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Submission in response to Issues Paper No 18 ‘Protecting the Anonymity of Victims of Sexual Crimes’

Please accept this personal submission in response to your issues paper, which I have prepared with research assistance from Bond University students enrolled in my media law and ethics subject. They have been required to read and discuss your report as part of an assignment for that subject and their scholarship and insights have informed the views I express here. I must stress, however, that this is a personal submission as an academic who teaches and researches in the field and my opinions do not necessarily reflect those of my employer, Bond University, or the international media freedom agency Reporters Without Borders, for whom I am the Australian representative.

By way of background, my research, teaching and industry consultancy focus on the interpretation of media law for journalists and other writers who might produce reportage as bloggers, ‘citizen journalists’ or social media users. I am co-author with barrister Mark Polden of *The Journalist’s Guide to Media Law* (4<sup>th</sup> edition, Allen & Unwin, 2011) and am sole author of *Blogging and Tweeting Without Getting Sued – A Global Guide to the Law for Anyone Writing Online* (Allen & Unwin, 2012). I have conducted media law training for Fairfax Media journalists at the Launceston *Examiner* and the Burnie *Advocate* newspapers. Our Centre for Law, Governance and Public Policy convened the national symposium ‘Courts and the Media in the Digital Era’ in 2011, which resulted in our co-edited book *The Courts and the Media – Challenges in the Era of Digital and Social Media* (Keyzer, Johnston and Pearson, Halstead Press, 2012). We are now collaborating with colleagues from other universities on a national research project examining the impact of social media upon the courts.

I have chosen to begin with some general observations about the tone and ambit of your issues paper before proposing a mechanism for reform.

### **Important contextual considerations**

Issues Paper 18 is an excellent summary of comparative legislation and case law on the identification of sex crime victims. It canvasses numerous public policy issues at stake when contemplating a reform of s. 194K. However, it seems to demonstrate little understanding of media organisations' news values and production values and does not acknowledge several important policy developments under way nationally and globally.

#### Journalists' training

The paper offers a handful of examples where such laws have been breached by the news media in Australia, including only one in recent times in Tasmania that has proceeded to court. While we all would prefer there were no media breaches of identification laws, I suggest that court reporters are overwhelmingly aware of, and compliant with, both *sub judice* contempt guidelines and statutory reporting restrictions. This is due mainly to the media law education and training reporters receive in their university journalism degrees and in the workplace. Most media organisations also provide shorthand tuition to their staff and adhere to strict court reporting protocols where cases are followed through the court system and junior reporters 'shadow' experienced colleagues before starting on the round. One of the fundamental topics all court reporters learn is that there are restrictions on the identification of children and sexual assault victims involved in proceedings.

#### News values, open justice and the role of court reporting

Your issues paper devotes a small section to the principle of 'open justice' which quite rightly quotes important jurists and international human rights documents and legislation enshrining it (Part 2.1). Yet, it implies news organisations are motivated primarily by commercial interest when reporting upon the courts. At 4.3.3, your paper states: "Media outlets have an obvious interest in publishing material that will attract readers or viewers. A story that identifies the victim of sexual assault is likely to attract greater consumer interest than one that does not. There is a strong incentive for the media to publish such details." I am aware of no research supporting this assertion and my informed view is that editors, sub-editors and court reporters strive to abide by the legal restrictions and ethical obligations forbidding identification. On rare occasions that determination is tested in the heat of competition for a particularly unusual story or one involving a celebrity – but such occasions have become even less common in the wake of strong national and international scrutiny of such media behaviour. It is, however, a mistake to view this story of this 12-year-old Tasmanian girl prostituted by her mother and the named accused as one of simply the media feeding a public titillation with sordid sexual detail. The story indeed featured the news values of 'unusualness' and sheer 'human interest' – but it also had the important public news value of what we call 'consequence' or 'impact' – many of which concern public policy benefits of the reportage of such matters.

### Public policy benefits of media reportage of sexual and juvenile cases

There is a principle as ancient and as inherent in a democracy as open justice - and that is the role of the news media as the 'Fourth Estate'. Key public policy reviews and reforms have ensued in Tasmania after this incident, and I suggest they might not have garnered the political traction to proceed if the public had been kept ignorant of the matters before the courts. These have included your own review of the defence of 'mistake as to age' and other important reviews of child protection. In short, court reporting by the news media and the public discussion and scrutiny it generates can fulfil many important functions in society beyond sheer entertainment; including deterrence from crime, education about justice, transparency of process, and as a watchdog on injustice and deficient public policy. Closed proceedings – or complex requirements involving media applications to cover certain matters – pose serious risks to such positive public policy outcomes.

