



## DISCUSSION PAPER – SECTION 194K EVIDENCE ACT 2001 (TAS)

10 MAY 2019

This submission is provided by Australia’s Right to Know (ARTK) coalition of media companies. Members of ARTK are AAP, ABC, Australian Subscription Television and Radio Association (ASTRA), Bauer Media, Commercial Radio Australia (CRA) – representing Australia’s commercial radio broadcasters, Community Broadcasting Association of Australia (CBAA) – representing community radio and TV, Free TV – representing all of Australia’s commercial free-to-air TV networks, Guardian Australia, HT&E, Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine, SBS and The West Australian.

We welcome the opportunity to make a submission to the Tasmanian Department of Justice Discussion Paper (the Discussion Paper) regarding section 194K of the *Evidence Act 2001* (the Act).

Section 194K prohibits the identification of victims of sexual offences, and any witness or intended witness in sexual offence proceedings other than the defendant, including when each of those persons is an adult at the time of publication and consents to being identified.

We have researched these matters fully, and recommend amending section 194K of the *Evidence Act 2001* to provide adult victims the right to consent to being identified if they if they wish, without requiring a court order. We also recommend that s 194K(1)(a)(iii) be repealed. Our detailed reasoning follows.

### IDENTIFICATION OF COMPLAINANTS IN SEXUAL OFFENCE PROCEEDINGS

#### Tasmania is out of step with other jurisdictions

The prohibition on identifying victims of sexual offences in the absence of a court order is out of step with the majority of states and territory jurisdictions in Australia. New South Wales, Victoria, South Australia, Western Australia and Australian Capital Territory allow for identification with the victim’s consent, with each state applying varying age parameters on consent.<sup>1</sup>

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<sup>1</sup> The ACT and Victoria allow for identification with the victim’s consent (*Evidence (Miscellaneous Provisions) Act 1991* (ACT), s. 40 and *Judicial Proceedings Reports Act 1958* (VIC), s.4). In NSW the victim must consent and be at least 14

We recommend that Tasmania join the majority of jurisdictions by permitting the identification of victims who are adults at the time of publication and who want to be identified. We believe that adult victims should have the right to consent to being identified if they wish, without requiring a court order.

Such an approach was reported in the 2013 Tasmania Law Reform Institute Report into Protecting the Anonymity of Victims of Sexual Crimes<sup>2</sup>. The Report says:

*[Protective provisions] reflect the notion that victims of sexual assaults are stigmatised by the community and that the complainant is entitled to be shielded from such so-called odium. But there is a compelling argument that the existence of the stigma – because of historical community prejudice against sexual assault victims based on notions of victim blaming – is the problem that needs to be addressed. Arguably, when the complainant consents, there is a strong public interest in publishing their identity as it may help to overcome the shame that seems to attach to sexual assault complainants. Of those respondents to [the Issues Paper] who addressed this question, most were in favour of permitting publication with the victim's consent. As an example, Women's Legal Service Tasmania stated:*

*'Victims have no need to be ashamed and should not be kept hidden if this is not their wish. In our practice, many victims of sexual crime feel a strong need to have their story heard, and for others to know what has happened to them.'*<sup>3</sup>

The Report goes on to cite the NSW case of *R v Ali*<sup>4</sup> which concerned the sexual assault of 18 year old Jessica Loiterton. A taxi driver attacked Ms Loiterton after a night out with friends. The driver – who turned off the car's security camera before sexually assaulting Ms Loiterton twice – was subsequently sentenced to at least eight years in prison. At the start of the trial, Brennan J made orders prohibiting Ms Loiterton from being identified. However, upon the verdict being delivered, *The Daily Telegraph* – with Ms Loiterton's consent – applied for that order to be lifted.

In revoking the order Brennan J noted<sup>5</sup>:

*There is a public interest in overcoming what seems to have been the community attitude for many years that victims of sexual assault should be ashamed. That is not the case at all. Although I have not heard submissions on sentence yet I anticipate that when I do sentence the offender I will be making some comment concerning the complete lack of blame which should be attributed to Ms Loiterton and her friends. Victims of robberies are not ashamed, victims of frauds may be embarrassed that they have been duped but their names are still published. Why should a person in Ms Loiterton's position, entirely blameless who has been preyed upon by a taxi driver, feel embarrassed at what happened to her.*

*There is a public interest in overcoming what remains of community attitudes which suggest that people in Ms Loiterton's position should be ashamed. I am satisfied that far from this being a case where publication is not in the public interest I make a positive finding that it is in the public interest for a victim of sexual assault who consents to her name being published having her name being*

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years of age (*Crimes Act 1900*(NSW), s. 578A. In South Australia and Western Australia the victim must consent and be at least 18 years of age (*Evidence Act 1929* (SA), s. 71A and *Evidence Act 1906* (WA), s. 36C).

<sup>2</sup> [http://www.utas.edu.au/\\_data/assets/pdf\\_file/0005/461768/S194k\\_Final\\_05\\_A4.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf) .

<sup>3</sup> *Ibid.* p 22.

