

TASMANIA
LAW REFORM
INSTITUTE

**Protecting the Anonymity of Victims
of Sexual Crimes**

FINAL REPORT NO 19

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Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice S Estcourt (appointed by the Honourable Chief Justice of Tasmania), Mr Simon Overland (appointed by the Attorney-General), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative) and Mr Rohan Foon (appointed by the Law Society of Tasmania). The Honourable Chief Justice AM Blow OAM was the former Chief Justice's appointee during the lifetime of this project.

Acknowledgments

This Final Report was prepared for the Board by Dr Helen Cockburn. Valuable feedback was provided by Honorary Professor George Zdenkowski, the Institute's Director, Professor Kate Warner and other members of the Board. Bruce Newey edited and formatted the final version of the paper.

Background to this Report

This project began as part of a project to review the defence of mistake as to age for sexual offences with young people. Board member, Mr Craig Mackie requested that, as part of the wider project, the Institute look at the operation of s 194K of the *Evidence Act 2001* (Tas). This reference was supported by the then Commissioner for Children (Tasmania). The Institute released an Issues Paper (IP) in August 2012, *Protecting the Anonymity of Victims of Sexual Crimes*, IP No 18 ('IP 18') with a call for submissions by 28 September 2012. Fourteen responses were received to the IP.

The following made submissions:

Ms Aileen Ashford, Commissioner for Children
Mr Benedict Bartl (Policy Officer), Tasmanian Association of Community Legal Centres
Mr Graham Davis (Manager), DPP Witness Assistance Service Tasmania
Ms Marg Dean, Laurel House, Northern Sexual Assault Group Inc
Mr Tim Ellis SC, Director of Public Prosecutions
Hobart Women's Health Centre
Mr David Killick
Ms Claire Konkes (oral submission)
Mr Craig Mackie
Mr Michael O'Farrell SC, The Tasmanian Bar
Professor Mark Pearson, Bond University
Ms Cheryl Sterkenburg
Assistant Commissioner Phil Wilkinson, Tasmania Police
Women's Legal Service Tasmania

The Institute thanks all those who responded.

This Report follows on from IP 18 and considers the operation of s 194K of the *Evidence Act 2001* and the law prohibiting the publication of information which identifies a complainant in a sexual offence case.

The Final Report is available at the Institute's web page at www.law.utas.edu.au/reform or can be sent to you by mail or email.

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Executive Summary

The purpose of this Report is to review the operation of s 194K of the *Evidence Act 2001* (Tas) which prohibits the publication of information likely to identify the complainant in sexual offences cases. It examines the adequacy of the law in achieving its objective of affording appropriate protection to victims of crimes of sexual assault. The Report also considers the position of victims who do not seek the protection of anonymity but who prefer that their voice be heard. The prohibition also applies to information likely to identify other witnesses in sexual offences cases, with the exception of the defendant. Although in some instances the observations and recommendations made may apply equally to other witnesses in sexual offences trials, the principal focus of this report is on the victims of sexual crimes. A related matter that falls outside the terms of reference for this Report is the extent to which authorised reports of cases, such as the Supreme Court's published Comments on Passing Sentence, are edited to ensure compliance with the requirements of s 194K. In responding to IP 18, Women's Legal Service Tasmania noted that the details contained in these can lead to identification whereas media reports are edited to avoid that likelihood. Detailed consideration of these issues is beyond the scope of this inquiry, although it may be something that the Court may like to pursue. The Report examines whether the current law requires clarification both of its scope and terminology, whether its purposes might be better achieved either by the introduction of additional features into s 194K or by the creation of a new statutory scheme, and whether it strikes the appropriate balance between protecting victims of sexual assault and the paramount public interest in open justice.

List of Recommendations

<p>Recommendation 1</p>	<p>(a) That legislation be enacted to provide as follows:</p> <p>In sexual offences cases,</p> <ul style="list-style-type: none"> (i) publication of name, address or image (broadly defined) of the complainant or witnesses other than the defendant is prohibited; (ii) publication of the name, address or image (broadly defined) of the defendant is prohibited where it is likely to identify the complainant; (iii) publication of such other information as is likely to identify the complainant or witnesses other than the defendant is prohibited; (iv) the prohibitions in (i) and (ii) also apply to the defendant in cases under s 133 of the Criminal Code (incest) (v) in determining (ii) ‘likely’ shall mean ‘an appreciable risk, more than a fanciful risk’; (vi) in making determinations pursuant to (ii) and (iii) the court shall have regard to potential identification by a reader, viewer or listener, equipped with knowledge in the public domain, in all the circumstances of the case; (vii) the court shall have a discretion to prohibit the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant; (viii) in exercising this discretion the court is required to have regard to the fact (if it be the case) that the complainant is ‘especially vulnerable’; (ix) ‘especially vulnerable’ complainants shall include persons under 18, persons with a mental impairment and persons with an intellectual disability; (x) unless otherwise specifically provided, all determinations by the court shall have regard to the public interest.
<p>Recommendation 2</p>	<ul style="list-style-type: none"> (a) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of such information (as the court thinks fit) as may be likely to identify the complainant. (b) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant. (c) Orders referred to in (a) and (b) may be made on the application of a party to the proceedings or the prosecutor or on the motion of the judge.

Recommendation 3	<p>(a) That a statutory right to apply for both publication and non-publication orders and to be heard in relation to the determination of applications be granted to the victim of the offence, the parties to proceedings, news media organisations and any other person considered by the court to have a sufficient interest in the making of the order.</p> <p>(b) That a similarly broad right be granted to apply for revocation or variation of orders and to appeal against a decision whether or not to make an order.</p>
Recommendation 4	<p>(a) That, with leave of the court, the publication of details which identify the victim is not prohibited if, prior to publication, the victim who has attained the age of 18 years and who has the capacity to consent and who has not been coerced, defrauded or otherwise manipulated into giving consent provides written consent to publication.</p> <p>(b) That in deciding whether to authorise the publication of details under (a) the court must give consideration to all the circumstances of the case including the risk that other victims may be identified without their consent.</p> <p>(c) That a court shall not make a non-publication order (as per Recommendation 2(a)) in relation to potentially identifying details without considering the views of the victim.</p>
Recommendation 5	<p>(a) That unless otherwise ordered by the court non-publication orders remain in force permanently.</p> <p>(b) That court orders are binding on all those who have actual or constructive notice of them.</p>
Recommendation 6	<p>(a) That the sanction for breach of the statutory prohibition against publication pursuant to the legislation replacing s 194K or for breach of any court order made under that legislation shall be a criminal offence in the following terms:</p> <p style="padding-left: 40px;">Any person who engages in conduct that contravenes the legislation replacing s 194K who does so intentionally or who knew or ought to have known that the conduct amounted to such a contravention is guilty of a crime.</p>
Recommendation 7	<p>(a) That penalties for contravention of the rules relating to publication are clearly set out.</p> <p>(b) That the sanction for breach should be a penalty imposed following summary prosecution for a criminal offence.</p> <p>(c) That proceedings may be brought in the Magistrates' Court or the Supreme Court at the discretion of the prosecution and that maximum penalties should be applied accordingly.</p> <p>(d) That the penalty structure should include a discretion for the Supreme Court to impose a custodial sentence in cases of deliberate, flagrant, repetitive or egregious breach.</p>

<p>Recommendation 8</p>	<p>(a) That the legislation replacing s 194K include an introductory definition section which provides:</p> <p>In this section:</p> <p>‘likely’ means an appreciable risk, more than a fanciful risk.</p> <p>‘picture’ includes all drawings, images, representations, or photographs whether in the form of documents or electronic forms.</p> <p>‘publish’ means disseminate or provide access to the public or a section of the public by any means, including by:</p> <ul style="list-style-type: none"> (a) publication in a book, newspaper, magazine or other written publication, or (b) broadcast by radio or television, or (c) public exhibition, or (d) broadcast or publication by means of the internet, or (e) broadcast by means of telecommunications generally. <p>For the avoidance of doubt, ‘sexual offence’ includes a child exploitation material offence.</p>
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Part 1

Introduction

1.1 Background

1.1.1 One of the singular features of sexual crimes is the persistence of misconceptions about sexual assault that tend to stigmatise the victim and hold her complicit in the offence.¹ These accepted understandings of sexual assault have been defined as ‘beliefs about sexual aggression ... that serve to deny, downplay or justify sexually aggressive behavior that men commit against women’.² The stigma of sexual assault contributes to the marked desire of many victims to remain anonymous or at least to keep knowledge of the assault from family and acquaintances. In turn, fear of publicity contributes to the reluctance of victims to report sexual assault.³ It is widely acknowledged that sexual assault is greatly under-reported⁴ and initiatives to boost reporting rates have been a focus of law reform efforts in this area. One aspect of legal reforms designed to ensure victim anonymity and encourage victims to come forward, is the introduction of legislative provisions such as s 194K of the *Evidence Act 2001* (Tas) that place restrictions on the reporting (predominantly by the media) of the identity of victims. When reporting on sexual assault cases the media are not permitted to disclose information about police investigations, court proceedings, and so on, that could directly or indirectly identify the victim. The plain language employed by s 194K conceals the difficulties that can arise in practice in determining exactly what information is caught by the prohibition. As noted in the Tasmania Law Reform Institute’s Issues Paper: *Protecting the Anonymity of Victims of Sexual Crimes*, IP No 18 (‘IP 18’), this was exemplified in a recent Tasmanian case concerning the prostitution of a 12-year-old girl by her mother and her mother’s friend. The mother and her friend stood trial for these offences, and whilst neither the girl nor her mother was directly identified, the friend’s name was reported in the media. Potentially, the publication of his name together with other details relating to the case could have enabled people with some knowledge of those involved to identify the victim. In response to a request by Mr Craig Mackie, the court-appointed Children’s Representative in Care and Protection Proceedings relating to the young girl, to review the newspaper article in question for compliance with s 194K, the Director of Public Prosecutions (DPP), Mr Tim Ellis SC, concluded that there had been no breach of the provision. (See Tasmania Law Reform Institute Issues Papers 17 and 18 for a more detailed discussion of the case).

1.1.2 Mr Mackie subsequently referred his concerns about the operation and scope of s 194K to the Institute by a letter dated 29 March 2010. His view was that s 194K is insufficiently clear in its scope

¹ Although it is acknowledged that there are male victims of sexual assault, the vast majority of such victims are female. Accordingly, the general discussion in this report refers to female victims.

² H Gerger et al, ‘The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validation in German and English’ (2007) *Aggressive Behavior* 422, 425.

³ See, eg, Denise Lievore, Australian Government Department of Families, Community Services and Indigenous Affairs, Office for Women, *No Longer Silent: A Study of Women’s Help-Seeking Decisions and Service Responses to Sexual Assault* (Report Prepared by the Australian Institute of Criminology for the Australian Government’s Office for Women, 2005) ch 6. In a recent national US study, 59.1% of respondents did not report because they did not want family to know and 57.4% did not report because they did not want others to know: K B Wolitzky-Taylor et al, ‘Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women’s Study-Replication’ (2011) 26(4) *Journal of Interpersonal Violence* 807, 817. See also S Walby and J Allen, Home Office Research, Development and Statistics Directorate, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (2004). According to the study 40% of respondents did not tell anyone about their worst experience of rape suffered since age 16: at x.

⁴ See, eg, Jenny Mouzos and Tony Makkai, AIC, *Women’s Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004) 101–02.

and terminology and that in its implementation it fails to provide adequate protection to victims of sexual offences. The reference was supported by the then Commissioner for Children (Tasmania), Mr Paul Mason.

1.1.3 IP 18 sought submissions on a range of proposals for amending s 194K (see Appendix 1 for a complete list of the IP questions). In short, they addressed the following questions in relation to the operation of the provision:

- What type of information should be covered by this provision?
- From whom is the victim's identity to be concealed (for example, should the provision be contravened when people who already knew the victim could identify him or her or should it only be when a member of the public without special knowledge could make the identification)?
- Is 'self-regulation' by the media or other publishers appropriate? If not what alternatives exist?
- Should publication be permitted if the victim consents? If so, in what circumstances?
- Does the provision provide effective protection of the anonymity of sexual assault victims and, if not, what reforms, including procedural reforms, might be appropriate?

1.1.4 It is important to note that it is not the task of the Institute to determine the correctness or otherwise of the DPP's decision in the matter which led to this inquiry including his interpretation of s 194K. That would be a matter for the Supreme Court in an appropriate case. Instead, this Report seeks to apply a critical eye to s 194K, the way it is drafted and the way it has been implemented. It considers the background and policy behind the rule, the range of interpretations to which it and comparable provisions in other jurisdictions have been held to be susceptible and whether it appropriately guides findings in relation to questions of breach. Ultimately it concludes that legislative reform is desirable to promote the objects of this protective provision.

1.1.5 The recommendations made in this Report seek to achieve certainty for all stakeholders, enhanced protection for complainants and a balance between the paramount principle of open justice and the protection of interests relating to the special position of particularly vulnerable complainants, namely children. They are not intended to undermine the pivotal role of the media in ensuring transparency in the administration of justice and public discussion of important legal and social issues. Nevertheless, in some respects the project does not reflect a positive view of the media generally. More than one respondent to IP 18 suggested that commercial media outlets engage in a cost/benefit analysis when faced with a decision about what to publish. Craig Mackie, for example stated: 'It's hard not to believe the sale of newspapers is considered more important than the anonymity of a complainant.'⁵ The Issues Paper ('IP') itself was not immune from making similar generalisations.⁶ A number of respondents took issue with this characterisation of media outlets. Several pointed to an increase in media accountability as a result of the embrace of codes of ethics at different levels of the profession.⁷ For example, Mark Pearson argued:

It is ... a mistake to view this story [the Devine case] ... as one of simply feeding a public titillation with sordid sexual detail. The story ... had the important news values of ... 'consequence' or 'impact' – many of which concern public policy benefits of the reportage of such matters.⁸

⁵ Submission of Craig Mackie. See also Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2nd ed, 2005) 305, below n 33 and accompanying text.

⁶ See IP 18, [4.3.3]: 'Media outlets have an obvious interest in publishing material that will attract readers or viewers. ... It may therefore be difficult for media outlets to be objective when deciding whether to publish information that could identify a complainant.'

⁷ For example, the Media Entertainment and Arts Alliance Journalists' Code of Ethics and the various codes policed by the Australian Communications and Media Authority.

⁸ Submission of Mark Pearson.

1.1.6 As an example, it is interesting to speculate whether, rather than being included in the newspaper article for prurient reasons, the additional information that the young girl in this case had contracted a sexually transmitted infection was intended to graphically demonstrate the harms of sexual assault.⁹ The misperceptions and misunderstandings are symptomatic of a general lack of communication between the courts and the media. Although other jurisdictions employ court liaison officers, this is not the case in Tasmania. In his submission, David Killick, a journalist with 20 years' experience of court reporting, noted the absence in Tasmania of court appointed media officers and also a reluctance by courts and the DPP to engage with the media. The ability to fund such a position may be an important factor in this, although there is an obvious argument that the role could be taken on by judges' associates. The benefits that would accrue from closer communication are undoubted. A clear statement from the court about the scope of prohibited details in individual cases will secure greater protection for victims of sexual offences. But over and above this, the media also fulfils an important role in promoting public confidence in the justice system and in fostering public discussion and awareness of legal issues. This ties in with the court's interest in promoting open and transparent justice and more informed public debate about the way the justice system operates.

1.2 Report structure

1.2.1 The Report has four Parts. Part 1 provides background information to the project and defines the parameters of the inquiry. Part 2 analyses the prohibition on publication as an example of an exception to the principle of open justice. It explains the theoretical underpinnings of the principle as well as the way it has been recognised in judicial statements and international instruments. The Report then explores the competing policy considerations which have led, in various circumstances, to the modification, restriction and, in exceptional cases, abrogation of the open justice principle in an attempt to understand how they have informed the balancing exercise in conflicts between victim privacy and open courts. Part 3 examines the current law in Tasmania and other jurisdictions. It considers judicial interpretation of protective legislation and assesses whether particular features of comparable provisions in other jurisdictions should be incorporated into the Tasmanian statute. In light of the discussion in the preceding sections, Part 4 argues the need for reform or replacement of s 194K. It draws upon the viewpoints expressed in public submissions to IP 18 and identifies those aspects of s 194K that should be changed. Finally, it sets out the Institute's proposals for reform.

⁹ This observation was made in the oral submission of Claire Konkes (14 February 2013).

Part 2

The Principle of Open Justice and its Exceptions

2.1 The principle of open justice

2.1.1 Legislative provisions that prohibit the publication of material likely to lead to the identification of sexual assault complainants represent an exception to the general principle of open justice. That principle ensures that justice will be administered in open court unless the subject matter of the action requires that the court be closed or there is a risk that parties may be discouraged from seeking justice in the absence of restrictions on the publication of identifying details relating to the proceedings.¹⁰

2.1.2 The principle of open justice has been described as ‘one of the oldest principles of English law, going back to before Magna Carta.’¹¹ It is a fundamental feature of the Australian system of justice and the conduct of proceedings in public is an essential characteristic of the court system.¹² The general principle is justified on numerous grounds. In *Scott v Scott*,¹³ Lord Atkinson noted that public trials are ‘the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.’¹⁴ In *Russell v Russell*¹⁵ Gibbs J observed:

This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for ‘publicity is the authentic hall-mark of judicial as distinct from administrative procedure’ (*McPherson v McPherson* (1936) AC 177 at p 200).¹⁶

2.1.3 The principle of open justice has received international endorsement. Article 14(1) of the *International Covenant on Civil and Political Rights* (‘ICCPR’) states that ‘everyone shall be entitled

¹⁰ See, eg, *Scott v Scott* (1913) AC 417, 445 (Lord Loreburn): ‘[I]n all cases where the public has been excluded with admitted propriety, the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or because the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court.’

¹¹ *Terry v Persons Unknown* [2010] EWHC 119 (QB) [106] (Tugendhat J).

¹² Writing in the context of the recently introduced *Court Suppression and Non-publication Orders Act 2010* (NSW), Justice Peter Johnson has stressed the fundamental importance of the open justice principle: Peter Johnson, ‘The *Court Suppression and Non-publication Orders Act 2010* Commences’ (2011) 23(6) *Judicial Officers’ Bulletin* 3. His Honour cites a recent curial analysis of the open justice principle in the context of suppression orders by French CJ in *Hogan v Hinch* (2011) 85 ALJR 398 [20]–[27].

¹³ (1913) AC 417.

¹⁴ *Ibid* 463 (Lord Atkinson).

¹⁵ (1976) 134 CLR 495.

¹⁶ *Ibid* 520.

to a fair and public hearing by a competent, independent and impartial tribunal established by law.’¹⁷ It is also enshrined in art 6 of the *European Convention on Human Rights*.¹⁸

2.1.4 One consequence of the open justice principle is that the media have a right to attend court and to report upon what occurs in open court proceedings. This is an important feature of a democratic society in that it provides the opportunity to disseminate information about the subject matter of the proceedings more widely, thus facilitating the public scrutiny to which Justice Gibbs referred above. This entitlement of the media is a practical necessity given that ‘few members of the public have the time, or even the inclination, to attend courts in person.’¹⁹ Generally speaking, it will be improper for the court to restrain the media from disseminating information heard by those present in court.²⁰ The principle has been incorporated in a New Zealand statute.²¹ It is also recognised in the UK’s Criminal Procedure Rules.²²

2.2 Competing policy considerations

2.2.1 It will be apparent from the discussion above that open justice is intended to, among other things:

- ensure impartial and transparent justice;
- secure and maintain public confidence and respect for the integrity and the independence of the courts;
- provide an opportunity for public and media scrutiny to prevent injustice and undetected abuse from flourishing;
- maintain freedom of the press; and
- provide a catalyst for public policy review, reform of the law, deterrence of crime and education about sex offences and the justice system.²³

However, in some circumstances, competing policy considerations have led to the modification, restriction and, in exceptional cases, abrogation of the open justice principle.²⁴ These include:

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979) art 14(1) (*ICCPR*). Australia is a signatory to the *ICCPR*.

¹⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1).

¹⁹ *R v Davis* (1995) 57 FCR 512, 514.

²⁰ *R v Arundel Justices; Ex parte Westminster Press Ltd* [1985] 1 WLR 708.

