

Victorian Law Reform Commission  
*Contempt of Court*  
Consultation Paper, May 2019

Submission by the Children's Court of  
Victoria

Dated 28 June, 2019



### **Introduction**

The Children's Court of Victoria (CCV) was established by s 8(1) of the *Children and Young Persons Act 1989* (CYPA). The Children's Court continues in operation under s 504(1) of the *Children, Youth and Families Act 2005* (CYFA). The Court's two main divisions are its Family and Criminal Divisions:

- The Family Division determines applications relating to the care and protection of children (from birth to 17 years of age) who are at risk of harm. In the Family Division the best interests of the child must always be paramount.<sup>1</sup> The Family Division also has jurisdiction to hear and determine intervention order applications.
- The Criminal Division has jurisdiction to hear all summary and indictable offences charged against a child (aged 10 or more, and under the age of 18 at the time of the alleged offending), except for six death-related offences and certain serious youth and other offences deemed unsuitable for summary determination.

The CYFA is the principal Act in this jurisdiction, and various other Acts apply to the Children's Court in conjunction or parallel with the CYFA. The legislative provisions relevant to this Contempt reference are outlined as follows.

### ***Children, Youth and Families Act 2005***

Section 534(1) provides a restriction on the publication of proceedings:

- (1) A person must not publish or cause to be published—
  - (a) except with the permission of the President or of a magistrate under subsection (1A), a report of a proceeding in the Court or of 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—
    - (i) the particular venue of the Children's Court, other than the Koori Court (Criminal Division) or the Neighbourhood Justice Division, in which the proceeding was heard; or
    - (ii) a child or other party to the proceeding; or
    - (iii) a witness in the proceeding; or
  - (b) except with the permission of the President or of a magistrate under subsection (1A), 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); or
  - (c) except with the permission of the President or of a magistrate under subsection (1A), or of the Secretary under subsection (3), any matter that contains any particulars likely to lead to the identification of a child as being the subject of an order made by the Court.

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<sup>1</sup> Section 10 CYFA.

Penalty:

- (a) In the case of a body corporate—500 penalty units;
- (b) In any other case—100 penalty units or imprisonment for 2 years.

Sections 528(1) and 528(2) provide that the CCV has certain powers of the Magistrates' Court of Victoria (MCV). Section 528(3) expressly refers to the relevant contempt powers in the *Magistrates' Court Act 1989* (MCA) that apply in the CCV:

- (1) The 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.
- (2) Unless the contrary intention appears in this Act or any other Act—
  - (a) the **Magistrates' Court Act 1989** (except section 58 and Part 5);...  
[applies] with any necessary modifications to the Children's Court and proceedings in the Court ...  
...
- (3) In punishing a person for a contempt of court under section 133 or 134 of the **Magistrates' Court Act 1989** (as applied by subsection (2) of this section) the Court must not order that a person under the age of 18 years be committed to prison but instead be committed to—
  - (a) in the case of a child of or above the age of 15 years, a youth justice centre; or
  - (b) in the case of a child under the age of 15 years, a youth residential centre.

The other express reference to contempt in the CYFA is in s 550(4), which provides that an author of a relevant report to the CCV is guilty of contempt where he or she fails, without sufficient excuse, to attend as required.<sup>2</sup>

Section 523 provides that the CCV is an open court with the powers to close the court where necessary:

- (1) Proceedings in the Court are, subject to subsection (2) and section 527A, to be conducted in open court.
- (2) The Court may, on the application of a party or of any other person who has a direct interest in the proceeding or without any such application—
  - (a) order that the whole or any part of a proceeding be heard in closed court; or
  - (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding.
- (3) Any party to the proceeding and any other interested person has standing to support or oppose an application under subsection (2).

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<sup>2</sup> Section 430L(4) is an equivalent provision which relates to the author of a pre-sentence report failing, without sufficient excuse, to attend an appellate court as required.

## Children's Court of Victoria

- (4) If an order has been made under this section, the Court must cause a copy of it to be posted on a door of, or in another conspicuous place at, the place at which the Court is being held.
- (5) An order posted under this section must not contain any particulars likely to lead to the identification of the child who is a party to the proceeding.
- (6) A person must not contravene an order made and posted under this section.

