SUBMISSION TO VICTORIAN LAW REFORM COMMISSION
REVIEW OF CONTEMPT OF COURT, *JUDICIAL PROCEEDINGS REPORTS ACT 1958* AND ENFORCEMENT PROCESSES CONSULTATION PAPER

15 JULY 2019

Australia's Right to Know (ARTK) coalition of media companies appreciates the opportunity to make this submission to the Victorian Law Reform Commission (the Commission) *Review of contempt of court, Judicial Reports Act 1958 (Vic) and enforcement processes Consultation Paper* (the Consultation Paper).

As the Commission is well aware, this is not a hypothetical issue, with 34 defendants involved in the Pell contempt proceedings.

Our submission focuses on the issues canvassed in the Consultation Paper which are most relevant to the operations of its members and with which it can most meaningfully assist the Victorian Law Reform Commission.

Broadly speaking, these submissions address the following topics:

1. Chapter 3 – General issues with the law of contempt of court
2. Chapter 7 – Contempt by publication (1) – sub judice contempt
3. Chapter 8 – Contempt by publication (2) – scandalising the court
4. Chapter 9 – Prohibitions on publication under the *Judicial Proceedings Reports Act*
5. Chapter 10 – Enforcement of prohibitions and restrictions on publication

Recommendations are listed on page 2 of this submission.

RECOMMENDATIONS

ARTK makes the following recommendations to the Commission.

General issues with the law of contempt of court

i. A fault element of intention to interfere with the administration of justice should be introduced for contempt of court.
ii. The Office of Public Prosecutions should avoid contacting publishers and editorial staff directly in relation to potential contempt charges.
iii. Maximum penalties for contempt of court should be introduced that are proportionate to the harm suffered by affected parties. Convictions should never be recorded for individual journalists unless an intention to interfere with the administration of justice is established or it is a repeat offence. Warnings should be given to offenders in such cases.

Contempt by publication (1) – sub-judice contempt

iv. A statutory offence of contempt of court should replace the current common law sub-judice contempt, which contains:
    a. A definition of 'publication';
    b. A defence of no actual interference; and
    c. A public interest defence.
v. Jurors should be requested to complete pre-trial questionnaires relating to their media and social media consumption.

Contempt by publication (2) – scandalising the court

vi. The offence of scandalising the court should be abolished. If this is not accepted, a defence of fair comment similar to that under the *Defamation Act 2005* and a public interest defence should be adopted.

Prohibitions on publication under the *Judicial Proceedings Reports Act*

vii. Section 3(1)(a) of the *Judicial Proceedings Reports Act 1958* (Vic) should be repealed.
viii. To the extent that section 3(1)(b) of the *Judicial Proceedings Reports Act 1958* (Vic) overlaps with section 121 of the *Family Law Act 1975* (Cth) it should be repealed.
ix. Notices should be placed on court room doors when prohibitions under section 3(1)(c) of the *Judicial Proceedings Reports Act 1958* (Vic) apply to hearings.
x. Section 4(1C) of the *Judicial Proceedings Reports Act 1958* (Vic) should be amended so that victims of sexual offences can be identified with consent or with consent of senior next available kin.

Enforcement of prohibitions and restrictions on publication

xi. The definition of "publication" should mirror the definition in defamation law for online publications, meaning when it is downloaded by a third party.
xii. Courts should maintain a shared online database of suppression orders searchable by party name or proceeding number.
xiii. The *Open Courts Act* should be amended so that legacy suppression orders are deemed to have expired six (6) years from the date of commencement of the Act (that being 1 January 2014) subject to applications by affected parties.
xiv. The *Children, Youth and Families Act 2005* (Vic) should be amended so that only material which identifies a child is prohibited from publication.

Following is detailed analysis and reasons for these recommendations. The structure of the submission follows the order of questions set out in the Consultation Paper.

1. GENERAL ISSUES WITH THE LAW OF CONTEMPT OF COURT

RECOMMENDATIONS

i. A fault element of intention to interfere with the administration of justice should be introduced for contempt of court.
ii. The Office of Public Prosecutions should avoid contacting publishers and editorial staff directly in relation to potential contempt charges.
iii. Maximum penalties for contempt of court should be introduced that are proportionate to the harm suffered by affected parties. Convictions should never be recorded for individual journalists unless an intention to interfere with the administration of justice is established or it is a repeat offence. Warnings should be given to offenders in such cases.

- **Uncertainty of scope – amendments to requisite intention**

The penalties Courts can impose for contempt of court are severe. Accordingly, conduct that does not intend to interfere with the administration of justice and is not reckless as to the potential to interfere should not be subject to penalties and punishment.

Given the quasi civil nature of prosecutions for contempt of court, limitations that would ordinarily apply in sentencing persons convicted of crimes, for example considerations under the *Sentencing Act 1991* (Vic), do not always apply in cases of contempt of court.

