RESPONSE TO TASMANIAN LAW REFORM INSTITUTE ISSUES PAPER NUMBER 18, PROTECTING THE ANONYMITY OF VICTIMS OF SEXUAL CRIMES.

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I would like to thank the Commission for the opportunity to comment on this discussion paper. By way of background, I have been a court reporter, or have overseen court coverage by others, for the last 20 years for newspapers and the national wire service AAP. The bulk of my court reporting experience is in Sydney and Melbourne. I have covered court matters in Hobart over the last five years. Although I have consulted several colleagues in producing this submission and have had the benefit of their feedback, this submission is not made on behalf of my employer, and what follows represents my opinion as a working journalist alone.

Like most journalists who have experience of court reporting, I regard the role of the media in court coverage as to facilitate the responsible, informed and balanced discussion of the administration of justice. This notion has substantial judicial authority to support it. Obviously this is a role which the media perform with varying lesser degrees of success. In my experience, contrary to the view in some quarters, court reporters are highly supportive of the principles of the justice system – of the right of the accused to a fair trial and of the open administration of justice. Particularly in Tasmania, it is often the case that a journalist is the only person in the courtroom who is not directly involved in the case and their report is the only record of proceedings readily accessible to members of the public.

I must at the outset take slight issue with the reference which forms the basis for the Discussion Paper. It is problematic that in this instance no evidence has been produced that any identification was actually made as a result of the publication and the Director of Public Prosecutions has quite rightly rejected the suggestion that such identification might have occurred in a way that has breached the Act. The case for reform – presumably in the direction of greater restriction – is being made on the basis of a single complaint which is not supported by any evidence and in the absence of any more substantial clamour for reform, particularly from complainants or their advocates.

Further, it might be noted that the article was not published in The Mercury on September 30 2010, but rather on the newspaper's website on March 23 that year. (A similar though not identical story ran in the newspaper under a different headline the following day.) While the article itself may have "engendered considerable controversy" – that controversy was arguably caused by the nature of the crime, rather than any slight possibility the complainant was identified.

It is also the case that the vast majority of sexual assault cases are not covered by the media. Most of those that are attract coverage only after a conviction and sentence. It is unusual for any journalists to be present during the evidence of witnesses.

Sexual assault is believed to be greatly underreported. In my opinion the public interest lies in the informed discussion of the administration of justice, no less so in sexual assault matters. The overriding principle in sexual assault matters, as in all court matters, should be that where restrictions on publication are required the least possible restriction is desirable. Publicity, and

hence a greater public understanding might arguably make it easier for victims to come forward and reduce the stigma or reporting sexual offences.

In any court matter, there will inevitably be a number of people who are already aware of the identity of the complainant. There will also be a larger group of people for whom any identification of the accused or even a general outline of the case will lead to a more or less informed attempt at identification of the complainant. Some will already know through their association with the accused or the complainant, others will be able to make – or attempt such identification – from the publication of only the barest of details. I do not believe should not be the role of the law to prevent such identifications, which would be an almost impossible task. It should be borne in mind that a person determined to identify a complainant or any witness in a case may easily do so simply by attending the hearing.

The role of the relevant restrictions on publication should be to prevent identification by a person outside of these groups not possessing such additional knowledge. I am unaware of any research that has been conducted on whether media coverage has afforded the inadvertent identification of a complainant in a sexual assault matter in Tasmania, or whether identification in any case has caused real or perceived harm.

In addition, there appears to have been no proactive consultation with complainants on how their interest might best be represented. While the potential for identification of a complainant may be one issue dissuading victims from coming forward, another factor may be a lack of proper understanding of the court process, in turn caused by reluctance by the media to report for fear of falling foul of the law.

The protection from identification of sexual assault complainants is in my experience wholeheartedly supported by media practitioners; in fact many reporters extend anonymity to victims of non-sexual offences, either with or without request. It is in nobody's interest for a complainant to be identified where this may cause distress, embarrassment or other harm where there is no overriding reason to do so.

