COURT SERVICES VICTORIA

Court Services Victoria (**CSV**) makes this submission to assist the Victorian Law Reform Commission (**VLRC**) in its consideration of the submission made by the Office of the Victorian Information Commission (**OVIC**) dated 12 December 2024 in response to the VLRC's consultation paper on the safe use of Artificial Intelligence (**AI**) in Victoria's Courts and Tribunals (**Consultation Paper**). Specifically, this submission responds to OVIC's recommendations that:

- section 10 of the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) is repealed;
- a new section be inserted into section 15 of the PDP Act, setting out that courts and tribunals are exempt from the IPPs only where they are acting in their judicial capacity; and
- section 84 is amended to include courts and CSV in the application of Part 4 for the handling of public sector information under the VPDSS,

(collectively referred to as the **OVIC Proposal**).

CSV's function is to provide, or arrange for the provision of, the administrative services and facilities necessary to support the performance of the judicial, quasi-judicial and administrative functions of Victoria's courts and tribunals (collectively referred to as the **Jurisdictions**), and to enable the Judicial College and the Judicial Commission to perform their functions.

Purpose of this submission

For the reasons that follow, CSV submits:

- that the VLRC ought not make any recommendations in accordance with the OVIC Proposal; or
- if the VLRC is considering a recommendation that addresses the OVIC Proposal, then at most the VLRC should recommend that the OVIC Proposal be considered further by Government.

OVIC Proposal outside the scope of the VLRC's terms of reference

While some of the Jurisdictions and CSV each made written submissions to the VLRC in response to the Consultation Paper, the OVIC Proposal raises additional, significant issues that do not appear to be within the scope of the VLRC's present inquiry.

The VLRC's terms of reference do not appear to extend to general changes to privacy policy. Rather, the terms of reference ask the VLRC to, amongst other things, consider 'the benefits and *risks of using AI* in Victoria's courts and tribunals, *including risks relating to … privacy*' (emphasis added).

The OVIC Proposal is not specifically related to the use of AI in the Victorian courts and tribunals. Rather, it seeks to broaden OVIC's regulatory oversight of the courts and tribunals by

repealing the carve out in section 10 of the PDP Act and making related subsequent amendments, all of which do not go to the specific use of AI in the handling of personal information in the Victorian justice system.

Further consideration of all issues is required

In the event the VLRC is of the view that the OVIC Proposal is within scope of the present inquiry, we submit that any consideration of the OVIC Proposal is only undertaken subject to further consideration of the complex issues it raises, including in-depth consultation with each of the Jurisdictions and other relevant stakeholders. The OVIC Proposal has raised issues and proposed amendments to the PDP Act at a very high level. CSV emphasises that point and considers that significant stakeholder consultation would be required to properly engage with the detail of any such proposal.

Any consideration of the OVIC Proposal should be undertaken in the context of a dedicated review of privacy laws that takes into account, amongst other things:

1. the impact it would have on the administration of justice, including open justice;
2. the impact it would have on judicial independence and the doctrine of separation of powers
3. resourcing implications for courts and tribunals; and
4. existing carve outs for courts in privacy legislation in other jurisdictions across Australia.

Section 10

Section 10 of the PDP Act states:

> Nothing in this Act or in any Information Privacy Principle or any data security standard applies in respect of the collection, holding, management, use, disclosure or transfer of information—
>
> (a) in relation to its or the holder's judicial or quasi-judicial functions, by—
> (i) a court or tribunal; or
> (ii) the holder of a judicial or quasi-judicial office or other office pertaining to a court or tribunal in their capacity as the holder of that office; or
> (b) in relation to those matters which relate to the judicial or quasi-judicial functions of the court or tribunal, by—
> (i) a registry or other office of a court or tribunal; or
> (ii) the staff of such a registry or other office in their capacity as members of that staff.

In its current form, section 10 carves out information handling that is 'in relation to' judicial or quasi-judicial functions. It strikes a balance between protecting privacy and information security, judicial independence and enabling the efficient administration of justice in the context of open justice principles. Any change to that balance should only be considered following a detailed privacy review. There are many instances where the PDP Act applies to the courts' handling of personal information, whether using AI or not.

Carve outs in privacy legislation in other jurisdictions

At pages 6-7 of OVIC's submission, OVIC states:

> The privacy laws of other Australian jurisdictions do not have such a broadly worded exemption. For example, section 6 of the *Privacy and Personal Information Protection Act 1998* (NSW) uses narrower wording, and there is no equivalent exemption in the *Privacy Act 1988* (Cth).