For example, there are instances of significant fines being imposed,[1] convictions being recorded[2] and in the most serious cases, journalists being imprisoned when findings of contempt of court have been made.[3]

In other cases, journalists have been convicted after failing to give evidence in response to being charged with contempt on the basis that doing so would reveal the identity of confidential sources.[4]

While severe penalties can be imposed in contempt cases, the prosecution does not bear the same onus of establishing fundamental elements of the offence that applies in other criminal proceedings.

It is necessary to bring any offence of contempt in line with other criminal offences. Where an allegation of contempt is made, the prosecution should be required to establish the fault element of the offence.

By way of analogy, where the prosecution cannot establish the requisite intention to satisfy a charge of murder even if a person acted intentionally, an accused person can be convicted with the alternative lesser offence of manslaughter.

Similarly, even when a journalist or publisher intends to publish material, if it did not intend to interfere with the administration of justice it should not be liable for contempt of court and subject to the severe penalties the courts can impose at their discretion once a finding of contempt has been made.

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[1] *DPP v Johnson & Yahoo!7 Pty Ltd* [2016] VSC 699 in which a conviction and fine of $350,000 was imposed on the Second Respondent.
[2] *R v Nationwide News Pty Ltd* [2018] VSC 572in which a conviction and fine was imposed on the Respondent.
[3] A recent example being *The Queen v Hinch (No 2)* [2013] VSC 554 in which the defendant was sentenced to fifty days imprisonment after defaulting in payment of his fine.
[4] *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619.

Further, it has been said by authority that the law of contempt requires publishers to be aware of every legal proceeding in the state which may be affected by a publication, no matter how unreasonable that may be, and to be able to guess at every statement which could be found to have a tendency to prejudice.[5] As the Commission can appreciate, such an approach is a particularly precarious environment for media organisations to operate in.

ARTK holds that these circumstances form an unreasonable impost on reporting and free speech, therefore should be remedied by legislative reform.

If the Commission does not agree that a fault element be introduced for the offence of contempt in all cases, it should at very least be introduced for individual journalist defendants – who should not be subject to severe criminal penalties for doing their jobs in the absence of any intent to interfere with the administration of justice.

- **Procedural safeguards**

When considering potential contempt charges, the Victorian Director of Public Prosecutions has adopted a practice of writing to potential respondents and inviting them to provide the Office of the Public Prosecutions with any relevant material which could bear on the decision of whether or not to issue proceedings.

While this practice should be encouraged, potential respondents should be given the same protection from self-incrimination as that enjoyed by any other potential accused person.

Therefore the Director of Public Prosecutions should be discouraged from contacting editorial staff directly and/or persons on their behalf in this process, and should be prohibited from requesting copies of relevant publications from the potential respondents themselves.

ARTK is aware of instances where representatives from the Office of Public Prosecutions have contacted journalists and administrative staff directly to obtain copies of publications for the purpose of considering whether or not to charge organisations employing those individuals with contempt of court. This practice is undesirable and in ARTK's submission, inappropriate.

We consider it highly unlikely a prosecutor would contact a potential accused person and ask them to provide material which would provide the prosecution with evidence to potentially charge that person. Potential respondents to contempt proceedings should not be treated any differently.

- **Overlap with criminal law**

Where conduct amounts to a statutory offence, the accused person should be charged under statute and not pursuant to common law contempt. We take this view because of the inherent lack of certainty involved in common law offences when compared with the relative certainty that can be achieved through careful drafting of statutory offences. Accordingly, it is suggested the common law offence of contempt of court be codified.

- **Penalties**

There should be a maximum penalty for contempt of court as there is with the majority of other criminal offences occasioning fines.

[5] See *Registrar of the Court of Appeal v Willesee* (1985) 3 NSWLR 650 at 652-654 (Kirby P).

Penalties should reflect the cost of reimbursing any parties harmed by the contempt. For example, if a jury is discharged because of a contemptuous publication, the Court should consider the cost of harm suffered by the family of any victims or witnesses by virtue of delays and having subsequent trials listed. Further, and importantly, any penalties imposed should be proportionate to the harm caused to those directly involved in the proceeding.

Apologies should be given significant weight in determining penalties. Remorse is often a significant factor in sentencing in other criminal proceedings. An apology signals that a repeat contempt is unlikely and therefore no specific deterrence is necessary.

It is also possible in some instances that an apology entirely purges an alleged contempt. For example, in 2017 Federal Government Ministers Greg Hunt, Alan Tudge and Michael Sukkar were accused of scandalising the Court of Appeal and in particular Chief Justice Warren and Justices Weinberg and Kaye through criticisms made during an active appeal against a sentence for terrorism offences.

Chief Justice Warren ultimately decided not to refer the matter for contempt as although in her view there was a strong prima facie case against the ministers, the apology they offered in open court was sufficient to purge the contempt.