²¹ Section 196 *Criminal Procedure Act 2011* (NZ) provides that the general rule is that every hearing is open to the public.

²² Criminal Procedure Rule Committee, *Criminal Procedure Rules* (at 1 October 2012) r 16.2(a).

²³ The last two points were raised by Mark Pearson in his submission to IP 18.

²⁴ As noted by Johnson, above n 12, ‘[t]he tension between competing interests where the open justice principle is applied has been considered in extra-curial writings in Australia and the United Kingdom’: at 49 n 20. See, eg, Justice James Spigelman, ‘Seen to be Done: the Principle of Open Justice’ (Pt 1) (2000) 74 *Australian Law Journal* 290; Justice James Spigelman, ‘Seen to be Done: the Principle of Open Justice’ (Pt 2) (2000) 74 *Australian Law Journal* 378; Justice James Spigelman, ‘Open Justice and the Internet’ (Address delivered at the Law via the Internet 2003 Conference, Sydney, 28 November 2003)

<http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_281103>; Justice James Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29 *UNSW Law Journal* 147; Lord Neuberger, ‘Open Justice Unbound?’ (Judicial Studies Board Annual Lecture, 16 March 2011) <<http://www.scribd.com/doc/97591797/Justice-Wide-Open-Lord-Neuberger-Open-Justice-Unbound>>; Lord Judge, Lord Chief Justice of England and Wales, ‘The Judiciary and the Media’ (Paper presented at the Annual Lionel Cohen Lecture, Hebrew University of Jerusalem, 28 March 2011) <<http://www.judiciary.gov.uk/media/speeches/2011/lcj-speech-judiciary-and-the-media>>.

- the privacy interests of individuals affected by the court process, whether to ensure a fair hearing (in the case, for example, of some alleged offenders) or the protection from avoidable harm or distress (of, for example, alleged victims);
- considerations of national security; and
- ensuring the safety of certain witnesses.

2.2.2 The case for open justice is normally supported by the public interest in ensuring the proper administration of justice. However, where these counter policy considerations are engaged, the same overarching interest in the administration of justice will sometimes dictate a different approach. This conflict has been discussed in a number of recent decisions of the NSW Supreme Court.²⁵ These cases involved balancing the desirability of preserving open justice against the public interest in upholding the administration of justice in the context of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (*CSNO Act*) (see 2.3.12). That legislation posits a test of necessity as the key basis for making an order: to prevent prejudice to the proper administration of justice; to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security; to protect the safety of any person; to avoid causing undue distress or embarrassment to a party or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency); or to make an order where it is in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice. Justice Price has ruled that the principle of open justice is a fundamental principle of the administration of criminal justice and that where the application of the power to make a non-publication order conflicts with the principle of open justice, the test of necessity must be applied strictly. A high level of certainty that prejudice will ensue is required. Accordingly, it is necessary to determine that the objective of ensuring fairness cannot be achieved in any other way.²⁶

2.3 Exceptions to the principle of open justice

2.3.1 It is evident that, notwithstanding the importance of the principle of open justice, it is not absolute in all cases.²⁷ So much is made clear in the NSW legislation, the *CSNO Act*. Section 6 of the Act provides that safeguarding the public interest in open justice is *a* primary objective of the administration of justice but not *the* primary objective. Considerations which lead to a qualification of the principle have been referred to above. It has been recognised that in some circumstances a public hearing may undermine or frustrate the administration of justice²⁸ and the courts and the legislature have created exceptions accordingly.²⁹ The particular legislative provision with which this inquiry is concerned is just such an exception.

²⁵ *R v Perish* (2011) NSWSC 1101; *R v Perish* (2011) NSWSC 1102; *Welker v Rinehart* (2011) NSWSC 1094.

²⁶ *R v Perish* (2011) NSWSC 1101 [27], citing *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 [51], [101]. On 19 December 2011, the NSW Court of Appeal upheld an appeal by various media interests in *Welker v Rinehart* (2011) NSWSC 1094. It ordered that the longstanding suppression orders (which prevented reporting details of a family dispute) be lifted. The court effectively found that the interests of open justice and the need for legal matters to be conducted in public override private facts. A stay was sought pending a High Court appeal: Paul Bibby, 'Rinehart Loses Appeal, Now Heads to High Court', *Sydney Morning Herald* (Sydney), 20 December 2011. On 9 March 2012, the High Court refused special leave to appeal against the Court of Appeal ruling that the suppression orders should be lifted.

²⁷ *R v Kwok* (2005) 64 NSWLR 325, [29] (Hodgson JA). See also *Witness v Marsden* (2000) 49 NSWLR 429, [14]–[17].

²⁸ *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1.

²⁹ *Scott v Scott* (1913) AC 417, 452 (Lord Atkinson). For a list of established exceptions see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 54 (Kirby P).

Protecting victims of sexual offences

2.3.2 Section 194K of the *Evidence Act 2001* (Tas) (the ‘*Evidence Act*’) provides that a person must not, without a court order, publish or cause to be published ‘the name, address, or any other reference or allusion likely to lead to the identification’³⁰ of the alleged victims of sexual offences. There is broad agreement that the protection of sexual assault complainants is one ground on which modification of the principle of open justice is justified. Part 3, which follows, discusses examples of such protective provisions in more detail. The purpose of legislative provisions that protect the identity of sexual assault complainants is to encourage victims to report offences committed against them and to protect them from the harm identification may cause, by respecting their privacy. As noted by the Heilbron Committee³¹ in 1975, identification can cause great distress to a complainant. Identification may lead to disclosures about his or her prior sexual history or other details which may exacerbate the complainant’s suffering.³² Jennifer Temkin has suggested two further justifications for victim anonymity. First, that a stigma is sometimes attached to victims of sexual assault which is not felt by other victims of crime (see 1.1.1 above). Second, that the media has a tendency to report cases of sexual assault ruthlessly and salaciously, with little regard to the harm this may cause to complainants.³³ It has been acknowledged that the prohibition on publishing material that may identify a sexual assault complainant is a minimal incursion into the principle of open justice. The media are still entitled to attend court and to report the facts of the case or the conduct of the trial and the open justice principle is not unduly compromised.³⁴

2.3.3 The existence of provisions such as s 194K demonstrates that the principle of open justice does not operate without constraint. In an appropriate case, proceedings may be heard in private or the parties or witnesses may be granted anonymity. Such cases are likely to be rare and it is critical that the rules against publication are clear so that protective provisions are invoked only where restrictions against publication are legitimately justified in the interests of vulnerable witnesses or other trial participants and in the public interest. It is clear that limitations will only be imposed where they are necessary and the circumstances are exceptional.³⁵ In some cases there is a power to close courts to the public. In other cases less restrictive limits on public scrutiny have been imposed. Illustrations of both kinds of exceptions to the open justice principle are considered below.

Closed courts

2.3.4 One recognised exception to the principle is the common law power of a judge to close the court to the general public in circumstances where publicity would undermine the administration of justice.³⁶ This is the most intrusive form of intervention in relation to open justice. In the case of young alleged offenders or children the subject of care proceedings, the purpose of closing the court is protective and to avoid stigmatisation. The court may also be closed where publicity would destroy the subject matter of the proceeding, such as cases concerning trade secrets or confidential

³⁰ *Evidence Act 2001* (Tas) s 194K.

³¹ The Heilbron Committee was established in the United Kingdom in 1975 to consider numerous issues relating to rape law reform, including complainant anonymity. The Committee’s report is, Home Office, *Report of the Advisory Group on the Law of Rape*, Cmnd 6352 (1975).

³² Temkin, above n 5, 305.

³³ *Ibid* 306.

³⁴ *Doe v Australian Broadcasting Commission* (2007) VCC 282, 48; *Canadian Newspapers Co v Canada (Attorney-General)* [1988] 2 SCR 122, 691. Both cases highlight the point that the prohibition on reporting the identity of sexual assault complainants is a minimal incursion into the principle of open justice and the right of an accused to a public hearing. It is a better option than closing the court or prohibiting reports of sexual assault cases in their entirety. See also *Witness v Marsden* (2000) 49 NSWLR 429, [14]–[17]; *R v Kwok* (2005) 64 NSWLR 335.

³⁵ *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512.

³⁶ *Scott v Scott* (1913) AC 417, 445–46 (Lord Loreburn).

information.³⁷ To avoid closing the court a judicial officer may alternatively order that witnesses be referred to by pseudonym in order to protect their identity or that evidence be presented in writing so it is not heard by members of the public who are present.³⁸ Statutory powers to close courts exist in some jurisdictions. Examples in Tasmania include:

- The *Magistrates Court (Children's Division) Act 1998* (Tas), establishes the Children's Division of the Magistrates Court and confers on it jurisdiction to hear and determine (among other things) all matters arising from and under the *Children, Young Persons and Their Families Act 1997* (Tas), such as care and protection orders in relation to children. Section 11 sets out the limited persons who may be present at a sitting of the court (parents, witnesses, Departmental employees, etc) while s 12 makes it an offence (punishable by a fine and/or imprisonment of up to two years) to publish any report of the proceedings which identifies or may lead to the identification of a child who is a subject of, a party to, or a witness in the proceedings.
- The *Youth Justice Act 1997* (Tas), which relates to criminal proceedings against a youth, sets out persons who may be present in court during such proceedings (s 30), and makes it an offence to publish identifying information about a youth who is the subject of or a witness in proceedings (s 31). The offence is punishable by a fine and/or imprisonment of up to two years.
- The *Terrorism (Preventative Detention) Act 2005* (Tas) provides that proceedings before the Supreme Court in which it is sought to make, vary or revoke preventative detention orders and prohibited contact orders must be heard in the absence of the public (s 50(2)), and gives the court power to do 'anything necessary or convenient' to prevent publication of the proceedings or the evidence given in them (s 50(3)).³⁹

For similar powers in other jurisdictions see Appendix 2.

Less restrictive statutory exceptions

2.3.5 Apart from the drastic measure of closing courts, less restrictive exceptions to the principle of open justice have also been created by statute in all Australian states and territories. The following material is by no means comprehensive but provides a glimpse of the nature of such provisions and the justifications put forward in support of them. This may assist in providing a context against which to assess the specific exception protecting the anonymity of sexual assault complainants which is the subject of the current inquiry.

2.3.6 In Tasmania s 194J of the *Evidence Act* empowers the court to forbid the printing or publication of evidence, argument or particulars in a case if the court is of the opinion that printing or publishing such material is likely to prejudice the fair trial of a case.

2.3.7 In relation to restraint orders, s 106K(1) of the *Justices Act 1959* (Tas) gives justices (in practice usually magistrates) the power to make an order forbidding the publication of the name of a party or witness if it appears to the justice that it would be desirable to do so 'for the furtherance of, or otherwise in the interests of, the administration of justice'. Publication contrary to such an order is made an offence punishable by fine and/or imprisonment of up to three months: s 106K(5).

2.3.8 In relation to proceedings for bail, s 37A *Justices Act 1959* (Tas) prohibits the publication of any account of such proceedings except as to the fact of the application and the fact that an order has been made. The penalty for breach is a fine and/or imprisonment of up to six months.⁴⁰

³⁷ Ibid 445.

³⁸ *R v Socialist Worker Printers & Publishers Ltd; Ex parte Attorney General* (1975) 1 QB 637; *R v Tait* (1979) 46 FLR 386, 405.

³⁹ See also *Witness Protection Act 2000* (Tas) s 16.

⁴⁰ See also *Family Violence Act 2003* (Tas).

2.3.9 The *Guardianship and Administration Act 1995* (Tas) establishes the Guardianship Board, a body with quasi-judicial functions. While dealing with the Guardianship Board rather than a court, this Act provides that the Board's hearings shall be open to members of the public (s 12), but goes on to prohibit the publication of identifying information (an offence punishable by fine and/or imprisonment of up to six months: s 13).

2.3.10 Section 195 of the *Evidence Act* prohibits the publication of prohibited questions. The express permission of the court is required before such questions can be published.

2.3.11 For illustrations of similar powers in other jurisdictions see Appendix 2.

Court Suppression and Non-publication Orders Act 2010 (NSW)

2.3.12 A major development in this area is the enactment of the *CSNO Act* which commenced operation on 1 July 2011. This legislation was introduced following recommendations by the NSW Law Reform Commission (NSWLRC)⁴¹ and a meeting of the Standing Committee of Attorneys-General in March 2008, which requested officers to examine the current use of suppression orders with a view to the possibility of harmonisation across all Australian jurisdictions. In May 2010 model provisions were produced and NSW is the first jurisdiction in Australia to adopt the model provisions.⁴²

2.3.13 The legislation does not purport to codify orders relating to suppression or non-publication, does not limit inherent powers in this respect or contempt powers, nor does it affect existing legislation which prohibits, restricts or grants a court powers to prohibit or restrict, the publication or disclosure of information in connection with proceedings. In the context of the current inquiry, it is important to note that the NSW government has 'been particularly careful not to dilute any protections currently afforded by other legislation, particularly as they relate to children, complainants and witnesses in sexual assault proceedings, and some witnesses in broader proceedings'.⁴³

2.3.14 The *CSNO Act* grants all courts in New South Wales the power to make a suppression or non-publication order on any one of the grounds specified in s 8 of the Act:

- the order is necessary to prevent prejudice to the proper administration of justice;
- the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national and international security;
- the order is necessary to protect the safety of any person;
- the order is necessary to avoid causing undue distress or embarrassment to a party or to a witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency); or
- it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

2.3.15 The *CSNO Act* was introduced in New South Wales as a complementary measure to the *Court Information Act 2010* (NSW) which regulates access to court information by the public, including the media. This Act is yet to commence.⁴⁴ According to the Agreement in Principle Speech it was the government's intention 'to promote transparency and a greater understanding of the justice system'

⁴¹ New South Wales Law Reform Commission (NSWLRC), *Contempt by Publication*, Report No 100 (2003).

⁴² This account is drawn from Johnson, above n 12.

⁴³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 October 2010, 27195.

⁴⁴ As at September 17 2013.

while, at the same time, ensuring ‘that the fair conduct of court proceedings, the administration of justice and the privacy and safety of participants in court proceedings are not unduly compromised’.⁴⁵

2.3.16 The relevant section of the *CSNO Act* in some respects echoes another potentially broad reaching protective provision, s 200 of the *Criminal Procedure Act 2011* (NZ). Section 200 enacts a discretionary prohibition on publication of the identity of the defendant.⁴⁶ Section 200(2) specifies the grounds on which the court may make such an order, namely if the publication would be likely to:

- cause extreme hardship to the defendant, or any person connected with the defendant; or
- cast suspicion on another person that may cause undue hardship to that person; or
- cause undue hardship to any victim of the offence; or
- create a real risk of prejudice to a fair trial; or
- endanger the safety of any person; or
- lead to the identification of another person whose name is suppressed by order or by law; or
- prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- prejudice the security or defence of New Zealand.

Section 202 provides for a further discretion to suppress the identity of witnesses and victims of offences on similar grounds.

Open Courts Act 2013 (Vic)

2.3.17 Legislation has recently been enacted in Victoria modelled on the *CSNO Act*.⁴⁷ However, whilst it is framed on the NSW Act, the *Open Courts Act 2013* (Vic) takes a more rigorous approach to granting suppression orders. Section 4 provides that in deciding whether or not to make an order, the court must have regard to a presumption in favour of disclosure. Moreover, the Act omits the general public interest ground for making an order that exists in the *CSNO Act*.

Guidelines for judicial officers

2.3.18 In some jurisdictions there are guidelines for judicial officers which seek to protect the privacy interests of particular participants in the court system. For example, in New South Wales, the Supreme Court has developed an ‘[i]dentity theft prevention and anonymisation policy’ which provides guidance as to the publication of personal or private information in court judgments, and must be adhered to by a judge’s staff and the staff of the reporting services branch. In Canada, judgments in which non-publication orders have been made pursuant to s 486 of the *Criminal Code*, RSC 1985, c C-46 (‘*Canadian Criminal Code*’) are required to have a cover sheet with a warning notice to that effect.

Conclusion

2.3.19 The respondents to IP 18 were united in the view that vulnerable witnesses in sexual offences cases deserve protection. Difficulties arise, however, in setting clear and consistent rules or guidelines for achieving an appropriate balance between upholding the important principle of open justice and

⁴⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 October 2010, 27195.

⁴⁶ Under the previous New Zealand law (*Criminal Justice Act 1985* (NZ) s 140(1)), the court had a very broad discretion to suppress publication of identifying information about the defendant.

⁴⁷ *Open Courts Act 2013* (Vic).

respecting the privacy of victims of sexual assault. Part 3 brings together examples of protective legislation from various jurisdictions and examines how this balancing exercise has been approached.

Part 3

The Current Law in Tasmania and Other Jurisdictions

3.1 Tasmania: section 194K

3.1.1 The anonymity of sexual assault complainants in Tasmania is protected by s 194K of the *Evidence Act*, which provides (in summary) that a person cannot publish anything which identifies an alleged victim of a sexual crime (or witness, or, in the case of incest, the accused) unless they have a court order; and if they do so publish without an order, it is punishable as a contempt of court. A court can only authorise publication of such information if it is considered to be in the public interest and may impose conditions in relation to any such publication. In full, s 194K reads:

- (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 –
 - (i) any person in respect of whom a crime is alleged to have been committed under section 124, 125, 125A, 125B, 126, 127, 127A, 128, 129, 185 or 186 of the *Criminal Code*; or
 - (ii) any person in respect of whom an offence is alleged to have been committed under section 35(3) of the *Police Offences Act 1935*; or
 - (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.
- (1A) 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 –
 - (i) any person in respect of whom a crime is alleged to have been committed under section 133 of the *Criminal Code*; or
 - (ii) the person who is alleged to have committed that crime; or
 - (iii) any witness or intended witness in those proceedings; or
 - (b) any picture purporting to be a picture of any of those persons.
- (2) A court is not to make an order under subsection (1) or (1A) unless satisfied that it is in the public interest to do so.
- (3) A court may make an order under subsection (1) or (1A) subject to any specified conditions.
- (4) A person who publishes or causes to be published anything in contravention of this section commits a contempt of court and is liable to punishment for that contempt as if it had been committed in the face of the court against which the contempt is committed.

3.2 Other jurisdictions

3.2.1 All Australian states and territories have enacted legislation which proscribes the publication of material that tends to identify the complainant in a sexual assault case.⁴⁸ Similar provisions are also included in legislation in New Zealand, Canada and the United Kingdom.⁴⁹ A selection of such legislation (relating to New South Wales, New Zealand, Canada and the United Kingdom) is briefly considered below.

New South Wales

3.2.2 As an Australian illustration, s 578A of the *Crimes Act 1900* (NSW) prohibits the publication of matters identifying a complainant in proceedings in respect of a prescribed sexual offence. The legislation provides as follows:

578A Prohibition of publication identifying victims of certain sexual offences

- (1) In this section -
 - “complainant” has the same meaning as in Division 1 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986*.
 - “matter” includes a picture
 - “prescribed sexual offence” has the same meaning as in the *Criminal Procedure Act 1986*
 - “publish” includes:
 - (a) broadcast by radio or television, or
 - (b) disseminate by any other electronic means such as the internet
- (2) A person shall not publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter which is likely to lead to the identification of the complainant. Penalty: In the case of an individual – 50 penalty units or imprisonment for six months, or both; in the case of a corporation – 500 penalty units.
- (3) This section applies even though the prescribed sexual offence proceedings have been finally disposed of.
- (4) This section does not apply to:
 - (a) a publication authorised by the judge or justice presiding in the proceedings concerned,
 - (b) a publication made with the consent of the complainant (being a complainant who is of or over the age of 14 years at the time of the publication),
 - (c) a publication authorised by the court concerned under section 11 of the *Children (Criminal Proceedings) Act 1987* in respect of a complainant who is under the age of 16 years at the time of publication,
 - (d) an official law report of the prescribed sexual offence proceedings or any official publication in the course of, and for the purposes of, those proceedings, or
 - (e) The supply of transcripts of the prescribed sexual offence proceedings to persons with a genuine interest in those proceedings or for genuine research purposes, or
 - (f) A publication made after the complainant’s death.
- (5) A Judge or Justice shall not authorise a publication under subsection (4)(a) unless the Judge or Justice:

⁴⁸ *Judicial Proceedings Reports Act 1958* (Vic) s 4; *Crimes Act 1900* (NSW) s 578A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 40; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6; *Evidence Act 1929* (SA) s 71A(4); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6; *Evidence Act 1906* (WA) s 36C.