The similarity or otherwise of comparable legislation in the abovementioned jurisdictions, and others across Australia, is complex and requires greater analysis and consideration than that provided in OVIC's submission.

We make the following preliminary and non -exhaustive observations:

- section 6(1) of the *Privacy and Personal Information Protection Act 1998* (NSW) states, '*Nothing in this Act affects the manner in which a court or tribunal, or the manner in which the holder of an office relating to a court or tribunal, exercises the court's, or the tribunal's, judicial functions'*. Section 6(3) states, *'Judicial functions of a court or tribunal means such of the functions of the court or tribunal* ***as relate to*** *the hearing or determination of proceedings before it' (emphasis added).* It is not clear that this carve out is any narrower than that in section 10 of the PDP Act.
- schedule 2 Part 2 items 1 and 2 of the *Information Privacy Act 2009* (Qld), which provide that the privacy principles do not apply to '*a court, or the holder of a judicial office or other office connected with a court,* ***in relation*** *to the court's judicial functions' or 'a registry or other office of a court, or the staff of a registry or other office of a court in their official capacity, so far as its or their functions* ***relate to*** *the court's judicial function'* (emphasis added).
- section 5(a) and (b) of the *Information Act 2022* (NT) provides that the Act does not apply to a court in relation to its judicial functions, or (except as expressly provided in Parts 7A and 8) a tribunal in relation to its decision-making functions. Further, section 69 provides that the information privacy principles under the Act do not apply in relation to a proceeding or other matter before a court or tribunal.
- section 7(1) (b) of the *Privacy Act 1988* (Cth) – the Act only applies to acts done and practices engaged in by federal *courts in respect of a matter of an administrative nature*. The Act does not define 'a matter of an administrative nature'. We note that in administrative law, it has been held that the expression 'decision of an administrative character' is 'incapable of precise definition' and is to be 'determined progressively in each case as particular questions arise'.[1] The Federal Court's Privacy Policy provides guidance on the application of the Privacy Act to documents and information the Court holds for administrative purposes.

[1] Hamblin v Duffy (1981) 34 ALR 333, 338–339

The OVIC Proposal

The OVIC submission states:

> The removal of section 10 and insertion of a new section into section 15 would have the effect of creating a 'functional' approach to the privacy exemption for courts and tribunals, providing an exemption only 'when' a court or tribunal is 'acting in a judicial capacity'
>
> ...
>
> OVIC recommends adopting this functional approach, which differentiates between the functions undertaken by a court or tribunal for its operations where the processing of personal information in a judicial capacity is required (for example, verdicts or decisions and civil and criminal proceedings), and
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> where a court or tribunal is undertaking functions to process personal information outside of its judicial capacity, such as registry officers dealing with personal information.

OVIC further states that:

> "several nations subject to the European Union's General Data Protection Regulation (GDPR) that have an exemption for courts and tribunals limit its application to a 'functional' approach determined by 'when' a court or tribunal is 'acting in their judicial capacity".

OVIC appears to consider that the 'functional approach' as adopted by several nations subject to the European Union's General Data Protection Regulation (**the Regulation**) clearly delineates when a court is 'acting in its judicial capacity' and when it is not. It contemplates a sharp distinction between administrative functions and judicial functions. However, exactly when a court or tribunal is 'acting in their judicial capacity' is not straightforward. One commentator states in the Irish Judicial Studies Journal[2]:

> "As regards the meaning of the phrase 'acting in their judicial capacity', Recital 20 of the Regulation suggests that it should not be limited to 'decision making' activities of courts, in other words, to the adjudication on the respective rights of the parties, which is the essence of the judicial function, but should also encompass all those 'judicial tasks' which may be ancillary to that"

and

> "A broad interpretation of the meaning of 'judicial capacity' to encompass ancillary matters to the exercise of the judicial function seems therefore to be warranted".

Further, we note that the Regulation states that member state law may restrict, by way of legislative measure, the scope of obligations and rights under the Regulation to safeguard, amongst other things, the protection of judicial independence and judicial proceedings[3].

No clear distinction between judicial and administrative functions

In the course of any proceeding before a court or tribunal, personal information may be handled for a range of administrative purposes that are essential for, and integral to, the court or tribunal's judicial or quasi-judicial functions. Whether a function is administrative or judicial will not always be clear cut, and there will be times when the two cannot be easily separated.