However a practical difficulty arises from the current approach to identification, not just in Tasmania. Where one media outlet may decide to publish certain attributes, another media outlet might publish others. While each publication may comply with the letter of the law, the overall effect may tend to allow easier identification. For example one outlet may publish the name of the accused, while avoiding the mention of the relationship between the accused and the complainant. Another may publish the relationship but refrain from naming the accused. While both outlets have complied with the law, the overall result may tend towards identification. In addition, the factors which might possibly lead to identification might vary from case to case.

Media reporting of court matters generally attempts to identify people as comprehensively as possible to avoid confusion. This is particularly the case for accused persons, where the convention is that name, age, place of residence and sometimes occupation are considered necessary to avoid misidentification. In mentioning complainants in sexual assault matters, name is obviously out of the question under the current legislation, so the barest of details are employed: a 19-year-old woman, a 30-year-old man, for example. The practical difficulty for the court reporter lies in determining which details might safely be included in or excluded from a report without either

breaching the act or rendering the report so general as to be virtually meaningless.

It is clearly the intent of the current section that naming a complainant should never be contemplated. Secondary identification may occur through spelling out the nature of the relationship between complainant and offender, through their family or other relationship. Or identification may occur when characteristics such as age, gender or place of residence may be sufficient – say in the example of a person living in a small community. In some cases, identifying witnesses whose relationship to the complainant, or their occupation, or the location of the incident is spelled out may be the factor that leads to identification. It is difficult to predict, from one case to another which factors may prove critical.

The courts in general, while almost generally supportive of the media's role, understandably have little practical understanding of how a media organisation operates and how editorial decisions are made. Media organisations in Tasmania cover only a small proportion of court cases, and cover few sexual assault cases. Section 194K has several shortcomings which in my view need to be addressed.

Firstly, the section bans the publication of any information which might lead to the identification of any witness. While the stated and laudable aim of the section is to prevent the identification of the complainant, there seems no sensible reason to prohibit the identification of witnesses where such identification will not identify the complainant. There are many possible witnesses in sexual assault cases whose identification will do nothing to erode the anonymity to the complainant. For example, under the current law, it is an offence to identify police or forensic witnesses - a restriction which severely limits what might be said at all for no good reason.

The current requirements for court permission to name a consenting victim are a paternalistic restriction on free speech which unfairly silences victims and should be scrapped. No evidence has been presented, nor any research conducted that media organisations employ coercion or manipulation in their dealings with complainants in criminal matters and my personal experience is to the contrary. A case currently before the courts that I am aware of involves the somewhat perverse situation of a media outlet being prosecuted for telling a victim's story with their consent and at their urging. Such prosecutions cannot be argued to be in the public interest or the interest of the victim.

This issue was dealt with by Justice Evans in the case of *The Age Company Ltd* [2000] TASSC 62. In that case his Honour was dealing with section 103AB of the *Evidence Act* 1910 which, for present purposes is the same as section 194K of the current Act. His Honour noted at paragraph 13 that one of the purposes of the section is to protect victims of sexual offences from the consequences which may flow from media publicity. Like the present section, his Honour noted that there was no provision allowing the victim to consent and said that the good reason for that was to avoid the situation where the media could pester victims to consent 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. One possible response to that is that there could be a provision in section 194K ensuring that consent could only be given once proceedings against the offender or alleged offender have concluded. The suggestion however that a victim might be ill-equipped to make the decision to allow publication, is the type of paternalism that in my opinion has no place in the legislation. The

countervailing argument to that proposition is that the legislature may be making the victim a victim twice over by not permitting that victim to consent to publication.

Whilst the comments made by Justice Evans were supported by Justice Underwood in *Australian Broadcasting Corporation* (2003) 12 Tas R 308, his Honour did in that case at paragraph 5 recognise that it was very much to the benefit of a victim to be able to speak publicly when that victim maintains that that will be part of the healing process.