Penalty:

- (a) In the case of a person of or above the age of 18 years, 25 penalty units or committal for a term of not more than six months to prison; or
- (b) In the case of a child of or above the age of 15 years, 25 penalty units or detention for a period of not more than six months in a youth justice centre; or
- (c) In the case of a child under the age of 15 years, 12 penalty units or detention for a period of not more than three months in a youth residential centre.

### ***Magistrates' Court Act 1989***

The statutory contempt provisions in the MCA applicable in the CCV are:

- Contempt in the face of the court (s 133); and
- Witness contempts (s 134).

Section 135 of the MCA sets out the powers of the MCV to make and enforce orders, other than for the payment of money. However, it is unclear whether s 135 MCA applies in the Children's Court as its origins appear to be civil in nature and s 528(2)(a) CYFA specifically excludes Part 5 of the MCA (Civil proceedings) from application in the CCV.

### ***Open Courts Act 2013***

Section 3 of the *Open Courts Act 2013* (OCA) defines "court or tribunal" in a list of courts and tribunals in Victoria, which does not include the CCV.<sup>3</sup> While the CCV is not specifically referenced as a court or tribunal under the OCA, one potential construction is that – as s 528(1) of the CYFA gives the CCV the same powers and authorities as the Magistrates' Court has in relation to the matters over which it has jurisdiction – arguably that includes the power to make suppression orders under the OCA.

The opposing construction is that Parliament did not intend the OCA to apply to the Children's Court at all, given that a separate express power to close the Court exists under s 523 CYFA which provides different penalties for breach from that in s 32 OCA, and given the provision in s 534 CYFA. The CCV considers the uncertainty about the application of the OCA to its proceedings is less than desirable.

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<sup>3</sup> Paragraph (f) refers to "any other prescribed court or tribunal", but that description would not expressly cover the CCV.

The CCV's responses to Consultation questions relevant to its jurisdiction are as follows:

### **Key issues and principles**

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

The CCV is a specialist jurisdiction dealing with cases involving children and young people. The personal and subject matter jurisdictions of the Court are key considerations in considering and addressing the Consultation questions in relation to the CCV.

#### *Restriction on publication of proceedings*

Section 534 of the CYFA restricts the publication of certain information, particulars and images of a child, party or a witness in a proceeding in the CCV (or in a proceeding in another court arising out of a CCV proceeding). As the Children's Court of Victoria is one of the only Children's/Youth Courts in Australia that is an open court (see s 523 CYFA),<sup>4</sup> s 534 serves as an important safeguard.

Section 534 aims to avoid the dissemination of information which would or could identify, embarrass or stigmatise a child, or his or her family, in relevant Court proceedings. This purpose aligns with the sentencing principle under s 362(1)(d) CYFA that the CCV must, as far as practicable, have regard to the need to minimise stigma to the child resulting from a court determination. Further, s 534 serves a critically important role in the Family Division given the often sensitive and distressing nature of child protection proceedings. In addition to stigmatisation, any inappropriate or unauthorised publication of child protection proceedings may jeopardise the wellbeing of vulnerable children and young people at risk of or subject to harm (contrary to the "best interests" principles in s 10 CYFA).

Section 534 is subject to certain statutory exemptions: where publication is permitted by the President, or a magistrate in emergency situations; where the Secretary to the Department of Justice grants permission in the case of escapes from custody; or in publications likely to identify an adult victim in circumstances that would not otherwise breach s 534(1).<sup>5</sup>

Despite the existence of s 534, the CCV has referred a number of instances of potential breaches of s 534 to the Director of Public Prosecutions for investigation. These referrals by the CCV have led to the Director issuing written, and repeated warnings, to various media outlets and highlighting the importance of compliance with s 534. In other cases, the Court has sought the co-operation of the media to remove images and articles, particularly those that remain online.