### Free expression and freedom of the press

A close relative of the principle of 'open justice' in a democracy is the human right of free expression and its derivative – freedom of the press. Your paper does not mention this principle, but it is crucial to note when comparing reporting restrictions across jurisdictions that Australia is unusual among western democracies in that it has no written constitutional guarantee of free expression or a free media. Each of the foreign jurisdictions your paper uses for comparison on sexual reporting restrictions – the United Kingdom, Canada and New Zealand – features such a guarantee in a charter of rights. Australia and Tasmania have no such statutory or constitutional mechanisms in place, which is an important point of difference because proposed restrictions trigger no formalised process of review on free expression grounds and courts here are not obliged to weigh free expression against other rights in their determinations. (There is, however, an argument that court reporting restrictions might breach the High Court's implied constitutional freedom to communicate on matters of politics and government; see *Nationwide News v. Wills* [1992] HCA 46; (1992) 177 CLR 1).

### Media ethics and regulation

I realise the your document focuses on the narrow question of whether S. 194K should be reformed, but highly relevant is the likelihood of media organisations being motivated to use a perceived legal 'loophole' to identify a vulnerable individual such as a child who has been subjected to sexual abuse. Such a motivation would represent a serious breach of the privacy provisions of the MEAA Journalists' Code of Ethics and all self-regulatory and co-regulatory codes of practice in place throughout print, broadcast, television and online news media industries – including in-house codes, those of the Australian Press Council and the numerous broadcast sector codes ultimately policed by the Australian Communications and Media Authority (ACMA). The question of media adherence to such codes has been the subject of two major inquiries in the form of the Convergence Review and its subsidiary Independent Media Inquiry chaired by former Federal Court justice Ray Finkelstein – the recommendations of which are currently under consideration by the Federal Government. Regardless of whether they are adopted, an impact has been significant attempts by the news media to get their own 'houses in order' to avoid the prospect of strict government regulation of their ethical practices and

complaints systems. The Australian Press Council has implemented significant improvements to its processes. All of this has been against the international backdrop of the UK inquiries into serious ethical and legal breaches by the Murdoch-owned *News of the World* newspaper.

### Privacy regulation and factors impacting media privacy intrusion

Related to this inquiry have been important developments in the area of privacy law and regulation. You would be aware that the Commonwealth Government has already implemented privacy law reforms recommended by the Australian Law Reform Commission Report 108: *For Your Information: Australian Privacy Law and Practice* (<http://www.alrc.gov.au/publications/report-108>). The Gillard Government is reported to be seriously considering a recommendation for a statutory tort of invasion of privacy. Whether or not that is implemented, your own issues paper at p. 14 cites the case of *Doe v. ABC* (2007) VCC 282, where a journalist's identification of a sexual assault victim led to both criminal charges and a civil suit where damages were awarded for the privacy invasion of the victim. Although this was an intermediate court decision, it stands as a precedent in a developing body of judge-made privacy law. Significant too is the ACMA's 2011 review of its privacy guidelines ([http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_410273](http://www.acma.gov.au/WEB/STANDARD/pc=PC_410273)) for broadcasters which included important changes in the way broadcast media should deal with vulnerable interviewees, particularly children. The submission from an ARC Vulnerability Linkage Grant project on which I was a chief investigator seems to have been influential in helping frame these new provisions. (See our submission to that ACMA inquiry at [http://www.acma.gov.au/webwr/assets/main/lib410086/ifc28-2011\\_arc\\_linkage\\_grant.pdf](http://www.acma.gov.au/webwr/assets/main/lib410086/ifc28-2011_arc_linkage_grant.pdf)). In short, my view is that media outlets are working to a higher level of internal, industry and public accountability when dealing with the vulnerable (particularly children) than they were two years ago when this court proceeding was reported.