⁴⁹ *Canadian Criminal Code* s 486.4; *Sexual Offences (Amendment) Act 1992* (UK) s 1; *Criminal Procedure Act 2011* (NZ) s 203.

- (a) has sought and considered any views of the complainant, and
 - (b) is satisfied that the publication is in the public interest.
- (6) The prohibition contained in this section applies in addition to any other prohibition or restriction imposed by law on the publication of any matter relating to prescribed sexual offence proceedings.
- (7) Proceedings for an offence against this section shall be dealt with summarily before:
- (a) the Local Court, or
 - (b) the Supreme Court in its summary jurisdiction.
- (8) If proceedings for an offence against this Act are brought before the Local Court, the maximum penalty that the Local Court may impose on a corporation is 50 penalty units.

3.2.3 It will be seen that publication is prohibited, even after proceedings have been finalised (s 578A(3)), subject to the exceptions listed in s 578A(4). Significantly, a judge or justice is not to authorise publication, under the exception provided pursuant to s 578A(4)(a), unless the views of the complainant have been sought and considered and unless satisfied the publication is in the public interest: s 578A(5). Section 578A operates in addition to any other prohibition or restriction imposed by law on the publication of any matter related to prescribed sexual offence proceedings: s 578A(6).

3.2.4 The NSW provision parallels s 194K in some respects. In each case the terminology used is similar: in s 578A(2) ‘A person shall not publish any matter which identifies the complainant ... or any matter which is likely to lead to the identification of the complainant’. In s 194K the prohibition relates to the publication of ‘the name, address or any reference or allusion likely to lead to the identification of’ the nominated persons, including the complainant. In each case the court must not authorise publication unless it is in the public interest to do so. However, while both provisions offer protection for the complainant, the prohibition against publication is expressed in absolute terms in the NSW legislation.⁵⁰ Section 578A prohibits the publication of ‘any matter’ whereas qualifications attach to the Tasmanian provision. Section 194K prohibits the publication of the name and address of the complainant. Whether or not other ‘references or allusions’ are confined to references or allusions to the complainant or whether the prohibition extends further is unclear. This issue is discussed in detail below (see 3.3.4). In addition, the definition of the prohibited means of dissemination is broader in the NSW legislation and specifically refers to the internet. Moreover, in accordance with s 5 of the NSW Act the court cannot authorise publication unless it has sought and considered the views of the complainant, a requirement that does not appear in s 194K. In NSW the prohibition continues after the proceedings have been finalised until the death of the complainant whereas the Tasmanian provision is silent on this issue. Finally, unlike s 194K, the NSW provision allows for the defence of consent by a complainant aged 14 years or older.

New Zealand & Canada

3.2.5 In New Zealand, s 203 of the *Criminal Procedure Act 2011* (NZ) provides that the identity of a complainant in relation to certain sexual offences is automatically suppressed, unless the complainant is aged 18 years or older and the court makes an order permitting publication. The purpose of the provision is to protect the complainant. Subsection (4) provides that the court must permit publication of the name of the complainant if she or he is aged 18 years or over (even if she or he was younger at the time of the offence or alleged offence) and applies to the court for an order permitting publication, and the court is satisfied that the complainant understands the nature and effect of her or his decision to apply for that order. However, the court may not make an order permitting publication under this provision, if the defendant has been granted a name suppression order and publishing the name of the victim may lead to identification of the defendant.

⁵⁰ The relevant Victorian legislation, s 4(1A) of the *Judicial Proceedings Act 1958*, is expressed in similar terms, viz, ‘any matter that contains any particulars’.

3.2.6 The Canadian counterpart of s 194K is to be found in s 486.4 of the *Canadian Criminal Code* which empowers a court to make an order directing that ‘any information that could identify the complainant or a witness’ (in relation to a series of enumerated sexual offences) ‘shall not be published in any document or broadcast or transmitted in any way’. The terms ‘published’, ‘document’, ‘broadcast’ and ‘transmitted’ are not further defined. The court shall, in relation to proceedings for the sexual offences listed, ‘at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order’: s 486.4(2). On the application of the complainant, the prosecutor or any such witness, the court is obliged to make the order. There is a further court discretion to make an order upon the application of the prosecutor, a victim or a witness in the same terms as provided by s 486.4 if no order has been made under s 486.4 where the court is satisfied that the order is necessary for the proper administration of justice: s 486.5(1). In this event, the applicant for an order shall set out the grounds relied on to establish that the order is necessary for the proper administration of justice: s 486.5(5). In relation to such an application, the court will consider:

- the right to a fair and public hearing;
- whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;
- whether the victim, witness or justice system participant needs an order for their security or to protect them from intimidation or retaliation;
- society’s interest in encouraging reporting of offences and the participation of victims, witnesses and justice system participants in the criminal process;
- whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
- the salutary and deleterious effects of the proposed order;
- the impact of the proposed order on the freedom of expression and those affected by it;
- and any other factor the court thinks relevant.⁵¹

Every person who fails to comply with an order is guilty of an offence punishable on summary conviction: s 486.6. The order may be subject to any conditions the court thinks fit: s 486.5(8). This would appear to cover issues such as the scope and duration of the order.

3.2.7 As can be seen, the New Zealand and the Canadian provisions take a different approach from the Tasmanian position. Tasmania’s s 194K(1) prohibits the publication of certain information likely to identify a complainant in respect of whom it is alleged that certain sexual offences have been committed unless a court authorisation is obtained. This requires speculation by the party seeking to publish material relating to the proceedings as to whether the publication would transgress the section. On the other hand, it requires a discretionary decision by the prosecutor as to whether to prosecute a publisher who has ‘crossed the line’. For abundant caution, a publisher could seek a court authorisation but that is likely to be a time consuming and costly process, certainly if sought on a regular basis. The New Zealand equivalent (s 203 *Criminal Procedure Act 2011* (NZ)) provides for the automatic suppression of the identity details of the complainant in relation to certain sexual offences unless the court makes an order permitting publication. Such an order can only be made if a complainant who is 18 or over applies for an order permitting publication and the court is satisfied that the complainant understands the nature and effect of the decision to seek such an order. However, the New Zealand provision only suppresses the name, address and occupation of the complainant and therefore imposes a narrower restriction on publication than its Tasmanian counterpart. In the Canadian legislation (s 486.4(1) *Canadian Criminal Code*), there is no automatic prohibition. The legislation empowers the court of its own motion to make a non-publication order. In relation to

⁵¹ *Canadian Criminal Code* s 486.5(7).

certain sexual offences, the court is obliged to inform complainants and any witnesses under the age of 18, at the first reasonable opportunity, of their right to seek such an order. If they make an application, the court must make such an order. The Canadian provision must be interpreted in a manner consistent with the values expressed in the *Canadian Charter of Rights and Freedoms*,⁵² specifically s 2(b) which enshrines the right to freedom of expression. The accepted approach in deciding whether to order publication bans is that set out in what is known as the *Dagenais/Mentuck* test.⁵³ The test is to be applied in the context of a presumption against a ban in light of the rights to free speech and freedom of the press protected by s 2(b) of the *Charter*. Accordingly, a persuasive onus rests on the party applying for the order against publication.

United Kingdom

3.2.8 On the other hand, the equivalent UK provision (leaving aside the question of when the alleged victim consents to publication) resembles the general approach in s 194K. Anonymity was first granted to complainants in rape cases pursuant to the *Sexual Offences (Amendment) Act 1976* (UK) s 4 and extended to complainants in other sexual offences cases by the *Sexual Offences (Amendment) Act 1992* (UK) ss 1 and 2. Section 1(1) prohibits the publication of the name, address and any still or moving picture of a person who is the alleged victim of the sexual offences listed in s 2 if the publication of such detail 'is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed'. Section 1(2) operates more broadly and provides that, where a person is charged with a relevant sexual offence, 'no matter' likely to lead to identification of the complainant shall be published. The prohibition covers written publications available to the public in England and Wales as well as relevant programme broadcasts in England and Wales. The prohibition remains in force during the lifetime of the alleged victim. Section 5 provides that a person who contravenes the prohibition shall be liable on summary conviction to a fine. One major difference between the UK and Tasmanian provisions is that in the UK it is a defence to a charge to prove that the alleged victim gave written consent for the publication in question or for the appearance of the details in the relevant programme: s 5(2). However, written consent is not a defence if it is proved that any person interfered unreasonably with the peace and comfort of the person giving consent, with intent to obtain it: s 5(3). The other major difference is that the UK provision makes it explicit that information is prohibited where it is 'likely to lead *members of the public*' to make the identification (emphasis added). One of the criticisms of the Tasmanian provision is that it is not clear who should be prevented from making the identification.

Summary

3.2.9 Legislation provides for suppression of the identity of sexual assault complainants in all Australian states and territories. Relevant provisions have been discussed above. In New South Wales (as in Tasmania) a court may authorise publication in the public interest but in New South Wales this specifically requires prior consideration by the court of the views of the complainant. In New Zealand the court must make an order permitting publication if it is sought by a complainant who is aged 18 years or older (whether or not he or she was younger at the time of the offence or alleged offence) if the court is satisfied that the complainant understands the effect of the decision to apply for such an order. In Canada the court may make an order for suppression of its own motion and must make such an order if requested by a complainant. In the United Kingdom, written consent by the alleged victim is a defence to prosecution if he or she has not been manipulated into giving consent. Notably, in each of these foreign jurisdictions, the relevant provisions operate within a human rights framework which may affect how conflict between privacy and an open court is adjudicated. In Canada, for example, despite recent recognition that privacy is a legitimate consideration in weighing arguments in relation

⁵² *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

⁵³ The test was articulated in the cases of *Dagenais v CBC* [1994] 3 SCR 835 and *R v Mentuck* [2001] 205 DLR (4th) 512 (SCC).

to open courts, the Supreme Court continues to endorse strongly the principle of open justice.⁵⁴ On the other hand, as Mark Pearson remarked in his submission to IP 18, in the absence of constitutional guarantees of freedom of speech ‘courts here are not obliged to weigh free expression against other rights in their determinations.’⁵⁵ Accordingly, direct comparisons between these provisions and domestic schemes should be undertaken with caution.

3.3 Interpreting s 194K and similar provisions

3.3.1 Section 194K as it is currently formulated presents a number of interpretative difficulties. Perhaps most problematic are:

- questions relating to the type of information which attracts the prohibition on publication and whether it is restricted to matters relating to the complainant; and
- questions relating to the class of people who, on the basis of published information, are able to identify the complainant.

3.3.2 Section 194K has been the subject of limited judicial consideration in Tasmania and those cases which have come before the courts have tended to be decided on the application of the legal principles that inform the provision rather than a construction of the language used. Thus, in both *Re Evidence Act 2001, s194K and an Application by the Australian Broadcasting Corporation and Davies Bros Limited*⁵⁶ and *Re an Application by the Australian Broadcasting Corporation pursuant to section 194K of the Evidence Act 2001*⁵⁷ it was held that the consideration of the public interest is central to a determination under s 194K. Underwood J stated that orders authorising publication of identifying details ought not be granted unless the court is satisfied that it is in the public interest to do so.⁵⁸ On the other hand, no Tasmanian case has yet considered the test for ‘likely to lead to identification’ nor whether the test must be applied with reference to members of the general public. In the absence of Tasmanian authority, recourse must be had to judicial consideration of similar legislation in other jurisdictions for guidance as to how a court might construe s 194K.

The scope of prohibited information

3.3.3 In Victoria s 4 of the *Judicial Proceedings Reports Act 1958* deals with the issue of complainant anonymity. In 1989, this provision was considered by the Victorian Supreme Court in *Bailey v Hinch*.⁵⁹ Although it has been amended subsequently, this case is important for its interpretation of the phrases, ‘any other particulars’ and ‘likely to lead to the identification of any person’. At that time, s 4 provided:⁶⁰

⁵⁴ Jamie Cameron, Department of Justice Canada, *Victim Privacy and the Open Court Principle* (2003) 4.

⁵⁵ Whilst the High Court has held that the Commonwealth Constitution contains an implied guarantee of free political discussion, this does not extend to freedom of speech generally: see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁵⁶ [2003] TASSC 118.

⁵⁷ [2005] TASSC 41.

⁵⁸ *Re Evidence Act 2001, s194K and an Application by the Australian Broadcasting Corporation and Davies Bros Limited* 2003] TASSC 118, [3].

⁵⁹ [1989] VR 78.

⁶⁰ The current provision essentially prohibits the same conduct using slightly different terminology (ie publishes or causes to be published ‘any matter that contains any particulars likely to lead to the identification of a person’). It also broadens the definition of publish, provides that there may be an offence whether or not proceedings are pending in respect of the alleged sexual offence and provides that it is a defence to a charge of publication if the accused can prove that the alleged victim consented (if there was no charge pending) or that the publication was in accordance with a court order (if a charge was pending).

- (1) A person shall not in relation to any proceedings in any court or before justices in respect of an offence of a sexual or unnatural kind publish or cause to be published in any newspaper or document or in any broadcast by means of wireless telegraphy or television –
 - (a) the name, address or school or any other particulars likely to lead to the identification of any person against or in respect of whom the offence is alleged to have been committed (whether or not that person is a witness in the proceedings); or
 - (b) any picture purporting to be or to include a picture of any such person
 unless the court or justices order that all or any particulars or such picture may be so published and the particulars or picture are published in conformity with the order.
- (2) Any person who contravenes any of the provisions of sub-section (1) of this section shall be guilty of an offence.

3.3.4 In *Bailey v Hinch* it was held that the phrase ‘any other particulars’ in s (1)(a) is not limited to particulars about the alleged victim or the alleged victim’s circumstances. If it was otherwise then the provision would have no effect if, for example, the name of the husband was published and the offence was clearly one of rape in marriage. The former s 4 is expressed in virtually identical terms to s 194K, so it is conceivable that a Tasmanian court might resolve the question of the scope of the prohibition in accordance with the decision of the court in *Bailey v Hinch*. However, another possibility is that, applying the *ejusdem generis* rule of statutory interpretation,⁶¹ the words in s 194K(1)(a), ‘any other reference or allusion’, should be read in conjunction with the words ‘name, address’. It follows that references or allusions are restricted to matters which directly relate to the alleged victim. The DPP made this point in his submission to IP 18. To paraphrase, the relevant part of s 194K provides that a person must not publish the name, address, or any other reference or allusion likely to lead to the identification, of an alleged victim of a sexual crime or any witness, other than the defendant, in proceedings for a sexual crime. The DPP contends that references and allusions are qualified in the same way as names and addresses. That is, to engage the prohibition on publication, they must refer to the complainant or another witness, other than the defendant. While not presuming to comment on the correctness or otherwise of this view, the Institute accepts that the provision might feasibly be interpreted in this way. The potential ambiguity in the wording of s 194K becomes more apparent when it is contrasted with the equivalent provision in the Queensland legislation. Section 6 of the *Criminal Law (Sexual Offences) Act 1978* provides:

- (1) Any report made or published ... shall not reveal the name, address, school or place of employment of a complainant ... or any other particular likely to lead to the identification of a complainant ...

It is clear that the specific particulars referred to (name, address etc) are restricted to particulars about the complainant, whereas ‘any other particular’ is not similarly limited in scope. In the interests of certainty and consistency it is essential that the ambiguity in the Tasmanian provision be resolved.

By whom is identification to be made?

3.3.5 Difficulty also arises in the interpretation of the phrase ‘likely to lead to the identification of any person’, either the alleged victim or in some jurisdictions another witness in proceedings. Only South Australia and the Australian Capital Territory use different terminology. The relevant provisions in those jurisdictions state the test in terms of drawing a reasonable inference about the complainant’s identity. The objective formulation of the test suggests a lower threshold for engaging the prohibition on publication. It may be, therefore, that cases from these jurisdictions will be of limited guidance due to this point of difference.

⁶¹ ‘A rule of construction stipulating that where general words follow particular words the general words may be construed as being limited to the same kind as the particular words’: Peter Butt (ed), *Concise Legal Dictionary* (Butterworths, 3rd ed, 2004).

3.3.6 The difficulty lies not in the interpretation of ‘likely’ — there is apparent consensus that ‘likely’ means ‘a real or substantial and not remote chance of [identification]’.⁶² Rather the difficulty lies in determining whether the proscribed identification is to be made by members of the general public or by people equipped with additional personal knowledge of the victim. The resolution of this question was critical to the DPP’s opinion about a potential breach of s 194K in the case which prompted this inquiry. The Director’s view was that the publication itself must lead to identification. Since the identification of the accused in the case could only lead to identification of the victim by those already familiar with the family, there had been no breach. In his submission to IP 18 he stated that s 194K was not intended to suppress details ‘where only prior and possibly intimate knowledge would enable the recipient of the publication to make the particular form of identification’. Otherwise the provision would operate more broadly than Parliament intended. It would prohibit the publication of details almost as a matter of course, since in every case someone would have intimate knowledge of the victim.

3.3.7 The competing arguments were canvassed in *Howe v Harvey*.⁶³ In that case the Victorian Court of Appeal was required to consider s 26(1)(a) of the *Children and Young Persons Act 1989* (Vic)⁶⁴ (since repealed) which stated:

- (1) A person must not publish or cause to be published –
 - (a) except with the permission of the Children’s Court Senior Magistrate, a report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to an identification of –
 - (i) the particular venue of the Children’s Court in which the proceeding was heard; or
 - (ii) a child or other party to the proceeding;
 - (iii) a witness in the proceeding

3.3.8 Counsel for the appellants submitted that the provision would be breached only where a real or substantial prospect existed that published details could lead to identification by the ‘ordinary reasonable reader’.⁶⁵ The ordinary reader was described as one ‘armed only with general knowledge of notorious facts in the public domain’.⁶⁶ The court rejected this argument, noting, ‘the question whether there has been a breach of s 26(1)(a) is a factual one, which does not require the interposition of a test based on the perception of an ‘ordinary reasonable reader.’ In the earlier case of *Bailey v Hinch* the court also eschewed reliance on an objective, reasonable person test, stating that whether material is ‘likely to lead to identification’ is a question of fact in each case.⁶⁷

3.3.9 The facts of the case were that broadcaster Derryn Hinch had published (in a radio broadcast) the name of a judge hearing a case concerning rape in marriage. The magistrate convicted Hinch and Macquarie Broadcasting Holdings (the owner of the radio network) of an offence under s 4 of the *Judicial Proceedings Reports Act 1958* (Vic). Hinch challenged the decision of the magistrate on the grounds that the magistrate had been wrong in law in the interpretation he gave to s 4. Because the rape case attracted substantial publicity and the subject matter was particularly controversial, the Supreme Court of Victoria held that in these circumstances, publishing the name of the judicial officer hearing the case meant it was likely someone could scan the law lists, see the accused’s name and therefore identify the victim. Gobbo J noted that the fact that only more knowledgeable members of the community would have the skills to look up the law lists did not mean the magistrate had created a

⁶² *Howe v Harvey* [2008] VSCA 181, [37], citing *Boughey v R* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ); *TSL v Secretary, Dept of Justice* (2006) 14 VR 109, 112–3 (Callaway AP).

⁶³ [2008] VSCA 181.

⁶⁴ This legislation was repealed by the *Children, Youth and Families Act 2005* (Vic).

⁶⁵ *Howe v Harvey* [47].

⁶⁶ *Ibid* [37], citing with approval *Howe v Harvey* [2007] VSC 130, [64] (Williams J).

⁶⁷ [1989] VR 78, 92.

new test based upon the conduct of a well-informed member of the community.⁶⁸ His Honour observed:

[T]he magistrate was not obliged to proceed on the basis that the broadcast had to be capable of leading anyone who heard it to proceeding further to a possible identification of the victim. The victim is not merely entitled to protection from the least astute members of the community.⁶⁹

3.3.10 In South Australia the position in relation to the anonymity of alleged victims of sexual offences is governed by s 71A(4) of the *Evidence Act 1929* which provides:

- (4) A person must⁷⁰ 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 authorisation or consent can be given where the alleged victim is a child).