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<sup>4</sup> Children's and Youth Courts in Queensland, New South Wales, South Australia, Tasmania and the Australian Capital Territory are closed courts. The Youth Justice Court in the Northern Territory is an open court.

<sup>5</sup> Sections 534(1), (1A), (3A), 534A CYFA.

A case where various journalists were prosecuted for breaches of the prohibition against publication under s 26(1) of the *Children and Young Persons Act 1989* (the antecedent provision to s 534 CYFA) was the subject of a decision of the Court of Appeal in *Howe v Harvey*.<sup>6</sup> The breaches in that case arose from media reports regarding an order of the Children's Court that gave the guardianship and custody of a 14-year-old boy to the Department of Human Services, in which the child was identified by name and a photograph. The Court of Appeal upheld the findings and convictions imposed on the newspaper, the editor, a television station, its program director and its executive producer.

While s 534, in combination with s 523, of the CYFA may have been considered sufficient protection in the past, the limited and derivative nature of the CCV powers are becoming increasingly problematic in the modern environment. For example, the CCV may need to make orders that go beyond the prohibition against the identification of the child (or other relevant party or witness) in the interests of justice. Given the inadequacies and uncertainties in the existing legislative framework, the powers which on one view are available under the OCA have, on occasion, been exercised by the Children's Court.

### *Limited contempt powers*

As noted above, the contempt provisions applicable in the CCV are derived from ss 133 and 134 of the MCA.<sup>7</sup> The CCV has the power to punish for contempt in the face of the court, and for certain contempts committed by witnesses. However, the CCV lacks broader powers to deal with other types of contempt. Notably, the CCV does not have any enforcement powers under the CYFA to deal with non-compliance with orders. The absence of this power leaves the CCV with no power to respond to egregious instances of non-compliance with orders it makes, of concern given the specialist nature of the Court's jurisdiction.

For the purposes of this submission the CCV emphasises two key principles:

- First, the fundamental importance of the proper administration of justice in our society, particularly where non-compliance with Court orders may impact on the best interests and safety/wellbeing of children and young people.
- Second, the need to ensure children and young people subject to proceedings in the CCV are not subject to stigmatisation or risk of harm through inappropriate and/or unauthorised publications.

The CCV considers it appropriate that it has the full suite of clear powers to deal with all forms of contempt. In making this submission, the CCV accepts that the exercise of any contempt power should be utilised with reluctance and as a matter of last resort. In many instances, concerns regarding behaviour in court, for instance insulting or disrespectful behaviour, are best managed by the presiding judicial officer using effective court craft. This is particularly the focus of specialist courts, such as the CCV, which deals daily with

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<sup>6</sup> (2008) 20 VR 638.

<sup>7</sup> Via s 528 CYFA. Noting the uncertainty about whether s 135 MCA applies in the CCV.

vulnerable litigants, often in person or with children whose behaviours (including those in Court) may well be the product of their own history of abuse, neglect or trauma.<sup>8</sup> However, where the contempt is egregious, or undermines the proper administration of justice, the full armoury of contempt powers should be available to the CCV in legislation.

### **General issues with the law of contempt**

- **Uncertainty of scope**

**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?**

Yes, the CCV's view is that the courts need a general power to punish any conduct that has a tendency to interfere with the proper administration of justice.

Broadly speaking, in relation to conduct intended to interfere with the administration of justice, the CCV suggests that both intention and a reckless disregard be considered as the relevant fault elements.<sup>9</sup>

- **Procedural safeguards**

**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?**

Yes, if contempt is found proved it is punishable by criminal sanctions and hence the procedure should have the same safeguards as exist for other criminal offences. There should be a fair, consistent and transparent process for dealing with contempt.<sup>10</sup>

- **Overlap with criminal law**

**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?**

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<sup>8</sup> See, e.g., the Sentencing Advisory Council, 'Crossover Kids': *Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (June 2019).

<sup>9</sup> See further discussion in the paper in relation to fault elements for specific types of contempt.

<sup>10</sup> See, e.g., the issues arising in *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186.

No, there is no need for statutory guidance. As noted in the Court's answer to question 3, the CCV is of the view that the same procedural safeguards should apply for contempt as exist for other criminal offences.