ARTK also takes the view that convictions should not be recorded against individual journalists unless the Court is satisfied the journalist intended to interfere with the administration of justice or if it is not the first time the journalist has been found to have committed contempt.

The recording of a criminal conviction is a very serious matter. We are aware of cases in which the recording of convictions against individual journalists for contempt of court has caused significant trauma to those concerned affecting their on-going capacity to work and mental health. A conviction also carries all of the usual impediments to the individual's life including inhibiting their ability to travel overseas.

For these reasons, courts and tribunals should be very reluctant to record convictions against journalists who commit contempt in the course of doing their job in good faith.

- **Warnings**

Warnings should be given for contempt in almost all cases where the accused is facing an accusation of contempt for the first time and it is not alleged they intended to interfere with the administration of justice.

It should be made clear in such cases that although a finding of contempt has been made, no convictions will be recorded or fines imposed.

2. CONTEMPT BY PUBLICATION (1) – SUB JUDICE CONTEMPT

RECOMMENDATIONS

i. A statutory offence of contempt of court should replace the current common law sub-judice contempt, which contains:
   a. A definition of 'publication';
   b. A defence of no actual interference; and
   c. A public interest defence.

ii. Jurors should be requested to complete pre-trial questionnaires relating to their media and social media consumption.

- **Is there a need to retain the law of sub-judice?**

  ARTK accepts there is a need to retain the law of sub-judice contempt. It is imperative that courts and tribunals are empowered to protect the integrity of the evidentiary procedures before them and protect the right of accused persons to a fair trial.

- **Should the common law be replaced by statutory provisions?**

  However, ARTK submits the law of sub-judice should be replaced with a statutory offence common to all jurisdictions – the implementation of a unified contempt law if you will.

  Statutory provisions can provide greater certainty, particularly given the nature of internet publications which were not envisaged when many of the seminal decisions on sub-judice contempt were handed down.

  Uniform defamation law which replaced what was previously a common law tort in all states and territories other than New South Wales can be used an example.

  We note however, as we have raised regarding the current review of the unified defamation law, it is essential that a unified approach have regular and ongoing statutory review, to deal with issues (should they arise) in a timely matter. This will be vital to maintaining the 'unified' qualities of such a law.

- **If so, what should the elements of the offence be?**

  The elements of the statutory offence should be:
  1) The publication must have a real and definite tendency, as a matter of practical reality to prejudice particular legal proceedings and cause serious injustice that cannot be overcome by other reasonably available means; and[6]
  2) The publisher must have intended to interfere with the administration of justice or have been reckless as to the publication's potential to interfere with the administration of justice.

  An example of "other reasonably available means" referred to in (1) above is directions to jury members or inquiries as to whether they have viewed or become aware of a particular publication.

  It is preferable to have the fault element a matter which must be established by the prosecution rather than requiring publishers to go to considerable expense in pleading such matters in defence.

  An additional defence of no actual interference should be introduced. That is, a publisher should be entitled to plead a defence that a particular publication did not result in any actual interference with the administration of justice. Where the evidence establishes that no jurors viewed or were aware of the publication, a complete defence should apply.

  This proposed defence would avoid the perverse situation where publishers can face severe penalties for merely creating a tendency to interfere with the administration of justice even in cases where there was no actual interference.

[6] This is similar to but higher than the tendency test currently expounded in *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 at 34 (Wilson J), at 46 (Deane J), at 70 (Toohey J), at 88 (Gaudron J). See also *Attorney General (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695; *Director of Public Prosecutions (Cth) v Australian Broadcasting Corp* (1987) 7 NSWLR 588; *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616; *Attorney General (NSW) v Dean* (1990) 20 NSWLR 650; *Attorney General (NSW) v Radio 2UE* (NSW, Court of Appeal, No 40236/96, 16 October 1997, unreported).

Rather than discharging a jury for fear of some abstract potential tendency to interfere, courts can be encouraged to make inquiries of jurors. ARTK submits that in many instances juries can be preserved despite a potentially contemptuous publication, which would save resources being wasted on a retrial and support the welfare of those directly involved in the proceeding.

- **Should the public interest test be expressly stated?**

A public interest defence along the lines of that set out in *Ex parte Bread Manufactures Ltd; Re Truth and Sportsman Ltd* [1937] SR (NSW) 242 should be retained as a statutory defence in any uniform legislative provisions. That provision should provide for a defence to an alleged contempt where the circumstances of the publication are such that the discussion of matters of public interest and public concern should take precedence over the administration of justice.

- **Remedial options**

As discussed above, in ARTK's view there is real merit in exhausting all options before expending significant public resources discharging a jury or prosecuting a publisher for contempt of court.

Parliament has plainly contemplated this concept in other similar contexts, for example in the *Open Courts Act 2013* (Vic). The *Open Courts Act* is designed to balance open justice with the need to protect the administration of justice through measures such as suppression orders and closed court orders.

