23 August 2019

The Hon Vickie Chapman MP
Attorney-General
Parliament House
ADELAIDE SA 5000

By email: attorneygeneral@sa.gov.au, madeleine.church@sa.gov.au

Dear Attorney-General,

Australia's Right to Know (ARTK) coalition of media companies writes to support your announcement of 26 June 2019 regarding the removal of the automatic publication restrictions pertaining to sexual offence cases currently prescribed by section 71A of the *Evidence Act 1929* (SA) (**the Act**).

South Australians have a right to know what is happening in their communities. Defendants charged with sex offences in South Australia should not enjoy special treatment and enjoy automatic anonymity any longer.

Specifically, we recommend the repeal of all of section 71A with the exception of subsection (4) which should remain. Section 71A appears in its entirety at Appendix A to this correspondence.

Further, we urge the South Australian Government to action this matter in a timely fashion. There are no justifications for delaying the progress of this change occurring. We urge the Government to take action to pass such an amendment in calendar 2019.

We make these recommendations on the basis of the following:

Section 71A automatically gags reporting about sex offences

Setting aside subsection 71A(4), section 71A broadly prohibits the reporting of:

1. Evidence given in proceedings against a person charged with a sexual offence including any report on such proceedings and evidence given in any related proceeding; and

2. Material which either identifies a person accused of a sexual offence or from which his (or her) identity might reasonably be inferred.

These prohibitions lapse upon the accused either pleading guilty or being committed to stand trial (**the relevant date**). While both of the above matters can be reported before the relevant date with the consent of the accused person, ARTK is not aware of any defendant ever having given consent.

Such protection is not afforded to any other accused in South Australia. Rather, all other individuals charged with an offence are subject to the usual process which is reporting is permitted unless an application for a suppression order or non-publication order is granted.

The law is anachronistic and out-of-date

This section of the Act is undeniably anachronistic and South Australians should rightly be puzzled as to why an automatic restriction on publishing the identity and details of sex offence cases applies in 2019.

As we understand it, the genesis of this provision arose in the mid-1970s, when the attitudes of Australian society were quite different to today and when the public's access to new was limited to newspapers, radio and the nightly television news.

While it was written in 2011, ARTK notes the Law Society of South Australia submission to the 2011 review which recommended that section 71A remain unchanged) notes what ARTK submits is the primary justification for maintaining the section: "*anecdotally* [sexual offences] *are more liable to false reporting than any other type of offence*". In other words, woman – who statistically comprise the majority of sexual offence victims – and children lie.

Repeal was previously recommended

In July 2011 the then-Government nominated the Hon Brian Martin AO QC to undertake a review of section 71A. That review was finalised completed and recommended repealing the provisions.

ARTK does not have a copy of the final report. In fact it seems the final report was not made publicly available by the then-Government.

We therefore refer to the Hansard record of the Hon Stephen Wade on 18 October 2012, where he notes that the primary recommendation of the Martin Report was to repeal the automatic gag.

Unfortunately, the then-Government opted to maintain protection for sex offence cases and keep names and details secret, to the detriment of South Australia's right to know. We also note the then-Government merely added to section 71A with a provision for an interested party to apply to the court to lift the automatic suppression order.

According to a 26 June 2019 report by *The Advertiser*[1], "SA Government moves to abolish automatic anonymity for alleged sex offenders — but victim protections will remain in place", on only one occasion has a court granted the automatic suppression order be overturned, being in the child exploitation case of former Member of the South Australian Parliament, Bernard Finnigan.

The Advertiser also included a list of "Who the laws hid", a non-exhaustive list of sex offenders in South Australia:

- Roman Heinze's identity was kept secret for 457 days. Heinze kidnapped two backpackers and subjected them to a horrifying ordeal on an isolated stretch of beach at Salt Creek. Because he had sexually assaulted one of the women, section 71A automatically suppressed his identity and once he was committed to stand trial, his lawyers successfully applied to have that gag kept in place until he was

[1] https://www.adelaidenow.com.au/news/south-australia/sa-government-moves-to-abolish-automatic-anonymity-for-alleged-sex-offenders-but-victim-protections-will-remain-in-place/news-story/852f8ebec416923d36e1c7a6344af2f6

convicted. As he was previously unknown to his two victims there was nothing about his identity which had any inherent capacity to identity either of the women.

- Gene Bristow's identity was kept secret for 298 days. Bristow imprisoned and sexually assaulted an overseas backpacker who accepted his offer of employment. She escaped and he was arrested, triggering both section 71A and resulting in suppression orders banning the publication of any photos of his Meningie property. His identity was revealed when he pleaded guilty and was jailed for 18 years.

SA is out of step with other Australian jurisdictions

Section 71A is out of step with New South Wales, Victoria, Western Australia, Tasmania and the ACT regarding this law.

There have been no ill-effects of the ability to publish the names of those charged with sex offences or the evidence disclosed in open court proceedings prior to committal in those jurisdictions. To the contrary, as Australian society has taken a more open and honest approach to talking about and tackling sexual and domestic violence, it is widely reported in research and by survivors that fulsome publication and broadcast of details about sexual offence prosecutions are powerful tools in educating and tackling these society-wide issues.

We also note that while we recommend the repeal of all of section 71A except subsection (4), it would remain open to a sex offence defendant to apply for a suppression order pursuant to section 69 of the Act in relation to his (or her) name and/or the evidence in the proceedings. Further, the parties to the proceedings are amongst those entitled to make submissions in relation to any suppression order application pursuant to section 69(5) of the Act. The court can then exercise the usual process of deciding whether or not to grant a suppression order and in what terms.