<sup>4</sup> [2008] NSWDC 318 [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWDC/2008/318.html?stem=0&synonyms=0&query=title\(%222008%20NSWDC%20318%22\)&sm\\_au\\_=-iVV2Tq34jHqD1Njk](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWDC/2008/318.html?stem=0&synonyms=0&query=title(%222008%20NSWDC%20318%22)&sm_au_=-iVV2Tq34jHqD1Njk) .

<sup>5</sup> at [6]-[7].

*published. Ms Loiterton should not, by implication, be forced to hide away, embarrassed about what has happened to her. She is entitled to hold her head up high and identify herself as a blameless victim of sexual assault.*

As a result, a number of reports appeared in the media identifying Ms Loiterton which gave wide coverage to the issue of sexual assault and not only encouraged other victims to come forward but also a series of law reforms aimed at making court proceedings less onerous on sexual assault victims (a selection of those reports is at **Appendix A**). Similar reports have also been published in relation to Tegan Wagner and Malika Maddox (also attached at **Appendix B**).

The fact that choosing to be identified remains the exception rather than the rule necessarily indicates that sexual assault victims do not feel unduly pressured to identify themselves.

### Research

Research continues to show that sexual violence goes unreported in a significant number of cases. Jenny Mouzos and Toni Makkai found<sup>6</sup> that:

- Only one in ten victims of physical and/or sexual violence by current spouses and one in five victims of physical and/or sexual violence by boyfriends regarded the incident as a crime; and
- Very few of the women surveyed who experienced physical and/or sexual violence had sought assistance from a specialised agency and few had reported the most recent incident to police: *'almost half of the women who did not report the incident thought that it was too minor to involve the police or judicial authorities.'*

The ability of the media to put a face to surviving and overcoming sexual violence will encourage other victims who might not otherwise have had the courage to do so to come forward and report their abuse.

### #LetHerSpeak /#LetMeSpeak

We cannot make this submission without referencing the #LetHerSpeak campaign that has drawn attention to the issues arising from the prohibition on identification posed by section 194K. The campaign has included stories by and about sexual assault victims who are able to be identified as the assaults occurred in other states, and the important role putting their name to their stories had on healing and defying out-of-date perceptions of the crime. The campaign has also included stories about sexual assault victims who want to be identified but cannot be due to Tasmania's law.

Below are examples of stories in that campaign.

news.com.au, 15 April 2019, [Gang rape survivor's surprise donation from the attacker's cousin](#)

news.com.au, 8 April 2019, ['He had pure evil in his eyes': Schoolgirl's gang rape horror story finally revealed](#)

The Mercury, 8 April 2019, [Talking Point – The survivor should make the call](#)

The Mercury, 7 April 2019, *'My story to tell, on my terms' & 'Survivor's call: It's time to change the law'* (attached at **Appendix C**)

The Mercury, 16 November 2018, [Let Her Speak: A flawed law gagging rape and sexual assault victims to be reviewed](#)

news.com.au, 8 November 2018, [Let her speak: Nina Funnell on ridiculous law that needs to be changed](#)

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<sup>6</sup> ["Women's Experiences of Male Violence Findings from the Australian Component of the International Violence Against Women Survey"](#) (IVAWS) at pp 4-5.

It is important to also note that #LetHerSpeak / #LetMeSpeak uses ‘survivor’ not ‘victim’. This submission uses ‘victim’ in this section for consistency with other sections in this submission.

#### ABC Four Corners program, *I Am That Girl*

In the recent ABC Four Corners program, *I Am That Girl*, 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.

#### Identification of sexual assault victims has occurred in Tasmania

Lastly, we note that the identification of sexual assault victims is not unheard of in Tasmania:

- In *Re Evidence Act 2001, s194K and an Application by the ABC and Davies Brothers Limited*<sup>7</sup>, Steven John Fisher supported the ABC and *The Mercury’s* application to identify him noting that he had been interviewed ‘on many occasions and says that the fact that he has been able to speak publicly about this matter has helped his healing process’. Mr Fisher was also keen to encourage other victims to come forward and was mindful of the fact that naming him would ‘lead to a greater understanding and compassion by the general public for the victims of the crimes specified in s194K’<sup>8</sup>; and
- In *Re an Application by the Australian Broadcasting Corporation pursuant to section 194K of the Evidence Act 2001*<sup>9</sup>, the application concerned a victim of sexual offences who had since committed suicide and was brought by the ABC with the consent of the victim’s mother. As put so eloquently in her supporting affidavit (at [4]):

*[3] I wish to speak publicly on ABC television and radio about the traumatic effect of the accused [sic] conduct towards my son. I believe that by discussing these matters publicly that this will assist me in the healing process and further assist others in the community who may have been the subject of sexual assault particularly by members of the clergy.  
[4] I further believe that if I am permitted to speak publicly and to identify my son that others...may be minded to come forward and make the [proper] and appropriate complaints of sexual misconduct.*

In granting the orders sought and permitting Brett Andrew Skipper to be identified, Slicer J notes that part of his reasoning was “*The public interest is best served by open discussion of issues which are of concern to the community and facilitate a rational discourse and understanding of a complex social issue*” (at [8]).

