CCYP
Commissioner for Children and Young People Tasmania

Our Ref: 816

17 May 2019

Secretary
Department of Justice
Office of the Secretary
GPO Box 825
HOBART TAS 7001

By email to: legislation.development@justice.tas.gov.au

Dear Secretary

Re: Consultation on section 194K *Evidence Act 2001*

Thank you for the opportunity to provide feedback in response to the *Discussion Paper: Section 194K of the Evidence Act 2001* (the Discussion Paper).

The Discussion Paper seeks to promote discussion about whether section 194K strikes the proper balance between protecting complainants in sexual offence proceedings and the public interest in open justice.

Role of the Commissioner for Children and Young People

The statutory office of Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions, which are set out in section 8(1) of the CCYP Act, include:

- advocating for all children and young people in the State generally;
- researching, investigating and influencing policy development into matters relating to children and young people generally;
- promoting, monitoring and reviewing the wellbeing of children and young people generally;
- promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives; and

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- assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.

In performing these and other functions under the CCYP Act, the Commissioner is required to do so according to the principle that **the wellbeing and best interests of children and young people are paramount** and must observe any relevant provisions of the United Nations *Convention on the Rights of the Child* (CRC).[1]

The Commissioner is required to give special regard to the needs of children and young people who are vulnerable or disadvantaged for any reason. The Commissioner's work must also be performed according to the principle that the views of children on all matters affecting them should be given serious consideration and taken into account and that children are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.[2]

The Commissioner may make recommendations in respect of the effects of any legislation, proposed legislation, documents, government policies, or practices or procedures, or other matters relating to the wellbeing of children and young people.[3]

Background

As the Discussion Paper notes, section 194K of the *Evidence Act 2001* (the Act) prohibits the publication of certain identifying particulars in sexual offence proceedings without the order of a Court. This provision is intended to help protect the anonymity of complainants in such proceedings. A person who publishes or causes to be published anything in contravention of section 194K of the Act may commit contempt and be liable to punishment for that contempt.

I note that laws provide for protections against publication of the identity of sexual assault complainants in all Australian states and territories.

In 2012-13, the Tasmania Law Reform Commission (the TLRI) reviewed the operation of s194K of the Act to examine the '*adequacy of the law in achieving the objective of affording the appropriate protection to victims of sexual assault*' and the extent to which the law strikes the '*appropriate balance between protecting victims of sexual assault and the paramount public interest in open justice*'.[4]

The TLRI concluded at 4.2.19 of its Final Report, '*that the current formulation of s194K presents interpretive difficulties and may not afford appropriate protection to vulnerable victims of sexual offences*' (including children).

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[1] CCYP Act, s3(1).
[2] CCYP Act, s3(2).
[3] CCYP Act, s11(2)(d).
[4] Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes - Final Report No 19*, November 2013, v, https://www.utas.edu.au/__data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf

In the context of that review, the TLRI also considered the views of victims who may wish to speak out publicly about their experience, and who do not wish to maintain anonymity. The TLRI considered the law in other Australian jurisdictions including New South Wales, Victoria and South Australia which permit publication of identifying information with the consent of the victim, a situation which is not permitted in Tasmania.

The TLRI noted the importance of making '*provision for consent [to publication] by victims in light of the strong autonomy and public interest arguments identified*' in submissions made to the review. It recommended that, with the leave of the Court, publication of details that identify a victim should be permitted if, prior to the publication, the victim has attained the age of 18 and had provided informed consent.

The TLRI made eight recommendations to reform the law which I discuss in the context of my comments below.

Relevant provisions of the CRC

A number of principles under the CRC are relevant to the consideration of existing or proposed policy or legislation that has the capacity to affect children or young people who are complainants in sexual offence proceedings. These principles include:

- the best interests of the child shall be a primary consideration in all matters affecting them (Article 3);
- children have the right to freely express their views in all matters that affect them and for their views to be given due weight in accordance with their age and level of maturity (Article 12);
- children have the right to be protected from all forms of violence, abuse or exploitation, including sexual abuse (Article 19);
- children have the right to have their privacy, honour and reputation protected (Article 16);
- children who are victims of sexual abuse or exploitation have the right to have their physical and psychological recovery promoted, in an environment that fosters their health, self-respect and dignity (Article 39).