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[2] Giacomo Bonetto, 'Data Protection and the Exercise of the Judicial Function in Ireland' [2020] Irish Judicial Studies Journal Vol 4 (2) p 66

[3] Article 23 (1) (f) General Data Protection Regulation

The OVIC Proposal fails to recognise that 'administrative' actions in connection with a judicial function are necessary for the appropriate and effective exercise of that function. Communications with individuals relating to their future availability to attend proceedings (an example given by OVIC), are a routine function in support of the listing of cases for judicial determination. A court cannot exercise its judicial function without a registry dealing with personal information. The ways in which that information needs to be dealt with reflect open justice principles which may, at times, not be compatible with privacy principles.

Implementing the OVIC Proposal would introduce uncertainty. For instance, for each handling of personal information in relation to a proceeding before a court, registry staff would need to consider whether the handling is 'administrative' or 'judicial'. It is far clearer to determine if a handling of personal information *relates to* judicial or quasi-judicial functions, rather than having to determine whether the handling is itself administrative or judicial.

The OVIC Proposal would result in registry staff needing to, among other things, issue collection notices and provide individuals with access to personal information and an opportunity to correct that information, for a significant volume of their work, because either the carve out no longer applies or it is unclear that it applies. This would add to the courts' and tribunal's workload in an already stretched working environment.

The OVIC Proposal raises a number of practical questions, such as:

- Would the proposed narrowed carve out for the courts when acting in a judicial capacity apply when a judicial officer is dealing with administrative matters at a directions or mention hearing? What if court staff dealt with the same administrative matters? Does it matter if those staff are doing so on the instructions of the judicial officer?
- Some of the IPPs could not sensibly be applied if the proposed narrowed carve out for courts is limited to certain aspects of a proceeding. For instance, IPP 4.2 provides 'An organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose'. Under the OVIC Proposal, at the conclusion of proceedings, would courts need to destroy or de-identify emails to parties about their future availability to attend proceedings, but not emails later in the proceeding, such as emails containing orders from the judicial officer?

It is also unclear whether the narrowed carve out for courts as per the OVIC Proposal:

- depends on the identity of the person handling the personal information;
- depends on the stage of proceedings; and/or
- requires individuals to turn their minds to whether each instance of handling of personal information is itself administrative or judicial.

Under the OVIC Proposal, there would be considerable uncertainty as to whether obligations in the PDP Act apply in any given circumstance. This would lead to court staff spending significant amounts of time assessing the potential application of the PDP Act, causing delays in the management of proceedings. Alternatively, court staff may assume the narrowed carve out does not apply and take a more restrictive approach to the handling of personal information than is warranted, impacting open justice principles.

Another potential impact on open justice would be that court media officers would potentially no longer be able to provide information to media outlets to promote accurate and timely reporting of proceedings.

Alternative approaches

CSV would caution against contemplating any technology-specific amendments to privacy law that sought to create a differential PDP Act application and OVIC oversight of AI applications within Victorian Courts. AI use in relation to purely administrative functions are already subject to the PDP Act and OVIC oversight. A technology-specific approach would be a significant shift in privacy policy, would require substantial stakeholder consultation and would be difficult to operationalise in practice.

Health Information

The *Health Records Act 2001* (Vic) (**HR Act**) is administered by the Health Complaints Commissioner and regulates the collection, use, disclosure and disposal of health information, as defined in the HR Act, similarly to the way the PDP Act regulates personal information. The HR Act sets out the Health Privacy Principles, which are in substantially the same terms as the IPPs. Relevantly, the HR Act includes, in section 14, a carve out in relation to courts and tribunals in functionally identical terms to section 10 of the PDP Act.

The OVIC Proposal does not address the HR Act or the carve out in section 14 of that Act. If the OVIC Proposal were to be effected as proposed, it would result in an incongruous set of privacy laws with inconsistent application to courts and tribunals depending on whether the personal information in question was "health information" as defined in the HR Act, or "personal information" under the PDP Act.

Any proper consideration of recommendations regarding proposed amendments to and/or repeal of section 10 of the PDP Act would need to include examination of section 14 of the HR Act and further consultation with relevant stakeholders, including the Health Complaints Commissioner.

Court Services Victoria
23 May 2025