3.3.11 In *Channel Seven Adelaide Pty Ltd v Stockdale-Hall*⁷¹ Vanstone J stated in relation to this section:

The prohibition in s 71A(4) is, subject to the exception, absolute. A breach occurs wherever there is publication of material describing the victim, sufficient, when added to knowledge already possessed by members of the community, to enable identification.⁷²

However, as noted above, this case may offer little guidance on the interpretation of s 194K. Arguably there is a clear indication of legislative intent in the South Australian provision that is absent from s 194K. This is because the South Australian provision articulates an objective standard of ‘reasonable inference’.⁷³

3.3.12 In New Zealand the relevant legislation until recently⁷⁴ was the *Criminal Justice Act 1985* s 139. This provision prohibited the publication of the name of a person against whom a sexual assault had been allegedly committed or the publication of ‘any name or particulars likely to lead to the identification’ of that person. In *R v W*⁷⁵ (where the court was considering the 1985 Act) the New Zealand Court of Appeal considered a decision to suppress the name and age of a sex offender, where the alleged victim was a child who had worked at the offender’s office on two occasions after school. Initially, the District Court refused a suppression order. That decision was appealed to the High Court, which held that the offender’s name should not be published as it was likely to lead to the alleged victim’s identification. The High Court granted leave to appeal to the Court of Appeal. The Court of Appeal dismissed the appeal, considered the meaning of ‘likely’ in this context, observed the prescriptive nature of the prohibition, and noted its aim was to protect the victim. The Court stated:

⁶⁸ Ibid 94.

⁶⁹ Ibid.

⁷⁰ ‘Must’ was substituted for ‘shall’ pursuant to *Evidence (Reporting on Sexual Offences) Amendment Act 2012* (No 44 of 2012) s 4(5). Power to make suppression orders more generally is governed by s 69A of the *Evidence Act*.

⁷¹ [2005] SASC 307.

⁷² Ibid [11].

⁷³ The DPP in his submission to IP 18 noted that the South Australian legislation in this respect is materially different from s 194K.

⁷⁴ This legislation was repealed in 2012 and replaced by the *Criminal Procedure Act 2011* (NZ). The current provision (s 203) is cast in narrower terms and only imposes an automatic suppression of the name, address and occupation of the complainant.

⁷⁵ [1998] 1 NZLR 35.

[T]here is no question of balancing the public interest in the open reporting of Court proceedings against the prospect of risk of harm to the victim. The exclusive focus of s 139 is on the welfare of the victim. It is the risk to the victim that is protected by the prohibition. The statute assumes that any identification of an under-16 victim is an unacceptable risk of harm by barring publication. It must be enough that there is an appreciable risk that publication of the material could lead to the identification of the victim. In that context, qualifying adjectives such as ‘real’, ‘appreciable’, ‘substantial’ and ‘serious’ are not used to set higher or different thresholds, but rather to bring out that the risk or possibility must not be fanciful and cannot be discounted.⁷⁶

3.3.13 In this case, it was already a notorious public fact that the alleged victim was a 15-year-old boy who had worked after school on two successive afternoons for a 48-year-old professional man in his Palmerston North office. The Judge (in the High Court decision, upheld by the Court of Appeal) concluded that to add the name and profession of the offender might lead to persons, including school companions, making the connection between the alleged victim and the respondent. This was an unacceptable risk. However, the repeal of the *Criminal Justice Act 1985* (NZ) raises doubt about whether the same conclusion would be reached under the new *Criminal Procedure Act 2011* (NZ). According to the initial government briefing on the Criminal Procedure (Modernisation and Reform) Bill 2011, the Bill was designed to clarify and strengthen the rules relating to the suppression of names and other information by ‘confirming that the starting point for considering publication will continue to be a presumption of open justice’⁷⁷ and by ‘replacing the current broad discretion ... with more clearly defined grounds’.⁷⁸

Summary

3.3.14 The key terminology in s 194K which establishes the criterion for prohibited details, namely ‘likely to lead to the identification of’, has parallels in New South Wales, Victoria, Canada, the United Kingdom and the former New Zealand legislation. As mentioned earlier, the Tasmanian courts have not considered in any significant detail how this phrase is to be interpreted. However, similar — though not identical — provisions have been interpreted by other courts in a way that prohibits publication not only of information which standing alone would lead to identification, but also of information which could lead to identification when combined with prior knowledge, or other publicly available information. While case law from other jurisdictions may point to one way of interpreting s 194K, the DPP’s conclusion that the newspaper article which provided the catalyst for this project was not caught by s 194K, strongly suggests that the provision may be open to an interpretation that prescribes a higher threshold for breach in Tasmania. It may be that the section accommodates a number of different interpretations. Such lack of clarity is not desirable in legislation which bears the very important responsibility of protecting victims of sexual offences.

3.4 Procedural features: complainant’s consent to publication

3.4.1 Comparable enactments in other jurisdictions permit publication of identifying details with the victim’s consent, a feature that is absent from s 194K. In the Australian Capital Territory and Victoria it is a defence to the offence of publishing material that is likely to lead to the identification of a complainant if the person charged can establish that the complainant consented to publication before publication occurred, although in Victoria the defence is only available where a proceeding in

⁷⁶ Ibid 40.

⁷⁷ Chester Burrows, Justice and Electoral Committee, Parliament of New Zealand, *Criminal Procedure (Reform and Modernisation) Bill: Initial Briefing* (2011) 11 [49.1].

⁷⁸ Ibid [49.2].

relation to the alleged offence is not pending.⁷⁹ In New South Wales publication is allowed if the complainant consents and is of or over the age of 14.⁸⁰ In South Australia publication may occur if the complainant consents and the victim is not a child.⁸¹ In Western Australia publication may occur if the complainant consents, the consent is in writing, the complainant is 18 or over and at the time consent was given the complainant was not, because of a mental impairment, incapable of making reasonable judgments in respect of publication of such matters.⁸² In the Northern Territory and Queensland (as in Tasmania) no provision is made for victim consent and publication can only occur with a court order.⁸³ In the United Kingdom, written consent by the alleged victim is a defence as long as there was no unreasonable interference with the peace or comfort of the person giving consent with intent to obtain it: *Sexual Offences (Amendment) Act 1992* (UK) ss 5(2)–(3). In New Zealand and Canada, there is effectively a consent option as the alleged victim may seek court authorisation for publication of the prohibited details (see paragraphs 3.2.5–3.2.7).

3.4.2 The protective provisions are based, at least in part, on broad privacy principles. Specifically, they 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 IP 18 who addressed the 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.

3.4.3 In *R v Ali*⁸⁴ Berman DCJ made a similar point and acknowledged that there is an apparent community attitude that victims of sexual assault should be ashamed. Publishing the identity of sexual assault complainants may help the community overcome this by demonstrating that victims do not feel ashamed and do not need to hide their identity.⁸⁵ Where the complainant consents to publishing their identity this may have the effect of empowering the victim and assisting in the overall healing process. Publishing their identity may help to vindicate them and to give them a voice. This may also encourage other victims of sexual assault to report crimes committed against them by demonstrating that there is no need to feel ashamed.

3.4.4 However, given the apparent prevalence and persistence of community prejudice against sexual assault victims,⁸⁶ the contrary argument may be made that encouraging complainants to self-identify is to subvert their individual interests in pursuit of the social good. There are always likely to be victims who do not feel comfortable about revealing their identity and who require the protection

⁷⁹ *Evidence (Miscellaneous Provisions) Act* (ACT) s 40(2); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B) (b) (ii).

⁸⁰ *Crimes Act 1900* (NSW) s 578A(4)(b).

⁸¹ *Evidence Act 1929* (SA) s 71A(4). Section 4 provides that a child means a person under the age of 18 years.

⁸² *Evidence Act 1906* (WA) s 36C(6)(b).

⁸³ *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 6; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6; *Evidence Act 2001* (Tas) s 194K.

⁸⁴ [2008] NSWDC 318.

⁸⁵ *Ibid* [6]–[7].

⁸⁶ See Heilbron Committee, above n 31; Temkin, above n 5; Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence – A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010).

of the law.⁸⁷ In these circumstances, a protective provision which allows for a consent defence appears to strike a reasonable balance.

3.4.5 It should also be noted that problems have occurred in situations where there are multiple victims and only one or two consent to publication of identifying information. Similar issues arise if there are multiple victims and one or more is precluded from consenting because of, for example, the age threshold for consent provided by law (as in New South Wales, South Australia and Western Australia) or the mental impairment of one of the victims (as in Western Australia). This issue was recognised in *R v The Age Company*⁸⁸ by Evans J, who noted that the editor of *The Age* had given no consideration to the risk that in identifying one victim (who had given her consent) others may also be identified. A similar issue arose in New Zealand in the case of *TV 3 Network Services Ltd v R*⁸⁹ where the court refused to grant an order allowing the publication of the names of two complainants who had consented as it would lead to the identification of a further three complainants who had not.

3.4.6 Consent may operate to allow an otherwise prohibited publication in other legislative contexts. For example, s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) prohibits the publication or broadcasting of the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings. However, there is an exception to the prohibition on publication or broadcast where a person who is 16 years or above at the time of publication or broadcast has consented: s 15D(1)(b). A child of 16 or 17 years can only give consent in the presence of a legal practitioner of their choosing: s 15D(3).

⁸⁷ In *R v Kwok* [2005] NSWCA 245 Hodgson JA (referring to the alleged victims of sexual servitude offences who sought protection of their identity via a non-publication order) observed: ‘However wrong it may be for people to think badly of another because that other has engaged in prostitution, particularly if this is under some kind of compulsion, I think the Court can recognise that victims will fear that this will happen, and that this circumstance could be a powerful disincentive against victims coming forward’: at [21]. See too the remarks of Evans J in *R v The Age Company Ltd* [2000] TASSC 62. Commenting on the absence of provision for the victim to consent to publication in the predecessor to s 194K (*Evidence Act 1910* s 103AB) he stated: ‘One benefit of a provision such as 103AB is community knowledge that those who make complaints about sexual offences are protected from publicity. This protection encourages people who might otherwise have been deterred from reporting sexual offences to come forward’: at [13].

⁸⁸ [2000] TASSC 62, 181.

⁸⁹ [1993] 3 NZLR 421.

Part 4

Options for Reform

4.1 Overview

4.1.1 The mandate for this project was to review the adequacy of s 194K and its role in protecting the anonymity of complainants in sexual assault cases. The IP concluded that reform in a number of areas was desirable. Broadly speaking these were: amendments to provide interpretative guidance on the provision; procedural reforms; and clarification of terms employed by the legislation. There was virtual unanimity in the responses to IP 18 that there is a need to reform s 194K. Alone amongst the respondents the DPP judged that the provision as currently formulated achieves a reasonable balance between granting protection to the victim and safeguarding the public interest in open justice, although quite properly, the DPP was not concerned to canvas the question of the adequacy of the protection afforded by s 194K at length. Whilst for most respondents, s 194K provides insufficient protection for the victims of sexual assaults,⁹⁰ for some, s 194K tips the balance too far towards the protection of victim interests.⁹¹ The most frequently cited shortcoming was the absence in the section of clear interpretative guidance. This was seen as problematic since, as one respondent stated, it ‘creates uncertainty in the law and may lead to a failure to adequately protect sexual assault complainants.’⁹² The Commissioner for Children noted that ‘the section is open to widely divergent interpretations’, whilst Women’s Legal Service Tasmania apprehended difficulties for media outlets in determining when they risked breaching the legislation. Tasmania Police suggested that clarification of the scope of s 194K would lead to consistent treatment by the courts of instances of breach. As noted above (see 3.3.5 and following), the Institute also considers that it is not clear where the provision sets the threshold for breach. The interpretation contended for by the DPP sets a high threshold, that is, the publication of information about the victim must, by itself, be likely to lead to identification. On the other hand, it is arguable that an alternative construction is possible which sets a lower threshold. Should courts in Tasmania embrace such an interpretation it would afford sexual assault victims somewhat broader protection, not dissimilar from that prevailing in Victoria and South Australia. In any case, even if the interpretation advanced by the DPP is correct and was endorsed as such, there remains the key issue of whether that state of the law affords adequate protection to such victims.

4.1.2 Legislating to clarify the uncertainty involves weighing the public interest in open justice against the concerns of victims. Clearly, any law which imposes limits on the conduct of transparent, accountable and open justice is a derogation from the general principle that favours open justice (see 2.1 above). Yet it is well established that, in appropriate cases, the law will afford such protection (see 2.3 above). The question in the current context is whether s 194K (however construed) affords appropriate protection to victims. The Institute has concluded that s 194K requires reform because:

- i. the interpretation embraced by the DPP (on the assumption that it is correct) did not provide adequate protection for the complainant in the instant case;
- ii. the possible alternative interpretation is not sufficiently certain to allow confidence in the law;

⁹⁰ Submissions of Aileen Ashford, Commissioner for Children; Craig Mackie; Tasmanian Bar Inc; Tasmanian Association of Community Legal Centres.

⁹¹ Submissions of David Killick and Mark Pearson.

⁹² Submission of Tasmanian Association of Community Legal Centres.

- iii. the law should be clarified;
- iv. it is desirable that any such clarified law provide a greater degree of protection in specific cases than currently afforded (on the basis of the DPP's interpretation); and
- v. there are various omissions and uncertainties in relation to procedural and other aspects of s 194K which require consideration.

4.1.3 Some respondents raised additional perspectives on the issue of victim anonymity that were not explicitly contemplated by IP 18. The complex issue of the impact of social media on the courts, specifically in relation to attempts to restrict the publication of identifying information, was noted by a number of respondents. For example, Mark Pearson referred to a “two-speed” suppression regime ... effectively one rule for traditional media and a different rule for citizens using social media’ and added that ‘a Tasmanian identification prohibition is [not] going to have any real effect on individuals publishing material on the internet from beyond the State’s borders.’ The impact of new media on court processes generally is a subject that is well beyond the scope of the current inquiry. Accordingly, whilst acknowledging that modern legislative responses to the protection of vulnerable witnesses cannot ignore the reality of the ubiquity of social media and the enormous challenges it poses for lawmakers, the Report does not delve further into the possibility of reform in this area other than to consider the court’s powers to make limited orders in relation to new media (see 4.3.21 and following).

4.1.4 Part 4 examines each of the areas of reform identified by IP 18 in turn. First, it discusses the lack of clarity in the current formulation of s 194K in detail, noting that this is especially problematic in Tasmania where the media self-regulates in relation to decisions to publish. As Craig Mackie noted in his submission to IP 18, this may lead to situations where breaches only come to the attention of the DPP after identifying details have been published and it is too late for the provision to have any protective effect. Second, it sets out the various reform options proposed to clarify the scope of s 194K. Part 4 then outlines the Institute’s views on the implementation of procedural reforms. It examines the questions of how and when decisions about publication should be made and the duration and geographical reach of court ordered prohibitions. It also considers whether additional procedural measures should be introduced better to protect the interests of victims of sexual crimes, chiefly whether the victim’s consent should in some cases permit publication of otherwise proscribed details. Next, the issue of appropriate sanctions for breaches of orders is examined before the Part concludes by setting out the Institute’s views on clarifying the terminology used in the provision.

4.2 The need for interpretive guidance: clarifying the scope of s 194K

Was there a breach of s 194K in this case?

4.2.1 In his submission to IP 18, the DPP set out his reasons for determining that s 194K had not been breached by the publication of the identity of the accused in the case that sparked this inquiry, and other details about the personal circumstances of the accused and the victim. The Director stated that it is not sufficient that people with intimate prior knowledge of the complainant may realise that the publication refers to that person or that their suspicions may be raised. He argued that in his view, for a breach of s 194K to occur the publication by itself must be likely to lead to identification. He noted the significance accorded to legislative purpose in the contemporary approach to statutory interpretation⁹³ and observed that, in determining that purpose in the present context, ‘the importance and the public interest in maintaining the principle of open justice should be recognised as a

⁹³ The purposive approach was first articulated in *Heydon’s Case* (1584) 76 ER 637 at 638. For a modern authority see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

significant aspect.’ He also noted that the prohibition ‘operates only on publication’ and thus cannot be intended to offer ‘an absolute guarantee of anonymity.’ According to this interpretation, a breach of s 194K only occurs if a reader with a general knowledge of notorious facts is able to identify the complainant from published material. Unless this is likely, the desire to protect vulnerable complainants does not justify derogation from the principle of open justice.

4.2.2 The concern with this interpretation is that a reader with general knowledge is unlikely to determine the identity of the complainant unless very specific information is published. This creates a high threshold test in that a substantial amount of information could be published (that would identify the complainant to a reader or viewer with prior knowledge) before a reader or viewer with general knowledge could make the identification. If numerous people have prior knowledge of a case or the parties (this may be only slight knowledge, for example knowing who the associates of the mother’s male friend were) this could lead to a large number of people making the identification from the published details without the publication breaching the provision. The relatively small population of Tasmania may enhance the risk of identification. From one perspective this frustrates the intention of s 194K as it gives undue weight to the need to maintain open courts at the expense of victim protection. On the other hand, it can be argued that a high threshold is justifiable because the importance of the open justice principle dictates a strict approach to the interpretation of its exceptions. It also seems clear that, if the prohibition operates only where the publication itself is likely to lead to identification, then the law is much simpler to apply. This is because a publisher cannot gauge the extent of the readership’s prior knowledge, and so will inevitably find it difficult to assess how much information can be published before someone with some prior knowledge will be likely to identify the victim.

4.2.3 Another aspect of s 194K which requires clarification is the type of information that is prohibited by the section. It is arguable that the provision as currently worded prohibits, amongst other things, the publication only of references or allusions to the complainant directly.⁹⁴ However, it is not clear that this was the narrow operation envisaged by Parliament when the current version of s 194K was enacted. In the second reading speech on the Evidence Amendment Bill 2002, the Attorney-General explained that there is no blanket prohibition on naming an accused in sexual offences but that publication of the accused’s name could be prohibited if it was likely to identify the complainant.⁹⁵ This statement plainly contemplates that details other than those directly related to the complainant could be subject to the rule in s 194K.⁹⁶ In the Institute’s view, if this were not the case, the effectiveness of the legislation would be substantially weakened. The very limited scope of information that might attract the prohibition on publication would offer little protection for vulnerable victims of sexual assault. If the provision were to be amended in line with the equivalent Queensland provision any ambiguity would be resolved.⁹⁷

4.2.4 In referring this matter to the TLRI, Craig Mackie was firmly of the view that the article published by *The Mercury* did breach s 194K.⁹⁸ In his request for a review of s 194K he stated, ‘I believe that s 194K is contravened even if the “identification” is likely to be made only by those people who already knew the [complainant].’⁹⁹ Mr Mackie also considered that the newspaper article in question contravened the spirit of the law by publishing collateral details such as the intimate medical history of the complainant.¹⁰⁰ As noted above (see 3.3.14), the fact that the DPP reached a different conclusion suggests that the provision may be construed in a number of ways. Such uncertainty in the law is undesirable. Those attempting to ensure compliance with the provision need

⁹⁴ See discussion at 3.3.4 above.

⁹⁵ Tasmania, *Parliamentary Debates*, House of Assembly, 22 October 2002, 29–87 (Judy Jackson).

⁹⁶ This interpretation was also endorsed in the case of *Bailey v Hinch* [1989] VR 78: see 3.3.4 above.

⁹⁷ See discussion at 3.3.4 above.

⁹⁸ See 1.1.2 above.

⁹⁹ Letter from Craig Mackie to Tasmania Law Reform Institute, 29 March 2010.

¹⁰⁰ *Ibid.*

to have a clear understanding of the parameters of the law. Future judicial pronouncements may provide clarity, but the possibility of an alternative construction of s 194K by the Supreme Court of Tasmania is ultimately an unsatisfactory situation because of the uncertainty involved for all concerned — the complainant, prosecutorial authorities, the media and the public. Moreover, the Institute considers that the extent of the protection to be afforded victims by this provision is a policy matter, and hence more appropriately dealt with by the Parliament than the judiciary. There is a need to reform s 194K, to remove doubt about the scope of the legislative prohibition, specifically in relation to:

- who should be prevented from making the identification (whether or not this includes people with prior knowledge of the case or parties);
- the type of information that is prohibited by the section (whether information that directly relates to the complainant or other indirectly related information); and
- what restrictions, if any, apply to the publication of collateral details.

