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26 May 2017

The Honourable Justice Frank Vincent
Open Courts Act Review
c/o Ms. Allison Will
Director, Criminal Law Policy
Department of Justice and Regulation
Level 24, 121 Exhibition St
MELBOURNE VIC 3000

By email: neha.kasbekar@justice.vic.gov.au

Dear Justice Vincent

Review of the *Open Courts Act 2013*

1. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au

2. Thank you for the opportunity to make a submission to the *Review of the Open Courts Act 2013* ('the Act') and for the extension of time granted to make this submission.

Endorsement of VLA Submission and Recommendations

3. We have had the opportunity to consider the detailed submission by Victoria Legal Aid ('VLA') and we respectfully endorse it and its recommendations.

4. We also make the following brief observations on overarching principles that can be applied to all Acts that contain provisions that restrict or prohibit publication.

The Importance of the Open Justice Principle

5. The principle of open justice is fundamental to the proper administration of justice.[1] That principle is clearly reflected in the Act.

6. It is important that the legal system operate in a way that is transparent, accountable and accessible to the public. Indeed, Liberty Victoria is concerned that some criticisms of the justice system stem from ignorance and misinformation.

7. For example, in relation to the criminal sphere, in *WCB v The Queen* [2] the Court of Appeal (Warren CJ and Redlich JA) observed:

> ***Ensuring media have access to all sentencing outcomes***
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> It follows from what we have said that to redress the myths under which the community labours and to enable the formulation of more objective community views as to sentences, the public must be provided with the necessary information to make informed judgments. The role of the media is critically important. The public depends upon the mass media for its knowledge of the workings of the criminal justice system. Conversely, the courts depend upon the media to convey information to the community about the sentencing process. For the public to have 'in their collective consciousness the true nature of their sense of justice', the public must have a great deal more detail about the general sentencing patterns for a crime and detail about the offence and the offender.
>
> The Sentencing Advisory Council concluded that, were the public to form opinions from adequate court-based information instead of through the lens of the mass media, there would be better community knowledge and fewer instances of misinformed calls for harsher punishment. We accept that proposition. However, the courts must assist the media in the task of accurately informing the public about their sentencing work. The courts and the media share the important burden of providing the public with sufficient

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1 See, eg, *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal* (2004) 9 VR 275

2 (2010) 29 VR 483, 490 (citations omitted).

> detail of the actual sentences being imposed for all types of crime, in those cases that presently receive little or no public attention. It is in the more common areas of offending that deterrence assumes particular importance. The courts need to provide sentencing information to the media in a form that can be readily communicated to the community and on court websites.

8. Accordingly, it is vital that the Courts are open and transparent with the public.

9. Equally, it is vital that the media engage in accurate and fair reporting of proceedings. Unfortunately, sensationalised media reporting has in part led to a significantly distorted perception by some members of the public about the operation of the justice system, particularly the criminal justice system.

10. We acknowledge that there has been criticism of the number and breadth of suppression orders in Victoria. A study undertaken by Jason Bosland and Ashleigh Bagnall of the University of Melbourne found that the rate of suppression orders in Victoria is higher compared to other states and there are significant problems with the breadth, clarity and duration of orders.[3]

11. Liberty Victoria supports measures that would give judicial officers, parties to proceedings, and the wider community, more clarity in relation to the operation and effect of non-publication orders.

Reasonable Limitations to the Open Justice Principle

12. While the open justice principle is of fundamental importance, it is not absolute and may be limited in certain circumstances.[4]

13. Accordingly, the issue of making non-publication orders often involves balancing competing rights, including those rights protected by the Charter of *Human Rights and Responsibilities Act 2006* ('the Charter'), such as the right to a fair trial, the right to privacy, and the right to free expression.

14. There are many tribunals that operate in Victoria and federally where the open justice principle has been limited, in some cases severely, because of the importance of other

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[3] Ibid, 671.

[4] *Scott v Scott* (1913) AC 417.

factors, such as the desirability of obtaining intelligence in relation to the operation of criminal organisations and/or ensuring integrity in government.

15. Just as the Government recognises that in some circumstances the open justice principle should give way to other important considerations, there will be some matters before Victorian courts and tribunals where the rights and interests of litigants and/or witnesses should result in the protection of their identities. Importantly, as explained in the VLA submission, that is often necessary to ensure that a person has effective access to justice, especially when seeking review of VCAT decisions at the Supreme Court of Victoria.

16. Simply put, it is our view that judicial officers are best placed to determine whether non-publication orders are necessary in a given case in order to protect those competing rights. Often that will require hearing evidence as to whether the threshold has been met for non-publication.

