Protecting the Anonymity of Victims of Sexual Crimes

Submission to Law Reform Institute of Tasmania
September 2012

women's legal service tasmania

Protecting the Anonymity of Victims of Sexual Crimes

Women's Legal Service Tasmania agrees with the Tasmanian Law Reform Institute that s194K of the *Evidence Act 2001* (Tas) should be amended. As highlighted in the issues paper of August 2012, the law with regard to protection of the anonymity of victims of sexual crimes needs to be clarified.

Scope of s194K

Women's Legal Service supports the third option for reform provided in the paper. We believe that s194K should be repealed and a new provision should be added prohibiting the publication of any information relating to proceedings unless a court order has been granted.

Although we are loathe to take up valuable court time, we consider that the protection of victims' anonymity is important and worthy of judicial consideration.

The option proposed in the issues paper requires media outlets to make an application before publication, however we suggest that instead of media outlets making multiple applications to the court each time they wish to publish information about the case, that the court instead make orders each time the matter is before them as to what information can be published.

This proposal places an obligation on the court to be proactive in issuing orders permitting publication, and it could be argued that this is impractical. There is also the risk that offenders may challenge these orders.

While it can be said that it appears to be rare in Tasmania that details are published that can lead to the identification of victims, it can, and does, happen. Victims in these matters are entirely innocent and blameless, and it could be said a publication that leads to the identification of even one victim should be prevented.

Publication cannot be taken back, and the unwarranted stigma of being a victim of a sexual crime can have long-lasting consequences on a victim's life if they are identified. Court proceedings are often truly traumatic for victims, and this time does not need to made more distressful unnecessarily.

In our experience, we have seen examples where offender's names have been published before proceedings have commenced, particularly in the case of marital rape, and for proceedings and comments on passing sentence the offender's name and details, and victim's details have been de-indentified.

Media outlets can make decisions to publish information before they are aware of the complete facts to the matter. If courts have the power to first determine whether information will or will not lead to identification, publications that may be both identifying and distressful to victims are less likely to occur.

Giving the Court the power to determine whether information can be published also provides protection to media outlets. If there is a court order in place allowing them to publish certain information, it is unlikely that they will run foul of the legislation and publish identifying details, as they will have court sanctioned information that they are able to provide.

If information is published with the permission of the court, and this information may lead to identification, possibly for unforeseen reasons, the publisher would presumably have a defence to any action against them as they acted in good faith and with the permission of the court.

In addition, many members of the public are untrusting of media outlets and may feel uncomfortable to know that the potential protection of their identity is in the hands of the media. Once publication is made, sanctions cannot undo the publication. Knowing that the court has carefully considered what information is available to the public will address this issue.

There are many factors that the court may take into account in deciding what information can be published. We suggest that these should include factors of open justice and public interest, with input from both the prosecution and the complainant. These should be only factors to be taken into account, and the court should have a discretion to decide based on all the factors.

We support s578A(5) of the *Crimes Act 1900* (NSW) being incorporated into the Tasmanian legislation, requiring the Judge or Justice to seek and consider any views of the complainant, and also the requirement that the Judge or Justice is satisfied that the publication is in the public interest. Another factor may be considering what information is already in the public arena, which may have been inadvertently or necessarily published.

The requirement that the Judge seek views from the victim is, we believe, an important one. The justice system can often feel disempowering to victims, and in our experience, victims of sexual violence often find the process upsetting and do not always feel that they have been heard. Victims are often in the best position to determine whether the publication of certain information will or will not lead to their identification.

We also support the inclusion of a provision that provides for publication if the victim seeks such an order, however potential limitations of this are discussed below.

The court should decide whether the material is likely to lead to identification having regard to all the circumstances of the case, however if in doubt, identification should mean identification by a general reader or viewer, and not the narrower definition of those with prior knowledge or involvement,

The court also needs to take into account the rise of the internet and social networking. It is now easier to disseminate information quickly and to many people. Facebook and other such sites provide anybody with the internet to search for and find details and pictures of people with only a name to search with.

We also wish to note that the publication of comments on passing sentencing can also cause distress and risk of identification for victims. Women's Legal Service supports the publishing of these comments as a key foundation of open justice, however in our experience, these comments can provide information that may or may not have been published that can lead to identification of victims.

Comments where initials of victims' names are used, victims' health conditions and schools or employment of victims are often published, and this information, in addition to details provided about offenders which can include their names, occupations and residence have lead to identification of victims.

It is also interesting to note that the Tasmanian Commissioner for Children's 'Inquiry into the circumstances of a 12 year old child under Guardianship of the Secretary' regarding the 12 year old prostituted by Gary Devine, contained more possibly identifying details about the child than the original *Mercury* article that was complained of, including references to the make-up of her family, the specific drugs used by her mother, her school attendance issues, and that her mother had an interstate court case.

As such, we propose that comments on passing sentence are carefully edited so that details such as residence, occupation and specific health conditions that are not relevant to the sentence be removed or broadened. Other authorised publications such as reports or inquiries also need to keep in mind that the details that provide, usually with the aim of supporting victims and preventing further incidents, can actually lead to their identification.

If s194K were to be retained, Women's Legal Service believes that the words 'likely to lead to the identification' should be defined. A definition would add clarity to the section.