The Scope of the Prohibition

4.2.5 It may be that anonymity for complainants in sexual offences cases is justified because of the singular nature of such crimes, or, instead, it may be that, in light of the drastic under-reporting of sexual assault, victim anonymity is a ‘remedial measure’¹⁰¹ to encourage victims to report. The former justification pre-supposes and tacitly supports the characterisation of sexual assault as inherently shameful for the victim as well as the perpetrator. There is certainly merit in the argument that the insistence on victim anonymity perpetuates such discriminatory attitudes and hence special rules should not apply in relation to the identification of victims in these cases. However, as one respondent to IP 18 noted, ‘[s]ocial attitudes ... must change in order for legislation to change to identify victims.’¹⁰² Since anonymity is an important factor in decisions to report to police,¹⁰³ the better course may be to continue to offer increased protection until such time as victims no longer experience the stigma of sexual assault. As noted above (see 3.4.4) a protective provision which allows for a consent option may be a reasonable method of resolving the tension between these two points of view. The following discussion of reform of s 194K proceeds on the basis that at least in some cases, granting anonymity to victims of sexual offences is justified.

What information should be prohibited?

4.2.6 The Institute considers that the prohibition on publication should not be limited to information directly related to the victim or the victim’s circumstances.¹⁰⁴ There is no reason in principle why the scope of prohibited information should be confined in this way. It is clear that in many cases, other details will enable the victim to be indirectly identified. So, for example, in this case, publishing the information that the accused was in a relationship with the victim’s mother may have been sufficient to enable identification within the small community in which the victim lived. The only relevant enquiry should be whether the reference or allusion may be likely to lead to the identification of the victim. This is the inclusive language adopted in other jurisdictions.¹⁰⁵ In this regard, it also seems desirable that courts should be provided with guidance on the meaning of the term, ‘likely’. Issues Paper 18 called for comment on a proposal to amend s 194K to include a definition of the term ‘likely’. Those respondents who addressed this proposal were generally in agreement with the

¹⁰¹ Cameron, above n 54, i.

¹⁰² Submission of Marg Dean, Northern Sexual Assault Group Inc.

¹⁰³ See Wolitzky-Taylor et al, above n 3; Walby and Allen, above n 3.

¹⁰⁴ This was the interpretation embraced by the DPP.

¹⁰⁵ See, eg, *Judicial Proceedings Reports Act 1958* (Vic) s 4(1A); *Evidence Act 1929* (SA) s 71A; *CSNO Act s 7*; *Crimes Act 1900* (NSW) s 578A(2).

definition derived from the New Zealand decision in *R v W*,¹⁰⁶ that is, ‘an appreciable risk, more than a fanciful risk’. The Institute considers that the suggested definition, variations of which have also found approval in other legal contexts,¹⁰⁷ should be adopted.

By whom is the identification to be made?

4.2.7 Safeguarding the principle of open justice is an integral component of the over-riding public interest in the proper administration of justice.¹⁰⁸ The question remains whether prohibiting the publication of information that might lead only those equipped with prior knowledge to identify the complainant represents an unwarranted interference with that process. Amongst the respondents to IP 18, support for a test based on the general reader was approximately on a par with support for a lower threshold test. Women’s Legal Service Tasmania, Graham Davis, David Killick and the DPP all supported the general reader test. David Killick referred to the futility of attempting to prevent identification by people with prior personal knowledge of the victim. The DPP noted that in almost every case, the victim will have reported the sexual assault to someone and it is likely that publication of any information about the case will enable that person to make the connection with the victim.

4.2.8 Determining the appropriate test is problematic as the question whether or not information is likely to identify the victim is very much context dependent (see Gobbo J’s remarks in *Bailey v Hinch* discussed at 3.3.9 above). This is particularly important in a small jurisdiction such as Tasmania where there may be a greater likelihood that significant sections of the community have some knowledge of the parties. For this reason a wholly objective test that does not take the particular circumstances of the case into account is inappropriate and is likely to offer little protection for victims.

4.2.9 There is no doubt that victims of sexual assault have been poorly treated by the justice system in the past, suffering unwarranted intrusions into their privacy and a lack of fairness throughout the investigation and trial process. It is also not clear that modern law reform efforts in this area have improved the justice system experience for victims. The Institute considers that the existing prohibition on the publication of the victim’s name and address be retained for two reasons. First, as a concession to the fact that social attitudes may not have changed sufficiently to forsake the exceptions to open court entirely. And second, that in any case, excising these details does not represent a threat to the openness and transparency of proceedings.

4.2.10 In relation to other potentially identifying details, a test of whether the information may be likely to lead to identification by a reader equipped with knowledge in the public domain should be adopted. This question should be considered in the context of all the circumstances of the case. The Institute is persuaded by the DPP’s arguments that s 194K would be unworkable if it was contravened where a reader with prior knowledge of the complainant recognises that a publication relates to them.¹⁰⁹ However, the test proposed adds an additional element, in that it envisages the possibility of imposing non-publication orders where the news item in combination with other publicly available information may lead to identification. Relevant considerations might include the age and vulnerability of the complainant (as to the justification for special considerations in cases of vulnerable victims see further 4.2.13 below), the notoriety and public interest that the case has attracted, whether information about the complainant already exists in the public domain and the size of the community in which the complainant ordinarily resides. A composite test may have offered better protection for the complainant in the case which was the catalyst for this project. Given the fact that she was a young child, that she was likely to be extremely sensitive to disclosure of intimate and

¹⁰⁶ [1998] 1 NZLR 35.

¹⁰⁷ See, eg, *R v W* [1998] 1 NZLR 35; *Howe v Harvey* [2008] VSCA 181, [37], citing *Boughey v R* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ); *TSL v Secretary, Dept of Justice* (2006) 14 VR 109, 112–3 (Callaway AP).

¹⁰⁸ See *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, 216 (Bathurst CJ).

¹⁰⁹ Submission of the Director of Public Prosecutions.

potentially embarrassing medical details¹¹⁰ and that the case had attracted some notoriety, greater restrictions on publication may have been justified.

4.2.11 An identification test based on a reader with prior knowledge of the victim is too broad and likely to derogate impermissibly from the principle of open justice. In many cases it will effectively prohibit the publication of the accused's name, an outcome that was clearly never contemplated by the legislature.¹¹¹ It would also deprive the community of the considerable public benefits to be gained from open discussion of the prevalence and nature of sexual assault and the harmful effects on victims.¹¹² Such discussion may, in specific cases, encourage other victims to come forward and, in a more general sense, help to remove the unwarranted stigma traditionally associated with victims of sexual assault. In her oral submission, Claire Konkes referred to the real danger that if the capacity to report on the human details of a case is curtailed too severely, the resulting generic account is likely to be considered of small news value.¹¹³ Ultimately this may have the unwanted and unintended result of a general decrease in reportage of sexual offending. The broader test is also problematic as it will be very difficult to assess the extent of prior knowledge in individual cases and therefore which details may be likely to lead to identification.

General power to prohibit publication of collateral details

4.2.12 In some cases it may also be appropriate to prohibit publication of additional information that is irrelevant (to the public) but potentially embarrassing or hurtful (to the complainant). For example, the power might be extended to enable the court to make orders on additional grounds such as those enumerated in ss 8(c)–(e) of the *CSNO Act*. The relevant grounds are:

- (c) the order is necessary to protect the safety of any person,
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),
- (e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

In accordance with s 7 of the *CSNO Act* the orders may extend beyond potentially identifying information to encompass information 'otherwise concerning any party to or witness in proceedings'.¹¹⁴ A broader power would enable the court to prohibit publication of collateral details (for example descriptions of sexually transmitted diseases contracted by the victim of a sexual assault). The Institute considers that the court should have a discretion in this regard. To date there have been no cases in New South Wales considering the construction of s 8(d) which might provide an indication of how that discretion might be exercised, but on its face it suggests a wider operation than the common law rules relating to suppression orders. That is, the common law test of whether orders are 'necessary to secure the proper administration of justice'¹¹⁵ may yield to considerations of the victim's or witness's feelings of distress or embarrassment. That is not, however, to ignore the prominence given to the preservation of open justice in the *CSNO Act* model. There is a test of necessity where suppression orders are sought on the grounds of public interest and that public

¹¹⁰ The desirability of empowering a court to prohibit publication of collateral details such as these is discussed at 4.2.12.

¹¹¹ See Tasmania, *Parliamentary Debates*, House of Assembly, 22 October 2002, 29–87 (Judy Jackson). In referring to the replacement of s 103AB of the *Evidence Act 1910* with s 194K, the Attorney-General noted: 'As a result of this change, an accused person in sexual assault proceedings can never be identified without the order of a court. This change was never intended.'

¹¹² This point was made in the submission of Mark Pearson.

¹¹³ Oral submission by Claire Konkes (14 February 2013).

¹¹⁴ *CSNO Act* s (7)(a).

¹¹⁵ *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477.

interest must *significantly* outweigh the public interest in open justice.¹¹⁶ Such a test could be incorporated into either an amended s 194K or a new provision replacing s 194K in order to deflect criticism that introducing a discretion to prohibit the publication of collateral details impermissibly derogates from the principle of open justice.

Children and other especially vulnerable victims

4.2.13 Although IP 18 did not invite submissions on the question of separate treatment for children or other especially vulnerable victims, a number of respondents argued that cases of sexual offences involving child victims may call for special considerations. The Commissioner for Children’s analysis of s 194K, for example, was framed by the principles enshrined in the *Convention on the Rights of the Child* (CROC).¹¹⁷ In her view, s 194K fails to protect the rights and interests of victims generally but particularly child victims of sexual offences. The Institute considers that this is an important matter of principle and it is included in this Report on that basis. All sexual assault victims are vulnerable and require a level of protection but child victims are especially vulnerable because of their immature age. There is a wealth of empirical evidence that many young children find the experience of court particularly stressful and do not possess the coping skills that an adult complainant might be able to draw upon to enable them to process the intense emotions to which the traumatic experience of becoming a victim of a sexual crime is likely to give rise. In particular, there is a body of research that suggests that young victims of sexual abuse suffer feelings of shame and stigmatisation particularly keenly. For example, Jones and colleagues note:

Shame is a stronger predictor of ongoing trauma and depression for victims than the severity of the abuse or the nature of the victim-offender relationship. ... The link between shame and traumatic symptoms can persist for years ... Publicity around a child’s victimization heightens a child’s risk of experiencing shame and stigmatization.¹¹⁸

The authors continue:

[C]hildren may be more likely to develop shame in the wake of traumatic experiences because their views of themselves are still forming. The effects of the publicity of their victimization may also be particularly hard on children because their self-concept is so dependent upon others ...¹¹⁹

A young victim may find it particularly distressing to have intimate or embarrassing details about ‘the unwanted interference with [their] body’¹²⁰ aired in the media, even where those details are effectively de-identified. It is also acknowledged that the question of the publication of collateral details assumes particular significance in relation to other categories of vulnerable victims. Thus, the arguments for granting special consideration to child victims apply with equal force to other especially vulnerable victims (for example, the mentally impaired or victims with a disability).

4.2.14 It is important that recommendations regarding the scope of s 194K take into account particular vulnerabilities and outline a framework to address this class of complainants in the legislation. The Canadian response has been to establish different rules for child victims by directing that complainants under the age of 18 must be informed at the earliest opportunity of their right to

¹¹⁶ *CSNO Act* s 8(e). Additionally, see s 6: ‘In deciding whether to make a suppression order or non-publication order, a court must take into account that a *primary objective of the administration of justice is to safeguard the public interest in open justice*’ (emphasis added).

¹¹⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹¹⁸ Lisa Jones et al, ‘Protecting Victims’ Identities in Press Coverage of Child Victimization’ (2010) 11(3) *Journalism* 347, 348 (citations omitted).

¹¹⁹ *Ibid* 349 (citations omitted).

¹²⁰ *R v L (D O)* [1993] 4 SCR 419, 465 (L’Heureux-Dubé J).

apply for a prohibition order.¹²¹ On application, the judge must make the order.¹²² Arguably, this approach does not offer adequate safeguards for child complainants. In a legislative scheme with no automatic prohibition against publication, the onus rests with the complainant proactively to seek a prohibition order. This may be problematic where the young victim does not comprehend the possible implications of publication or where they are being badly advised. Section 486.5(7) of the *Canadian Criminal Code* goes on to state the considerations relevant to the making of an order. Two of the listed considerations in particular, reveal the sensitivity of the legislation to the *Canadian Charter of Rights and Freedoms*. Section 486.5(7)(a) provides that the judge must consider the right to a fair and public hearing and s 486.5(7)(g) requires the judge to consider the impact of such an order on freedom of expression. In Tasmania however, the absence of any domestic state or federal Charter or Bill of Rights suggests that those considerations may more readily yield to arguments about the paramount importance of offering protection to especially vulnerable witnesses, including child victims.

4.2.15 Another option might be to deal with particularly vulnerable victims in accordance with the general provision but make it explicit that, in such cases, the primary focus for the court is the protection of the complainant. This is the approach adopted in New Zealand. Section 203 of the *Criminal Procedure Act 2011* prohibits the publication of the name, address or occupation of victims under the age of 18,¹²³ and states that the purpose of the section is to protect the complainant.¹²⁴ The Institute considers that protection is best achieved via the general court discretion proposed above to prohibit the publication of collateral details (for example, age, school, place of work, particular medical conditions, mental health issues) but that the provision granting the discretion should be qualified so that, in exercising its discretion, the court is required to have regard to the fact that the victim is ‘especially vulnerable’. This term needs to be defined in the legislation to include such classes as: persons under 18; persons with a mental impairment; persons with an intellectual disability. The discretion route is preferable to a blanket suppression of all details regarding especially vulnerable victims but the greater derogation from open justice that it entails is justified because of the need to afford extra protection to the particular cohort of people in this category.

4.2.16 The Commissioner for Children argued that introducing a discretion to prohibit publication of collateral details would provide greater protection than is presently the case. She stated:

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 importance of the public interest

4.2.17 Also relevant to the foregoing discussion about the reach of s 194K is the question of the role of the public interest. This question is important in all decisions about how much or how little information may be published in a given case. Under the current provision, an order authorising publication is not to be made unless the court is satisfied that it is in the public interest to do so.¹²⁵ No guidance is provided in the legislation as to the criteria the court must apply in weighing the public interest. Question 10 in IP 18 invited comment on whether the public interest test should be retained. The few submissions that commented on this aspect of prohibition orders agreed that the public interest should continue to be factored into court determinations. Women’s Legal Service Tasmania suggested that open justice and the public interest were important factors but how these are best served should be judged by taking into account all the circumstances of the case. They also stated that

¹²¹ *Canadian Criminal Code* s 486.4(2)(a).

¹²² *Ibid* s 486.4(2)(b).

¹²³ *Criminal Procedure Act 2011* (NZ) s 203(3).

¹²⁴ *Ibid* s 203(2).

¹²⁵ *Evidence Act 2001* (Tas) s 194K(2).

victim input into the decision to permit publication is very important. The Commissioner for Children agreed that it was important to retain the public interest test and that the court should take all the circumstances of the case into consideration, but she argued that likelihood of identification should not be the only basis on which a non-publication order is justified. The Commissioner stated that the court should also have power to make such orders in order to protect the victim's safety, for example (see the discussion above regarding the court's power to prohibit publication of collateral details at 4.2.12).

4.2.18 These responses also touch upon the allied question of whether it is desirable to retain the broad judicial discretion as to what constitutes 'the public interest' or whether it is preferable to specify criteria to guide the court. There was no support amongst respondents to IP 18 for the suggestion that the legislation specify the criteria that the court should/must consider. Both Women's Legal Service Tasmania and Graham Davis argued that courts are used to weighing competing considerations in determining where the public interest lies. An assessment of where the interests of justice or the public interest lie in a particular case will depend upon the unique circumstances of the case. As was observed in the High Court case of *Hogan v Hinch*, '[t]he application of a public interest criterion may require a balancing of competing interests and "be very much a question of fact and degree."' ¹²⁶ The Institute agrees that the court must give consideration to all the circumstances of the case in deciding which details may be subject to a prohibition on publication. Securing the interests of justice should be the overriding consideration, therefore additional details in a case should not be suppressed unless it is in the interests of justice to do so. However, the Institute endorses a broad understanding of how those interests might best be served. Relevant considerations are not limited to fairness for the accused, although the accused's right to a fair trial is paramount, but should also encompass respect for victims' rights and interests and acknowledgment of the public interest. The Institute agrees that the weight to be accorded particular factors should be determined on the facts of individual cases and that a prescriptive listing of relevant criteria may hamper the court in this task. The circumstances of the complainant will be particularly salient to the decision. It may, for example, be in the public interest to encourage open discussion of the issues raised by the case or there may be little likelihood that the victim will be identified even with the publication of quite a large amount of information. On the other hand, the fact that the complainant is a young person should require a different test, that is, the publication of either potentially identifying information or collateral information should not be authorised unless the court is satisfied on the balance of probabilities that the public interest would be served by allowing publication (see the discussion of the particular risk of harm that publicity poses for especially vulnerable complainants at 4.2.13 above). The test proposed by the Commissioner for Children in cases involving child complainants stipulated three requirements: the views of the child have been sought and taken into account; the order is in the best interests of the child; and the order does not violate other victims' rights (particularly child victims).

The Institute's view

4.2.19 The Institute considers that the current formulation of s 194K presents interpretative difficulties and may not afford appropriate protection to vulnerable victims of sexual offences. The Institute considers that the legislation should make it clear what type of details may be caught by the prohibition and by whom the prohibited identification is to be made. In ruling on publication matters, in appropriate cases the court must have regard to the fact that the complainant is 'especially vulnerable'. In such cases, the principle of open justice may more readily yield to a consideration of interests of the individual victim. The Institute also considers that in making determinations about publication, the public interest test in s 194K(2) should be retained. It considers that courts are well equipped to assess where the public interest lies in the circumstances of particular cases and prescriptive criteria may impermissibly constrain the court in this task.

¹²⁶ [2011] HCA 4, citing *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 and the authorities quoted therein.

4.2.20 The recommendations that follow involve considerable procedural and substantive reform to the law regulating publication matters in sexual offences cases. The Institute questions whether the *Evidence Act* is the appropriate legislative instrument within which to house these rules. Section 194K does not deal with rules of evidence and it is absent from the Evidence Acts in the other jurisdictions which are part of the uniform Evidence Act scheme.¹²⁷ Excising it from the Tasmanian Act would therefore be desirable in the interests of consistency. It is also not clear that these rules could be accommodated appropriately in another existing piece of legislation. Accordingly, the Institute suggests a separate statute be enacted to govern the publication of information relating to victims in sexual offences cases without making a final recommendation in this regard.¹²⁸

Recommendation 1

That legislation be enacted to provide as follows:

In sexual offences* cases,

- (i) publication of name, address or image (broadly defined) of the complainant or witnesses other than the defendant is prohibited;
- (ii) publication of the name, address or image (broadly defined) of the defendant is prohibited where it is likely to identify the complainant;
- (iii) publication of such other information as is likely to identify the complainant or witnesses other than the defendant is prohibited;
- (iv) the prohibitions in (i) and (iii) also apply to the defendant in cases under s 133 of the *Criminal Code* (incest);
- (v) in determining (ii) ‘likely’ shall mean ‘an appreciable risk, more than a fanciful risk’;
- (vi) in making determinations pursuant to (ii) and (iii) the court shall have regard to potential identification by a reader, viewer or listener, equipped with knowledge in the public domain, in all the circumstances of the case;
- (vii) the court shall have a discretion to prohibit the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant;
- (viii) in exercising this discretion the court is required to have regard to the fact (if it be the case) that the complainant is ‘especially vulnerable’;
- (ix) ‘especially vulnerable’ complainants shall include persons under 18, persons with a mental impairment and persons with an intellectual disability;
- (x) unless otherwise specifically provided, all determinations by the court shall have regard to the public interest.

*See Recommendation 8 which recommends the use of the generic term, ‘sexual offences’.