We also note that the risk of identifying the victim/s in such circumstances is very low. In the case of news reporting this is managed in the usual course of reporting and, as we have expressed above, has not been an issue in other jurisdictions that have had this process for some time. Nor is ARTK aware of it ever being problematic to the reporting of South Australian cases after the relevant date.

Unjustifiable protection for sex offence defendants

The combination of the above would justifiably prompt South Australians to wonder what type of society they live in when sex offence defendants enjoy a protection from being identified which is not extended to any other person or class of person charged with a criminal offence.

This should not continue and we urge the South Australian Liberal Government to make good its long-held commitment to make this important change to deliver a consistent approach and process for the issuing of suppression orders.

SA: the secret state

Lastly, it is important to raise here that South Australia's reputation as the secret state continues. As at 16 August 2019, South Australia had issued 99 suppression orders since 1 January 2019 ahead of all states and territories and Federal jurisdictions (including just pipping NSW), only beaten to first place by Victoria. This is consistent with previous years: in 2018 SA issued 179 suppression orders, NSW 185 and Victoria 443; while in 2017 SA issued 179, NSW 181 and Victoria 444. This demonstrates a disproportionate per capita rate of suppression orders being made in South Australia compared to other states. This is not a record South Australia should be proud of holding, nor seek to continue.

As is clear from our correspondence, there are strong societal and policy reasons to remove the automatic suppressions on publication in sex offence cases. As is the case in other jurisdictions, this can be achieved without adverse consequences and victims will continue to be protected by existing law.

We look forward to working with the South Australian Government to achieve this sensible outcome.

Kind regards

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition of media organisations

APPENDIX A Section 71A of the *Evidence Act 1929 (SA)*

Division 3—Sexual cases

71A—Restriction on reporting on sexual offences

(1) Subject to this section, a person must not, before the relevant date, publish—

(a) any evidence given in proceedings against a person charged with a sexual offence (whether the evidence is given in the course of proceedings for a summary or minor indictable offence or in committal proceedings for an indictable offence); or

(b) any report on such proceedings; or

(c) any evidence given in, or report of, related proceedings in which the accused person is involved after the accused person is charged but before the relevant date,

unless the accused person consents to the publication.

Maximum penalty:

(a) in the case of a natural person—$10 000;

(b) in the case of a body corporate—$120 000.

(2) Subject to this section, a person must not, before the relevant date, publish any statement or representation—

(a) by which the identity of a person who has been, or is about to be, charged with a sexual offence is revealed; or

(b) from which the identity of a person who has been, or is about to be, charged with a sexual offence, might reasonably be inferred,

unless the accused person consents to the publication.

Maximum penalty:

(a) in the case of a natural person—$10 000;

(b) in the case of a body corporate—$120 000.

(3) If an accused person has not consented to the publication of material under subsection (1) or (2), the court may, on application, make an order (a ***publication order***) that the restriction on publication under the relevant subsection be varied or removed altogether, if satisfied that to do so—

(a) may assist in the investigation of an offence; or

(b) is otherwise in the public interest.

(3a) A publication order may be subject to such exceptions and conditions as the court thinks fit and specifies in the order.

(3b) An application for a publication order may be made, with the permission of the court, by any person who has, in the opinion of the court, a proper interest in the question of whether an order should be made.

(3c) If the court permits an application for a publication order to be made, any of the following persons may make submissions to the court on the application and, with the permission of the court, call or give evidence in support of those submissions:

(a) the applicant for the publication order;

(b) a party to the proceedings in which the order is sought;

(c) a representative of a newspaper or a radio or television station;

(d) any other person who has, in the opinion of the court, a proper interest in the question of whether an order should be made.

(3d) A publication order may be varied or revoked by the court by which it was made, on the application of any of the persons entitled to make submissions by virtue of subsection (3c).

(3e) On an application for the making, variation or revocation of a publication order—

(a) a matter of fact is sufficiently proved if proved on the balance of probabilities; and

(b) if there appears to be no serious dispute as to a particular matter of fact, the court (having regard to the desirability of dealing expeditiously with the application) may—

(i) dispense with the taking of evidence on that matter; and

(ii) accept the relevant fact as proved.

(4) A person must not publish any statement or representation—

(a) by which the identity of a person alleged in any legal proceedings to be the victim of a sexual offence is revealed; or

(b) from which the identity of a person alleged in any legal proceedings to be the victim of a sexual offence might reasonably be inferred,

unless the judge authorises, or the alleged victim consents to, the publication (but no such authorisation or consent can be given where the alleged victim is a child).

Maximum penalty:

(a) in the case of a natural person—$10 000;

(b) in the case of a body corporate—$120 000.

(5) In this section—

relevant date means—

(aa) in relation to a charge of a major indictable offence for which the Magistrates Court is to determine and impose sentence—the date on which a plea of guilty is entered by the accused person; or

(a) in relation to a charge of any other major indictable offence or a charge of a minor indictable offence for which the accused person has elected to be tried by a superior court—the date on which the accused person is committed for trial or sentence; or

(b) in relation to a charge of any other minor indictable offence or a charge of a summary offence—the date on which a plea of guilty is entered by the accused person or the date on which the accused person is found guilty following a trial; or

(c) in any case—the date on which the charge is dismissed or the proceedings lapse by reason of the death of the accused person, for want of prosecution, or for any other reason.