Comment

It is important to understand that, consistent with my statutory functions, the views I express below relate to the publication of details which may identify a complainant **aged less than 18 years of age at the time of publication**. I do, however, note that if the law as it applies to adults is amended to allow publication of details with consent, this may have consequences for children and young people aged less than 18 years. Therefore I reserve the right to provide further comment on any proposed changes to the law.

My views are informed by the comprehensive submission (*copy attached*) made by former Commissioner for Children Aileen Ashford to the TLRI review[5] and the findings and recommendations made by the TLRI in its final report.

1. *Should there be strengthened protections for complainants?*

The TLRI found that the law does not currently '*provide appropriate protection to victims of crimes of sexual assault; largely due to the lack of certainty in relation to what information is prohibited by the section and who should be prevented from identifying the complainant*'.[6] It also found that in some cases, it may be appropriate to prohibit the publication of collateral information about the case which, if published, may be likely to cause embarrassment or harm to the complainant.[7]

For the reasons put forward in the TLRI's Final Report, I strongly support the introduction of strengthened legislative safeguards for children and young people who are complainants in sexual assault matters to better ensure their anonymity and to promote their recovery.

Possible areas of reform which have been recommended by the TLRI, and that I would support, include (but are not limited to):

- Clarifying aspects of the law to provide stronger protections for complainants:
  - Including a requirement that, in determining whether material is likely to identify the complainant, the Court should have regard to identification by a reader equipped with knowledge in the public domain.
  - Better explaining the meaning of the phrase 'likely to lead to identification'. The TRLI has recommended that 'likely' be defined to mean 'an appreciable risk, more than a fanciful risk.'
  - Ensuring that the terms 'publication' and 'picture' are defined broadly (eg publication on social media).
- Providing discretion for the Court to make an order prohibiting the publication of specific details in a case which may be likely to identify a complainant. This discretion would be in addition to the current prohibition on publication of the name, address, or any other reference or allusion likely to lead to the identification. In effect, this would enable a tailored approach to protecting a complainant's anonymity on a case-by-case basis over and above the general prohibition on publication. A complainant should be informed of their right to make an application for this type of order, and the Court

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[5] Commissioner for Children, *Response to Tasmania Law Reform Institute's Issues Paper No.18 regarding protecting the anonymity of victims of sexual crime*, 10 September 2012, https://www.utas.edu.au/__data/assets/pdf_file/0010/549964/Commissioner-for-Children.PDF

[6] University of Tasmania, Media Release, *New Law Reform report: Protecting the Anonymity of Victims of Sexual Crimes*, 13 December 2013, https://www.utas.edu.au/__data/assets/pdf_file/0006/461994/Protecting-the-anonymity-of-victims-of-sexual-crime-TLRI-release-FR.pdf

[7] Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes - Final Report No 19*, November 2013, v, https://www.utas.edu.au/__data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf

should take account of the views of the child or young person concerned before making the order.

- Providing discretion to the Court to make an order prohibiting the publication of collateral information which may be likely to cause harm, distress, humiliation or embarrassment to the complainant. This discretion would assist to promote the recovery of complaints in child sexual assault cases by protecting their right to be treated with dignity and should take account of the views of the child or young person concerned.

2. *Should publication be permitted with informed consent?*

I note the strong arguments for autonomy that have been made by survivors of sexual assault for reform of s194K to enable them to speak about their experiences publicly, without the requirement to first obtain a court order permitting them to reveal their identity.

As is acknowledged by the Attorney-General and Minister for Justice in her foreword to the Discussion Paper, it is vitally important that appropriate safeguards are in place to ensure that, for example, where one complainant may wish to speak publicly about their experience, that action does not identify or otherwise intrude upon the rights of any other complainants who wish to remain anonymous.

After much consideration, I would have strong reservations about any reform which would allow the consent of a complainant **aged less than 18 years** to be sufficient in and of itself to allow the publication of identifying details.

I would, however, be open to a situation which would enable a mature minor to apply to the Court for leave to provide informed consent to the publication of identifying information which is otherwise prohibited. Consistent with Article 3 of the CRC, protecting and promoting the best interests of the child should be a primary consideration in the Court's determination whether or not to grant such leave. In saying this, I note that there can be no proper application of the best interests test without taking account of the views of child and providing due weight to those views in accordance with the age and maturity of the child.[8] I acknowledge that my position differs from that recommended by the TLRI in that the TLRI recommended such applications to the Court for leave to publish details could only be made by a victim who has attained the age of 18 years (see Recommendation 4 of the TLRI).