4.3 Procedural matters

Court’s power to determine prohibited details

4.3.1 Accompanying the question of the scope of the prohibited information are questions about how and when decisions about publication are made. Several respondents pointed to the difficulty that media organisations have in assessing whether or not information is likely to attract the operation of

¹²⁷ Uniform legislation applies in the Commonwealth, New South Wales, Tasmania, the Australian Capital Territory and Norfolk Island.

¹²⁸ The *CSNO Act* and the *Open Courts Act 2013* (Vic) are examples of such stand-alone legislation.

s 194K. David Killick noted, '[t]he current legislation requires an exercise of considerable judgment by media outlets'. He added, '[i]t is difficult to predict, from one case to another which factors may prove critical [to identification]'. It may also be the case that media outlets are complacent about the requirements of the legislation. As Wood J observed in *R v Haley*,¹²⁹ the fact that a 'strikingly obvious' breach of s 194K was not detected prior to publication was 'suggestive of complacency' by the media organisation.¹³⁰ As an alternative, it may be preferable to entrust courts with the responsibility for determining how much detail may be published in individual cases. Women's Legal Service Tasmania stated:

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.

Mark Pearson suggested that the court be required to rule on the identifying factors allowable in the particular case. Women's Legal Service Tasmania and David Killick also advocated a similar approach. Time and resource constraints raise questions about the viability of such a proposal, but extra imposts may be minimised if these questions are resolved at the beginning of every sexual offence proceeding, eliminating the need for parties to make multiple applications to the court.

4.3.2 One criticism of this approach is that a requirement that the court proactively rule on which details *may* be made public is not conceptually distinct from a blanket prohibition. In effect, it prohibits the publication of all details unless the court has ruled otherwise. This was canvassed as an option for reform (Question 3 in IP 18). It attracted some support but several respondents echoed the argument made in IP 18 that, whilst providing greater protection for complainants, this option would arguably impinge too heavily upon the principle of open justice.¹³¹ Tasmania Police noted that a blanket prohibition without a court order, '[has] the potential for causing congestion within the court system and may impinge upon the principles of open justice'. Such an incursion may be difficult to justify given the fundamental importance of the principle and the fact that other options for reform are available. A less objectionable option may be to require the court to rule on those details which are *not* to be made public, that is, those details which may be likely to lead to the identification of the victim or those details which in the court's opinion may cause distress or harm to the victim. This option provides media outlets with clear guidance on what they may not publish and the confidence to publish additional information that has not been vetoed by the court. Parties, including media outlets and prosecutors, should have the opportunity to make submissions to the court. This would ensure that principled consideration is given in advance to the likely effects of publication and that victim interests are duly taken into account. The assessment should be informed by the test outlined above, ie, identification by a reader, equipped with knowledge in the public domain, in the particular circumstances of the case.

4.3.3 Another benefit of this approach is that conferral of anonymity does not depend on the complainant acting to safeguard her interests. In this respect, this proposal offers greater protection for victims than does the broadly similar Canadian approach (see 3.2.6 above). In Canada the court's power to rule proactively on prohibited information is discretionary rather than mandatory. Therefore, unless an order is made, the complainant does not have the automatic protection afforded by the current legislation in, for example, Tasmania, New South Wales, New Zealand and the United Kingdom. A modification of the Canadian approach, stipulating instead that the court must rule on the scope of prohibited details, offers a guarantee that in every case the important question of victim anonymity is given due consideration.

4.3.4 There are, however, obvious practical difficulties with such an approach. A mandatory requirement couched in these terms effectively absolves the media from all responsibility to exercise

¹²⁹ [2012] TASSC 86.

¹³⁰ Ibid [53]–[54].

¹³¹ Submissions of Tasmanian Bar Inc, Commissioner for Children and Graham Davis.

judgment about what they choose to publish. Potentially identifying details that have been overlooked by the court or have only come to light subsequent to the court ruling, and thus have not been identified as prohibited details, may be published with impunity. Instituting a system of discretionary pre-trial consideration of publication matters also suggests that, in order to prepare a submission in relation to the content of court orders, a publisher will need to know in advance that the case is to come before the court. This seems to require, perhaps unfairly, a degree of prescience that the organisation may not have. It is also true that the question of how information about non-publication orders made in this way is communicated to the media may be problematic. For example, it is probably impractical for media organisations to have a representative attend every sexual offence case. A possible solution to these difficulties, flagged earlier in this Report (see 1.1.6), is to appoint a court officer to liaise directly with media organisations. This would provide a reliable conduit for relevant information about forthcoming sexual offence matters between the courts and the media. In any case, where the opportunity to come before the court before the commencement of proceedings has passed, the Institute recommends that publishers may subsequently apply for a variation or revocation of orders (see Recommendation 3(b) below).

The Institute's view

4.3.5 A process of discretionary pre-trial, court consideration of publication matters relating to both potentially identifying information and collateral details offers a number of benefits. It increases the likelihood that the Crown will pay due regard to the need to seek suppression orders and it is to be hoped that, with time, publication matters will be considered by all those involved in sexual offences proceedings as a matter of course. The recommendation also makes clear that the court has power to suppress other, non-identifying details on the grounds that they may be embarrassing or otherwise harmful to the victim. The decision about whether certain material may be likely to lead to the identification of the complainant is to a considerable extent taken out of the hands of the media. In this regard, one of the respondents to IP 18 suggested that under the current self-regulatory regime, media outlets rarely make an application to publish and thus independent scrutiny only comes after publication.¹³² In *R v Haley*¹³³ Wood J noted the insufficiency of training offered to journalists on the effect of the prohibition in s 194K and the absence of an adequate system for vetting articles.¹³⁴ This alternative removes primary responsibility for publication decisions from the media and vests it in the judicial officer, whose determinations are unlikely to be influenced by subjective interests. Having an independent arbiter decide would arguably result in greater protection for complainants and allow for flexibility having regard to the particular circumstances of the case, including the age of the complainant. Another benefit is that it should be simple to determine whether or not a breach has occurred (that is, whether the published information has been previously prohibited by a court order). Moreover, information that, for whatever reason, is not encompassed by an initial court order may still be caught by the residual automatic prohibition on potentially identifying details proposed in Recommendation 1(iii) above.

¹³² Submission of Craig Mackie.

¹³³ [2012] TASSC 86.

¹³⁴ *Ibid* [40].

Recommendation 2

- (a) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of such information as may be likely to identify the complainant.
- (b) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant.
- (c) Orders referred to in (a) and (b) may be made on the application of a party to the proceeding or the prosecutor or on the motion of the judge.*

*See Recommendation 3(a) below in relation to who should have standing to apply for orders.

The question of standing**Who may apply?**

4.3.6 Issues Paper 18 also reflected upon the questions of standing to apply for orders and to be heard in the matter as well as on the court's power to revoke or vary non-publication orders. Currently, s 194K is silent on the question of standing. It would appear that this initiative has been regarded as the responsibility of the media or other publisher in the relevant proceedings. For a number of reasons this is an unsatisfactory state of affairs.

4.3.7 There are various scenarios in which interested parties could apply for non-publication orders or seek to have pre-existing orders varied or revoked. The prosecution may seek to have potentially identifying information or collateral details about the victim suppressed. Media organisations may seek to have prohibitions on the publication of some or all of the details lifted. At some point either during or after proceedings the complainant may seek to self-identify. Arguably, therefore, whilst it seems appropriate that media outlets are permitted to apply for or seek to vary or revoke orders once made, this entitlement should be expanded. The *CSNO Act*, in describing the scope of the right to apply for non-publication orders, provides a useful guide on how far the entitlement should extend. According to s 9:

- (1) A court may make a suppression order or non-publication order on its own initiative or on the application of:
 - (a) a party to the proceedings concerned, or
 - (b) any other person considered by the court to have a sufficient interest in the making of the order.

With the exception of the *CSNO Act*, legislation in other Australian jurisdictions is generally silent on the question of standing. The Victorian legislation does not articulate a positive entitlement to apply but it provides in s 4(1C) that it is a defence to prove that publication was authorised by the court on an application by 'a person'.¹³⁵ This implies a broad statutory right to apply for orders. The Canadian approach (discussed above at 3.2.6) empowers the court to take the initiative and make non-publication orders of its own motion, as a matter of discretion: *Canadian Criminal Code* s 486.4(1), or upon application by the prosecution, if the court is satisfied that it is necessary for the proper administration of justice: *Canadian Criminal Code* s 486.5(1). In addition, the court is obliged to inform the complainant (in relation to the nominated sexual offences) and any witness under the age of 18 years, at the first reasonable opportunity, of their right to seek an order prohibiting publication of any information that could identify them: *Canadian Criminal Code* s 486.4(2). In the event that either the complainant or such a witness seeks such an order the court must make it.

¹³⁵ *Judicial Proceedings Reports Act 1958* (Vic) s 4(1C).

4.3.8 The Institute considers that the legislation should stipulate who is entitled to apply to the court in scenarios such as those suggested above (4.3.7). The over-riding concern in granting an application should be that it serves the interests of justice. Clearly, open courts generally serve the interests of justice but in particular cases victims' interests or fairness to the accused may justify a reconsideration of restrictions on publication. Creating a broad right ensures that the interests of justice are weighed in a comprehensive and balanced way. Therefore, the Institute considers that the right to apply should be extended to the prosecution, the complainant and the accused and anyone with sufficient interest in the making of such orders to enable a diversity of views and interests to be aired.

Who may appear?

4.3.9 It follows that if a broad right to apply is created (either for an initial publication or non-publication order or for variation or revocation of orders) the right to be heard in relation to the determination of the application should be similarly inclusive. To date, the court has exercised its discretion and has generally allowed appearance by the media. However, the scope of the entitlement is unclear (for example as to whether there is a right to appear or whether leave of the court is required) and there is no statutory guidance on the range of persons or agencies who might claim an interest. Again, a useful model is provided by s 9(2) *CSNO Act*¹³⁶ which provides a statutory right to appear (in respect of persons seeking a non-publication order) to a group of persons or entities including:

- (a) the applicant for the order;
- (b) a party to the proceedings concerned;
- (c) the government (or an agency of the government) of the Commonwealth or a state or territory; and
- (d) a news media organisation.¹³⁷

Review and appeal

4.3.10 Section 194K is also silent on the court's power to review an order under this section. Nor is there any specific statutory power to appeal. It may be desirable to make specific provision for such powers. A useful model (in the context of non-publication orders) is provided by the *CSNO Act*. Section 13 provides that a court may review a non-publication order on its own initiative or on the application of a person who is entitled to apply for a review. Persons entitled to apply for and appear and be heard by the court on the review of an order are: the applicant for the order; a party to the proceedings in connection with which the order was made; the government (or an agency of government) of the Commonwealth or of a state or territory; a news media organisation; and any other person who, in the court's opinion, has a sufficient interest in the question of whether the relevant orders should continue to operate. On a review, the court has powers to confirm, vary or revoke any order it has made.¹³⁸

¹³⁶ See paragraphs 1.4.13–1.4.17.

¹³⁷ There is a wide definition of the term 'news media organisation' in s 3 of the *CSNO Act* which encompasses a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.

¹³⁸ See also *Criminal Procedure Act 2011* (NZ). A recent illustration concerned criminal proceedings against a football coach for sexual offences against a member of a junior team many years earlier. The defendant was convicted and sentenced to a maximum term of five years imprisonment by Bennett J of the NSW District Court. The defendant's lawyer successfully applied for a suppression order prohibiting disclosure of the defendant's name, under the *CSNO Act*, 'in order to protect the victim'. However, several days later, an application lodged by the media to review the order proved successful. Judge Bennett varied his original order to allow publication of the defendant's name and the detailed facts of the case on the basis that a pseudonym be used for the victim. A crucial aspect of the successful media application was the consent of the victim to the variation sought because he 'wanted the story to be told': see Daniel Lane, 'For 30 Years, They Had a Monster in their Midst', *The Sydney Morning Herald*, 19 February 2012.

4.3.11 In addition, s 14 of the *CSNO Act* provides for an appeal, by leave, against a decision to make (or not to make) a non-publication order or a decision on review. The ‘appellate’ court for the purposes of s 14 is the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court. The entitlement to appear and be heard on appeal is in the same terms as the rights to appear and be heard on a review.

The Institute’s view

4.3.12 The Institute considers that the Tasmanian legislation should include a provision clearly setting out the rules relating to standing, using the *CSNO Act* provision as a guide. This would grant media outlets, the parties to proceedings and the victim the right to make submissions in relation to the desirability of making orders relating to additional potentially identifying information or collateral details as well as the content of proposed orders.¹³⁹ The same right to be heard should be granted where an application for variation or revocation is made. The Institute considers that a broad right to be heard will promote justice between the parties. In light of the support expressed for a broad right to appear generally in relation to non-publication orders the Institute also considers that a broad right to appeal should be adopted in Tasmania.

Recommendation 3

- (a) That a statutory right to apply for both publication and non-publication orders and to be heard in relation to the determination of applications be granted to the victim of the offence, the parties to proceedings, news media organisations and any other person considered by the court to have a sufficient interest in the making of the order.
- (b) That a similarly broad right be granted to apply for revocation or variation of orders and to appeal against a decision whether or not to make an order.

Publication with victim consent

4.3.13 Reform may also be desirable to allow for publication when the complainant consents. As discussed at 3.4 above, a number of other jurisdictions allow for publication when the complainant consents. Section 194K is silent in this regard. Arguably, when considering an application to publish details, a complainant’s consent could be taken into account by the court as part of the court’s consideration of the ‘public interest’ (which the court is bound to consider). While it may be possible for a court to consider a complainant’s consent in this way, it is certainly not clear that the court must do so, nor is the court given any guidance as to how much weight should be given to this factor (among many other possible factors) in making a decision. Uncertainty about how decisive a court might consider the victim’s consent to be could make publishers and complainants reluctant to seek publication orders. This is undesirable since, in appropriate cases, allowing publication with the victim’s consent will not unreasonably dilute the protection offered to complainants by s 194K. On the other hand, the special vulnerability of victims of sexual offences seems to require that, even if the possibility of publication with the victim’s consent is entertained, such consent may only be validly given in limited circumstances. It may be thought necessary, for example, to protect victims from making a decision (to consent) that they may come to regret, particularly if the victim has decided (or been persuaded) to give consent for short term gain (eg, payment by a media organisation or simply media attention) or questionable motives (eg, a desire for revenge by exposing the offender, even if that comes at the cost of self-identification) or without a very realistic idea of what the actual consequences of identification may be. Evans J, in *R v The Age*¹⁴⁰ explained the rationale for the absence of a provision granting publication with the complainant’s permission in the following way:

¹³⁹ See the discussion at 4.3.4 above regarding how a court media liaison officer might anticipate media submissions and alert organisations to forthcoming sexual offences trials.

¹⁴⁰ [2000] TASSC 62 (9 June 2000).

Such a provision may encourage representatives of the media to pester victims to consent to publicity. It is undesirable to expose victims to this pressure at a time when they are likely to be in considerable emotional turmoil and may be ill-equipped to weigh up and assess the consequences of publicity. ... The perception that victims are protected from publicity would be diminished if the media was able to publish details of victims who consented to that course.¹⁴¹

In a later case, *Re Application by ABC and Davies Bros*,¹⁴² Underwood J noted that statement with approval but added that the benefits to the victim of speaking publicly legitimately form part of the public interest, which in turn is the critical consideration in making publication orders. In distinguishing the earlier case, he concluded that, in the instant case, the risk that publication of the victim's name would deter other victims from coming forward was minimal.¹⁴³

4.3.14 Amongst respondents to IP 18 most agreed with the suggestion that publication of identifying particulars be permitted with the victim's consent. Women's Legal Service Tasmania wrote at some length on this issue and echoed many of the views of other respondents. They stated:

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.

It is not for others to make judgment 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.

We agree with the notion that shielding victims leads to increased stigma and shame as well as victim blaming. ... 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.

David Killick also argued that 'the suggestion that a victim might be ill-equipped to make the decision to allow publication' was paternalistic and that refusing to permit publication with victim consent unfairly silences victims. Hobart Women's Health Centre stated that 'a complainant, having been a victim of a sexual crime, becomes entangled in a system that does nothing to give them control over their lives.' The inability to share their stories is one aspect of this and therefore 'they should have choice over what is published about them'.

4.3.15 It may be desirable, not only to stipulate a standard of informed consent, but also to limit effective consent to complainants who have attained a certain age, are not vulnerable because of, for example, a form of mental impairment, and who have not been coerced or manipulated by third parties into consenting. Additionally, any reform will need to take account of the possibility that in some cases there are multiple complainants, only some of whom consent to publication or only some of whom have the capacity to consent. Women's Legal Service Tasmania endorsed these factors and also listed several other factors that should be taken into account. Amongst these were:

- the time elapsed since the offence;
- the victim's reasons for disclosure.

4.3.16 A number of respondents argued that the consent of a complainant under the age of 18 should not make publication permissible.¹⁴⁴ The Commissioner for Children, whilst not ruling out the possibility that adult complainants may be permitted to grant consent to publication, expressed her

¹⁴¹ Ibid [13].

¹⁴² [2003] TASSC 118 (10 November 2003).

¹⁴³ Ibid [7].

¹⁴⁴ See submissions of Women's Legal Service Tasmania and Tasmanian Association of Community Legal Centres.

strong view that in cases involving child victims no publication of identifying details should be permitted in the absence of a court order. Accordingly, the consent of a child victim should not be a defence to unauthorised publications.

Consent to publication or consent to court order authorising publication

4.3.17 Issues Paper 18 invited submissions on two options for dealing with victim consent. The first option is to provide that the victim's consent may be relied upon as a defence in the event of prosecution for breach of a prohibition on publication.¹⁴⁵ The second option is to provide either that the court must make a publication order if there is relevant consent (as in Canada) or alternatively that the court may take the victim's consent into consideration in authorising publication (as in New South Wales). Mark Pearson, David Killick and the Hobart Women's Health Centre endorsed the first option and argued that the written consent of a competent adult victim should act as a defence to publication. Mark Pearson argued that, in order to defeat the defence, the prosecution should be required to prove that the publisher knew or ought to have known that consent was vitiated in some way. Conversely, Hobart Women's Health Centre preferred the approach in s 36C(6)(b) of the West Australian *Evidence Act* which places the onus of proof in this regard on the publisher. Messrs Pearson and Killick also suggested that publication with consent should only be possible once proceedings have concluded.

4.3.18 The Tasmanian Bar was not in favour of allowing victim consent to be a defence to unauthorised publication. Their submission noted that a victim may be pressured into giving consent and they may not consider the long-term implications of self-identifying. They proposed an alternative system whereby a victim (along with other interested parties) could challenge a prohibition order once made. The fact of the victim's consent to publication of details, including name and address, may be a powerful reason to lift a non-publication order. Court supervision of this process ensures that the question of the validity of the complainant's consent is investigated. Other respondents favoured option two, where a court order was required to permit publication with the victim's consent.¹⁴⁶ However, none of those who favoured this option considered that consent alone should be sufficient to allow publication.

The Institute's view

4.3.19 The Institute considers that it is desirable to make provision for consent by victims in light of the strong autonomy and public interest arguments identified. However, any mechanism for publication with consent must include relevant safeguards to provide adequate protection to victims — a theme which emerged strongly in submissions to IP 18. Publication should only be sanctioned where a competent adult victim has given their consent in writing, free of coercion or inducements and where there is no risk that other victims may be identified. The reference to a competent adult victim also encompasses child victims who, after reaching adulthood, decide that they wish to self-identify. The Institute considers that the best way to achieve this is as part of the court's power to rule on prohibited details at the commencement of proceedings per Recommendation 2 and its supervision of applications for publication orders per Recommendations 3(a) and (b) above. The consent of the complainant should not be decisive but the final decision on publication should remain a matter of court discretion (as it is in New South Wales). This residual discretion is important because of the possibility that others may be affected by publication, such as related victims who may be unable or unwilling to consent to being identified. This recommendation provides sufficient opportunity for the court to consider the weight that should be given to the victim's consent and also enables an application for variation or revocation of non-publication orders to be made on the grounds that the victim has agreed to be identified subsequent to proceedings. In light of this, and the Institute's view

¹⁴⁵ This is the case in the UK. See *Sexual Offences (Amendment) Act 1992* (UK) s 5(2).

¹⁴⁶ See submissions of the Commissioner for Children Tasmania, Marg Dean, Northern Sexual Assault Group Inc, Women's Legal Service Tasmania and Tasmanian Association of Community Legal Centres.