- **Penalties**

**Question 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?**

As to (a), the CCV has no submission as to what maximum penalties should apply, other than noting that fixing a statutory maximum penalty is appropriate for a statutory offence.

As to (b), the CCV's view is that there should not be any differentiation between the maximum penalties for different types of contempt.

**Question 6: What weight, if any, should be given to apologies in determining whether and what penalty is imposed for contempt of court?**

The relevant weight to attach to an apology is properly a matter for the relevant judicial officer to assess, having regard to factors such as the timing and content of the apology, in addition to any remedial action taken. These are some of the factors that a court may consider in determining an appropriate sentence in each particular case.

**Question 7: Should the *Sentencing Act 1991* (Vic) apply to contempt proceedings?**

If the *Sentencing Act 1991* (SA) is considered the most appropriate legislative vehicle, then the CCV notes the SA applies only to adult offenders and does not have any application to the CCV.<sup>11</sup> The CCV would require additional legislative power to be able to sentence an adult for contempt. Alternatively, given that summary charges for adult accused are filed in the Magistrates' Court, the CCV notes that a judicial officer in the CCV may sit in the MCV for the purposes of such a proceeding.

In only the rarest and most egregious cases should contempt prosecutions against children be even contemplated. The CCV notes that the sentencing considerations applicable for children and young people under the CYFA differ markedly from the sentencing principles provided in the SA.<sup>12</sup>

- **Warnings**

**Question 8: In what circumstances do the courts give warnings for contempt?**

**Question 9: When should contempt warnings be given?**

<sup>11</sup> Section 4 SA.

<sup>12</sup> Section 362(1) CYFA cf. s 5(1) SA.



The CCV considers it is appropriate to require the Court to give a warning that clearly identifies the conduct in issue and in appropriate cases, outlines the potential penalties that may attach to any relevant contempt/s. Potential contemnors should also be afforded the opportunity to seek legal advice.

**Question 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?**

No, as so much depends on the circumstances. The discretion on the use of contempt warnings should be left to the judiciary. It is difficult to anticipate, in legislation, all the circumstances in which a contempt or potential contempt warranting a warning may arise, and the CCV does not consider guidance, other than in general form, to be appropriate.

**Question 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?**

The CCV notes that it is unclear whether this question relates to 'show cause' warnings given where a court has formed a view that a contempt may have been committed. Forming a view that a contempt may have arisen is not commensurate with making a finding that a contempt has been committed. In general, the CCV does not consider it beneficial to require a finding of contempt as a pre-condition to giving a contempt warning, as one of the purposes of a warning should be to prevent or remediate the potential contempt.

### **Contempt in or near the courtroom: contempt in the face of the court**

**Question 12: Is there a need to retain the law of contempt in the face of the court?**

Yes, the CCV's view is that contempt in the face of the court needs to be retained.

**Question 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?**

Yes, statutory provisions should be introduced for contempt in the face of the court, with non-exhaustive definitions as to what constitutes contempt in the face of the court. Otherwise the CCV does not have a view on whether contempt offence provisions should be encapsulated in legislation that is contempt-specific and applicable to all jurisdictions, or alternatively provided for in existing legislation across the jurisdictions.

As to the requisite fault elements, the CCV cannot comment on what is required given the numerous types of conduct that may constitute contempt in the face of the court and as it is currently unclear as to whether they will be encapsulated in a statutory provision, or provisions, with particular types of conduct at issue. In the most general terms, the CCV

suggests consideration be given to the fault element to the offence, being either actual intention or a recklessness element.

**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?**

Insulting behaviour should be included within the scope of the offence. While the CCV supports the retention of disruptive conduct in contempt in the face of the court, it does not hold a view on the inclusion of 'disrespectful' behaviour.

**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?**

No, it should not be limited to conduct directly seen or heard by the presiding judicial officer. It should be broad enough to cover contempt of the Court as an institution and not be limited to contemptuous behaviour in the presence of a judicial officer.