Clarity as to what the section means is important as noted in the paper, it is those who are publishing the information that currently need to decide if the information that they are publishing is likely to lead to identification. This places the onus on media outlets which can be problematic as the legislation does not provide them with guidance as to who is likely to identify.

We believe that the 'identification' should be defined to mean identification by the general reader or viewer and that 'likely' should mean 'an appreciable risk, more than a fanciful risk'. This is to balance the competing considerations of protection of the victim, and open justice.

Consent by the Complainant

Women's Legal Service strongly believes that victims should not be further victimised by being subject to virtual gag orders, however acknowledges that there are many factors that need to, and should be, taken into account before publication with victim consent is permitted.

The purpose of the section as it currently stands is to protect victims. Victims should therefore have to option to determine the level of protection that they require. The legislation should therefore be amended to provide clarity and the option of publication if the victim requests.

It is not for others to make judgement calls about whether a victim may regret this decision later, or whether they are doing it for the right reasons, or if it is in their best interests, especially without consultation with the victim.

The legislation currently does not adequately protect victims, as the current case against Davies Brothers Limited in Tasmania shows that the law is unclear. This case has once again forced the victim's life and decisions back into the justice system. Victims should also not face possible contempt of court proceedings if they disclose details about themselves, the offence or the offender.

We agree with the notion that shielding victims leads to increased stigma and shame as well as victim blaming. 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. Clarifying or changing the legislation will allow this.

Complainants should not be able to give consent to publication if they are under the age of eighteen.

We believe that a court order should be necessary and that whether publication should be permissible would be assessed by a range of factors. These could include:

- time elapsed since the offence
- victim's reasons for disclosure
- current situation of the offender
- possible identification of other victims
- victim's age at time of offence
- open justice and public interest
- age of the offender

None of these factors need be determinative on its own. For example, the possibility of other victims or family members being identified by publication is a compelling one, while the age of the victim at the time of the offence may not be as relevant if they were an older child or teenager.

Victim's reasoning for wanting publication may or may not be irrelevant. If the victim is to receive money for a story, this should not prevent publication unless

the victim has somehow been coerced. Also, just because a victim's reasons for publication may be vindictive and vengeful, this does not necessarily mean that the court should prevent publication. However, it would need to be taken into account, especially if this would cause undue hardship or additional punishment to the offender.

While the purpose of the provision should be to protect victims and not offenders, the concern that innocent family members of the offender may be vilified should be taken into consideration, as should the time elapsed from the offence and court proceedings, if the offender has been punished, undergone treatment and has integrated back into the community.

WLS acknowledges that being falsely accused of sexual offences can have serious and long-lasting consequences in personal and professional life. However, we would also argue that offenders do not generally have their identity suppressed or concealed for crimes such as murder or serious assaults, and arguably, being falsely charged with murder would also have significant personal consequences. This does not mean that the names of alleged murderers are suppressed, nor should it.

It can be argued that this process will again use valuable court time, however it is anticipated that the number of sexual crimes where the offender has not already been named, and the number of victims who will actually want their details disclosed, will be small.

Terminology and Procedural Matters

With regard to the possible changes to s194K proposed in Question 7, we support the inclusion of the definition of 'publish' and 'picture' and a geographically restricted application of suppression of identity details.

We do not support a generic definition of 'sexual offence' and prefer the current provision which refers to the relevant existing provisions. Referring to the existing sexual offence provisions provides clarity and we cannot foresee a need to include a generic definition instead.

With regard to the proposed amendment that the prohibition operates during the complainant's lifetime unless ordered by the court, we do support placing a time limit or expiration on suppression. Even after death, identification of victims can affect remaining family members and potentially the memory and reputation of the victim.

As previously discussed, although we strongly believe that the stigma relating to victims of sexual crimes should not exist, the purpose of the section is to protect victims, and the information that they may have been a victim of a sexual crime is owned by that individual, and it is their choice as to if, who, when and how they disclose this information.

This does not mean that we believe there should be prohibition theoretically forever regarding the identity of victims of sexual crimes. It may be that the preferable option is that a court can allow identification after death if an application is made, and that the court will have a discretion whether or not to grant such an order.

Contempt

We submit that the sanction for a breach of s194K (or its replacement provision if necessary) should not continue to lie in contempt proceedings. It is preferable that it is a summary criminal offence so that it is a clear offence, and appropriate sentences can be imposed.

Public Interest Test

Women's Legal Service support the continuation of the public interest test. We do not believe that the legislation needs to specify criteria that the court should or must consider. Courts often need to take into account considerations such as public interest and weigh competing interests, and as such, providing criteria is not necessary.

In essence, the test of whether something is in the public interest would generally take into account what is in the interests of justice. The court can also take into account open justice and sentencing principles.

Open and transparent justice is a fundamental feature of our system of justice. It should not be compromised without valid reasons.

Sentences regarding sexual crimes are often contentious and it is a common view of our clients and many in the community that the courts give light sentences for offenders of sexual assaults and rapes. By keeping the justice system as open as possible, without compromising victims' identity, the public can be informed about why sentences are given and the factors taken into account.

Another key issue is that a pillar of sentencing principles is deterrence. If facts and comments on passing sentence are not published, the focus on deterrence will be undermined as those who the sentence may deter will not be aware of it.

Contact Us
For any questions or to discuss this issue further please contact Mary Paterson.

Women's Legal Service Tasmania
T (03) 6231 9466
E mary@womenslegaltas.org.au
www.womenslegaltas.org.au