(discussed below at 4.4.5) that culpability for breach can depend on constructive notice of publication prohibitions, the Institute does not recommend that the consent of the victim should be a defence in the event of prosecution for breach of a prohibition on publication.

Recommendation 4

- (a) That, with leave of the court, the publication of details which identify the victim is not prohibited if, prior to publication, the victim who has attained the age of 18 years and who has the capacity to consent and who has not been coerced, defrauded or otherwise manipulated into giving consent provides written consent to publication.
- (b) That in deciding whether to authorise the publication of details under (a) the court must give consideration to all the circumstances of the case including the risk that other victims may be identified without their consent.
- (c) That a court shall not make a non-publication order (as per Recommendation 2(a)) in relation to potentially identifying details without considering the views of the victim.

Duration of the statutory prohibition or non-publication order

4.3.20 It may also be desirable in the interests of certainty that explicit provision is made for the duration and geographical reach of orders. In New South Wales, s 578A *Crimes Act 1900* appears to provide that the prohibition on publishing material which identifies victims of prescribed sexual offences remains in force during the lifetime of the victim. Section 578A(3) provides: ‘This section applies even though the prescribed sexual assault proceedings have been finally disposed of.’ Section 578A(4)(f) however provides that the section does not apply to ‘a publication made after the complainant’s death.’ Section 12 *CSNO Act* provides that a non-publication or suppression order shall operate for the period decided by the court and specified in the order. The court is required to consider a period no longer than reasonably necessary to achieve the purpose for which it is made. The order may be for a fixed period or may be limited by reference to the occurrence of a specified future event. The *Criminal Procedure Act 2011* (NZ) provides that a suppression order may be made permanently or for a limited time: s 208(1)(a). If it is for a limited time it may be renewed: s 208(1)(b). If the term is not specified it has permanent effect: s 208(2). Section 1 *Sexual Offences (Amendment) Act 1992* (UK) provides that the prohibition protecting the victim shall remain in force during the lifetime of the alleged victim. The duration of legislative prohibitions or of court orders authorising publication is less certain elsewhere. In Tasmania s 194K is silent on these issues. In *Re an Application by the Australian Broadcasting Corporation*¹⁴⁷ publication orders were sought in relation to a deceased complainant, a clear indication that the prohibition may extend beyond the life of the victim. On the other hand, s 194K(3) empowers a court to make an order authorising publication subject to any specified conditions which might arguably include the length of an order.

Geographical reach of the statutory prohibition or the non-publication order

4.3.21 The DPP observed in his submission, ‘[t]he legislation provides a measure but not an absolute guarantee of anonymity.’ It is aimed at the mass media and was not intended to interfere with private communications. However, modern communication technologies blur the distinction between public and private discussion. Any consideration of the geographical reach of orders must therefore take into account the rise of social media and the global news saturation. The very complex issue of modern media regulation and social media regulation in particular is beyond the scope of this Report, but it was touched on in the responses to IP 18. Mark Pearson’s proposal included closed courts in matters involving children and sexual offences ‘to limit social media “leakage” of matters such as identification’. Only authorised media representatives would be granted a privilege to attend. Whilst

¹⁴⁷ [2005] TASSC 41 (20 May 2005).

this may provide additional safeguards for victims and might be justified for child witnesses, arguably a blanket rule in all sexual offences cases is an unacceptable infringement on the principle of open courts. As has been noted elsewhere in this Report, the public discussion of sexual offending serves an important purpose (see 4.2.11 above).

4.3.22 The issue of the reach of non-publication orders raises two difficult questions — whether the court can make orders binding upon the world at large and, assuming the court does have that power, the utility of making such orders in any case. The answer to the first question is by no means clear cut. Several recent cases have expressed doubt about whether non-publication orders can bind the world at large. French CJ in *Hogan v Hinch*¹⁴⁸ stated that, at common law, it is ‘contentious’ whether a court can make binding non-publication orders on anyone not present in the courtroom. Buchanan JA in *News Digital Media v Mokbel*¹⁴⁹ assumed for the purposes of that case that the court did not have the power to make such orders.¹⁵⁰ *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*¹⁵¹ considered the operation of the *CSNO Act* including whether relevant sections of the Act conferred power to make orders binding the world at large. Delivering the judgment of the court, Basten JA concluded that the Act could not confer such a power.¹⁵² He also stated that, pursuant to s 16 of the Act, no offence was committed unless the existence of the order had been brought to the attention of a person.¹⁵³ Culpability under s 16 requires that a person ‘is reckless as to whether the conduct constitutes a contravention of a suppression order or non-publication order’. The Tasmanian provision provides no such test for culpability. However it may be that awareness of the order is necessary before proceedings for contempt can be commenced. The language of the provision governing contempt committed in the face of the court in the *Justices Act 1959 (Tas)*¹⁵⁴ refers to wilful misbehaviour. In the context of breach of non-publication orders this would seem to require at least recklessness about the existence of such orders. In the age of the internet there may be an army of ‘citizen journalists’ who have no general knowledge of the legal regime relating to publication restrictions and no specific knowledge that orders are in place in a particular case. In their ignorance, they may be beyond the reach of any orders of the court.

4.3.23 Information on the internet has a permanency that print publications do not have. Moreover, once a report is uploaded the ability to halt its spread is lost. Even if the original publisher removes it from their site it is likely to be cached on numerous other sites. (As an illustrative example, a Google search on the words ‘Tasmania’, ‘12-year-old’, ‘prostitute’ and ‘mother’ resulted in an astounding 45,600,000 hits). One of the arguments against extending the geographical reach of non-publication orders is the so-called, ‘King Canute argument’, that is, that the volume of information available electronically is so immense no court order would be able to stem the tide.¹⁵⁵ Any declaration by the court that purported to bind the world at large would thus be an essentially futile and empty gesture. However, in *Attorney-General for New South Wales v Time Inc Magazine Co*¹⁵⁶ the court dismissed the respondent media organisation’s argument that it had no effective control over the distribution or retrieval of a publication that was the subject of forthcoming contempt proceedings. Kirby P stated: ‘I would be loath to assume that this Court is without effective remedy to defend its process in [such] circumstances’.¹⁵⁷ His Honour went on to say, ‘[t]he fact that entire success could not be secured does

¹⁴⁸ (2011) 85 ALJR 398, [20]–[27].

¹⁴⁹ (2010) 30 VR 248.

¹⁵⁰ *Ibid* 27.

¹⁵¹ [2012] NSWCCA 125 (13 June 2012).

¹⁵² *Ibid* [95].

¹⁵³ *Ibid* [70]. Basten JA also observed that a construction of the provision that permitted prosecution in the absence of awareness of the prohibition would be void for inconsistency with sch 5 of the *Broadcasting Services Act 1992 (Cth)*: at [96].

¹⁵⁴ Section 25.

¹⁵⁵ See *East Sussex County Council v Stedman* [2009] EWHC (Fam) 935, [74].

¹⁵⁶ [1994] NSWCA 134 (7 June 1994).

¹⁵⁷ *Ibid* [10] (Kirby P).

not establish that the provision of the relief sought would be a futility.¹⁵⁸ On this point the case was cited with approval by the majority in *Mokbel*.¹⁵⁹ However, in endeavouring to ‘defend its process’ the court is not compelled to make sweeping non-publication orders. Orders should not be made unless there is at least some possibility that they can have effect. Due to the global nature of the internet, as noted above, there are likely to be many ‘publishers’ who do not have notice of the orders and there will be great difficulties prosecuting breaches committed by persons outside the court’s jurisdiction. For these reasons, an order purporting to bind the whole world is probably futile.

The Institute’s view

4.3.24 The Institute considers that the reforms should remove doubt about the duration of both legislative and court ordered prohibitions and make express provision for court powers in relation to setting the duration of a non-publication order. The preferred option is to install permanent prohibition as the default position. This ensures that victims or their families are not obliged to remain vigilant about whether the protection remains in place. Anonymity should persist beyond the death of the complainant. As Graham Davis observed in his submission to IP 18, there may be cogent reasons why a family would wish to preserve the victim’s anonymity. Provision should be made though, in line with Recommendation 3(b), to permit a court to review and vary the duration of non-publication orders if an application is made to do so. The application may be made by anyone with sufficient interest in the case.¹⁶⁰

4.3.25 It is also desirable that specific provision is made in the Tasmanian legislation for the geographical scope of the statutory prohibition and of any orders prohibiting publication made under that legislation. Moreover, orders should operate as widely as possible, whilst recognising the impossibility of preventing the publication of prohibited information in every corner of the globe. In this regard, Mark Pearson, for example, stated that it was ‘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.’ Accordingly, the legislation replacing s 194K should be framed in such a way that orders are binding only on those who have actual or constructive notice of them.¹⁶¹ What should be embraced in the notion of constructive notice will be discussed in the next section (4.4). This approach accommodates concerns about the impracticality of orders which purport to bind the whole world and, by including the notion of constructive notice, also tackles the difficulties which might otherwise attend a requirement that the court bring orders to the notice of all established media outlets, whether their representatives are in court or not. The court is entitled to attribute to these outlets knowledge of the legal rules relating to the identification of victims of sexual offences.

Recommendation 5

- (a) That unless otherwise ordered by the court non-publication orders remain in force permanently.
- (b) That court orders are binding on all those who have actual or constructive notice of them.

¹⁵⁸ Ibid [11].

¹⁵⁹ 30 VR 248 [88] (Warren CJ, Byrne AJA).

¹⁶⁰ If review is authorised by legislation, questions about victim notification in cases where orders are varied or revoked will arise. It seems certain that some victims would wish to be alerted to court determinations that affect prior non-publication orders. Others may prefer not to be compelled to revisit the case once proceedings have otherwise been disposed of. In many cases, attempts to contact victims will present serious practical difficulties. This Report does not reach a conclusion on the question of victim notification, noting only that it is an issue with implications for victims of crime generally, well beyond the specific context of sexual offences cases and non-publication orders.

¹⁶¹ This is the position under s 16 of the *CSNO Act*.

4.4 How should breaches of the statute or non-publication orders by the court be punished?

4.4.1 Issues Paper 18 invited comment on how the justice system should respond to contraventions of s 194K (or a replacement provision), whether they should continue to be punished as a contempt of court or whether breach should constitute a criminal offence, as is the case in some other jurisdictions. The fashioning of an appropriate response requires consideration of not only the objective seriousness of the type of conduct required for breach but also whether in fact intentional or reckless breaches are common. The objective seriousness may be assessed with reference to the potential for harm arising from a breach of the prohibition. Wood J in *R v Haley*¹⁶² referred to the risk of harm occasioned by publication, noting:

While there was no suggestion of specific harm or prejudice to Z as a consequence of publication, there is a risk that that could occur in the future or emerge later. There is also general harm of the kind ... involving undermining the community perception that victims are protected from publicity, and thus impacting upon the preparedness of victims to report sexual offences.¹⁶³

4.4.2 Irrespective of the risk of specific harm to an individual complainant, interference with the proper administration of justice must be regarded as objectively very serious conduct. However, much will hinge on whether the person is aware of acting in breach. In *R v The Age*,¹⁶⁴ the only Tasmanian prosecution involving a knowing breach, Evans J noted that ‘courts take an especially serious view of such a contempt.’¹⁶⁵ Several respondents to IP 18 argued that breaches of s 194K are likely to be both rare and inadvertent rather than intentional.¹⁶⁶ In fact, there have only been three prosecutions in Tasmania for breach of s 194K and its predecessor s 103AB of the *Evidence Act 1910*¹⁶⁷ and, as noted, only one of these involved an intentional breach. Accordingly, implementing criminal sanctions which include the option of a jail term could be seen as a disproportionate and unwarranted step.

4.4.3 A number of respondents were of the view that prosecution for a summary offence was the appropriate sanction. Women’s Legal Service Tasmania considered this was preferable to punishment for contempt as it would enable the constituents of the offence of breaching a non-publication order to be clearly set out and the appropriate sentence determined accordingly. The Tasmanian Bar also considered that the sanction for breach should be a penalty imposed following summary prosecution for a criminal offence. This would bring Tasmania into line with other jurisdictions (such as New South Wales, Victoria, South Australia, Canada, New Zealand and the United Kingdom) that have opted to make the sanction for breach of orders protecting the anonymity of sexual assault complainants a summary criminal offence. The penalty in those jurisdictions is normally a fine (with the usual upper limit) or sometimes also imprisonment for up to six months. Mark Pearson was another who favoured the summary offence option, arguing that contempt powers were too broad, but he strongly opposed the possibility of jailing an offender. He suggested that the penalty should be limited to a fine, stating ‘it is an affront to democracy when states jail journalists for publishing offences’.

¹⁶² [2012] TASSC 86 (20 December 2012).

¹⁶³ *Ibid* [34].

¹⁶⁴ [2000] TASSC 62 (9 June 2000).

¹⁶⁵ *Ibid* [17].

¹⁶⁶ Submissions of Mark Pearson and Graham Davis.

¹⁶⁷ *R v The Age Co Ltd* [2000] TASSC 62 (9 June 2000); *R v Holman* [2012] TASSC 75 (2 November 2012); *R v Haley* [2012] TASSC 86 (20 December 2012). The Law Council of Australia has noted too that contempt proceedings are rare. See Sally Walker, Law Council of Australia, *Suppression and Non-Publication Orders and Internet Sites* (2012) [8]–[9].

The law relating to contempt

4.4.4 One factor which may weigh against retaining the current regime is the lack of clarity in the law of contempt in Tasmania (and elsewhere). Of particular relevance to this inquiry is the existing uncertainty as to the requisite mental element. On the one hand, at common law, a preponderance of authority suggests that no specific intention to interfere with the administration of justice is required for an act to constitute contempt of court.¹⁶⁸ However, other authority suggests that no liability for contempt exists in the absence of such an intention.¹⁶⁹ The other difficulty is that the power to punish for contempt of court, at least in superior courts, is governed by the common law rather than statutory punishment regimes. Therefore statutory limits on imprisonment do not apply. This has been recognised as unsatisfactory and unfair because of the uncertainty occasioned by the possibility, albeit rarely exercised, of open-ended (and potentially harsh) punishment.¹⁷⁰ In Tasmania, common law principles of sentencing continue to apply to convictions for contempt on the basis that the *Sentencing Act 1997* (Tas) is not a codification of sentencing law.¹⁷¹ It would appear, therefore, that some of the sentencing options in the *Sentencing Act* do not apply to convictions for contempt so more flexible sanctions better tailored to the offending conduct, such as community service orders or suspended sentences, may not be imposed.

The Institute's View

4.4.5 The Institute recommends that the sanction for contravention of the rules against publication should be prosecution for a criminal offence rather than contempt. The offence should be triable summarily. The creation of an offence which penalises breaches of statutory prohibitions on publication of identifying details and associated non-publication orders will result in a clear legislative statement of the ingredients of that offence. The external element should be satisfied by the act of publishing the categories of information identified in Recommendation 1(i), (ii), (iii), (iv) and (vii) above in contravention of the statutory provision or any existing court order. The Institute does not recommend the imposition of absolute liability, arguing instead that some element of the offence should relate to culpability. However, if culpability relies solely on proof of a subjective intention to interfere with the administration of justice, the offence may be very difficult to prosecute. This raises the possibility that well-resourced media outlets could elect to publish prohibited information with the intention of increasing sales, judging that the risk of conviction is sufficiently remote. Instead, culpability should rest on either an intentional breach or a finding of recklessness in relation to circumstances amounting to a breach of the statute or the existence of orders, which in turn should be grounded in the notion of constructive notice.¹⁷² Constructive notice in this regard should be framed as a test of whether the publisher 'knew or ought to have known' that the conduct was in breach of the legislation or an order prohibiting publication. A publisher may be presumed to have constructive notice of the statutory prohibitions against publication or court imposed non-publication orders if reasonable enquiries would have revealed the existence of such, irrespective of whether or not the publisher has actual notice. The inquiry thus focuses on the institutional mechanisms in place to prevent publication breaches. What constitutes 'reasonable enquiries' will depend on the nature and circumstances of the publisher. For example, notice of the rules relating to publication in sexual offences cases may be more readily attributed to a mainstream media organisation which regularly

¹⁶⁸ *John Fairfax & Sons Proprietary Ltd v McRae* (1955) 93 CLR 351; *Lane v Registrar of Supreme Court of NSW* (1981) 148 CLR 245, 259.

¹⁶⁹ *R v Minshull; Ex Parte the Director of Public Prosecutions for Western Australia* (Unreported, Supreme Court of Western Australia, Full Court, 21 May 1997).

¹⁷⁰ ALRC, *Contempt*, Report No 35 (1987); NSWLRC, *Contempt by Publication*, Discussion Paper No 43 (2000).

¹⁷¹ *Sentencing Act 1997* (Tas) s 6. See *Martin v Trustrum (No 3)* (2003) 12 Tas R 131, 140. In that case Slicer J held that, whilst the imposition of a suspended sentence might be within the Court's inherent power to punish for contempt, the executive would be under no corresponding obligation to raise its breach: at 139.

¹⁷² Constructive notice is also proposed as the criterion for determining the geographical reach of orders. See Recommendation 5(b) above.

considers such questions and which has access to legal advice than to an individual posting on a social media site.

Recommendation 6

- (a) That the sanction for breach of the statutory prohibition against publication pursuant to the legislation replacing s 194K or for breach of any court order made under that legislation shall be a criminal offence in the following terms:

Any person who engages in conduct that contravenes the legislation replacing 194K who does so intentionally or who knew or ought to have known that the conduct amounted to such a contravention is guilty of a crime.

Procedure and penalty structure

4.4.6 Recommendations about the appropriate sanction for breach of publication bans must also take account of the appropriate mode of trial. Recommendation 6 above proposes the creation of a new criminal offence but there are competing arguments about whether the offence should continue to be dealt with, as at present, by way of summary proceedings or whether it should be dealt with by way of indictment. The latter mode offers the benefit of trial by jury whilst the former provides a speedier resolution of cases.

Arguments for indictable procedure

4.4.7 In its report on contempt by publication,¹⁷³ the NSWLRC identified two main arguments in support of indictable proceedings: '(a) speed in hearing [such cases] is not always essential; and (b) certain questions of primary fact are best dealt with by a jury.'¹⁷⁴ To these may be added the argument that the Supreme Court is the best forum in which to adjudicate breaches of Supreme Court orders.¹⁷⁵

Arguments for summary procedure

4.4.8 On the other hand, in many cases the fact that published details breach a non-publication order or the statutory prohibitions on publication will not be in dispute. This will be particularly so if Recommendation 2 is adopted and the court is empowered to rule on prohibited details in every sexual offence trial. What is more, the task of balancing the legal principles of freedom of speech, open justice and the proper administration of justice seems to require the application of the particular legal experience and expertise of a judge rather than the application of the common sense of the jury.¹⁷⁶

4.4.9 If a defined penalty structure is created as a result of the adoption of Recommendation 6 then the argument for summary prosecution becomes even more persuasive. A clear penalty framework will indicate the maximum fine which may be imposed for breach and, if a custodial option is considered appropriate, it may also include a maximum prison term. As mentioned, the evidence is that breaches are relatively rare and often not deliberate. Moreover, echoing Mark Pearson's comments above, the spectre of the state imprisoning journalists for publishing offences is anathema to democratic principles. However, arguably the penalty scheme should include a custodial option reserved for deliberate, flagrant or repetitive breaches. It is noted that a custodial sentence option for

¹⁷³ NSWLRC, above n 41.

¹⁷⁴ Ibid 297.

¹⁷⁵ In a similar context, s 27 of the *Sentencing Act 1997* (Tas) requires that an authorised person seeking orders in relation to breach of a suspended sentence apply to the court which made the original order. Notably, however, pursuant to s 27(4A), if an application is made to a court other than the court that imposed the suspended sentence, that court may deal with the application.