While there is uncertainty about the meaning of 'in the face of the court', it should be noted in that in various Acts the definitions of court may include other persons apart from judicial officers. For example, under the CYFA the 'Court' is defined as 'the Children's Court', which consists of a President, the magistrates, the judicial registrars and the registrars of the Court.<sup>13</sup>

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

No. Prohibited conduct may fall within two or more statutory offences as often happens with other offences (e.g. intentionally cause serious injury, recklessly cause serious injury, intentionally cause injury, assault, etc). It should be a matter for the relevant judicial officer to decide whether it is necessary, on the facts arising, to proceed with a contempt charge. Contempt in the face of the court arises and is particular to the courts, hence the evolution and development of contempt at common law, rather than reliance on existing criminal offences that may overlap with forms of contempt.

**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?**

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<sup>13</sup> Sections 3(1), 504 CYFA.

- (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?

The CCV is of the view that the answer to (a) is yes, there is absolutely a need to preserve the power of courts to deal with contempt in the face of the court summarily.

The Court is unable to give a definite answer to (b) as it depends on the proceedings themselves and the nature of the disruptive behaviour.

Broadly speaking to (c), the relevant judicial officer should hear the case unless appropriate circumstances warrant a different judicial officer hearing the matter instead.<sup>14</sup>

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

None, this should be left to the discretion of each judicial officer, however is appropriately a matter for judicial education.

**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?**

Other than to reiterate that the vulnerabilities of particular groups of people, including children, are best managed with effective court craft by the presiding judicial officer and that any contempt powers should be used with great reluctance, the CCV has no further observations or responses to this question.

**Non-compliance with court orders or undertakings: disobedience contempt**

**Question 25: Is there a need to retain the law of disobedience contempt?**

Yes. Magistrates sitting in the Children's Court regularly raise concerns, particularly in the Family Division of the Court, about instances of non-compliance with Court orders. Non-compliance issues, in turn, impact on the timely disposition or resolution of cases. Unlike other courts in Victoria, the CCV does not have any clear statutory powers to enforce its own orders or issue remedies for non-compliance of CCV orders. The CCV requires a workable remedy for disobedience contempt by persons committing serious breaches of Court orders.

There are two situations where non-compliance with CCV orders commonly arise and where the Court has no recourse to any form of contempt law:

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<sup>14</sup> Cf. the relevant circumstances arising in *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186.

## Children's Court of Victoria

- Failing to provide reports and other documents in accordance with Court orders in the Family Division (e.g. failures to provide reports in accordance with the times set by the Court or under the CYFA, or to provide key documents to the Court in discovery).
- Non-compliance with Court orders, and the conditions that attach to those orders, in the Family Division (e.g. non-compliance with the contact/access conditions imposed by order of the CCV).

As noted in the Consultation paper, the ability of courts to enforce their orders is of critical importance to the proper administration of justice. When considering the purposes of the law of disobedience (outlined at [6.40] of the Consultation paper), namely coercing compliance with Court orders, and punishing non-compliance with orders and undertakings – in the context of the specialist nature of the CCV and its role in the justice and welfare system in relation to children and young people – it is critical that the CCV be provided with a legal basis to enforce its orders.

### **Question 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?**

In relation to (a), the CCV's view is that the distinction should be maintained.

As for (b), the CCV prefers the introduction of a statutory procedure for civil enforcement of Court orders and undertakings and responds to the (i)-(iii) questions as follows:

- i. a magistrate and/or the President of the Children's Court;
- ii. failure to comply with a Court order on the balance of probabilities;
- iii. monetary penalties, undertakings and/or declaratory, injunctive or similar remedies.

### **Contempt by publication**

The CCV does not address the specific questions relating to *sub judice* contempt (QQ 27-31), contempt by scandalising the court (QQ 32-35) or prohibition on publication under

the *Judicial Proceedings Reports Act 1958* (QQ 36-42). However, in response to the general issue of contempt by publication the CCV considers that:

- i. the operation of s 534 CYFA; and
- ii. the associated issue of breaches of Court orders relating to the publication of information and particulars in Court proceedings (e.g. where permission has been granted for publication of material of a limited scope and where that Court order is then breached);<sup>15</sup>

are significant issues for the CCV which may benefit from legislative reform.