The fact that there are only two reported judgments on such applications demonstrates that the media has adopted a responsible approach and not sought to identify every sexual assault victim in every case before the courts: a practice that is unlikely to change.

It is also important to acknowledge that in making this recommendation, we are also mindful of the decision *R v Age Company Limited*<sup>10</sup>. Should the proposed amendment be enacted, we would take care particularly in

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<sup>7</sup> [2003] TASSC 118.

<sup>8</sup> *Ibid.* (at [5]-[6]).

<sup>9</sup> [2005] TASSC 41.

<sup>10</sup> [2000] TASSC 62.

cases where identifying one sexual assault victim could potentially identify others, and would abide by the law by not identifying a victim who does not consent. It is also important to note, that the mere fact of one victim consenting to being identified would not allow a publisher to identify all other people in the same matter covered by s 194K(1).

**RECOMMENDATION** – We recommend that section 194K of the *Evidence Act 2001* be amended. We suggest that this could occur by inserting the following after section 194K(1A) of the Act:

*(1B) Subsection (1) does not apply to any publication made with the consent of the person (including a witness) being a person who is aged 18 years or over at the time of publication.*

## IDENTIFICATION OF WITNESSES IN SEXUAL OFFENCE PROCEEDINGS

We also recommend that s 194K(1)(a)(iii) be repealed. The section provides:

- (1) A person, in relation to any proceedings in any court, must not, without a court order, publish or cause to be published in any newspaper, journal, periodical or document or in any broadcast by means of wireless, telegraphy or television –*
- (a) the name, address, or any other reference or allusion likely to lead to the identification, of –*
- ...
- (iii) any witness or intended witness, other than the defendant, in those proceedings; or*
- (b) any picture purporting to be a picture of any of those persons.*

We submit that the prohibition on identifying all witnesses and intended witnesses (other than the defendant) in sexual offence proceedings is a step too far, and is vague and difficult for media publishers to interpret.

There is a wide range of possible witnesses that could be required to give evidence at a trial for a sexual offence. These include police officers, medical professionals, friends of the complainant, friends of the defendant, or possible eye witnesses to the offence. It is difficult to see why witnesses in these categories ought to be treated in any way differently from witnesses who give evidence in other criminal proceedings in Tasmania. To the extent that identification of a witness could identify the complainant, then that is already covered by s 194K(1)(a)(i) and (ii).

The provisions of s 194K prohibiting identification of victims and witnesses in sexual offence proceedings were first introduced in Tasmania via amendment to section 103AB of the *Evidence Act 1910*. The provisions were part of the *Evidence Amendment Bill 1987* and were the subject of considerable discussion in committee in the Legislative Council.<sup>11</sup> Even then, concerns were expressed that the provision went beyond what was reasonable.

Donald Wing, Member of the Legislative Council, highlighted the broadness of the previous version of the s 194K(1)(a)(iii), and questioned its necessity:

*“I would like to ask ... why there is protection for any witness or intended witness in any such proceedings. I can understand the desirability and importance of protecting the identity of the actual victim but this goes far beyond that... As I interpret it, that means all witnesses, even police officers*

<sup>11</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 29 July 1987, 1733–1739, accessible at <http://www.parliament.tas.gov.au/HansardArchive/isysquery/40d66dd3-ba0a-42c5-a2c7-1a84c594b7dd/1/doc/C19870729.pdf#xml=http://www.parliament.tas.gov.au/HansardArchive/isysquery/40d66dd3-ba0a-42c5-a2c7-1a84c594b7dd/1/hilite/>

who have conducted interviews with the accused person, would be covered by that. If I am correct in my interpretation I am surprised that this prohibition extends to those areas...

"It seems to me that this is going too far when it provides that even the name of the police officer, for example, who is conducting the inquiries cannot be published under threat of penalty and dire consequences to the media representatives who might publish that name. I think there ought to be some limit and this seems to me to go far beyond the bounds of reasonableness..."

"I believe it is gilding the lily and going beyond the bounds of reasonableness to extend this to any witness or any intended witnesses in such proceedings, without any qualification or limitation whatsoever. I do not see the reasonableness or the necessity of that."<sup>12</sup>

With respect, we agree with Mr Wing's observations.

Additionally, it is also difficult for media organisations to know who is an "intended witness", and when a person becomes an "intended witness". For example, if police were to charge a person over an alleged sexual assault which occurred in public, in view of bystanders, would the media fall afoul of s 194K(1)(a)(iii) by speaking to and identifying those bystanders in a broadcast or report? It is difficult to know. Breach of s 194K is treated as contempt in the face of the court, and attracts the serious penalties for contempt, including conviction, imprisonment and significant fines. The provisions leading to such significant sanctions ought to be clear and unambiguous. Section 194(1)(a)(iii) is not.

**RECOMMENDATION** – We recommend that section 194K(1)(a)(iii) of the *Evidence Act 2001* be repealed.

We look forward to discussing this important matter as appropriate.

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<sup>12</sup> Tasmania, *Parliamentary Debates*, Legislative Council, 29 July 1987, 1736–1737 (Donald Wing).