### The Internet, social media and the Tasmanian jurisdiction

Your issues paper makes some mention of the Internet, primarily with regard to the terminology and scope of s 194K at 5.4.2, but it mentions social media only as a footnote on page 32. My informed opinion, drawing upon research for my most recent book and for our courts and social media project at Bond University's Centre for Law, Governance and Public Policy, is that it would be a grave error to proceed to legislative reform without due consideration of the extraordinary ways in which social media has changed the capacity for ordinary citizens to become publishers about court proceedings. Importantly, this allows for the *exact reverse* situation to occur in a trial to what happened in this case. Instead of the traditional media revealing, albeit indirectly, the identity of a child sexual crime victim to people who might otherwise not know her, social media allows for those who know the victim to reveal her identity to the wider world via their networks of Facebook 'friends' and Twitter 'followers'. Here you are dealing with ordinary citizens who may be completely ignorant of legal restrictions on identifying such victims and may even be relying on second hand information from court proceedings they have not even attended. The reality is that the advent of social media means that no tightening of restrictions such as those found in s.194K will be totally effective in protecting the identity of anyone involved in court proceedings – no matter how compliant journalists from traditional media might be. Web 2.0 means that secrets – particularly interesting ones – will not

often be revealed, and those revealing them might not be identifiable or answerable. It has led to what I describe as a “two-speed” suppression regime in our justice systems – effectively one rule for traditional media and a different rule for citizens using social media who sometimes have an even larger audience than news outlets for their gossip and innuendo. For a recent example of this, see the remarkable situation where the mainstream media was prevented from reporting that the acting police minister faced serious sexual charges under the Evidence Act 1929, s 71A – but his name was all over the Internet and social media (See <http://www.adelaidenow.com.au/news/south-australia/bernard-finnigans-name-was-all-over-the-internet-despite-suppression-order/story-e6frea83-1226480605607> and <http://journalaw.com/2011/05/04/south-australias-antiquated-sex-id-law/> ).

A feature of Internet searches is that Google searches for certain terms group the results, leading to possible identification via a combination of factors across different results, whereas any single publication would not identify a victim. Similarly, an individual’s Facebook page or Twitter profile will list their ‘friends’ or associates, allowing social media to link an unnamed victim with a named accused if they have a close relationship. These factors present a challenge for reform of such legislation. A bizarre aspect of your inquiry is that the Law Reform Institute has in fact repeated the sin of the *Mercury* by itself republishing the name of the accused male offender, his suburb and his relationship to the girl in its own Issues Paper, which appears quite readily in a Google search on the matter. Further, it draws attention by headline to the actual article that has triggered the inquiry, thus facilitating readers to access the very material that identifies the victim. It is sad and ironic that someone who knew the family and those basic facts might well discover the victim’s identity via the Institute’s very own document.

The paper also seems to take a pre-Internet approach to jurisdictional sovereignty, suggesting that Tasmania’s reach might extend beyond its island borders to ‘the entire world’ (4.3.9). While the state might well achieve such reach in the most serious offences via extradition agreements, I suggest it is counter-productive and unrealistic to entertain the notion that a Tasmanian identification prohibition is going to have any real effect on individuals publishing material on the Internet from beyond the State’s borders.

#### Court closure and judicial censorship are a threat to open justice

Completely closing the court in such proceedings would be a draconian and retrograde step, counter to the principle of open justice and damaging to the important public policy outcomes I mentioned earlier in this submission. I understand the detailed mention in the *Mercury* article of the sexually transmitted diseases the girl had contracted was a special concern of those who wanted the DPP to press charges in this matter. Yet there is strong argument that there could be important public policy outcomes from the publication of such graphic details; such as deterring prostitution clients from engaging in unprotected intercourse and the incentive for the numerous clients in this case to seek treatment to prevent their spread through the broader community. A closed court would prevent such public messages being conveyed.

Just as concerning is the censorship regime proposed in Option 3, requiring at 5.2.4 “that the media outlet provide details of what they intend to publish to assist the court in determining whether to grant the order”. The following sentence reads like a dictum from a despotic regime

on the Reporters Without Borders watch list: “The court could then decide whether to allow publication of the whole piece, some parts of the piece or to deny publication altogether”. Such an approach is anathema in a state of a progressive western democracy like Australia. It would breach the ancient rule against ‘prior restraint’ – defended so eloquently by the first Chief Justice of NSW, Sir Francis Forbes against Governor Darling in 1826 (See Spigelman, J., 2002 at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/vwPrint1/SCO\\_speech\\_spigelman\\_201103](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_201103)).

