ex parte A-G* (Vic) [1911] VLR 171.

43 *Juries Act 2000* (Vic) s 78(2).

indictable.⁴⁴ Statutory exceptions allow jurors to disclose information to certain people and for specific purposes.⁴⁵

Possible reforms to contempt by jurors

Amendments to the *Juries Act 2000* (Vic)

- 5.35 Currently, juror behaviour is regulated under the Juries Act and the common law, including the law of contempt. The Juries Act preserves the court's common law powers to deal with a contempt of court summarily of its own motion.⁴⁶
- 5.36 There are important questions about statutory and common law powers that regulate jurors:
- Do existing provisions under the Juries Act adequately address problematic juror behaviour?
 - What amendments, if any, to the Juries Act are required?
 - Should the common law of contempt continue to apply to jurors, given the few cases involving contempt by jurors and provisions under the Juries Act that regulate juror behaviour?
 - If the common law of contempt should continue to apply to jurors, should behaviour that constitutes a common law contempt by jurors be replaced by statutory provisions in the *Juries Act 2000* (Vic), or another statute?

Education of jurors

- 5.37 Potential jurors are given information about jury duties when they are in the jury pool.⁴⁷ There is also publicly available information about the role of juries and provisions that regulate juror behaviour.⁴⁸
- 5.38 In 2017, the New Zealand Law Commission (NZ Commission) recommended a review of educational information provided to people called for jury service and jurors to ensure it provided adequate guidance on the problems, risks and consequences if jurors undertake their own research.⁴⁹ The Commission commented that jurors should be told why doing their own research poses a risk to fair trials.⁵⁰ It also recommended that jurors and potential jurors be educated about why there are restrictions on disclosing deliberations and the consequences of breaching these restrictions, with an increased focus on the impropriety of jurors posting information online.⁵¹
- 5.39 The Law Commission of England and Wales recommended that the Department of Education look at ways to encourage schools to teach children about the role and importance of jury service.⁵² It considered that jurors are more likely to comply with their obligations if they understand why the obligations are important.⁵³
- 5.40 A possible reform may be a review of the information and material currently provided to potential jurors during the selection and empanelment process. If necessary, these materials could be redeveloped to include, for instance, an explanation of why prohibitions on juror research and disclosure of deliberations are critical to fair trials, and potential consequences of breaching these prohibitions.⁵⁴

44 Ibid s 78(10).

45 Ibid ss 78(3), (5), (7) (12).

46 Ibid s 84.

47 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 15 [2.46].

48 See, eg, Juries Commissioner's Office Victoria, Supreme Court of Victoria, *Juror's Handbook* (2012); Court Services Victoria, 'During Trial, Jury Service' (Web Page, 27 April 2016) <www.courts.vic.gov.au/jury-service/during-trial>; W Benjamin Lindner, 'Juries', *The Law Handbook* (Web Page, 30 June 2017) <www.lawhandbook.org.au/2018_01_02_05_juries/>.

49 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 10, 76 [4.32].

50 Ibid 76 [4.32].

51 Ibid 11, 85–6 [4.88].

52 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 111–2 [5.12]–[5.16].

53 Ibid 111 [5.15].

54 See, eg, Ministry of Justice (UK), 'Your Legal Responsibilities as a Juror' (information sheet, March 2018).

The juror oath

- 5.41 In Victoria, jurors take an oath or affirmation to ‘faithfully and impartially’ try the issues before them and to ‘give a true verdict according to the evidence’.⁵⁵ Possible amendments to the juror oath to address concerns about juror research and disclosure of deliberations have been considered in other jurisdictions.
- 5.42 The Law Commission of England and Wales recommended in 2013 that the oath be amended to include an agreement to base the verdict only on the evidence presented in court and not to seek or disclose information about the case.⁵⁶ It also recommended that jurors sign a written declaration acknowledging that they have been warned not to conduct trial-related research.⁵⁷
- 5.43 In 2017, the NZ Commission noted that its oath and affirmation implicitly required jurors not to privately obtain or use extraneous material before or during the trial in order to reach a verdict, but that jurors may not always understand that implicit requirement.⁵⁸ Like the Law Commission of England and Wales, the NZ Commission recommended the oath and affirmation be amended so that jurors explicitly agree to base their verdict solely on the evidence presented in court and not to undertake research, to ensure that jurors specifically turn their minds to this issue.⁵⁹ The Law Commission did not, however, recommend that the oath and affirmation include a promise by jurors not to disclose information, citing concerns that this would make the oath and affirmation ‘overly long’.⁶⁰
- 5.44 A possible reform may be amendments to the current wording of the oath and affirmation under the Juries Act to specify that jurors have a duty not to independently conduct trial-related research or disclose information about deliberations.

Jury directions

- 5.45 Jurors are given directions by the trial judge throughout the trial.
- 5.46 Courts today generally assume that juries can follow judicial directions and make decisions based only on the evidence presented in court, even if they have been exposed to irrelevant or prejudicial material.⁶¹ However, some judicial officers have questioned this assumption.⁶²
- 5.47 The extent to which jury directions can prevent juror misconduct or cure prejudice where misconduct has occurred, and whether existing directions are adequate for this purpose, are key questions in this reference.
- 5.48 Judicial officers have suggested the need for more precise jury directions in cases where jurors’ understanding of directions has been questioned. For instance, in *Martin v R*, the Court of Appeal found that judicial officers would be wise to instruct juries that the prohibition in section 78A(1) of the Juries Act extends to searching legal dictionaries or texts ‘in an attempt to elaborate the meaning of [beyond reasonable doubt]’.⁶³

55 *Juries Act 2000* (Vic) s 42, sch 3.

56 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 116 [5.35].

57 *Ibid* 115–16 [5.31]–[5.32].

58 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 78 [4.41]–[4.42].

59 *Ibid* 10, 78 [4.45].

60 *Ibid* 86 [4.89].

61 See, eg, *R v Glennon* (1992) 173 CLR 592, 603 (Mason CJ and Toohey J); *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68, 84 [54]; *Yuill v R* (1993) 69 A Crim R 450, 453–4; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 366 [103] (Spigelman CJ, Handley JA, Campbell AJA agreeing).

62 See, eg, *R v Dupas (No 2)* (2005) 12 VR 601, 627 [81] (Nettle JA) citing *R v Glennon* (1992) 173 CLR 592, 614–5 (Brennan J); *Gilbert v R* (2000) 201 CLR 414, 425 [31] (McHugh J); *R v Rich (Ruling No 7)* [2008] VSC 437 [14] (Lasry J).

63 *Martin v R* (2010) 28 VR 579, 587 [92] (Ashley JA, Buchanan and Redlich JJA agreeing). See also *MJR v R* (2011) 33 VR 306, 319 [74] (Ashley JA), [75] (Weinberg JA), [76] (Harper JA).

- 5.49 The NZ Commission recommended that jurors be reminded about prohibitions on conducting research and investigations throughout a trial, given jurors must process a lot of new information at the outset of a trial.⁶⁴ It also encouraged judicial officers to consider the desirability of giving juries comprehensive directions about asking questions, in order to dissuade jurors from conducting their own enquiries and to reinforce that it is preferable to raise questions with the judge.⁶⁵
- 5.50 The Law Commission of England and Wales said jurors needed to understand they are permitted to ask questions about the evidence heard in court, and should be empowered to do so.⁶⁶ Jurors who are deterred from asking questions may be tempted to undertake research themselves.⁶⁷ It recommended a direction to juries that would reflect the 'correct balance between being too explicit in seeking questions from jurors, which could lead to judges being inundated and time wasted with unanswerable or irrelevant questions, and deterring jurors from asking proper and pertinent questions'.⁶⁸
- 5.51 Currently, the Judicial College of Victoria publishes bench notes and sample directions that guide judicial officers in instructing juries about determining cases on the evidence and prohibitions on juror research and disclosure of deliberations. These include directing jurors to avoid online research and posting on social media about the case, explaining why these actions are problematic and describing the consequences of breaching the prohibitions.⁶⁹ The College also provides some guidance on directing juries about asking questions of the judge.⁷⁰
- 5.52 The Commission may consider proposed reforms to the content and delivery of jury directions to adequately inform jurors about their functions and duties. Such reforms could be proposed statutory amendments or non-statutory reforms.

Questions

- 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:
- How should it be defined?
 - What fault elements, if any, should be required?
 - Should conduct already covered by other statutory offence provisions be excluded?

64 Law Commission, *Reforming the Law of Contempt of Court: A Modern Statute*, Report No 140 (2017) 79 [4.50], [4.52].

65 Ibid 80 [4.57].

66 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 117 [5.39].

67 Ibid.

68 Ibid 117 [5.41].

69 Judicial College of Victoria, '1.5.1 – Bench Notes: Decide Solely on the Evidence', *Victorian Criminal Charge Book* (Web Page, 21 October 2013) <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1285.htm>; Judicial College of Victoria, '1.5.2 – Charge: Decide Solely on the Evidence', *Victorian Criminal Charge Book* (Web Page, 15 November 2018) <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1286.htm>.

70 See Judicial College of Victoria, '1.4.2—Charge: The Role of Judge and Jury', *Victorian Criminal Charge Book* (Web Page, 19 December 2006) <www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1283.htm>.

Questions

- 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?
- 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?

Disobedience contempt

- 70** Introduction
- 71** Defining disobedience contempt
- 74** Issues with disobedience contempt
- 77** Possible reforms to disobedience contempt

6. Disobedience contempt

Introduction

6.1 Disobedience contempt arises when a person fails or refuses to comply with an order of the court or an undertaking given to the court. In these circumstances, commencing contempt proceedings against the person is one mechanism by which to compel compliance. Contempt proceedings may also provide a mechanism to punish the non-compliance, particularly where it involves deliberate defiance of the court or where compliance is no longer possible.

6.2 Contempt proceedings arising from non-compliance are generally commenced by the party for whose benefit the order was made and any sanctions issued usually serve the interests of that party. However, there is a broader public interest in the exercise of the disobedience contempt power. As the High Court explained:

Even when proceedings are taken by the individual to secure the benefit of an order or undertaking that has not been complied with, there is also a public interest aspect in the sense that the proceedings also vindicate the court's authority. Moreover, the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests.¹

6.3 The seriousness with which courts view breaches of a court order was expressed by Justice Gillard in *Law Institute of Victoria v Nagle*:

It is vital to the administration of justice in this State that a person bound by an Order obeys it. Disobedience of an order poses a threat to the administration of justice and attacks its very foundation. It threatens the rule of law and its destruction results in anarchy and a return to the law of the jungle. If a person bound by an order wilfully refuses to obey it and is not severely punished for wilful disobedience then parties in litigation will have no confidence in the legal system. Respect for the system must be maintained. There is a public interest factor in punishing a contemnor in most cases, especially where the contempt is a criminal one.²

6.4 The different contexts in which disobedience contempt arises, and the different purposes for which disobedience contempt proceedings are initiated, have led to uncertainty about the nature of the proceedings and the procedures that should be adopted. In particular, those differences have led to an ambiguous distinction between:

- civil contempt which serves the purpose of *compelling obedience* with court orders, and
- criminal contempt which serves the purpose of *punishing disobedience*.

- 6.5 This chapter considers whether this distinction between civil and criminal contempt is sustainable and necessary and poses questions about whether it should be abolished.
- 6.6 In approaching that overarching question, this chapter considers the range of alternative enforcement procedures available to secure compliance with court orders and poses questions about whether it is necessary for parties to have recourse to disobedience contempt proceedings as an additional enforcement tool.
- 6.7 Finally, this chapter considers and poses questions about how disobedience contempt might be reformed to clarify its purpose and procedures.

Defining disobedience contempt

- 6.8 Court orders and undertakings to the court take many forms and address an almost infinite variety of subject matter. Consequently, disobedience contempt can be committed in many different ways.³
- 6.9 For example, disobedience contempt proceedings can be commenced where a person refuses or neglects to do an act that they were required by a judgment or court order to do by a specified date.⁴ This may include a failure to: pay money into court or to another person;⁵ give possession of land;⁶ deliver goods;⁷ or comply with an order for interrogatories, discovery or the production of documents.⁸
- 6.10 Disobedience contempt proceedings can also be commenced where a court order requires a person to abstain from doing an act, and the person has disobeyed the order.⁹ This may involve breach of an order which restrains a person from:
- dealing with their assets¹⁰
 - being at a certain place¹¹
 - contacting a certain person¹²
 - publishing certain information.¹³
- 6.11 Even in the absence of a judgment or order, disobedience contempt proceedings can be commenced when a person contravenes an undertaking they have given to the court to do or to refrain from doing a particular thing.¹⁴
- 6.12 Finally, failure to comply with a subpoena without lawful excuse may also be a contempt of court.¹⁵

³ *Morgan v State of Victoria* (2008) 22 VR 237, 258.

⁴ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 66.05(1)(a), 66.05(2); *County Court Civil Procedure Rules 2018* (Vic) r 66.05(1)(a), 66.05(2).

⁵ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 66.02(1)(f), 66.02(2)(b); *County Court Civil Procedure Rules 2018* (Vic) rr 66.02(1)(f), 66.02(2)(b). For special considerations which might apply when the judgment or order concerns the payment of money, see *Morgan v State of Victoria* (2008) 22 VR 237; *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [2019] NSWSC 193.

⁶ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.03(2)(b); *County Court Civil Procedure Rules 2018* (Vic) r 66.03(2)(b).

⁷ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.04(1)(b); *County Court Civil Procedure Rules 2018* (Vic) r 66.04(1)(b); See, eg, *Harris v Marubeni Equipment Finance (Oceania) Pty Ltd* [2018] VSCA 211, where the defendant failed to deliver up an excavator to the plaintiff (the mortgagee) by the date the court ordered.

⁸ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 29.14(1), (3), r 30.10(1), (3); *County Court Civil Procedure Rules 2018* (Vic) r 29.14(1), (3), r 30.10(1), (3).

⁹ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 66.05(1)(b), 66.05(2); *County Court Civil Procedure Rules 2018* (Vic) rr 66.05(1)(b), 66.05(2).

¹⁰ See, eg, *Zhang v Fortune Holding Group Pty Ltd (No 2)* [2018] VSCA 70; *Fortune Holding Group Pty Ltd (No 3)* [2018] VSC 22; *Fortune Holding Group Pty Ltd (No 2)* [2017] VSC 738.

¹¹ See, eg, *VICT v CFMMEU* [2018] VSC 794.

¹² See, eg, *Legal Services Board v Forster (No 2)* [2012] VSC 633.

¹³ See, eg, *National Australia Bank Ltd v Juric* [2001] VSC 375.

¹⁴ *Australian Consolidated Press Limited v Morgan* (1965) 112 CLR 483, 489, 496; *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 563; *Sidebottom v The Queen* [2018] VSCA 280 [51].

¹⁵ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 42.12(1); *County Court Civil Procedure Rules 2018* (Vic) r 42.12(1). See also *Supreme Court (Criminal Procedure) Rules 2017* (Vic) r 1.12 and *County Court Criminal Procedure Rules 2009* (Vic) r 1.09 which provide that Order 42 (Subpoenas) of the General Civil Procedure Rules applies to criminal proceedings.

Jurisdiction

- 6.13 As a superior court of record, the Supreme Court of Victoria has inherent power to punish for contempt of court, including where the contempt is by way of non-compliance with a court order or an undertaking given to the court. Further, the Supreme Court has power to deal not only with contempts of itself but with contempts of any inferior court.¹⁶
- 6.14 The County Court has no inherent jurisdiction to deal with non-compliance with court orders or undertaking by punishing for contempt.¹⁷ However, this power is conferred on the County Court by statute.¹⁸
- 6.15 As with all manifestations of contempt, in the Supreme and County Courts the procedure for commencing and hearing disobedience contempt proceedings, the punishments which may be imposed and the costs orders which the court may make are regulated by the *Supreme Court (General Civil Procedure Rules) 2015* (Vic) and the *County Court Civil Procedure Rules 2018* (Vic) (General Civil Procedure Rules). For relevant purposes, the Rules mirror each other.
- 6.16 The Magistrates' Court also has no inherent jurisdiction to deal with non-compliance with court orders or undertakings by punishing for contempt. However, section 135 of the *Magistrates' Court Act 1989* (Vic) sets out the powers of the Magistrates' Court to make and enforce orders, other than for the payment of money.¹⁹

The elements of disobedience contempt

- 6.17 In order to prove disobedience contempt, the party bringing the proceedings must establish five elements:²⁰
- 1) that an order was made by the court
 - 2) that the terms of the order were clear, unambiguous, and capable of being complied with
 - 3) that the order was served on the alleged contemnor or that service was excused in the circumstances, or service dispensed with pursuant to the Rules of Court²¹
 - 4) that the alleged contemnor had knowledge of the terms of the order
 - 5) that the alleged contemnor breached the terms of the order.
- 6.18 The party bringing the contempt proceedings must prove each of these elements beyond reasonable doubt.²²
- 6.19 Unless the terms of the order require otherwise, it is unnecessary to prove that the alleged contemnor committed the breach with an intention to disobey the court order.²³ It is sufficient to establish that the alleged contemnor had knowledge of the terms of the order and they deliberately and voluntarily committed an act or omitted to do some act which had the effect of breaching the order.²⁴

16 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 360; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.05(1)(c).

17 *Morgan v State of Victoria* (2008) 22 VR 237, 269.

18 *County Court Act 1958* (Vic) ss 53, 54.

19 See also *Magistrates' Court Act 1989* (Vic) s 134 in relation to contempt arising from failure to comply with a summons.

20 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [31]; *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 234 IR 59; [2013] VSC 275, [8]; *Law Institute of Victoria Ltd v Nagle* [2005] VSC 35 [15]; *National Australia Bank Ltd v Juric* [2001] VSC 375 [37].

21 *County Court Civil Procedure Rules 2018* (Vic) r 66.10; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.10.

22 *Witham v Holloway* (1995) 183 CLR 525, 534; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [32]; *Law Institute of Victoria v Nagle* [2005] VSC 35 [16].

23 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 563–4; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [34], [51].

24 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 563–4; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 [51].

Penalties

- 6.20 As with other types of contempt, the penalties for disobedience contempt are imprisonment or fine or both,²⁵ and, for a corporation, sequestration²⁶ or fine or both.²⁷ The flexibility of the available punishments supports their potential use as a coercive tool. For example, where the court makes an order for imprisonment, fine or sequestration, the court can suspend execution of the order on condition that the contemnor comply with specified terms.²⁸ Where a contemnor has been imprisoned, the court may order the release of a contemnor at any time.²⁹
- 6.21 What penalty is imposed for disobedience contempt depends on the purpose of the proceedings. Where the purpose is to coerce compliance with a court order, the penalty may be open ended, for example a fine which accrues until the breach is remedied or imprisonment until the contempt has been purged. However, where the purpose is to punish for a past breach, the term of imprisonment or the quantum of the fine is more likely to be fixed.³⁰ The courts have held that where the contempt involves non-compliance with court orders that is not wilfully defiant, a sentence of imprisonment will rarely be appropriate as a disciplinary sanction.³¹

Who brings proceedings?

- 6.22 Where a contempt arises from a breach of court orders made in civil proceedings it has generally been left to the parties, or to the court, to bring proceedings to deal with the contempt.³²
- 6.23 One explanation given for why it has not been the practice for the Attorney-General (or the DPP) to prosecute contempts arising from civil proceedings is that, unlike criminal proceedings, they have ‘no direct control over civil litigation and, unless informed by a party, could not be expected to know of interferences with such litigation’.³³
- 6.24 The result is that disobedience contempts arising from civil proceedings are generally prosecuted by a private party even though, if the contempt is proven, it may lead to imprisonment or fine and possibly conviction. The result is also that it is a private party who bears the financial risk of the contempt proceedings.
- 6.25 The costs of contempt proceedings are at the discretion of the court, whether a penalty is imposed or not.³⁴ In Victoria a party found to be in contempt will usually be ordered to pay the applicant’s costs of the proceeding on an indemnity basis.³⁵ This recognises that the party bringing the proceeding has vindicated the public interest in upholding the rule of law,³⁶ and that ‘the litigant who must come to court to enforce an order which has been breached by contempt, or to have a person dealt with [for] contempt, should not be out of pocket’.³⁷

25 *County Court Civil Procedure Rules 2018* (Vic) r 75.11(1); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(1).

26 A sequestration order is directed to named sequestrators who are required to take possession of the contemnor’s property and to retain it until the contempt has been purged and the court has made appropriate orders: see LexisNexis, *Halsbury’s Laws of Australia* (online at 25 September 2018) 105 Contempt, ‘8 Punishment, Injunctions and Enforcement of Orders’ [105–515].

27 *County Court Civil Procedure Rules 2018* (Vic) r 75.11(2); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(2).

28 *County Court Civil Procedure Rules 2018* (Vic) r 75.11(4); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.11(4). See also *McNair Anderson Associates Pty Ltd v Hinch* [1985] VR 309.

29 *County Court Civil Procedure Rules 2018* (Vic) r 75.12; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.12.

30 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 563, 569–70.

31 *Vaysman v Deckers Outdoor Corporation Inc* (2011) 276 ALR 596, 640 (Bromberg J).

32 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 562. For enforcement of orders by or against a non-party, see *County Court Civil Procedure Rules 2018* (Vic) r 66.12 (1), (2); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.12 (1), (2). It is also established in case law that a person, not directly bound by an order, can be guilty of contempt of court if that person, with knowledge of the order, does an act which infringes, or frustrates, the efficacy of the order. See *R v Witt* [2016] VSC 19 [49]–[53]; *R v Hinch (No 1)* [2013] VSC 520 [55].

33 *Broken Hill Proprietary Co Ltd v Dagi* [1996] 2 VR 117, 124, 126 (Winneke P).

34 *County Court Civil Procedure Rules 2018* (Vic) r 75.14; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.14.

35 *Deputy Commissioner of Taxation v Gashi & Anor (No 3)* (2011) 85 ATR 262; [2011] VSC 448 [20]; *National Australia Bank Limited v Juric (No 2)* [2001] VSC 398 [67]–[70]; *VICT v CFMMEU* [2018] VSC 794 [44].

36 *Deputy Commissioner of Taxation v Gashi & Anor (No 3)* (2011) 85 ATR 262, 270–1; [2011] VSC 448 [20]; *VICT v CFMMEU* [2018] VSC 794 [44].

37 *National Australia Bank Limited v Juric (No 2)* [2001] VSC 398 [70].

Issues with disobedience contempt

The distinction between civil and criminal contempt

- 6.26 Almost all forms of contempt are classified as criminal in nature and are described as criminal contempts. Traditionally, however, a contempt arising from breach of a court order or undertaking, particularly in civil proceedings, has been characterised differently. Contempts of this kind are usually described as civil contempts.³⁸ This is not a fixed classification and in certain circumstances a civil contempt might be converted into a criminal contempt.
- 6.27 For example, where it can be shown that the breach of a court order or undertaking involved deliberate defiance, often referred to as ‘contumacy’, this may be relevant to whether the contempt is classified as civil or criminal.³⁹ This is because where the breach is contumacious, the purpose of the contempt charge is said to shift from achieving compliance with the court’s order to punishing the alleged contemnor.⁴⁰
- 6.28 The High Court has described the distinction between civil and criminal contempts as illusory⁴¹ and unsatisfactory.⁴² The High Court has noted that ‘very great difficulty has been experienced in maintaining the distinction between civil and criminal contempts and, in particular, in elaborating a precise and certain criterion which divides one class of contempt from the other’.⁴³ The High Court has observed that the concept that disobedience to an order becomes criminal when the primary purpose of exercising the contempt power changes from vindication of the private rights of the plaintiff to vindication of the authority of the court is both complex and artificial.⁴⁴
- 6.29 When identifying the uncertainty of the distinction between criminal and civil contempt, the courts have at the same time noted that the significance of the distinction has become less relevant to the procedures adopted, the standard of proof required and the penalties available.⁴⁵
- 6.30 The General Civil Procedure Rules do not distinguish between civil and criminal contempts and there is no provision for different procedures or punishment based on whether the contempt is civil or criminal.⁴⁶ Nonetheless, the courts in practice continue to make this distinction. The case law shows that categorisation of a contempt as civil or criminal is often determined at the penalty stage of proceedings and is closely linked to the question of whether or not a conviction should be recorded.⁴⁷
- 6.31 The distinction between civil and criminal contempt complicates proceedings for disobedience contempt because, at the commencement of proceedings, the type of liability the alleged contemnor is exposed to may not always be entirely clear.⁴⁸ This aspect of disobedience contempt proceedings has been the subject of judicial criticism because of the potential unfairness to an alleged contemnor who must determine how to defend the charge

38 *Witham v Holloway* (1995) 183 CLR 525, 530; *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 562. It is noted that part of the Victorian Court of Appeal’s judgment in this case was appealed to the High Court. In *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 the appeal was dismissed and the judgment of the Court of Appeal was affirmed. The judgment of the High Court was concerned with the nature of contempt proceedings, that is whether they are civil or criminal proceedings, and the Rules which govern them. The judgment of the High Court did not consider in detail the difference between civil and criminal contempts, except to cite earlier authorities which had described the distinction as illusory and an insufficient justification for the allocation of different standards of proof for civil and criminal contempt. The judgment of the High Court is discussed further in Chapter 3 under the heading ‘Adequacy of procedural safeguards’.

39 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 564–5, 599; *VICT v CFMMEU* [2018] VSC 794 [9].

40 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 565.

41 *Witham v Holloway* (1995) 183 CLR 525, 534.

42 *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107.

43 *Ibid* 108.

44 *Ibid*.

45 *Witham v Holloway* (1995) 183 CLR 525, 541 (McHugh J).

46 *County Court Civil Procedure Rules 2018* (Vic) Order 75; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Order 75.

47 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 593–5.

48 *Ibid* 527, [279]–[285]; *Seymour v Migration Agents Registration Authority* (2006) 234 ALR 350, 373 (Rares J).

without fully knowing the nature of the liability they are exposed to.⁴⁹

- 6.32 Given the complexity and uncertainty generated by the distinction between civil and criminal contempt, the question arises whether the classification of ‘civil contempt’ should be abandoned and all disobedience contempts should simply be treated, like other contempts, as criminal. The answer to this question will likely also be informed by whether contempt proceedings are still regarded as having a necessary role to play in enforcing compliance with court orders or whether in practice their purpose is now primarily punitive.

Are contempt proceedings necessary to enforce court orders?

- 6.33 Case law indicates that disobedience contempt proceedings should not be commenced lightly, particularly when other more appropriate civil remedies are available to enforce an order of the court.⁵⁰ In the Supreme Court case, *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd*, Justice Gillard commented:

The enforcement of a court order by the remedy of contempt is indeed drastic, bearing in mind that the penalty includes imprisonment, and in my opinion contempt proceedings to enforce an order should be a remedy of last resort. As a general rule, the coercive function of the proceeding should only be employed when there are no other effective means of doing so. The cases support that proposition.⁵¹

- 6.34 There are many alternative mechanisms which a party may use to enforce a court order made in their favour or an undertaking given to the court. Examples of alternative mechanisms available to enforce court orders include:

- Where the judgment or order concerns the possession of land, it may be enforced by a warrant of possession.⁵²
- Where the judgment or order concerns the payment of money, it may be enforced by a warrant of seizure and sale,⁵³ attachment of debts,⁵⁴ attachment of earnings,⁵⁵ a charging order⁵⁶ or the appointment of a receiver.⁵⁷
- Where the judgment or order concerns the payment of money, there is also legislation which specifically regulates the recovery of judgment debts, including the *Imprisonment of Fraudulent Debtors Act 1958* (Vic)⁵⁸ and the *Judgment Debt Recovery Act 1984* (Vic). This later Act, for example, provides for
 - the examination of debtors⁵⁹
 - the making of instalment orders⁶⁰

49 *Seymour v Migration Agents Registration Authority* (2006) 234 ALR 350, 373 (Rares J). In *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527, 593–600, the Victorian Court of Appeal considered whether a disobedience contempt charge must put the alleged contemnor on notice that what is alleged is a criminal contempt. The Court of Appeal concluded that deliberate defiance or contumacy, the existence of which might determine whether non-compliance with an order is a criminal contempt, does not need to be pleaded as part of the contempt charge. However, from a procedural fairness perspective, the Court of Appeal held that the alleged contemnor must at least be made aware that the charge is for a criminal offence or may be converted into a criminal offence if the conduct alleged is found to have been contumacious.

50 *Morgan v State of Victoria* (2008) 22 VR 237, 269.

51 *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201 (13 June 2003) [93]. The cases cited in support by Gillard J are *Danchevsky v Danchevsky* [1975] Fam 17 at 22–3 and *Ansah v Ansah* [1977] Fam 138, 144.

52 This warrant directs the Sheriff to cause the plaintiff to have possession of the subject land: *County Court Civil Procedure Rules 2018* (Vic) r 66.03(a), Order 70; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.03(a), Order 70.

53 This warrant directs the Sheriff to take and sell the property of the person bound: *County Court Civil Procedure Rules 2018* (Vic) r 66.02(1)(a), Order 69; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02(1)(a), Order 69; *Magistrates’ Court Act 1989* (Vic) s 111(1)(a).

54 *County Court Civil Procedure Rules 2018* (Vic) r 66.02(1)(b), Order 71; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02(1)(b), Order 71; *Magistrates’ Court Act 1989* (Vic) s 111(1)(c).

55 *County Court Civil Procedure Rules 2018* (Vic) r 66.02(1)(c), Order 72; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02(1)(c), Order 72; *Magistrates’ Court Act 1989* (Vic) s 111(1)(b).

56 *County Court Civil Procedure Rules 2018* (Vic) r 66.02(1)(d), Order 73; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.02(1)(d), Order 73.

57 *County Court Civil Procedure Rules 2018* (Vic) rr 66.02(1)(e), 66.02(2)(a), Order 74; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 66.02(1)(e), 66.02(2)(a), Order 74.

58 For discussion of the Imprisonment of Fraudulent Debtors Act and how it interacts with the Supreme and County Courts’ powers to commit for contempt, see *Morgan v State of Victoria* (2008) 22 VR 237, 265–7.

59 *Judgment Debt Recovery Act 1984* (Vic) pt III.

60 *Ibid* pt II.

- the stay of enforcement of the judgment when an instalment order is in force⁶¹
- the enforcement of instalment orders in the event of default.⁶²
- Where the judgment or order concerns the delivery of goods, it may be enforced by a warrant of delivery.⁶³
- Where the order relates to interrogatories, discovery or the production of documents, other remedies for failure to comply include that the court may dismiss the action, strike out the defence, enter judgment for non-compliance and make orders as to costs.⁶⁴
- Where the judgment or order requires the person bound to do an act and the person bound does not do the act, the court may order substituted performance, that is, they may direct the act to be done by a person appointed by the court and direct the person bound to pay any costs and expenses occasioned by the default.⁶⁵

6.35 Where court orders are made under a statutory regime, the relevant Act may specifically provide for enforcement powers and procedures and also include statutory offences in relation to non-compliance. For example:

- The *Family Violence Protection Act 2008* (Vic) empowers the court to make family violence intervention orders⁶⁶ and counselling orders.⁶⁷ The Act further provides that breach of a family violence intervention order is an offence punishable by imprisonment or fine or both.⁶⁸ Likewise, a failure, without reasonable excuse, to attend counselling as ordered is an offence liable to a penalty not exceeding 10 penalty units.⁶⁹
- The *Open Courts Act 2013* (Vic) regulates the power of various courts to make proceeding suppression orders, broad suppression orders and closed court orders. The Act creates offence provisions in relation to breach of orders made under the Act.⁷⁰
- The *Sentencing Act 1991* (Vic) contains provisions dealing with the powers of courts to sentence offenders convicted of a range of criminal offences. Part 3C of that Act is concerned with contravention of sentencing orders and includes a number of offence provisions, for example, in relation to breach of a community correction order⁷¹ or breach of a fine conversion order.⁷²
- The *Fines Reform Act 2014* (Vic), in conjunction with the Sentencing Act,⁷³ provides for the management, collection and enforcement of court-imposed fines. Section 378 of the *Children, Youth and Families Act 2005* (Vic) provides for the enforcement of fines against children.

61 Ibid s 9.

62 Ibid pt IV. In particular, section 19(1) provides that a judgment debtor who has the means to pay the instalments under an instalment order and persistently and wilfully and without an honest and reasonable excuse defaults in the payment of those instalments shall be liable to imprisonment for not more than 40 days.

63 This warrants directs the Sheriff to cause the subject goods to be delivered to the plaintiff or, if the Sheriff cannot do this to levy the property of the person bound for the assessed value of the goods: *County Court Civil Procedure Rules 2018* (Vic) r 66.04(1)(a); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.04(1)(a); *Magistrates' Court Act 1989* (Vic) s 111(8).

64 See, eg, *County Court Civil Procedure Rules 2018* (Vic) rr 24.02, 21.02; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 24.02, 21.02; *Civil Procedure Act 2010* (Vic) s 56.

65 *County Court Civil Procedure Rules 2018* (Vic) r 66.11(1); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 66.11(1); *Magistrates' Court Act 1989* (Vic) s 135(2)(c); *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 66.11(1). See also *Vella v Waybecca Pty Ltd (No 2)* (2015) 303 FLR 315.

66 *Family Violence Protection Act 2008* (Vic) pt 4.

67 Ibid pt 5.

68 Ibid ss 123, 123A.

69 Ibid s 130(4).

70 *Open Courts Act 2013* (Vic) ss 23(1), 27(1), 32(1).

71 *Sentencing Act 1991* (Vic) s 83AD.

72 Ibid s 83ADA.

73 Ibid ss 69–69Y.

- 6.36 These statutory enforcement and non-compliance offence provisions do not necessarily oust the disobedience contempt powers and jurisdiction of the court, particularly the inherent jurisdiction of the Supreme Court. In some contexts, the contempt jurisdiction and power of the courts are specifically preserved.⁷⁴ However, the *Victorian Criminal Proceedings Manual*, published by the Judicial College of Victoria, advises that where applicable, these specific statutory offences should be used in preference to general contempt powers.⁷⁵
- 6.37 In view of the range of alternative enforcement options outlined above, it is arguable that it is no longer necessary for parties to have recourse to contempt proceedings as a means to compel compliance with court orders.

Possible reforms to disobedience contempt

- 6.38 The ability of courts to enforce their orders is of critical importance to the proper administration of justice.
- 6.39 As Justice Vincent in the Victorian Court of Appeal noted in *Miller v Eurovox*:
- The status and enforceability of orders of the Court must be maintained if our system of civil dispute resolution is to possess efficacy and the respect of the community. As a general proposition, those who treat such orders with the contumelious disregard demonstrated in the present case must anticipate that they will be subject to significant sanctions, including, where appropriate, incarceration. The principles of general and specific deterrence are applicable to such situations in order to protect not only the rights created or vindicated by court orders but also the status of such orders and the very viability of the process itself.⁷⁶
- 6.40 The law of disobedience contempt therefore serves two interconnected purposes:
- coercing compliance with court orders and undertakings for the benefit of the party in whose favour the order was made
 - punishing non-compliance with court orders and undertakings in order to safeguard the authority of the court and ensure that the public has confidence in the fact that court orders cannot be disobeyed without consequence.
- 6.41 As a result of these dual purposes, disobedience contempt proceedings may be characterised as hybrid in nature and considerable litigation has been generated focused on determining what laws, principles and procedures should apply.⁷⁷ In *Hearne v Street*, Justice Kirby commented that the law of civil contempt:
- as conventionally understood, lacks conceptual coherence and is replete with uncertainties, inadequacies and fictions. It calls out for re-expression or reform. Despite proposals for legislative change, such reform has thus far failed to materialise.⁷⁸
- 6.42 Disobedience contempt proceedings are generally prosecuted by a private party even though, if the contempt is proven, it may result in the imposition of a punishment and, possibly, a conviction. Further, despite the penalties that may be imposed, the proceedings do not attract all the procedural safeguards traditionally available to an accused facing a serious criminal charge. Moreover, as a result of the ongoing distinction between civil and criminal contempt, proceedings can be commenced and tried without the alleged contemnor knowing, until the penalty stage, whether the contempt, if proven, will amount to a criminal offence.

⁷⁴ See, eg, *Open Courts Act 2013* (Vic) s 6(1).

⁷⁵ Judicial College of Victoria, *Victorian Criminal Proceedings Manual* (Web Page, 26 February 2018), [8.3.2] <www.judicialcollege.vic.edu.au/eManuals/VCPM/index.htm#27318.htm>. See also *R v Nationwide News Pty Ltd* (2008) 22 VR 116, 129 (Mandie J).

⁷⁶ *Miller v Eurovox Pty Ltd* [2004] VSCA 211 [29].

⁷⁷ See, eg, *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd & Ors* (2014) 47 VR 527.

⁷⁸ *Hearne v Street* (2008) 235 CLR 125, 136 (Kirby J).

- 6.43 Like other manifestations of contempt, disobedience contempt has been subject to review in other Australian and overseas jurisdictions.⁷⁹ A common theme of the recommendations from these reviews is that the law of disobedience contempt should be subject to some degree of legislative reform to clarify:
- when and for what purpose proceedings may be commenced
 - what procedures should govern the proceedings
 - who should be empowered to commence proceedings
 - what penalties should apply.
- 6.44 Key aspects of some of these recommendations are summarised below. The differences between them highlight that the extent to which it is necessary for parties to have recourse to contempt proceedings to enforce court orders is an important consideration in whether and how disobedience contempt is reformed.

Australian Law Reform Commission recommendations

- 6.45 The Australian Law Reform Commission (ALRC) in its 1987 report recommended abolishing the common law of civil contempt and replacing it with:
- a statutory form of proceedings for civil enforcement of court orders which could be commenced only by the party in whose favour the order was made. The ALRC recommended that the penalties available in such proceedings should include imprisonment for a fixed term with the power to order earlier release if the contempt is purged; accruing fines subject to a daily limit and maximum cap; sequestration; and other sanctions.⁸⁰
 - an indictable offence of wilful failure or refusal to comply with an order of the court in such a way as to constitute a flagrant challenge to the authority of the court. The ALRC recommended that the court should be able to direct that one of its officers institute a prosecution for the offence.⁸¹

Law Reform Commission of Western Australia recommendations

- 6.46 The Law Reform Commission of Western Australia (WA Commission) concluded that the civil jurisdiction of contempt by disobedience should be abolished and replaced by offence provisions:⁸²
- an indictable offence, defined to include an element that the defendant wilfully disobeyed the order or undertaking, but with a defence available that the disobedience was due to a failure, based on reasonable grounds, to understand the nature of the obligation imposed by the order
 - a lesser offence, not involving an element of wilful disobedience.⁸³
- 6.47 The WA Commission recommended that maximum penalties should apply to both offences⁸⁴ and that imprisonment should only be available in relation to the wilful disobedience offence.⁸⁵

79 See, eg, Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper No 10, 2016); Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003); Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute*, Report No 140 (2017); The Law Reform Commission, *Contempt* (Report No 35, December 1987).

80 The Law Reform Commission, *Contempt* (Report No 35, 1987) lxxiv–vii.

81 *Ibid* 326 [561].

82 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 95.

83 *Ibid* 98.

84 *Ibid* 107.

85 *Ibid* 98.

- 6.48 With respect to applicable procedures, it was recommended that the more serious indictable offence for wilful disobedience should be tried according to the ordinary rules for indictable offences. However, it was recommended that the summary jurisdiction should be retained for the lesser offence, with a proviso that there should be a prohibition against the same judicial officer hearing the disobedience contempt matter as had made the original order or as had been presiding when the undertaking was made.⁸⁶
- 6.49 In relation to the lesser offence, it was also recommended that provision be made for a plaintiff to apply to the presiding judge for leave to initiate proceedings for the lesser offence of disobedience contempt within the summary jurisdiction of that court.⁸⁷

New Zealand Law Commission recommendations

- 6.50 The New Zealand Law Commission (NZ Commission) also recommended that new statutory provisions should be enacted to replace the common law in respect of disobedience contempt. However, the NZ Commission did not consider that these should take the form of offence provisions. The NZ Commission recommended as follows:

We agree that the party in whose favour the court makes an order should retain the ability to enforce that order through the ultimate sanction of contempt, because without contempt the party would not have adequate civil enforcement remedies. We agree with submitters that prosecuting an offence does not give the party an effective remedy. ... We therefore recommend enacting a statutory form of contempt for responding to breaches of court orders, rather than a criminal offence.⁸⁸

- 6.51 The new provisions proposed by the NZ Commission contemplate that either a person who has obtained an 'applicable court order' or the Solicitor-General would be able apply to the court for an order that the other party has failed to comply with the order.⁸⁹ An 'applicable court order' would not include an order requiring the payment of money or an order relating to the recovery of land. However, it would include an undertaking given to the court.⁹⁰
- 6.52 The courts would not be empowered to initiate this form of contempt proceedings of their own motion.⁹¹
- 6.53 Under the proposed new provisions, where it is proven beyond reasonable doubt that the other party has, without reasonable excuse, intentionally failed to comply with the order, the court would be empowered to make an enforcement order which may include imposing a term of imprisonment or a fine. The Commission recommended that these penalties be subject to a maximum limit and recommended that this be set at six months for imprisonment and \$25,000 for a fine.⁹²

86 Ibid 101.

87 Ibid 102.

88 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 100 [5.61].

89 Ibid [5.62].

90 Ibid 100 [5.63], 101 [5.65].

91 Ibid 100 [5.62].

92 Ibid 101 [5.66]–[5.67].

Questions

- 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?

Contempt by publication (1)— sub judice contempt

- 82** Introduction
- 85** Issues with sub judice contempt
- 97** Sub judice contempt and the fair trial
- 104** Suppression orders and take-down orders
- 105** Possible reforms to sub judice contempt

7. Contempt by publication (1)—sub judice contempt

Introduction

- 7.1 This chapter considers contempt by publication which interferes with or prejudices legal proceedings. This manifestation of contempt is also known as sub judge contempt. Today, the law of sub judge contempt is facing new challenges which not only test the technical and operational adaptability of the offence, but also whether the law and the assumptions on which it is based, are compatible with ensuring a fair trial in the 21st century.¹
- 7.2 The law of sub judge contempt operates to restrict the publication of material which has, as a matter of practical reality, a real and definite tendency to prejudice or embarrass legal proceedings pending in court at the time of publication.² Sub judge means ‘under judicial consideration’.
- 7.3 Sub judge contempt aims to ensure a fair trial by quarantining jurors from extraneous information. As stated by Justice Dixon in *DPP v Johnson & Yahoo!7 (Yahoo!7)* the purpose of the law of sub judge contempt:
- is to ensure that the actions of those involved, whether directly or indirectly, with any proceeding that is subject to adjudication in the courts do not interfere with or compromise the administration of justice. Conduct by a publication that interferes with the due administration of justice by materially prejudicing the fair hearing of a criminal trial before a jury is classified as *sub judge* contempt of court.³
- 7.4 The law of sub judge contempt also seeks to ensure a fair trial by:
- reinforcing the rules of evidence which ensure that the material before a jury to make their decision is relevant to the charge being heard and to uphold the assumption that the accused person is innocent until proven guilty⁴
 - protecting the integrity⁵ of the trial itself and the efficient running of proceedings⁶
 - ensuring justice is ‘seen to be done’⁷ by avoiding the risk that decisions appear to the public and the parties involved to be influenced by the media.⁸

1 Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century - Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103, 105; Zak Rich, ‘The Past and Future of Sub Judge Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States’ (2010) 15 *Media and Arts Law Review* 361, 372–3; Bell, Virginia, ‘How to preserve the integrity of jury trials in a mass media age’ (2005) 7 *Judicial Review* 311, 314; Chief Justice Spigelman, ‘The Internet and the Right to a Fair Trial’ (2005) 29 *Criminal Law Journal* 331, 332; Michael Chesterman, ‘OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt with in Australia and America’ (1997) 45(1) *The American Journal of Comparative Law* 109, 142.

2 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 372 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J).

3 *DPP (Vic) v Johnson & Yahoo!7* [2016] VSC 699 [23].

4 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 19 [2.18]. See also Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 18–19.

5 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 19.

6 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 31 [1.70].

7 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ).

8 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 19 [2.19].

- 7.5 Sub judge contempt engages with the principle of open justice, which requires that the administration of justice by courts takes place in public.⁹ Sub judge contempt does not restrict the publication of material which is a fair and accurate report of court proceedings. The law only restricts the publication of extraneous information which may be prejudicial until court proceedings are complete.¹⁰
- 7.6 Sub judge contempt limits the principle of freedom of expression, which is provided ‘partial protection’ by common law and rules of statutory interpretation.¹¹ As the High Court has recognised, freedom of expression must sometimes be restrained in order to protect other aspects of the public interest, such as the proper administration of justice.¹²
- 7.7 However, the courts have recognised that the summary power to punish for sub judge contempt should be exercised only in exceptional circumstances.¹³ Where there is significant public interest in the matter being discussed, the right to a fair trial may be overridden.¹⁴
- 7.8 The balancing of the principles of a right to a fair trial, open justice and freedom of expression, means the law of sub judge contempt must be flexible enough to adapt to novel types of publication and circumstances which might interfere with a fair trial.¹⁵ However, this flexibility also creates uncertainty and inconsistency in how the law is defined, and in its scope and application.
- 7.9 The law of sub judge contempt is underpinned by the following assumptions:
- Media publicity can influence jurors by diverting them from the evidence before them, contributing to preconceptions which will make them partial and unreliable when making their decision.¹⁶
 - These preconceptions and prejudices will survive the length of a trial and deliberations despite judicial directions.¹⁷
 - The public accesses news information through traditional media such as newspapers, television and radio broadcasts¹⁸ and such news information can be controlled, ‘taken-down’ or prevented from being published.¹⁹
- 7.10 Further, the law of sub judge contempt presupposes that jurors are more susceptible to media publicity than are judges or magistrates (judicial officers) who are considered less likely to be influenced or biased. This perception originated from a distrust held by a ‘formally educated and socially privileged judiciary’ about the ability of the rest of the community to make a decision based on the information before them.²⁰

9 *Scott v Scott* [1913] AC 417, 435 (Viscount Haldane LC); *Dickason v Dickason* (1913) 17 CLR 50, 51 (Barton ACJ; Isaacs, Gavan Duffy, Powers and Rich JJ). See also *Russell v Russell* (1976) 134 CLR 495, 505 (Barwick CJ); 520 (Gibbs J); 532–3 (Stephen J); *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ).

10 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 19 [2.17].

11 *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67, 76–7 (French J).

12 *R v Glennon* (1992) 173 CLR 592, 611–12 (Brennan J), citing *Hinch v Attorney-General (Victoria)* (1987) 164 CLR 15, 18 (Mason CJ).

13 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370 (Dixon CJ, Fullagar, Kitto and Taylor JJ).

14 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 22 (Mason CJ); *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 242 (Jordan CJ); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 56 (Gibbs CJ).

15 Ian Cram, *Borrie & Lowe: The Law of Contempt* (LexisNexis, 4th ed, 2010) 78.

16 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 22; The Law Reform Commission, *Contempt* (Report No 35, 1987) 159–60 [280].

17 The Law Reform Commission, *Contempt* (Report No 35, 1987) xlii.

18 Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103, 107.

19 Zak Rich, ‘The Past and Future of Sub Judge Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States’ (2010) 15 *Media and Arts Law Review* 361, 372–3; Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103, 110.

20 Frank Vincent, *Open Courts Act Review* (2017) 122 [484] <<https://engage.vic.gov.au/open-courts-act-review>>.

- 7.11 There are conflicting views as to the validity of this assumption but the weight of authority²¹ and the operation of the law of sub judice contempt appear to support the view that judicial officers are not susceptible to the same extent as jurors.²²
- 7.12 The validity of these assumptions and the operation of sub judice contempt are, however, being questioned in the context of the 21st century.
- 7.13 New media have significantly transformed the media landscape so that traditional distinctions between print, broadcast and online news are now dissipating. News is increasingly accessed online through digital platforms such as Facebook, Twitter and Google,²³ publications are permanent, immediate, accessible and may be published and disseminated outside the jurisdiction not just by media outlets, but also by members of the general public who may be unidentifiable.²⁴
- 7.14 These issues are not new. In 1974, the United Kingdom’s Committee on Contempt of Court considered the advent of television and the need for contempt of court laws to adapt to ‘modern conditions’:
- The ambit and power of the press have increased enormously. It is only fair to say that this power is on the whole used responsibly, but the potential dangers to the administration of justice are obvious, and new forms of communication such as television, can make a powerful impact on the public.²⁵
- 7.15 The ‘ambit and power’ of the media in today’s context of online news and social media have not only affected the volume of information that can be published by a wider group of individuals, but have also changed the way news information is accessed and consumed. In turn, the influence of the media on individuals may be of a different nature to when the news was confined to a newspaper headline or television bulletin. These changes not only impact the technical operation of sub judice contempt, but also the court’s ability to enforce the law and protect jurors of the 21st century.²⁶
- 7.16 Conflicting judicial opinion and research about the influence of media publicity on jurors and their decision-making capabilities also raise questions about the necessity of quarantining jurors from extraneous information and whether they can be trusted to make decisions based only on the admissible evidence before them.²⁷
- 7.17 Accordingly, at the heart of this chapter are the questions of whether or not the assumptions on which sub judice contempt rest are still valid, and whether the law is appropriate for, and is capable of adapting to, the modern age.
- 7.18 This chapter begins by considering a number of technical and operational issues with the law of sub judice contempt which have been the subject of extensive review, and some reform, in other jurisdictions.
- 7.19 The larger question of whether the law of sub judice contempt can still operate effectively to ensure a fair trial in the modern media age is then considered. A number of options for reform are then discussed and finally some questions for consideration are set out.

21 *Bell v Stewart* (1920) 28 CLR 419, 425–6 (Knox CJ, Gavan Duffy and Starke JJ); *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 301 (Reid LJ); *Victoria v Australian Building Construction Employees’ and Builders’ Labourers’ Federation* (1982) 152 CLR 25, 58 (Gibbs CJ), 102 (Mason J), 136 (Wilson J).

22 See discussion in The Law Reform Commission, *Contempt* (Report No 35, 1987) 218–19 [377].

23 Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Report* (February 2018) 23; Sora Park et al (eds), *Digital News Report: Australia 2018* (News & Media Research Centre, University of Canberra, 2018) 50; Culture Department for Digital, Media and Sport (UK), *The Cairncross Review: A Sustainable Future for Journalism* (February 2019) 14.

24 For a discussion of the unique characteristics of online publications, see *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; *HM Advocate v Beggs (No 2)* (2001) 4 SLT 139; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52.

25 Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 5.

26 See Marilyn Warren, ‘Open Justice in the Technological Age’ (2014) 40(1) *Monash University Law Review* 45; Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103; Jacqueline Horan, ‘Communicating with Jurors in the Twenty-first Century’ (Pt 29) (2007) *Australian Bar Review* 75; Chief Justice Spigelman, ‘The Internet and the Right to a Fair Trial’ (2005) 29 *Criminal Law Journal* 331; Justice Kirby, ‘Delivering Justice in a Democracy III—the Jury of the Future’ (1998) 17 *Australian Bar Review* 113.

27 *R v Dupas (No 2)* (2005) 12 VR 601, 627 [81] (Nettle JA) citing *R v Glennon* (1992) 173 CLR 592, 614–15 (Brennan J); *Gilbert v R* (2000) 201 CLR 414, 425 [31] (McHugh J); *R v Rich (Ruling No 7)* [2008] VSC 437 [14] (Lasry J). For a summary of the research, see Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012).

Issues with sub judice contempt

The tendency test

7.20 The test for sub judice contempt is set out in the High Court case *Hinch v Attorney-General (Victoria) (Hinch)*:

that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice. The impugned material must exhibit a real and definite tendency to prejudice or embarrass pending proceedings ...²⁸

7.21 The courts have held that the tendency of the publication to prejudice proceeding is assessed at the time of publication alongside a consideration of the nature of the publication and other circumstantial factors.²⁹ These factors include:

- the content of the publication³⁰
- the nature of the proceedings that may be affected³¹
- the profile of the person making the statement or publishing the material³²
- the size of the publication³³ and the audience³⁴
- the stage of the legal proceedings³⁵
- the time between publication and the legal proceedings³⁶
- whether prejudicial material has already been published.³⁷

7.22 It appears that directions given to a jury to ignore media publicity are not considered a relevant consideration when determining the tendency of a publication to prejudice an accused's right to a fair trial. This is despite the 'overwhelming judicial experience' that juries follow such directions. As stated by Justice Lasry in *Yahoo!7*, to take account of directions as disproving the publication's tendency to prejudice would:

necessarily significantly undermine the law's protections of the integrity of the jury process. It remains essential that the media respect the restraints imposed upon them by the law of contempt.³⁸

7.23 It has also been stated that the fact a trial was aborted because of prejudicial media coverage is not a relevant consideration when determining whether that publication is contemptuous. The reason for this is that a judge's consideration of whether or not to abort a trial does not involve hearing from the publisher of the prejudicial publication and the relevant issues are different.³⁹ However, the Victorian Supreme Court has stated that the fact a trial was aborted as a result of the prejudicial article will be considered in relation to the penalty.⁴⁰ For example, in *R v Spectator Staff*, the fact the news article, which included material which had been presented the jury's absence, had led to the discharging of a jury was considered when sentencing the respondents.⁴¹

28 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J).

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

33 *DPP (Vic) v Johnson & Yahoo!7* [2016] VSC 699 [44].

34 *R v Hinch (No 1)* [2013] VSC 520 [95]–[96].

35 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J).

36 *R v Hinch (No 1)* [2013] VSC 520 [94] (Kaye J) citing *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 699 (Samuels JA), 711 (McHugh JA); *R v The Age Co Ltd* [2006] VSC 479 [16] (Cummins J). The delay between the internet publication and trial of accused did not affect the finding of contempt because the publication was about prior convictions, custodial history and about graphic content and so would remain in the public's memory.

37 *R v Hinch (No 1)* [2013] VSC 520 [94] (Kaye J) citing *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 711 (McHugh JA).

38 *DPP (Vic) v Johnson & Yahoo!7* [2016] VSC 699 [36].

39 *R v Spectator Staff* [1999] VSC [107].

40 *Ibid.*

41 Ultimately a stay of proceedings for the remaining charge was allowed with no eventual retrial: *R v Spectator Staff* [1999] VSC 431 [6]–[7], [33].

- 7.24 The tendency test has been formulated by the courts in different ways, with the differing formulations being used interchangeably.⁴² These formulations include that:
- The publication must create a *substantial risk of serious interference*.⁴³
 - The publication must reveal as a matter of *practical reality* a tendency to interfere with the due course of justice in a pending case.⁴⁴
 - The publication's interference with the proceedings is *likely*.⁴⁵
- 7.25 These different formulations have been criticised for being uncertain and creating a broad scope of liability.⁴⁶
- 7.26 In *Hinch* Chief Justice Mason stated that the 'substantial risk' approach provided an appropriate balance between the administration of justice and freedom of expression.⁴⁷
- 7.27 The law reform commissions of New South Wales and Western Australia also considered that the 'substantial risk' test was an appropriate test, being more precise, allowing the media greater certainty about what might constitute sub judice contempt, creating a higher threshold for liability and therefore not excessively infringing on freedom of expression.⁴⁸
- 7.28 The New South Wales Law Reform Commission recommended a statutory formulation of the test comprising two elements:
- 1) that there is a substantial risk jury members or witnesses will become aware of the publication
 - 2) that there is a substantial risk jury members or witnesses will recall the content of the publication at the relevant time.⁴⁹
- 7.29 This approach reflects research indicating that a juror's recall of pre-trial publicity is piecemeal, whereas their recall of in-trial publicity is more prominent and therefore has a greater tendency to prejudice.⁵⁰
- 7.30 As another way to help clarify this area of the law, the Australian,⁵¹ New South Wales,⁵² and Irish⁵³ law reform commissions considered introducing a prescribed list of the types of statement that may be capable of creating a substantial risk of prejudice to a fair trial.
- 7.31 The identified statements reflect the common types of statement found to constitute sub judice contempt at common law. For example:
- statements as to the accused's guilt or innocence⁵⁴
 - prior convictions⁵⁵
 - confessions or admissions by the accused⁵⁶
 - statements about the character of the accused⁵⁷

42 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 68 [4.11].

43 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 27–8 (Mason CJ); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 99 (Mason J).

44 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 133 (Wilson J), 166, 176–7 (Brennan J); *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J), 70 (Toohey J).

45 *Bell v Stewart* (1920) 28 CLR 419, 432 (Isaacs and Rich JJ); *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 248 (Jordan CJ).

46 The Law Reform Commission, *Contempt* (Report No 35, 1987) [288]–[295]; New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) [4.6]–[4.9]. See also *Hinch v A-G (Vic)* (1987) 164 CLR 15, 27 (Mason CJ).

47 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 27–8 (Mason CJ).

48 New South Wales Law Reform Commission, *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.

49 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 64 [4.3].

50 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity—An Empirical Study of Criminal Jury Trials in New South Wales* (Report, February 2001) 200 [504]; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 74 [4.27].

51 The Law Reform Commission, *Contempt* (Report No 35, 1987) 180 [311].

52 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 77–80 [4.40]–[4.45].

53 The Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) 36.

54 *DPP (NSW) v Wran* (1987) 7 NSWLR 616.

55 *R v Hinch (No 1)* [2013] VSC 520; *R v The Herald and Weekly Times Ltd* (2007) VR 248; *A-G (NSW) v Willesee* [1980] 2 NSWLR 143.

56 *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

57 *Hinch v A-G (Vic)* (1987) 164 CLR 15.

- opinions about the quality of the case⁵⁸
- interviews with witnesses⁵⁹
- photographs or video footage of an accused where it is reasonably probable that identification will be an issue at trial.⁶⁰

7.32 However, the New South Wales Law Reform Commission (the NSW Commission) noted that a prescriptive list, even if non-exhaustive, may restrict freedom of speech by identifying certain types of statement and information as prejudicial when such statements may not always have that effect.⁶¹ In addition, the NSW Commission noted that such a list could also preclude some relevant categories, thereby allowing the media to escape liability.⁶² Accordingly, the NSW Commission dismissed this approach on the basis it would be inflexible and would potentially complicate and confuse the law.⁶³

7.33 These concerns are particularly relevant to new media, whereby certain publications may have a greater tendency to interfere with proceedings based on the way in which they are published and disseminated.⁶⁴ As the New Zealand Law Commission (NZ Commission) identified:

the advent of the internet and the consequential durability and potential reach of any publication now pose significant challenges for the Court when applying the “real risk” test. Some internet-based publications and social media posts go viral. Consequently they have much greater potential impact than those with more limited circulation or dissemination.⁶⁵

The definition of ‘publication’

7.34 In order for there to be sub judice contempt, an act of ‘publication’ must occur. The courts have held that the act of publication occurs when the information ‘is made available to the general public’ or to ‘a section of the public which is likely to comprise those having a connection with the case’.⁶⁶

7.35 This type of publication traditionally occurs when information is published by print and broadcast media outlets, but also applies to online publications such as a tweet or blog where there is a sufficiently wide audience.⁶⁷

7.36 Publication can also include actions such as giving a speech or an interview to a journalist, where it is foreseeable that information will be communicated to a wider audience.⁶⁸

7.37 It is unclear whether a social media post communicated to an individual or private group of people would satisfy the definition of publication, as well as whether new forms of media are captured, such as YouTube videos.⁶⁹

58 *Packer v Peacock* (1912) 13 CLR 577.

59 *Ibid.*

60 *Ex parte Auld re Consolidated Press Ltd* (1936) SR (NSW) 594.

61 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 77–80 [4.40]–[4.45].

62 *Ibid* 139 [4.69].

63 *Ibid* 80 [4.45].

64 Rachel Hews and Nicolas Suzor, “‘Scum of the Earth’: An Analysis of Prejudicial Twitter Conversations During the Baden-Clay Murder Trial” (2017) 40(4) *University of New South Wales Law Journal* 1604; Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013).

65 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 38 [2.13].

66 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 ed, 1996) 85. See *Viner v Australian Building Construction Employees’ and Builders Labourers Federation* (1963) 56 FLR 5, 22–3.

67 *R v Hinch (No 1)* [2013] VSC 520 [95]–[96].

68 See *DPP (NSW) v Wran* (1987) 7 NSWLR 616; *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

69 See The (England and Wales) Law Commission’s consideration of these issues in its review of its contempt legislation and the definition of ‘other communication in whatever form’: Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 12 [2.24]. For a discussion of whether hyperlinks are considered a ‘publication’ in the context of defamation law, see also Kim Gould, ‘Hyperlinking and Defamatory Publication: A Question of “Trying to Fit a Square Archaic Peg into the Hexagonal Hole of Modernity”?’ (2012) 36 *Australian Bar Review* 137.

- 7.38 Traditionally, the act of publication of print or broadcast material is taken to occur at the time⁷⁰ and place the material was first made available to the public or a section of the public.⁷¹ By this definition, publication is a single act which occurs only when the material was first made available.⁷²
- 7.39 However, there is now support for the view that the publication of information online is taken to occur for as long as the information is available, regardless of whether or not the material is accessed.⁷³ By this definition, ‘publication’ is a ‘continuing act’ for as long as the material is available.⁷⁴
- 7.40 This view was stated in the 2010 Victorian Court of Appeal case *News Digital Media v Mokbel (Mokbel)* in which the nature of online publications and their potential to prejudice legal proceedings were under consideration.⁷⁵
- 7.41 In this case, the court identified the unique characteristics of online publications in that they are permanent,⁷⁶ lack a specific location,⁷⁷ are still easily accessible by searching once archived,⁷⁸ and can be copied and published on other websites outside Victoria.⁷⁹
- 7.42 The permanence of an online publication means that once published the material continues to be available to a juror or potential juror. Regardless of whether or not a juror or potential juror has accessed it, the court process is exposed to risk.⁸⁰
- 7.43 This definition of ‘publication’ as a continuing act gives rise to two issues for publishers:
- Online publishers could be liable for archived material published before legal proceedings have commenced as well as material published after legal proceedings have concluded if the accused person is charged with another crime or there is an appeal.
 - Online publishers may become liable for material published which is relevant to proceedings in another jurisdiction, a problem that also applies to broadcast or print publications made available in other jurisdictions.
- 7.44 The NSW Commission considered the definition of ‘publication’, and the issue of when ‘publication’ is taken to occur. The NSW Commission, referring to the law as it was in 2003, stated:

It would seem, as a matter of principle, that publication of material is taken to occur at the time of original publication, rather than regarded as a continuing process. Otherwise, the sub judice rule would potentially operate too harshly against publishers ...

Under the current law, every distribution of written or printed material and every broadcast is treated as a separate act of publication occurring at the time of the relevant distribution or broadcast.⁸¹

70 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 372 (Dixon CJ, Fullagar, Kitto and Taylor JJ); *Hinch v A-G (Vic)* (1987) 164 CLR 15, 70 (Toohey J).

71 *Viner v Australian Building Construction Employees’ and Builders Labourers Federation* (1963) 56 FLR 5, 22–3. See also New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 88 [3.15]–[3.16].

72 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 377 [6.160].

73 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 265 [65]. The Court of Appeal distinguished the definition of online publication in the contempt context from the approach taken in defamation law whereby publication occurs when and where the material is accessed: see *Dow Jones v Gutnick* (2002) 210 CLR 575. The definition of online publications as a ‘continuing act’ was adopted from Lord Osborne’s judgment in the Scottish High Court case *HM Advocate v Beggs (No 2)* (2001) 4 SLT 139, 145. The New South Wales Court of Appeal supported the view that online publication is a continuing act, but appeared to also approve the definition in *Gutnick* whereby the information must be accessed to constitute publication: *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52. See also *R v Hinch (No 1)* [2013] VSC 520 [54], where the Victorian Supreme Court of Victoria accepted the definition of online publications as a ‘continuing act’.

74 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 65 [44] (Basten JA).

75 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248: an order requiring specific internet material be taken down from websites was set aside because it lacked necessity given the material was not current and was unlikely to be accessed by potential jurors. The part of the order restricting the publications from putting up future material about the accused was also set aside because the court should instead rely on the media to not publish material that would be in contempt. The issues of necessity and the futility of take-down orders are considered in Chapter 10.

76 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 268 [76] (Warren CJ and Byrne AJA).

77 *Ibid* [77] (Warren CJ and Byrne AJA).

78 *Ibid* [78]–[83] (Warren CJ and Byrne AJA).

79 *Ibid* 270 [84] (Warren CJ and Byrne AJA).

80 *Ibid* 265 [65] (Warren CJ and Byrne AJA).

81 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 88 [3.15]–[3.16].

- 7.45 In light of the further development of online news and social media since the NSW Commission's report, it is arguable that a change of view is needed to accommodate the permanent and accessible nature of online archived news, as reflected in *Mokbel*.
- 7.46 In this context, the Law Commission of England and Wales, in its 2012 review of sub judge contempt and its application to internet publications, considered the definition of online publications as a continuing act, noting the significant burden this placed on the media to monitor its contents.⁸² However, the Commission recommended that the existing definition be maintained, but that liability should only arise in circumstances where the publisher had been put on notice by the Attorney General.⁸³
- 7.47 The Law Commission of England and Wales also considered whether a statutory definition of 'place of publication' was needed and whether the reach of the law of sub judge contempt should be wide enough to capture the 'mischief' of material published abroad which causes serious prejudice when it is accessed within the United Kingdom.⁸⁴
- 7.48 The Law Commission of England and Wales did not form a conclusion on this issue, but noted instead the complexity of these issues:
- At its simplest, criminal content could be created in one country, saved on servers in a second country, with accessibility in both the first and second countries and numerous other third countries as well.⁸⁵
- 7.49 Even without the advent of new media, the complexity of this issue has long been recognised by the courts.
- 7.50 In 1985 in the New South Wales case *Registrar of the Court of Appeal v Willesee*, Justice Kirby also acknowledged the problem of jurisdictional reach and the burden sub judge contempt creates for publishers:
- In a large country, divided into many jurisdictions, it is impossible to expect, and unreasonable to demand, that newspapers, broadcasters or other alleged contemnors should be aware of every trial, civil and criminal, being conducted throughout the country. To impose upon them strict liability for contempt of court for any chance utterance, either general or specific, which might prejudice the fair trial of a person before the courts would be oppressive and unreasonable.⁸⁶
- 7.51 Similarly, in 2003 the NSW Commission recognised that it would be 'difficult or impossible' to prosecute a publisher who carries out their business outside of the relevant state where proceedings are on foot.⁸⁷
- 7.52 However, the reach and potential impact today of online publications published outside Victoria may be more significant than in the past. A recent example is the media coverage of the criminal trial of George Pell which, despite a suppression order, was widely covered by the international media, and so was also accessible online from within Victoria. While such global media interest is rare for criminal trials in Victoria, the case raises questions about the enforceability of the law of sub judge contempt where a court's jurisdictional reach is limited, as well as who should be held liable.⁸⁸
- 7.53 Liability of internet intermediaries and the challenges of enforcement are considered in Chapter 10.

82 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 31 [2.101].

83 Ibid 42 [2.147].

84 Ibid 60 [2.209].

85 Ibid 59 [2.207]. See also: UK Government, *Online Harms White Paper* (Web Page, April 2019) <www.gov.uk/government/consultations/online-harms-white-paper>.

86 *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 652.

87 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 49–50 [3.11].

88 The DPP issued a motion against local media outlets for 'aiding and abetting' international media outlets. Adam Cooper, 'DPP Moves to Jail Editors, Journalists', *The Age* (Melbourne, 27 March 2019); Richard Ackland, 'The Media and Contempt of Court' *The Saturday Paper* (Web Page, 6 April 2019) <www.thesaturdaypaper.com.au/opinion/topic/2019/04/06/the-media-and-contempt-court/15544692007951>. The UK Government has discussed the need for an 'international approach' to harmful and illegal content online. See UK Government, *Online Harms White Paper* (Web Page, April 2019) 66–7 <www.gov.uk/government/consultations/online-harms-white-paper>.

The definition of 'pending'

- 7.54 Sub judice contempt only operates when legal proceedings are before the courts. This time period is often referred to as 'pending'.⁸⁹
- 7.55 Criminal proceedings commence when a court has become seised of the case and the criminal law has been 'set in motion'.⁹⁰ The courts have held that criminal proceedings have commenced when:
- a warrant has been issued⁹¹
 - a person has been arrested (with or without a warrant)⁹² or
 - a person has been arrested and charged.⁹³
- 7.56 The issue of whether sub judice operates when proceedings are 'imminent', for example, during a police manhunt,⁹⁴ has been considered both in case law and other law reform reviews.⁹⁵ The courts have rejected this as a starting point because it is imprecise and uncertain.⁹⁶
- 7.57 Despite the statutory definition of when proceedings are 'active' in the United Kingdom's *Contempt of Court Act 1981*, the media reported to the Law Commission of England and Wales that it was still difficult to determine when the proceedings were active. Reasons for this included the lack of consistent communication from the police about releasing the names of arrestees or that an arrestee may be on bail for months before charges are brought and a trial commences.⁹⁷
- 7.58 The effect of this uncertainty is that journalists could be deterred from reporting on police activities.⁹⁸
- 7.59 Proceedings continue to be pending until all avenues of appeal have been exhausted or an appeal judgment has been handed down.⁹⁹
- 7.60 This definition of when proceedings have concluded also gives rise to uncertainty, for example about whether or not the law operates to prevent publicity from impacting a judicial officer who may be delivering the sentence after the verdict or presiding over an appeal, well after any jury involvement has ceased.
- 7.61 In *R v The Herald & Weekly Times* in 2006, the Victorian Supreme Court considered whether an editorial published after a plea and before sentencing was sub judice contempt. The article included negative depictions of the convicted man and his character and posed the question as to whether he should be 'locked away with no parole'. Justice Harper, citing the Court of Appeal,¹⁰⁰ held that the editorial did not give rise to a 'serious risk that the court would appear by reason of this editorial to be subject to outside influence'.¹⁰¹
- 7.62 In 1987 the Australian Law Reform Commission (ALRC) noted that on the one hand judicial determination of a sentence may be subject to preconceptions and bias, thereby justifying the need for sub judice contempt to continue to operate. On the other hand, if media comment on sentencing were restricted, that would 'make significant inroads on freedom to discuss a topic of vital public interest'.¹⁰²

89 *James v Robinson* (1963) 109 CLR 593, 607 (Kitto, Taylor, Menzies and Owen JJ).

90 Ibid 615–16 (Windeyer J). See also *R v The Herald and Weekly Times Ltd* (2007) VR 248, 271: Smith J considered whether the relevant proceedings were 'pending', although the case was dismissed on other grounds.

91 *Packer v Peacock* (1912) 13 CLR 577, 586 (Griffith CJ); *James v Robinson* (1963) 109 CLR 593, 615 (Windeyer J).

92 *James v Robinson* (1963) 109 CLR 593.

93 *Packer v Peacock* (1912) 13 CLR 577, 586 (Griffith CJ); A-G (NSW) v *TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 374–5.

94 *James v Robinson* (1963) 109 CLR 593, 605 (Kitto, Taylor, Menzies and Owen JJ).

95 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 57.

96 A-G (NSW) v *TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 376; *James v Robinson* (1963) 109 CLR 593, 607. See New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003).

97 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Consultation Paper, 2012) 8 [2.15].

98 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003).

99 *James v Robinson* (1963) 109 CLR 593, 615 (Windeyer J).

100 *The Herald & Weekly Times Ltd v A-G (Vic)* [2001] VSCA 152.

101 *R v The Herald & Weekly Times Pty Ltd* [2006] VSC 94 [30].

102 The Law Reform Commission, *Contempt* (Report No 35, 1987) 222 [384].

- 7.63 The Law Commission of England and Wales more recently noted similar concerns about the potential influence media reporting could have on a sentencing judge. However, the Commission also found that there was evidence of many reputable publishers treating the final verdict as the end of the ‘active’ period and questioned whether there was a need to bring the law into line with practice.¹⁰³
- 7.64 Further issues with the point at which proceedings are deemed to conclude were identified by the Law Reform Commission of Western Australia (WA Commission):
- The chance of appeal is relatively rare.¹⁰⁴
 - The ability to extend the time limit for the lodging of an appeal makes it difficult to determine whether or not all appeal options have been exhausted.¹⁰⁵
- 7.65 However, the NSW Commission also noted the influence that media publicity between the verdict and sentencing could have on parties, such as witnesses called into sentencing proceedings or the accused who may be deciding whether or not to appeal.¹⁰⁶
- 7.66 Accordingly, both the WA and NSW Commissions recommended that proceedings should be regarded as ending upon a conviction or acquittal at first instance, and beginning again if a re-trial is ordered.¹⁰⁷ The NSW Commission added, however, that sub judice contempt should operate post-verdict but only to the extent necessary to protect parties (such as witnesses) from prejudicial publicity.¹⁰⁸

The strict liability standard

- 7.67 Liability for sub judice contempt falls on any person found to be ‘responsible’ for the contents, production, distribution or broadcasting of a publication regardless of their knowledge of the material.¹⁰⁹
- 7.68 No intention to interfere with the administration of justice is required.¹¹⁰ However, the court may take culpability into account when deciding to exercise its summary jurisdiction and when considering penalty.¹¹¹
- 7.69 Persons who may be responsible for a print publication include
- editors¹¹²
 - proprietors¹¹³
 - reporters¹¹⁴
 - printers¹¹⁵
 - distributors.¹¹⁶
- 7.70 Persons who may be responsible for a broadcast publication include
- television or radio licensees¹¹⁷
 - production companies¹¹⁸
 - executive producers¹¹⁹

103 Law Commission (England and Wales), *Contempt of Court* (Consultation Paper, 2012) 10 [2.24].

104 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 32.

105 Ibid.

106 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 172–3 [7.63]–[7.68].

107 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 33; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 175.

108 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 177.

109 *A-G (NSW) v Willesee* [1980] 2 NSWLR 143, 155–7.

110 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371.

111 *R v The Herald & Weekly Times Pty Ltd* [2008] VSC 251 [16] citing *R v David Syme & Co Ltd* [1982] VR 173, 178; *R v Griffiths, Ex parte A-G (UK)* [1957] 2 All ER 379, 383.

112 *R v The Age Co Ltd* [2006] VSC 479; *R v Spectator Staff* [1999] VSC 107.

113 *James v Robinson* 109 CLR 593; *R v Spectator Staff* [1999] VSC 107.

114 *DPP (Vic) v Johnson & Yahoo!7* [2016] VSC 699; *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45; *R v Spectator Staff* [1999] VSC 107.

115 *R v David Syme & Co Ltd* [1982] VR 173.

116 *R v Collins* (1984) 15 A Crim R 148; *R v Griffiths* [1957] 2 All ER 379.

117 *A-G (NSW) v Willesee* [1980] 2 NSWLR 143.

118 Ibid.

119 *R v Pacini* [1956] VLR 544.

- editors¹²⁰
 - television stations.¹²¹
- 7.71 In the small number of cases that have come before the courts involving online publications, media companies,¹²² journalists,¹²³ website editors,¹²⁴ bloggers¹²⁵ or social media users have been held responsible.¹²⁶
- 7.72 Given the criminal nature of contempt and the ‘extraordinary procedures and punishments available’, it has been suggested that strict liability whereby no intention to prejudice is required, is inconsistent with the approach taken in other criminal offences¹²⁷ and tilts the balance away from freedom of expression.¹²⁸
- 7.73 Accordingly, a number of alternatives to the current strict liability approach have been proposed.¹²⁹ These include:
- introducing an actual intention or recklessness element to the test for liability¹³⁰
 - introducing a requirement to demonstrate negligence by the defendant¹³¹
 - creating a defence or defences to cover a situation where there is an absence of fault and reasonable care has been taken.¹³²
- 7.74 However, the purpose of sub judice contempt is to protect the administration of justice and ensure a fair trial. Consequently, there may be justifications for the retention of the strict liability approach. In addition, such an approach helps to give organisations some incentive to set up systems to prevent prejudicial publication¹³³ and avoids some of the difficulty of applying the requirement of an intention to a corporation.¹³⁴
- 7.75 The extent to which sub judice contempt liability applies, and can apply, to those involved in online publications remains uncertain.
- 7.76 The United Kingdom Attorney-General’s Office noted in its 2019 report on the impact of social media, the uncertainty of liability around social media posts. In the scenario where members of the public post contemptuous comments below a media organisation’s news article on a social media site, is the media organisation or the digital platform responsible for the post?¹³⁵
- 7.77 The liability of internet intermediaries who often do not have knowledge of the content being published, or who publish outside the jurisdiction, is considered in Chapter 10.

120 *R v Australian Broadcasting Corporation* [1983] Tas R 161.

121 *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368.

122 *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45.

123 *Ibid.*

124 *R v The Age Co Ltd* [2006] VSC 479.

125 *R v Hinch (No 1)* [2013] VSC 520.

126 *Ibid.*

127 President Kirby noted that the requirement at criminal law that an intention be shown, should also apply to sub judice contempt: *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650, 652–3.

128 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 172 [5.20].

129 *Ibid.* 174 [5.29].

130 This approach was rejected by the New South Wales, Australian and Ireland law reform commissions, as it imposed too great a burden on the prosecution to prove the intention or recklessness: New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 102 [5.11]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 144 at [260]; Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) [6.10].

131 Law Reform Commission of Canada, *Contempt of Court* (Report No 17, 1982) 55; Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) [6.10].

132 The Law Reform Commission, *Contempt* (Report No 35, 1987) 145 [262]; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 181–2; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 54 [2.93]; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 37–41. The failure of a media organisation’s systems has been considered a factor in sentencing: see *R v Herald & Weekly Times Pty Ltd* [2008] VSC 251, [41]; *DPP (Vic) v Yahoo!7* [2017] VSC 45 [28]; *R v Spectator Staff* [1999] VSC 107 [42].

133 The Law Reform Commission, *Contempt* (Report No 35, 1987) 142 [259]; New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 173 [5.22].

134 The Law Reform Commission, *Contempt* (Report No 35, 1987) 143 [2.59]; New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 173 [5.23].

135 Attorney-General’s Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019) 8–9 [2.18].

The public interest principle

- 7.78 Although a publication may be found to have a tendency to prejudice legal proceedings, a contempt will not arise if the publication was a fair and accurate report of proceedings¹³⁶ or the publication relates to a matter of public interest.¹³⁷ This part considers the public interest principle, the formulation and operation of which is uncertain.
- 7.79 The principle comes from the 1937 New South Wales case *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman* where it was stated:
- ... if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations.¹³⁸
- 7.80 The High Court in *Hinch* held that the principle was to be applied by a balancing approach which considers whether the administration of justice is outweighed by the public's interest in the free discussion of public affairs.¹³⁹ Little guidance exists, however, as to what matters of public discussion would outweigh the administration of justice but for a 'major constitutional crisis' or 'imminent threat of nuclear disaster'.¹⁴⁰
- 7.81 The balancing approach has been recognised as expanding the scope of the defence to include publications which deal specifically with legal proceedings, rather than just those publications in which the discussion of the legal proceedings arises as an 'incidental but not intended by-product'.¹⁴¹
- 7.82 Despite this expansion, it is unclear whether the public interest principle applies to publications where the 'pith and substance'¹⁴² of the report goes to the guilt or innocence of the accused.¹⁴³ To date, the courts have considered it unlikely that the principle would apply in these circumstances.¹⁴⁴
- 7.83 The effect of this uncertainty around the scope and application of the principle is that publishers may err on the side of caution and not publish material even if the subject is of significant public interest. Alternatively, some other publishers may 'dress up' the material as being in the public interest, as a means of discussing specific legal proceedings.¹⁴⁵
- 7.84 Law reform commissions have taken a range of approaches to the public interest principle in an attempt to clarify the law and to balance the relative importance of a fair trial and freedom of expression:
- The ALRC recommended a narrower construction of the public interest principle whereby the publisher should prove that the publication was an 'integral part of the discussion and that the discussion would suffer significantly if the publication were delayed until the risk of prejudice had ceased'.¹⁴⁶

136 A report is fair and accurate if it is 'one which a person of ordinary intelligence using reasonable care might reasonably regard as giving a fair summary of the proceedings': *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 259 (Jordan CJ).

137 *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242, 249 (Jordan CJ).

138 *Ibid.*

139 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 22–8 (Mason CJ), 37–45 (Wilson J), 46–53 (Deane J), 68–9 (Toohey J), 83–7 (Gaudron J); *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 56 (Gibbs CJ), 74–5 (Stephen J), 95–8 (Mason J), 133–7 (Wilson J), 175 (Brennan J).

140 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 26 (Mason CJ).

141 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 187 [8.8].

142 *A-G (NSW) v X* (2000) 49 NSWLR 653, 673 [100].

143 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 187 [8.10].

144 The Victorian Supreme Court stated that where the central matter of the publication went to the guilt of the accused, it is unlikely the public's interest in the administration of justice and a fair trial will be outweighed by any other interest: *R v Hinch (No 1)* [2013] VSC 520 [120]. See earlier cases: *DPP (NSW) v Wran* (1987) 7 NSWLR 616, 629; *Hinch v A-G (Vic)* (1987) 164 CLR 15, 88 (Gaudron J).

145 Felicity Robinson, '“No, No! Sentence First—Verdict Afterwards”: Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*' (2001) 23 *Sydney Law Review* 261, 265; Sally Walker, 'Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared' (1991) 40 *International and Comparative Law Quarterly* 584, 602.

146 The Law Reform Commission, *Contempt* (Report No 35, 1987) 195 [332].

- The NSW Commission proposed a legislative provision mirroring the balancing approach in *Hinch*, with more guidance on how the balancing of principles should be carried out. The NSW Commission also recommended that the statutory test set out how the public interest in the administration of justice and a fair trial might be harmed, which it defined as ‘the creation of a risk of influence on those involved in a pending legal proceeding’.¹⁴⁷
- In 1994 the Law Reform Commission of Ireland considered that a public interest principle should not apply because a fair trial should always be prioritised. Instead, the Commission recommended that there should be a defence of ‘necessity to publish’ which would allow the court to have discretion as to whether certain publications were in the public interest and could be protected.¹⁴⁸
- In 2016 the Law Reform Commission of Ireland recognised that there may be circumstances where publishers need to bring issues to the attention of the public and should be able to do so even when the publication has the potential to prejudice legal proceedings.¹⁴⁹

The summary procedure for sub judice contempt

- 7.85 As discussed in Chapter 2, common law contempt proceedings in the Supreme or County Court are commenced by way of summons or originating motion under Order 75 of the *Supreme Court (General Civil Procedure) Rules 2015* or the *County Court Civil Procedure Rules 2018* (the General Civil Procedure Rules). Contempt proceedings are heard summarily by a judge alone. The proceedings may be commenced by the Attorney-General, the DPP or the Court itself may direct the Prothonotary in the Supreme Court or the Registrar in the County Court to initiate proceedings.¹⁵⁰
- 7.86 Given the harsh penalties that can be imposed for sub judice contempt, the appropriateness of and necessity for the summary procedure for sub judice contempt prosecutions have been questioned.
- 7.87 As stated by Chief Justice Dixon in the High Court case *John Fairfax & Sons v McRae*, the summary procedure is only used in exceptional cases:
- this summary jurisdiction has always been regarded as one which is to be exercised with great caution, and, in this particular class of case, to be exercised only if it is made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case.¹⁵¹
- 7.88 The use of the summary procedure was justified in the New South Wales case *Killen v Lane*:
- The departure from ordinary safeguards necessarily involved in such cases, by the court being both accuser and adjudicator, has been regarded as only justified, because of the overriding public interest in the safeguarding of the administration of justice from interference by swift deterrent action by the court itself.¹⁵²
- 7.89 In that case the court also stated that if there were to be procedural requirements, such as committal proceedings, they would ‘bog down’ the court and interfere with the urgent need for the court to establish its authority and conduct a trial without interference.¹⁵³
- 7.90 In considering the appropriateness of the summary procedure, law reform commissions have noted the following in support of retaining the procedure:

147 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 199. This proposal was made following *A-G (NSW) v X* (2000) 49 NSWLR 653, where the majority supported the balancing approach and held that a publication could still be in the public interest even though it went directly to the guilt of the accused.

148 Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) 62.

149 Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper, 2016) 62 [5.33]. This was in light of a decision which required sub judice contempt to comply with the *European Charter of Human Rights* Article 10 which provides for freedom of expression: *Sunday Times v UK* (1979) 2 EHRR 245.

150 *Supreme Court (General Civil Procedure Rules) 2015* (Vic) rr 75.06, 75.07; *County Court Civil Procedure Rules 2018* (Vic) rr 75.06, 75.07.

151 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 370.

152 *Killen v Lane* [1983] 1 NSWLR 171, 178.

153 *Ibid.*

- Contempt by publication requires an immediate response and therefore summary trial.¹⁵⁴
- The unique nature of sub judice contempt, which ‘strikes directly at the administration of justice’, requires that the offence be distinguished from other criminal offences and the court have the power to bring proceedings summarily.¹⁵⁵
- The elements of the offence have acquired technical meanings and should be considered by the court and not a jury. The balancing of principles also requires an understanding of legal notions which are better dealt with by the courts.¹⁵⁶
- Juries are expensive, can return incorrect or risky verdicts and their decisions would only add to the uncertainty of the law.¹⁵⁷
- The facts in a sub judice prosecution, such as ‘publication’ or the existence of pending proceedings, are often uncontested and previous case law will have determined what type of material is recognised as sub judice contempt. Therefore the role of the court is confined to determining whether punishment is necessary and what that punishment should be.¹⁵⁸
- Summary procedure has been used by the courts for such a long time that it is now customary among the legal profession and gives rise to few practical difficulties.¹⁵⁹

7.91 However, law reform commissions have also stated the following arguments against the summary procedure:

- Although immediate proceedings may be necessary where a contempt has been committed in the face of the court, contempt by publication proceedings in some jurisdictions are often adjourned and heard at the end of the related legal proceedings.¹⁶⁰
- There may be a need for a speedy response to a contempt, but not a speedy trial. Once the relevant authorities have instituted proceedings for contempt to avoid a further publication, there is no reason why the subsequent trial should not be dealt with like any other serious offence.¹⁶¹
- If contempt proceedings are heard immediately, those proceedings could add to the harm already caused by the original publication.¹⁶²
- The facts and issues in sub judice contempt proceedings would be better dealt with by a jury.¹⁶³ The question of whether there was a substantial risk that the publication would become known to jurors, may be appropriately dealt with by a jury.¹⁶⁴ Other key issues such as intent, knowledge and reasonable care are traditionally better dealt with by a jury.¹⁶⁵

154 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 45.
 155 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 300 [12.70]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 278 [474].
 156 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 300–301 [12.71]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 277 [474].
 157 New South Wales Law Reform Commission, *Contempt by Publication* (Report 100, 2003) 301 [12.72]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 277–8 [474].
 158 The Law Reform Commission, *Contempt* (Report No 35, 1987) 277 [474].
 159 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 301 [12.73]. See also The Law Reform Commission, *Contempt* (Report No 35, 1987) 277 [474].
 160 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 297 [12.62]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 267 [437].
 161 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 45.
 162 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 297 [12.62].
 163 Ibid 299 [12.66]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 276 [473].
 164 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 45.
 165 The Law Reform Commission, *Contempt* (Report No 35, 1987) 277 [473].

Penalties for sub judice contempt

- 7.92 The fundamental aim for punishment of sub judice contempt was stated by Justice Dixon in *Yahoo!7*:
- To uphold and preserve the undisturbed and orderly administration of justice in the courts according to law, in this case the right of the accused persons in criminal trials before an impartial jury. The principal sentencing considerations are to effect specific and general deterrence, and denunciation.¹⁶⁶
- 7.93 An individual can be fined or committed to prison or both¹⁶⁷ and a corporation can be fined or sequestered or both.¹⁶⁸ There are no upper limits to a fine or imprisonment.¹⁶⁹ The court may also impose a good behaviour bond¹⁷⁰ and has the discretion not to record a conviction.¹⁷¹
- 7.94 The fact that penalties for contempt are ‘at large’¹⁷² has a unique impact in the context of sub judice contempt. This was stated by the WA Commission:
- In practice, it means that the media and their employees have no way of measuring their exposure when making decisions that require a balancing of the relevant interests. This might have a “chilling effect” as those making the decisions err on the side of caution, and too much information is kept from the public. Not surprisingly, the introduction of maximum penalties is widely regarded as the most urgent reform needed to the law of contempt by publication.¹⁷³
- 7.95 The ALRC noted that unlimited penalties provided a strong deterrent effect and prevented media organisations from being able to ‘indulge in a “cost-benefit exercise”, measuring the likely fine to be imposed if they are prosecuted for contempt against the advantages of increasing their sales or ratings’.¹⁷⁴
- 7.96 The ALRC also considered the need for the court to consider the financial resources of the contemnor and have the flexibility to set a fine accordingly.¹⁷⁵
- 7.97 Regardless, the ALRC recommended upper limits be imposed. The NSW Commission and WA Commission also recommended upper limits be set.¹⁷⁶
- 7.98 Imprisonment has been considered to be a harsh penalty, particularly when there may be no fault on the part of the contemnor,¹⁷⁷ and the sentence is unlimited.¹⁷⁸ In Victoria, this penalty has only been imposed once for sub judice contempt.¹⁷⁹ The potential risk of imprisonment still stands, however, and may be imposed in an appropriate case.¹⁸⁰
- 7.99 Reasons for retaining imprisonment as a penalty option include:
- Imprisonment allows for the consideration that a fine is usually paid by the employing corporation which undermines the deterrent effect of the penalty.¹⁸¹

166 *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45 [6].

167 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r. 75.11 (1).

168 *Ibid* r. 75.11 (2).

169 *Smith v The Queen* (1991) 25 NSWLR 1, 15.

170 *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45.

171 *R v The Herald & Weekly Times Pty Ltd* [2008] VSC 251.

172 *Smith v The Queen* (1991) 25 NSWLR 1, 15; *Grocon Constructors (Victoria) Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) IR 288.

173 Law Reform Commission of Western Australia, *Contempt by Publication* (Discussion Paper, March 2002) (ii).

174 The Law Reform Commission, *Contempt* (Report No 35, 1987) 283 [482].

175 *Ibid*.

176 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003); New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003).

177 The Law Reform Commission, *Contempt* (Report No 35, 1987) 481 [282].

178 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 50.

179 Derryn Hinch was sentenced to six weeks imprisonment which was reduced to 28 days by the Full Court of the Supreme Court of Victoria. The seriousness of Hinch’s conduct in continuing to broadcast prejudicial information about the accused Glennon despite being warned not to and his experience as a journalist were said to justify the custodial sentence: *Hinch v A-G (Vic)* [1987] VR 721, 749–50.

180 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 49.

181 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000), 425–6 [13.34].

- Imprisonment may have a residual role in being available for journalists who had an intention to interfere with the administration of justice or with reckless indifference.¹⁸²
- 7.100 The ALRC and the NSW and WA Commissions recommended that imprisonment remain a sentencing option but an upper limit should be set to bring the offence into line with other criminal offences which are subject to sentencing restrictions.¹⁸³

Sub judice contempt and the fair trial

- 7.101 The assumptions on which sub judice contempt is founded are that:
- Prejudicial publicity is capable of influencing a juror's impartiality despite directions from the judge.¹⁸⁴
 - The mass media are responsible for prejudicial publicity, the flow of that information can be controlled and jurors can be protected.¹⁸⁵
- 7.102 The validity of these assumptions is being challenged by the impact of the new media landscape and the changes in how information is accessed and consumed. In turn, this brings into question the adaptability and necessity of sub judice contempt, or at least, the way it currently operates. These issues will be discussed below.

The influence on jurors

- 7.103 The law of sub judice contempt operates as a preventative means of shielding jurors from publicity that is irrelevant or may affect their impartiality.¹⁸⁶
- 7.104 However, modern courts are rejecting the assumption that jurors are 'exceptionally fragile and prone to prejudice'.¹⁸⁷ Instead, the courts assume that juries can follow judicial directions and make decisions based on the evidence presented and tested in court, even if they may have been exposed to irrelevant or prejudicial material.¹⁸⁸
- 7.105 In this part, the judicial opinions contesting this view, the available evidence and the way both of these inform the operation of sub judice contempt will be discussed.

The robustness of juries

- 7.106 There are contradictory and inconsistent views among the judiciary and in research about jurors' decision-making and comprehension abilities and hence their robustness.
- 7.107 As stated above, there is a strong view from the judiciary that jurors are competent decision makers. Some judicial officers have observed that the continued existence of the jury system depends upon the faith put in juries to make decisions based on the evidence.¹⁸⁹ To hold otherwise would give rise to serious questions about whether the community's participation through the jury system could continue.¹⁹⁰

182 The Law Reform Commission, *Contempt* (Report No 35, 1987) 282 [481].

183 Ibid 282–3 [482].

184 Felicity Robinson, "'No, No! Sentence First—Verdict Afterwards': Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*" (2001) 23 *Sydney Law Review* 261, 263; Zak Rich, 'The Past and Future of Sub Judice Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States' (2010) 15 *Media and Arts Law Review* 362; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103; 108–9; Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45(1) *The American Journal of Comparative Law* 109, 139; The Law Reform Commission, *Contempt* (Report No 35, 1987) 159–60 [280].

185 Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45(1) *The American Journal of Comparative Law* 109, 142; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103.

186 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 174.

187 *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 366 [103] (Spigelman CJ, Handley JA and Campbell AJA agreeing). See also *Hinch v A-G (Vic)* (1987) 164 CLR 15, 74 (Toohey J).

188 See, eg, *R v Glennon* (1992) 173 CLR 592, 603 (Mason CJ and Toohey J); *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68, 84 [54]; *Yuill v R* (1993) 69 A Crim R 450, 453–4; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, 366 [103] (Spigelman CJ, Handley JA, Campbell AJA agreeing).

189 *R v Dupas (No 2)* (2005) 12 VR 601, 627 [81] (Nettle JA) citing *R v Glennon* (1992) 173 CLR 592, 614–5 (Brennan J); *Gilbert v R* (2000) 201 CLR 414, 425 [31] (McHugh J).

190 Frank Vincent, *Open Courts Act Review* (2017) 123 [486] <<https://engage.vic.gov.au/open-courts-act-review>>.

- 7.108 The shift in the way the courts have managed juries based on these changing views and the reality of quarantining juries in today's media age was described by the Honourable Frank Vincent in his review of the *Open Courts Act 2013* (Vic):
- To reduce the risk of miscarriages of justice arising from this perceived unreliability of juries, endeavours have been made over the years to quarantine certain kinds of information from them. Until relatively recently, an attempt to avoid their exposure to possible external influences, at least during the trial itself, was made through the sequestering of juries. This no longer occurs and they are instructed not to undertake any internet or social media searches themselves or to discuss the case with anyone outside the jury room. A considerable level of claimed trust is reposed in them in this respect. The extent to which jurors obey such instructions is difficult to establish. However, the inference can be reasonably drawn that for some there is possibly little more likely to produce the opposite result than to inform them that there may be potentially probative information that, for some usually unexplained reason, is to be denied to them. It would also be naive to assume that discussion with families and friends who are not bound by any such restrictions does not occur, even if the jurors have been living in an information vacuum themselves.¹⁹¹
- 7.109 Others have queried the foundations of the view that juries can be trusted. Justice Lasry of the Supreme Court of Victoria stated that judicial assumptions that jurors are faithful to their oaths are 'often based more in hope than any identifiable objective evidence', describing his own experience as 'mixed'.¹⁹²
- 7.110 Further, while there may be faith in juries, it has been emphasised that the role of the courts in mitigating the exposure of jurors to prejudicial material should not be abandoned.¹⁹³
- 7.111 Justice Lasry, in *Yahoo!7*, also noted that many of the authorities that state juries are reliable and able to follow directions are concerned with publicity before the trial and before jurors are empanelled, which can be expressly addressed and considered when giving directions. Justice Lasry stated:
- That circumstance is materially different from publication after empanelment while the trial is running.¹⁹⁴
- 7.112 As summarised by Jacqueline Horan, much of the research about juror comprehension shows that jurors themselves believe they comprehend contemporary trials,¹⁹⁵ but the ability to provide empirical evidence proving this is limited.¹⁹⁶ On the other hand, there have been studies that demonstrate that jurors, to an extent, can misunderstand the law as explained by judges.¹⁹⁷
- 7.113 Some studies have also cast some doubt on the ability of jurors to understand jury directions.¹⁹⁸ However, research has also indicated that despite this, these misunderstandings do not always lead to widespread unfair decisions due to a variety of other safeguards such as the collective decision-making process.¹⁹⁹
- 7.114 A 2016 study into the likelihood of unfair prejudice towards an accused in joint child sexual

191 Ibid 122–3 [485].

192 *R v Rich (Ruling No 7)* [2008] VSC 437 [14] (Lasry J).

193 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 265 [73].

194 *DPP (Vic) v Johnson & Yahoo!7* [2016] VSC 699 [36].

195 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 71. Horan summarises some of the following studies: Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, United Kingdom, 2010); James Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling Williams (eds), *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005).

196 Comprehension testing can be limited by the number of factors affecting the process. Legal restrictions around the disclosure of jury deliberations also make this kind of research difficult: Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 71.

197 Ibid. See James Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer & Kipling Williams (eds), *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005); Law Commission (New Zealand), *Juries in Criminal Trials*, Report 69 (2001); Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, United Kingdom, 2010).

198 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 73. For a summary of research on jury instructions in the context of preventing impermissible use of different types of evidence, see Jane Goodman-Delahunty, Annie Cossins & Natalie Martschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016) 28, 63–4; see also Law Commission (New Zealand), *Juries in Criminal Trials*, Report 69 (2001); Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, United Kingdom, 2010).

199 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 73. See Law Commission (New Zealand), *Juries in Criminal Trials Part Two—A Summary of the Research Findings*, Preliminary Paper (1999) 26, 55; Law Commission (New Zealand), *Juries in Criminal Trials*, Report 69 (2001) 146.

abuse trials significantly challenged the assumption that jurors are ‘fragile and prone to prejudice’. The study, involving 90 mock child-sex trials, found that no jurors carried out impermissible reasoning in a joint trial, despite being exposed to evidence relating to other victims, accused persons or ‘tendency’ evidence (evidence about similar assaults by the accused, but uncharged).²⁰⁰

- 7.115 Arguably, this type of exposure is analogous to external media publicity, and although the above-mentioned types of evidence are distinct from publicity in that they can be predicted and addressed directly by the judicial officer through directions, the research does provide support for the view that juries are robust and competent in their decision-making abilities.

Types of information more likely to prejudice jurors

- 7.116 Arguably, the operation of the rules of evidence themselves, which ensure a case is decided beyond reasonable doubt based on the material before the court, demonstrate an ongoing need for sub judge contempt.

- 7.117 That is, sub judge contempt reinforces the rules of evidence by preventing jurors from being exposed to information which has not been tested by the parties in court.²⁰¹ Similarly, the NSW Commission stated:

what the sub judge rules seek to do is filter out the most damaging of prejudicial effects so that views formed prior to trial, or from extrinsic sources during trial, are not held so strongly that they cannot be displaced by the evidence which is presented and tested in the courtroom, as well as by judicial directions and instructions on the law, and arguments and submissions by counsel on that evidence.²⁰²

- 7.118 Accordingly, the key question is whether there are types of information and preconceptions so prejudicial that they should not be tolerated and therefore need to be restricted by the law of sub judge contempt.

- 7.119 The research indicates that this depends on the timing, detail and nature of the publication and also the amount of coverage. For example:

- Research conducted in the 1990s in New South Wales and New Zealand found that jurors were less likely to be influenced by the specific details in pre-trial publicity than had been originally thought.²⁰³
- Juror prejudice, for example with regard to terrorism, can affect the juror’s verdict, as shown in an Australian study.²⁰⁴ Horan noted that the prejudice depends on the extent of the media coverage.²⁰⁵ Often it is not specific publications which contribute to this prejudice, but generic media coverage about the issue, such as terrorism, that can cumulatively impact a potential juror.

200 Jane Goodman-Delahunty, Annie Cossins & Natalie Martschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016). See also Joanne McCarthy, ‘Justice Peter McClellan Says Study Raises Questions about Rules on Child Sex Trials’, *The Newcastle Herald* (Web Page, 25 May 2016) <www.theherald.com.au/story/3928516/worlds-largest-jury-behaviour-study-surprises/>.

201 The Law Reform Commission, *Contempt* (Report No 35, 1987) 161–2 [283].

202 New South Wales Law Reform Commission, *Contempt by Publication*, (Discussion Paper, 2000) 44 [2.35].

203 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity—An Empirical Study of Criminal Jury Trials in New South Wales* (February 2001) 69–73; Law Commission (New Zealand), *Juries in Criminal Trials Part Two—A Summary of the Research Findings*, Preliminary Paper (1999) 26, 60–1. Horan noted that both these studies were conducted at the beginning of the internet revolution and did not account for the nature of online information today: Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 187.

204 David Tait, ‘Deliberating About Terrorism: Prejudice and Jury Verdicts in a Mock Terrorism Trial’ (2011) 44(3) *Australian & New Zealand Journal of Criminology* 387.

205 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 191.

- In the United Kingdom, research found that jurors were not likely to recall pre-trial publicity and only recalled coverage published during the trial. This suggests the existence of a ‘fade factor’—that is, jurors do not recall publications from before a trial commences.²⁰⁶
- However, the United Kingdom and New South Wales research found pre-trial publicity in high profile trials, or where the accused was a ‘household name’, was more likely to be recalled by jurors.²⁰⁷ The New South Wales study also found that the effect of pre-trial publicity is intensified when the offence occurred near where the juror lived and the publicity was encountered during the trial.²⁰⁸
- Based on its survey of the research and its own findings, the ALRC identified a list of the types of publicity that would be most likely to threaten the impartiality of a juror. These included allegations of specific fact which were inadmissible and prejudicial and ‘value-laden’ comment such as racial prejudice.²⁰⁹

Sub judge contempt proceedings compared to stay of proceedings applications

- 7.120 The view of the courts as to the robustness of juries appears to vary between when the court is considering whether there has been a sub judge contempt and when the court is considering an application for a stay of proceedings on the basis of prejudicial media publicity.
- 7.121 The courts’ view as to what material is considered to have a requisite ‘tendency’ to influence jurors is illustrated by recently prosecuted and punished contempts in Victoria. For example:
- a graphic headed ‘Victims of Melbourne’s Gangland Killings’ including an image of a victim and a caption detailing how he was killed. The graphic was published while a trial was proceeding against a man accused of the murder. Any link of the killing to ‘gangland wars’ or the way the newspaper had alleged the victim had been killed were not part of the case.²¹⁰
 - an online publication about a murder trial before the court at the time of publication. The publication reported that the accused had been violent to the victim before the murder and referred to social media posts published by the victim that had not been put before the jury.²¹¹
 - a print and online publication which linked the accused in a criminal trial to prior convictions after being warned by the Director of Public Prosecutions to avoid publishing such material. It was found no harm actually occurred, but the notoriety of the accused person, the number of persons who had accessed the online version of the publication and the longevity of an online publication contributed to the *potential* harm done by the publication.²¹²
- 7.122 Conversely, in applications for stay proceedings on the basis of prejudicial media publicity, the judiciary has shown a faith in the ability of the jury to follow directions to ignore coverage.²¹³ Stay of proceedings applications, following high-profile criminal trials, have been refused even in circumstances where a sub judge contempt was found and prosecuted in the original trial.²¹⁴

206 Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, United Kingdom, 2010) 44.
207 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity—An Empirical Study of Criminal Jury Trials in New South Wales* (February 2001) 200 [504]; Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice, United Kingdom, 2010) 44.
208 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity—An Empirical Study of Criminal Jury Trials in New South Wales* (February 2001) 200 [504].
209 The Law Reform Commission, *Contempt* (Report No 35, 1987) [287] 165–6.
210 *R v The Herald & Weekly Times Pty Ltd* [2008] VSC 251.
211 *DPP (Vic) v Johnson & Yahoo!* [2016] VSC 699.
212 *R v Nationwide News Pty Ltd* [2018] VSC 572 [58].
213 *Dupas v R* (2010) 241 CLR 237; *R v Mokbel* [2009] VSC 342; *Murphy v R* (1989) 167 CLR 94.
214 See *Hinch v A-G (Vic)* (1987) 164 CLR 15; *R v Glennon* (1992) 173 CLR 592.

- 7.123 Justice Weinberg noted in *R v Dupas (No 3)*, that if a stay of proceedings were granted on the basis of prejudicial publicity, it would be near impossible for a high-profile trial to ever go ahead successfully.²¹⁵
- 7.124 There is a disparity in the assumptions about juries' behaviour and decision making underlying sub judge contempt proceedings and applications for a stay of proceedings. These disparities may be explained by the different purposes of both processes. Those are:
- Sub judge contempt is aimed at preventing prejudicial publicity, regardless of the actual effect or intention. The purpose of the punishment is to deter other media and publishers.²¹⁶
 - Stay of proceedings is only granted where actual harm has been proven and only in the most extreme case.²¹⁷
- 7.125 This disparity in assumptions may also reflect distrust of the media by the judiciary.²¹⁸
- 7.126 Regardless of the reasons for these different approaches, the diverging treatment of jurors as either fragile or robust raises more uncertainty and inconsistency around the question of whether jurors are influenced by prejudicial publicity and to what extent should they be protected.²¹⁹

Can jurors be protected from prejudicial information in today's media landscape?

- 7.127 Sub judge contempt is effective in controlling prejudicial media coverage in the traditional media where issues of 'publication' and liability are clear-cut and are well tested by the case law.
- 7.128 In 2001, academic Michael Chesterman stated:
- The Australian law of sub judge presupposes that prohibitions focussing predominantly on the mass media will be broadly effective in preventing potential members of a jury from acquiring certain sorts of information about a trial, on the ground that it is predominantly through the media that information reaches the community.²²⁰
- 7.129 However, the media landscape and the way people consume and share information is changing. These changes are disrupting traditional assumptions, suggesting that the law of sub judge contempt may not be translating well to the modern age of journalism and online communication.²²¹

Changes to the media landscape

- 7.130 Today, the internet has caused significant change in the way news is produced, disseminated and accessed, with enormous volumes of material being made available immediately and permanently. Consequently, there has been a decline in the concentration and influence of traditional media.²²² For example:

215 *R v Dupas (No 3)* (2009) 28 VR 380, 442 [251].

216 *DPP (Vic) v Johnson & Yahoo!7 (No 2)* [2017] VSC 45 [6].

217 *Dupas v R* (2010) 241 CLR 237, 249–50.

218 See Frank Vincent, *Open Courts Act Review* (2017) 66 [10.2.1]–[10.2.2] <<https://engage.vic.gov.au/open-courts-act-review/>>; Karin Derkley, 'Suppression Orders in the Open Courts Era' (2019) *Law Institute Journal (Web Page)* 93(4).

219 See The Law Reform Commission, *Contempt* (Report No 35, 1987) 163–4 [285]; Andrew Dodd, 'Media Files/Podcast: Pell Trial Reporters, a Judge and a Media Lawyer on why the Suppression Order Debate is far from over' (Podcast, 21 March 2019) *The Conversation* <www.theconversation.com/podcast-pell-trial-reporters-a-judge-and-a-media-lawyer-on-why-the-suppression-order-debate-is-far-from-over-111634>.

220 Michael Chesterman, Janet Chan and Shelley Hampton, *Managing Prejudicial Publicity—An Empirical Study of Criminal Jury Trials in New South Wales* (February 2001) 142.

221 Zak Rich, 'The Past and Future of Sub Judge Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States' (2010) 15 *Media and Arts Law Review* 361; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103; Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45(1) *The American Journal of Comparative Law* 109.

222 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Preliminary Report, December 2018) 2–3.

- Print circulation of newspapers is declining, with more people accessing their news online.²²³
- Although television still remains the most used source for news, the younger demographic of 18–24 year olds is increasingly using social media platforms such as YouTube, WhatsApp, Instagram and Snapchat to access news.²²⁴ Podcasting is also becoming a major source of news for 25–34 year olds.²²⁵
- Today, over 50 percent of traffic on Australian news media websites comes from Google and Facebook.²²⁶

- 7.131 As a consequence of these changes, traditional media has been under significant pressure to adopt new business models to adapt to the shift in revenue from print to online.²²⁷ This has resulted in a loss of experienced journalists,²²⁸ a decline in traditional types of journalism such as court reporting,²²⁹ a decline in the quality of content²³⁰ and a growing mistrust in the reliability of the media.²³¹
- 7.132 In addition, and as a consequence of changes to Australian media ownership laws, there has been a merging of different forms of media²³² blurring the traditional distinctions between news types and different media forms.
- 7.133 All of these changes mean that traditional media outlets and journalists are no longer the sole publishers responsible for potentially prejudicial publications.²³³ Content can now be published and shared across different media and platforms by a wider range of individuals within and outside the jurisdictions; public commentary on social media can cumulatively cause prejudice to a trial; and companies such as Google and Facebook now play a significant role in the publishing process.²³⁴
- 7.134 The *Teacher's Pet* podcast is one example of new media challenging the traditional limits of sub judice contempt in shielding jurors.²³⁵ The podcast, which was published before charges were laid against the accused, provided details of the victim's death and the surrounding circumstances. Despite charges being laid, the podcasts continued to be available up until the New South Wales Director of Public Prosecutions requested the episodes be taken down, which they were on 5 April 2019.²³⁶ It was reported that since the podcast's release, there had been 27 million downloads with over a million within the week after the accused was charged.²³⁷

- 223 Nielsen, 'Australian News Media Total Audience Report December 2018', *Emma* (Web Page, December 2018) <www.emma.com.au/reports>; Zoe Samios, 'ABCs: Newspaper Circulation Suffers Across the Board with Falls as Large as 16%' (17 August 2018) *Mumbrella* <<https://mumbrella.com.au/abcs-newspaper-circulation-suffers-across-the-board-with-falls-as-large-as-16-535665>>.
- 224 Sora Park et al (eds), *Digital News Report: Australia 2018* (News & Media Research Centre, University of Canberra, 2018) 50.
- 225 Ibid.
- 226 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Preliminary Report, December 2018) 8.
- 227 Public Interest Journalism Committee, Parliament of Australia, *Future of Public Interest Journalism* (Final Report, February 2018, February 2018) 25–29.
- 228 Public Interest Journalism Committee, Parliament of Australia, *Future of Public Interest Journalism*, Final Report (February 2018) 29 [2.21].
- 229 Ibid 38 [2.55]; Margaret Simons et al, 'Understanding Civic Impact Journalism' (2017) 18(11) *Journalism Studies* 1409–10.
- 230 Public Interest Journalism Committee, Parliament of Australia, *Future of Public Interest Journalism*, Final Report (February 2018) 39 [2.56].
- 231 Australian Competition & Consumer Commission, *Digital Platforms Inquiry* (Preliminary Report, December 2018) 8.
- 232 'Government's Media Ownership Law Changes Pass Senate with Help from NXT, One Nation', *ABC News* (Web Page, 14 September 2017) <www.abc.net.au/news/2017-09-14/media-law-changes-bill-passes-senate/8946864>; on 16 October 2017, the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* (Cth) was enacted, abolishing the the 75% and 'two in three' rules which had restricted ownership of media companies.
- 233 See Attorney-General's Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019).
- 234 See, eg, Toby Manhire, 'New Zealand Courts Banned Naming Grace Millane's Accused Killer. Google Just Emailed it Out.', *The Guardian* (Web Page, 13 December 2018) <www.theguardian.com/world/2018/dec/13/new-zealand-courts-banned-naming-grace-millanes-accused-killer-google-just-emailed-it-out>; Sam Hurley, 'Grace Millane Case: Suppression Flouted by Google and Others, Prosecutions to Follow?', *New Zealand Herald* (Web Page, 14 December 2018); <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12176432>. The issue of Google auto-completing searches which were in themselves prejudicial or published restricted identities was addressed in Attorney-General's Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019). See also UK Government, *Online Harms White Paper* (Web Page, April 2019) <www.gov.uk/government/consultations/online-harms-white-paper>.
- 235 Hedley Thomas, 'The Teacher's Pet', *The Australian* (Podcast, 5 December 2018) <www.theaustralian.com.au/the-teachers-pet>.
- 236 Jerome Doraisamy, 'Teacher's Pet Podcast Now Raising "Real Risk of Contempt"', *Lawyers Weekly* (Web Page, 10 December 2018) <www.lawyersweekly.com.au/politics/24619-teacher-s-pet-podcast-now-raising-real-risk-of-contempt>; David Murray, 'Teacher's Pet Podcast Series to be Temporarily Unavailable in Australia', *The Australian* (Web Page, 5 April 2019) <www.theaustralian.com.au/podcasts/teachers-pet-podcast-series-to-be-temporarily-unavailable-in-australia/news-story/957300743da2878171631990510abd0b>.
- 237 Jerome Doraisamy, 'Teacher's Pet Podcast Now Raising "Real Risk of Contempt"', *Lawyers Weekly* (Web Page, 10 December 2018) <www.lawyersweekly.com.au/politics/24619-teacher-s-pet-podcast-now-raising-real-risk-of-contempt>.

- 7.135 Another example of the impact of the new media landscape was the social media commentary surrounding a high-profile murder trial in the United Kingdom which attracted significant local and national media attention. Throughout the trial the public posted numerous adverse comments on the otherwise fair and accurate media reports of the case which had been posted on social media. As a result of those comments, the jury was discharged and a retrial ordered several months later in a different venue.²³⁸
- 7.136 Although this case was acknowledged to be an exceptional situation rather than illustrative of a wider problem, it gave rise to questions around the impact of social media on the administration of justice and the adaptability of sub judge contempt as a tool to manage such prejudicial coverage.²³⁹
- 7.137 These examples demonstrate how restricting and controlling news about legal proceedings has become more complicated and, in some circumstances, such control may be impossible.
- 7.138 The enforceability of sub judge contempt and other offences in this context will be discussed in Chapter 10.

Changes to how people consume information

- 7.139 There are also changes in the way people understand, access and interact with information which challenge the assumption that jurors can be protected from extraneous information.
- 7.140 In this context, Oscar Bartel-Wallace summarised a number of ways in which the internet affects human cognition which may have implications for how jurors carry out their role. These include:
- Humans have more doubt of their own knowledge and therefore an increased reliance on the internet.²⁴⁰
 - There is a desire for instantaneous knowledge and people are less accustomed to any delay in answers in the digital age.²⁴¹
 - The internet is used for everyday needs such as banking or communication, which has decreased the barriers between jurors and harmful publicity.²⁴²
- 7.141 Recent data shows that people are increasingly accessing digital news, instead of print news, through mobile phones or other devices,²⁴³ while newspaper circulation is declining.²⁴⁴ A University of Canberra study of digital news found that in 2018, for the first time in four years of conducting the survey, participants' use of digital platforms such as apps or social media to access news, surpassed their use of traditional platforms such as television, radio or print.²⁴⁵
- 7.142 These changes to how people access and consume information affect how jurors comprehend evidence and directions within the courtroom. People who make up juries today are accustomed to daily news, engaging footage, concise and quick information and a level of control over what information they consume.²⁴⁶
- 7.143 Further, jurors themselves can easily access information and there have been a number of

238 Attorney-General's Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019) 3 [1.1]–[1.3]. *Ex Parte British Broadcasting Corporation and others R v F and another* [2016] EWCA Crim 12.

239 The case was an impetus for the UK Attorney General's call for evidence: Attorney-General's Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019).

240 Oscar Battell-Wallace, 'No Search Results in Fairness: Addressing Jurors' Independent Research in the 21st Century' (2018) 49 *Victoria University of Wellington Law Review* 83, 90.

241 *Ibid* 93.

242 *Ibid* 94.

243 Nielsen, 'Australian News Media Total Audience Report December 2018', *Emma* (Web Page, December 2018) <www.emma.com.au/reports>; R. Warwick Blood, 'Generational Shifts in News Consumption' in Sora Park et al (eds), *Digital News Report: Australia 2018* (News & Media Research Centre University of Canberra, 2018) 60.

244 Zoe Samios, 'ABCs: Newspaper Circulation Suffers Across the Board with Falls as Large as 16%', (17 August 2018) *Mumbrella* <<https://mumbrella.com.au/abcs-newspaper-circulation-suffers-across-the-board-with-falls-as-large-as-16-535665>>.

245 R. Warwick Blood, 'Generational Shifts in News Consumption' in Sora Park et al (eds), *Digital News Report: Australia 2018* (News & Media Research Centre University of Canberra, 2018) 60, 60.

246 Justice Kirby, 'Delivering Justice in a Democracy III—the Jury of the Future' (1998) 17 *Australian Bar Review* 113; Jacqueline Horan, 'Communicating with Jurors in the Twenty-first Century' (Pt 29) (2007) *Australian Bar Review* 75.

cases where jurors have been found to carry out their own inquiries online.²⁴⁷ This scenario has been referred to as the ‘Googling juror’²⁴⁸ and is discussed in Chapter 5.

- 7.144 Together, these changes suggest that not only is the task of protecting jurors from prejudicial publicity becoming more complicated, but also the operation of the jury system and restrictions such as sub judice contempt may not be adequately adapted to, or appropriate for, the 21st century jury.

Suppression orders and take-down orders

- 7.145 Despite the growing recognition of the robustness of juries, there has been a resistance to completely forgoing the court’s role in safeguarding a fair trial, particularly in the context of online publications. This was stated by the Victorian Court of Appeal in *News Digital Media Pty Ltd v Mokbel*:

This confidence in the corporate integrity of juries, however, does not mean that the law should abandon its traditional role of protecting them from events which put this integrity to the test. This role has relied upon the familiarity of the media with the restraints of the law of contempt and their respect of these constraints. It has also relied upon the power of the court to make orders restraining publications which might breach these restraints.²⁴⁹

- 7.146 To ensure a fair trial and the proper administration of justice, the courts have relied on statutory²⁵⁰ and inherent powers²⁵¹ to make orders either preventing the publication of prejudicial material or requiring already published online material to be taken down.
- 7.147 However, the practice of issuing pre-emptive suppression orders or take-down orders has been criticised by academics and some members of the judiciary as undermining the law of sub judice contempt²⁵² and potentially exceeding what is necessary to ensure a fair trial.²⁵³
- 7.148 Reasons for this practice may include:
- The decline in dedicated court reporters has led to a need to make specific orders to ensure journalists and other publishers are clear about what they can and cannot publish.
 - Technological developments may encourage the courts to take a pre-emptive approach.²⁵⁴
 - There had been a loss of confidence in the ‘efficacy of alternatives to suppression such as the law of contempt’.²⁵⁵
- 7.149 However, Butler and Rodrick warn against overstating the suggestion that suppression orders have taken over from sub judice contempt.²⁵⁶

247 *Martin v R* (2010) 28 VR 579; *Benbrika v R* (2010) 29 VR 593.

248 Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103, 116; Oscar Battell-Wallace, ‘No Search Results in Fairness: Addressing Jurors’ Independent Research in the 21st Century’ (2018) 49 *Victoria University of Wellington Law Review* 83.

249 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 267 [73].

250 Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013). The *Open Courts Act 2013* (Vic) s 17 provides for the statutory power to make proceeding suppression orders.

251 The *Open Courts Act 2013* (Vic) s 5(1) preserves the Supreme Court’s inherent jurisdiction to make suppression orders restricting specified material by publication.

252 Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 109; J J Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29(2) *University of New South Wales Law Journal* 147; the Hon. Philip Cummins, ‘Open Courts: Who Guards the Guardians?’ (Speech, Justice Open and Shut: Suppression Orders and Open Justice in Australia and the United Kingdom Seminar, Sydney, 4 June 2014) 3.

253 Jason Bosland, ‘Restraining ‘Extraneous’ Prejudicial Publicity: Victoria and New South Wales Compared’ (2018) 41(4) *University of New South Wales Law Journal* 1263, 1291–3.

254 *Ibid* 1267.

255 Frank Vincent, *Open Courts Act Review* (2017) 64 <<https://engage.vic.gov.au/open-courts-act-review>>.

256 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 435 [6.790].

- 7.150 Similarly, the Courts of Appeal in Victoria²⁵⁷ and New South Wales²⁵⁸ have emphasised the ongoing role of sub judge contempt and acknowledged the limitations and futility of controlling internet publications.
- 7.151 In a 2018 Victorian Court of Appeal case,²⁵⁹ the court rejected an appeal by two accused persons facing terrorism-related charges who had applied for a suppression order on the jury's verdict. The applicants argued that publication of the verdict would prejudice a second trial. Among other factors, the court acknowledged that the contempt of court laws should operate to prevent prejudicial reporting of prior convictions and that the media respondents in the case were aware of their obligations relating to contempt.²⁶⁰
- 7.152 Academics have questioned whether take-down orders are useful and enforceable in the digital age.²⁶¹ These issues are central for the courts in considering whether such orders should be issued or upheld, and are discussed in Chapter 10.

Possible reforms to sub judge contempt

- 7.153 In Australia, the primary means of ensuring a fair trial and protecting the administration of justice, with respect to prejudicial material, has traditionally been through the law of sub judge contempt.²⁶² However, as indicated by the numerous reviews in Australia and abroad, the current operation of the law of sub judge contempt is not satisfactory.
- 7.154 There are two overlapping but distinct issues which give rise to these concerns:
- The uncertainties in the definitions and scope of the common law caused by the complex balancing act between the principles of fair trial, open justice and freedom of expression, which make the law difficult to navigate.
 - The compatibility of the law with the principles it intends to serve. That is, is the departure from freedom of expression justified by the aim of ensuring a fair trial in the modern age when information is immediate, permanent and increasingly accessible?
- 7.155 The options for reform discussed below include statutory reforms to address uncertainties about the offence. Broader reform options are also considered which challenge the assumptions underpinning the way in which criminal trials are carried out, in the context of modern media and changing understandings of juror decision making.

A statutory offence of sub judge contempt

- 7.156 The current uncertainty in the law of sub judge contempt may be having a 'chilling effect' on the reporting of the courts,²⁶³ but it also gives rise to the risk of a fair trial being improperly influenced because those publishing material are ignorant of the law or do not understand it.²⁶⁴

257 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248.

258 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 78.

259 *Chaarani v DPP (Cth)* [2018] VSCA 299.

260 *Ibid* [47]. The court also considered the fact that the first trial had been extensively publicised and a Google search of the applicants' names revealed material about the trial. Therefore the court said that in this case 'the genie cannot be put back in the bottle' [45].

261 Isaac Frawley Buckley, 'In defence of "take-down" orders: Analysing the Alleged Futility of the Court-ordered Removal of Archived Online Prejudicial Publicity' (2014) 23 *Journal of Judicial Administration* 203; Brian Fitzgerald and Cheryl Foong, 'Suppression Orders After Fairfax Ibrahim: Implications for Internet Communications' (2013) 37 *Australian Bar Review* 175; Paul Karp and Sophie Dawson, 'Holding Back the Tide: King Canute Orders and Internet Publications' (2012) 30(4) *Communications Law Bulletin* 10; Jason Bosland, 'Restraining 'Extraneous' Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *University of New South Wales Law Journal* 1263.

262 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 369.

263 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 17.

264 See Rachel Hews and Nicolas Suzor, "'Scum of the Earth': An Analysis of Prejudicial Twitter Conversations During the Baden-Clay Murder Trial' (2017) 40(4) *University of New South Wales Law Journal* 1604, which showed the prejudicial nature of tweets about a trial from the general public who are generally unaware of legal restrictions.

- 7.157 Retaining sub judge contempt, but in a legislative form, has been recommended by numerous law reform commissions in Australia²⁶⁵ and elsewhere.²⁶⁶ Legislation was implemented in the United Kingdom in 1981 following an extensive review on contempt in 1974.²⁶⁷ In Canada, a bill was put before parliament but lapsed in 1984. Currently, New Zealand's and Ireland's parliaments have bills before them. The New Zealand Parliament's Justice Committee has handed down its report suggesting amendments to the proposed bill.²⁶⁸
- 7.158 The WA Commission stated that the statutory reform of the common law would align the law with criminal law and process. The Commission also stated the reform would:
- address the absence of any maximum sentence, the anomalous summary process by which contempt is often tried, and the absence of effective avenues for appeal.²⁶⁹
- 7.159 The main uncertainties of the law of sub judge contempt which could be addressed by definitions and boundaries set out in legislation include:
- the formulation of the tendency test
 - the definition of publication
 - the start and end point of the sub judge period
 - whether or not a fault element should apply
 - what is considered in the 'public interest' and the test that determines whether or not it outweighs a fair trial
 - the summary procedure
 - the range of penalties that can be imposed.
- 7.160 The NZ Commission recommended the replacement of sub judge contempt with a statutory offence to clarify some of the above-mentioned elements, supplemented by other powers addressing the implications of online publications. These included an automatic prohibition on the publication of an arrested person's previous convictions and concurrent charges and statutory powers to postpone the publication of other prejudicial material and to order online content hosts to take down such material.²⁷⁰
- 7.161 However, a disadvantage of such legislative reform is the way in which it would restrict the flexibility needed to deal with new forms of contempt and a varying range of circumstances. As the case law has shown, a range of factors are considered when applying the law to the facts such as the prominence of the publisher, the type of publication, the accessibility of the article and the publication of other material about the proceedings.²⁷¹ The balancing of the principles of a fair trial, open justice and freedom of expression may also be difficult to reflect in legislation.²⁷²

265 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003); Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003); The Law Reform Commission, *Contempt* (Report No 35, 1987).

266 The Law Reform Commission of Hong Kong, *Contempt of Court*, Report, Topic No 4 (December 1986); Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994); Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute*, Report No 140 (May 2017). Proposed legislation is currently before parliament in Ireland and New Zealand.

267 Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974).

268 For the status of the New Zealand and Ireland Bills, see New Zealand Parliament, 'Administration of Justice (Reform of Contempt of Court) Bill', *Bills and Laws* <www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_77664/administration-of-justice-reform-of-contempt-of-court>; Justice Committee, *Final Report (Administration of Justice (Reform of Contempt of Court) Bill 39-2* (Web Page, April 2019) <www.parliament.nz/en/pb/sc/reports/document/SCR_86592/administration-of-justice-reform-of-contempt-of-court>; Houses of the Oireachtas, 'Contempt of Court Bill 2017', *Bills & Acts* (Web Page) <www.oireachtas.ie/en/bills/bill/2017/117/>.

269 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 17.

270 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 55–7. See the Justice Committee's suggested amendments to the proposed Bill: Justice Committee, *Final Report (Administration of Justice (Reform of Contempt of Court) Bill 39-2* (Web Page, April 2019) <www.parliament.nz/en/pb/sc/reports/document/SCR_86592/administration-of-justice-reform-of-contempt-of-court>.

271 See paragraph [7.21].

272 See Zak Rich, 'The Past and Future of Sub Judge Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States' (2010) 15 *Media and Arts Law Review* 361, 370–1. Rich suggested separating the offence from the defence. The test for finding sub judge would be a strict test and the consideration of whether the publication was a matter of public interest would become an isolated defence which would allow for discretion based on the facts.

- 7.162 The Commission notes, however, that an approach may be that these relevant factors could be listed non-exhaustively to be taken into account by the court. For example, the NZ Commission's proposed bill included a provision which set out how the court should determine whether a publication creates a real risk of prejudice to the accused's right to a fair trial, listing some of the relevant factors to be considered and types of publication which may be subject to the proposed offence.²⁷³
- 7.163 The flexibility provided by the common law, while confusing, may also be an advantage for the media, who make assessments about when they can and cannot publish based on the circumstances of each case.
- 7.164 Introducing a new legislative instrument may merely serve to further confuse the already complex landscape with existing statutes on suppression orders, judicial proceedings and juries. The workability of such legislation and how it interacts with existing statutes also need to be carefully considered.
- 7.165 The Commission also notes that despite the introduction of the *Contempt of Court Act 1981* in the United Kingdom in 1981, a number of definitional and operational problems persist, as indicated by the Law Commission of England and Wales' recent reviews of publication contempt. Some of these problems included uncertainty about when proceedings are pending, the meaning of 'prejudice', a lack of clarity around when contempt proceedings are commenced, a lack of safeguards around the contempt proceedings and the difficulties that arise in prosecuting new types of publisher such as citizen journalists.²⁷⁴

Other ways to manage jury behaviour

- 7.166 The assumption that jurors cannot be trusted to make decisions based only on the admissible evidence and that they are influenced by prejudicial publicity underlies the operation of the law of sub judice contempt.²⁷⁵ As discussed above at [7.106], researchers and the judiciary have both begun to question this assumption.
- 7.167 There is growing confidence in the robustness of juries and the ability of jury members to follow directions and to make decisions based only on the evidence put before them in court.
- 7.168 This change in views and the questioning of traditional assumptions open the possibility of other mechanisms to address the problem of jury exposure to prejudicial publicity, instead of simply attempting to quarantine jurors from accessing such materials.²⁷⁶
- 7.169 Currently in Australia there is a range of other measures available to manage prejudicial publicity and the jury.²⁷⁷ These include jury directions, postponing a trial, changing the trial venue, sequestering a jury or having the trial heard by judge alone.²⁷⁸
- 7.170 However, in Australia, the courts' reliance on these other options is outweighed by their reliance on restricting and punishing prejudicial media coverage.²⁷⁹ In contrast, the courts in the United States rely heavily on remedial options rather than trying to prevent prejudicial publicity.²⁸⁰

273 Justice Committee, *Final Report (Administration of Justice (Reform of Contempt of Court) Bill 39-2* (Web Page, April 2019) 12–13 <www.parliament.nz/en/pb/sc/reports/document/SCR_86592/administration-of-justice-reform-of-contempt-of-court>.

274 As summarised in Law Commission (England and Wales), *Contempt by Publication*, (Impact Assessment, 2012).

275 Frank Vincent, *Open Courts Act Review* (2017) 110 [441] <<https://engage.vic.gov.au/open-courts-act-review>>.

276 Ibid; Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103.

277 Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnson and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 103–5.

278 Ibid 103–104. Trial by judge alone is an option in Queensland, New South Wales and Western Australia: *Criminal Code 1899* (Qld) s 615; *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Procedure Act 2004* (WA) s118.

279 Roxanne Burd and Jacqueline Horan, 'Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?' (2012) 36 *Criminal Law Journal* 103, 107; Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45(1) *The American Journal of Comparative Law* 109, 116.

280 For a comparison of the US and other jurisdictions to Australia, and their use of remedial options, see Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45(1) *The American Journal of Comparative Law* 109; Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnson and Mark Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012) 106; Zak Rich, 'The Past and Future of Sub Judice Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States' (2010) 15 *Media and Arts Law Review* 361, 366–8. Other remedial options in the United States include: sequestration of the jury ie isolating them for the duration of the trial or bringing in jurors from different areas of the country where publicity has not been as significant.

- 7.171 Acknowledging the different approaches taken in the two jurisdictions to freedom of speech and the unfettered freedom of the media in the United States, academics have argued that the preventative approach of Australia may no longer be effective in the 21st century and that instead greater focus should be placed on remedial options.²⁸¹
- 7.172 This part therefore considers alternative mechanisms to manage the jury. These include a greater focus on the role of jury directions and the option of questioning jurors before they are empanelled about their exposure to prejudicial media coverage.

Pre-trial questioning of jurors

- 7.173 Pre-trial questioning of jurors is conducted in the United States by a voir dire process.²⁸² A similar practice is available in the United Kingdom, where judges can issue questionnaires about prejudicial media coverage to potential jurors in high-profile cases.²⁸³ The purpose of such questioning is to identify possible prejudice or bias in prospective jurors.
- 7.174 A more limited practice of questioning jurors is allowed for in Queensland and New South Wales, where a potential juror can be questioned about exposure to prejudicial publicity.²⁸⁴
- 7.175 In Queensland such questioning is limited to where there are special reasons surrounding a trial, including prejudicial publicity.²⁸⁵ In this scenario the parties can make an application for people selected to serve as jurors to be questioned at the end of the jury selection process.²⁸⁶ In New South Wales, examination of jurors about prejudicial publicity is limited to during the trial.²⁸⁷
- 7.176 The use of pre-trial questioning was considered by the Victoria Law Reform Commission in its review of jury empanelment in 2014. The Commission concluded at that time that there was little support for adopting pre-trial questioning in Victoria.²⁸⁸
- 7.177 Instead, the Commission considered that the current excuse process, whereby a juror can be excused from jury duty because of a matter that affects their impartiality,²⁸⁹ was an adequate means for identifying prospective jurors who would not be able to fairly try the issues.²⁹⁰ Further, the pre-trial questioning method was stated to be:
- time consuming and intrusive ... it would add no benefit to Victorian jurisprudence on jury selection and if adopted would significantly change the Victorian culture on jury selection.²⁹¹
- 7.178 In the context of sub judge contempt, the NSW Commission and the ALRC rejected the use of pre-trial questioning on the grounds that the process could be ‘unconscionably’ long to carry out and counterproductive in bringing the publicity to the attention of the jurors.²⁹²
- 7.179 The NZ Commission similarly did not support the approach used in the United States which involves a cross-examination of jurors. Instead, the Commission recommended that a more interactive approach be taken when empanelling jurors, particularly in high-profile cases. This would involve clarifying whether potential jurors have been exposed to information about the case to an extent that it would affect their ability to make a decision based on the evidence.²⁹³

281 Roxanne Burd and Jacqueline Horan, ‘Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?’ (2012) 36 *Criminal Law Journal* 103, 117–8; Zak Rich, ‘The Past and Future of Sub Judge Contempt: A Historically Contingent Rhetoric, a Modern Age Threat, and the Lessons to be Learned from the United States’ (2010) 15 *Media and Arts Law Review* 361, 357–7.

282 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 50 [3.221].

283 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 53 [2.184].

284 *Jury Act 1995* (Qld) s 47. In New South Wales, a judge may examine a juror on oath about exposure to prejudicial material during a trial: *Jury Act 1977* (NSW) s 55D.

285 *Jury Act 1995* (Qld) s 47(1).

286 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 50 [3.221].

287 *Jury Act 1977* (NSW) s 55D.

288 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 50 [3.221].

289 *Juries Act 2000* (Vic) s 32(3).

290 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 50 [3.221].

291 *Ibid* 49 [3.220].

292 The Law Reform Commission, *Contempt* (Report No 35, 1987) 200–1 [345]. See for a discussion of the disadvantages, such as cost and time, of relying on remedial options: New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 32–3.

293 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report 140 2017) 78 [4.40].

Jury directions

- 7.180 As discussed in Chapter 5, jury directions are part of a suite of mechanisms, including the juror's oath²⁹⁴ and the *Juror's Handbook*, which are aimed at ensuring jurors understand their role and make their decisions 'faithfully and impartially' according to the admissible evidence.²⁹⁵
- 7.181 In addition, trial judges give juries directions to assist them to reach fair and just verdicts.²⁹⁶ Jury directions are frequently relied on to manage prejudicial publicity and its impact on the jurors in criminal trials.
- 7.182 As discussed above, applications for a stay of proceedings, on the basis of prejudicial media coverage, have been rejected because of the directions given to the jury at trial to ignore the publicity.²⁹⁷
- 7.183 In trials where pre-trial publicity has been particularly problematic, such as terrorism trials, the judge will explain the importance of empanelling a group of jurors who can remain impartial in the face of the high levels of publicity.²⁹⁸ Jurors are then invited to be excused if they believe they would not be able to discharge their obligation to try the case based only on the evidence.²⁹⁹
- 7.184 As discussed above and in Chapter 5, there are, however, concerns about the infallibility of jury directions. In the context of directions to the jury about media publicity and accessing the internet, research has demonstrated that:
- Jurors do not always understand jury directions.³⁰⁰ For example, research in the United Kingdom found 23 percent of jurors were confused about the rule on internet access.³⁰¹
 - Jurors are known to ignore judicial directions and carry out their own research.³⁰²
 - The internet and communicating electronically has become second nature for people, and so jurors may come across information unintentionally.³⁰³
 - Jury directions may have a counter-productive 'boomerang effect' by alerting jurors to publicity which they then seek out.³⁰⁴
- 7.185 In light of the apparent shortcomings of jury directions and the increased risk of jurors being exposed to or accessing prejudicial material online, law reform commissions have recommended proactive measures to manage jurors including:
- informing jurors before and during service about what they can and cannot do³⁰⁵
 - providing educational material with specific details about why it is important that jurors do not investigate or undertake their own research and why it poses a risk to a fair trial³⁰⁶
 - updating the content of jury warnings and directions to take account of technological developments and providing specific examples³⁰⁷

294 For the oath or affirmation of jurors on empanelment, see *Juries Act 2000* (Vic) sch 3.

295 Juries Commissioner's Office Victoria, Supreme Court of Victoria, *Juror's Handbook* (2012). The *Juror's Handbook* explains the role of the jury, the standard of proof to be applied and the need for decisions to be based in the evidence heard or seen in court, amongst other things.

296 Victoria Law Reform Commission, *Jury Directions*, Final Report (2009) 7.

297 *Dupas v R* (2010) 241 CLR 237, 246–247.

298 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 186.

299 *Ibid.* See, eg, the High Court's description in *Dupas v R* (2010) 241 CLR 237, 246 [21] of the trial judge's directions given prior to the start of a murder trial.

300 Law Commission (New Zealand), *Juries in Criminal Trials Part Two—A Summary of the Research Findings*, Preliminary Paper (1999) [7.45]; New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 29 [2.50]; Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012), 73, 186.

301 Cheryl Thomas, 'Avoiding the Perfect Storm of Juror Contempt' (2013) 6 *Criminal Law Review* 483, 488.

302 *Benbrika v R* (2010) 29 VR 593; *Martin v R* (2010) 202 A Crim R 97.

303 Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Keyzer, Johnson and Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012), 116.

304 *Ibid.* citing V Gordon Rose and James R P Ogloff, 'Challenge for Cause in Canadian Criminal Jury Trials: Legal and Psychological Perspectives' (Pt Criminal Law Quarterly) (2002) 46 *Criminal Law Journal* 210, 236.

305 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 112–117.

306 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report 140, 2017) 76 [4.32].

307 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 112–17.

- requiring jurors to sign a written declaration that they have heard and understood warnings given by the judge about conducting their own research³⁰⁸
 - giving jurors consistent and frequent directions explaining why their decision should be made based only on the evidence presented in court and the risks of undertaking their own research.³⁰⁹
- 7.186 In a report prepared for the Victorian Department of Justice, Jane Johnston and others also made recommendations about the content and dissemination of ‘don’t research’ jury directions.³¹⁰
- 7.187 These included references to social media; that directions should be written in plain language; and that they should clearly explain the consequences of failing to comply with the directions.³¹¹
- 7.188 However, according to research comparing the approach of different jurisdictions in Australia and overseas, authors Elizabeth Greene and Jodie O’Leary stated that directions alone were inadequate to deal with the impact of the internet. They observed that judge-alone trials are the most desirable option for ensuring a fair trial in the era of digital and social media.³¹² Judge-alone trials are currently under review by the Victorian Government Department of Justice and Community.³¹³

Legal education about social media and sub judice contempt

- 7.189 Many individuals publishing on the internet, particularly on social media, do not have the same level of training, expertise and knowledge about legal restrictions and professionalism that court reporters have attained. The general public or freelance journalists also do not have the benefit of editorial input, fact checking and legal resources.³¹⁴
- 7.190 In the context of a decline in traditional media and a rise in citizen journalism and social media commentary, there may be a need for expanding legal education about sub judice contempt to the broader community.
- 7.191 This was one of the approaches implemented by the United Kingdom government in 2019 following a ‘Call for Evidence on the Impact of Social Media on the Administration of Justice’.³¹⁵
- 7.192 The report relied on evidence that showed the positive impact which timely and comprehensible legal education for jurors could have on reducing risks of prejudice which could extend to the community.³¹⁶ Further, there was evidence that individuals using social media may not have given much thought to the consequences their social media posts might have and therefore, education would help people understand the importance of an effective legal system and to ‘think before they post’.³¹⁷
- 7.193 A dedicated webpage, www.gov.uk/contempt-of-court, was set up to raise awareness of the risks and implications of using social media to undermine the administration of justice. As at the time of writing, the web page included basic information about what contempt of court

308 Ibid.

309 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute*, Report 140 (2017) 79 [4.50].

310 Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013) 24 [5.2].

311 Ibid.

312 Elizabeth Greene and Jodie O’Leary, ‘Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia’ in Keyzer, Johnson and Pearson (eds), *The Courts and the Media: Challenges in the Era of Digital and Social Media* (Halstead Press, 2012), 119.

313 Farrah Tomazin and Sumeeya Ilanbey, ‘Andrews Government Considers “Judge-only” trials for Criminal Cases’, *The Age* (Web Page, 13 December 2018) <www.theage.com.au/national/victoria/andrews-government-considers-judge-only-trials-for-criminal-cases-20181213-p50m5u.html>.

314 Sharon Rodrick, ‘Achieving the Aims of Open Justice? The Relationship Between the Courts, the Media and the Public’ (2014) 19(1) *Deakin Law Review* 123, 154; Rachel Hews and Nicolas Suzor, ‘“Scum of the Earth”: An Analysis of Prejudicial Twitter Conversations During the Baden-Clay Murder Trial’ (2017) 40(4) *University of New South Wales Law Journal* 1604, 1612.

315 Attorney-General’s Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019).

316 Ibid 5 [2.5]. The report referred to evidence submitted by academic Professor Cheryl Thomas arising from her 10-year research project on the jury system. The research led to the formulation of a revised juror notice, ‘Your Legal Responsibilities as a Juror.’

317 Attorney-General’s Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019).

is, what you should not publish about a court case, the legal consequences of being found to be in contempt, as well as a hotline to report a publication 'that you think risks the fairness of a future or ongoing case'.³¹⁸

- 7.194 The report also recommended comprehensive guidance on contempt (particularly in the context of social media) for judges, advocates, prosecutors and the public.³¹⁹ This was based on evidence that suggested the practitioners often avoid contempt proceedings because of their complexity.³²⁰
- 7.195 The United Kingdom Attorney-General's Office stated that they are now working with Facebook, Google and Twitter to address contemptuous or otherwise unlawful social media posts and create systems that will allow for the platforms to be notified of such content quickly, enabling them to mitigate a risk to the administration of justice.³²¹
- 7.196 There may also be a role for internet platforms in setting standards for acceptable behaviour on their websites to ensure jurors are not exposed to prejudice online.³²²

Questions

- 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?

318 UK Government, 'Contempt of court', *Your Rights and the Law* (Web Page) <www.gov.uk/contempt-of-court>.
 319 Attorney-General's Office (UK), *Response to Call for Evidence on the Impact of Social Media on the Administration of Justice* (March 2019) 11 [3.8].
 320 Ibid 8 [2.17].
 321 Ibid 12 [3.10].
 322 Rachel Hews and Nicolas Suzor, "'Scum of the Earth': An Analysis of Prejudicial Twitter Conversations During the Baden-Clay Murder Trial' (2017) 40(4) *University of New South Wales Law Journal* 1604, 1633. See the UK Government's proposals for regulation of the digital economy (encompassing online content, platforms and applications) including the imposition of a duty of care on users, holding companies accountable for tackling online harms, including contempt of court: UK Government, *Online Harms White Paper* (Web Page, April, 2019) www.gov.uk/government/consultations/online-harms-white-paper 7, 41–2.

Contempt by publication (2)— scandalising the court

114 Introduction

116 Issues with the law of scandalising contempt

121 Is the law of scandalising contempt adaptable and relevant?

126 Possible reforms to scandalising contempt

8. Contempt by publication (2)— scandalising the court

Introduction

- 8.1 This chapter considers the manifestation of contempt which addresses acts or publications calculated to impair the public's confidence in the judiciary.¹ This type of contempt is also known as 'contempt by scandalising the court' and 'scandalising contempt'.
- 8.2 Scandalising contempt was justified by the High Court in *Gallagher v Durack (Gallagher)* on the following basis:
- The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.²
- 8.3 The offence is aimed at protecting the administration of justice as an ongoing process, meaning the scope of this law is not limited to publications that comment on a specific trial.³ Rather, the offence covers publications which comment on the courts and judges generally. Such publications commonly fall within the category of either 'scurrilous abuse'⁴ or accusations of partiality.⁵
- 8.4 Examples of comments that have been held to constitute scandalising contempt include:
- calling a judge a 'cretin' in the presence of the media⁶
 - suggesting that an individual or group of persons, such as a union, can influence a judge's decision⁷
 - allegations that the judge was racist and that this influenced the judge's decision⁸
 - allegations that judicial officers were biased and corrupt⁹
 - reprimanding judicial decisions.¹⁰
- 8.5 The principles engaged by scandalising contempt were summarised by Justice Cummins in the Victorian Supreme Court case *Anissa v Parsons*:
- First, proceeding for contempt of court is not and must not be in diminution of free speech. Second, proceeding for contempt of court is to preserve the administration of justice. Third, proceeding for contempt of court is not to protect the individual person of the judge.¹¹

1 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434; *R v Kopyto* (1987) 62 OR (2d) 449.

2 *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ).

3 *R v Fletcher* (1935) 52 CLR 248, 257 (Evatt J); *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 443 (Rich J).

4 *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 910 (Hope JA).

5 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442 (Rich J).

6 *A-G (Qld) v Lovitt* [2003] QSC 279.

7 *Gallagher v Durack* (1983) 152 CLR 238; *A-G (NSW) v Munday* [1972] 2 NSWLR 887.

8 *A-G (NSW) v Munday* [1972] 2 NSWLR 887.

9 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443; *Hoser & Kotabi Pty Ltd v R* [2003] VSCA 194.

10 *Tate v Duncan-Strelec* [2014] NSWSC 1125; *Hoser & Kotabi Pty Ltd v R* [2003] VSCA 194; *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443; *A-G (Qld) v Lovitt* [2003] QSC 279.

11 *Anissa Pty Ltd v Parsons* [1999] VSC [19]. See also *Gallagher v Durack* (1983) 152 CLR 238, 243.

- 8.6 There are a number of uncertainties in the operation and application of the offence, as well as in the assumption on which the law is based—that the judiciary requires special protection from attacks and criticism in order to maintain the public’s confidence in the system.¹²
- 8.7 Not only is there a lack of empirical evidence behind this assumption, but ‘public confidence’ is also a vague and developing concept which may be interpreted differently by the judiciary and may change over time, creating uncertainty around the scope of the law.¹³
- 8.8 Further, in today’s political and social environment, public debate and freedom of expression are highly valued and considered a necessary part of democracy.¹⁴ The nature of criticism has also changed, as well as the technology available to disseminate and access information.¹⁵
- 8.9 In this context, the ongoing adaptability of and need for the law of scandalising contempt and the assumptions on which it is based are being questioned.¹⁶
- 8.10 In the United Kingdom the law of scandalising contempt has been abolished.¹⁷ Long before then, the courts in England had considered scandalising contempt ‘virtually obsolescent’.¹⁸ Similarly, in the United States and Canada the law has been found to be incompatible with their respective constitutional rights to freedom of expression.¹⁹ Conversely, the New Zealand Law Commission (NZ Commission) has recommended that the law of scandalising contempt be retained and replaced by statutory provisions.²⁰
- 8.11 In Australia, the law of scandalising contempt continues to apply and to be raised as an issue by the courts.²¹ In Victoria, scandalising contempt was raised in 2017 in relation to comments made by three federal ministers about the approach of the Court of Appeal in *DPP v Besim*; *DPP v MHK* when considering the adequacy of a sentence for a person who had pleaded guilty to terrorism charges.²² In 2019 members of the media were also accused of committing scandalising contempt when reporting on the Victorian County Court criminal trial of George Pell.²³
- 8.12 Given the purpose of the law is to protect the integrity and authority of the court, unique issues arise in relation both to the operation and scope of the offence and to the broader assumptions and policies underlying the law. Accordingly, this chapter considers the following issues:
- the definition and scope of the law
 - whether scandalising contempt is a necessary and relevant law in today’s modern context
 - the approach of different jurisdictions
 - whether reform of the offence is required.

12 The Law Reform Commission, *Contempt* (Report No 35, 1987) 245 [423].

13 See Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1.

14 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Mason CJ), citing *The Commonwealth v John Fairfax & Sons Ltd.* (1980) 147 CLR 39, 52 (Mason J).

15 Justice Michael Kirby, ‘Attacks on Judges—A Universal Phenomenon’ (Speech, Winter Leadership Meeting, Hawaii, 5 January 1998); Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1.

16 The law of scandalising contempt has been described as ‘archaic’ and ‘antiquated’, see Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 159; Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) [5.1]; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 109 [6.27].

17 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court*, Report No 335 (2012) 26; *Crime and Courts Act 2013* (UK) s 33 ‘Abolishment of scandalising the judiciary as form of contempt of court’.

18 *McLeod v St Auyyn* [1899] AC 549, 561; *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 (HC), 347A.

19 *R v Kopyto* (1987) 62 OR (2d) 449; *Bridges v California*, 314 US 252 (1941).

20 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 116–17.

21 Kim Gould, ‘Scandalising Contempt in Australia: Dead? Dying? In Much Danger? ... (Not!)...!’ (2010) 15 *Media and Arts Law Review* 23.

22 *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* [2017] VSCA 165. See Chapter 3 for a discussion of this case.

23 Amanda Meade, ‘Up to 100 Journalists Accused of Breaking Pell Suppression Order Face Possible Jail Terms’, *The Guardian* (online), 26 February 2019 <www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breaking-pell-trial-suppression-order-face-possible-jail-terms?CMP=Share_iOSApp_Other>; Adam Cooper, ‘DPP Moves to Jail Editors, Journalists’, *The Age* (Melbourne), 27 March 2019; Richard Ackland, ‘The Media and Contempt of Court’, *The Saturday Paper* (online), 6–12 April 2019 <<https://www.thesaturdaypaper.com.au/opinion/topic/2019/04/06/the-media-and-contempt-court/15544692007951>>.

Issues with the law of scandalising contempt

The uncertain test

- 8.13 In 1935 the High Court stated in *R v Dunbabin; Ex Parte Williams (Dunbabin)* that scandalising contempt was constituted by:
- publications which tend to detract from the authority and influence of judicial determinations; publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.²⁴
- 8.14 A number of cases have described this test as an 'inherent tendency' to interfere with the administration of justice.²⁵ As is the case with other forms of contempt, the test does not require that the administration of justice was in fact undermined or discredited, but rather that a risk existed. There is also no requirement that there be any intention to interfere on the part of the publisher²⁶ but it appears that an intention to publish is needed.²⁷
- 8.15 There is some guidance from the courts as to the scope of the test. For example, it has been stated that the act or publication must pose a 'real' or 'serious' risk as opposed to a remote possibility that the publication will undermine public confidence in the administration of justice.²⁸
- 8.16 Similarly to sub judice contempt, however, the 'inherent tendency' test has been criticised for being imprecise, broad and as setting a low threshold, thereby infringing on freedom of expression.²⁹
- 8.17 In particular, 'tendency', 'calculated to impair' and 'public confidence' are all vague and general concepts leaving room for doubt as to what would constitute a scandalising contempt.
- 8.18 In his dissenting judgment in *Gallagher*, Justice Murphy stated that the offence is so 'vague and general that it is an oppressive limitation on free speech'.³⁰ In light of this, he supported the higher threshold test used in the United States, that the 'substantive evil be extremely serious and the degree of imminence extremely high before utterances can be punished'.³¹ It is noted, however, that the US jurisdiction should be treated with some caution, given its constitutional right to freedom of speech.³²
- 8.19 The Australian Law Reform Commission (ALRC) also noted the vague and abstract notion of 'public confidence'.³³ The Commission stated that there was a lack of evidence as to what the Australian public expects of judges and the courts and instead there was a reliance on the courts to guess what those expectations might be.³⁴
- 8.20 In addition, judicial attitudes, community expectations and the political climate are always changing, meaning there can be a lack of consistency in determining what does or does not have an inherent tendency to undermine the integrity and authority of the courts.³⁵

24 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442 (Rich J).

25 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 371 (Dixon CJ, Fullagar J, Kitto J, Taylor J); *A-G (Qld) v Lovitt* [2003] QSC 279 [58] (Chesterman J).

26 *R v Brett* [1950] VLR 226, 231. See also *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 911 (Hope J); Cf: *A-G (Qld) v Lovitt* [2003] QSC 279 [58] (Chesterman J).

27 *Wade v Gilroy* (1986) 83 FLR 14, 20.

28 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [55]; *The Herald & Weekly Times Ltd v A-G (Vic)* [2001] VSCA 152; *R v Herald & Weekly Times Ltd (No 2)* [2000] VSC 35.

29 *Gallagher v Durack* (1983) 152 CLR 238, 248 (Murphy J); The Law Reform Commission, *Contempt* (Report No 35, 1987) 248–9 [428] [431].

30 *Ibid.*

31 *Ibid.*

32 *Ibid.* 243.

33 The Law Reform Commission, *Contempt* (Report No 35, 1987) 251 [434].

34 *Ibid.*

35 *Ibid.* 251–2 [434]. See *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 908 (Hope JA); see also Kim Gould, 'Scandalising Contempt in Australia: Dead? Dying? In Much Danger? ... (Not!)...' (2010) 15 *Media and Arts Law Review* 23, 68; Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39 *Adelaide Law Review* 1, 6.

Balancing scandalising contempt and fair criticism

8.21 The court has stated that a comment about the courts or a judge may be scandalising contempt if it is either ‘scurrilous abuse’,³⁶ or ‘excites misgivings as to the integrity, propriety and impartiality brought to the exercise of judicial office’.³⁷

8.22 However, it is well established that criticism, even if ‘colourful and vitriolic’,³⁸ is not a contempt if it is fair, does not impute improper motives to a judge and is made in good faith.³⁹

8.23 The courts have recognised that there is a delicate balance between protecting the public’s confidence in the judiciary and fair criticism and that fair criticism is a necessary component of the administration of justice.⁴⁰

8.24 It remains unclear, however, when allegations of partiality or impropriety may be properly distinguished from fair or ‘intemperate, yet permissible, criticism’.⁴¹ This problem was stated by Justice Hope in the New South Wales case *A-G v Munday*:

It is this qualification which must cause the greatest concern for any would-be critic, for its application in particular circumstances can give rise to great difficulty; it is certainly not every such criticism that amounts to contempt, and the boundary between what is and what is not contempt involves questions of degree, and therefore uncertainty.⁴²

8.25 There have been some decisions which have distinguished a fair criticism from an allegation of partiality or impropriety. For example, the following statements were held *not* to constitute scandalising contempt:

- suggesting that a ‘Judge may, in his approach to a problem be influenced by his character and general outlook’⁴³
- suggesting a judge or court has been influenced by a particular matter, provided the comment is not scurrilous⁴⁴
- commenting on a statement made by a judge which in itself impairs the public’s confidence in the courts⁴⁵
- suggesting improper motives if the judge in question is deserving of that accusation.⁴⁶

8.26 The changing boundaries of the law of scandalising contempt can make it difficult to predict and adhere to.⁴⁷

Truth as a defence

8.27 Truth as a defence ‘implicitly’⁴⁸ arises from the aim of scandalising contempt to prevent ‘baseless’,⁴⁹ ‘unwarrantable’⁵⁰ and ‘unjustified’⁵¹ attacks on the integrity of the courts. That is, if the criticism is based on fact or is justifiable, the offence of scandalising contempt may not be made out.

36 *R v Kopyto* (1987) 62 OR (2d) 449, 910; *A-G (NSW) v Munday* [1972] 2 NSWLR 887. ‘Scurrilous abuse’ is no longer commonly used, but it is defined as ‘grossly or indecently abusive’: Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 57 [6.6].

37 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442 (Rich J); *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 910.

38 *R v Kopyto* (1987) 62 OR (2d) 449.

39 *R v Nicholls* (1911) 12 CLR 280, 286 (Griffith CJ).

40 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 39 (Brennan J); *R v Nicholls* (1911) 12 CLR 280, 286 (Griffith CJ). See also *Ambard v A-G (Trinidad & Tobago)* [1936] AC 322.

41 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 446 [6.840].

42 *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 910.

43 *R v Brett* [1950] VLR 226, 231.

44 *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 910.

45 *R v Nicholls* (1911) 12 CLR 280, 286.

46 *Ahnee v DPP* [1999] 2 AC 294, 306.

47 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Consultation Paper, 2012) 5 [18].

48 See Oyiela Litaba, ‘Does the “Offence” of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?’ (2003) 8(1) *Deakin Law Review* 113.

49 *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ).

50 *R v Fletcher* (1935) 52 CLR 248, 257 (Evatt J); *Bell v Stewart* (1920) 28 CLR 419, 429 (Isaacs and Rich JJ).

51 *R v Fletcher* (1935) 52 CLR 248, 257 (Evatt J).

- 8.28 The obiter comments of Justice Brennan in the High Court case of *Nationwide News Pty Ltd v Wills* in 1992 appears to suggest that the truth is a defence to scandalising contempt:

It is not necessary, even if it be possible, to chart the limits of contempt scandalizing the court. It is sufficient to say that the revelation of truth—at all events when its revelation is for the public benefit—and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence.⁵²

- 8.29 However, it is unclear whether truth operates as a complete defence as it does in defamation.⁵³ Academic Oyiela Litaba noted that, given the severe punishment that can arise from the offence, there was still too much unpredictability as to how scandalising contempt could be proved and defended.⁵⁴

- 8.30 The ALRC noted that without a defence of truth:

[W]ell-founded allegations of judicial misconduct may be punished and, more importantly, people in possession of sound evidence establishing judicial misconduct may be restrained from revealing it publicly out of fear of being convicted of contempt. The public scrutiny which is necessary to ensure the proper functioning of any social institution of major importance will thus be significantly hampered in the case of the judiciary, and a dangerous tradition of excessive deference to the judiciary may arise within the media and the community at large.⁵⁵

- 8.31 To clarify this aspect of the law of scandalising contempt, the ALRC recommended that a defence of justification should be introduced.⁵⁶

- 8.32 The Law Reform Commission of Western Australia recommended that the same defences that apply to defamation, including truth and fair comment, should apply to the recommended statutory offence of scandalising contempt.⁵⁷

- 8.33 The NZ Commission also recommended a statutory defence of truth similar to the defence available in the jurisdiction's defamation legislation.⁵⁸ The Commission stated:

The defence of truth exists in defamation law because an individual cannot claim damage to a reputation that he or she does not have. Similarly, a defendant cannot be said to be responsible for undermining public confidence in the judiciary where the allegations made are in fact true.⁵⁹

- 8.34 An identified problem with having a defence of truth, however, is that it could have the effect of putting the judge on trial and exposing the judge's conduct to external scrutiny.⁶⁰

Prosecution of high-profile individuals

- 8.35 The relevance of the status and influence of an individual⁶¹ when prosecuting for scandalising contempt has been criticised, particularly when an accused is prosecuted to the exclusion of the media outlets which published the statement.⁶²

52 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 39.

53 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 119 [6.76]; LexisNexis, *Halsbury's Laws of Australia* (online at 25 September 2018) 105 Contempt, '2 Criminal Contempt' [105–230].

54 Oyiela Litaba, 'Does the "Offence" of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8(1) *Deakin Law Review* 113, 145.

55 The Law Reform Commission, *Contempt* (Report No 35, 1987) 255 [439].

56 *Ibid.*

57 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 116.

58 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 120 [6.78].

59 *Ibid.*

60 Law Commission (New Zealand), *Contempt in Modern New Zealand, Issues Paper* (2014) 64 [6.62]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 254 [438].

61 For example, Lovitt, a barrister, was carrying out his duties to the court at the time of stating to the media that the judge was a 'cretin'. In finding the defendant guilty of scandalising contempt, the judge considered the defendant's status as a barrister and that his criticisms would therefore be considered knowledgeable by the public. Lovitt's status was held to have contributed to the serious nature of the contempt: *A-G (Qld) v Lovitt* [2003] QSC 279.

62 For example, it was held in *Lovitt* that the barrister's recklessness in making the statement in the presence of the media, 'with no basis for believing that all of their news organisations would decline to publish his remarks', was enough to establish contempt of court. The publicising media were not prosecuted: *A-G (Qld) v Lovitt* [2003] QSC 279.

- 8.36 Justice Murphy in the High Court decision of *Gallagher* stated in his dissenting judgment:
- The authority and standing of the Federal Court can only be lowered if it allows itself to become the vehicle of unexplained selective prosecutions for contempt of itself.⁶³
- 8.37 The ALRC also noted that the effect of selective prosecution of influential speakers and writers is dangerous.
- This concentration on public figures and the media may be justified on the broad basis that power demands responsibility. But it has its dangers. At worst, the law of scandalising can become, or appear to be, an overt political weapon used against prominent individuals who ‘challenge the system’.⁶⁴
- 8.38 The Court of Appeal’s decision to hold a hearing in relation to potential charges of contempt against three federal ministers is another more recent example of high-profile individuals being the focus of potential contempt proceedings.⁶⁵ In these circumstances, however, the publishing media outlet, *The Australian*, was also included as a party.
- 8.39 In the cases where the original speaker of the statement and the publicising media have both been prosecuted and convicted, there was a distinct connection between the first speaker and publishing media.⁶⁶

The appropriateness of the summary procedure

- 8.40 The appropriateness of the summary procedure for scandalising contempt cases has been repeatedly affirmed by the courts.⁶⁷ Justice Dixon stated the justification for this procedure:
- It is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority. But it must be done by judicial remedies, and judicial remedies are necessarily administered by the Courts themselves. The Court must, therefore, undertake the task notwithstanding the embarrassment of considering what it should do in relation to an attack upon itself. There is no practicable alternative.⁶⁸
- 8.41 The courts have also recognised that, given the broad purpose of scandalising contempt—to protect the authority and integrity of the court—the summary procedure should be invoked only in exceptional⁶⁹ or extremely serious⁷⁰ circumstances and not to protect judges from personal attacks.⁷¹
- 8.42 Despite these acknowledgements of the need for judicial restraint in exercising the summary procedure to punish for scandalising contempt, the process has been the subject of criticism.⁷²

63 *Gallagher v Durack* (1983) 152 CLR 238, 252–3.

64 The Law Reform Commission, *Contempt* (Report No 35, 1987) 253 [435].

65 *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* [2017] VSCA 165.

66 For example, in *Hoser* the publishing company of a book (owned by the original speaker) was also prosecuted: *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443; *Hoser & Kotabi Pty Ltd v R* [2003] VSCA 194; *A-G (Qld) v Lovitt* [2003] QSC 279 [63]; *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 915; *R v The Herald & Weekly Times Ltd* [1999] VSC 432; *R v Herald & Weekly Times Ltd (No 2)* [2000] VSC 35; *The Herald & Weekly Times v A-G (Vic)* [2001] VSCA 152.

67 *Re Colina; Ex Parte Torney* (1999) 200 CLR 386, 393 (Gleeson CJ and Gummow J) citing *DPP v Australian Broadcasting Corporation* (1987) 7 NSWLR 588, 595. See also *R v Fletcher* (1935) 52 CLR 248, 259 (Evatt J).

68 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 447.

69 *Bell v Stewart* (1920) 28 CLR 419, 429 (Isaacs and Rich JJ).

70 *Gallagher v Durack* (1983) 152 CLR 238, 240 (Gibbs CJ).

71 *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442 (Rich J).

72 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 114 [6.53]; The Law Reform Commission, *Contempt* (Report No 35, 1987) 279; Enid Campbell, ‘Contemptuous Criticism of the Judiciary and the Judicial Process’ (1960) 34 *The Australian Law Journal* 224. See also Justice Kirby’s (dissenting) discussion of section 80 of *The Constitution*, and its effect of deeming scandalising contempt as an indictable offence that should have the option of being heard by a jury: *Re Colina; Ex Parte Torney* (1999) 200 CLR 386, 422–427 (Kirby J); Justice Murphy (dissenting) also stated a trial by jury should be restored: *Gallagher v Durack* (1983) 152 CLR 238.

- 8.43 The varying criticisms arise from the apparent contradiction that the impartial and fair institution of the judiciary should be responsible for prosecuting its own critics and the risk that a judgment against a critic could be perceived as the courts protecting their own interests.⁷³
- 8.44 The Law Commission of England and Wales, in its review of scandalising contempt, stated:
- There is something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges.⁷⁴
- 8.45 The ALRC, which recommended that a trial by jury be the appropriate mode of procedure for scandalising contempt,⁷⁵ summarised a range of arguments against the current summary procedure:
- The current procedure could possibly be seen as biased and any sentencing that might result could be perceived as a ‘gut reaction’ of the court rather than a measured response.⁷⁶
 - A jury trial is not available for less serious crimes, so if it is not available in the context of scandalising contempt, then should a prosecution be brought at all? ⁷⁷
 - Given the importance of the opinions of the ‘common person’, would a jury trial not be more appropriate to counter the risk of a judge alone being out of touch with the community? ⁷⁸
- 8.46 The NZ Commission also raised the question of whether the efficiency of the summary procedure was necessary for scandalising contempt, given the offence is protecting not a particular trial but administration of justice as an ongoing process.⁷⁹

Apologies and retractions

- 8.47 As the courts have recognised, apologies can work to either prevent a prosecution or mitigate a sentence in any case of contempt.⁸⁰ As the ALRC has also recognised, this is particularly relevant to scandalising contempt because it is:
- avowedly concerned with the impairment of public confidence in the administration of justice. It is anomalous that an apology to the court itself should be thought to have some effect in restoring such confidence—which by hypothesis has been damaged, or at least jeopardised, by the scandalising remarks in question—while there is no explicit recognition that a publicised apology might be effective to do this.⁸¹
- 8.48 As discussed in Chapter 3, three federal ministers purged their alleged scandalising contempt following an apology.⁸²
- 8.49 However, as also discussed in Chapter 3, there is uncertainty around when and how an apology should be made for an alleged contempt and how it may affect a prosecution or sentencing for scandalising contempt.
- 8.50 The ALRC noted that the concept of apologies and retractions in defamation law could be a useful guide for how they should operate in scandalising contempt.⁸³
- 8.51 In this context it is noted that the *Defamation Act 2005* (Vic) provides that an apology made by the defendant to the plaintiff or the publication of a correction can be considered in the

73 Justice Ronald Sackville, ‘How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary’ (2005) 31(2) *Monash University Law Review* 191, 193.

74 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 15 [63].

75 The Law Reform Commission, *Contempt* (Report No 35, 1987) 281 [479].

76 *Ibid* 279 [477].

77 *Ibid* 280 [477].

78 *Gallagher v Durack* (1983) 152 CLR 238, 249–50 (Murphy J).

79 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 114 [6.53].

80 See, eg, *R v The Age Co Ltd* [2008] VSC 305 where an apology mitigated the punishment imposed; *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* (2017) 52 VR 296 where an apology purged the contempt so that it was not necessary to impose any penalty or to commence contempt proceedings.

81 The Law Reform Commission, *Contempt* (Report No 35, 1987) 259 [448].

82 *DPP (Cth) v Besim*; *DPP (Cth) v MHK (No 2)* [2017] VSCA 165 [29].

83 The Law Reform Commission, *Contempt* (Report No 35, 1987) 259 [448].

mitigation of damages.⁸⁴

Is the law of scandalising contempt adaptable and relevant?

8.52 This part of the chapter considers the assumption that public confidence in the judiciary must be maintained to ensure the proper administration of justice.

8.53 The evidence behind this assumption is lacking and requires testing, as was stated by former Chief Justice Sir Anthony Mason:

Judges associate public confidence in the administration of justice with the independence of the judiciary and impartial enforcement of the law. That may well be right, though, in the absence of proof, it necessarily rests on that assumption. Whether the public appreciates the concept of judicial independence and values it highly may be questionable.⁸⁵

8.54 The ALRC summarised the ‘principal responses’ to the argument that public confidence is needed to support the judicial system:

- There is no clear evidence that a lack of public confidence could lead to the operation of the legal system being negatively impacted.⁸⁶
- It is short-sighted to expect that the public might ‘rise up’ and destroy the system if public discussion, education and criticism were to be allowed instead of repressed.⁸⁷
- Even if public confidence is perceived to be desirable, it should not be an ‘absolute good’ pursued at all costs, ‘[i]n particular, it should not override the need for public education as to the genuine flaws in the system ...’.⁸⁸

8.55 Further, judicial officers have acknowledged that they should be robust in the face of criticism, and that being criticised is part of the job of a judicial officer.⁸⁹ This is reflected in Lord Salmon’s statement in the 1980 United Kingdom case *A-G v BBC*:

I am and have always been satisfied that no judge would be influenced in his judgment by what may be said by the media. If he were, he would not be fit to be a judge.⁹⁰

8.56 The assumptions underlying scandalising contempt and the available evidence testing these assumptions are considered in three contexts. These are:

- the nature of criticism of the judiciary today in the context of new and emerging issues, acceptance of greater scrutiny of the courts and the impact of online and social media
- the global shift towards freedom of speech and the impact of the implied freedom of political communication
- alternative avenues for dealing with criticism of the court today and whether they provide a more appropriate balance between maintaining the integrity and authority of the court and freedom of speech.

84 *Defamation Act 2005* (Vic) s 38(1)(a)(b).

85 Sir Anthony Mason, ‘The Courts and Public Opinion’ (Speech to the National Institute of Government and Law, Parliament House Canberra, 20 March 2002) *NSW Bar Association News* 11 (2002) 30, 31. See also Justice Ronald Sackville, ‘How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary’ (2005) 31(2) *Monash University Law Review* 191.

86 The Law Reform Commission, *Contempt* (Report No 35, 1987) 246 [424].

87 *Ibid.*

88 *Ibid* [425].

89 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1, 16.

90 *A-G (UK) v British Broadcasting Corporation* [1980] 3 All ER 161, 169.

Criticism of the judiciary

- 8.57 Judicial and community expectations as to what type of criticism may ‘shake the public’s confidence’ have changed over time, as has the nature of communication giving rise to new types of criticism.
- 8.58 The NZ Commission reflected on these changes and the fact that the expression ‘scandalising’, ‘harks back to a bygone era and no longer reflects the nature of the harm caused by the offence or what the punishment is meant to achieve’.⁹¹
- 8.59 Further, heightened public debate and discussion about the judiciary have been acknowledged as a positive development and in the public’s interest.⁹² This is reflected in the courts’ consideration of ‘the good sense of the community’ as a sufficient safeguard against scandalising comments,⁹³ and current ‘Australian standards’,⁹⁴ as well as the apparent acceptance of fair comment and truth as defences to scandalising contempt.⁹⁵
- 8.60 However, new issues that have come before the court, such as terrorism⁹⁶ and native title cases,⁹⁷ and the consequent public and media attention, have given rise to a ‘climate of intense scrutiny and criticism’⁹⁸ in the form of sophisticated and concerted campaigns against the judiciary.
- 8.61 Justice Kirby, speaking extra-curially about the public response to the High Court decision in *Mabo v Queensland* ⁹⁹(*Mabo*) stated that there is concern that:
- such an unrelenting barrage of criticism and denigration would, if unabated, undermine the community’s confidence in the courts and acceptance of court decisions. Editorialists might declare that “robust political debate [is] good for the country”. But a lot of judges and lawyers, unused to such unrelenting assaults, had their doubts.¹⁰⁰
- 8.62 Justice Eames in *R v Hoser & Kotabi Pty Ltd (Hoser)* noted the modern challenges posed by criticism in the form of ‘concerted campaigns’ such as that following the *Mabo* decision. He stated that there was a difference between criticism which can be ignored and sophisticated, sustained campaigns that require a response from the courts.¹⁰¹
- 8.63 The changing media landscape has also affected the nature and reach of such criticism.¹⁰² Justice Eames, for example, noted that past calls for the judiciary to exercise caution before punishing contempt may need to be rethought in the context of mass communication.¹⁰³
- 8.64 An example of a campaign of this nature was the local, international and social media response to the George Pell trial. Not only did much of the media coverage allegedly breach a suppression order which was in place to prevent prejudice to Pell’s second trial, but the existence of the suppression order in the first place was implicitly criticised by media outlets which published stories about the ‘Censored’ case.¹⁰⁴

91 Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper (2014) 60 [6.29].

92 *R v Police Commissioner of the Metropolis; Ex parte Blackburn (No 2)* (1968) 2 QB 150, 155; *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443; *R v Kopyto* (1987) 62 OR (2d) 449; *A-G (NSW) v Munday* [1972] 2 NSWLR 887, 908.

93 *Bell v Stewart* (1920) 28 CLR 419, 429 (Isaacs and Rich JJ); *R v Dunbabin; Ex Parte Williams* [1935] 53 CLR 434, 442–3 (Rich J); *Gallagher v Durack* (1983) 152 CLR 238, 243 (Gibbs CJ, Mason, Wilson and Brennan JJ); *Mills v Townsville City Council (No 2)* [2003] QPELR 548. Eames J stated, however, that the ‘good sense of the community’ can only go so far in protecting against ‘hyperbole and fatuous argument’ compared to a published book with apparent credibility: *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [234].

94 *Anissa Pty Ltd v Parsons* [1999] VSC [22] (Cummins J).

95 *R v Nicholls* (1911) 12 CLR 280; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 90–1 (Dawson J).

96 *DPP (Cth) v Besim; DPP (Cth) v MHK (No 2)* [2017] VSCA 165.

97 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v State of Queensland* (1991) 187 CLR 1.

98 Kim Gould, ‘When the Judiciary is Defamed: Restraint Policy Under Challenge’ (2006) 80 *Australian Law Journal* 602, 606.

99 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

100 Justice Michael Kirby, ‘Attacks on Judges—A Universal Phenomenon’ (Speech, Winter Leadership Meeting, Hawaii, 5 January 1998).

101 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [226].

102 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1, 17.

103 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [228]. See also Chief Justice in Equity Bergin noted in the New South Wales Supreme Court case *Tate v Duncan-Strelec* [2014] NSWSC 1125 [198]: ‘The fact that there is more capacity to read other people’s opinions, comments and allegations than in times prior to the establishment of the internet does not mean that the Court should be less vigilant in ensuring that there is no interference with the administration of justice and protecting the Court from being scandalised.’

104 On Thursday, 13 December 2018, the day Pell’s verdict came down, the *Herald-Sun* newspaper published on its front page the headline ‘CENSORED’, followed by ‘The world is reading a very important story that is relevant to Victorians. *The Herald-Sun* is prevented from publishing details of this significant news.’

- 8.65 International media outlets also commented on the ‘gag order’ and that such orders were ‘true anachronisms in the digital age’.¹⁰⁵ In March 2019, the Director of Public Prosecutions commenced proceedings against 36 members of the media for contempt of court, including publications which ‘had the effect of scandalising the court’.¹⁰⁶ A directions hearing in this case took place in the Supreme Court on 15 April 2019 and the matter has been set down for a further directions hearing on 26 June 2019. The matter is yet to be fixed for hearing.
- 8.66 Social media has also provided a platform for highly critical, malicious and personal comments to be published about individual judges.¹⁰⁷ Perspectives differ, however, as to whether this type of content is best ignored, or its cumulative effect is a cause for concern.
- 8.67 The NZ Commission identified a number of ‘unsavoury websites’ with offensive material about judges, some of which took on a menacing tone and could appear to be ‘official’.¹⁰⁸ The Commission stated that the risks created by social media should not be ignored and may justify retaining scandalising contempt.

With the internet being a permanent repository of information and with the potential for posts to go viral, we can no longer dismiss attacks on judges on the ground that today’s newspaper is tomorrow’s fire lighter.¹⁰⁹

- 8.68 Academics Marilyn Bromberg and Andrew Ekert identified a gap in the current discourse as to how the judiciary should respond to critical or malicious comments on social media.¹¹⁰
- 8.69 The ability to filter, police and respond to such comments, however, has been identified as impossible.¹¹¹
- 8.70 The Law Commission of England and Wales on the other hand has noted that extreme abuse of judges, mostly online, ‘does not appear to be doing any harm. The very extremity of the language prevents most readers from taking it seriously.’¹¹²

Scandalising contempt and freedom of expression

- 8.71 Other jurisdictions have found scandalising contempt to be incompatible with their respective constitutional rights to freedom of expression, with the United Kingdom abolishing the offence,¹¹³ bringing them into line with Canada¹¹⁴ and the United States¹¹⁵ where the offence has been found to be incompatible with their constitutional rights to freedom of expression.¹¹⁶

105 Margaret Sullivan, ‘A Top Cardinal’s Sex-Abuse Conviction is Huge News in Australia. But the Media Can’t Report It There’, *The Washington Post* (Web Page, 12 December 2018) <www.washingtonpost.com/lifestyle/style/a-top-cardinals-sex-abuse-conviction-is-huge-news-in-australia-but-the-media-cant-report-it-there/2018/12/12/49c0eb68-fe27-11e8-83c0-b06139e540e5_story.html?utm_term=.7a635aecd36a>. For a discussion of the media’s reporting of the Pell verdict, see Margaret Simons, ‘Suppression Orders Aren’t Perfect but Journalistic Hubris Won’t Fix the Problem’, *The Guardian* (Web Page, 27 February 2019) <www.theguardian.com/commentisfree/2019/feb/27/suppression-orders-arent-perfect-but-journalistic-hubris-wont-fix-the-problem>; for a brief discussion of the international coverage of the Pell case, see Justice François Kunc, ‘Current Issues—Victorian Suppression Orders and the International Media’ (2019) 93 *Australian Law Journal* 79, 80.

106 Adam Cooper, ‘DPP Moves to Jail Editors, Journalists’, *The Age* (Melbourne), 27 March 2019. See also Richard Ackland, ‘The Media and Contempt of Court’, *The Saturday Paper* (Web Page, 6–12 April 2019) <www.thesaturdaypaper.com.au/opinion/topic/2019/04/06/the-media-and-contempt-court/15544692007951>.

107 Marilyn Bromberg and Andrew Eckert, ‘Haters Gonna Hate: When the Public Uses Social Media to Comment Critically or Maliciously About Judicial Officers’ (2017) 24 *Journal of Judicial Administration* 141, 142–5; Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1, 14. See also Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 19 [71].

108 Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper (2014) 64 [6.58].

109 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 113 [6.47].

110 Marilyn Bromberg and Andrew Eckert, ‘Haters Gonna Hate: When the Public Uses Social Media to Comment Critically or Maliciously About Judicial Officers’ (2017) 24 *Journal of Judicial Administration* 141, 145.

111 Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, ‘The Judiciary and the Public: Judicial Perceptions’ (2018) 39 *Adelaide Law Review* 1, 16.

112 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 9 [33].

113 *Crime and Courts Act 2013* (UK); Law Commission (England and Wales), *Scandalising the Court: Summary of Conclusions* (Final Report No 335, 2012).

114 *R v Kopyto* (1987) 62 OR (2d) 449.

115 *Bridges v California*, 314 US 252 (1941).

116 See Cory JA’s discussion of the position of different jurisdictions in the Canadian case *R v Kopyto* (1987) 62 OR (2d) 449. See also Oyiela Litaba, ‘Does the “Offence” of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?’ (2003) 8(1) *Deakin Law Review* 113, 135.

- 8.72 Despite not having a constitutional right to freedom of expression in Australia, the common law has afforded protection of freedom of speech.¹¹⁷ In light of this, Justice Murphy (dissenting) noted in *Gallagher*:
- The absence of a constitutional guarantee does not mean that Australia should accept judicial inroads upon freedom of speech which are not found necessary or desirable in other countries. At stake is not merely the freedom of one person; it is the freedom of everyone to comment rightly or wrongly on the decisions of the courts in a way that does not constitute a clear and present danger to the administration of justice.¹¹⁸
- 8.73 The Australian Constitution does, however, provide for the protection of freedom of communication about government or political matters.¹¹⁹ In 1997 in *Lange v ABC*, the High Court held that courts must determine whether laws that restrict this freedom are justified.¹²⁰
- 8.74 The compatibility of the implied freedom with scandalising contempt appears to be uncertain. On the one hand, Justice Eames stated in *Hoser* that scandalising contempt did not detract from the principles in *Lange* and the common law of scandalising contempt already appropriately accommodated freedom of expression.¹²¹ Further, in a defamation case concerning criticism of a magistrate, it was stated that criticisms of a judicial officer are not considered to be discussion of government and political matters.¹²²
- 8.75 However, there have been expressions to the contrary where it has been suggested, or at least questioned, that criticism of the courts could be argued to be about ‘government or political matters’ or relevant to the actions of ‘elected representatives’ or ‘public officials’ and thereby protected by the implied freedom.¹²³
- 8.76 For example, criticisms related to the appointment of or removal of judges may be considered discussion of government or political matters because such discussion ‘concerns, expressly or inferentially, acts or omissions of the legislature or the Executive Government’.¹²⁴
- 8.77 Justice Sackville, writing extra-curially, suggested that if the freedom of political communication was to apply to criticism of judicial officers, a much higher threshold would consequently be set for scandalising contempt, aligning the protections afforded to the judiciary with the protections afforded to other ‘elected representatives or public officials’.¹²⁵

Alternatives to scandalising contempt

- 8.78 Alternative legal mechanisms for dealing with abusive behaviour towards the judiciary have been identified. These include defamation law and other criminal offences that deal with assaults or threats. The ALRC stated:

... if the offence of scandalising were to be wholly eliminated from the law of contempt, such criticism would still be subject to a substantial degree of legal regulation.¹²⁶

117 See Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate Publishing Company, 2000) 7–13.

118 *Gallagher v Durack* (1983) 152 CLR 238, 248.

119 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018) 696 [10.237].

120 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

121 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [90].

122 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 8–10 (Winneke ACJ).

123 The Victorian Court of Appeal asked whether comments on the judiciary qualified as ‘communication about government or political matters’; the issue was unresolved: *Hoser & Kotabi Pty Ltd v R* [2003] VSCA 194.

124 This possibility was noted by Justice McHugh but the suggestion was qualified: ‘Courts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible’ government in the constitutional sense: *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 361.

125 Justice Ronald Sackville, ‘How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary’ (2005) 31(2) *Monash University Law Review* 191, 211. The enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which confers a right to a freedom of expression has not been considered at all by the courts in the context of scandalising contempt.

126 The Law Reform Commission, *Contempt* (Report No 35, 1987) 242 [418].

- 8.79 Examples of criminal offences under the *Crimes Act 1958* (Vic) which may address abusive acts or publications aimed at the court include:
- threats to kill, section 20
 - threats to inflict serious injury, section 21
 - assaults or threats of assault, section 31
 - threats to destroy or damage property, section 198.
- 8.80 It is also an offence under the *Criminal Code Act 1995* (Cth) to use an online service in a way that reasonable persons would regard as being menacing, harassing or offensive.¹²⁷
- 8.81 Defamation may also be an alternative when dealing with publications about judges that are unwarranted or false. Recent cases both in Victoria and other jurisdictions indicate a willingness on the part of the courts to use the law of defamation in situations where the publication in question may have also been prosecuted for scandalising contempt.¹²⁸ Academic Kim Gould noted that the Australian judiciary's use of defamation proceedings may be a sign that traditional 'judicial restraint' towards taking such a course may be changing.¹²⁹
- 8.82 However, a defamation action, which is aimed at protecting an individual's reputation, would not address the damage done to the reputation of the administration of justice.¹³⁰ Justice Eames noted in *Hoser* that there is a need to treat the trend of using defamation proceedings with caution:
- The costly, time consuming and distracting pursuit of defamation proceedings ... makes the pursuit of such proceedings entirely unattractive, for a judge or magistrate who may have no interest in gaining financial benefit but is simply wanting to defend the institution of the court against unfounded or damaging attack.¹³¹
- 8.83 Scandalising contempt has also been seen to supplement other types of contempt and without it, there may be situations where acts or publications fall outside the other categories of contempt or the law of defamation and so escape legal consequences.¹³²
- 8.84 Alternatively, the judiciary has been making increasing use of non-legal avenues to address criticisms of the court and to explain the workings of the legal system. This trend contrasts with the traditional view that the judiciary should not reply to criticisms or enter public controversy.¹³³
- 8.85 The changing media landscape, including the rise of social media and decline in journalists reporting on court cases, has been identified as a force behind the courts engaging more directly with the community.¹³⁴

127 *Criminal Code Act 1995* (Cth), s 474.17 'Using a carriage service to menace, harass or cause offence.'

128 See *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1; *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 291; *Mann v O'Neill* (1997) 191 CLR; Kim Gould, 'When the Judiciary is Defamed: Restraint Policy Under Challenge' (2006) 80 *Australian Law Journal* 602.

129 Justice Ronald Sackville, 'How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) 31(2) *Monash University Law Review* 191; see also Kim Gould, 'When the Judiciary is Defamed: Restraint Policy Under Challenge' (2006) 80 *Australian Law Journal* 602, 603.

130 Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper (2014) 285 [6.65].

131 *R v Hoser & Kotabi Pty Ltd* [2001] VSC 443 [229] (*Hoser*). See also Kirby J in *Mann v O'Neill* (1997) 191 CLR, 271–2.

132 For example, scandalising contempt supplemented contempt in the face of the court where a defendant filed an affidavit in which he had included allegations of corruption by the court. As the defendant's affidavit was read into evidence by the prosecution, it was not a contempt in the face of the court. However, a prosecution did proceed on the basis of scandalising contempt. The defendant was found guilty of contempt and sentenced to a good behaviour bond: *Martin v Trustrum (No 3)* (2003) 12 Tas R 131. See also *The Herald & Weekly Times v A-G (Vic)* [2001] VSCA 152; *R v Herald & Weekly Times Ltd (No 2)* [2000] VSC 35; *R v The Herald & Weekly Times Ltd* [1999] VSC 432: scandalising contempt may be a supplement for sub judice contempt where a publication is relating to pending proceedings, but the case is being heard by a judge alone and therefore the risk of influencing a jury is not present. Discussed in Kim Gould, 'Scandalising Contempt in Australia: Dead? Dying? In Much Danger? ... (Not!)...' (2010) 15 *Media and Arts Law Review* 23.

133 *R v Police Commissioner of the Metropolis; Ex parte Blackburn (No 2)* (1968) 2 QB 150, 155 (Denning MR).

134 Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45.

- 8.86 Examples of direct engagement with the public include making comments in the media,¹³⁵ at conferences and in speeches;¹³⁶ the introduction of court media-liaison officers,¹³⁷ court social media pages¹³⁸ and podcasts;¹³⁹ and the availability of judgments online as a means of defending and explaining judicial decisions and conduct.¹⁴⁰
- 8.87 The broadcasting of Chief Judge Peter Kidd's sentencing of George Pell is another example of developments in relation to the courts' communication and engagement with the community.¹⁴¹ Chief Judge Kidd stated in his sentencing remarks that the decision to broadcast the judgment was made in accordance with 'transparent and open justice and an accessible communication of the work of the court'.¹⁴²

Possible reforms to scandalising contempt

- 8.88 The central question when considering the future of scandalising contempt is whether judicial officers should be subject to special treatment. This in turn depends on the validity of the assumption that certain types of criticism are capable of shaking the public's confidence in the judiciary in today's modern context.
- 8.89 Scandalising contempt cases, although infrequent, continue to arise in Australia, suggesting there is a view that this contempt power needs to be retained in some form.¹⁴³ This stands in contrast to the position taken in other jurisdictions where the offence has been abolished or has fallen into disuse because of its incompatibility with freedom of expression.
- 8.90 Accordingly, this part sets out a number of criticisms of the law of scandalising contempt, as well as some justifications for the retention of the law and the introduction of a statutory offence. A number of questions are then posed.

Abolition of scandalising contempt

- 8.91 The law of scandalising contempt has been criticised for treating the judiciary as a 'specially favoured institution where public criticism is concerned'¹⁴⁴ and for being self-serving in purpose.¹⁴⁵
- 8.92 Scandalising contempt has also been criticised as an 'untenable' imposition on freedom of expression.¹⁴⁶ Similarly to sub judice contempt, the uncertain and inconsistent nature of the law of scandalising contempt has been criticised for creating a 'chilling effect' by which comments about the judiciary are censored.¹⁴⁷
- 8.93 In light of these criticisms, and following recommendations by the Law Commission of England and Wales, scandalising contempt was abolished in the United Kingdom in 2013.¹⁴⁸

135 See, eg, 'Chief County Court Judge Criticises "Denigrating" Media Coverage of Court Appeal', on *Mornings with Jon Faine* (Web Page, 22 May 2018) <www.abc.net.au/radio/melbourne/programs/mornings/peter-kidd/9786720>

136 See Justice Michael Kirby, 'Attacks on Judges—A Universal Phenomenon' (Speech, Winter Leadership Meeting, Hawaii, 5 January 1998); Sir Anthony Mason, 'The Courts and Public Opinion' (Speech, National Institute of Government and Law, Parliament House Canberra, 20 March 2002); the Hon Philip Cummins, 'Open Courts: Who Guards the Guardians?' (Paper presented at the *Justice Open and Shut: Suppression Orders and Open Justice in Australia and the United Kingdom Seminar*, Sydney, 4 June 2014).

137 Oyiela Litaba, 'Does the "Offence" of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8(1) *Deakin Law Review* 113, 128; Jane Johnston, 'Public Relations in the Courts' (2001) 28(1) *Australian Journal of Communication* 109.

138 Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40(1) *Monash University Law Review* 45.

139 Supreme Court of Victoria, 'Gertie's Law Podcast', (Podcast, March 2019) <www.supremecourt.vic.gov.au/podcast>.

140 Oyiela Litaba, 'Does the "Offence" of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8(1) *Deakin Law Review* 113, 128.

141 Jerome Doraisamy, 'Why Chief Judge Kidd Broadcast the Pell Sentence', *Lawyers Weekly* (Web Page, 15 March 2019) <www.lawyersweekly.com.au/wig-chamber/25247-why-kidd-cj-broadcast-the-pell-sentence>.

142 County Court of Victoria, 'Sentencing Remarks in DPP v George Pell' (Web Page, 19 March 2019) <www.countycourt.vic.gov.au/news-and-media/news-listing/2019-03-13-sentencing-remarks-dpp-v-george-pell>; *DPP v Pell (Sentence)* [2019] VCC 260 (13 March 2019).

143 Kim Gould, 'Scandalising Contempt in Australia: Dead? Dying? In Much Danger? ... (Not!) ...' (2010) 15 *Media and Arts Law Review* 23, 24–6.

144 The Law Reform Commission, *Contempt* (Report No 35, 1987) 264 [457].

145 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 6 [18].

146 Law Commission (New Zealand), *Contempt in Modern New Zealand* (Issues Paper, 2014) 64 [6.62].

147 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 9 [31].

148 *Crime and Courts Act 2013* (UK) s 33; Law Commission (England and Wales), *Scandalising the Court: Summary of Conclusions* (Final Report No 335, 2012).

8.94 In addition, it has been noted that:

- Scandalising contempt is not well-known to the public and has a limited symbolic value.¹⁴⁹
- Prosecutions for scandalising contempt can have negative consequences, re-publicising offending material and putting the conduct of the judge on trial.¹⁵⁰
- Prosecutions for scandalising contempt are not necessary to uphold the administration of justice.¹⁵¹
- The law of scandalising contempt does not align with current public attitudes and expectations of the judiciary.¹⁵²
- There are legal alternatives available to address false accusations of misconduct.¹⁵³

8.95 However, in contrast it has also been recognised that:

- The law of scandalising contempt helps to maintain public confidence in the judiciary and to ensure the proper functioning of the court system, and that any undermining of the judiciary could lead to non-compliance with court orders or the system being ignored.¹⁵⁴
- Public confidence will not be maintained unless there is a criminal offence to prevent the making of statements which have a tendency to impair that confidence.¹⁵⁵
- The law of scandalising contempt helps to protect the reputation of judges which is essential to the community's acceptance of their role.¹⁵⁶
- The court requires a quick and effective means of dealing with a damaging statement and making sure it is not repeated; the law of scandalising contempt provides that means.¹⁵⁷
- The judiciary are restricted by their position from pursuing other avenues to respond to criticism,¹⁵⁸ and have no forum in which they can do so; the law of scandalising contempt provides a mechanism to deal with these issues.¹⁵⁹
- Other legal avenues such as defamation do not provide for the protection of the administration of justice and the preservation of public confidence in the courts and the judiciary.¹⁶⁰

Redefining scandalising contempt

8.96 If the purpose and assumptions underlying scandalising contempt are considered still to be valid and necessary in today's modern context, it may be that the law does not need to be abolished. Instead, it may be sufficient for the law to be retained, replaced by statutory provisions and defined so as to remove any uncertainties.¹⁶¹

8.97 In contrast with the approach of the Law Commission of England and Wales discussed above, this has been the approach proposed by other law reform commissions.¹⁶²

149 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 5 [18].

150 Ibid 6 [18].

151 Ibid.

152 Ibid 18 [66]–[71].

153 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 6 [18].

154 The Law Reform Commission, *Contempt* (Report No 35, 1987) 244 [422].

155 Ibid.

156 Ibid 264 [457].

157 Ibid 244 [422].

158 Ibid 264 [457]; Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 69 [162].

159 Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 69 [162].

160 Ibid.

161 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 14 [51].

162 The Law Reform Commission, *Contempt* (Report No 35, 1987) 266 [460]; Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 116; Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 118–21.

- 8.98 For example, the ALRC recommended the introduction of a limited offence to publish an allegation imputing misconduct to a judge or magistrate in circumstances where publication is likely to cause serious harm to the reputation to the judge or magistrate in his or her official capacity.¹⁶³ This recommendation was also subsequently supported by the Law Reform Commission of Western Australia.¹⁶⁴
- 8.99 More recently, the NZ Commission recommended:
- the introduction of a statutory offence for publications which make untrue allegations or accusations against a judge or court where there is a real risk the publication would undermine ‘public confidence in the independence, integrity or impartiality of the judiciary as an institution’¹⁶⁵
 - the prescription of defences which exclude the prosecution of comments based on fact or that are ‘legitimate criticisms’¹⁶⁶
 - the High Court having a statutory power to make orders requiring publications to be taken down from the internet or the publication to make a correction or apology.¹⁶⁷
- 8.100 The introduction of a statutory offence would have the benefit of:
- clarifying the requisite knowledge and intention of the person who made or published the statement¹⁶⁸
 - clearly defining the other elements of the offence and the procedures for hearing and determining the charge
 - identifying who would be responsible for investigating complaints or bringing the proceedings¹⁶⁹
 - providing a remedy in situations where other legal avenues may not be appropriate or available.¹⁷⁰
- 8.101 However, the uncertainty that exists at common law may have a practical advantage. That is, the broad nature of the offence and the concept of public confidence in the administration of justice ‘does not call for detailed proof of what in many instances will be unprovable’.¹⁷¹
- 8.102 In addition, a number of problems with a statutory offence have also been identified:
- A statutory offence may not address cumulative allegations against the judiciary as it may be difficult to prove or disprove the falsity of a ‘collective accusation’.¹⁷²
 - How would the offence cover situations where the person making the statement believed their allegations were true?¹⁷³
 - There may be negative implications in narrowing the scope of the offence to deliberate lying, which may also be difficult to prove.¹⁷⁴
 - The distinction between what kind of abuse or criticism is acceptable and what kind is not changes with time and may be difficult to define in statute.¹⁷⁵

163 The Law Reform Commission, *Contempt* (Report No 35, 1987) 266 [460].

164 Law Reform Commission of Western Australia, *Review of the Law of Contempt* (Report, Project No 93, June 2003) 116.

165 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 118 [6.72].

166 *Ibid* 117 [6.67].

167 *Ibid* 121–2 [6.83]–[6.85].

168 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 118 [6.71]–[6.72]; Law Reform Commission of Ireland, *Report on Contempt of Court* (Report No 46, September 1994) [5.17].

169 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 116–7 [6.65]–[6.66].

170 The Law Reform Commission, *Contempt* (Report No 35, 1987) 266 [458].

171 *Ibid* 247 [427].

172 Law Commission (England and Wales), *Contempt of Court: Scandalising the Court* (Report No 335, 2012) 21 [77].

173 *Ibid* [78].

174 *Ibid*.

175 *Ibid* 7 [24].

Questions

- 32 Is there a need to retain the law of scandalising contempt?
- 33 If the law of scandalising contempt is to be retained, should the common law be replaced by statutory provisions? If so:
 - (a) How should the law and its constituent elements be described, including:
 - i. The 'tendency' test
 - ii. What constitutes 'fair comment'?
 - (b) Should truth be a defence?
 - (c) What fault elements, if any, should be required?
 - (d) What weight, if any, should be given to an apology?
- 34 In stakeholders' experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?
- 35 What other reforms, if any, should be made to this area of law?

**PART THREE: THE JUDICIAL
PROCEEDINGS REPORTS ACT**

Prohibitions on publication under the Judicial Proceedings Reports Act

- 132 Introduction**
- 133 A principles-based approach**
- 134 Indecent matters and public morals**
- 135 Divorce and related proceedings**
- 136 Directions hearings and sentence indications**
- 138 Victims of sexual offences**
- 141 A victim's ability to speak**
- 145 Temporary restrictions—sex offences and family violence**

9. Prohibitions on publication under the Judicial Proceedings Reports Act

Introduction

- 9.1 This chapter considers the *Judicial Proceedings Reports Act 1958* (Vic) which restricts the publication of material in relation to judicial proceedings.¹ It contains four statutory prohibitions, which apply automatically without the need for a court order:
- a prohibition on publishing indecent matter calculated to injure public morals²
 - a prohibition restricting the details that can be published about divorce or related proceedings³
 - a prohibition restricting the details that can be published about criminal directions hearings and sentence indication hearings in the County Court and Supreme Court⁴
 - a prohibition on identifying a person against whom a sexual offence is alleged to have been committed.⁵
- 9.2 Contravention of any of the prohibitions is a summary criminal offence.⁶ A prosecution for breach can only be commenced with the consent of the Director of Public Prosecutions (DPP).⁷ Prosecutions are rare, with annual reports indicating that the Director has only given consent to prosecute an offence under the Judicial Proceedings Reports Act four times since June 2000.⁸
- 9.3 The Annual Reports do not disclose which particular provision the consents relate to, nor whether the Director received, but refused, additional requests to consent to prosecutions of other alleged contraventions of the Act.
- 9.4 In reviewing the publication prohibitions, this chapter:
- outlines the scope of each prohibition
 - outlines how the prohibitions operate today, including how frequently public reference is made to the prohibitions by the courts or by those reporting on the courts
 - poses a number of questions about whether any or all of the prohibitions should be reformed, repealed, or relocated to other legislation.

1 The prohibition in section 4(1A) on identifying a person against whom a sexual offence is alleged to have been committed operates more broadly than the other provisions. It restricts the publication of material likely to lead to the identification of a victim, whether or not the identifying material arises from, or is related to, a judicial proceeding.

2 *Judicial Proceedings Reports Act 1958* (Vic) s 3(1)(a).

3 *Ibid* s 3(1)(b).

4 *Ibid* s 3(1)(c).

5 *Ibid* s 4(1A).

6 *Ibid* ss 3(3), 4(2). For a person, the maximum penalty is a fine of not more than 20 penalty units and/or not more than four months imprisonment; for a corporation, the maximum penalty is a fine of not more than 50 penalty units.

7 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(4), 4(4).

8 Office of Public Prosecutions, *Annual Report 2002–2003* (2003) 12; Office of Public Prosecutions, *Annual Report 2009–2010* (2010) 70. All other Annual Reports for the period 2000 to 2018 record that there were no consents to prosecute offences under the Judicial Proceedings Reports Act.

- 9.5 As specifically required by the terms of reference, this chapter also considers and poses questions about whether a further statutory prohibition is required to temporarily restrict the publication of sensitive information upon the laying of charges in relation to sexual and family violence criminal matters.
- 9.6 Finally, this chapter also considers and poses questions about how statutory prohibitions which are designed to protect the anonymity of victims can afford appropriate agency and choice to those victims who wish to speak about their experiences.

A principles-based approach

- 9.7 Each of the prohibitions in the Judicial Proceedings Reports Act operates as an automatic departure from the principle of open justice and as a limitation on the right to freedom of expression recognised in section 15(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
- 9.8 Therefore, in reviewing whether and how these statutory prohibitions should be reformed, the following matters need to be considered:
- What is the public interest that the statutory prohibition is designed to protect?
 - Does that public interest continue to justify a departure from the principle of open justice and a limitation on freedom of expression?
 - Is a mandatory, automatic statutory prohibition required to protect the identified public interest or would a discretionary power vested in the courts allow for a better balancing of competing principles and interests?
 - Should the court have an overriding discretion to permit publication where the interests of justice otherwise require it?
 - Should the person for whose benefit the prohibition operates have the power to waive the protection the statutory provision confers?
- 9.9 This chapter considers each of the provisions of the Judicial Proceedings Reports Act within that framework. Given the nature of some of the prohibitions, particularly the prohibition in section 4(1A) which protects of the privacy of victims of sexual assault, the chapter focuses on the rights and interests of victims in the criminal trial process.
- 9.10 As discussed in the Commission's report *The Role of Victims of Crime in the Criminal Trial Process*, victims have a right to be protected from unnecessary trauma, intimidation and distress, and unjustified interference with their privacy.⁹ Recognising and respecting the rights and interests of victims in the criminal trial process is a critical element of the requirement to uphold the principles of a fair trial.¹⁰ The *Victims Charters Act 2006* (Vic) provides that a victim's personal information is not to be disclosed by any person except in accordance with the *Privacy and Data Protection Act 2014* (Vic).¹¹ Further, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides generally that a person has the right not to have their privacy unlawfully or arbitrarily interfered with or their reputation unlawfully attacked.¹² Child victims or witnesses in particular have the right to such protection as is in their best interests and is needed by them by reason of being a child.¹³ In that context, this chapter considers whether and how the interests and rights of victims might give rise to exceptional circumstances requiring a departure from the principles of open justice.

9 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 32.
 10 Ibid 25–9.
 11 *Victims' Charter Act 2006* (Vic) s 14.
 12 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.
 13 Ibid s 17(2).

Indecent matters and public morals

- 9.11 Section 3(1)(a) of the Judicial Proceedings Reports Act provides that in relation to any judicial proceedings it is not lawful to print or publish, or to cause or procure to be printed or published:
- any indecent matter or indecent medical surgical or physiological details being matter or details the publication of which would be calculated to injure public morals.
- 9.12 This prohibition applies to reporting on any judicial proceedings, whether those proceedings have taken place in Victoria or elsewhere.¹⁴ The terms ‘indecent matter’, ‘indecent medical, surgical or physiological details’ and ‘public morals’ are not defined.
- 9.13 The prohibition in section 3(1)(a) is in the same terms as when it was originally enacted in 1929.¹⁵ It is modelled on an identical provision in English legislation—which today also remains in force without substantive amendment.¹⁶
- 9.14 In reviewing the operation of the prohibition, the Commission was unable to find any record of a prosecution for contravention of section 3(1)(a), nor any reference to, or consideration of, the provision in reported judgments more broadly.
- 9.15 The prohibition was reviewed in 1958 by the Statute Law Revision Committee. Without making any specific comment on its operation, the Committee did ‘not recommend any change’ to the section.¹⁷
- 9.16 Dr Stephen Cretney, writing in 1997 in relation to the identical English provision, concluded ‘it is clear that the prohibition on publication of indecent matter added little to the law and has, in the context of press reporting, been effectively a dead letter’.¹⁸

The option of repeal

- 9.17 When section 3(1)(a) was enacted, there were statutory provisions in force which specifically empowered Victorian courts to close proceedings to the public or to restrict reporting of proceedings on public decency and morality grounds.¹⁹ These provisions have since been repealed and do not have contemporary counterparts.²⁰
- 9.18 In this changed statutory context, it is suggested that the prohibition on reporting indecent matters in section 3(1)(a) may be an outdated anomaly.
- 9.19 Some ninety years have now passed since the prohibition in section 3(1)(a) was first enacted. Community attitudes and regulatory approaches to restricting publication have altered significantly over that time. The section is directed towards safeguarding public morals rather than any purpose associated with the administration of justice or the protection of the rights and interests of parties, victims or witnesses.²¹ It is a mandatory prohibition which applies without consideration for whether any restriction is necessitated by the circumstances of the particular proceedings. In this context it is suggested that section 3(1)(a) sits uneasily with the principle, adopted in the *Open Courts Act 2013* (Vic), that our system of justice must be open to public scrutiny and assessment to the maximum extent possible.

14 *Judicial Proceedings Reports Act 1958* (Vic) s 3(6).

15 See *Judicial Proceedings (Regulation of Reports) Act 1929* (Vic) s 2(1)(a).

16 *Judicial Proceedings (Regulation of Reports) Act 1926* 16 & 17 Geo 5, c 61, s 1(1)(a).

17 Statute Law Revision Committee, Parliament of Victoria, *Regulation of Reports of Judicial Proceedings*, Parliamentary Report (30 October 1958), 5 [9].

18 Stephen Cretney, ‘Disgusted, Buckingham Palace—The Judicial Proceedings (Regulation of Reports) Act 1926’ (1997) 9 *Child and Family Law Quarterly* 43, 59.

19 See, eg, *Supreme Court Act 1928* (Vic) s 29; *County Court Act 1928* (Vic) ss 89, 90; *Justices Act 1958* (Vic) ss 213, 214; *Supreme Court Act 1958* (Vic) s 29; *Magistrates’ Court Act 1971* (Vic) s 48 (all Acts repealed); *Supreme Court Act 1986* (Vic) ss 18–19; *County Court Act 1958* (Vic) s 81 (all sections repealed).

20 Jason Bosland, ‘Two Years of Suppression Under the *Open Courts Act 2013* (Vic)’ (2017) 39 *Sydney Law Review* 25, 30–31.

21 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 14 August 1929, vol 179, 827–8, 830 (Ian Macfarlan, Attorney-General); *Rapisarda v Colladon* [2014] EWFC 1406 (8 December 2014) [16]–[17].

- 9.20 Accordingly, the question arises whether section 3(1)(a) should be repealed, with the filtering of reporting on court proceedings, to the extent that it might involve indecent, obscene or distressing material, left to be regulated by laws and standards of general application to all publications and broadcasts.

Question

- 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

- 9.21 Section 3(1)(b) of the *Judicial Proceedings Reports Act* provides that, in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, for judicial separation, or for restitution of conjugal rights, it is unlawful to print or publish or cause or procure to be printed or published any particulars other than limited, specified details.²²
- 9.22 The laws regulating separation and divorce in Australia have significantly changed since this prohibition on publishing the details of divorce and related proceedings was first enacted in 1929.²³ Jurisdiction over family law matters in Victoria, including divorce, is now exercised by courts applying Commonwealth law, primarily the *Family Law Act 1975* (Cth).
- 9.23 Under the *Family Law Act*, two of the types of proceedings referred to in section 3(1)(b), proceedings for judicial separation and for restitution of conjugal rights, have been abolished.²⁴
- 9.24 In relation to other family law proceedings, section 121 of the *Family Law Act* provides that it is an offence to publish or disseminate an account of the proceeding that could identify a party, witness or other person associated with the proceeding. However, section 121 of the *Family Law Act* does not otherwise restrict the publication of detailed accounts of family law proceedings. This reflects a statutory intention that the family law courts should be as open to scrutiny and media comment as any other court, except to the extent that protecting the privacy of parties requires otherwise.²⁵

The option of repeal

- 9.25 Section 3(1)(b) of the *Judicial Proceedings Reports Act* restricts reporting on four types of family law proceeding, two of which have since been abolished by Commonwealth statute. Publication of reports on the two remaining types of family law proceeding is regulated by section 121 of the *Family Law Act*. Section 3(1)(b) is inconsistent with that Commonwealth provision. Therefore, to a large extent section 3(1)(b) of the *Judicial Proceedings Reports Act* has no operative effect²⁶ and is effectively a dead letter.²⁷

22 Those permissible details are: the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and counter-charges in support of which evidence has been given; submissions on any point of law arising in the course of the proceedings and the decision of the court or judge on them; and the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

23 *Judicial Proceedings (Regulation of Reports) Act 1929* (Vic) s 2(1)(b).

24 *Family Law Act 1975* (Cth) s 8(2).

25 See discussion of the history of section 121 in Sharon Rodrick and Adiva Sifris, '100 Years of Open Justice in Family Law Proceedings in Australia' (2016) 16(2) *Legal History* 13, 39. See also Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) 304–9.

26 *Australian Constitution* s 109.

27 Justice Barry expressed the view that section 3(1)(b) had been superseded by a provision of the Commonwealth predecessor to the *Family Law Act*, the *Matrimonial Causes Act 1959* (Cth), as far back as 1961: *Skitch v Skitch* [1961] VR 304, 305. However, in a recent Victorian Supreme Court matter, Justice Richards indicated that section 3(1)(b) may have some operation by restricting the publication of material obtained from historical divorce proceeding files held by the Victorian Supreme Court: *Re Proceeding No. 449 of 1962* [2019] VSC 286 [8].

Question

- 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?

Directions hearings and sentence indications

- 9.26 Section 3(1)(c) of the *Judicial Proceedings Reports Act* restricts the matters that may be printed or published about a directions hearing held under Part 5.5 of the *Criminal Procedure Act 2009* (Vic) or a sentence indication hearing held under Part 5.6 of that Act.
- 9.27 The information which may be lawfully published about proceedings under Part 5.5 and Part 5.6 of the *Criminal Procedure Act 2009* is limited to:
- the names of the court, judge and legal practitioners²⁸
 - the names, addresses, ages and occupations of the accused and witnesses²⁹
 - certain business information relating to the accused³⁰
 - the offence(s) charged or a summary of it or them³¹
 - the date and place to which the proceedings are adjourned³²
 - any bail arrangements that have been made.³³
- 9.28 The statutory prohibition imposed by section 3(1)(c) is qualified in two important ways:
- The prohibition on publication is temporary and only remains in place until the conclusion of the trial of the person charged, or of the last of the persons charged.³⁴
 - On application by an accused person, the court may order that the prohibition does not apply.³⁵
- 9.29 The Commission has been unable to find any reference to section 3(1)(c) of the *Judicial Proceedings Reports Act* in Victorian case law.
- 9.30 An introductory guide for journalists published by the County Court to assist journalists covering the courts urges general caution in reporting on pre-trial hearings but does not refer specifically to the restriction in section 3(1)(c) and the narrow list of matters which may be lawfully reported on.³⁶
- 9.31 An empirical analysis of all suppression orders made in the Victorian courts from 2008 to 2012 records that one order was made under section 3(1)(c) in that time.³⁷
- 9.32 One purpose of directions hearings under Part 5.5 of the *Criminal Procedure Act* is to narrow the matters in issue at trial and to resolve, by court order or through agreement, what evidence will be presented to the jury and the manner in which it will be presented. If potential jurors were to become aware, through media reporting, of the matters identified and discussed at directions hearings but not later admitted into evidence at the trial,

28 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(c)(i), s 3(c)(v).

29 *Ibid* s 3(c)(ii).

30 *Ibid* s 3(c)(iii). The relevant business information is set out in s 3(1A).

31 *Ibid* s 3(c)(iv).

32 *Ibid* s 3(c)(vi).

33 *Ibid* s 3(c)(vi).

34 *Ibid* s 3(1E).

35 *Ibid* s 3(1B).

36 County Court of Victoria, *Covering the Courts—A Q&A Guide for Journalists* (Information Sheet, 2016) <www.countycourt.vic.gov.au/files/documents/2018-09/covering-courts.pdf>.

37 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 680 n 70. As section 3(1)(c) contains an automatic statutory prohibition, it is possible that the order referred to was an order made on the application of an accused under section 3(1B). An order can be made under that section that the restrictions in section 3(1)(c) do not apply.

this purpose may be frustrated. There is a risk that an accused's fair trial rights may be compromised by potential jurors reaching their verdict other than according to the law and evidence presented to them in the courtroom.

- 9.33 The purpose of sentence indication hearings under Part 5.6 of the Criminal Procedure Act is to allow offenders to obtain a broad indication of the sentence that they would likely face if they pleaded guilty to the offence(s) charged. If hearings held under Part 5.6 are publicly and contemporaneously reported on, potential jurors may be exposed to information that an accused was contemplating a guilty plea, requested a sentence indication and/or was informed that they would face imprisonment if convicted.
- 9.34 Given that proceedings under Part 5.5 and 5.6 occur close to trial, the memory and impact on potential jurors of reporting on those proceedings will have limited time to fade.³⁸
- 9.35 By restricting what can be published about directions hearings and sentence indications, the prohibitions in section 3(1)(c) are intended to protect the fair trial rights of the accused. The restrictions are only temporary and cease to operate at the end of the trial.³⁹
- 9.36 However, the prohibition in section 3(1)(c) of the Judicial Proceedings Reports Act is somewhat of an anomaly, as there are no automatic statutory restrictions which specifically prohibit or limit reporting on other pre-trial proceedings in Victoria such as committals, bail hearings or sentence indications in the Magistrate's Court.⁴⁰

Possible reforms to prohibitions on reporting directions hearings and sentence indications

- 9.37 Through section 3(1)(c), the legislature has struck a balance in relation to criminal directions hearings and sentence indications held in the County Court and Supreme Court. The legislature has determined, for all hearings of this type, the degree to which the principle of open justice must be departed from in order to ensure a fair trial. The statutory approach adopted allows directions hearings and sentence indications to be held in open court and attended by the public⁴¹ without requiring:
- the parties to be diligent in identifying and anticipating what potentially prejudicial information might be reported from the proceedings and to seek a suppression order accordingly
 - the presiding judicial officer to evaluate the potentially prejudicial effect of matters discussed and the necessity of suppression orders.
- 9.38 The result of the restrictions, however, is that only the most rudimentary contemporaneous reporting on directions hearings or sentence indications is allowed. The restrictions potentially go beyond the restrictions that sub judice contempt would impose.
- 9.39 Important matters of public interest may be raised and discussed at directions hearings. These include issues that relate more broadly to the administration of the criminal justice system in Victoria and in particular to the resourcing and efficacy of the courts, the DPP and Victoria Legal Aid. For example, if there are delays in a matter proceeding to trial after committal, the causes of such delay are likely to be discussed at a directions hearings. The restrictions in section 3(1)(c) potentially prohibit the timely publication of information which might better allow the public to understand and scrutinise how resourcing and other practical matters might affect whether, when and how a matter is brought to trial.
- 9.40 The restrictions in section 3(1)(c) are also unusual in that there are no equivalent default

38 See, eg, New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 258 [11.50]–[11.51] for discussion of the impact that the passage of time may have on risk of prejudice.

39 *Judicial Proceedings Reports Act 1958* (Vic) s 3(1E).

40 Section 3(1)(c) of the Judicial Proceedings Reports Act and the supporting provisions in 3(1A)–(1E) are based on, and closely mirror, section 11 of the *Criminal Justice Act 1987* (UK). In the United Kingdom, there are a number of automatic statutory restrictions on reporting on preliminary, pre-trial proceedings. See, eg, Crown Prosecution Service (UK), *Contempt of Court, Reporting Restrictions and Restrictions of Public Access to Hearings—Legal Guidance* (Web Page, 11 May 2018) The Code for Crown Prosecutors <www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings>.

41 The importance of sentence indication hearings being held in open court for the transparency of the process is discussed in Sentence Advisory Council, *Sentencing Advisory Council Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 74–5.

statutory prohibitions in Victoria in relation to other preliminary hearings, such as bail or committal proceedings. Regulation of what can or cannot be published about those proceedings is left to the law of sub judice contempt or the discretion of the presiding judicial officer exercising powers conferred under legislation like section 7 of the *Bail Act 1977* (Vic) or section 17 of the *Open Courts Act*.

- 9.41 In consultations for the *Open Courts Act Review*, criminal lawyers consulted through the Law Institute of Victoria and the DPP ‘supported broader use of statutory restrictions on publication of certain categories of information rather than primary reliance on a regime of suppression orders made by courts and tribunals’.⁴² This suggests that there is likely support for restrictions of the type contained in section 3(1)(c).
- 9.42 Importantly, in the *Open Courts Act Review* consultations, the DPP also ‘warned that the efficacy of a statutory scheme depended upon the media and members of the public being made aware of the subject of the statutory prohibitions’.⁴³ The Commission’s preliminary research suggests that awareness of section 3(1)(c) of the *Judicial Proceedings Reports Act* is limited. For that reason, if the section is retained, consideration should be given to whether relocating it to another statute may increase awareness of the section.

Questions

- 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

- 9.43 Section 4(1A) of the *Judicial Proceedings Reports Act* prohibits the publication of any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed. For the purposes of the provision, a ‘sexual offence’ is defined as one of a list of specified offences in the *Crimes Act 1958* (Vic), and includes an attempt to commit any such offence or an assault with an attempt to commit a listed offence.⁴⁴
- 9.44 The prohibition in section 4(1A) is not restricted to reporting on judicial proceedings. It applies before proceedings commence and continues after proceedings have concluded.⁴⁵ However, it is a defence to a charge under section 4(1A) to prove that at the time the material was published, no proceedings were pending in a court in respect of the alleged offence and one of the following applied:

42 Frank Vincent, *Open Courts Act Review* (2017) 65 [250] <<https://engage.vic.gov.au/open-courts-act-review>>.

43 *Ibid.*

44 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1). The offences listed are those in subdivisions (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the *Crimes Act 1958* (Vic).

45 *Hinch v DPP* (Vic); *Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683, 689. However, in *Nixon v Random House Australia Pty Ltd* (2000) 2 VR 523, Justice Hedigan indicated that the prohibition may not apply indefinitely and that whether anonymity should be kept must be judged on a case-by-case basis.

- no complaint had yet been made about the alleged offence to a police officer⁴⁶
 - the matter was published with the permission of the Supreme Court, the County Court or the Magistrates' Court, granted on an application by a person⁴⁷
 - the matter was published with the permission of the person against whom the offence is alleged to have been committed.⁴⁸
- 9.45 If proceedings were pending in relation to the alleged offence at the time of publication, it is a defence to a charge under section 4(1A) to prove that permission to publish the relevant matter was obtained from the court before which the proceedings were pending.⁴⁹
- 9.46 Although there are variations in their scope and operation, every state and territory in Australia has a statutory provision to protect the anonymity of the complainant in sexual offence cases.⁵⁰
- 9.47 Unlike the other provisions in the Judicial Proceedings Reports Act discussed above, there appears to be wider awareness of the prohibition in section 4(1A).⁵¹
- 9.48 Reported cases indicate that people have been successfully prosecuted for breach of the prohibition,⁵² although such prosecutions are rare. As noted above, Annual Reports published by the Office of Public Prosecutions indicate that the DPP has given only four consents to prosecute breaches of the Judicial Proceedings Reports Act in the last 17 years.⁵³
- 9.49 Case law also reveals that the courts are mindful of the implications of the section in relation to:
- the release of or access to documents on the court file⁵⁴
 - the identification of parties and witnesses in civil proceedings⁵⁵
 - the publication of court judgments, which are routinely redacted or employ pseudonyms in order to be consistent with the public policy of the provision.⁵⁶

Is the prohibition necessary to protect victims?

- 9.50 Section 4(1A) of the Judicial Proceedings Reports Act is a departure from the principle of open justice. It restricts what can be published about proceedings in cases where the accused is charged with a sexual offence. More broadly, section 4(1A) is also a limitation on freedom of expression in that it restricts the publication of identifying information irrespective of whether it is derived from or relates to judicial proceedings. However, the provision is only a partial departure from the principle of open justice and only a partial limitation on freedom of expression. Except to the extent that the reporting would likely lead to the identification of the victim, section 4(1A) does not prevent the public and media from attending proceedings, or from reporting on proceedings and sexual assault allegations and investigations more generally.⁵⁷

46 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B)(a).

47 *Ibid* s 4(1B)(b)(i).

48 *Ibid* s 4(1B)(b)(ii).

49 *Ibid* s 4(1C). On 2 May 2019, the Parliament of Victoria passed the *Open Courts and Other Acts Amendment Act 2019* (Vic), which introduced a new defence to a charge under section 4(1A) of the *Judicial Proceedings Reports Act 1958*. This amendment is discussed below at paragraph [9.70] to [9.76].

50 Frank Vincent, *Open Courts Act Review* (2017) Appendix 2, 140 <<https://engage.vic.gov.au/open-courts-act-review>>.

51 For example, a County Court guide for journalists refers specifically to section 4(1A): County Court of Victoria, *Covering the Courts—A Q&A Guide for Journalists* (Information Sheet, 2016) <www.countycourt.vic.gov.au/files/documents/2018-09/covering-courts.pdf>; likewise, the *Open Courts Bench Book*, prepared by the Judicial College of Victoria for the guidance of judicial officers, includes a sub-chapter on the scope and operation of section 4: Judicial College of Victoria, *Open Courts Bench Book* (Web Page, 6 February 2019) [3.9] <www.judicialcollege.vic.edu.au>.

52 *Hinch v DPP* (Vic); *Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683; *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007); *Bailey v Hinch* [1989] VR 78.

53 Office of Public Prosecutions, Annual Report (Annual Reports, 2000–18).

54 See, eg, *DPP v Theophanous* (2009) 27 VR 295; *Stephensen v Salesian Society Inc*; *Easton v Salesian Society Inc* (No 2) [2018] VSC 630.

55 See, eg, *TTT & JJJ v State of Victoria* [2013] VSC 162 (11 April 2013) [26].

56 See, eg, *DPP (Vic) v Goillon* [2017] VCC 1220; *DPP (Vic) v Latimer* [2017] VCC 87; *DPP (Vic) v Ivanov (a pseudonym)* [2018] VCC 834 (6 June 2018); Supreme Court of Victoria, *Court of Appeal—Anonymisation Protocol for Criminal Applications and Appeals* (2017).

57 *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007) [48].

- 9.51 This incursion into the principle of open justice has been justified on the grounds that the proper and effective administration of justice requires restrictions on publication:
- to ensure a fair trial for the victim, where a fair trial requires that the victim is not subjected to undue distress or humiliation or invasion of privacy
 - to encourage reporting and prosecution of sexual offences.⁵⁸
- 9.52 The basis for this differential treatment of victims of sexual assault stems from acknowledgment that significant distress, shame, embarrassment and social stigma are still experienced by many sexual assault victims.⁵⁹ Further, the nature of the evidence in such cases can cover sensitive and acutely personal matters. Where an accused is charged with sexual offences, ensuring a fair trial for all participants requires particular vigilance to safeguard the privacy rights of the victim and to ensure that the justice ultimately delivered by the courts is not undermined by the trauma endured to achieve it.
- 9.53 However, it does not necessarily follow that any prohibition on identifying sexual assault victims should operate automatically by way of statutory prohibition. The imposition of mandatory anonymity on sexual assault victims could potentially remove a victim's agency and affirm and perpetuate the stigma it is designed to address.
- 9.54 On the other hand, any alternative which relies on victims being sufficiently informed and empowered to proactively seek a suppression order from the court, might equally be characterised as unfairly placing the burden on the victim to secure what should be a guaranteed protection. A departure from the current default anonymity position could also undermine awareness of and compliance with the prohibition on identifying sexual assault victims.

The scope of the prohibition

- 9.55 The prohibition in section 4(1A) is not limited to listed particulars about a victim and includes any particulars 'likely to lead to the identification' of the person against whom the offence is alleged to have been committed. This means that the precise scope of the material captured by the prohibition cannot be easily defined. The Judicial Proceedings Reports Act does not contain, by way of guidance, a non-exhaustive list of potentially identifying particulars similar to the list contained in the *Family Violence Protection Act 2008* (Vic),⁶⁰ the *Children, Youth and Families Act 2005* (Vic)⁶¹ and the *Family Law Act 1975* (Cth).⁶² Whether or not any published particular is likely to lead to the identification of the victim is a question of fact which is dependent on context, such as the size of the victim's community or the notoriety of other facts surrounding the circumstances of the case.⁶³

Possible reforms to prohibitions against identifying victims

- 9.56 The prohibition on identifying victims in section 4(1A) of the Judicial Proceedings Reports Act operates as a mandatory, default statutory prohibition. The prohibition applies to any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed. Whether a publication breaches the provision is a question of fact which is very dependent on context.
- 9.57 The Commission seeks the views of the community, including victims, media, and those responsible for monitoring and enforcing compliance with the provision, on whether greater clarity on the scope of the prohibition is necessary. If so, the Commission seeks the views of those affected on how this should be achieved.

58 See, eg, Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988) 30–1.
59 Frank Vincent, *Open Courts Act Review* (2017) 131 [520] <<https://engage.vic.gov.au/open-courts-act-review>>; Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (1988) 31–2; Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes* (Final Report No 19, 2013) 1,7.
60 *Family Violence Protection Act 2008* (Vic) s 168.
61 *Children, Youth and Families Act 2005* (Vic) s 534(4). Note that section 13 of the *Open Courts and Other Acts Amendment Act 2019* (Vic) amends section 534(4) to clarify and reduce the number of identifying particulars listed.
62 *Family Law Act 1975* (Cth) s 121(3).
63 *Bailey v Hinch* [1989] VR 78, 93–4; see also *Howe v Harvey* (2008) 20 VR 638.

- 9.58 As the effectiveness of the prohibition in protecting the privacy of victims depends on public and media awareness of the section, the Commission also seeks comment on whether the prohibition should remain in the *Judicial Proceedings Reports Act* or whether the prohibition is more appropriately located in other legislation.

Question

- 39 Should the statutory prohibition on identifying victims of sexual offences under section 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) continue to apply automatically from the time of complaint, throughout proceedings and after proceedings have concluded? If so:
- What further legislative guidance should be provided about the scope of the prohibition?
 - Should the prohibition continue to be located in the *Judicial Proceedings Reports Act 1958* (Vic) or is the provision more appropriately located in other legislation?

A victim's ability to speak

Consent to publication

- 9.59 Under section 4(1B)(b)(ii) of the *Judicial Proceedings Reports Act*, it is a defence to a charge of publishing identifying information about a victim to prove that at the time of the publication:
- no proceeding in respect of the alleged offence was pending, and
 - the matter was published in accordance with the permission of the person against whom the offence is alleged to have been committed.⁶⁴

Child victims

- 9.60 The *Judicial Proceedings Reports Act* does not differentiate between adult and child victims. The Victorian Supreme Court has held that, where the victim is still a child, they 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 section 4(1A).⁶⁵ Parents cannot give consent on behalf of their child.⁶⁶

Proceedings pending

- 9.61 There is no specific guidance in the *Judicial Proceedings Reports Act* about when a proceeding in respect of the alleged offence will or will not be considered pending.⁶⁷
- 9.62 It is not clear why the defence of consent to publication is only available if there are no proceedings pending at the time of publication. Where proceedings in respect of the alleged offence are pending, permission to publish the identifying information must be obtained from the court before which the proceedings are pending.⁶⁸ This indicates that the court's supervision is required to ensure that the publication does not interfere with or prejudice

64 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B)(b)(ii).

65 *Hinch v DPP* (Vic); *Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683, 695.

66 *Ibid* 691–3.

67 See *Ibid* 686. In that case, material identifying the victim was published after the offender was convicted and sentenced but before relevant appeal periods had expired. There was no appeal on foot at time of publication. The Supreme Court stated, in those circumstances, that no proceedings were pending in any court at the time of publication.

68 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1C).

the ongoing proceedings. However, the purpose of section 4(1A) is to protect the victim's privacy, rather than to safeguard the accused's fair trial rights. Therefore the rationale for requiring the court's involvement and approval for the removal of the protection is not certain.

Transference of protection to the accused

9.63 The anonymity of a person accused of committing a sexual offence is not protected by the Judicial Proceedings Reports Act. However, sometimes the relationship between the accused and the victim is such that publishing the identity of the accused would likely lead to the identification of the victim.

9.64 In these circumstances, the accused also benefits from the protection of section 4(1A) and does not have to endure the publicity of criminal proceedings and, where relevant, conviction, in the ordinary way. The *Open Court Act Review* observed:

The injustice of this transference of protection is increasingly appreciated by victims and the wider society. They object to the ability of the perpetrator of life-changing offences against their victims to hide from public accountability and become the principal beneficiary of measures designed for victim protection.⁶⁹

9.65 This transference of protection is often an unavoidable consequence of the operation of section 4(1A). However, it has underlined the importance of ensuring that victims who do not seek the protection of anonymity, particularly at the cost of the perpetrator avoiding public scrutiny, must be given clear avenues to consent to the publication of information which may potentially identify them.

Victim's voices and public awareness

9.66 Given that the purpose of the prohibition in section 4(1A) of the Judicial Proceedings Reports Act is to protect the victim, it follows that a victim who does not seek or perceive the need for this protection should be empowered to authorise publication of their identity.⁷⁰

9.67 If the prohibition applies contrary to a victim's wishes, then the justification for the departure from the principle of open justice and the limitation on freedom of expression is harder to sustain. In those circumstances, the prohibition may serve the purpose of protecting the victim from embarrassment or humiliation that they are assumed to be feeling, notwithstanding that they do not feel burdened in that way or do not seek that protection.

9.68 Increased public awareness and discussion around sexual offences is also likely to encourage reporting of offences and to slowly erode the stigma and prejudice that might otherwise lead to under-reporting. However, if victims are prevented from speaking openly about their experiences, with respect to both the offence and the subsequent institutional responses, public debate and discussion about these issues is muted and robbed of the personal element which so often resonates with the community. For this reason, regardless of its intended purpose, a prohibition on identifying victims which does not sufficiently allow them to waive anonymity and publicly tell their stories, may in practice undermine the proper and effective administration of justice.

9.69 This view was reflected in the judgment of a New South Wales District Court Judge who received an application to revoke, with the victim's consent, a suppression order identifying the victim of a sexual offence. Judge Berman stated:

There is a public interest in overcoming what remains of community attitudes which suggest that people in Ms Loiterton's [the victim's] position should be ashamed. I am satisfied that far from this being a case where publication is not in the public interest, *I make a positive finding that it is in the public interest for a victim of sexual assault who consents to her name being published having her name being published.* Ms Loiterton should not, by

implication, be forced to hide away, embarrassed about what has happened to her. She is entitled to hold her head up high and identify herself as a blameless victim of sexual assault. [Emphasis added.]⁷¹

Recent amendments

9.70 The *Open Courts Act Review* considered the issue of victims consenting to the disclosure of their identity. The Review observed that:

An increasing number of victims reject the absurd notion that they have been in any way diminished by the commission of criminal acts committed against them by another and are prepared to have their identities disclosed. There seems to be no good reason why a person who adopts this view, or an adult who has previously suffered abuse as a child, and makes an informed decision to do so should not be entitled to opt for disclosure and to have that publicly recorded upon the conviction of the perpetrator.⁷²

9.71 The *Open Courts Act Review* did not specifically consider the operation or effectiveness of section 4(1B)(b)(ii) of the Judicial Proceedings Reports Act. However, Recommendation 15 of the *Open Courts Act Review* stated that adult victims of sexual assault or family violence, or child victims who are now adults, should be able to opt for disclosure of their identity on the conviction of the offender.⁷³ The Review further recommended that, in situations where there is more than one victim, the court should be required to refuse an application or impose conditions on publication, to secure the anonymity of any non-consenting victim.⁷⁴

9.72 This recommendation contemplates that only victims who are now adults may give consent to disclosure and that this may only occur if the offender is convicted. In contrast, section 4(1B)(b)(ii) appears to allow a victim to give permission to the disclosure of their identity regardless of whether a criminal prosecution was commenced or how it was resolved, as long as there are no proceedings currently pending in respect of the alleged offence.

9.73 In response to the *Open Courts Act Review*, the *Open Courts and Other Acts Amendment Act 2019* (Vic) was passed by the Parliament of Victoria on 2 May 2019. The amendments made by the new Act are not yet in operation.⁷⁵ The Act does not amend existing section 4(1B)(b). Instead, it inserts new sections 4(1CA) and 4(1CB) into the Judicial Proceedings Reports Act. The new section 4(1CA) creates a defence to a charge under section 4(1A) where:

- the accused has been convicted of the relevant offence, and
- the Magistrates Court, County Court or Supreme Court has given permission for the publication on application or on its own motion, and
- if the person against whom the sexual offence was committed is 18 years of age or over, they have also given permission.⁷⁶

9.74 The new section 4(1CB) requires the court to withhold its permission where:

- there were sexual offences against multiple victims dealt with in the same proceeding and disclosure of the identity of the consenting victim would identify a non-consenting victim or a child victim, or
- disclosure is not appropriate in all the circumstances.⁷⁷

71 *R v Md Kowser ALI* [2008] NSWDC 318, [7].

72 Frank Vincent, *Open Courts Act Review* (2017) 131 [522] <<https://engage.vic.gov.au/open-courts-act-review>>.

73 Ibid 133.

74 Ibid 133, Recommendation 15.

75 Section 2 of the *Open Courts and Other Acts Amendment Act 2019* (Vic) provides that the Act will come into operation on a day or days to be proclaimed, or if a provision of the Act does not come into operation before 7 February 2020, it comes into operation on that day. As at 7 May 2019, the Act had received assent but a commencement date had not been proclaimed.

76 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 15.

77 Ibid.

- 9.75 The intended purpose of the amendments is to aid victims who want to tell their stories,⁷⁸ but the interaction of the proposed new sections with existing section 4(1B)(b)(ii) of the Judicial Proceedings Reports Act is ambiguous.
- 9.76 Relevant to the issue of victims' agency and consent, the Open Courts and Other Acts Amendment Act also amends section 15 of the Open Courts Act.⁷⁹ The amendments allow for victims who do not seek anonymity to apply for a variation to or revocation of a suppression order which was made to protect their identity.⁸⁰

Possible reforms—greater autonomy for victims

- 9.77 The *Open Courts Act Review* has highlighted the need to ensure that statutory provisions which are designed to protect victims of sexual offences do not also deny them the ability to talk about their experiences. In that context, the Commission is seeking the views of the community on whether and how the Judicial Proceedings Reports Act should be amended to allow victims greater autonomy and agency in electing to waive the anonymity currently afforded them by section 4(1A).
- 9.78 In particular, the Commission is seeking the views of the community on what if any role the court should play in authorising the giving of consent to identification. For example, is it necessary for the court to supervise whether:
- any consent to identification by the victim is informed and freely given
 - any consent to identification by one victim will not lead to the identification of other non-consenting victims or child victims
 - any publication of information identifying the victim will not interfere with ongoing proceedings?
- 9.79 The Commission also seeks the views of the community on whether a victim's permission to publish their identity should be sufficient, without the need for a court order and irrespective of whether proceedings are pending.

Questions

- 40 How should the law accommodate a victim's ability to speak?
- 41 When should a victim be able to consent to publication of identifying material?
- (a) Should the court's supervision and permission also be required?
- (b) What, if any, special provision should be made for child victims?

78 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2019, 425 (Jill Hennessy, Attorney-General).
79 *Open Courts and Other Acts Amendment Act 2019* (Vic) s 10.
80 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2019, 425 (Jill Hennessy, Attorney-General).

Temporary restrictions—sex offences and family violence

- 9.80 As part of its review of the Judicial Proceedings Reports Act, the Commission has been asked to consider whether a further statutory prohibition on publication should be introduced which would temporarily restrict the publication of sensitive information in relation to alleged sexual and family violence criminal matters upon the laying of charges.
- 9.81 This aspect of the reference has its genesis in Recommendation 17 of the *Open Courts Act Review* which provided as follows:
- That it becomes mandatory at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences for an interim suppression order to be issued, confining publication of reports to the laying of the charges and the fact and date of the hearing. This order would remain in effect for five working days. Alternatively, the Judicial Proceedings Reports Act should be amended to the same effect.⁸¹
- 9.82 The recommendation was made after consultation with affected stakeholders revealed that if adequate attention was not given to protecting the privacy of victims in the earliest stages of the criminal process, personal information may be exposed resulting in repeated trauma and humiliation.⁸² Concern was expressed in the Review that this might act as a deterrent to reporting crimes and seeking justice.⁸³
- 9.83 There are a number of statutory provisions which may be relied upon to protect the identity, safety and wellbeing of alleged victims of sexual or family violence at the early stages of criminal proceedings.⁸⁴ However, the *Open Courts Act Review* indicates that the combined protection for victims provided by these statutory provisions may be inadequate. The Review noted that:
- A problem of the absence of consideration of the possible necessity for a suppression order to protect victims has emerged in relation to initial bail hearings.⁸⁵
- 9.84 The *Open Courts Act Review* found that, according to anecdotal evidence, victims have little knowledge of the statutory prohibitions on publication or grounds for suppression orders under the Open Courts Act.⁸⁶ The Review further found that, at the stressful point at which a matter first comes before the court, victims of sexual and family violence offences will not necessarily be in a position to properly consider the need for a suppression order, nor to make an application or ask for one of their behalf.⁸⁷ The Review observed that by the time a proper assessment is made of whether an order is necessary and an appropriate application made it may be too late, with the damaging information already reported in the public domain.⁸⁸
- 9.85 Accordingly, to address these concerns Recommendation 17 of the *Open Courts Act Review* proposed that a temporary publication restriction should commence ‘at an initial bail hearing consequent upon the laying of charges’.

Defining relevant cases

- 9.86 Where an automatic statutory publication prohibition applies, the circumstances in which it applies must be clearly defined. This is because criminal sanction will potential result from breach of the prohibition. The Commission has been asked to consider a temporary publication restriction which would apply in cases of ‘alleged sexual or family violence criminal offences’.

81 Frank Vincent, *Open Courts Act Review* (2017) 134 <<https://engage.vic.gov.au/open-courts-act-review>>.

82 Ibid 8, 71, 133–4.

83 Ibid 8.

84 See, eg, *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A); *Family Violence Protection Act 2008* (Vic) s 166; *Bail Act 1977* (Vic) s 7; *Open Courts Act 2013* (Vic) s 18(1)(c)–(e), s 30(2)(c)–(e).

85 Frank Vincent, *Open Courts Act Review* (2017) 133 [528] <<https://engage.vic.gov.au/open-courts-act-review>>.

86 Ibid 70 [268], 72 [274], 133 [529].

87 Ibid 71 [273], 134 [529].

88 Ibid 71 [273], 133 [528].

- 9.87 The Judicial Proceedings Reports Act defines the application of the prohibition in section 4(1A) by reference to cases where a ‘sexual offence’ is alleged to have been committed. The captured offences are defined by reference to a list of offence provisions in the *Crimes Act 1958* (Vic).⁸⁹ However, a ‘family violence criminal offence’ is more difficult to define.
- 9.88 For example, the definition used in the Open Courts Act extends beyond conduct which is in breach of an existing intervention order to include conduct which ‘if established, constitutes family violence within the meaning of the *Family Violence Protection Act 2008* by the accused against the complainant or alleged victim and the conduct could reasonably have justified the making of a family violence intervention order ...’.⁹⁰ The definition of family violence in the Family Violence Protection Act is very broad⁹¹ and turns on establishing a ‘family member’⁹² relationship between victim and perpetrator.
- 9.89 Therefore a family violence offence is not defined by offence type but instead is contingent on the context of the offending and the relationship between victim and perpetrator. The context-dependent nature of the definition means that it may not always be clear or agreed at the early stages of proceedings whether an offence is a family violence criminal offence.

Defining sensitive information

- 9.90 The prohibition on temporary publication which the Commission has been asked to consider would restrict the publication of ‘sensitive information’ in relation to alleged sexual or family violence offences.
- 9.91 ‘Sensitive information’ is a subjective term and if it is to be used as the touchstone for a statutory prohibition and offence provision, it is suggested that further definition will be required. Definitions of this term are provided in other statutory contexts. For example, ‘sensitive information’ is defined in Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic). However, that definition is not directly transferable to the present context and purpose.
- 9.92 If a definition is not included, a list of permissible publishable details may assist in providing certainty to those reporting on relevant proceedings. Recommendation 17 of the *Open Courts Act Review* proposed that the temporary restriction should confine publication of reports to the laying of the charges and the fact and date of the hearing.⁹³

Public awareness

- 9.93 There is a significant public interest in raising awareness about the frequency, nature and circumstances of both sexual and family violence in the community. This must be balanced against the level of caution employed to ensure that existing protections for victims’ privacy and dignity operate effectively. If the media cannot report on sexual and family violence criminal offences in a timely way or if the restrictions around reporting are regarded as too legally complex, the amount of coverage these types of cases receive may be reduced.

Possible reforms to restrictions in cases of sexual and family violence

- 9.94 The *Open Courts Act Review* has identified a potential gap in the privacy protection afforded victims of family violence and sexual offences at the earliest stages of proceedings. There are a number of ways that this could be addressed.
- 9.95 More information could be provided to victims about the orders the court is empowered to make and more support could be provided to assist them to make a timely application for a suppression order or to request that one be made on their behalf. Measures of this type were also canvassed in the *Open Courts Act Review*.⁹⁴

89 *Judicial Proceedings Reports Act 1958* (Vic) s 4(1).

90 *Open Courts Act 2013* (Vic) s 3.

91 *Family Violence Protection Act 2008* (Vic) s 5.

92 *Ibid* s 8.

93 Frank Vincent, *Open Courts Act Review* (2017) 134 <<https://engage.vic.gov.au/open-courts-act-review>>.

94 *Ibid* 72 [274], 134 [529].

- 9.96 Statutory amendments could be made to reverse the default position in section 7 of the Bail Act so that, unless an order was made permitting publication of a report of the bail proceedings, publication of the details of those proceedings would be restricted.⁹⁵ This would ensure that specific consideration was given to the need for a suppression order at this early stage of the process or that, in the absence of such consideration, the opportunity to apply for a suppression order later was not lost. This could apply to all initial bail proceedings or specifically to cases where an accused has been charged with a sexual and family violence criminal offence.
- 9.97 A temporary statutory prohibition could be imposed on publishing sensitive material in cases where an accused was charged with a sexual or family violence criminal offence for a specified period. The term 'sensitive material' could be defined. Alternatively, the provision could include an exhaustive list of matters that may permissibly be reported. The court could have discretion to order that the temporary prohibition does not apply, on application by the victim or on the court's own motion. This statutory prohibition could be included in the Judicial Proceedings Reports Act or other subject-specific legislation.

Questions

- 42 Is a statutory prohibition required to temporarily restrict reporting in cases where an accused has been charged with a sexual or family violence criminal offence? If so:
- What information should be permitted to be published—should the court have discretion to order that additional or less information be published?
 - When should the temporary prohibition apply?
 - Should the temporary prohibition only apply to cases where the accused has been charged with a sexual or family violence criminal offence?

PART FOUR: ENFORCEMENT

Enforcing laws that restrict publication

- 150** Introduction
- 151** Open Courts Act Review—recommendations
- 152** Data about enforcement
- 155** Definitions of ‘publication’
- 161** Jurisdiction
- 164** Awareness of prohibitions and restrictions
- 169** Responsibility for instituting proceedings
- 170** Fault elements to prove breach of prohibitions
- 172** Defences and exceptions
- 175** Penalties and remedies
- 180** Legacy suppression orders

10. Enforcing laws that restrict publication

Introduction

- 10.1 This chapter considers the underlying principles for enforcement of prohibitions and restrictions on the publication of information, with reference to the law relating to contempt, the *Judicial Proceedings Reports Act 1958* (Vic) and the *Open Courts Act 2013* (Vic). This chapter discusses whether procedural, administrative and legislative changes are required, and can be implemented, to ensure these laws are effectively, consistently and fairly enforced.
- 10.2 This chapter focuses on the enforcement of laws that prohibit and restrict publication, including:
- definitions of ‘publication’ and features of online publication
 - enforcement of Victorian laws outside of Victoria
 - awareness of the laws and notification of court orders
 - monitoring compliance
 - responsibility for proceedings for breach
 - fault elements that must be proven to establish breach
 - existing penalties
 - defences to alleged breaches
 - enforcement of suppression orders with no end date that were made before the *Open Courts Act 2013* (Vic) commenced.
- 10.3 In 2017, the Hon. Frank Vincent AO QC reviewed the scope, operation and underlying principles of the *Open Courts Act 2013* (Vic).¹ The Commission has been asked to consider these recommendations of the *Open Courts Act Review*, which are discussed below.
- 10.4 Open justice is a common law principle that requires the administration of justice to occur in public.² Broadly speaking, it requires that courts are open to members of the public who wish to attend and that those who attend may report what they see and hear there, including the names of parties and witnesses and details about the evidence.³ The media has an important role in keeping the public informed about the courts by fairly and accurately reporting on cases.⁴

1 Frank Vincent, *Open Courts Act Review* (2017) <<https://engage.vic.gov.au/open-courts-act-review>>.

2 *Scott v Scott* [1913] AC 417, 435 (Viscount Haldane LC); *Dickason v Dickason* (1913) 17 CLR 51, 51 (Barton ACJ; Isaacs, Gavan Duffy, Powers and Rich JJ agreeing); see also *Russell v Russell* (1976) 134 CLR 495, 505 (Barwick CJ), 520 (Gibbs J), 532–3 (Stephen J); *Hogan v Hinch* (2011) 243 CLR 506, 530 [20] (French CJ); see also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.

3 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 55 (Kirby P); *Hogan v Hinch* (2011) 243 CLR 506, 532 [22] (French CJ).

4 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 258–9 (Warren CJ and Byrne AJA).

- 10.5 Open justice can be limited by statutory and common law prohibitions and restrictions on publishing information about cases that are necessary to secure the proper administration of justice.⁵
- 10.6 The law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act prohibit and restrict the publication of information about cases in Victoria. As these laws sanction departures from the open justice principle, this principle must be considered when assessing their application and enforcement.
- 10.7 Courts apply and enforce prohibitions and restrictions on publication for a range of reasons, including protecting the identities of people involved in cases, such as child witnesses, or shielding jurors from prejudicial material about an accused person who is on trial. Effective enforcement is critical to securing fair trials for parties, witnesses, victims and the community.
- 10.8 The internet and other modern technologies challenge the courts' ability to enforce prohibitions and restrictions on publication. If prohibitions and restrictions are rendered futile, there may be significant implications for the maintenance of fair trials and public confidence in the court system.
- 10.9 The key prohibitions and restrictions examined in this reference are:
- statutory prohibitions and restrictions that apply automatically, without the need for a court order, such as provisions under the Judicial Proceedings Reports Act⁶
 - proceeding suppression orders, interim orders and broad suppression orders made by courts using their statutory powers under the *Open Courts Act 2013* (Vic)⁷
 - common law suppression orders made by the Supreme Court of Victoria in its inherent jurisdiction and the County Court of Victoria exercising aspects of the Supreme Court's inherent jurisdiction⁸
 - pseudonym orders made by courts under the common law⁹
 - the common law of sub judice contempt.

Open Courts Act Review—recommendations

- 10.10 The purpose of the *Open Courts Act Review*, which recommended the Commission's current review, was to consider whether the Open Courts Act was:
- striking the right balance between the need for open and transparent justice, and the need to protect the legitimate interests of victims, witnesses and accused persons, and to preserve the proper administration of justice.¹⁰
- 10.11 The *Open Courts Act Review* made several recommendations that are particularly relevant to the enforcement of prohibitions and restrictions on publication, including:
- Recommendation 4: that the Victorian Law Reform Commission report on possible reform of the *Judicial Proceedings Reports Act 1958* (Vic) and codification of the law of contempt of court, including the legal framework and processes for enforcement, to ensure a consistent approach to principle and practice for suppression orders and related areas

5 See *Scott v Scott* [1913] AC 417, 437 (Viscount Haldane LC), 445–6 (Earl Loreburn), 482–3 (Lord Shaw of Dunfermline); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J); *Hogan v Hinch* (2011) 243 CLR 506, 531–2 [21] (French CJ); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54 (Kirby P).

6 There are other statutory prohibitions and restrictions that apply automatically in Victoria, but they are not a focus of this review: see, eg, *Children, Youth and Families Act 2005* (Vic) s 534; *Family Violence Protection Act 2008* (Vic) s 166.

7 *Open Courts Act 2013* (Vic) ss 3 (definitions of 'court or tribunal', 'suppression order'), 17–8, 20, 24–6.

8 The inherent jurisdiction of the Supreme Court of Victoria is not limited or otherwise affected by the *Open Courts Act 2013* (Vic): s 5(1).

9 The Open Courts Act preserves the courts' common law powers to conceal a person's identity by restricting how they are referred to in open court and/or court documents, often by giving them a pseudonym. These are often called 'pseudonym orders': *Open Courts Act 2013* (Vic) s 7(d)(i).

10 Frank Vincent, *Open Courts Act Review* (2017) <<https://engage.vic.gov.au/open-courts-act-review>> 12 [18].

- Recommendation 5: that harmonisation of the law and practice among the states and territories relating to suppression orders be referred to the Council of Attorneys-General for further consideration. Whether or not this referral occurs, the *Open Courts Act Review* recommended that the Council of Attorneys-General be asked to consider the desirability of developing a system for interstate and territory recognition and enforcement of suppression orders.
- Recommendation 7: that there be established a central, publicly accessible register of suppression orders made by all Victorian courts and tribunals containing details of their terms and duration and, to the extent reasonably possible in the circumstances, the reasons for them
- Recommendation 18(4): that the Public Interest Monitor report annually to the Attorney-General for Victoria on the operation of the *Open Courts Act 2013 (Vic)* provided it receives additional funding and resources to do so, among other additional powers.¹¹

Implementation of recommendations

- 10.12 Legislative amendments to the *Open Courts Act*, *Judicial Proceedings Reports Act* and *Children, Youth and Families Act 2005 (Vic)* that fully or partially implement Recommendations 1, 2, 3, 6, 9, 13, and 15 of the *Open Courts Act Review* were recently passed by the Parliament of Victoria.¹²
- 10.13 The Victorian Government supported Recommendations 4, 5 and 7 in its response to the *Open Courts Act Review*, but Recommendation 18 was 'subject to further consideration'.¹³
- 10.14 The *Open Courts Act Review* considered that broad adoption of its recommendations would improve monitoring and enforcement of suppression orders and help to identify systemic issues.¹⁴ The recommendations are discussed at various points in this chapter.

Data about enforcement

Orders under the Open Courts Act

- 10.15 The enforcement of legal prohibitions and restrictions on publication is a contentious topic in Victoria among government officials, courts, legal practitioners and the media.¹⁵
- 10.16 The Commission's further examination of enforcement processes would be enhanced by an understanding of the volume of prohibitions and restrictions made by courts, current enforcement processes and the extent to which prohibitions and restrictions are monitored and enforced.
- 10.17 Reviews and studies provide publicly available statistics about the enforcement of prohibitions and restrictions on publication, particularly orders made under the *Open Courts Act 2013 (Vic)*. Some studies have acknowledged gaps in their data.

11 Ibid 9–11.

12 *Open Courts and Other Acts Amendment Act 2019 (Vic)*; Explanatory Memorandum, *Open Courts and Other Acts Amendment Bill 2019 (Vic)* 1. See generally Victoria, Parliamentary Debates, Legislative Assembly, 20 February 2019, 423–6 (Jill Hennessy, Attorney-General).

13 Victorian Government, *Open Courts Act Review—table of Recommendations* (2018).

14 Frank Vincent, *Open Courts Act Review* (2017) 6–7 [14]–[15].

15 See, eg, Michael Douglas and Jason Bosland, 'We Knew George Pell Was Guilty of Child Sex Abuse. Why Couldn't We Say it Until Now?' (26 February 2019) *The Conversation* <<https://theconversation.com/we-knew-george-pell-was-guilty-of-child-sex-abuse-why-couldnt-we-say-it-until-now-112521>>; Richard Ackland, 'The Media and Contempt of Court', *The Saturday Paper* (Web Page, 6–12 April 2019) <www.thesaturdaypaper.com.au/opinion/topic/2019/04/06/the-media-and-contempt-court/15544692007951>; Sumeyya Ilanbey, 'Andrews Vows to Implement Suppression Order Overhaul this Term', *The Age* (Web Page, 13 December 2018) <www.theage.com.au/national/victoria/andrews-vows-to-implement-suppression-order-overhaul-this-term-20181213-p50lz7.html>.

- 10.18 The data analysis in the *Open Courts Act Review* focuses on suppression orders issued between 1 January 2014 and 31 December 2016. During that period, under the Open Courts Act:
- The Supreme Court, including the Court of Appeal, made 173 suppression orders.
 - The County Court made 377 suppression orders.
 - The Magistrates' Court made 430 suppression orders.¹⁶
- 10.19 The *Open Courts Act Review* also recorded that the Supreme Court made 13 orders and the County Court made one order in their inherent jurisdiction between 1 January 2014 and 31 December 2016.¹⁷
- 10.20 Jason Bosland, Deputy Director of the Centre for Media and Communications Law at Melbourne Law School, published a study on suppression orders made under the Open Courts Act in the first two years of its operation and the Supreme Court's common law powers. The study found that between 1 December 2013 and 30 November 2015:
- The Supreme Court made 66 suppression orders.
 - The County Court made 230 suppression orders.
 - The Magistrates' Court made 190 suppression orders.¹⁸
- 10.21 At this stage, the Commission is unable to access data about the number of prosecutions for breaches of orders under the Open Courts Act and the outcomes of any such prosecutions.

Consent to prosecute under the *Judicial Proceedings Reports Act 1958 (Vic)*

- 10.22 A prosecution for breach of the prohibitions and restrictions under the Judicial Proceedings Reports Act can be commenced only with the consent of the Director of Public Prosecutions (DPP).¹⁹
- 10.23 Since June 2000, the DPP has consented to four prosecutions for breach of the Judicial Proceedings Reports Act.²⁰ Annual reports of the Office of Public Prosecutions do not record whether there were requests for consent to prosecute that the DPP refused.

¹⁶ Frank Vincent, *Open Courts Act Review* (2017) 86–100, 149–53, app 3.

¹⁷ *Ibid* item 11.

¹⁸ Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013 (Vic)*' (2017) 39 *Sydney Law Review* 25, 38–39.

¹⁹ *Judicial Proceedings Reports Act 1958 (Vic)* ss 3(4), 4(4).

²⁰ Office of Public Prosecutions, *Annual Report* (Annual Reports, 2000–18).

Data about initiation of proceedings for contempt by the Director of Public Prosecutions

10.24 The two most recent annual reports of the Office of Public Prosecutions do not provide statistics about contempt prosecutions. Annual reports from 2000 and 2018 reported the following statistics regarding the number of contempt proceedings commenced by the DPP:

Year ²¹	Number of contempt proceedings
2017–18	N/A
2016–17	N/A
2015–16	0
2014–15	0
2013–14	0
2012–13	0
2011–12	0
2010–11	18
2009–10	16
2008–09	0
2007–08	1
2006–07	8
2005–06	N/A
2004–05	0
2003–04	0
2002–03	2
2001–02	1
2000–01	0

Access to data

10.25 There are gaps in the publicly available data about:

- the number of proceedings for contempt of court for alleged breaches of common law suppression orders made in Victorian courts
- the number of prosecutions for alleged breaches of orders made under the Open Courts Act in Victorian courts
- the number of requests to the DPP for consent to prosecute alleged breaches of the Judicial Proceedings Reports Act
- the number of proceedings for sub judge contempt in Victorian courts
- the parties against whom proceedings for breaches of prohibitions and restrictions on publication are brought
- the processes which courts and other agencies use to monitor and address potential breaches of the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act
- the outcomes of proceedings for contempt of court for breaches of common law suppression orders, breaches of orders under the Open Courts Act, breaches of the Judicial Proceedings Reports Act and proceedings for sub judge contempt.

Definitions of 'publication'

- 10.26 Prohibited and restricted information about court cases must have been 'published' for liability to arise under the law of sub judice contempt, the Judicial Proceedings Reports Act and the Open Courts Act. The nature of 'publication' and its current definition under these laws must therefore be examined in order to properly consider reforms to enforcement processes.
- 10.27 Definitions of 'publication' can include or refer to:
- how information is made available, such as the distribution of a book or provision of access to archived material
 - the media through which information is published, such as a book, newspaper, radio or television broadcast or website
 - where information is published, such as a publication by a newspaper based in Victoria or on the website of a media organisation based outside Australia
 - the identities of individuals and entities publishing information, such as media organisations, journalists and members of the public
 - the identities of individuals and entities receiving information, such as the public in general, or a section of the public, such as jurors.
- 10.28 This chapter discusses these issues as they arise in the enforcement of prohibitions and restrictions on online publications.

Online publication

- 10.29 The law has always needed to adapt to developments in society, technology and communication. In 1974, the Committee on Contempt of Court in England described television as a new form of communication with a 'powerful impact on the public'.²²
- 10.30 In 2002, a majority of the High Court of Australia stated in the defamation case *Dow Jones & Co Inc v Gutnick*:
- In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas. Radio and television presented the same kind of problem as was presented by widespread dissemination of printed material, although international transmission of material was made easier by the advent of electronic means of communication.²³
- 10.31 Though technological developments are not new, each development creates new challenges for existing laws and the courts enforcing them.
- 10.32 Chief Justice Warren and Acting Justice of Appeal Byrne of the Victorian Court of Appeal have described online information as having four unique characteristics:
- it is permanent,
 - it lacks a specific location,
 - it is easily accessible,
 - it can be copied and published on other websites outside Victoria.²⁴

22 Committee on Contempt of Court (UK), *Report of the Committee on Contempt of Court* (December 1974) 5.
 23 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 605 [38] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
 24 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 268–70 [75]–[84] (Warren CJ and Byrne AJA).

- 10.33 Prohibited and restricted information can be published online by different individuals and entities in a range of ways. In *Commonwealth Director of Public Prosecutions v Brady*, the suppressed material was published through the original publication of the suppression order by Wikileaks, republications of the order and various ‘articles, tweets and blogs which refer in some way’ to the order, including by reposting the order, naming people mentioned in the order or linking to the order on Wikileaks.²⁵
- 10.34 Online publication of information raises legal and practical issues for courts seeking to enforce prohibitions and restrictions on publication under the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act. These issues include:
- how to define ‘publication’
 - the courts’ power to enforce Victorian laws in other Australian states and territories and in foreign countries
 - identifying the original publisher of information posted online when the information has been republished multiple times or was originally published anonymously
 - how courts determine the liability of online intermediaries, such as internet service providers and social media companies
 - how courts approach enforcement when prohibitions or restrictions on publication are rendered futile by subsequent events, such as the posting, sharing and discussion of suppressed information on social media networks like Facebook, Twitter and Instagram.

Definitions of ‘publication’

- 10.35 There are different definitions of, and references to, ‘publication’ in the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act. There are also definitions of ‘publication’ in other areas of the law which are not the subject of this review, such as defamation and copyright.
- 10.36 Under the Open Courts Act, ‘publish’ means disseminate or provide access to the public, or a section of the public, by any means, including:
- publication in a book, newspaper, magazine or other written publication
 - broadcast by radio or television
 - public exhibition or broadcast
 - electronic communication.²⁶
- 10.37 The word publication must be construed according to this definition.²⁷
- 10.38 Section 4 of the Judicial Proceedings Reports Act has the same definition of publish as the Open Courts Act, but it does not expressly require that publication be construed according to the definition of publish.²⁸
- 10.39 Publication under section 4 of the Judicial Proceedings Reports Act is permitted ‘for a purpose connected with a judicial proceeding’.²⁹ In *Hinch v Director of Public Prosecutions*, the Victorian Court of Appeal considered when a matter would be considered to be published ‘for a purpose connected with a judicial proceeding’. The Court of Appeal held that the words may ‘have to be narrowly construed in order to preserve the operation of the prohibition in section 4(1A)’, and that the phrase ‘will save only a publishing that is for a purpose having a real and direct link with the furtherance or conduct of a judicial proceeding’. The phrase would not encompass public criticism of a judicial proceeding,

25 *Commonwealth Director of Public Prosecutions v Brady* [2015] VSC 246 [41]–[45].
26 *Open Courts Act 2013* (Vic) s 3 (definition of ‘publish’).
27 *Ibid.*
28 *Judicial Proceedings Reports Act 1958* (Vic) s 4 (definition of ‘publish’).
29 *Ibid.*

whether legitimate or not, nor any campaign designed to gather support for judicial proceedings to be commenced.³⁰

- 10.40 Section 3 of the Judicial Proceedings Reports Act has no definition of ‘publish’ or ‘publication’ but makes several references to publication.³¹
- 10.41 Under the Open Courts Act and Judicial Proceedings Reports Act the definition of ‘publish’ is broad and inclusive. Most online communications would likely be an ‘electronic communication’ or another ‘means’ of dissemination or provision of access.
- 10.42 Under the law of sub judice contempt, publications can include newspapers,³² online news,³³ radio broadcasts,³⁴ television,³⁵ and statements to the media.³⁶ To be published, material must be made available to the public, or to a section of the public likely to include those connected with a case.³⁷ The definition of publication under the law of sub judice contempt is discussed in detail in Chapter 7.
- 10.43 A key issue in this reference is whether the law of sub judice contempt requires restatement in statute, including the definition of publication to clarify the scope and application of the law.

Definitions of ‘public’ and ‘a section of the public’

- 10.44 It is unclear when people and organisations, including online intermediaries, are considered to have disseminated, or provided access, ‘to the public’ or ‘a section of the public’. If a person posts suppressed information about a case on their Facebook page:
- Has the person disseminated it or provided access to it to the public or to a section of the public?
 - To what section of the public must a person have disseminated the information or provided access to it for it to be a publication?
- 10.45 For example, does sending a private message to a group of friends on social media or a private email satisfy the requirement that the material is made available to a section of the public?³⁸

Duration of publication

- 10.46 Existing definitions of publication may impact harshly on certain online publishers. In a sub judice contempt case, a majority of the Court of Appeal found that the publication of online material occurs for as long as the material is available online.³⁹
- 10.47 This definition is particularly problematic for publishers or managers of archived online material. For instance, a publisher who posts an article online about a person convicted of criminal offences may become liable for sub judice contempt if the convicted person is later put on trial for further criminal offences while the article remains accessible.

30 *Hinch v DPP (Vic); Television and Telecasters (Melbourne) Pty Ltd v DPP* [1996] 1 VR 683, 690.

31 *Judicial Proceedings Reports Act 1958* (Vic) s 3.

32 *Bell v Stewart* (1920) 28 CLR 419; *DPP (NSW) v Wran* (1987) 7 NSWLR 616; *Monis v the Queen*; *Droudis v the Queen* (2013) 249 CLR 92.

33 *DPP v Johnson & Yahoo!7* [2016] VSC 699; *DPP v Johnson & Yahoo!7 (No 2)* [2017] VSC 45.

34 *Hinch v A-G (Vic)* (1987) 164 CLR 15.

35 *A-G (NSW) v Willesee* [1980] 2 NSWLR 143; *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368; *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68.

36 *DPP (NSW) v Wran* (1987) 7 NSWLR 616.

37 *Viner v Australian Building Construction Employees’ and Builders Labourers Federation* (1963) 56 FLR 5, 22–3; 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 ed, 1996) 85.

38 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) 15 [2.33].
39 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 264–5 [63]–[65] (Warren CJ and Byrne AJA). The majority of the Court of Appeal also considered the High Court’s approach in *Dow Jones v Gutnick* (2002) 210 CLR 575, a defamation case in which publication was taken to be at the place and time it was downloaded. See also *R v Hinch (No 1)* [2013] VSC 520 [54], citing *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 64–5 [43] (Basten JA, Bathurst CJ and Whealy JA agreeing).

Liability of online intermediaries

- 10.48 The Australian Law Reform Commission has defined an intermediary as:
- An entity that provides services that enable online content to be provided to the public and includes content platforms, application service providers, host providers and internet access providers.⁴⁰
- 10.49 Different types of intermediary can enable and restrict access to information online, including:
- telecommunications providers, such as Telstra
 - internet service providers
 - content hosts
 - search engines, such as Google
 - social media platforms, such as Facebook and Twitter
 - e-commerce and payment providers, such as PayPal.⁴¹
- 10.50 The liability of online intermediaries for the actions of third parties, such as the liability of Facebook for a person's Facebook post, is 'confusing', 'largely incoherent' and has developed separately in different areas of Australian law, according to Kylie Pappalardo and Nicolas Suzor.⁴² The issue has not yet been considered by Australian courts in a case of sub judice contempt.⁴³ The liability of intermediaries for automated search results, emails and notifications that give rise to publications is also a critical question in this area of the law.⁴⁴
- 10.51 There are two main issues with assessing the liability of intermediaries:
- Many internet intermediaries do not have control over the content of the information that goes through their systems, though they may be able to include or exclude certain information.⁴⁵ Given the volume of material published online, liability for the content of such publications may be an unfair burden on an intermediary that had no knowledge of, or control over, a publication.
 - There may not always be a local distributor to hold liable when content is published from foreign jurisdictions.⁴⁶ An online distributor may be anonymous⁴⁷ or outside the jurisdiction.⁴⁸ Enforcement of prohibitions and restrictions on publication outside of Victoria is discussed later in this chapter.
- 10.52 Under Commonwealth law, statutory provisions regulate the liability of certain online intermediaries for 'internet content'.⁴⁹ Clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) provides that a state or territory law, or a rule of common law or equity, has no effect to the extent to which it:
- subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content; or

40 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media* (Report No 118, March 2012) 398.

41 Kylie Pappalardo and Nicolas Suzor, 'The Liability of Australian Online Intermediaries' (2018) 40 (4) *Sydney Law Review* 469, 469.

42 Ibid.

43 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 38 [2.63].

44 See *Trkulja v Google* (2018) 356 ALR 178; *Google v ACCC* (2013) 249 CLR 435; Sam Hurley, 'Grace Millane case: Suppression Flouted by Google and Others, Prosecutions to Follow?', *New Zealand Herald* (Web Page, 14 December 2018) <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12176432>; Toby Manhire, 'New Zealand Courts Banned Naming Grace Millane's Accused Killer. Google just Emailed it Out.', *The Guardian* (Web Page, 13 December 2018) <www.theguardian.com/world/2018/dec/13/new-zealand-courts-banned-naming-grace-millanes-accused-killer-google-just-emailed-it-out>. The liability of platforms such as Google, Facebook and Twitter has been questioned in New Zealand where despite a suppression order on the name of an accused, Google published the details in an email sent to subscribers.

45 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 33 [2.63].

46 New South Wales Law Reform Commission, *Contempt by Publication*, (Discussion Paper, 2000) 74 [2.97]; Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (2013) 5–6 [2.4].

47 Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013) 5–6 [2.4].

48 New South Wales Law Reform Commission, *Contempt by Publication*, (Discussion Paper, 2000) 74 [2.97].

49 *Broadcasting Services Act 1992* (Cth) sch 5 pt 1 cl 3 (definition of 'internet content'; definition of 'information'; definition of 'ordinary email').

- requires, or would have the effect (whether direct or indirect) of requiring, an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host; or
- subjects, or would have the effect (whether direct or indirect) of subjecting, an internet service provider to liability (whether criminal or civil) in respect of carrying particular internet content in a case where the service provider was not aware of the nature of the internet content; or
- requires, or would have the effect (whether direct or indirect) of requiring, an internet service provider to monitor, make inquiries about, or keep records of, internet content carried by the provider.⁵⁰

10.53 Under the Broadcasting Services Act:

- Clause 90 declares that the schedule is not intended to exclude a state or territory law, including a Victorian law, to the extent to which that law can operate concurrently with Schedule 5.
- A state or territory law, or rule of common law or equity, can be exempted from the operation of clause 91.⁵¹

10.54 An aim of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), which introduced clause 91, was to prevent intermediaries being unfairly burdened with monitoring or enquiring about content and to encourage the development of internet technologies.⁵²

10.55 These provisions are important to consider when assessing proposed reforms that seek to address the liability of online intermediaries.

Possible reforms—laws concerning publication

Clarifying and harmonising definitions

10.56 One reform option is a revised and harmonised definition of ‘publication’ in the Open Courts Act and the Judicial Proceedings Reports Act, which would specify when a person or organisation has disseminated or provided access to the public or a section of the public.

10.57 Such amendments may also more precisely define what material, particularly online material, is a publication under these laws, through expanded definitions or the inclusion of examples in the statute.

10.58 Alternatively, a revised and harmonised definition of publication could include an exemption for private communications,⁵³ such as a personal email between two individuals.

10.59 If the law of sub judice contempt were wholly or partially restated in statute, this reform may include harmonising the definition in the law of sub judice contempt with other definitions of publication in statutes such as the Judicial Proceedings Reports Act and Open Courts Act. This is discussed in Chapter 7.

50 *Broadcasting Services Act 1992* (Cth) sch 5 pt 9 cl 91. ‘Internet content host’ and ‘internet carriage service’ are defined under cl 3 of the schedule. ‘Internet service provider’ is defined under cl 8 of the schedule.

51 *Broadcasting Services Act 1992* (Cth) sch 5 pt 1 cl 91(2).

52 *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) sch 1 cl 4. The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) was introduced to regulate offensive content on the internet.

53 The Australian Law Reform Commission made this recommendation in its review of section 121 of the *Family Law Act 1975* (Cth), which contains provisions restricting the publication of family law proceedings to the public: Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) 307–8 [12.73]–[12.78].

- 10.60 Given the volume and reach of online communications, it is important to consider whether alterations to definitions of publication would create practical impediments to enforcement, such as placing an unrealistic burden on particular agencies to monitor online content.

Clarifying the liability of online intermediaries

- 10.61 Another reform option is the enactment of new statutory provisions, or the amendment of existing provisions, to clarify aspects of the liability of online intermediaries and their responsibility for monitoring, making enquiries and removing prohibited and restricted information published on their platforms. This is also a relevant consideration for any legislative restatement of the law of sub judice contempt.
- 10.62 Reform options in this area need to take account of:
- the existing regulation of internet content hosts and internet service providers under Commonwealth law, particularly the Broadcasting Services Act
 - provisions in the Broadcasting Services Act that limit the application of Victorian statutes and the common law to the regulation of internet content hosts and internet service providers.
- 10.63 The New South Wales Law Reform Commission supported the aims of the Broadcasting Services Amendment (Online Services) Act, which introduced clause 91 of the Broadcasting Services Act.⁵⁴ The NSW Commission recommended, however, that internet content hosts and service providers that become aware they are carrying or hosting a contemptuous publication should be obliged to take steps within their means to prevent it from continuing to be published, in line with their obligation to remove content after formal notification by the Australian Broadcasting Authority.⁵⁵
- 10.64 One reform option is that any such statutory provisions may specify which online intermediaries are liable for the publication of prohibited or restricted information, such as by amending definitions or providing examples in the legislation that refer to particular intermediaries.

Questions

- 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?

54 *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) sch 1 cl 10.

55 New South Wales Law Reform Commission, *Contempt by Publication* (Report No 100, 2003) 34 [2.65], citing *Broadcasting Services Act 1992* (Cth) sch 5 pt 4.

Jurisdiction

Enforcement in Victoria

- 10.65 Victorian courts can enforce prohibitions and restrictions on information that is published within Victoria, whether the information is published in print, by broadcast, online or through any other medium.
- 10.66 Information posted online is available to anyone who can access the internet, without geographic limitations.⁵⁶ Courts can struggle to enforce prohibitions and restrictions on publication when the relevant information is published by individuals and entities who are not bound by Victorian laws and court orders.

Enforcement in Australia

- 10.67 Prohibitions and restrictions on publication of information vary in their applicability to jurisdictions outside Victoria.
- 10.68 Under the Open Courts Act 2013 (Vic), proceeding suppression orders and interim orders apply to the publication or disclosure of information in a place specified in the order.⁵⁷ Broad suppression orders made in the Magistrates' Court only apply to the publication of material in a place specified in the order.⁵⁸ These orders can apply anywhere in Australia, but an order cannot apply outside Victoria unless the court is satisfied it is necessary for an order to apply outside Victoria in order to achieve the purpose for which the order was made.⁵⁹
- 10.69 Section 3(2) of the Judicial Proceedings Reports Act states that it is not lawful to:
- sell distribute or give away or cause or procure to be sold distributed or given away or to have in possession for sale distribution or giving away any newspaper or document (whether printed or published in Victoria or elsewhere) containing or purporting to contain any matter or details or particulars the printing or publication of which would if the newspaper or document were printed or published in Victoria be a contravention of the provisions of this section.⁶⁰
- 10.70 Section 3(2) of the Judicial Proceedings Reports Act does not, however, empower Victorian courts to exercise their jurisdiction outside of Victoria. Rather, it prohibits the sale and distribution of publications which are prohibited or restricted in Victoria, but published 'elsewhere' and brought into Victoria. Section 3 was originally enacted in 1929, when newspapers were the primary focus of publication provisions.⁶¹

Enforcement in foreign jurisdictions

- 10.71 The online publication of prohibited or restricted information about a court case may render the prohibition or restriction futile.
- 10.72 In June 2014, Justice Hollingworth of the Supreme Court issued a suppression order sought by the Commonwealth Department of Foreign Affairs and Trade (DFAT) in a high-profile case alleging corruption involving foreign public officials. Some of the terms of the order could not be published without disclosing the suppressed information. WikiLeaks published the order online in July 2014 and many Australian and foreign media organisations and bloggers republished it.⁶² Most republications of the suppression order after the initial publication by WikiLeaks were in Asia, but they were available for download in Australia.⁶³ At that time,

56 See *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 605 [39] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

57 *Open Courts Act 2013* (Vic) s 21(1).

58 *Ibid* s 26(2).

59 *Ibid* ss 21(2)–(3), 26(3)–(4).

60 *Judicial Proceedings Reports Act 1958* (Vic) s 3(2).

61 *Judicial Proceedings (Regulation of Reports) Act 1929* (Vic) s 2(2).

62 *Commonwealth Director of Public Prosecutions v Brady* [2015] VSC 246 [1]–[4], [31]–[32].

63 *Ibid* [42].

Wikileaks' server was hosted in Sweden and there were reportedly other servers located in other jurisdictions, but none in Australia.⁶⁴

10.73 In revoking the order, Justice Hollingworth found:

The widespread on-line dissemination that has already occurred cannot now be undone. Whilst the court has power to make orders which have effect within Australia (including orders requiring the removal of material already published in this country), it cannot make orders controlling publication of the DFAT order outside Australia. And, unlike the case with most suppression orders, it is the publication overseas that has the capacity to cause the greatest harm. ... There is no rule that automatically prevents suppression orders from being made or continued, in respect of information that has already been published. However, the court's ability to enforce its order, and protect against the threatened harm, are likely to be highly relevant.⁶⁵

10.74 In his analysis of *Commonwealth Director of Public Prosecutions v Brady*, Jason Bosland commented that it would be a 'perverse result' if courts attempted to garner respect for their authority and promote compliance with orders by insisting that orders continue when they are no longer useful.⁶⁶ In agreeing with Justice Hollingworth's decision to revoke the order, Bosland argued that courts cannot allow futile orders to continue because the making and continuation of orders is subject to a strict test of necessity and a futile order cannot be considered necessary.⁶⁷

10.75 Enforcing prohibitions and restrictions on publication against the local distributor of a publication, or local office of a company, is one approach to enforcement where the publication is online. For instance, in 1957, the United Kingdom distributors of an American magazine were found liable for the prejudicial content it contained.⁶⁸ The Queen's Bench stated:

We shall impose a fine (albeit of a nominal amount) and we do so to emphasise the risk which is run by dealing in foreign publications imported here but which have no responsible editor or manager in this country. The distributors are the only persons who can in these circumstances be made amenable in the courts of this country.⁶⁹

10.76 There are difficulties with this approach when material is published online. An online distributor may be outside the jurisdiction,⁷⁰ and there may not be a local distributor to hold liable.⁷¹ An online distributor may also be anonymous,⁷² making it difficult for courts to identify the original source of the publication so as to determine liability.

10.77 Recently, the DPP initiated proceedings for contempt in the Supreme Court of Victoria against 36 organisations and individuals in the media for allegedly breaching a suppression order restricting publication of information about the conviction of Cardinal George Pell for child sex offences. International media organisations had published stories reporting on Pell's conviction. In court documents, the DPP alleges, in part, that the organisations and individuals 'aided and abetted overseas media's contempt'.⁷³ A directions hearing in this case took place in the Supreme Court on 15 April 2019 and the matter has been set down for a further directions hearing on 26 June 2019. The matter is yet to be fixed for hearing.

64 Jason Bosland, 'Wikileaks and the Not-so-super Injunction: The Suppression Order in *DPP (Cth) v Brady*' (2016) 21(1) *Media and Arts Law Review* 34, 35 n 6.

65 A suppression order may still be maintained after a breach, but each case needs to be assessed on its facts: *Commonwealth Director of Public Prosecutions v Brady* [2015] VSC 246 [75]–[76], [80].

66 Jason Bosland, 'Wikileaks and the Not-so-super Injunction: The Suppression Order in *DPP (Cth) v Brady*' (2016) 21(1) *Media and Arts Law Review* 34, 62.

67 *Ibid*; *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [32].

68 *R v Griffiths, Ex parte A-G (UK)* [1957] 2 All Er 379.

69 *Ibid* 383.

70 New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper, 2000) 74 [2.97].

71 *Ibid*; Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013) 5–6 [2.4].

72 Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, 2013) 5–6 [2.4].

73 Adam Cooper, 'DPP Moves to Jail Dozens of Editors, Journalists Over Reports after Pell Verdict', *The Age* (Web Page, 26 March 2019) <www.theage.com.au/national/victoria/dpp-moves-to-jail-dozens-of-editors-journalists-over-reports-after-pell-verdict-20190326-p517qf.html>.

Possible reforms—enforcement outside Victoria

Statutory provisions with extraterritorial application in Australia

- 10.78 The Victorian Parliament can enact provisions in Victorian legislation which purport to have extraterritorial application if a sufficient connection with Victoria can be demonstrated. There are a number of these provisions in the *Crimes Act 1958* (Vic).⁷⁴
- 10.79 A reform option is the enactment of criminal offence provisions in the Crimes Act, the Open Courts Act or another statute, that permit Victorian authorities to prosecute breaches of prohibitions and restrictions on publication that occur outside Victoria, but which may affect legal proceedings within Victoria.

Interstate and territory recognition and enforcement of orders

- 10.80 One reform option is the further development of a system for the mutual recognition and enforcement of Victorian orders in other states and territories in Australia.
- 10.81 This option is reflected in the *Open Courts Act Review*, which recommended that the Council of Attorneys-General be asked to consider the desirability of developing a system for interstate and territory recognition and enforcement of suppression orders.⁷⁵
- 10.82 In its response to the *Open Courts Act Review*, the Victorian Government supported this recommendation and stated that at the Council of Attorneys-General meeting on 1 December 2017, jurisdictions had agreed that the Commonwealth Government would undertake a stocktake of the suppression order regimes operating across Australia.⁷⁶ This was noted in the Council of Attorneys-General communiqué from December 2017.⁷⁷ The Council of Attorneys-General communiqué from November 2018 provided an update:
- Participants noted that the Australian Attorney-General's Department has undertaken a review of the suppression order regimes operating at the federal and state and territory levels. Participants also noted that the review has highlighted that the implementation of the former Standing Committee of Attorneys-General's (SCAG) model legislation in respect of suppression orders varies across jurisdictions.⁷⁸
- 10.83 The current status of this stocktake and any resulting developments is unclear. Reform options would need to take account of the work of the Council of Attorneys-General in this area, and other developments at the federal, state and territory level to advance interstate and territory recognition and enforcement of orders.

International recognition of prohibitions and restrictions

- 10.84 A key concern for the enforcement of prohibitions and restrictions is the effect of breaches and the courts' inability to properly enforce orders on the proper administration of justice and public confidence in the courts.
- 10.85 Current and proposed approaches to identifying, preventing and addressing breaches of prohibitions and restrictions by publications outside Victoria are an important consideration in this review.
- 10.86 A further reform option is the creation of a recognition and enforcement regime for Victorian or Australian orders in foreign jurisdictions. There would be significant legal and practical impediments to establishing such a system, including:
- costs of establishing and maintaining the system
 - logistical complexities of working with other jurisdictions

⁷⁴ See, eg, *Crimes Act 1958* (Vic) ss 80A–87, 321A.

⁷⁵ Frank Vincent, *Open Courts Act Review* (2017) 9.

⁷⁶ Victorian Government, *Open Courts Act Review—Recommendations* (2018) <https://engage.vic.gov.au/download_file/8086/822>.

⁷⁷ Council of Attorneys-General, 'Communiqué—Council of Attorneys-General' (1 December 2017) 2.

⁷⁸ Council of Attorneys-General, 'Communiqué—Council of Attorneys-General' (23 November 2018) 4.

- responsibility for establishing and maintaining the system
- the potential for the law and the courts to be brought into disrepute by the creation and operation of an ineffective regime.

Question

- 47 Should the law seek to enforce prohibitions and restrictions on publication:
- (a) in other Australian states and territories?
 - (b) in foreign jurisdictions?
- If so, how should this be achieved?

Awareness of prohibitions and restrictions

- 10.87 For the purposes of the offences under the Open Courts Act, a person will be considered aware that a proceeding suppression order, interim order or broad suppression order is in force if a court or tribunal has ‘electronically transmitted notice’ of it to them, in the absence of evidence to the contrary.⁷⁹ There is no equivalent provision in the Open Courts Act for common law orders made under the courts’ inherent jurisdiction.
- 10.88 The prohibitions and restrictions on publication under the Judicial Proceedings Reports Act apply automatically, without the need for a court order, so there are no procedures for notifying people of their application.
- 10.89 The common law of sub judice contempt applies automatically. There is no issuing of a court order or formal notification process that alerts a person that proceedings are pending for the purposes of sub judice contempt. The question of when proceedings are considered pending for the purposes of sub judice contempt is uncertain. This issue is discussed in Chapter 7.

Court notification process

- 10.90 There is a central, internal database of suppression orders, which collates suppression orders made by Victorian courts. The Supreme Court provides some information about its notification process in a practice note.⁸⁰ The *Open Courts Act Review* described the process of notification generally across the courts:
- Briefly, each court either directly notified media organisations that had already expressed an interest in the proceeding in question or communicated the terms of orders through an email system to the email addresses of news media organisations that had registered with the court that they would like to receive such notices.⁸¹
- 10.91 Currently, there are no statistical records of notifications of orders.⁸²
- 10.92 There are numerous issues with this process, including:
- People cannot independently check whether a suppression order exists in a particular case.
 - There are time delays between the making of an order in court and the uploading of the order to the database.

- Court staff may not have the time or resources to promptly upload orders to the database for distribution.
- Court staff who are tasked with uploading or distributing orders may be absent.
- It is unclear how courts determine who is permitted to access suppression orders.
- It is difficult to track who has been notified of orders and other data.

- 10.93 A lack of clarity in notification processes can also challenge authorities seeking to prosecute people for alleged breaches of orders. The DPP has commented on the difficulty of establishing that a person had the knowledge or recklessness required to prove an offence under sections 23 and 27 of the *Open Courts Act*, when a person is not on the courts' email distribution list by which media representatives are notified of suppression orders.⁸³ The *Open Courts Act Review* noted that while this approach appeared to have worked reasonably well for major media organisations, an 'increasing number' of individuals and organisations are not covered by this system.⁸⁴
- 10.94 Media organisations have described the timeliness of notifications as poor.⁸⁵ Michael Bachelard, Investigations Editor of *The Age* and foreign editor for *The Age* and *Sydney Morning Herald*, noted that the courts' email distribution process was 'problematic because the text of suppression orders were not easily searchable, particularly where the content of the email attaching a suppression order misspelt critical details'.⁸⁶ Mr Bachelard also said it was difficult to keep track of limits on publication in individual cases because a number of suppression orders were received each day from the courts, with multiple communications issued where orders were varied.⁸⁷

Possible reforms—notifying the public

Database for orders

- 10.95 One reform option is the establishment of a searchable and/or public database of Victorian suppression orders. The *Open Courts Act Review* recommended the creation of a:
- central, publicly accessible register of suppression orders made by all Victorian courts and tribunals containing details of their terms and duration and, to the extent reasonably possible in the circumstances the reasons for them ...⁸⁸
- 10.96 Public access to a register of suppression orders is currently available in South Australia.⁸⁹ The Supreme Court of Tasmania has a public database of suppression orders on its website.⁹⁰ It is unclear if this database includes all suppression orders issued in Tasmania.
- 10.97 At the time of writing, some suppression orders on the Supreme Court of Tasmania's database cannot be downloaded, either because there is no link to the order or a note saying 'refer to Registrar'. The website includes the date when orders were rescinded.⁹¹
- 10.98 In submissions and consultations for the *Open Courts Act Review*, Mr Bachelard, the Media, Entertainment and Arts Alliance, barrister Haroon Hassan and academic Jason Bosland called for a searchable notification system.⁹² Mr Hassan commented that if transparency was an important value, courts need to transition to a more public notification system instead of emailing orders to undisclosed media groups.⁹³ Australia's

83 Ibid 70 [267].

84 Ibid 117 [470].

85 Ibid 76 [288].

86 Ibid 77 [291].

87 Ibid 77 [291].

88 Ibid 10.

89 *Evidence Act 1929 (SA)* s 69A(10)–(11).

90 Supreme Court of Tasmania, 'Suppression Orders' (Web Page, 20 March 2019) <www.supremecourt.tas.gov.au/for_the_media/suppression_orders>.

91 Ibid.

92 Frank Vincent, *Open Courts Act Review* (2017) 77 [291]–[292] <<https://engage.vic.gov.au/open-courts-act-review>>.

93 Ibid 77 [292].

Right to Know Coalition recommended a searchable database in its 2008 report on suppression orders and media access to court documents and information.⁹⁴

- 10.99 The Media, Entertainment and Arts Alliance also asked that consideration be given to making notifications quicker once orders are made.⁹⁵
- 10.100 Key questions that would need to be addressed in the design and operation of any database include:
- Who should be responsible for designing, developing and maintaining the database?
 - Should the database be public?
 - Should the database be searchable?
 - Should the database be digital?
 - Should the database be online?
 - If the database is searchable, how should it secure sensitive information in orders, such as the identity of police informers?
 - If the database is searchable and sensitive information database is anonymised, how could people searching the database seek proper notification of orders?
 - If the database is not public, what processes should be in place to determine who is granted access, and why?
- 10.101 The *Open Courts Act Review* suggested that a potential body to operate a central, publicly accessible register of suppression orders was Court Services Victoria.⁹⁶
- 10.102 A further issue is how to define 'the media' for the purposes of providing access to orders. The *Open Courts Act* defines 'news media organisation', but that definition does not determine who would be permitted to access a database of orders that is not publicly available. A news media organisation is defined under the *Open Courts Act* as:
- a commercial enterprise that engages in the business of broadcasting or publishing news
 - a public broadcasting service that engages in the dissemination of news through a public news medium.⁹⁷
- 10.103 This definition does not sufficiently cover all interested parties who may seek access to suppression orders. Examples of other parties who may be interested in accessing suppression orders include:
- an author writing a book
 - an academic researcher
 - a film or television production company.

Public versions of orders

- 10.104 Australia's Right to Know Coalition recommended in 2008 that courts could consider drafting a brief, public version of the order to prevent the publication of sensitive information, such as the identity of a police informer. There would then be two orders:
- 'a neutral order for public display to the effect that a suppression order has been made and details are available from the judge's associate or the court registry or other appropriate officer'

94 Prue Innes, Australia's Right to Know Coalition, *Review of Suppression Orders and the Media's Access to Court Documents and Information* (13 November 2008) 91.

95 Frank Vincent, *Open Courts Act Review* (2017) 77 [292] <<https://engage.vic.gov.au/open-courts-act-review>>.

96 *Ibid* 117 [469] n 419.

97 *Open Courts Act 2013* (Vic) s 3 (definition of 'news media organisation').

- ‘a detailed order stating what is prohibited, which should be prepared for the media’.⁹⁸

10.105 A limitation of this approach is the burden it places on judicial officers and court staff of drafting and uploading two orders for each prohibition and restriction on publication.

Reminders of automatic prohibitions

10.106 A possible reform may be for courts to issue reminders to the media of what information can and cannot generally be published about cases, such as the automatic prohibitions under section 4 of the Judicial Proceedings Reports Act.

10.107 In a 2008 report, Australia’s Right to Know Coalition noted that it relied on emails of the details from suppression orders distributed to the media by the New South Wales Supreme Court’s media office, which often included judges’ reminders about not publishing certain matters. These emails ensured the media were aware of statutory prohibitions or that matters raised in the absence of the jury could not be reported, without requiring formal orders.⁹⁹ Australia’s Right to Know Coalition felt that judges reminding the media of legal prohibitions without making orders was helpful, and appeared to be used in New South Wales and Queensland.¹⁰⁰

Question

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?

Monitoring compliance with prohibitions and restrictions

10.108 Law enforcement agencies often become aware of alleged offences through reports to police or other agencies by the victims of alleged offending, prompting investigations and potential criminal charges which are then pursued through the courts. By contrast, an alleged breach of a suppression order may have no direct victim whose complaint will trigger an investigation.

10.109 The Commission has limited information about how compliance with prohibitions and restrictions on publication is currently monitored by courts and other agencies. There appear to be no clear procedures for monitoring compliance.

10.110 Monitoring compliance with court-ordered prohibitions and restrictions on publication is challenging because there is a lack of:

- clarity around who is responsible for monitoring publications to ensure they are compliant
- public awareness of prohibitions and restrictions
- clear processes for monitoring compliance.

10.111 These issues contribute to an accountability gap and may result in the burden for monitoring compliance unduly falling on the people who are mostly directly affected by their breach, such as victims of crime.

98 Prue Innes, Australia’s Right to Know Coalition, *Review of Suppression Orders and the Media’s Access to Court Documents and Information* (13 November 2008) 90.

99 Ibid 87.

100 Ibid 91–2.

10.112 In the *Open Courts Act Review*, the parents of a child complainant in a sexual assault case reported that:

no information on legislation or processes relevant to the desirability of a suppression order was provided to them to protect their child at the initial stages, including the bail hearing of the persons charged. The consequent publication of unnecessary and extremely distressing detail not only resulted in the identification of the child in the area but added substantially to the extreme trauma already being experienced by the young person. It was not until they made their own inquiries as to what could be done that any action was taken by the Office of Public Prosecutions. By then, it was too late to be of any real assistance to the child. ... They said that they had been expected to assume the burden of monitoring breaches of suppression orders, as the DPP [Director of Public Prosecutions] did not take a proactive role in ensuring that suppression orders were obeyed. This added to their suffering.¹⁰¹

10.113 The DPP acknowledged that most victims lacked prior knowledge about statutory prohibitions on publication and suppression orders, and the Office of Public Prosecutions provided information to victims on a 'case by case basis'.¹⁰²

Possible reforms—monitoring compliance

10.114 One reform option is to specify a process for monitoring compliance with prohibitions and restrictions on publication and to identify those responsible for monitoring compliance, which may be an existing or new body.

10.115 This could include, for example, the DPP undertaking internet searches to identify any prejudicial publications that could affect a trial, and then requesting the information be taken down until the trial is complete.¹⁰³ However, as recognised by the Victorian Court of Appeal, such strategies would depend on requests being complied with and the removal of the material being useful.¹⁰⁴

10.116 In addition, such monitoring processes may impose a significant administrative burden, and there are also questions around whose responsibility it should be. Academic Jacqueline Horan has suggested that lawyers should be proactively screening the internet for prejudicial pre-trial publicity about their clients, noting that the costs of a potential aborted trial should motivate this proactive approach.¹⁰⁵ In this context, Horan has suggested that a more cost-effective approach would be for the creation of an independent monitoring role in Australian jurisdictions to conduct routine screening of online material, which could then be dealt with appropriately by the courts.¹⁰⁶

10.117 However, the DPP may not have the resources to conduct such monitoring, or be the appropriate agency, as its core functions relate to prosecution rather than investigation or monitoring.

10.118 In developing reforms in this area, the roles and resources of existing courts and agencies are critical to assessing whether a monitoring role would be appropriate and feasible. It is also important to consider how a responsible agency would monitor publications about cases online, given the nature and volume of online publication.

101 Frank Vincent, *Open Courts Act Review* (2017) 71–2 [273] <<https://engage.vic.gov.au/open-courts-act-review>>.
102 Ibid 72 [274].
103 Virginia Bell, 'How to Preserve the Integrity of Jury Trials in a Mass Media Age' (2005) 7 *Judicial Review* 311.
104 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 272 [91].
105 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 192.
106 Ibid 193–4.

Questions

- 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

- 10.119 The responsibility for instituting proceedings for breaches of prohibitions and restrictions on publication varies across the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act.
- 10.120 Prosecutions for breach of orders made under the Open Courts Act are indictable offences that are triable summarily,¹⁰⁷ and charges are filed by Victoria Police.
- 10.121 A prosecution for breach of the statutory prohibitions under the Judicial Proceedings Reports Act can only be commenced with the consent of the DPP.¹⁰⁸ Contravention of a prohibition under the Judicial Proceedings Reports Act is a summary criminal offence,¹⁰⁹ with charges filed by Victoria Police.
- 10.122 Proceedings for common law contempt are instituted by way of summons or originating motion in either the Supreme Court¹¹⁰ or the County Court,¹¹¹ including for sub judice contempt. Depending on the type of contempt, the summons or originating motion may be filed by:
- the Attorney-General¹¹²
 - the DPP¹¹³
 - the Court, which may direct the Prothonotary in the Supreme Court or the Registrar in the County Court to initiate proceedings.¹¹⁴

The 'prosecutorial gap'

- 10.123 In the *Open Courts Act Review*, former Chief Justice of Victoria Marilyn Warren expressed concern about a 'seeming reluctance to prosecute breaches' of statutory prohibitions or suppression orders, even where the courts have referred them.¹¹⁵ Criminal defence lawyers consulted through the Law Institute of Victoria agreed there was a 'prosecutorial gap'.¹¹⁶
- 10.124 The DPP noted complexities with proving breaches of prohibitions and restrictions, particularly where it was unclear whether an accused knew of the existence or scope of a prohibition. The DPP also commented on the difficulty of meeting the required standard of proof for contempt and the complexity of contempt proceedings.¹¹⁷
- 10.125 This 'prosecutorial gap' may be related to a lack of clarity around who is responsible for monitoring compliance with prohibitions and restrictions on publication and the processes for doing so, as discussed earlier in this paper.

107 See *Criminal Procedure Act 2009* (Vic) s 28.

108 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(4), 4(4).

109 *Ibid* ss 3(3), 4(2).

110 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.06.

111 *County Court Civil Procedure Rules 2018* (Vic) r 75.06.

112 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208.

113 *Public Prosecutions Act 1994* (Vic) s 22(1)(ba)(iii).

114 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.07; *County Court Civil Procedure Rules 2018* (Vic) r 75.07.

115 Frank Vincent, *Open Courts Act Review* (2017) 70 [266] <<https://engage.vic.gov.au/open-courts-act-review>>.

116 *Ibid*.

117 *Ibid* 70 [267].

Possible reforms—instituting proceedings

- 10.126 A reform option is the specification of a process for monitoring compliance with prohibitions and restrictions on publication, and the identification of those responsible for monitoring compliance. This issue and relevant reform options are discussed earlier in this paper.
- 10.127 Another reform option is the removal of the requirement to seek the consent of the DPP to prosecute breaches of the statutory prohibitions and restrictions under the Judicial Proceedings Reports Act.
- 10.128 This option may simplify proceedings for a breach of statutory prohibitions in the Judicial Proceedings Reports Act, which could then be directly instituted by Victoria Police filing a criminal charge in the Magistrates' Court.
- 10.129 There are currently different authorities that can institute proceedings for contempt, including the Attorney-General, the DPP and the Supreme and County courts. It is not always clear when individuals can institute proceedings for contempt.
- 10.130 One reform option is the potential restatement of the law of contempt in statute. Provisions in a contempt statute may specify who can institute proceedings for different manifestations of contempt.

Questions

- 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

- 10.131 The terms of reference ask the Commission to consider the appropriateness of fault elements that must be proved to establish breaches of prohibitions and restrictions on publication under the law of contempt, the Judicial Proceedings Reports Act and the Open Courts Act. These elements vary across the different laws considered in this chapter.
- 10.132 The extent to which members of the public and the media are informed, or should be informed, about prohibitions and restrictions on publication is relevant to establishing fault for breaches of these laws. Awareness of prohibitions and restrictions on publication is discussed earlier in this chapter.
- 10.133 Under the Open Courts Act, a person must not contravene a proceeding suppression order, interim order or broad suppression order if they know the order is in force, or are reckless as to whether the order is in force.¹¹⁸
- 10.134 The statutory prohibitions and restrictions under the Judicial Proceedings Reports Act do not specify a required fault element, such as knowledge or recklessness, requiring only that the prohibited information be published.
- 10.135 The fault elements in the law of sub judice contempt, including whether sub judice contempt is a strict liability offence, are discussed in detail in Chapter 7.

- 10.136 Contempt proceedings may be initiated where a person has breached an order issued by the Supreme Court in its inherent jurisdiction or a common law pseudonym order. The fault elements for disobedience contempt are discussed in Chapter 6 of this paper.

Proving fault elements

- 10.137 The DPP has described the complexities with proving the fault elements of the various prohibitions and restrictions on publication, including:
- where it was unclear whether a person accused of breaching a prohibition or restriction had knowledge about its existence or scope
 - difficulties with establishing knowledge and recklessness under sections 23 and 27 of the Open Courts Act where a person was not on the email distribution list by which suppression orders are circulated to the media, as noted by the DPP in the *Open Courts Act Review*¹¹⁹
 - difficulties with meeting the standard of proof in contempt proceedings
 - the complexity of contempt proceedings, particularly civil proceedings.¹²⁰

Notification processes

- 10.138 Under the Open Courts Act, a person is taken to be aware that a proceeding suppression order or broad suppression order is in force if a court or tribunal has electronically transmitted notice of the order to them, in the absence of evidence to the contrary.¹²¹
- 10.139 The courts' existing notification procedures for certain orders, such as orders under the Open Courts Act, may make it more likely that a journalist or media organisation would be aware of prohibitions and restrictions on publication. A member of the public is unlikely to have notice of these orders unless they are on the courts' email list for notification, or happen to be in court when orders are issued.
- 10.140 There are no notification procedures for the application of automatic statutory prohibitions and restrictions like those under the Judicial Proceedings Reports Act.
- 10.141 An important consideration is whether members of the public who publish information about a case but have no knowledge of, or access to, information about prohibitions and restrictions on publication, should be liable for breach of those orders or provisions. Additionally, there are questions about whether notification procedures can be improved to ensure better awareness of prohibitions and restrictions, and to monitor when a person or organisation has been notified.

Possible reforms—fault elements

Clarification of fault elements in statute

- 10.142 One reform option is the specification of required fault elements for each offence in statute. The Open Courts Act currently specifies knowledge or recklessness as fault elements required to establish an offence under that statute.¹²²
- 10.143 Alternatively, statutory provisions could be created that expressly state whether offences are absolute or strict liability offences.

119 Frank Vincent, *Open Courts Act Review* (2017) 70 [267] <<https://engage.vic.gov.au/open-courts-act-review>>.
 120 Ibid.
 121 *Open Courts Act 2013* (Vic) ss 23(2), 27(2).
 122 Ibid ss 23(1), 27(1).

- 10.144 A strict liability offence is a criminal offence which does not require any proof of mens rea (a guilty mind), but to which the common law defence of honest and reasonable mistake of fact applies.¹²³ An absolute liability offence is a criminal offence that does not require proof of any mental element or intention on the part of the accused.¹²⁴
- 10.145 Neither the Judicial Proceedings Reports Act nor the Open Courts Act expressly state that the offences under those statutes are strict or absolute liability offences.
- 10.146 One reform option is the restatement in statute of whether certain offences are strict or absolute liability. Such a reform would help to clarify:
- what intent a person must have had in publishing information, to have committed an offence
 - whether a person who committed an offence may argue as a defence that they made an honest and reasonable mistake of fact, which is discussed later in this chapter.
- 10.147 Another reform option is the restatement in statute of the law of sub judice contempt. A key consideration is whether any such statute should include a provision expressly stating whether sub judice contempt is a strict or absolute liability offence.

Harmonisation

- 10.148 A further reform option is whether fault elements for prohibitions and restrictions on publication can or should be defined in the Open Courts Act, the Judicial Proceedings Reports Act, or a general statute to clarify and unify fault elements across the different areas of the law of contempt.

Amendments to notification processes

- 10.149 There are a number of issues with current notification processes and potential options for reform that are discussed earlier in this chapter.

Question

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

Defences and exceptions

- 10.150 The Commission is asked to consider defences which may be available to a person who has allegedly breached prohibitions or restrictions on publication under the law of sub judice contempt, a common law order, the Judicial Proceedings Reports Act and the Open Courts Act.

Statutory defences and exceptions

- 10.151 Under the Open Courts Act, there are no specified defences to breach of a suppression order. The defences currently available under the law of sub judice contempt and the Judicial Proceedings Reports Act are described in Chapters 7 and 9, respectively.

- 10.152 The Judicial Proceedings Reports Act and the Open Courts Act contain provisions that exempt certain agencies and individuals from liability for offences under those statutes.
- 10.153 Under the Open Courts Act, a proceeding suppression order, interim order or broad suppression order does not prevent a person from disclosing information if the disclosure is in the course of performing functions or duties or exercising powers in a public official capacity:
- in connection with the conduct of any proceeding or the recovery or enforcement of any penalty imposed in a proceeding, or
 - in compliance with any procedure adopted by a court or tribunal for informing a person of the existence and content of a proceeding suppression order, interim order or broad suppression order.¹²⁵
- 10.154 The prohibitions in section 3(1) of the Judicial Proceedings Reports Act do not apply to the:
- printing or distribution of documents for use in connection with any judicial proceedings or to persons concerned in the proceedings
 - printing or publishing of any notice or report pursuant to a direction of the court
 - publication of material in a bona fide series of law reports or any publication of a technical character intended for circulation among members of the legal or medical professions.¹²⁶
- 10.155 Section 4(1D) of the Judicial Proceedings Reports Act provides that the prohibition in section 4(1A) does not operate to prohibit a disclosure of information to a prescribed person or body for the purpose of enabling the person or body to perform a prescribed statutory function.¹²⁷
- 10.156 Appropriate information sharing is a critical issue, given the sensitive nature of some information connected with court cases. There is a need to ensure that the privacy of members of the community engaged in court proceedings is respected and people are not subjected to undue trauma or embarrassment by poor information-sharing processes.

Defence of honest and reasonable mistake of fact

- 10.157 If an offence is a strict liability offence, an accused person may be able to argue the common law defence of honest and reasonable mistake of fact.
- 10.158 The defence of honest and reasonable mistake of fact provides that an accused will not be guilty of the offence if they 'acted under an honest and reasonable mistake as to the existence of facts which, if true, would have made [the] act innocent'.¹²⁸

Possible reforms—defences and exceptions

Publication by a victim, or with a victim's consent

- 10.159 A reform option is the creation of defences and exceptions to publication where a victim has published, or has consented to the publication of, information that would otherwise constitute a breach of a prohibition or restriction on publication. There have been recent amendments to other Victorian laws, which have provided some scope for adult victims to consent to publications which would otherwise have been unlawful.¹²⁹ This issue is discussed in Chapter 9.

Online intermediaries

- 10.160 A further reform option is the creation of statutory defences for online intermediaries to be available where they had no control over prohibited or restricted information published on their platforms.

125 *Open Courts Act 2013* (Vic) ss 22, 26(5).
 126 *Judicial Proceedings Reports Act 1958* (Vic) s 3(5).
 127 *Ibid* s 4(1D).
 128 See *He Kaw Teh v R* (1985) 157 CLR 523, 532–3 (Gibbs CJ).
 129 See *Family Violence Protection Act 2008* (Vic) s 169B.

- 10.161 In its report on the law of contempt by publication, the New South Wales Law Reform Commission recommended establishing a defence for internet service providers and content hosts charged with sub judice contempt to escape liability:
- ... if they can establish that they had no control over the content placed on the Internet which contained the prejudicial material and that they either did not know the content contained the material or, having become aware of this, took all reasonable steps to prevent it being published.¹³⁰
- 10.162 As noted earlier in this chapter, reform options regarding online intermediaries need to consider the existing regulation of internet content hosts and internet service providers under Commonwealth law, particularly the Broadcasting Services Act.

Exception for information-sharing agencies

- 10.163 Another reform option is the creation of exceptions for certain agencies and individuals that are required to share information in a manner which might otherwise constitute a breach of a prohibition or restriction on publication.
- 10.164 Such exceptions already exist under the Judicial Proceedings Reports Act and Open Courts Act. The Open Courts Act provides that a proceeding suppression order or interim order does not prevent a person from disclosing information if the disclosure is in the course of performing functions or duties, or exercising powers, in a public official capacity.¹³¹
- 10.165 If certain types of common law contempt are restated in statute, a key consideration is whether a provision like those in the Judicial Proceedings Reports Act and Open Courts Act should be included in the new provisions to facilitate necessary information sharing between relevant agencies.
- 10.166 Reforms in this area require careful consideration of which agencies and individuals should be permitted to share information and how such information should be shared.

Clarification of absolute or strict liability offences

- 10.167 Neither the Judicial Proceedings Reports Act nor the Open Courts Act expressly state that the offences under those statutes are strict or absolute liability offences.
- 10.168 A reform option is the restatement in statute of whether certain offences for breach of a prohibition or restriction on publication are strict or absolute liability offences. This would help to clarify whether a person alleged to have committed an offence may argue as a defence that they made an honest and reasonable mistake of fact.
- 10.169 A key consideration is whether any restatement of the law of contempt should include the creation of a provision that expressly states whether contempt is a strict or absolute liability offence. Strict and absolute liability offences and the defence of honest and reasonable mistake of fact are described earlier in this chapter.

Questions

- 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

- 10.170 The Commission is asked to consider the adequacy of existing penalties for breaches of orders prohibiting or restricting the publication of information about cases, including:
- fines and imprisonment for breaches of orders made under the Open Courts Act
 - fines and imprisonment for breaches of statutory prohibitions in the Judicial Proceedings Reports Act
 - penalties and remedies for contempt for breach of common law orders made by the Supreme Court exercising its inherent jurisdiction¹³²
 - penalties and remedies for contempt for breach of an injunction made by the County Court exercising the Supreme Court's inherent jurisdiction to grant an injunction in a criminal proceeding restraining a person from publishing any material, or doing any other thing, in order to ensure the fair and proper conduct of the proceeding¹³³
 - penalties and remedies for contempt for breach of common law pseudonym orders¹³⁴
 - apologies to the court for alleged contempts of court.
- Appendix E provides a comparative table illustrating the fragmented nature of contempt-related offences, penalties and prosecution procedures by reference to some of the more frequently used and major related statutory offences. Many other statutes also contain contempt-related offences. However for the purposes of this consultation paper the Appendix is limited to the most major and frequently used.
- 10.171 An individual who knowingly or recklessly breaches a proceeding suppression order, interim order, or an order prohibiting publication of specified material made under the Open Courts Act, is liable for 600 penalty units or up to five years' imprisonment, or both, while a corporation is liable for 3000 penalty units.¹³⁵
- 10.172 A contravention of the prohibitions under the Judicial Proceedings Reports Act is a summary criminal offence.¹³⁶ For an individual, the maximum penalty is a fine of not more than 20 penalty units, and/or not more than four months imprisonment. For a corporation the maximum penalty is a fine of not more than 50 penalty units.¹³⁷
- 10.173 Those who breach a suppression order made by the Supreme Court, or the County Court exercising the Supreme Court's inherent jurisdiction, are not prosecuted for an offence under sections 23 or 27 of the Open Courts Act.¹³⁸ Similarly, breach of a pseudonym order is dealt with under the common law. Courts retain their common law powers to deal with such a breach as a contempt of court,¹³⁹ including contempt by disobedience of a court order.

132 Ibid s 5(1).

133 Ibid s 25.

134 Ibid s 7(d)(i). These are referred to in the Open Courts Act as an order or decision that 'conceals the identity of a person by restricting the way the person is referred to in open court'.

135 Ibid ss 23(1), 27(1).

136 *Judicial Proceedings Reports Act 1958* (Vic) ss 3(3), 4(2).

137 Ibid ss 3(3), 4(2).

138 See *Open Courts Act 2013* (Vic) ss 5(1), 25.

139 Ibid s 6.

- 10.174 In prescribing available penalties for contempt, the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* and *County Court Civil Procedure Rules 2018 (Vic)* do not distinguish between types of contempt. The Rules afford the court considerable discretion to determine whether a punishment should be imposed for contempt and what form it should take.¹⁴⁰ For example:
- Where the court finds a person guilty of contempt of court, the court may punish the contempt by committal to prison or fine or both.¹⁴¹
 - Where the contemnor is a corporation, the court may punish for contempt by sequestration or fine or both.¹⁴²
 - Where the court imposes a fine, it may commit, or further commit, the contemnor to prison until the fine is paid.¹⁴³
 - The court may make an order for punishment on terms, including a suspension of punishment.¹⁴⁴
 - Where a person has been sentenced to a term of imprisonment for contempt, the court retains the discretion to order their discharge before the end of the term.¹⁴⁵
- 10.175 The role of apologies in contempt and the application of the *Sentencing Act 1991 (Vic)* to findings of contempt are important issues relating to penalties and remedies, which are discussed in Chapter 3 of this paper.

Injunctions

- 10.176 The court has an inherent power to grant a quia timet injunction, an equitable remedy which restrains threatened or imminent wrongful acts.¹⁴⁶ This injunction is an available remedy to prevent prejudicial publication or provide for the retrieval of already published material.¹⁴⁷
- 10.177 The threatened publication must, as a matter of practical reality, have a tendency to prejudice or embarrass particular legal proceedings.¹⁴⁸ Chief Justice Warren and Acting Justice of Appeal Byrne noted that such injunctions are rarely issued, citing the United Kingdom case *P v Liverpool Daily Post and Echo Newspapers plc*:

it is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter commission of the offences.¹⁴⁹

140 See section 320 of the *Crimes Act 1958 (Vic)*, which does not specify a maximum term of imprisonment for the common law offence of contempt.

141 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.11(1); *County Court Civil Procedure Rules 2018 (Vic)* r 75.11(1).

142 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.11(2); *County Court Civil Procedure Rules 2018 (Vic)* r 75.11(2).

143 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.11(3); *County Court Civil Procedure Rules 2018 (Vic)* r 75.11(3).

144 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.11(4); *County Court Civil Procedure Rules 2018 (Vic)* r 75.11(4).

145 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* r 75.12; *County Court Civil Procedure Rules 2018 (Vic)* r 75.12; see also *Magistrates' Court Act 1989 (Vic)* s 133(5).

146 Judicial College of Victoria, 'Broad Suppression Orders', *Open Courts Bench Book* (Web Page, 1 December 2013) 6.3 <www.judicialcollege.vic.edu.au>.

147 *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25, 42 (Gibbs CJ); *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 75 [21].

148 *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 79 [36]. For a discussion of Victoria's use of general and proceedings suppression orders and general precautionary orders, see Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *University of New South Wales Law Journal* 1263, 1279–1290. See the Court of Appeal's discussion of quia timet injunctions: *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 261–3 [48]–[56] (Warren CJ and Byrne AJA).

149 *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 381–2, cited in *Attorney-General v Random House Group Ltd* [2010] EMLR 233 [28].

- 10.178 The Victorian Court of Appeal has likened a suppression order made in the court's inherent jurisdiction to a quia timet injunction in that they both prevent a threatened contempt.¹⁵⁰ However, a suppression order is not subject to the same procedural restraints and instead is made when the court is satisfied, on the balance of probabilities, that an order is necessary to protect the court's own process from risk.¹⁵¹
- 10.179 Jason Bosland reported that in Victoria, there are no publicly available cases where injunctions have been granted in equity in these circumstances.¹⁵² Bosland noted that since 2004 the Supreme Court has instead relied on its inherent jurisdiction, and the County and Magistrates' Courts rely on their statutory powers, to grant broad suppression orders to achieve the same purpose as an injunction to restrain a threatened contempt.¹⁵³

Take-down orders

- 10.180 Victorian courts can order the removal of prohibited or restricted material that is published within Australia,¹⁵⁴ including material published online before a trial. These orders are commonly called 'internet orders' or 'take-down orders'. The Commission uses the term 'take-down orders'.
- 10.181 Take-down orders have been considered an effective option to ensure the courts are doing all that they can to ensure a fair trial.¹⁵⁵ On the other hand, they are criticised as being futile, incapable of holding back the 'tide of publications',¹⁵⁶ and that the court should not slip into the role of 'King Canute'.¹⁵⁷
- 10.182 Take-down orders are usually directed to a particular website and offending content.¹⁵⁸ The power to make take-down orders was expressed by Justice Kaye in *R v Mokbel (Ruling No 3)*:

In the course of argument, I postulated to Mr Houghton an example of a case where a person erects a sign on the person's private property which would have the potential to prejudice the fair trial of an accused person. Mr Houghton submitted that this court would not have the power to prevent the continued publication of that sign by making an order that it be removed. In my view, he was unable to advance, when challenged, any adequate reason why the court's power would not extend in a necessary case thus far. Indeed, in my view, it would make a mockery of the inherent jurisdiction of this court, to protect the right of an accused person to a fair trial, if this court did not have the power, not only to prevent anticipatory breaches of the right of a fair trial, but indeed continuing and ongoing such breaches.¹⁵⁹

- 10.183 Take-down orders are relatively new, as traditional media publications were fleeting and accessing archived print material, such as at a library, was more difficult than searching for an article published online.¹⁶⁰
- 10.184 The law surrounding the making of take-down orders is developing, but has been considered in Victoria and New South Wales. The courts' considerations when determining whether to make a take-down order include:

150 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 263 [55] (Warren CJ and Byrne AJA), citing *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 76 [28].

151 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 263 [55] (Warren CJ and Byrne AJA); *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 76 [28]; *DPP (Vic) v Williams* (2004) 10 VR 348, 352 [18]–[20].

152 Jason Bosland, 'Restraining "Extraneous" Prejudicial Publicity: Victoria and New South Wales Compared' (2018) 41(4) *University of New South Wales Law Journal* 1263, 1279.

153 *Ibid.*

154 *Commonwealth Director of Public Prosecutions v Brady* [2015] VSC 246 [75].

155 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 271 [90].

156 Sophie Dawson and Paul Karp, 'Holding Back the Tide: King Canute Orders and Internet Publications' (2012) 30(4) *Communications Law Bulletin* 10.

157 *East Sussex County Council v Stedman* [2010] 1 FCR(UK) 567, [92]; cited in *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248 (Warren CJ and Byrne AJA), 270–1 [87].

158 *R v Rich (Ruling No 7)* [2008] VSC 437; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248.

159 *R v Mokbel (Ruling No 3)* [2009] VSC 653 [9]; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248 [66].

160 Sophie Dawson and Paul Karp, 'Holding Back the Tide: King Canute Orders and Internet Publications' (2012) 30(4) *Communications Law Bulletin* 10, 11.

- when the original publication was published and the currency of the material
- whether the article is forced upon a visitor to the website
- the permanency of the publication and whether a cached version would remain available even if taken down
- if the material is taken down from a more reliable website subject to the take-down order, whether more obscure publications may be given greater prominence in a search result
- the likelihood that jurors, subject to criminal sanction, will not undertake research about the trial and comply with jury directions
- the impossibility of identifying all websites which might have published the material, some of which would be unidentifiable or controlled from overseas.¹⁶¹

10.185 A majority of the Victorian Court of Appeal overturned a take-down order because:

- The articles in question were not current
- The articles were not forced upon a visitor
- The articles were unlikely to be accessed inadvertently
- Jurors were unlikely to ignore jury directions
- The articles would remain cached even if taken down.¹⁶²

10.186 In *R v Rich (Ruling No 7)*, Justice Lasry refused an application for a take-down order because the article in question was not current and there was no surrounding publicity at the time, potential jurors would be unlikely to come across the articles and potential jurors would be unlikely to ignore directions not to make their own enquiries about cases.¹⁶³

Possible reforms—penalties and remedies

Restatement in statute and harmonisation of penalties

10.187 The *Open Courts Act Review* noted that if the enforcement of prohibitions and restrictions on publication is to possess credibility, attention must be directed to developing a consistent approach to sanctions for non-compliance across related areas of the law.¹⁶⁴

10.188 A key question for this reference is whether penalties for breach of orders prohibiting and restricting publication can and should be defined in the Open Courts Act, or a general statute, to clarify and unify them.

Power to make take-down orders

10.189 The Victorian Court of Appeal and New South Wales Court of Appeal have acknowledged the futility of attempting to control internet publications and have emphasised the ongoing role of sub judice contempt.¹⁶⁵

10.190 The Law Commission of England and Wales, in its consideration of whether courts should have a temporary removal power, noted arguments raised in consultation, including that the power:

- would create an impractical burden for online publishers to find and take down archived material related to a case and then reinstate it, as well as issues with cached pages
- would be ineffective because of the global reach of the media

161 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; *R v Rich (Ruling No 7)* [2008] VSC 437.

162 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 272 [93–4]. The take-down order was made in the context of intense media publicity around the accused, Tony Mokbel. A Google search of the accused's name generated 522,000 results: 268 [79]. The take-down order was also drafted so as to prevent the media outlets from publishing any future material about the accused.

163 *R v Rich (Ruling No 7)* [2008] VSC 437 [20].

164 Frank Vincent, *Open Courts Act Review* (2017) 111 [450] <<https://engage.vic.gov.au/open-courts-act-review>>.

165 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 78.

- could be costly for the media, who would have to be represented in court when applications for an order are made
 - could extend the length of proceedings and delay the trial
 - ignores the important social, historical and research value of historic online material and prevents members of the public from accessing the information
 - is incompatible with the right to freedom of expression under Article 10 of the *European Convention on Human Rights*.¹⁶⁶
- 10.191 The argument that take-down orders are futile rests on the judicial view that jurors should be trusted to carry out their duties and decide a case based only on the evidence before them.¹⁶⁷ If the opposite view were taken, a successful criminal trial in a high-profile case would be near impossible.¹⁶⁸
- 10.192 An aspect of making take-down orders is the monitoring and identification of prejudicial publications. The Honourable Justice Virginia Bell, writing extra-curially, suggested steps that could be taken before a trial, including:¹⁶⁹
- The DPP might carry out internet searches to identify any prejudicial publications that could affect a trial, and then request that they be taken down from local websites until the trial is complete.
 - The Court Information Officer could make a request to the local website.¹⁷⁰
- 10.193 The above strategies depend on the requests being complied with and there being utility in taking down the material.¹⁷¹ The issues with identifying and monitoring compliance with prohibitions and restrictions on publication are discussed earlier in this chapter.
- 10.194 Other jurisdictions have considered the role of suppression orders and take-down orders in preventing and taking down online publications.
- The New Zealand Law Commission (NZ Commission) recommended new statutory provisions for the court to make both temporary suppression orders prohibiting publication of information leading up to and during the trial, and take-down orders to apply to information already publicly available which breaches those suppression orders.¹⁷²
 - The NZ Commission suggested the burden should lie on Crown prosecutors to make enquiries about what material is in the public domain.¹⁷³
 - The NZ Commission also noted that take-down orders alone are not a complete solution but go some way towards ‘minimising the impact of an offending publication’ by deterring users and preventing the material from being lawfully disseminated within the jurisdiction.¹⁷⁴
 - Conversely, in Ireland, the High Court held that there is no duty on the Director of Public Prosecutions to monitor the internet for prejudicial publications, and that juries should be trusted to exclude prejudicial publications from their minds.¹⁷⁵
 - In considering a temporary power to order that material published before legal proceedings were pending be taken down, the Law Commission of England and Wales recommended that:

166 For full list of arguments against the power, see Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report, 2013) 32–4 [2.107].

167 This was the approach of the Court in *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 266 [68].

168 *R v Dupas (No 3)* (2009) 198 A Crim R 454; *Gilbert v R* (2000) 201 CLR 414.

169 Virginia Bell, ‘How to Preserve the Integrity of Jury Trials in a Mass Media Age’ (2005) 7 *Judicial Review* 311, 319.

170 This was done in *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344.

171 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 272 [91].

172 Law Commission (New Zealand), *Contempt in Modern New Zealand*, Issues Paper No 36 (May 2014) 34–6.

173 Law Commission (New Zealand), *Reforming the Law of Contempt of Court: A Modern Statute* (Report No 140, 2017) 54 [2.90].

174 *Ibid.*

175 Law Reform Commission of Ireland, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (Issues Paper No 10, 2016) 64, citing *Byrne v DPP* [2010] 2 IR 461 [37].

- 1) the Attorney-General must put the publication on notice of the offending content
- 2) the procedure to do so be formalised in legislation
- 3) an option for appealing such an order be available.¹⁷⁶

Questions

- 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 ('take-down order')? If so:
 - (a) Should the process for seeking and making such orders be embodied in legislation?
 - (b) Who should be responsible for monitoring the internet (and social media) for potential 'take-down' material?
 - (c) Who should be responsible for making applications for take-down orders?
 - (d) Should such applications be conducted on an adversarial or ex parte basis?

Legacy suppression orders

- 10.195 The terms of reference include a request for the Commission to review and make recommendations about existing suppression orders made before the commencement of the Open Courts Act which do not contain an end date. In this reference, these orders are called 'legacy suppression orders'.
- 10.196 The Open Courts Act came into effect on 1 December 2013.¹⁷⁷ Orders made under the new statute are required to be of limited or specified duration. This reference considers legacy suppression orders made prior to the Open Courts Act under:
 - provisions in the courts' statutes that have since been repealed¹⁷⁸
 - the common law.¹⁷⁹
- 10.197 Suppression orders made under the repealed provisions continue to apply if the orders were in force when those sections were repealed.¹⁸⁰
- 10.198 The *Open Courts Act Review* was required to review various aspects of the Act and it therefore did not make recommendations regarding legacy suppression orders.

176 Law Commission (England and Wales), *Contempt of Court (1): Juror Misconduct and Internet Publications* (Report No 340, 2013) [2.152], [2.166], [2.189].

177 *Open Courts Act 2013* (Vic) s 2(2).

178 See *Supreme Court Act 1986* (Vic) ss 18, 19; *County Court Act 1958* (Vic) ss 80–80AA; *Magistrates' Court Act 1989* (Vic) s 126. The *Magistrates' Court Act 1989* s 126 was repealed by the *Open Courts Act 2013* (Vic) s 51. While the amending provisions in Part 8 of the Open Courts Act were repealed by section 67 of the same Act one year after the Act's commencement, they remain operative.

179 For a summary of common law orders, see Frank Vincent, *Open Courts Act Review* (2017) 30–36. <<https://engage.vic.gov.au/open-courts-act-review>>.

180 *Supreme Court Act 1986* (Vic) s 152(2); *County Court Act 1958* (Vic) s 98(4); *Magistrates' Court Act 1989* (Vic) sch 8 cl 52(2). Suppression orders made under section 126 of the *Magistrates' Court Act* can be set aside or varied in accordance with that section as if it had not been repealed.

- 10.199 A process for reviewing and rescinding legacy suppression orders is necessary to address the legal and practical difficulties these orders can cause to courts, the media and other interested parties. To permit the ongoing existence of suppression orders which no longer fulfil a legitimate purpose tends to breach the principle of open justice.
- 10.200 Suppression orders which are valid ‘until further order’ can remain in force indefinitely and long after the need for suppression has passed, causing difficulties for journalists who unwittingly breach an order by mentioning a case years after the order was made.¹⁸¹ Media organisations, publishers and members of the public may also unknowingly breach orders because they are unaware of their existence.
- 10.201 Additionally, it is unclear if and when people are considered to have been notified of legacy suppression orders, how people find out whether such orders exist and how to seek their revocation.
- 10.202 For example, the publisher of a book on a high-profile court case that occurred 12 years earlier may seek to ensure that publication does not breach an order. It appears that currently a publisher would need to separately contact each court to ask if such orders were still in force or, if such an order had been made previously, whether another order was subsequently made to revoke it. It may be difficult for courts to locate such orders, for instance, if an order predates the digitisation of orders and is only available in hard copy. There may also be no clear process for assessing whether the order is still necessary or should be revoked.

Access to data

- 10.203 Studies have examined legacy suppression orders, but the data available is incomplete, methodologies for collecting and analysing the data are unclear or vary across studies, and some studies provide data only on the number of orders, but not their duration. The data therefore does not provide a clear picture of how many legacy suppression orders are in force today.
- 10.204 Australia’s Right to Know Coalition found that between 2006 and June 2008:
- The Victorian Court of Appeal made 13 suppression orders. Of the four suppression orders made in 2006, three remained active and one had been revoked. The number of active and revoked orders between 2007 and June 2008 were unavailable.
 - The Supreme Court of Victoria made 177 suppression orders, of which 126 remained active and 51 had been revoked.
 - The County Court of Victoria made 240 suppression orders, of which 199 remained active and 41 had been revoked.
 - The Magistrates’ Court of Victoria made 219 suppression orders.¹⁸²
- 10.205 Australia’s Right to Know Coalition analysed 141 suppression orders and revocations of suppression orders, identifying one of the main problems as orders with ‘no clear duration, or the use of the term “until further order”, without review or revocation’.¹⁸³ Australia’s Right to Know Coalition felt there was a large number of Victorian orders mainly because of suppression orders drafted to remain in force ‘until further order’, which could be years old and were rarely lifted.¹⁸⁴ It is unclear how many of the suppression orders examined had no end date.¹⁸⁵

181 Media, Entertainment and Arts Alliance, *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia* (2012) 61.
 182 Prue Innes, Australia’s Right to Know Coalition, *Review of Suppression Orders and the Media’s Access to Court Documents and Information* (13 November 2008) 35–9.
 183 Ibid 35.
 184 Ibid 86.
 185 The report said ‘hundreds of old orders worded “until further order” would be counted in those figures [of suppression orders made in Victoria] as they remained current’, but did not provide more precise numbers: ibid 88.

- 10.206 In 2010, the Hon. Philip Cummins stated in a speech that from 2005 to August 2010:
- The Supreme Court of Victoria (Trial Division) made 344 suppression orders.
 - The County Court of Victoria made 604 suppression orders.
 - The Magistrates' Court of Victoria made 501 suppression orders.¹⁸⁶
- 10.207 The Media, Entertainment and Arts Alliance reported in 2012 that 1077 suppression orders were granted in Australia in 2011, 644 of them in Victoria, citing research by Australia's Right to Know Coalition.¹⁸⁷
- 10.208 Jason Bosland and Ashleigh Bagnall analysed all suppression orders made by the Supreme, County and Magistrates' Courts that were distributed to the media via email between 25 February 2008 and the end of 2012.¹⁸⁸ Bosland and Bagnall reported that during this period:
- The Supreme Court of Victoria made 247 suppression orders under the common law and *Supreme Court Act 1986* (Vic), of which 174 had no time limit or were made to continue 'until further order'.
 - The County Court of Victoria made 432 suppression orders under the common law and *County Court Act 1958* (Vic), of which 275 had no time limit or were made to continue 'until further order'.
 - The Magistrates' Court of Victoria made 547 suppression orders under the common law and *Magistrates' Court Act 1989* (Vic), of which 398 had no time limit or were made to continue 'until further order'.¹⁸⁹
- 10.209 Bosland and Bagnall did not ascertain how many orders without a time limit or made to continue 'until further order' had been revoked, but their study obtained figures on revocation orders sent to the media and the number of orders revoked by those revocation orders.¹⁹⁰ Bosland and Bagnall observed that 'very few revocation orders appear to have been made by the courts' and 'many orders appear to remain active when they are no longer necessary'.¹⁹¹
- 10.210 The identification of legacy suppression orders made by Victorian courts is key to assessing reform options for dealing with these orders.

Need for clarity in notification and compliance

- 10.211 From 1993 up to the passage of the Open Courts Act, the media was routinely notified of all suppression orders.¹⁹² Suppression orders and orders revoking suppression orders were logged on a central database, scanned and sent to journalists and legal representatives of media organisations via email.¹⁹³ In 2005, the Supreme Court of Victoria established an electronic database of suppression orders from all Victorian courts and the Victorian Civil and Administrative Tribunal.¹⁹⁴

186 P D Cummins, 'Justice and the Media' (Speech, Melbourne Press Club, 17 August 2010) 3.

187 Media, Entertainment and Arts Alliance, *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia* (2012) 58, 62.

188 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 672; The Open Courts Act Review focused on orders issued under the *Open Courts Act 2013* (Vic), but compared those orders and orders discussed in the Bosland and Bagnall study: Frank Vincent, *Open Courts Act Review* (2017) 100–5.

189 Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 681, 691.

190 Ibid 692.

191 Ibid.

192 Prue Innes, Australia's Right to Know Coalition, *Review of Suppression Orders and the Media's Access to Court Documents and Information* (13 November 2008) 34.

193 Ibid. The report states that 'statistics on the number of suppression orders from each court were provided to the review by the strategic communications adviser at the Supreme Court in Victoria': 35.

194 Ibid 35.

- 10.212 Despite this database, notification and distribution processes appear to have varied across courts. To take the Supreme Court as an example, judges' associates sent some orders to the media via email and fax and orders were generally posted on courtroom doors, with trial judges giving the media notice of an application for a suppression order in 'some long-running trials'. Media organisations and journalists could also ring the Communications Office during the day to check the status of an order or whether any order had been made relating to a particular individual. The court registry did not keep suppression orders on file, but the media could search civil files.¹⁹⁵
- 10.213 The only reported problem with the distribution of suppression orders via email was delays in the relevant court officer transmitting notice of the order to the central database.¹⁹⁶
- 10.214 In a 2008 study by Australia's Right to Know Coalition, a Melbourne-based television reporter commented:
- Most orders aren't revoked or don't have sunset clauses, so by the time a case gets to a plea hearing or trial, often it's us (journalists) alerting the court about suppressions. We often find the judge or magistrates didn't realise there was suppression still in place. This leads to more difficulties because often the judge or magistrate will have no idea why the previous judge or magistrate made the order in the first place. Once I was in a magistrate's case where the media informed the court there was a suppression on a defendant's identity, and we applied for the order to be lifted. The fact there was a suppression was news to the magistrate and the defence, and the prosecution couldn't recall why it had been made. The court was stood down while the magistrate tried to find the magistrate who made the original order. He wanted to find out the reason the order was made before he changed it. It's not a sophisticated system!¹⁹⁷
- 10.215 It is unclear whether people are considered to remain on notice of these orders indefinitely if they have no end date.

Lack of provision for legacy suppression orders

- 10.216 The Open Courts Act introduced provisions aimed at ensuring that orders made under that Act did not operate indefinitely.
- 10.217 Under the Open Courts Act, courts must ensure a suppression order operates for no longer than reasonably necessary to achieve the purpose for which it is made.¹⁹⁸ Courts must specify the duration of suppression orders, except interim orders, by reference to:
- a fixed or ascertainable period
 - the occurrence of a specified future event, such as the conclusion of proceedings, exhaustion of appeal rights or death of a person involved in proceedings.¹⁹⁹
- 10.218 If there is a possibility that the 'specified future event' in a suppression order may not occur, the order must also specify a period of up to five years from the date of the order, at the end of which the order expires unless it is sooner revoked.²⁰⁰
- 10.219 As legacy suppression orders were not addressed in the Open Courts Act, a critical question for this reference is how best to address the application and enforcement of legacy suppression orders to ensure they only exist if they are necessary and do not operate indefinitely.

195
196
197
198
199
200

Ibid.
Ibid 34–5.
Ibid 39.
Open Courts Act 2013 (Vic) s 12(4).
Ibid ss 12(1)–(2); Explanatory Memorandum, *Open Courts Bill 2013* (Vic) 4.
Open Courts Act 2013 (Vic) s 12(3).

Possible reforms—legacy suppression orders

Audit and revocation

- 10.220 The data about legacy suppression orders is incomplete, and orders are not available either publicly or on a searchable database.
- 10.221 A reform option may be for Victorian courts to audit suppression orders issued prior to the Open Courts Act to identify the number of legacy suppression orders and the bases on which they were made. Such a reform would need to address who would be responsible for an audit and how an audit would be conducted.

Revocation of unnecessary orders

- 10.222 One reform option is that legacy suppression orders which have no limits on their duration could be revoked by court order when they are no longer necessary, with orders only operating in perpetuity in exceptional cases.²⁰¹

Statutory reforms

- 10.223 An alternative reform option is the insertion of statutory provisions in the Open Courts Act to outline a process for:
- deeming legacy orders to expire by default on a specified future date, subject to applications for such orders either to continue or to be revoked earlier
 - specifying the duration of orders to ensure orders that are no longer necessary do not apply indefinitely
 - notification of legacy suppression orders to the media, lawyers and other interested parties
 - allowing the media, lawyers and other interested parties to apply for continuation or revocation of the order.

Questions

- 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?

Conclusion

11. Conclusion

- 11.1 This consultation paper discusses a range of issues to assist the Victorian Law Reform Commission in considering whether and how the law of contempt of court, the *Judicial Proceedings Reports Act 1958* (Vic) and the legal framework for enforcement of prohibitions or restrictions on the publication of information should be reformed to ensure the proper administration of justice in the modern internet era.
- 11.2 This consultation paper sets out options for reform and poses questions for consideration.
- 11.3 This consultation paper does not represent concluded views on the matters raised by the terms of reference. Those conclusions will be stated in the Commission's report, to be delivered to the Attorney-General by 31 December 2019.
- 11.4 The Commission welcomes submissions from all parts of the community. It particularly invites submissions from victims of crime, persons affected, professionals, other stakeholders and members of the community who have had direct experience of the law of contempt of court, the *Judicial Proceedings Reports Act 1958* (Vic) and the legal framework for enforcement of prohibitions or restrictions on the publication of information.
- 11.5 You can provide input into the Commission's review by responding to the specific questions posed throughout the paper. These questions are also included at the front of this paper. You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.
- 11.6 To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 28 June 2019.**
- 11.7 Your responses to these questions will assist the Commission in determining what changes are required to the law to improve its operation and to better ensure the proper administration of justice.

Appendices

- 188 Appendix A: Advisory committee members**
- 189 Appendix B: Summary of other reviews of the law of contempt of court**
- 200 Appendix C: Recommendations of the Open Courts Act Review**
- 204 Appendix E: Common law contempt of court¹**

Appendix A: Advisory committee members

- 1 Ms Marita Altman, Partner, Lethbridges Barristers & Solicitors, Member of the LIV Criminal Law Executive Committee
- 2 Mr Peter Bartlett, Partner, MinterEllison
- 3 Associate Professor Jason Bosland, Deputy Director, Centre for Media and Communications Law, Director of Studies, Communications Law, Melbourne Law School, University of Melbourne
- 4 Dr Matthew Collins QC, President, Victorian Bar Council
- 5 Mr Ross H Gillies QC, Chairman, Common Law Bar Association
- 6 Ms Abbey Hogan, Manager Policy and Specialised Legal Division, Office of Public Prosecutions
- 7 Ms Kerri Judd QC, Director of Public Prosecutions, Office of Public Prosecutions
- 8 Ms Julia Kretzenbacher, Barrister, Victorian Bar, Liberty Victoria representative
- 9 Professor James Ogloff AM, Foundation Professor of Forensic Behavioural Science & Director, Centre for Forensic Behavioural Science, Swinburne University of Technology, Executive Director of Psychological Services & Research, Forensicare
- 10 Dr Suzie O’Toole, Lecturer, Law School, La Trobe University
- 11 Mr Justin Quill, Principal Lawyer, Macpherson Kelley Lawyers, Chair, Media Committee, Law Council of Australia
- 12 Professor David Rolph, Professor of Law Sydney Law School, The University of Sydney
- 13 Ms Rae Sharp, Barrister, Victorian Bar, Criminal Bar Association of Victoria representative
- 14 Ms Belinda Thompson, Partner, Allens
- 15 Ms Melinda Walker, Accredited criminal law specialist, Co-chair LIV Criminal Law Section Executive Committee

Appendix B: Summary of other reviews of the law of contempt of court

Appendix B Tables appear on following page

	Contempt in the face of the court (Disruptive behaviour in court/interference with proceedings)	Publication contempt			Juror contempt	Disobedience contempt (Non-compliance with court orders—civil contempt)	Contempt through interference	Other key matters addressed
		Sub judge	Contempt by publication	Scandalising				
1	New Zealand (2017)	Yes	Yes	Yes	Yes	Yes	No	Inherent jurisdiction
2	Ireland (2016)	Yes	No	Yes	No	No	No	Distinction between civil and criminal contempt
3	UK (2014)	No	Yes (court reporting)	No	No	No	No	No
4	UK (2013)	No	No	No	Yes (juror misconduct)	No	No	No
5	UK (2012)	No	No	Yes	No	No	No	No
6	NSW (2003)	Yes	No	No	No	No	No	Suppression orders; access to and reporting on court documents; penalties and remedies; payment for costs of aborted trials
7	WA (2003)	Yes	Yes	Yes	No	Yes	No	Distinction between civil and criminal contempt; bringing the administration of justice into disrepute
8	Ireland (1994)	Yes	No	Yes	No	Yes	Yes	Jurisdiction
9	Commonwealth (1987)	Yes	Yes	Yes	Yes	Yes	Yes—influence on juries and other participants	Inherent jurisdiction; Constitutional considerations; suppression orders
10	Hong Kong (1986)	Yes	Yes	Yes	No	Yes	Yes	Distinction between civil and criminal contempt
11	Canada (1982)	Yes	No	Yes	No	Yes	No	No
12	UK (1974)	Yes	Yes	Yes	No	Yes	Yes	Yes—various

A summary of the scope of each of the key reviews on the law of contempt of court. With the exception of the 2016 Irish review, all references are to the final reports. Please note the 2017 Senate review is omitted, as no report addressing the terms of reference was published.

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
<p>1. 2017 New Zealand—Law Commission Report 140: Reforming the Law of Contempt of Court: A Modern Statute</p>	<p>First principles review of the law of contempt and to make recommendations to ensure the law was appropriate for New Zealand</p> <p>Asked in particular to consider whether the common law of contempt should be amended or replaced by statutory provisions</p>	<p>The law should be brought up to date in one statute. In particular, we recommend the abolition of various old common law contempts of court and their replacement with new statutory offence provisions that are easier to understand and apply. We also propose new provisions specifically empowering courts to make take-down orders for material on the internet and social media platforms that is liable to affect the administration of justice adversely. At the same time we recommend the High Court should retain its inherent jurisdiction so it may still address any conduct not otherwise covered by the new statute.</p>	<p>Administration of Justice (Reform of Contempt of Court) Bill 2018 (3-91)</p> <p>(Member's bill—Hon Christopher Finlayson) Introduced 22 May 2018 and adopted by the Government.</p> <p>The Bill was referred to the Justice Committee which recommended the Bill be passed with amendments: <i>Justice Committee, Administration of Justice (Reform of Contempt of Court) Bill</i> (Final Report, 5 April 2019). As at the time of writing, the Bill is at the Second Reading stage.</p> <p>The bill has three principal purposes:</p> <ul style="list-style-type: none"> to 'promote and facilitate the administration of justice and uphold the rule of law' to 'maintain and enhance' public confidence in the judicial system' to 'reform the law of contempt of the court' (<i>Part 1, clause 3(1)</i>). <p>For these purposes, the proposed legislation would enable courts to make certain orders and impose certain sanctions so that:</p> <ul style="list-style-type: none"> civil and criminal proceedings are heard and determined fairly by independent and impartial judges jury verdicts are based only on facts admitted or proved by properly adduced evidence after free, frank and confidential discussions, and the finality of verdicts will be protected individual cases are heard and determined in a manner that is expeditious, efficient and consistent with the principles of justice and the rule of law except in proceedings where the law restricts access to the court or restricts the reporting of proceedings (such as proceedings in the Family Court or the Youth Court) or in unusual circumstances, proceedings are open to the public and news media orders made by the courts are enforceable the independence, integrity and impartiality of the judiciary are protected (<i>Part 1, clause 3(2)</i>).

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
			<p>The Bill proposes to abolish the common law contempts of:</p> <ul style="list-style-type: none"> contempt in the face of the court publishing information that interferes with a fair trial jurors researching information relevant to the trial disclosing juror deliberations disobeying court orders scandalising the court. <p>The Bill expressly retains the High Court’s inherent jurisdiction in circumstances where the bill does not apply.</p> <p>The Bill:</p> <ul style="list-style-type: none"> limits publication of trial-related information prohibits publication of certain criminal trial information deals with disruptive behaviour in court includes offences for juror to investigate or research case or to disclose jury deliberations provides for enforcement of certain court orders prohibits publication of untrue allegations or accusations against judges or courts.
<p>2. 2017 Commonwealth—Senate Legal and Constitutional Affairs References Committee Law of Contempt</p>	<p>The Senate Committee was asked to examine:</p> <ol style="list-style-type: none"> the recommendations of the 1987 ALRC report on contempt and, in particular, the recommendation that the common law principles of contempt be abolished and replaced by statutory provisions the recommendations of the 2003 New South Wales Law Reform Commission on contempt by publication and the need to achieve clarity and precision in the operation of the law on sub-judice contempt the development and operation of statutory provisions in Australia and overseas that codify common law principles of contempt 	<p>That the submissions received to this inquiry be referred to any future Senate inquiry into contempt (Recommendation 1).</p>	<p>Not implemented.</p>

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
	<p>d. the importance of balancing principles, including freedom of speech and expression, the right of fair trial by an impartial tribunal, public scrutiny of the operations of the court system and the protection of the authority, reputation and due process of the courts</p> <p>e. any other related matters.</p>		
<p>3. 2016 Ireland—Law Reform Commission Issues Paper on Contempt of Court</p>	<p>Examines 7 issues—including, relevantly:</p> <ul style="list-style-type: none"> • some general questions concerning contempt of court and asks if legislation should be introduced to address those areas (Issue 1) • the distinction between civil and criminal contempt and asks whether that distinction should be maintained or abolished (Issue 2) • the law concerning contempt in the face of the court (Issue 3) • the law concerning scandalising the court (Issue 4) • the law concerning contempt in connection with pending proceedings, sub justice contempt (Issue 5). 	<p>No final report or recommendations.</p> <p>Review seems to have lapsed—this may be because of the introduction of a private members Bill into the Irish Parliament in 2017 concerning the law of contempt.</p>	<p>Contempt of Court Bill 2017</p> <p>An Act to codify the law on contempt of court and to provide for related matters.</p> <p>Bill covers criminal contempt, civil contempt, recording of court proceedings, publication, and court powers in relation to online publications on a summary basis, subject to certain restrictions. These powers include the power to direct that posts be removed or not posted by way of suppression or take-down orders. Court orders may also be made to social media providers and provide for consequential repercussions where orders not complied with.</p> <p>Status: Presented to the House on 24 October 2017. Bill unopposed. Still before the House.</p>
<p>4. 2014 United Kingdom—Law Commission Contempt of Court (2): Court Reporting</p>	<p>Concerned with one particular aspect of contempt by publication, namely the issue of reporting restrictions ordering the postponement of contemporary court reporting.</p> <p>Looks at the accurate contemporary reporting of the content of legal proceedings taking place in public in criminal courts. Focuses on the power of the Crown Court to order that such reporting be postponed to avoid prejudice to court proceedings.</p>	<p>The report recommends that all court reporting postponement orders be posted on a single publicly accessible website. A further restricted service would also be available where, for a charge, registered users could find out the detail of the reporting restriction and could sign up for automated email alerts of new orders. This would reduce the risk of contempt for publishers, from large media organisations to individual bloggers, and enable them to comply with the court's restrictions or report proceedings to the public with confidence.</p>	<p>As at January 2017 it was noted that the Government supports proposals encouraging transparency and openness in the Criminal Justice system, and welcomes these recommendations. It will consider how an online reporting restriction database could be taken forward as existing technology is replaced and updated, and will respond formally when the Criminal Justice System Common Platform is implemented.</p>

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
<p>5. 2013 United Kingdom—Law Commission Contempt of Court (1): Juror Misconduct and Internet Publications</p>	<p>Considered:</p> <ul style="list-style-type: none"> contempt by publication and the impact of the modern media (1.13) contempt committed by jurors (1.13). <p>Rationale: these [two] areas represent the two sides of the same most pressing issue, namely, how to maintain public confidence that jury trials are, and continue to be, conducted on the evidence in the case and not by consideration of extraneous material, particularly material available on the internet. (1.14).</p>	<p>Made recommendations to reform the law of strict liability contempt relating to archived online material and to modernise the way in which juror misconduct is handled, including by creating offences of jurors researching their cases, and to provide limited exceptions to the prohibition on jurors disclosing deliberations, for example, in order to uncover miscarriage of justice.</p>	<p>Criminal Justice and Courts Act 2015 (UK)</p> <p>Recommendations largely incorporated in the Criminal Justice and Courts Bill introduced in February 2014 but the strict liability provisions were later dropped. The remaining provisions relating to juror misconduct remained in the Bill which received Royal Assent on 12 February 2015. The juror misconduct provisions came into force on 13 April 2015.</p>
<p>6. 2012 United Kingdom—Law Commission Contempt of Court: Scandalising the Court</p>	<p>Considered whether the offence of scandalising the court should be retained, abolished, replaced or modified.</p>	<p>Recommends that scandalising the court should cease to exist as an offence or as a form of contempt in the law of England and Wales. This recommendation does not affect contempt in the face of the court, or liability for publications that may interfere with proceedings before any court.</p>	<p>Criminal Justice and Courts Act 2015 (UK)</p> <p>The Law Commission's report from its contempt review recommending abolition of the offence of scandalising the court was a major factor in the Government's decision to support an amendment to the Crime and Courts Bill to repeal the offence. The Bill received Royal Assent on 25 April 2013 and the offence of scandalising the court was abolished two months later on 25 June 2013.</p>

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
<p>7. 2003 New South Wales— Law Reform Commission Report 100: Contempt by Publication</p>	<p>To inquire into, and report on, whether the law and procedures relating to contempt by publication are adequate and appropriate, including whether and in what circumstances, a person against whom a charge of contempt is found proven should be liable to pay, in addition to any criminal penalty, the costs (of the government and of the parties) of a criminal trial aborted as a result of the contempt.</p> <p>The Commission noted in its report that its review was primarily concerned with sub justice contempt but also covered the power of courts to restrict the reporting of legal proceedings and the rules determining whether media representatives or other members of the public should be entitled to have court documents.</p>	<p>Recommendations aimed to 'achieve clarity and precision in the operation of the law on sub justice contempt, with only such restrictions on freedom of discussion as are necessary.'</p> <p>'To codify only one aspect of contempt, leaving the common law to regulate the remaining areas, may lead to confusion and uncertainty for legal practitioners and the media. This has been the experience in the UK where the <i>Contempt of Court Act 1981</i> (UK) purports, among other things to codify sub justice contempt but allows the rest of the law of contempt to be embodied in common law principles.'</p> <p>Recommended some legislative reforms to make the law 'clearer and fairer', while allowing the common law to continue to develop.</p> <p>Proposed 2 draft bills:</p> <ul style="list-style-type: none"> • Draft Contempt of Court by Publication Bill 2003 • Draft Legal Proceedings (Access to Documents and Reporting) Bill 2003 	<p>Court Information Act 2010 (NSW)</p> <p>Makes provision for access to information held by courts</p>

	Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
8.	<p>2003 Western Australia— Law Reform Commission Report on Review on the Law of Contempt (Project No 93)</p>	<p>To inquire into and report upon the principles, practices and procedures relating to:</p> <ul style="list-style-type: none"> • contempt by publication; • contempt in the face of the court; and • contempt by disobedience to the orders of the court <p>and whether the law pertaining thereto should be reformed and, if so, in what manner.</p>	<p>The law of contempt of court in Western Australia, other than as applicable under the <i>Family Court Act 1997</i> (WA), should be codified and the procedures for prosecution made uniform. Upon codification of the law of contempt, s 7 of the <i>Criminal Code Act Compilation Act 1913</i> (WA), which retains the authority of courts of record to punish a person summarily for the offence commonly known as ‘contempt of court’, should be repealed. (Recommendation 1)</p>	<p>Not implemented.</p>
9.	<p>1994 Ireland— Law Reform Commission Report on Contempt of Court</p>	<p>The Commission was asked to examine the laws of defamation and contempt of court. This report contains proposals on the second branch of the Attorney General’s request, that is, contempt of court.</p> <p>The report notes: ‘The essential questions to be considered are whether it is (a) possible and (b) necessary to replace the existing common law structure of contempt of court with a new statutory scheme which would abolish the present concepts of criminal and civil contempt and replace them with a number of specific statutory offences. There may well be aspects of the law of contempt which could be reformed or clarified so as to render the law more “acceptable” in modern circumstances, but if the power to attach a person for contempt is an inherent power of the courts can one remove, curtail or vary that power or should one enact parallel legislation?’</p>	<p>The report made a number of recommendations for reform of the law in this area, including that some statutory offences should be introduced to replace the existing common law of contempt.</p> <p>Notably, the Commission was divided on the issue of the inherent jurisdiction of the courts to deal with contempt, with some Commissioners ruling out any interference with the inherent powers of the courts to attach summarily for contempt and others wishing to clarify and delimit such powers in legislation or remove them entirely, as being unnecessary.</p>	<p>Not implemented.</p>

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
<p>10. 1987 Commonwealth—Australian Law Reform Commission Report No 35: Contempt</p>	<p>The Commission was asked to examine:</p> <ul style="list-style-type: none"> • whether the law and procedures relating to contempt of court applied by Federal Courts and courts of the Territories, and by State courts in relation to the exercise of Federal jurisdiction, are adequate and appropriate; • whether the laws and procedures relating to contempt of Tribunals and Commissions created by or under laws of the Commonwealth are adequate and appropriate; • the appropriate legislative means of reforming those laws and procedures, having regard to any constitutional limitations on Commonwealth power; and • any related matter. <p>The ALRC was to have regard to:</p> <ol style="list-style-type: none"> a. the existing law of contempt; b. the provisions of Article 19 of the International Covenant on Civil and Political Rights, that everyone shall have the right to freedom of expression; c. the provisions of Article 14 of the International Covenant on Civil and Political Rights, that everyone shall, in the determination of any judicial proceedings, be entitled to a fair trial; d. the need to ensure that judicial proceedings are conducted in an orderly fashion; and e. the need to ensure that courts, tribunals and their officers are not unjustifiably brought into disrepute. <p>Note: <i>Gallagher v Durack</i> (1983) 152 CLR 238 was the impetus for the reference being given to the ALRC.</p>	<p>Recommended the common law principles of contempt be abolished and replaced by statutory provisions governing all Federal Courts except the High Court.</p> <p>Recommendation 1. <i>Approach to reform.</i> Reform of the law of contempt should proceed as follows:</p> <ul style="list-style-type: none"> • The common law of contempt of court including the procedure at common law for dealing with contempt, should be abolished and replaced by statutory provisions governing both substance and procedure. • The principles of criminal contempt, except for contempt in the face of the court, should be recast as criminal offences, to the extent that they do not already overlap with criminal law. Normal procedures for the trial of criminal offences should apply instead of summary contempt procedures. • Contempt in the face of the court should be replaced by a series of criminal offences, but the mode of trial should continue to be a summary one. The accused person should be entitled to elect, however, to be tried by a member or members of the court other than the member presiding at the time of the alleged offence. 	<p>Except in relation to the <i>Family Law Act 1975</i> (Cth), recommendations not implemented</p>

Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
11.	<p>1986 Hong Kong— The Law Reform Commission Report on Contempt of Court</p> <p>The Commission was asked to consider whether the present law and practice relating to contempt of court in Hong Kong should be changed and, if so, in what way.</p>	<ul style="list-style-type: none"> The law of civil contempt should be replaced by a statutory regime of ‘non-compliance proceedings’, in which the party entitled to the benefit of an order or undertaking allegedly disobeyed should be able to obtain sanctions to coerce the other party into obeying a subsisting order or to punish him or her for past disobedience. <p>‘Contempt’ in relation to commissions and tribunals should continue to take the form of specific statutory offences.</p>	Not implemented

	Review	Scope/ Terms of Reference	Key recommendations (summary)	Outcome/ implementation status
12.	1982 Canada— Law Reform Commission of Canada Report on Contempt of Court	The report examines criminal contempt, and does not consider civil contempt.	Recommended codifying the law of criminal contempt, and proposed draft legislation to this end.	A Bill designed to incorporate the law of criminal contempt into provisions of the Canadian <i>Criminal Code</i> was put to the Canadian parliament in 1984 but lapsed.
13.	1974 United Kingdom— Committee on Contempt of Court Report (Phillimore Review)	The Committee was asked to consider whether any changes were required to the law relating to contempt. (Note: <i>Administration of Justice Act 1960</i> (UK) makes some provision for the law of contempt of court)	Recommendations aimed to achieve greater clarity and certainty in the law of contempt, especially with respect to the media. In relation to sub justice contempt, the recommendations sought to clarify and limit the scope of liability so as to ensure greater freedom of expression for the media.	Contempt of Court Act 1981 (UK) Amends the law of contempt to introduce a strict liability rule for any publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. For the Act to apply, the relevant proceedings must be active at the time of publication. The Act also deals with the confidentiality of jury deliberations, use of tape recorders, sources of information, publication of matters exempted from disclosure in court and offences of contempt of magistrates' courts. The Act was introduced in response to the ruling of the European Court of Human Rights in <i>Sunday Times v United Kingdom</i> (1979) 2 EHRR 245, where it held that the English law of sub justice contempt violated the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights.

Appendix C: Recommendations of the *Open Courts Act Review*

Rec No.	Recommendation of Open Courts Act Review
1	Sections 4 and 28 of the <i>Open Courts Act 2013</i> (Vic) be amended to make clear that orders made under the Act constitute exceptions, based on necessity in the circumstances, to the operation of the principle of open justice rather than it being a matter of the operation of a presumption in favour of transparency.
2	The Open Courts Act be amended to include a new preamble emphasising the fundamental importance of transparency in our legal system.
3	The Open Courts Act be amended to restrict the power to make suppression orders to situations not otherwise encompassed by statutory provisions prohibiting or limiting publication.
4	In order to ensure consistency of approach to principle and practice in relation to suppression orders and related areas, the Victorian Law Reform Commission be requested to report on the possible reform of the <i>Judicial Proceedings Reports Act 1958</i> (Vic) and the codifying of the law relating to contempt of court, including the legal framework and processes for enforcement.
5	<ol style="list-style-type: none"> 1 The harmonisation of the law and practice relating to suppression orders be referred to the Council of Attorneys-General for further consideration. 2 Whether or not this recommendation is accepted, the Council of Attorneys-General be requested to consider the desirability of the development of a system for interstate and territory recognition and enforcement of suppression orders.
6	In each matter in which a suppression order is made, the court or tribunal be required to prepare a written statement of its reasons for the order, including the justification for its terms and duration. Save for restrictions and redactions reasonably required to effect the purpose and efficacy of the order, these reasons should be publicly available.
7	A central, publicly accessible register of suppression orders made by all Victorian courts and tribunals containing details of their terms and duration and, to the extent reasonably possible in the circumstances the reasons for them, be established.
8	All suppression orders should be treated as interim for a period of five days to enable interested parties to present submissions as to their necessity or terms. In the absence of any such challenge, the orders would continue in effect for the period and terms stated.
9	In the event of an appeal being lodged against the outcome of proceedings in which a suppression order was made, the order would continue in effect until the determination of the appeal or it is discharged or varied on application to the court or tribunal hearing the appeal.
10	The Open Courts Act be simplified by removing the unnecessary distinction between broad and proceeding suppression orders.
11	The Judicial College of Victoria be approached with a view to establishing programs and materials to improve the level of understanding within the judiciary concerning the operation of the Open Courts Act and other legislation restricting the public dissemination of information relating to legal proceedings.
12	A formal relationship be developed through the Department of Justice and Regulation between the media, the courts and legal practitioners with the purpose of addressing the issues presented in effecting an appropriate balance between openness and the suppression of information in our court and tribunal processes.

Rec No.	Recommendation of Open Courts Act Review
13	Consideration be given to statutory reform to enable the discretionary disclosure of the relevant convictions of juvenile offenders in cases of their continuing and entrenched propensity to engage in serious offending as adults.
14	Section 184 should be amended to restrict the making of suppression orders concealing the identity or whereabouts of persons subject to supervision under the <i>Serious Sex Offenders (Detention and Supervision) Act 2009</i> (Vic). In so restricting the making of suppression orders, the Act should continue to have regard to the ramifications of disclosure, including the personal safety of individuals.
15	Adult victims of sexual assault or family violence or who as children have been so subjected should, on the conviction of the offender, be able to opt for disclosure of their identity. In situations where there is more than one victim, the court would be required to refuse an application where disclosure of the identity of a victim or perpetrator would result in that of a non-consenting victim or impose any conditions required in the circumstances to secure the anonymity of a non-consenting victim.
16	Section 534 of the <i>Children, Youth and Families Act 2005</i> (Vic) be amended to enable adult victims who are also witnesses to disclose their own identities, provided that to do so does not breach any other of the requirements of the section.
17	It becomes mandatory at initial bail hearings consequent upon the laying of charges in relation to alleged sexual or family violence criminal offences for an interim suppression order to be issued. This order would remain in effect for five working days. Alternatively, the Judicial Proceedings Reports Act should be amended to the same effect.
18	<p>Provided the Public Interest Monitor receives the additional funding and resources necessary to perform the following functions:</p> <ol style="list-style-type: none"> 1. The Monitor should be empowered, if requested by the judge to appear as contradictor, to make submissions and ask questions when the judge is determining whether orders should be made under the Open Courts Act, on what grounds and the framing of their scope. 2. Orders, once made, can be referred to the Monitor for consideration by interested parties to enable the independent consideration of the need, terms and duration of the order while maintaining the security of the underlying information. The Monitor's decision whether or not to pursue the review of an order is final. 3. If it is considered necessary in the public interest to intervene, the Monitor should be able to seek the review of the order by the judge or prosecute an appeal. 4. The Monitor would report annually to the Attorney General on the operation of the Open Courts Act.

Appendix D: Jurisdiction and powers of the courts to deal with contempt of court[†]

	Supreme Court of Victoria	County Court of Victoria	Magistrates' Court of Victoria	Children's Court of Victoria	Coroners Court of Victoria
Court of Record	Superior Court of Record with unlimited jurisdiction - <i>Constitution Act 1975</i> (Vic) s 85	Court of record— <i>County Court Act 1958</i> (Vic) s 35(2)	<i>Magistrates' Court Act 1989</i> (Vic) is silent on whether the Magistrates' Court is a Court of Record.	<i>Children, Youth and Families Act 2005</i> (Vic) is silent on whether the Children's Court is a Court of Record. ¹	<i>Coroners Act 2008</i> (Vic) is silent on whether the Coroners Court is a Court of Record. ²
Inherent jurisdiction to punish criminal contempt	Unlimited inherent jurisdiction—can punish contempts of court wherever they occur. ³ <i>Constitution Act 1975</i> (Vic) s 85	No inherent jurisdiction to punish for contempt. ⁴ As a Court of Record, may have implied jurisdiction to punish for contempt in the face of the court.	No inherent jurisdiction to punish for contempt. May have implied jurisdiction to punish for contempt in the face of the court. ⁵	No inherent jurisdiction to punish for contempt, may have implied jurisdiction to punish for contempt in the face of the court.	No inherent jurisdiction to punish for contempt, may have implied jurisdiction to punish for contempt in the face of the court
Supervisory/protective jurisdiction	As a superior court, the Supreme Court is empowered to deal summarily with contempts of inferior courts—to protect the rights of litigants and to ensure that justice is done. ⁶				

[†] Note whilst not a court, both the Victorian Civil and Administrative Tribunal and the Victims of Crime Assistance Tribunal have power conferred by statute to deal with conduct that would otherwise be contempt. See *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 137; *Victims of Crime Assistance Act 1996* (Vic) s 64.

¹ The Report of the Protecting Victoria's Vulnerable Children Inquiry recommended that the *Children, Youth and Families Act 2005* (Vic) should be amended to confirm the status of the Children's Court as a court of record, suggesting that it may already have that status, but that it was unclear. See: Report of the Protecting Victoria's Vulnerable Children Inquiry, (Department of Premier and Cabinet, 2012) Recommendation 65.

² See *Annetts v McCann* (1990) 170 CLR 596, 617.

³ *R v Metal Trades Employers' Association: Ex parte Amalgamated Engineering Union (Australian Section)* (1951) 82 CLR 208, 241 (Latham CJ), 254 (Dixon J); *R v Taylor: Ex parte Roach* (1951) 82 CLR 587, 598 (Dixon, Webb, Fullagar and Kitto JJ).

⁴ See *Morgan v State of Victoria* (2008) 22 VR 237, 269; Judicial College of Victoria, Victorian Criminal Proceedings Manual (26 February 2018), [8.5.1] <www.judicialcollege.vic.edu.au/eManuals/VC/PM/index.htm#27318.htm>.

⁵ *Magistrates' Court of Prahran v Murphy* [1997] 2 VR 186, 204

⁶ *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.05(1)(c).

Statutory jurisdiction	Supreme Court of Victoria Procedure for exercise of Supreme Court's inherent jurisdiction is prescribed by the <i>Supreme Court (General Civil Procedure) Rules 2015</i> (Vic) r 75.	County Court of Victoria <i>County Court Act 1958</i> (Vic) s 54—Court has the same jurisdiction, and may exercise the same powers and authority, in respect of any contempt of the court as the Supreme Court and may exercise in respect of any contempt of the Supreme Court. Procedure for exercise of the County Court's jurisdiction to punish for contempt is prescribed by the <i>County Court Civil Procedure Rules 2018</i> (Vic) r 75.	Magistrates' Court of Victoria <i>Magistrates' Court Act 1989</i> (Vic) s 133—Magistrates' Court has power to deal summarily with contempt in the face of the court. <i>Magistrates' Court Act 1989</i> (Vic) s 134 - Magistrates' Court has power to deal summarily with certain contempts committed by witnesses. <i>Magistrates Court Act 1989</i> (Vic) s 135(2)—Magistrates' Court has limited power to fine or imprison a person while in default of an order.	Children's Court of Victoria <i>Children, Youth and Families Act 2005</i> (Vic) s 528(3)—Court has, and may exercise in relation to all matters over which it has jurisdiction, all the powers and authorities that the Magistrates' Court has in relation to the matters over which it has jurisdiction.	Coroners Court of Victoria <i>Coroners Act 2008</i> (Vic) s 103—Coroners Court has power to deal summarily with contempts of the Coroners Court.
-------------------------------	--	--	--	---	--

Appendix E: Common law contempt of court¹

Appendix E Table appears on following page

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Contempt of court, including: <ul style="list-style-type: none"> - disobedience contempt - sub judge contempt - scandalising contempt - juror contempt - interference contempt 	Common law	Common law offence triable summarily by the Supreme or County Court under their Civil Procedure Rules. Historically capable of being punished upon indictment or presentment. However, no instance in modern times of indictment being brought. Summary procedure has wholly superseded trial by jury—now regarded as obsolete. ² Not all disobedience contempts are criminal offences. ³	At large—there is no maximum penalty for common law contempt in section 320 of the <i>Crimes Act 1958</i> (Vic).	Summons or originating motion in the Supreme or County Court. ⁴ Depending on the type of contempt, an application may be made by: <ul style="list-style-type: none"> - a party in a civil contempt case.⁵ - Attorney-General.⁶ - Director of Public Prosecutions.⁷ - Prothonotary in the Supreme Court, or Registrar in the County Court, directed by a Supreme or County court judge.⁸ 	Supreme or County Court judge	For example, contempt can be found where there has been a: <ul style="list-style-type: none"> - breach of a common law suppression order made by the Supreme Court in its inherent jurisdiction.⁹ - breach of an injunction made by the County Court exercising the inherent jurisdiction of the Supreme Court.¹⁰ - breach of a common law pseudonym order.¹¹

2 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 562–3.

3 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375, 395.

4 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.06; *County Court Civil Procedure Rules 2018* (Vic) r 75.06.

5 *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 562.

6 *The Broken Hill Proprietary Company Ltd v Dagi* [1996] 2 VR 117, 125; *Construction, Forestry, Mining and Energy Union v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527, 562. While the Victorian Court of Appeal in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2013] VSCA 378 (13 December 2013) [11], [14].

7 *Public Prosecutions Act 1994* (Vic) s 22(1)(ba)(iii).

8 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.07(1); *County Court Civil Procedure Rules 2018* (Vic) r 75.07(1).

9 *Open Courts Act 2013* (Vic) s 5(1).

10 *Open Courts Act 2013* (Vic) s 25.

11 *Open Courts Act 2013* (Vic) s 7(d)(i).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Contempt in the face of the court	Common law	Common law offence triable summarily by the Supreme or County Court or under their Civil Procedure Rules.	At large—there is no maximum penalty for common law contempt in section 320 of the <i>Crimes Act 1958</i> (Vic).	A Supreme or County Court Judge may punish the contempt directly and summarily, without a separate, formal proceeding being commenced by summons or originating motion. ¹² As with other contempts, a separate proceeding to punish the contempt may be commenced by summons or originating motion in the Supreme or County Court. ¹³	Supreme or County Court judge.	
Contempt in the face of the Magistrates' Court	<i>Magistrates' Court Act 1989</i> (Vic) s 133	Summary offence ¹⁴	Individual: up to six months' imprisonment or up to 25 penalty units ¹⁵	The Magistrate may punish the contempt directly and summarily	Magistrates' Court of Victoria	The Children's Court has the same powers to punish for contempt as the Magistrates' Court but a person under the age of 18 cannot be committed to prison for contempt. They may be committed to a youth justice or a youth residential centre instead. ¹⁶

¹² *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.02–75.04; *County Court Civil Procedure Rules 2018* (Vic) r 75.02–75.04.

¹³ *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 75.06; *County Court Civil Procedure Rules 2018* (Vic) r 75.06.

¹⁴ *Sentencing Act 1991* (Vic) s 112(2).

¹⁵ *Magistrates' Court Act 1989* (Vic) s 133(4).

¹⁶ *Children, Youth and Families Act 2005* (Vic) s 528.

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Contempt by witness failing to appear, be sworn, or answer questions in the Magistrates' Court etc	<i>Magistrates' Court Act 1989</i> (Vic) s 134	Summary offence ¹⁷	Individual: up to one months' imprisonment or up to five penalty units. ¹⁸	The Magistrate may punish the contempt directly and summarily	Magistrates' Court of Victoria	The Children's Court has the same powers to punish for contempt as the Magistrates' Court but a person under the age of 18 cannot be committed to prison for contempt, but may be committed to a youth justice or a youth residential centre instead. ¹⁹
Contempt of the Coroners Court	<i>Coroners Act 2008</i> (Vic) s 103	Summary Offence	Individual: Up to 12 months imprisonment or 120 penalty units. Corporation up to 600 penalty units ²⁰	The Coroner may punish the contempt directly and summarily.	Coroners Court of Victoria	
Publishing a prohibited report of a judicial proceedings	<i>Judicial Proceedings Reports Act 1958</i> (Vic) s 3	Summary offence ²¹	Individual: up to four months' imprisonment or up to 20 penalty units, or both. Corporation: up to 50 penalty units.	Director of Public Prosecutions must consent to a prosecution. Police charge.	Magistrates' Court of Victoria.	
Publishing identifying details about an alleged victim of sexual offences	<i>Judicial Proceedings Reports Act 1958</i> (Vic) s 4	Summary offence ²²	Individual: up to four months' imprisonment or up to 20 penalty units, or both. Corporation: up to 50 penalty units.	Director of Public Prosecutions must consent to a prosecution. Police charge.	Magistrates' Court of Victoria.	

17 *Sentencing Act 1991* (Vic) s 112(2).
18 *Magistrates' Court Act 1989* (Vic) s 134(3).
19 *Children, Youth and Families Act 2005* (Vic) s 528
20 *Coroners Act 2008* (Vic) s 103(7)
21 *Sentencing Act 1991* (Vic) s 112(2).
22 *Sentencing Act 1991* (Vic) s 112(2).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Breaching a: - proceeding suppression order - interim order	<i>Open Courts Act 2013</i> (Vic) s 23	Indictable offence that is triable summarily. ²³	Individual: up to 5 years' imprisonment or 600 penalty units, or both. Corporation: 3000 penalty units. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ²⁴	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	Director of Public Prosecutions may provide prior advice, but this is not mandatory.
Breaching a broad suppression order made by the Magistrates' Court	<i>Open Courts Act 2013</i> (Vic) s 27	Indictable offence that is triable summarily. ²⁵	Individual: up to 5 years' imprisonment or 600 penalty units, or both. Corporation: 3000 penalty units. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ²⁶	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	Director of Public Prosecutions may provide prior advice, but this is not mandatory.
Publishing, soliciting or obtaining disclosure of jury deliberations	<i>Juries Act 2000</i> (Vic) s 78(1)	Indictable offence that is triable summarily. ²⁷	Individual, or anyone else: Imprisonment for 5 years or 600 penalty units. Corporation: 3000 penalty units. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ²⁸	Director of Public Prosecutions, or a person authorised by the DPP, must consent in writing to a prosecution. ²⁹ Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	There are other offences in sections 65-77, 80-3, including summary offences, indictable offences and offences that a court may deal with 'in a summary way'.

²³ *Sentencing Act 1991* (Vic) s 112(1); *Criminal Procedure Act 2009* (Vic) ss 28-29.

²⁴ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

²⁵ *Sentencing Act 1991* (Vic) s 112(1); *Criminal Procedure Act 2009* (Vic) ss 28-29.

²⁶ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

²⁷ *Juries Act 2000* (Vic) s 78(10); *Criminal Procedure Act 2009* (Vic) s 28(1), sch 2 d 18.

²⁸ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

²⁹ *Juries Act 2000* (Vic) s 78(11).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Juror or former juror disclosing deliberations with reason to believe it is likely to be, or will be, published	<i>Juries Act 2000</i> (Vic) s 78(2)	Indictable offence that is triable summarily. ³⁰	Imprisonment for 5 years or 600 penalty units. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ³¹	Director of Public Prosecutions, or a person authorised by the DPP, must consent in writing to a prosecution. ³² Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	There are other offences in sections 65-77, 80-3, including summary offences, indictable offences and offences that a court may deal with 'in a summary way'.
Registered medical practitioner or registered psychologist disclosing deliberations by a former juror disclosed in the course of treatment for issues arising out of jury service	<i>Juries Act 2000</i> (Vic) s 78(5)–(6)	Indictable offence that is triable summarily. ³³	Imprisonment for 5 years or 600 penalty units. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ³⁴	Director of Public Prosecutions, or a person authorised by the DPP, must consent in writing to a prosecution. ³⁵ Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	There are other offences in sections 65-77, 80-3, including summary offences, indictable offences and offences that a court may deal with 'in a summary way'.
Jury panel member or juror making improper enquiries about a case	<i>Juries Act 2000</i> (Vic) s 78A	Summary offence. ³⁶	120 penalty units.	Police charge.	Magistrates' Court of Victoria	There are other offences in sections 65-77, 80-3, including summary offences, indictable offences and offences that a court may deal with 'in a summary way'.

³⁰ *Juries Act 2000* (Vic) s 78(10); *Criminal Procedure Act 2009* (Vic) s 28(1)(a), sch 2 cl 18.

³¹ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

³² *Juries Act 2000* (Vic) s 78(11).

³³ *Juries Act 2000* (Vic) s 78(10); *Criminal Procedure Act 2009* (Vic) s 28(1)(a), sch 2 cl 18.

³⁴ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

³⁵ *Juries Act 2000* (Vic) s 78(11).

³⁶ See *Sentencing Act 1991* (Vic) s 112(2).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Intimidating, or causing or procuring physical harm or detriment to a person because of their involvement in a criminal investigation or proceeding, including a witness, victim or juror ³⁷	<i>Crimes Act 1958</i> (Vic) s 257	Indictable offence that is triable summarily. ³⁸	Up to 10 years' imprisonment. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ³⁹	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Threats to kill	<i>Crimes Act 1958</i> (Vic) s 20	Indictable offence that is triable summarily. ⁴⁰	Up to 10 years' imprisonment. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ⁴¹	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Threats to inflict serious injury	<i>Crimes Act 1958</i> (Vic) s 21	Indictable offence that is triable summarily. ⁴²	Up to 5 years' imprisonment. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ⁴³	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Extortion with threat to kill	<i>Crimes Act 1958</i> (Vic) s 27	Indictable offence that is triable summarily. ⁴⁴	Up to 15 years' imprisonment. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ⁴⁵	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.

37 See *Crimes Act 1958* (Vic) s 256 for the meanings of 'detriment', involvement in a criminal investigation, and involvement in a criminal proceeding.

38 *Crimes Act 1958* (Vic) s 257; *Criminal Procedure Act 2009* (Vic) s 28(1).

39 *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

40 *Crimes Act 1958* (Vic) s 20; *Criminal Procedure Act 2009* (Vic) s 28(1).

41 *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

42 *Crimes Act 1958* (Vic) s 21; *Criminal Procedure Act 2009* (Vic) s 28(1).

43 *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

44 *Criminal Procedure Act 2009* (Vic) s 28(1), sch 2 cl 4.2.

45 *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Perjury	<i>Crimes Act 1958</i> (Vic) s 314	Indictable offence that is triable summarily. ⁴⁶	Up to 15 years' imprisonment. If tried summarily: up to 2 years' imprisonment or up to 500 penalty units. ⁴⁷	Police charge.	Tried summarily by a magistrate in the Magistrates' Court of Victoria, or by judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Perjury	Common law Section 314(1) of the <i>Crimes Act 1958</i> (Vic) encompasses common law perjury and sub-sections (2) and (3) extend it to capture circumstances that would not amount to perjury at common law. ⁴⁸	Indictable offence.	At large. There is no maximum penalty for common law perjury in section 320 of the <i>Crimes Act 1958</i> (Vic).	Police charge. A judge may direct that a person may be tried for perjury in certain circumstances, pursuant to sections 5(c) and 415 of the <i>Criminal Procedure Act 2009</i> (Vic).	Judge and jury in the County or Supreme court.	At common law, a person commits perjury by giving false evidence on oath in a judicial proceeding. This is an offence both at common law and under s 314 of the <i>Crimes Act 1958</i> (Vic). ⁴⁹
Wilful destruction or damage of property	<i>Summary Offences Act 1966</i> (Vic) s 9(1)(c)	Summary offence	25 penalty units or six months' imprisonment.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.

⁴⁶ *Criminal Procedure Act 2009* (Vic) s 28(1), sch 2 cl 4.26.

⁴⁷ *Sentencing Act 1991* (Vic) ss 112A(1), 113(1).

⁴⁸ Ian Freckelton and Kerryn Cockroft, *Indictable Offences in Victoria* (Thomson Reuters, 6th ed, 2016) 788.

⁴⁹ Ian Freckelton and Kerryn Cockroft, *Indictable Offences in Victoria* (Thomson Reuters, 6th ed, 2016) 788.

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Using profane, indecent or obscene language or threatening, abusive or insulting words.	<i>Summary Offences Act 1966</i> (Vic) s 17(1)(c)	Summary offence	10 penalty units or two months' imprisonment. For a second offence—15 penalty units or three months' imprisonment. For a third or subsequent offence—25 penalty units or six months' imprisonment.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.
Behaving in a riotous, indecent, offensive or insulting manner, including by exposing oneself.	<i>Summary Offences Act 1966</i> (Vic) s 17(1)(d)	Summary offence	10 penalty units or two months' imprisonment. For a second offence—15 penalty units or three months' imprisonment. For a third or subsequent offence—25 penalty units or six months' imprisonment.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.
Behaving in a disorderly manner.	<i>Summary Offences Act 1966</i> (Vic) s 17A	Summary offence	Up to 10 penalty units.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Common assault – unlawfully assaulting or beating another person.	<i>Summary Offences Act 1966</i> (Vic) s 23	Summary offence	15 penalty units or three months' imprisonment.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.
Harassing a person because that person has taken part, is about to take part or is taking part in a criminal proceeding in any court as a witness or in any other capacity.	<i>Summary Offences Act 1966</i> (Vic) s 52A	Summary offence	120 penalty units or 12 months' imprisonment.	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.
Refusing to comply with a reasonable direction from an 'authorized officer' to do or not do something.	<i>Court Security Act 1980</i> (Vic) s 3(2B)	Summary offence ⁵⁰	10 penalty units.	Police charge.	Magistrates' Court of Victoria	Directions that an authorized officer may give are specified in section 3(2A). 'Authorized officer' is defined in section 2(1). This offence is included because it could apply in circumstances where common law contempt might also apply.
Making a recording of proceedings where not authorised by the <i>Court Security Act 1980</i> (Vic).	<i>Court Security Act 1980</i> (Vic) s 4A	Summary offence ⁵¹	20 penalty units	Police charge.	Magistrates' Court of Victoria	This offence is included because it could apply in circumstances where common law contempt might also apply.

50 *Sentencing Act 1991* (Vic) s 112(2).
51 *Sentencing Act 1991* (Vic) s 112(2).

Offence	Source	Classification of offence	Penalty	Initiation of proceedings	Triable by whom	Notes
Attempting to pervert the course of justice	Common law. Recognised in section 320 of the <i>Crimes Act 1958</i> (Vic).	Indictable offence.	Up to 25 years' imprisonment.	Police charge.	Judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Perverting the course of justice	Common law. Recognised in section 320 of the <i>Crimes Act 1958</i> (Vic).	Indictable offence.	Up to 25 years' imprisonment.	Police charge.	Judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.
Embracery	Common law. Recognised in section 89 of the <i>Juries Act 2000</i> (Vic) and section 320 of <i>Crimes Act 1958</i> (Vic).	Indictable offence.	Up to 15 years' imprisonment.	Police charge.	Judge and jury in the County or Supreme court.	This offence is included because it could apply in circumstances where common law contempt might also apply.



Victorian
Law Reform
Commission

Contempt of Court
CONSULTATION PAPER

GPO Box 4637
Melbourne
Victoria 3001
Australia

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800

Freecall
1300 666 555 (*within Victoria*)

Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au

www.lawreform.vic.gov.au