Any contemplated reform would also need to take very careful account of the possibility that in some cases, there may be other complainants such as younger siblings or school friends whose rights and wellbeing may be affected by the publication and who do not wish to waive their anonymity or are not sufficiently mature to express a view.

[8] UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 11.

Thank you again for the opportunity to provide comment on this important issue. I look forward to contributing to further discussions regarding any contemplated legislative reform which may affect the rights and wellbeing of children and young people who are complainants in sexual offence proceedings. I would appreciate the opportunity to provide comment on any draft Bill proposing amendments to this area of the law.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc *Hon Elise Archer, Attorney General, Minister for Justice*
cc *Hon Roger Jaensch MP, Minister for Human Services*

Attachment: September 2012 Submission by Commissioner Ashford to the Tasmania Law Reform Institute

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Your Ref:
Our Ref:

Dr Helen Cockburn
Executive Officer
Tasmania Law Reform Institute
Faculty of Law
University of Tasmania
Private Bag 89
Hobart TAS 7001

10 September 2012

Dear Dr Cockburn,

Re: Response to Tasmania Law Reform Institute's Issues Paper No. 18 regarding protecting the anonymity of victims of sexual crimes

Thank you for the opportunity to respond to the matters discussed in your 18th Issues Paper - *Protecting the Anonymity of Victims of Sexual Crimes* ('the paper').

As you may be aware, the Commissioner for Children is an independent officer appointed by the Governor of Tasmania pursuant to s78 of the *Children, Young Persons and Their Families Act 1997*. The Commissioner's powers and functions are set out in Part 9 of that Act.

A major focus of my role is to promote the health, welfare, care, protection and development of children and young people [1] and to provide advice to the Minister for Children on policy, practice and services provided to or for children and young people in Tasmania, which may include any laws affecting the wellbeing of children.

The *Convention on the Rights of the Child* (CROC) provides an appropriate framework for analysis of policy and legislative proposals which have the capacity to impact upon the rights and wellbeing of children and young people who are the victims of sexual offences.

A fundamental principle enshrined in CROC is that contained in Article 3, which makes it clear that the best interests of a child are the primary consideration in all actions taken with respect to the child.

[1] Those persons aged below 18 years of age.

Article 3 provides as follows:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Consequently, in all matters affecting children and young people, their ***best interests*** must be a primary consideration. Implicit in this approach is the need to ensure that legislation and policy prioritise the protection of children from harm or the risk of harm wherever practicable, and promote their health and well-being.

A further principle enshrined in CROC is that contained in Article 12, which provides that children should be given the opportunity to express their views and for those views to be given due weight. Article 12 provides that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

States Parties are obliged to uphold this principle even where a child is adjudged not to have full legal capacity.

Article 19 imposes on States Parties the duty to protect the child from all forms of abuse and violence, including sexual abuse and violence. Article 19 provides:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 16 protects the privacy, honour and reputation of the child. It provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

States Parties must ensure their laws protect child victims of sexual crimes from violations of their right to privacy and from attacks on their honour or reputation. Laws can only provide such protection if they are clear and unambiguous.

Article 39 promotes the recovery of child victims including those who are victims of sexual crimes. It provides that:

> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

My comments focus on how s194K of the *Evidence Act 2001* (Tas) might be amended to better protect the rights and interests of children and young people in respect of whom a sexual crime is alleged to have been committed ("child victim(s)") and those of children and young people who are witnesses in those proceedings ("child witness(es)").

It must be acknowledged that in any consideration of this area of law, regard must be had to the need to balance the principle of open justice with the privacy interests of child victims and witnesses, including the need to protect them from avoidable harm or distress, clearly matters that go to" best interests".

Summary of key points

- I am of the strong view that s194K of the *Evidence Act 2001* (Tas), as it currently stands, does not adequately protect the rights and interests of victims and witnesses and in particular those persons who are children. The varying responses to the newspaper article which formed the backdrop to the paper demonstrate that the section is open to widely divergent

interpretations with very different implications for victims and other persons potentially affected by the publication.