Several options are presented in the Discussion Paper for reform. Option one – that of no change is undesirable for the reasons outlined above. Option two, to redraft the section, is supported in order to:

1. Remove current restrictions on the identification of any witnesses, where such identification would not lead to the identification of the complainant.
2. Allow for publication of information which might identify the complainant with written consent and who is 18 years of age or more at the time such consent is given.
3. Allow the court to issue guidance on what details might be published without restriction, in order to prevent the totality of media coverage

The current legislation requires an exercise of considerable judgement by media outlets at a time when training; supervision and experience are sometimes at a premium. In addition, the emergence of a new class of "publishers" through the internet – via blogs and social media commentators - suggests that many would benefit from greater simplicity and clarity in what may and may not be published.

Working journalists in Tasmania face additional practical difficulties in deciding what details of sexual assault cases might safely be published. The state's court system does not have any formal media liaison officers, as is the case in many interstate and federal jurisdictions, to offer guidance or to act as a go-between between the court and the media. In addition judge's associates are often reluctant to engage in any discussion with the media on any matter ever and the Director of Public Prosecutions, who is sometimes best placed to provide general advice, is generally reluctant to engage with the media.

The simplest method by which courts might assist media organisations in the responsible coverage of sexual assault matters might be to issue written verbal or preferably written guidance from the presiding judicial officer in cases which attract or might be likely to attract coverage. Ordinarily a verbal direction from the bench would suffice, however such a direction might need to be in written form and may also need to be attached to any written judgements or comments on sentencing published by the court. In some jurisdictions, such advice is readily available on the court's website or is distributed to the media via other methods. Such advice would eliminate the problem of overlapping identifications mentioned above.

Among journalists who cover court matters in Tasmania there is a range of experience and awareness of the law. Although it is desirable that every reporter have a perfect knowledge of every limit to publication, this is not always the case. A direction from the court, whether specific or general, might go a long way toward serving the objectives of the section. Such a direction could be drafted by the prosecution and might take the form:

Under section 194K of the Evidence Act, the court has determined that in the matter of SMITH, the publication of the age and suburb of residence of the complainant is permissible. The identification of witnesses in this matter as also prohibited, with the exception of the witnesses JONES,JACKSON and LEWIS.

Responses to questions within the discussion paper:

Question 1

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

No, the section as it stands should be redrafted to better serve its purported aims and to allow freer discussion of matters before the courts while better protecting complainants from identification, where and while such identification is not desired.

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?

I believe attempts to prevent identification of a complainant by people with prior knowledge of the complainant are futile and misguided. I believe that any change should be aimed at preventing identification outside of the class of people with additional knowledge of the case or the complainant. I believe that current restrictions under the section which prevent the naming of any witness in proceedings should be removed and replaced with a form of words which is designed only to prevent to publication of material which might identify a complainant.

I believe that the court should have the power to identify what material might safely be published and to communicate that information to the media, whether at the application of the Crown or of its own motion.

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?

No, such a blanket restriction is paternalistic, overbearing, and unnecessary and attempts to solve a problem that has not been demonstrated to exist.

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?

I am not convinced the need has been made out to "bolster" the section, although I am convinced there is a need for reform so it might better meet its stated aims.

(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?

I believe the test should reflect the intention of avoiding identification, where such identification is undesired by the complainant. The court should favour granting an application which clarifies what publication might be permissible, only so far as necessary to avoid identification.

(iv) Should the court consider the seriousness of the case?

No.

(v) Should the court consider the nature of the information (for example if it is likely to be particularly embarrassing)?

Only so far as the information is likely to lead to the identification of the complainant.

(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)?

It may be the case that additional care may be required where the complainant may be more affected, however I do not believe that a high profile complainant should be afforded additional protection not afforded to a "low profile" complainant.

(vii) Who should be able to make the application: any person; or only the DPP and/or complainant (or their representative)?

Any person, or the court by its own motion.

I hope this submission is of some assistance to the Institute in its consideration of this matter. I am happy to assist in any way if required,

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