Protecting the anonymity of victims of sexual crimes:

Submission to the Tasmania Law Reform Institute inquiry

This media law reform report will explain the research path, discoveries and recommendations for the submission to the Tasmania Law Reform Institute inquiry into ‘Protecting the Anonymity of Victims of Sexual Crimes’. Question 5 (a) and (b) under the section ‘5.2 Scope of s 194K’ will be answered. The strengths and weaknesses of the Canadian model will be identified and discussed. Finally, recommendations for submission will be outlined.

There is a delicate balancing act between freedom of the press, open justice, individual rights of privacy and reputation, and the right to a fair trial. Australia does not have a national Bill of Rights that states the fundamental rights of its citizens. In the Australian Capital Territory and Victoria there are acts that protect human rights, but these are limited to individuals and exclude corporations (Pearson & Polden, 2011).

The principles of open justice include transparency of process of the judicial system. Part of the role of the media in this regard is to facilitate this transparency to the public, and act as a watchdog on prejudice and injustice. This allows the individual the right to have a fair and public trial and should help prevent false convictions. The media also fulfils a social control role by reporting on the consequences of anti-social behaviour (Pearson & Polden, 2011). The media play a very important public and social role as the ‘Fourth Estate’. The United Nations’ Article 14 of the International Covenant on Civil and Political Rights (OHCHR 1976) strengthens and supports the principles of open justice (Pearson & Polden, 2011). There are statutory restrictions on publication that concern national security and official secrets, inquests, bail, juries, divorce, children and sexual offences (Pearson & Polden, 2011).
5.2 Scope of s 194K - Question 5

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

In the Canadian model there is no automatic prohibition of identification publication. With respect to victims of sexual crime, in relation to listed sexual offences, legislation (s 486.4 of the Criminal Code, RSC 1985, c C-46) empowers the court, the prosecutor, the complainant and witnesses under the age of eighteen years to make an order, or to be expeditiously informed by the court that they (witnesses and complainants) have the right to make an application for the order (s 486.4(2)), directing that ‘any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way’ (Tasmania Law Reform Institute, 2012).

(a).1 Strengths of the Canadian model in protecting the anonymity of victims of sexual crimes.

Firstly, a balance will be reached between the protection of privacy of the complainant (and any witnesses under eighteen years) and the open justice principle. The court must make the order of non-publication of any information that could indentify them when either the complainant or such witness seeks it. Furthermore, the court can only make non-publication orders of its own to necessitate proper administration of justice. The media is able to, upon the granting of such a non-publication order by the court, apply to the court and must give good reason for the grounds for variation or revocation of the order (Tasmania Law Reform Institute, 2012). Here, the media can put forth the public’s right to know, and argue for a fair and public hearing and the upholding of the open justice principle.

Secondly, the decision of allowing publication or non-publication orders made by the courts will be clear-cut and timely. This will enable the media to be certain about what they can and cannot publish and should reduce any breaches of the identification law.
Thirdly, the terminology in the Canadian model (s 486.4 of the Criminal Code, RSC 1985, c C-46) and s 486.4(2)) states that ‘any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way’ (Tasmania Law Reform Institute, 2012). Here the word ‘any’ is used three times and the scope that it implies is very broad and should cover future advancements in media, technology and social media.

Fourth, a defence of complainant’s consent would help maintain the balance in terms of the open justice principle. The court must make the order of non-publication of any information that could indentify them when either the complainant or any witness under eighteen years seeks it. If there is no non-publication order made by the court then the complainant and/or such witnesses have automatically given consent.

Fifth, because of the empowerment of the court, the prosecutor, the complainant and witnesses under the age of eighteen years to make, or have the right to make an application for, a non-publication order (s 486.4(2)) this will negate the argument that it is possible the complainant might be coerced or pressured into giving consent. It will also prevent exploitation of vulnerable complainants.