- At the very least, the section requires clarification to better explain what is meant by the term "likely to lead to identification". As illustrated by the paper, there are conflicting views about the scope of this phrase. On the one hand, the phrase could be interpreted as meaning the publication itself must be likely to lead to the identification. Alternatively, it could extend to the situation where the published details, combined with prior specific knowledge about the circumstances of the case or other publicly available information are likely to lead to the identification.[2]

  I am of the strong view that the meaning of 'identification' in this section should be given as wide a scope as possible. That is, "likely to lead to identification" should be defined to include (but not necessarily be limited to) identification by:

  i. people with prior knowledge of the complainant or other details of the case; *and*
  ii. general members of the public.

- Further, section 194K should be revised to accommodate changes in technology affecting the publication of information and images. It is important that all types of publication through electronic means such as the internet, including on social media sites, be covered by this provision. Specifically, it may be useful to include broad definitions for the terms "publish" and "picture" as described at p 47 of the paper.

- On balance, I prefer a two-pronged model which incorporates:

  i. a strengthened s 194K; together with

  ii the ability for the Court to make a non-publication order in relation to particular details of the case (not necessarily those likely to lead to identification):
     - to protect the safety of the victim or witness;
     - to avoid causing undue distress or embarrassment to the victim or witness; or
     - where it is otherwise in the public interest that such an order be made.

  The Court should be permitted to make such order on the application of the prosecutor, victim or witness, or on its own motion.

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[2] I understand that contempt proceedings against Davies Brothers Ltd are presently pending in the Supreme Court of Tasmania for an alleged breach of s 194K and that the decision, when ultimately handed down, is likely to contain the first detailed judicial consideration of s194K and is therefore likely to have significant implications for its interpretation.

The victim and witnesses – particularly those under the age of 18 – should be informed by the Court of their right to apply for a non-publication order relating to details other than of an identifying nature.

I favour this model because it would provide more robust protection to victims and witnesses than is presently provided by s194K but, unlike a blanket prohibition on publication of sexual crimes cases, it would not unduly impinge on the notion of open justice.

- s194K currently makes publication of potentially identifying information subject to a Court order. In my view, there is a strong need for the introduction of additional safeguards, when an application for a publication order is made, to protect the rights and interests of victims and witnesses (other than the defendant). This is particularly important where the persons affected by a potential publication order are below the age of 18. Presently, the only express limitation on an order for publication is that it cannot be made unless the Court is satisfied that it is in the public interest for the order to be made. In my opinion, the Court should also seek and consider the views of the complainant/victim before making such a publication order.

  Specifically, in addition to the public interests test, no order should be made in relation to potentially identifying information regarding a child victim unless the Court is satisfied that:

  - where the child is able to form and express views about the application, that his or her views have been sought and taken into account; and
  - it is in the best interests of the child to make the order; and
  - it would not violate the rights or interests of another victim who does not wish for such order to be made, particularly where that person is a child.

  A similar approach might also be taken if the order sought relates to a child witness.

- It is not clear whether the section as currently drafted would permit a victim of any age to make an application for a publication order relating to relevant identifying material. I therefore make no comment on this issue.

- It is my strong view that the consent of a child complainant should not be a defence to publication in the absence of a court order.

Answers to specific questions

I provide specific comments in response to those questions that I consider of particular relevance to my role as Commissioner for Children below.

Question 1.

Should there be no change to s194K of the *Evidence Act 2001* (Tas)?

No.

Section 194K is ambiguous, as shown by the conflicting views surrounding the article that gave rise to the Tasmania Law Reform Institute's project, and consequently requires amendment. As long as there is uncertainty about the interpretation of the section, the rights of victims of sexual crimes are not adequately protected.

This lack of clarity is unacceptable, particularly with respect to child victims of sexual crimes, an especially vulnerable category of victims. In keeping with Article 16 of CROC, in order to protect the privacy, honour and reputation of child victims of sexual crimes the law must be clearer.

Question 2

(a) Should s194K be amended so that the words 'likely to lead to the identification' are defined?

Yes

The words 'likely to lead to the identification' should be defined as they are currently open to very different interpretations by different parties, with very serious implications.

(b) If so, should 'identification' be defined to mean 'identification by persons with prior knowledge of the complainant?

Yes

As indicated above, I am of the strong view that the meaning of 'likely to lead to identification' in this section should be given as wide a scope as possible. The appropriate test in my view is whether publication is likely to lead to identification by persons including those with prior knowledge of the complainant or access to other publically available information.

Section 194K has extremely limited scope if a 'general reader' test is applied. The prohibition on publication is arguably of most relevance to persons already connected to the victim in some way or those who may be motivated to try and piece together various details to identify him or her.