Courts and tribunals are only empowered to make suppression orders under the *Open Courts Act* when a real and substantial risk of prejudice to the proper administration of justice cannot be prevent by other reasonably available means. The example provided in the provision containing the power to make orders is directions to the jury.[7]

Similarly in the contempt of court context, jurors should be given increased comprehensive warnings not to review social media or traditional media to avoid any risk of reading articles about the case.

Jurors could also be required to complete pre-trial questionnaires regarding their media and social medial consumption to identify jurors who may be vulnerable to infection in high profile cases.

When potentially prejudicial material arises, jurors should be asked whether they are aware of the material. If the Court is satisfied it can proceed after making these inquiries, resources which would otherwise be expended conducting retrials and prosecuting publishers can instead be used for more beneficial purposes.

Another way in which potential prejudice could be dealt with would be for courts to have the power to dispose of a jury, and to proceed to trial with a judge alone, in situations where there is a real risk of a contempt.

- **Education about the impact of social media**

Jury directions should be modernised to cater for the modern patterns of news consumption. That should include increasing the emphasis in jury directions on online news and information including but not limited to social media.

The reality of the digital world we live in is that many people access news and information via a range of means, including online channels such as social media and search in addition to consuming

[7] *Open Courts Act 2013* (Vic) section 18(1)(a).

media via traditional media channels. Therefore to the extent possible jurors should be warned to consciously manage their access to and consumption of information across all channels they use and avoid material relating to the matter – be that information that is 'pushed' to them and information that they actively 'pull'.

There are countless authorities affirming the principle that juries are robust and are capable of complying with directions and ignoring potentially prejudicial material when necessary.

- **Certainty around extradition cases**

There is little case law on extradition, particularly in relation to when proceedings might be "pending". When a warrant has been issued for a suspect who is in an overseas jurisdiction it can be difficult to determine when the sub-judice period has commenced.

Clarity on when the sub-judice period starts in a codified contempt law would be useful in these cases, as well as for reporting all criminal proceedings. Uncertainty arises when proceedings are commenced on issue of a warrant, but the accused is in a different jurisdiction. The sub-judice period should be clarified to commence upon arrest or charge to avoid this confusion.

Example *"The Justice Principle",* ABC Australian Story program about alleged child abuse at the Adass Israel School in Melbourne

In April 2018, two episodes of Australian Story told the stories of three of Ms Leifer's alleged victims, Dassi Ehrlich, Elly Sapper and Nicole Meier. It was difficult to determine whether the sub-judice period had commenced due to uncertainty about the timing of extradition proceedings against Ms Leifer in Israel. Ms Leifer remains still in jail in Israel over a year later, and her extradition proceedings are sporadic and protracted. Such continuing uncertainty can have a chilling effect on media reporting of important criminal cases and matters in the public interest.

3. CONTEMPT BY PUBLICATION (2) – SCANDALISING THE COURT

RECOMMENDATION

i. The offence of scandalising the court should be abolished. If this is not accepted, a defence of fair comment similar to that under the *Defamation Act 2005 and a public interest defence* should be adopted.

- **Retain the law of scandalising contempt?**

ARTK strongly recommends that the offence of scandalising the court be abolished.

It is imperative that courts and tribunals, and their officers, be subject to public scrutiny. At times, that scrutiny may amount to strident criticism. Nevertheless, an active fourth estate and media scrutiny are important to the principle and process of open justice, and ensuring that the judiciary remains accountable to the public and reduces the risk of processes being corrupted.

Legitimate discussion and debate on the exercise of the courts' processes should not be stifled by antiquated common law offences such as scandal.

Whilst officers of the court should be afforded the utmost respect, discussion of the exercise of their functions – including in the media – should be immune from prosecution.

- **What should the elements of scandalising be?**

  Despite this submission, if some form of the offence of scandalising the court is preserved, the elements of the offence should include an intention to bring the court into disrepute or reduce the public's confidence in the integrity of the judicial system.

  Guidance can be taken from the defence of honest opinion under section 31 of the *Defamation Act 2005* in terms of what amounts to fair comment in the context of scandalising the court.

  ARTK submits the defence should apply where the respondent can show the comment was based on proper material and related to a matter of public interest. The comment will often relate to a matter of public interest given the conduct of courts and court offices is inherently a matter in which the public has a legitimate interest.

  Only where the prosecution can establish the view expressed was not honestly held would the defence of honest opinion fail.

  A public interest defence should also be introduced.

4. CHAPTER 9 – PROHIBITIONS ON PUBLICATION UNDER THE *JUDICIAL PROCEEDINGS REPORTS ACT*

RECOMMENDATIONS

i. Section 3(1)(a) of the *Judicial Proceedings Reports Act 1958* (Vic) should be repealed.
ii. To the extent that section 3(1)(b) of the *Judicial Proceedings Reports Act 1958* (Vic) overlaps with section 121 of the *Family Law Act 1975* (Cth) it should be repealed.
iii. Notices should be placed on court room doors when prohibitions under section 3(1)(c) of the *Judicial Proceedings Reports Act 1958* (Vic) apply to hearings.
iv. Section 4(1C) of the *Judicial Proceedings Reports Act 1958* (Vic) should be amended so that victims of sexual offences can be identified with consent or with consent of senior next available kin.

The location of the prohibitions on publication in the JPR Act is of no great issue, but if uniform legislation is introduced for the purpose of contempt of court, it should logically include these prohibitions. The inclusion of as many reporting restrictions as possible in a single piece of uniform piece legislation streamlines the process of compliance, regulation and amendment.

- **Indecent matters and public morals**

  Section 3(1)(a) of the *Judicial Proceedings Reports Act 1958* (Vic) (JPR Act) should be repealed.

  The concept of "indecent" is inherently subjective and difficult to interpret, much less prosecute.

  Publication of this sort of material, whilst sensitive, is not serious enough to warrant the preservation of a statutory criminal offence.

- **Divorce and related proceedings**

  To the extent that a publication in breach of section 3(1)(b) of the JPR Act would also amount to a breach of section 121 of the *Family Law Act 1975* (Cth), section 3(1)(b) should be abolished.

The potential to cause harm or embarrassment to parties to such proceedings is significantly reduced where publishers are prohibited from identifying the individuals (as is the case with the *Family Law Act*). On this basis, publishers should be able to fairly and accurately report on what occurs in these court proceedings without potentially committing a criminal offence.

- **The prohibition on reporting directions hearings and sentence indications**

  ARTK's primary submission is that these prohibitions are not necessary.

  Although publication of these matters in certain circumstances can be prejudicial, journalists should be entitled to fairly and accurately report these hearings. Members of the public are considered capable of distinguishing between allegations and statements of fact, and are taken to understand that accused persons are entitled to a presumption of innocence in criminal proceedings. Similarly the public should be deemed capable of not giving undue weight to matters discussed at interlocutory stages of criminal proceedings which may not form part of the evidence at trial.

  In the event the prohibitions are retained, experience suggests significant confusion surrounds the application of these prohibitions.

  For example, there can be confusion as to whether a proceeding is listed for a directions hearing which is covered by the prohibitions in section 3(1)(c) or a mention which is not.

  To assist court reporters and those who advise them to comply with these prohibitions, notices should be placed on court room doors specifying any hearings to which the prohibitions apply.

  This procedure is unlikely to cause undue cost or burden to court staff as it can be a standard notice placed on court room doors. Court staff would likely be familiar with this kind of procedure which is already undertaken when closed court orders are made.

  Further, ARTK strongly opposes the expansion of the prohibitions to any other pre-trial hearings not already captured. This would reduce the transparency with which our courts conduct proceedings and that would be an undesirable result.

  In particular, bail hearings relate to the exercise of the Court's most significant power, namely to deprive someone of their liberty. The importance of ensuring the exercise of this power is subject to public scrutiny is paramount.

  This concept has been recognised in a long line of authorities establishing the fair report defence to publications such as reports on committal hearings and bail applications that would otherwise amount to sub-judice contempt.

  In particular, the Victorian Supreme Court has quoted Jordan CJ in *Ex Parte Terrill* with approval as follows:*"…so long as any account so published is fair and accurate and is published in good faith and without malice, no one can complain that its publication is defamatory of him, notwithstanding that it may in fact have injured his reputation, and no one can in general be heard to say that it is a contempt of court, notwithstanding that it may in fact be likely to create prejudice against the party to civil or criminal litigation."*[8]

- **Victims of sexual offences**

[8] For example, see *R v The Herald and Weekly Times Ltd & Anor* [2007] VSC 482 at [65].

To the extent required, it should be clarified that the prohibition in section 4(1A) does not apply in circumstances where victims have consented to being identified.

The requirement in section 4(1C) that consent be obtained from a court in circumstances where a proceeding is pending should be abolished. Victims should be empowered to tell their stories and their consent to identification should be sufficient to allow publication. The extra layer of protection requiring court approval is impractical and unnecessary provided victims are over 18 and of sound mind for the purpose of having capacity to provide their consent.

Example *"The Justice Principle*", ABC Australian Story program about alleged child abuse at the Adass Israel School in Melbourne

Because this story involved an extradition case, it was extremely difficult to establish whether proceedings were pending (see more detailed example above). Removal of the requirement will improve certainty for the media.

In circumstances where the capacity of the victim to consent is in question, publishers should be entitled to identify victims if consent is obtained from a senior available next of kin, parent or guardian of an adult victim.

However, there should be no change that would prevent the identification of deceased victims of sexual offences, particularly in high profile murder cases such as those of Jill Meagher, Aiia Maarsawe and Eurydice Dixon, in which there is a high public interest.

- **A victim's ability to speak**

Example "*I Am That Girl",* Four Corners program about sexual assault consent laws in NSW

In the May 2018 program, the alleged victim of sexual assault consented to be identified and discuss at length her experience, and views of how the law construes consent in such cases.

The program has led to the NSW Attorney-General announcing a review of consent laws and important public discussion about the issue. The fact that Saxon Mullins was able to be identified was an important element in exploring the issue in all its nuance and complexity.

ARTK refers to and repeats its submission in response to the question directly above in relation to victims of sexual offences.

In ARTK's submission, no special provisions need to be made for child victims. These are matters which can and always have been appropriately dealt with as editorial judgments or pursuant to editorial policies.

- **Temporary restrictions- sex offences and family violence**

ARTK believes that no further reporting restrictions are necessary in proceedings of this nature. Victims of sexual offences are adequately protected by section 4(1C) of the JPR Act.

Complainants and witnesses in sexual and family violence offence proceedings and child witnesses in criminal proceedings have the added protection of designated grounds for the making of suppression orders under the *Open Courts Act*.[9]

[9] *Open Courts Act 2013* (Vic) section 18(1)(d) and (e).

These provisions empower courts and tribunals to make suppression orders to avoid causing undue distress or embarrassment to people who fall within these categories.

5. ENFORCEMENT OF PROHIBITIONS AND RESTRICTIONS ON PUBLICATION

RECOMMENDATIONS

i. The definition of "publication" should mirror the definition in defamation law for online publications, meaning when it is downloaded by a third party.
ii. Courts should maintain a shared online database of suppression orders searchable by party name or proceeding number.
iii. The *Open Courts Act* should be amended so that legacy suppression orders are deemed to have expired six (6) years from the date of commencement of the act (being 1 January 2014) subject to applications by affected parties.
iv. The *Children, Youth and Families Act 2005* (Vic) should be amended so that only material which identifies a child is prohibited from publication.

– **Publication**

The definition of "publication" should mirror the definition of this term in defamation law. It should effectively remain the same for print and traditional radio and television publications, but material should only be considered to have been published online when it has been downloaded onto a third party reader's computer.[10]

This is consistent with the above proposed reforms to introduce a fault element to the offence of contempt. A publisher should not be criminally liable where the prosecution fails to establish that potentially contemptuous material has been read by a third party.

This can be readily inferred for mass media publications in print newspapers, on television and on radio, but the prosecution should bear the onus of proving (whether by inference or otherwise) that online publications have been downloaded by third parties before publishers can be charged with contempt.

In cases of content published through online intermediaries such as Google or Facebook, these intermediaries should only be liable once potentially contemptuous material has been brought to their attention and they have failed to take remedial action.

This should also apply to comments posted on social media pages of traditional media companies. For example, if a newspaper publisher posts a link to an article on its Facebook page and other Facebook users then post contemptuous material in the comments section below the article, the publisher should not be liable for contempt until it has been notified of the existence of the material.

[10] *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433 at [44].

Again, this is consistent with the requirement proposed above that an intention to interfere with the administration of justice be made an element of the offence of contempt.

It is important for the Commission to understand that Facebook does not provide the functionality for page owners to 'close' comments on their public Facebook pages, nor any reasonable way to pre-moderate them.

It is also important for the Commission to understand that the person that has written the comment is liable for contempt.

As an alternative to dealing with this issue in the drafting of a definition, ARTK proposes that an exemption could be enacted which provides that certain intermediaries are not publishers of third party content until they are notified of the existence of the third party content and fail to take such steps as are reasonable in the circumstances to take down the content. This should be an exemption, rather than a defence, so that the parties do not incur the costs of taking legal proceedings to a trial, and the courts' resources are not used unnecessarily.

Contempt proceedings should only be commenced against individuals where it can be established that their involvement in the publication was such that they published or caused to be published the material as a whole to the extent that they should be held criminally responsible for it.

- **Jurisdiction**

The nature of internet publications means that it is almost impossible to perfectly protect a jury from viewing potentially prejudicial material.

Whilst Australian courts have jurisdiction to enforce prohibitions in Australian states and territories, in particularly high profile cases prohibited material can still be made available by publishers in foreign jurisdictions.

Once the prohibited material is published on the internet, potential jurors can readily access the information, even if those websites are geo-blocked. This occurred when foreign publishers such as the *Daily Beast* reported on Cardinal George Pell's criminal trial and the articles were available in Australia through Twitter and other applications.

In this context, courts and tribunals must accept the realities of the limited utility of suppression orders and contempt proceedings in the context of internet publication and instead rely more heavily on jury directions to ensure accused persons obtain a fair trial.

There are countless authorities affirming the principle that juries are robust and are capable of complying with directions and ignoring potentially prejudicial material when necessary.

For instance, the noteworthy comments of his Honour Justice Cummins:

> "*…long experience in the law, and my limited experience in the law, confirms that juries are robust and responsible…juries, time and again, come to court in cases of great notoriety and publicity and demonstrate by their evident application of mind that they act according to*

their oath or affirmation to give a true verdict according to the evidence led before them in Court."[11]

The robustness of juries should give courts, tribunals and prosecutors confidence that valuable public resources need not be wasted on complicated prosecutions of foreign publishers for contempt because juries can remain intact despite problematic publications.

It is critical that as the potential threat of prejudice to administration of justice posed by internet publication evolves, the Court's procedures for dealing with this potential interference must also adapt and become more flexible.

Another way in which potential prejudice could be dealt with would be for courts to have the power to dispose of a jury, and to proceed to trial with a judge alone, in situations where there is a real risk of a contempt.

- **Awareness of prohibitions and restrictions**

Suppression orders from all courts must be circulated by email to representatives of the media and their advisers when they are made. Such emails must set out the terms of the order in full (including any names which are being suppressed so that it is apparent on the face of the order what must not be published), and should set out the basis on which the order has been made.

Additionally, all courts and tribunals must keep an online database of suppression orders, searchable by party name or proceeding number on the relevant court or tribunal's website. Such a database could be password protected, with access granted to accredited media organisations and their legal representatives.

These online database should be shared between courts and tribunals so a search of one name will produce orders made in all jurisdictions.

Whilst it is impractical to attempt to ensure that every member of the public is aware of every suppression order, an online database which is easily searchable will reduce the risk of breaches in circumstances where publishers are not aware of the existence of orders. This is <u>in addition</u> to the orders being emailed to the media and media representatives when orders are made.

To this end, orders should be drafted in terms that are capable of being understood on their face as to the persons and/or specific information to which they apply. For example, where parties are identified in orders only by pseudonyms or letters (eg. AB, Witness X), it is impossible to conduct searches for orders relating to that person without already knowing the pseudonym, in addition to which multiple proceedings may use the same letters for different parties. This is particularly difficult when conducting historical searches.

Also, orders which refer to material only by reference to parts of documents such as exhibits or affidavits (eg. Paragraph 10 of the Affidavit dated 10 June) but which do not annexe those documents or otherwise identify the actual content of the material being suppressed, are incapable of being understood on their face and complied with.

- **Fault elements to prove breach of prohibitions and restrictions**

Liability should not arise where suppression orders have not been circulated via email <u>and</u> published on the online database proposed above.

[11] DPP v Carl Williams [2004] VSC 209 at [20].

Similarly, liability also should not apply where amendments have been made to statutory prohibitions without proper notice being given to media companies.

- **Penalties and remedies**

We refer to and repeat our submissions above in relation to penalties.

- **Take down orders**

The law on take down orders in the state of Victoria is clear. Take down orders should only be made in very limited circumstances because it is assumed jurors do not go looking for material already published about a case in breach of their obligations under section 78A the *Juries Act 2000* (Vic) and their directions.

Conducting these searches would amount to a criminal offence and so jurors are trusted not to do so. As a result, take down orders are very rarely considered "necessary" because the risk of jurors being infected if the order is not made is remote.

In this respect, we note the Court of Appeal's comments:

> "*The risk that a potential juror's mind might at this stage be further and irremediably tainted by the presence in a library of an article or reference adverse to him must be negligible. There is no evidence that any such person would be likely to seek out this information in a library. Subject to the difference which we have identified, the prospect of such a potential juror making a search on the internet at this stage must also be negligible…*
> *We respectfully doubt the necessity for making that part of the order requiring the applicants take down the material from their websites provided the articles, the subject of the order, were no longer sufficiently current or were not presented in such a way as to be forced upon a visitor to the site who was not searching for them. We are of the opinion that a juror in this case would not be likely to have inadvertently come across material adverse to Mr Mokbel which was archived and not readily available to such a visitor. Nor do we readily accept that a juror would deliberately set about searching for such material in defiance of the trial judge's warning and direction*."[12]

Given the state of authorities on take down orders is abundantly clear, we submit that no further legislative powers are necessary.

In the event that such powers are considered, any provisions should make it plain that a suppression order does not operate as a take-down order and therefore a separate application for a take-down order would need to be made by affected parties. It cannot be assumed that a suppression order requires publishers to remove material published on the internet prior to the date of the order that would otherwise amount to a breach.

It should also be noted that take down orders will in many cases be futile or of very limited utility given they do not bind overseas entities who have published the same information, meaning that it remains accessible to anyone searching for it.

- **Legacy suppression orders**

ARTK is aware of at least 13 legacy suppression orders in Victoria with no end date. We anticipate there are dozens more.

[12] *News Digital Media Pty Ltd & Anor v Mokbel & Anor* [2010] VSCA 51 at [68]-[72] and [94].

A provision should be included in the *Open Courts Act* providing that legacy suppression orders are deemed to have expired six (6) years from the introduction of the *Open Courts Act* (that being 1 January 2014) subject to any application by interested parties to revoke, vary or continue the order.

The six year period is reasonable and consistent with period proposed in section 12 of the *Open Courts Act* as a maximum duration for suppression orders which are expressed to remain in place until a specified future event which may not occur.

The *Open Courts Act* should set out the procedure for applications relating to legacy suppression orders which should be subject to the same notice requirements as other applications for suppression orders under the act.

- ***Children, Youth and Families Act 2005*** **(Vic)**

ARTK submits this review should also consider necessary amendments to the *Children, Youth and Families Act 2005* (Vic) (CYF Act).

We note the *Open Court and Other Acts Amendment Act 2019* (Vic) which came into effect on Friday 5 July 2019. This included some amendments to section 534 of the CYF Act which unacceptably restricts the media, but in ARTK's submissions further amendment is necessary.

- Overview of section 534 of the CYF Act

  In short, section 534(1) currently prohibits the publication of:
  - a report of a proceeding in the Children's Court of Victoria (Court) (or a proceeding in any other court arising out of a proceeding in the Court) that contains any particulars likely to lead to the identification of a child or other party to, or a witness in, the proceeding;
  - a picture of a child or other party to, or a witness in, a court proceeding ; and
  - any matter that contains any particulars likely to lead to the identification of a child as being subject of an order made by the court**;**

  except with the permission of the President of the Court or a magistrate.

Section 534(4) further outlines a list of particulars which are deemed to be particulars "likely to lead to the identification" of a child offender, which include for example their "style of dress" or "recreational interests".

There is no doubt section 534 as a whole severely restricts the media's ability to inform the public. A key reason for this is the express objectives of the CYF Act, notably section 10 which sets out guiding 'best interest' principles. Some of the key 'best interest' principles include:

- that the best interests of the child must always be paramount (section 10(1)); and
- that the need to protect a child from harm and to promote his or her development must always be considered when determining whether a decision or action is in a child's best interests (section 10(2)).

Accordingly, the current judicial view is that the law protects youths from public scrutiny and ridicule, and stops them later in life bearing the burden of their decisions made in childhood.

However, this has led to wholly unnecessary restrictions placed on the media's ability to inform the public when it comes to reporting Children's Court proceedings, particularly in relation to matters which, when viewed in isolation, simply cannot lead to the identification of a child offender or witness.

- Proposed amendments to section 534(1)(b)

ARTK proposes section 534(1)(b) of the Act be amended to make it read as follows:

(1) A person must not publish, or cause to be published –
(a) …
(b) a picture as being or including a picture of a child or other party to, or a witness in, a proceeding referred to in paragraph (a) that identifies the child, party or witness; or
(c) …

- *Regarding Pictures of children*

  ARTK wishes to emphasise the underlined section of the above proposed amended section 534(1)(b), prohibiting the publication of a picture of a child which "identifies the child, party or witness".

  As the law currently stands on a plain word interpretation, publishing *any* photo whatsoever of a child or other party to, or a witness in, a court proceeding is a breach of the Act. Remarkably, this includes publishing photos of youths with pixelated faces.

  In our view, this prohibition is incomprehensible. It means the media is prohibited from publishing pictures of youths which, especially if they are pixilated, could not possibly identify the individual in question. This includes pictures of children which do not include their face at all.

  Correspondence from the Children's Court of Victoria in 2009 confirmed this position. It was in relation to the publication of a picture of a child's bruised forearm which was completely incapable of identifying the child. This letter has been more recently circulated and relied upon by the Court.

  Therefore, limiting section 534(1)(b) to a photo which "identifies" a youth is, in ARTK's submission, one of the most important (and obviously appropriate) changes required to the CYF Act.

- *The position in NSW*

  The equivalent provisions in NSW are found in the *Children (Criminal Proceedings) Act 1987 (NSW).*

  Section 15A of the NSW Act prevents the publication of the name of a child, or material that "identifies …or is likely to lead to the identification" of the child, in a way that connects the child with a criminal proceeding. This includes pictures of a child.

  Section 15A of the NSW Act is far more defined than the Victorian Act. For example, if a media organisation publishes a heavily pixelated image of a child in NSW, or an image of a child which does not show their face, there would be no breach of the NSW Act.

  Accordingly, it is clear the Victorian position is far too rigid and burdensome and the CYF Act ought to be amended.

  The current CYF Act is prohibiting the media from properly and fully reporting matters which are in the public interest.

For example, in relation to spates of cases involving African youths, the media is arguably not entitled to say a child charged with an offence is of African descent. Separately, the media is arguably not entitled to say a youth charged with a terror related offence is of Muslim descent, or that a youth charged with gun violence recreationally played violent computer games.

These are matters which are important to the public debate on issues such as youth gangs and youth radicalisation.

The Victorian media should not be inhibited in a way that does not exist in other states and significantly curtails important public discussion and debate.