### My suggested mechanism for reform of s. 194K

Rather than debating the pros and cons of the various options foreshadowed in your paper, I will instead propose a workable solution that will minimise the likelihood of the recurrence of the circumstances that occurred in this case. As I suggested above, there is now no watertight legislative or procedural way to be absolutely certain of protecting the anonymity of victims of sexual crimes.

Your paper offered an excellent summary of sexual case reporting restrictions in Australia and in comparable foreign jurisdictions, but seemed to ignore the similar identification laws that apply to the identification of children in proceedings. The case prompting this inquiry involved both a juvenile and a sexual matter, which of course prompts the highest level of caution with identification. Our text, *The Journalist’s Guide to Media Law* (with Mark Polden, Allen & Unwin, 2011) features comparative tables of both juvenile and sexual proceedings reporting restrictions (at pp. 160-162 and pp.156-158 respectively). I feel S 104C of the *NSW Children and Young Persons (Care and Protection) Act 1998* offers a promising solution in the form of a news media privilege to attend proceedings for reporting purposes:

#### **104C Entitlement of media to hear proceedings**

*At any time while the Children’s Court is hearing proceedings with respect to a child or young person, any person who is engaged in preparing a report of the proceedings for dissemination through a public news medium is, unless the Children’s Court otherwise directs, entitled to enter and remain in the place where the proceedings are being heard.*

The news media have traditionally been extended certain privileges in courts as the ‘eyes and the ears’ of the broader citizenry – reserved seating at a press bench, access to court papers, and sometimes even standing to make a submission on a court order (*Evidence Act (SA)* s. 69A(5).) In NSW they are allowed to attend and report upon children’s court proceedings – but are of course expected to comply with identification restrictions. This is sensible, given journalists’ training in media law and court reporting matters and their understanding that it is only a privilege that a judicial officer might choose to withdraw. All this also prompts questions about the role and entitlements of reporters from non-traditional media - bloggers and ‘citizen journalists’ - who might choose to cover certain trials and report upon them on social media or upon specially constructed crime websites devoted to high profile proceedings. I suggest procedures could be applied to require ‘citizen journalists’ to satisfy the court that they deserve such a media privilege on a case-by-case basis.

In summary, and without extended further explanation, my proposal is:

- Close the courts in matters involving children and sexual assault victims to the broader citizenry to limit social media ‘leakage’ of matters such as identification;
- Allow authorised news media representatives to attend and report with the following identification restrictions;
- Tighten the identification wording so that indirect identification is less likely. Prohibit the naming of the victim, of course. Require the court to rule upon the other identifying factors allowable in the particular case, with the working principle that a combination of factors does not identify the victim. (For example, allow her suburb and her age to be published if the suburb is populous enough, but not the sporting organisation of which she is a member.) Also prohibit visual identification of the accused in sexual assault cases where the accused has had an ongoing relationship with the victim (not necessary where the assault has been an attack by a stranger) so that those who have seen the accused with the victim do not identify her by this means.
- Prohibit all photographs or footage of the victim being published or broadcast – even those pixelated or obscured in any way. (This practice is flawed.)

My final comments address two important points related to journalists. Firstly, I suggest there are excellent public policy reasons why victims should be permitted to self-identify as sexual assault victims at a reasonable time after proceedings have ended. I am not a psychologist, but I float the suggestion that a period of two years after the completion of proceedings might be a time when some victims might feel able to give ‘informed consent’ to a media outlet to tell their story – and that such a story could itself have major public policy benefits. Given that abuses of such a privilege are rare in jurisdictions that allow it, I suggest it be worded so that it is enough that the victim gives the journalist his or her permission in writing for publication, and that the onus of proof be on the prosecutor to demonstrate that the journalist “knew, or should have known” that the consent was not “informed” by the condition of the victim at the time and that financial inducements be prohibited.

Secondly, I offer my strong view that any penalties for breach of the reformed statute be dealt with as an offence against the statute itself, and with a fine and not a jail term. Breaches have been so rare in the past and are usually accidental, and it is an affront to democracy when states jail journalists for publishing offences. Contempt powers, particularly those wielded by superior court judges, are far too broad to justify their application to this type of publishing error.

I wish you well with your deliberations on this important matter and would be pleased to offer any further assistance if you should require it.

Yours sincerely,

Professor Mark Pearson