Only the wider 'identification test' would thus adequately protect the privacy of victims. As was noted by Gobbo J in *Bailey v Hinch*[3], "[t]he victim is not merely entitled to protection from the least astute members of the community". This is particularly important in a small community such as Tasmania where, as is highlighted in the paper (p 42), there may be a greater likelihood that significant sections of the community have some knowledge of the parties to a case.

Publication of identifying details has the potential to cause victims of sexual crimes such grave distress that its prevention should prevail over other policy considerations.

(c) Should the term likely be defined?

No comment.

Question 3

Should there be an automatic suppression of all details in sexual assault cases unless there is a court order authorising publication in whole or in part?

No.

Automatic suppression of all details in all cases involving sexual offences impinges too strongly on the principle of open justice. In particular, it is in victims' interests, including child victims, to know that the court process is available to prosecute sex offenders.

Question 4

(a) Do you favour the option of bolstering s194K by empowering the DPP and/or complainant to apply to the court for an order prohibiting publication of any details concerning the case.

As discussed above, I support an approach which couples a more robust s194K with the capacity for the Court to make a non-publication order on the application of the prosecutor, complainant or witness - or on its own motion - in relation to particular aspects of the case.

This two-pronged approach would in my view provide a much higher level of protection than is presently the case without impinging too far on the principle of open justice.

Orders could be aimed at providing extra protection against identification of the victim but could also be aimed at protecting the victim's safety, avoiding undue distress or embarrassment to the victim or could be made where it is otherwise in the public interest and/or the interests of justice.

The Court would therefore be empowered to restrict the nature of the details published depending on the circumstances of the case. With regard to child victims,

[3] [1989] VR 78.

it would appear in the interests of justice that as few details be published as possible.

Utilising this approach, the Court could for example make an order prohibiting the publication of potentially embarrassing and intimate information about a sexually transmitted disease contracted by the victim as a consequence of the crime.

The victim and witnesses – particularly those under the age of 18 – should be informed by the Court of their right to apply for a non-publication order which could provide protections over and above those pursuant to s194K.

Question 5

a) Should Tasmania introduce reform based on the Canadian model?

b) If so, should s194K (perhaps with clarifications) also be retained (as a 'back-up')?

While adoption of the Canadian model is not my preferred option, if it was to be introduced then it is my strong view that s194K (with modifications) should be retained to ensure all victims (and witnesses) are adequately protected, not only those in relation to whom a non-publication order is sought. Without retention of s194K victims and witnesses would potentially be left with fewer protections than is presently the case in Tasmania.

Question 6

a) Do you agree that publication should be permissible when a complainant consents?

b) If there is reform so that consent does make publication permissible –

i) is a new provision based on the WA provision preferable?

ii) should a court order still be necessary before publication?

It is my strong view that where child victims or witnesses are concerned, consent is insufficient to allow publication of identifying information in the absence of a court order. I note that this appears to be the case in South Australia and Western Australia.

Control over the publication of identifying material should ultimately lie with the Court which should have to consider protection of the child's best interests (CROC, Article 3).

In my view, no order should be made regarding the publication of identifying information, irrespective of any claims that the victim granted its consent to a particular publisher, unless the Court, having sought and considered the views of the child, is satisfied:

- it is in the best interests of the child to make the order; and

- it would not violate the rights or interests of another victim who does not wish for such order to be made, particularly where that person is a child.

Question 7

Do you agree with any or all of the above five suggestions regarding terminology in, and scope of, s194K?

I agree with all five suggestions set out in paragraph 5.4.2 of the paper.

In particular, I agree that the definitions of 'publish' and 'picture' need to be revised to accommodate publication on the internet.

Question 9

Do you agree with all or any (and if so, which?) of the suggested procedural reforms?

Of the suggested procedural reforms, I particularly support (i) which deals with the parties entitled to make an application for a publication or non-publication order:

"an order can be made: on the court's own initiative; on the application of a party to the proceedings (that is, the prosecutor or the defendant); and on the application of any other person considered by the court to have a sufficient interest in the making of the order"

I am of the strong view that the right to apply for a publication or non-publication order (as the case may be) must not be extended to persons without a sufficient interest, to be determined by the Court.

Conclusion:

I hope these answers, observations and comments are of assistance.

Yours sincerely,

Aileen Ashford
Commissioner for Children