¹⁷⁶ See NSWLRC, above n 41, 300–01.

publication offences is already available under the *Children, Young Persons and Their Families Act 1997* (Tas) and the *Youth Justice Act 1997* (Tas).¹⁷⁷ In egregious cases, free speech arguments may have less force on the grounds that culpability requires at a minimum proof of constructive notice (see 4.4.5) and that a custodial penalty would only apply to those who would deliberately and flagrantly scorn the protection the law affords to the vulnerable victims in question. In Tasmania, s 38 of the *Acts Interpretation Act 1931* provides that offences attracting a penalty of more than three years imprisonment are, generally, tried on indictment. Although there are rare exceptions in the Tasmanian statute book,¹⁷⁸ indictable offences attract a general statutory maximum of 21 years imprisonment. This suggests that if the new breach offence is prosecuted on indictment it would attract a maximum custodial sentence that is arguably grossly disproportionate to the gravity of the offence. It is very unlikely that the legislature would contemplate a prison term of this magnitude for an offence with such important free speech resonances. Moreover, as was noted in the ALRC report on contempt, the defendant in breach of non-publication orders 'is usually an enterprise deriving profit from the activity which creates the relevant risk [of breach].'¹⁷⁹ Even though responsibility for the breach cannot be attributed to a particular individual, the company may be held responsible for a failure to 'devote the necessary resources to ensure that reasonable care to avert the risk is taken at all times'.¹⁸⁰ The defendant company in *R v Haley*,¹⁸¹ for example, was fined \$20,000 for contempt in relation to an unintentional breach of s 194K. Wood J observed:

[t]he inevitable conclusion is that the company has not taken the prohibition sufficiently seriously, and guarding against breaching the prohibition was not a matter to which it gave significant priority.

It is concerning that at the material time there was no systematic vetting of all articles before publication. That is suggestive of complacency by the second respondent.¹⁸²

Clearly, a custodial sanction is inapt in such circumstances. On these grounds, it seems more appropriate that the publication offence is tried summarily. This still facilitates a custodial option up to a maximum of three years imprisonment and it also permits the setting of quite high maximum penalties. However, the Institute notes that the maximum prison penalty for like offences in comparable jurisdictions is less than this.¹⁸³ Although fines for summary offences are generally at the lower end of the scale¹⁸⁴ there are examples on the Tasmanian statute book of much higher fines.¹⁸⁵

4.4.10 Given the potentially wide range of factual circumstances in which a breach may occur, it also seems appropriate that breaches may be heard either in the Magistrates' Court or in the Supreme Court exercising summary jurisdiction at the election of the prosecution, with suitable maximum

¹⁷⁷ See 2.3.4 above.

¹⁷⁸ For example, the *Sex Industry Offences Act 2005* stipulates maximum terms of imprisonment for indictable offences contained therein.

¹⁷⁹ ALRC, above n 170, 143.

¹⁸⁰ *Ibid.*

¹⁸¹ [2012] TASSC 86 (20 December 2012).

¹⁸² *Ibid* [53]–[54].

¹⁸³ See *CSNO Act 2010* s 16 (12 months); *Crimes Act 1900* (NSW) s 578A (6 months); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 6 (2 years); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 40 (6 months); *Judicial Proceedings Reports Act 1958* (Vic) s 4 (4 months).

¹⁸⁴ For example, unauthorised publication of information relating to youth justice proceedings attracts a maximum fine of 100 penalty units: *Youth Justice Act 1997* (Tas) s 31(1).

¹⁸⁵ For example, s 51B of the *Environmental Management and Pollution Control Act 1994* (Tas) creates a summary offence with a maximum fine of 1000 penalty units. In addition, although ss 50, 51 and 51A of the same Act are indictable offences, they may be heard with the consent of both the prosecution and the defence in a court of summary jurisdiction and the maximum fine for these offences is 10,000 penalty units.

penalties. The penalty structure in the *CSNO Act* provides for the imposition of discrete maximum penalties depending on the court in which proceedings are brought.¹⁸⁶

The Institute's view

4.4.11 The Institute considers that the imposition of a fine is likely to be the most appropriate sanction for most cases of breach. However, it also recommends that a custodial option is available for cases of egregious breaches.

Recommendation 7

- (a) That penalties for contravention of the rules relating to publication are clearly set out.
- (b) That the sanction for breach should be a penalty imposed following summary prosecution for a criminal offence.
- (c) That proceedings may be brought in the Magistrates' Court or the Supreme Court at the discretion of the prosecution and that maximum penalties should be applied accordingly.
- (d) That the penalty structure should include a discretion for the Supreme Court to impose a custodial sentence in cases of deliberate, flagrant, repetitive or egregious breach.

4.5 Terminology

Methods of publication

4.5.1 It will be evident from the discussion above in 4.3.21 and following, that the Institute considers that the various modes of dissemination of publications caught by s 194K should be broadened to include all electronic methods. The respondents to IP 18 generally agreed. For many, the electronic media is not only the most important source of news and information but also the only source. The major mass media publishers all have an online presence supplementing their print media business. In that climate, there can be no reason in principle why such methods of dissemination should be exempt from the rules relating to publication. It should be clear in the legislation that publication by all electronic means, including the internet and all types of telephonic communication (including by text message, etc) is covered. The practical impediments to attempting to regulate all internet content are acknowledged, however, the point has been made above that non-publication orders only bind those with actual or constructive knowledge of the ruling (see 4.3.25 above). Section 578A(1) *Crimes Act 1900* (NSW) (the 'equivalent' NSW provision to s 194K) provides that "publish" includes (a) broadcast by radio or television, or (b) disseminate by any other electronic means such as the internet'. Section 3 *CSNO Act* provides the following definition of 'publish': "publish" means disseminate or provide access to the public or a section of the public by any means, including by (a) publication in a book, newspaper, magazine or other written publication, or (b) by radio or television, or (c) public exhibition, or (d) publication by means of the Internet.' As currently formulated, s 194K describes the modes of publication within the offence description itself. If the method of electronic communication is added to what is already a reasonably prolix provision, the section becomes even more unwieldy. It is suggested instead that the format adopted by the NSW Acts is followed, that is, the term 'publish' is included in an introductory definition section and defined there with some particularity.

¹⁸⁶ See *CSNO Act* ss 16–17.

Pictures

4.5.2 There is also lack of clarity in the definition of ‘picture’. Arguably it could be narrowly interpreted so as not to include all possible forms of representation. If this is so, perhaps the terminology could be expanded to make it clear that ‘picture’ includes all drawings, images, representations, photographs etc whether in documentary or electronic form. Other jurisdictions avoid this problem by simply referring to a prohibition on the publication of any ‘matter’. The Institute considers that the inclusion of an additional prohibition against the publication of pictures purporting to be images of the relevant persons serves a useful purpose in removing doubt about whether non-publication orders extend that far. It is also desirable that the definition of ‘picture’ be expanded to include a wide range of visual representations, both documentary and electronic. The Commissioner for Children submitted that ‘the definitions of “publish” and “picture” need to be revised to accommodate publication on the internet.’ The definition of ‘picture’ should be included in a definition section.

Scope of ‘sexual offences’

4.5.3 It is important that all relevant sexual offences are covered by the provision replacing s 194K. If this is not the case, some complainants will not be the beneficiaries of the protections it affords. This issue attracted very little comment amongst respondents to IP 18. Only Graham Davis directly referred to it, noting in particular that as it stands, s 194K does not cover offences involving the production or possession of child exploitation materials. He added:

This leads to the possibility that a child in such material, if the offender was not charged with other matters, would not have the protection of this section.

The simplest method of achieving this would be to express the definition of sexual offences in generic terms (as in some other jurisdictions).¹⁸⁷ Whilst child exploitation material offences are encompassed within the term ‘sexual offences’, given that such offences are not covered by the current law, legal officers may not necessarily be alert to this. It may therefore be preferable, for the avoidance of doubt, to explicitly provide that ‘sexual offence’ includes a child exploitation material offence.

Recommendation 8

- (a) That the legislation replacing s 194K include an introductory definition section which provides:

In this section:

‘likely’ means an appreciable risk, more than a fanciful risk.

‘picture’ includes all drawings, images, representations, or photographs whether in the form of documents or electronic forms.

‘publish’ means disseminate or provide access to the public or a section of the public by any means, including by:

- (a) publication in a book, newspaper, magazine or other written publication, or
- (b) broadcast by radio or television, or
- (c) public exhibition, or
- (d) broadcast or publication by means of the internet, or
- (e) broadcast by means of telecommunications generally.

For the avoidance of doubt, **‘sexual offence’** includes a child exploitation material offence.

¹⁸⁷ See, eg, s 71A(4) *Evidence Act 1929* (SA) (‘identity of a person alleged to be the victim of a sexual offence’); s 4 *Judicial Proceedings Reports Act 1958* (Vic) (‘any proceedings in any court or before justices in respect of an offence of a sexual or unnatural kind’); and s 578A *Crimes Act 1900* (NSW) (‘the complainant in prescribed sexual offence proceedings’).

Appendix 1

List of Questions in IP No 18

Question 1

Should there be no change to s 194K of the *Evidence Act 2001* (Tas)?

Question 2

- (a) Should s 194K be amended so that the words ‘likely to lead to the identification’ are defined?
- (b) If so, should that ‘identification’ be defined to mean:
 - identification by persons with prior knowledge of the complainant; or
 - identification by the general reader or viewer?
- (c) Should the term ‘likely’ be defined? If so, would you agree with the following definition: ‘an appreciable risk, more than a fanciful risk’?
- (d) Should the court have power to determine whether or not information is ‘likely to lead to identification’ having regard to all the circumstances of the case?

Question 3

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

Question 4

- (a) Do you favour the option of bolstering s 194K by empowering the DPP and/or complainant to apply to the court for an order prohibiting publication of any details concerning the case?
- (b) If so, what would be the test applied by the court in granting such an order?

For example:

- (i) Should the court favour granting the application unless, for example, it is satisfied (on the balance of probabilities) that the interests of justice would not be served by the order?
- (ii) Alternatively, should the court refuse such an order unless satisfied (on the balance of probabilities) that the interests of justice would be served by the order?
- (iii) Should the court only make the order if it is satisfied that s 194K is inadequate in the circumstances of the case?
- (iv) Should the court consider the seriousness of the case?
- (v) Should the court consider the nature of the information (for example if it is likely to be particularly embarrassing)?
- (vi) Should the court consider the circumstances of the complainant (for example, a complainant with a high-profile may be more easily identified, and may also be more affected by identification)?
- (vii) Who should be able to make the application: any person; or only the DPP and/or complainant (or their representative)?

Question 5

- (a) Should Tasmania introduce reform based on the Canadian model?
- (b) If so, should s 194K (perhaps with clarifications) also be retained (as a ‘back-up’)?

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?

Question 7

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

- (i) the inclusion of a definition of ‘publish’, in broad terms, to encompass all forms of electronic communication such as the internet (along the lines of that in s 3 of the *Court Suppression and Non-publication Orders Act 2010* (NSW)), which provides: ‘publish means disseminate or provide access to the public or a section of the public by any means, including by (a) publication in a book, newspaper, magazine or other written publication, or (b) by radio or television, or (c) public exhibition, or (d) publication by means of the Internet’;
- (ii) ‘picture’ might be defined more broadly to make it clear that this term includes all forms of representation (ie drawings, images, photographs, paintings, sketches, representations whether in document or electronic form); and
- (iii) ‘sexual offence’ might be defined in generic terms (rather than a list of legislative provisions which refer to existing sexual offence provisions);
- (iv) the automatic suppression of identity details protecting complainants (‘the prohibition’) might be geographically unrestricted in its application;
- (v) the prohibition might operate during the complainant’s lifetime unless the court otherwise orders.

Question 8

Should the sanction for breach of s 194K lie in contempt proceedings (as at present) or in prosecution for an offence (as in South Australia, Victoria, NSW, Canada, New Zealand and the United Kingdom)?

Question 9

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

- (i) 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;
- (ii) an order made pursuant to this provision should be unrestricted both geographically and in terms of the persons to whom it extends;
- (iii) the following persons have a right of appearance: the applicant for the order; a party to the proceedings concerned; the government (or an agency of government) of the Commonwealth or a state or a territory; a news media organisation;
- (iv) in relation to the duration of an order a court shall have power to make an order unrestricted in terms of time or for a fixed period or by reference to the occurrence of a specified future event (in default of a specific order the order shall remain in force during the lifetime of the alleged victim);
- (v) a court shall have power to review an order and, on such review, to confirm, vary or revoke the order it has made;

- (vi) an appeal shall lie (by leave) in respect of the decision to make (or not to make) an order as well as in respect of a decision on review;
- (vii) the following persons have a right of appearance in relation to review or appeal proceedings: the applicant for the order; a party to the proceedings in connection with which the order was made; the government (or an agency of the government) of the Commonwealth or of a state or territory; a news media organisation; and any other person who, in the court's opinion, has a sufficient interest in the question whether the relevant orders should continue to operate;
- (viii) a court must publish reasons for any decision to make, confirm, vary or revoke an order unless the court is satisfied that exceptional circumstances exist in which event the court may decline to state the reasons in public.

Question 10

- (a) Should the 'public interest' test be retained?
- (b) Is so, should relevant legislation specify criteria that the court should/must consider, and if so, what should they be?
- (c) If you do not think the test of 'public interest' should be retained, what test would you suggest (eg, 'in the interests of justice')?

Appendix 2

Powers to close courts in other jurisdictions

As an illustration of the position in other Australian jurisdictions, in New South Wales, there is a statutory power to close a court to protect complainants from publicity where the proceedings relate to a ‘prescribed sexual offence’.¹⁸⁸ Also in NSW, a court may exclude from criminal proceedings involving children anyone not directly interested in the proceedings.¹⁸⁹ Any ‘family victim’ is entitled to remain.¹⁹⁰ Media representatives may remain unless the court otherwise directs.¹⁹¹ The legislation prohibits the publication or broadcasting of the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings.¹⁹² There are similar provisions in relation to Children’s Court proceedings in ss 104 and 105 *Children and Young Persons (Care and Protection) Act 1998* (NSW). These concern the power to exclude persons and make non-publication orders. Section 26P *Terrorism (Police Powers) Act 2002* (NSW) requires that proceedings heard in the Supreme Court concerning applications to make or revoke a preventative detention order or a prohibited contact order must be heard in the absence of the public. Section 27Y which concerns applications for covert search warrants is in similar terms and s 27ZA prohibits the publication of applications, reports or occupiers’ notices (or information derived from them) with certain exceptions. The *Witness Protection Act 1995* (NSW) s 26 provides that where the identity of a participant in a witness protection program is in issue or may be disclosed, the court must, unless of the view that the interests of justice require otherwise, hold that part of the proceedings in private and make an order suppressing publication of the evidence to ensure that the participant’s identity is not disclosed. Section 31E provides that the court may give leave to a party to ask questions of a witness which may disclose a protected person’s identity. If leave is granted, that part of the proceedings must be conducted in private (s 31E(6a)) and the court must make an order suppressing publication of that part of the evidence (s 31E(6)(b)).

In Victoria, s 80 of the *County Court Act 1958* grants power to close court proceedings to the public. Section 80AA provides that this power may be exercised, inter alia, on the grounds that it is necessary to do so in order not to cause undue distress or embarrassment to the complainant in a proceeding that relates, wholly or partly, to a charge for a sexual offence (s 80AA(e)). If such an order is made, the court has a discretion to allow persons or classes of person to remain in court (s 80(1)(b)). The *Magistrates’ Court Act 1989* contains a provision in the same terms (s 126). In Queensland, s 20(1) of the *Childrens Court Act 1992* empowers a court to exclude persons from proceedings relating to a child whilst s 20(2) provides that the court may otherwise permit relevant persons, including media representatives, to be present. Section 5 of the *Criminal Law (Sexual Offences) Act 1978* provides for the exclusion of members of the public whilst the complainant is giving evidence.

In New Zealand, s 197 *Criminal Procedure Act 2011* (NZ) confers a power to clear the court apart from certain specifically listed persons, if doing so is necessary to avoid certain risks, namely, undue disruption to the proceedings, prejudicing the security or defence of New Zealand, prejudicing a fair trial, endangering the safety of any person, or prejudicing the maintenance of the law. However, the court may only be cleared if the court is satisfied that making a suppression order will not be

¹⁸⁸ As defined in s 3 *Criminal Procedure Act 1986* (NSW). The relevant provisions of that Act (ss 291, 291A and 291B) require certain proceedings, or parts of proceedings to be held in camera. Media access to such proceedings is governed by s 291C *Criminal Procedure Act 1986* (NSW). The court may make arrangements for media representatives to view or hear evidence or a record of it, in circumstances where the media are not entitled to be present in the courtroom: s 291C(2).

¹⁸⁹ *Children (Criminal Proceedings) Act 1987* (NSW) s 10.

¹⁹⁰ *Ibid* s 10(1)(c).

¹⁹¹ *Ibid* s 10(1)(b).

¹⁹² *Ibid* s 15A.

sufficient to avoid the relevant risk. Moreover, pursuant to s 197(3), even if the court is cleared, the announcement of the verdict or the decision of the court, and the passing of sentence, must take place in public.

Less restrictive statutory exceptions in other jurisdictions

As an illustration of the position in other Australian jurisdictions, in New South Wales various statutes qualify the open justice principle. A number of statutory provisions prohibit publication in particular circumstances. For example, s 195 *Evidence Act 1995* (NSW) prohibits the publication of prohibited questions (either disallowed under s 41 or because an answer would contravene the credibility rule or it was a question where the court refused to give leave under Pt 37 ‘Credibility’). The express permission of the court is required before such questions can be published. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 45(1) prohibits the publication of names or identifying information concerning children in domestic or personal violence proceedings. Sections 51B and 100H of the *Crimes (Sentencing Procedure) Act 1999* (NSW) prohibit the publication or broadcast of names specified in parole orders or non-association orders (other than that of the offender). Section 36C of the *Bail Act 1978* (NSW) is in similar terms. Section 28 *Law Enforcement (Controlled Operations) Act 1997* (NSW), and s 34 *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW), are in substantially similar terms and concern the identification of persons who are ‘participants’ under the relevant legislation. Both require a court to make suppression orders which ensure the identity of particular persons is not disclosed, unless the court forms the opinion that it is required in the interests of justice: ss 28(1)(b) and 34(2)(b). Moreover, a court may make non-publication orders in relation to any information identifying or facilitating the identification of any person called or proposed to be called to give evidence: ss 28(2)(b) and 34(2)(b). Section 111 of the *Crimes (Appeal and Review) Act 2001* (NSW) prohibits the publication of details concerning particular acquitted persons (within the meaning of that section) unless publication is permitted by the Court of Criminal Appeal or the court before which the person is being retried. Under s 11(2), the court may make such an order if it is satisfied that it is in the interest of justice to do so. Section 18 of the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW) prohibits the publication of the identity of registrable persons and victims in relation to any proceedings relating to an order under the Act subject to the exceptions set out in ss 18(2) and (3). Section 25 of the *Status of Children Act 1996* (NSW) prohibits the publication of particulars identifying any person by, or in relation to whom, an application for a declaration of parentage or for an annulment order (in relation to parentage) under Div 2 or 3 of the Act, has been brought.

4.5.4 Commonwealth legislation also imposes restrictions on publicity of proceedings. Section 15MK(4) *Crimes Act 1914* (Cth) requires a court to make a suppression order in respect of anything said when an order is made under s 15MK(1), which enables a court to make any order it considers necessary to protect the identity of an ‘operative’ for whom a witness identity protection certificate has been filed. Section 15YR(1) prohibits the publication of material identifying a child witness or child complainant in proceedings for particular offences, set out in s 15Y(1), without the leave of the court. Section 28(2) of the *Witness Protection Act 1994* (Cth) requires a court to make suppression orders concerning the identity of a participant in the National Witness Protection Program. The *Crimes Act 1914* (Cth) and *Criminal Code* (Cth) both contain provisions which enable a court to exclude all or some members of the public and make orders concerning the non-publication of evidence in particular proceedings. Section 85B *Crimes Act 1914* (Cth), in Pt VII titled ‘Official secrets and unlawful soundings’, requires the court to be satisfied ‘such a course is expedient in the interest of the defence of the Commonwealth’. Section 93.2 of the Code, in Pt 5.2 titled ‘Offences relating to espionage and similar activities’, is in similar terms except that the test to be applied is whether the court is satisfied the order is ‘in the interest of the security or defence of the Commonwealth’. Both sections enable orders to be made limiting access to evidence used in particular proceedings. The contravention of the order is an offence.