As noted in the preliminary, s 534 applies a mandatory restriction on the publication of certain matters likely to lead to the identification of children, parties or witnesses involved in CCV proceedings. The CCV does not possess any other contempt powers to deal with contempt by publication. It is becoming increasingly apparent in the CCV that, especially in high-profile cases and the modern media environment, breaches of s 534 may arise.

The CCV highlights that one of the issues arising with s 534 is ambiguity in the scope of its temporal operation. Section 534 applies to reports of a 'proceeding', which is defined at s 3(1) to mean any matter in the Court, including a committal proceeding.<sup>16</sup> Until a charge sheet is filed in the CCV, it is unclear whether a proceeding has commenced for the purposes of s 534. The scope of the protection afforded by s 534 is problematic as currently drafted. For instance, identifying publication of images/footage may occur before a charge is filed and the (then) offending publications remain on the internet or in other forms of publication. For instance, footage of children engaging in offending behaviour that is widely distributed, often necessitating the Court contacting media organisations to have that material removed, with varying degrees of success given the widespread dissemination of material over the internet.

In reviews that led to the initial enactment of the prohibition on publication it was said that "it was not in the interests of the system that the court be without protection and immediate remedies".<sup>17</sup> Since then, and especially in today's media and modern landscape, the deficiencies in s 534, and issues with non-compliance, have become of greater concern.

Further, the CCV emphasises that it does not have any contempt power to deal with publications that may interfere with a proceeding or the fair and effective administration of justice in proceedings before the Court. There is a need for the CCV to have broader contempt powers available to it and the CCV supports the encapsulation of such powers in statutory provisions.

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<sup>15</sup> May also constitute disobedience contempt in appropriate cases.

<sup>16</sup> But does not include the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as registrar under Schedule 3.

<sup>17</sup> Victorian Child Welfare Practice and Legislation Review, 'the Carney' Final Report (1984), 409.

(See also the CCV response to Q 25 on pp 11-12 of this paper).

### **Enforcing laws that prohibit or restrict publication**

- **Online publications**

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

Section 3(1) of the CYFA defines 'publish' as having the same meaning as in the OCA. The OCA definition applies in the construction of s 534 CYFA and when the CCV exercises powers under the OCA.

However, from the CCV's perspective, the overriding concerns for the Court arise from non-compliance with s 534 and the lack of enforcement or contempt powers to deal with publication contempts, rather than any potential issues with the scope of the terms 'publish' and 'publication'.

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

The CCV has no submission to make regarding this question.

- **Awareness of prohibitions and restrictions**

**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?**

**Question 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?**

The CCV has no submissions to make regarding these questions.

- **Responsibility of instituting proceedings**

**Question 50: Who should be responsible for instituting proceedings for breach of prohibitions and restrictions on publication?**

The CCV suggests:

- i. the Victoria Police or the relevant prosecutorial body for breaches of s 534, as is currently the case; and
- ii. the Court for disobedience/publication contempts.

- **Level of fault needed to prove a breach**

**Question 52: Should liability arise where there is a lack of awareness of the relevant prohibition or restriction on publication?**

The CCV suggests consideration be given to the fault element to the offence being either actual intention or a recklessness element.

- **Defences and exceptions**

**Question 54: What defences, if any, should be available to people who have published information which is prohibited or restricted?**

The CCV has no submission to make regarding this question.

- **Penalties and remedies**

**Question 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?**

Yes.

**Question 56: Should penalties for breaches of common law suppression orders and pseudonym orders be set out in statutory provisions?**

Yes.

**Question 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?

Yes, courts should be able to issue 'take-down' orders.

## Children's Court of Victoria

As to (a), yes the process should be provided in statute.

As to (c) the CCV suggests any person prima facie affected by the internet materials, with leave of the court.

As to (d), the CCV's view is that the same sort of regime should apply as for an interlocutory injunction. Applications may be conducted on an ex parte basis if the court considers it sufficiently urgent.