17. While there should be a strong presumption of open proceedings, it is important that judicial officers retain the power to ensure that litigants and/or witnesses, in appropriate cases, are properly protected.

18. To that end, it should be noted that the use of pseudonym orders involves a far more limited derogation of the open justice principle than broad suppression orders.[5] Pseudonym orders still allow for reporting of the proceeding, and for the public to be informed about what is occurring in the justice system.

19. In relation to issues of mental illness and intellectual disability, the law should be vigilant to protect the identify of those who have impaired mental functioning.

20. In *Re An Application by PL*,[6] Cummins J held:

> [A] suppression order of its nature is antipathetic to the judicial process. It follows that suppression orders should not be granted, or come to be granted, routinely. The powerful and fundamental value of the community's knowledge of the judicial process in its midst should not be whittled down by a developing

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5 *AX v Stern* [2008] VSC 400 (30 September 2008), where Warren CJ cited with approval at [6] the principles identified by Forrest J in *ABC v D1 & Ors; Ex Parte The Herald and Weekly Times Limited* [2007] VSC 480 (30 November 2007). Cf Secretary, Dept of Justice and Regulation v Zhong (No 2) [2017] VSCA 19.

6 [1998] VSC 209, [27] (emphasis added).

> habit of suppression. Nearly always, publication of the identity of an applicant will be likely to cause some difficulty to the applicant or to have some deleterious effect upon rehabilitation. Plainly, in some cases the degree of such negative impact will justify, indeed necessitate, a suppression order. But in others it will not. The degree of likely negative impact needs to be examined in each case. The existence of negative impact will not of itself justify a suppression order. Sufficient negative impact needs to be established to justify departure from the fundamental that courts are open…
>
> However, it must be remembered that applicants found not guilty by reason of mental impairment (or previously insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection for the community is that persons found not guilty by reason of mental impairment are able to return to the community as useful citizens.

21. Those passages were cited in *XFJ v Director of Public Transport (Occupational and Business Regulation)*,[7] where Macnamara DP (as his Honour then was) considered a case of a person who had been acquitted on the grounds of (what was then called) insanity and sought accreditation to drive a taxi:

> I have already commented upon the irony of the Herald and Weekly Times describing XFJ as an *'insane killer'* on the front page of its largest circulating daily newspaper and contending in the Tribunal that his rehabilitation cannot be prejudiced by the upsurge in publicity based upon the good psychiatric health which he has kept for many years. The sensationalised reporting of XFJ's application laced with emotive language and replete with inaccuracies, describing him as *'insane'* and as *'a murderer'* has the capacity to set back his rehabilitation by years.

22. In that case a media organisation unsuccessfully sought to remove the pseudonym order protecting XFJ's identity.

23. At the VCAT hearing XFJ was granted accreditation, his identify was protected, and ultimately the Court of Appeal rejected an appeal by the Director of Public Transport on the issue of accreditation in *Director Of Public Transport v XFJ* .[8] In that judgment, Harper JA observed:[9]

> It may be that perceptions of community expectations about, and the need to maintain community confidence in, the taxi driver accreditation system, will be

7 [2009] VCAT 96.
8 (2011) 33 VR 612.
9 Ibid, [83].

> coloured by fear generated by media headlines. Headlines designed to attract the public's interest rather than the public benefit might reasonably be expected to follow the success of the respondent's application. Such headlines, if they occur, will improperly play upon the fear of mental illness and its consequences. But a decision maker's apprehension of misleading headlines should never stand in the way of decisions otherwise properly reached.

24. It is important that the open justice principle is not allowed to become used as a sword by those who would engage in sensationalised reporting and tabloid journalism. It is important that the legal system still provide a shield to those who require it in order to access justice.

25. With regard to children and youthful offenders, the law should also be vigilant to give primacy to their rehabilitation.[10] That is a fundamental principle of our legal system, and any derogation that allows for the identification of child offenders, even in the "worst cases", would constitute a significant erosion that doubtlessly will be further eroded over time.

26. As French CJ observed in *Hogan v Hinch*,[11] "[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest."[12]

27. The Courts have a vital role in protecting and promoting rehabilitation, both in criminal matters such as sentencing, but also in allowing for social reintegration through civil matters, such as licencing and accreditation. While the open justice principle is important, it must be carefully balanced against competing rights, and it is judicial officers who are best placed to conduct that careful balancing exercise in a given case.

28. Thank you for the opportunity to make this submission. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty

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10 *R v Mills* [1998] 4 VR 235.

11 (2011) 243 CLR 506.

12 Ibid, 537 [32].

office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.

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