Sixth, the Tasmania Law Reform Institute Report (5.3.2 Consent by the complainant) mentions concern about complainants consenting to publication. The Institute suggests a possible way of addressing this would be to force the media, even with a complainant’s consent, to get a court order to allow publication (Tasmania Law Reform Institute, 2012). This would be costly and time consuming. In the Canadian model this problem would not arise as the court already has the power to make a non-publication order of its own motion.

Seventh, it is suggested in the Institute’s report (5.3.5 Consent by the complainant) that it may be prudent, despite a complainant’s consent, that the court retains a discretion to order non-publication to address the circumstance (among others) where there are multiple complainants, and also where the complainants are of varying ages and vulnerabilities (Tasmania Law Reform Institute, 2012). In the Canadian model, this problem would not arise because the court already has this discretion and any victim or witness under eighteen years can seek a non-publication order.
Eighth, at present in Tasmania, contraventions of s 194K results in proceedings for contempt. The special features of contempt law include a summary mode of trial, waiving the ‘acting with guilty intent’ requirement and unlimited sentencing powers of superior court judges (Pearson & Polden, 2011). In the Canadian model the sanction for breach lies in prosecution for an offence – a summary criminal offence (Tasmania Law Reform Institute, 2012). This allows for a fairer consequence and punishment for any breach of the identification law.

Lastly, one suggested procedural reform in the Institute’s report (5.4.4 (iv) Procedural reforms) refers to the power of the court with relation to the duration of an order. The Institute states the court should be able to make the term of the order, with relation to time, unrestricted, a fixed period or one referenced to a specified future event occurrence (Tasmania Law Reform Institute, 2012). Once again, the Canadian model provides for this by giving the court power to make a non-publication order of its own motion.

(a).2  Weakness of the Canadian model in protecting the anonymity of victims of sexual crimes

There is no automatic prohibition of publication to provide anonymity to victims of sexual crimes. A vulnerable complainant (or witness) is not automatically protected by the current legislation. If they are unable, for any reason, to make their own informed decision about this matter, this leaves them reliant on the proactive role of the court and the prosecution. This will affect their individual rights of privacy and reputation.

(b) If so, should s 194K (perhaps with clarifications) also be retained (as a ‘back-up’)?

The weakness identified in (a).2 needs to be addressed, but it is not necessary to have another complete legislation such as s 194K retained as a ‘back-up’. This could cause confusion especially as they differ on many points, including those of the default position of publication/non-publication of identities of victims of sexual crimes, the issue of complainant’s consent and the sanction for any breach of the identification law.
**Recommendations**

Tasmania could introduce reform based on the Canadian model with some modification of the model’s current approach. The following comprise possible additions to the Canadian model to address the weakness identified in (a).2:

1. There should be an automatic prohibition of publication to protect the anonymity of victims of sexual crimes in relation to the age of the victim. In choosing an appropriate age it might be prudent to follow the lead of s 15A of the *Children (Criminal Proceeding) Act 1987* (NSW) and set the age to be under sixteen years for automatic prohibition of publication.

2. There should be an automatic prohibition of publication to protect the anonymity of victims of sexual crimes in relation to impaired mental capacities of the victim. Taking guidance from the wording of s 36C (6)(b) of the *Evidence Act 1906* (WA) - this should apply to any victim of sexual crime who, because of any mental impairment, is incapable of making reasonable judgements in respect of the publication or broadcasting of such matters.

3. Although not identified as a weakness in (a).2 the term ‘any’ might appear to be too broad for some critics. Further clarification on the terms ‘publish’, ‘documents’, ‘broadcast’ and ‘transmitted’ can be included to attempt to bring clarity for the issues of globalisation, mass media and social media. However, the challenges that have emerged from these issues have revealed that they cannot be totally and effectively addressed through legislation in the sphere of identification law.

In conclusion, there is a definite need for a reform of the current s 194K of the *Evidence Act 2001* (TAS). Given the scope and the questions posed by the Tasmania Law Reform Institute Issues Paper No 18 August 2012, the nine identified strengths of the Canadian model addresses some of the questions and suggestions contained within the Institute’s report.
Additional recommendations have been put forth to address some of the weaknesses of the Canadian model.

Reference:
