



## OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

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INQUIRIES: Mr T J Ellis SC  
OUR REF: 28855  
YOUR REF:

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Professor Kate Warner  
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Dear Madam

Issues Paper No. 18, "Protecting the Anonymity of Victims of Sexual Crimes", is a disappointing contribution as it does not attempt to offer a reasoned interpretation of s 194K of the *Evidence Act 2001* applying principles of interpretation. Had the author or the Institute bothered to ask me before publication of the Paper, I would have been happy to have supplied my own reasoning which could have thus been exposed to public consideration and comment, but this was not done.

Instead, the Paper commences by looking at how different statutes in different jurisdictions have been interpreted and concludes that I have "embraced" a "lower" "threshold for breach". This approach and its conclusion are fallacious, as they assume that the Tasmanian statute is identical to those in other jurisdictions (so any setting of the "threshold" must be mine rather than the statute's). It also assumes that the interpretations of the other statutes are unarguably correct.

### **Purpose or object**

Section 8A(1) of the *Acts Interpretation Act 1931* provides "In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object." Closely allied to that is the placing of the statute in context. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, Brennan CJ, Dawson, Toohey and Gummow JJ observed,

"... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law, and the mischief which, by legitimate means ... one may discern the statute was intended to remedy ..."

In looking for context, purpose and object the importance and the public interest in maintaining the principle of open justice should be recognised as a significant aspect. So too should the context that s 194K operates only on publication: it does not promote anonymity of the sexual assault complainant at all cost to the exclusion of that principle. For example, indictments and complaints must still carry that identification, and these are read in open court on plea and usually given to the jury, the complainant is not excused from identifying themselves in evidence, they appear in person and even if their evidence is given by video link their voice and image still appear in court, they may be referred to by name in the course of proceedings and members of the public are entitled to attend court.

Further, it is only publication by the mass media which is sought to be prohibited. “*Publication*” is, in law, a word of wide import, but what might be termed private or restricted publication, such as by conversational speech, is not prohibited, further indicating that it is not protection of anonymity at all costs or to the greatest conceivable extent which is sought. The legislation provides a measure but not an absolute guarantee of anonymity.

Still less would the context, purpose or object of the legislation be taken to be to ensure the practical anonymity of those charged with sexual crimes.

As was said by the Supreme Court of the United States in *Rodriguez v United States* 480 US 552 (1987) at 525-526,

“No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”<sup>1</sup>

### **The words used**

None of the words or phrases in s 194K are likely to give rise to difficulty except the phrase “*the name, address, or any other reference or allusion likely to lead to the identification, of (a series of persons) in respect of whom a crime is alleged to have been committed...*” in s 194K(1)(a). (Although the same phrase with a different object appears in s 194K(1A)(a) its meaning is there clear and, as will be discussed, its presence in that section may help to illuminate its meaning and purpose in s 194K(1)(a).)

As a matter of grammar, the nouns “name” and “address” each attach to the phrase “*of any person*”. So the publication of the “*name of any person*” and the “*address of any person*” who is the alleged victim of crime are prohibited. The commas surrounding the phrase “*or any ... identification*” require that the other nouns be read similarly – “*a reference to any person (who is an alleged victim)*”, and “*an allusion to any person*”

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<sup>1</sup> cited with approval *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 248

(who is an alleged victim)". That not only makes grammatical sense, it conforms with one of the established aids to the interpretation of statutes, the *ejusdem generis* syntactical presumption by which general matters are constrained by reference to specific matters<sup>2</sup>.

So while a name is "of" a person, a "reference" is "to" a person, as is an "allusion", and in each case the person is the person in respect of whom the offence is alleged to have been committed. A reference to the person charged is not a reference to the alleged victim.

In the Mercury article which sparked this reference (by Mr Mackie, the Board member who referred it), there was a direct identification of the person charged, Mr Devine.

The Issues Paper at 1.1.8 claims that the claimed offending publication by the Mercury newspaper contained "a number of intimate details about the complainant and her mother". The Paper does not say what those details were, which is unfortunate. The only "intimate" detail I could see was that the complainant had contracted sexually transmitted diseases. I fail to see how that detail – it being no doubt a "reference" to the alleged victim within the meaning of s 194K(1)(a) – would be "likely to lead to (her) identification". The contraction of those diseases is neither unique nor do those with them widely disseminate that fact. The only other details of the victim were that she was 12 and had a mother. Hardly "intimate" details nor ones likely to lead to identification.

I can see no "intimate" details about the mother.

### **The interpretation which appears to be contended for**

Although the author of the Paper does not seem to have troubled Mr Mackie to explain the basis of his disagreement with my view that the publication complained of did not breach s 194K, it might be assumed that he views s 194K as requiring a similar view to be taken as Vanstone J did of s 71A(4) of the *Evidence Act 1929 (SA)* in *Channel Seven Adelaide Pty Ltd v Stockdale-Hall* [2005] SASC 307 cited at 3.3.7 in the Paper,

"[t]he prohibition in s 71A(4) is, subject to the exception, absolute. A breach occurs whenever there is publication of material describing the victim, sufficient, when added to the knowledge already possessed by members of the community, to enable identification."

The provision there under consideration was clearly wider than s 194K, and can be paraphrased thus: "A person shall not publish **any** statement or representation by which the identity of the alleged victim of a sexual offence is revealed or from which it **might** reasonably be inferred."

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<sup>2</sup> See "Statutory Interpretation in Australia", Pearce & Geddes (LexisNexis) 7<sup>th</sup> ed. at 4.24-4.30

With respect, I doubt that Vanstone J's interpretation is correct in any event, but the statute in question is so clearly different that it is not at all helpful or even as a matter of law permissible to use that as an aid to the interpretation of s 194K.

The cases from other jurisdictions the author of the Paper finds so helpful as "*guidance*" are similarly wide – for example, the Victorian statute in referring to "*any other particulars*" is not (and has been held not to be) limited in any way.

If that is the interpretation contended for it confuses identification with recognition. In effect, it says that if someone with prior knowledge of the complainant is able to recognise that a publication relates to them as an alleged victim of sexual crime, that is sufficient for the prohibition in s 194K to be breached.

Such an interpretation would be unworkable. Almost every victim of sexual crime relates the experience to someone or even several people before going to Police (the doctrine of recent complaint would not exist were it not so). Then usually a statement is made to Police. Charges are laid, which contain the name of the complainant. People are present in court when the accused pleads. The Police file comes to my Office where, if the matter proceeds, an Indictment will be filed in the Supreme Court, again with the name of the alleged victim. This is, of course, read by court staff. In the interpretation which seems to be contended for, because all those people<sup>3</sup> will be able to recognise from a publication of the name of the person charged that the alleged victim of crime is a certain person because they already know that, the section is breached .

Such a result would be to prohibit the publication of all accuseds' names, as in every case there will be someone who knows who is the alleged victim, and so on this interpretation there would always be an "identification". The result would be therefore an absurd one. If the legislature had wanted to forbid the publication of the identity of accused persons, it would have done so.

### **s 194K(1A)**

In fact, the legislature did prohibit the publication of the identity of accused persons in the case of charges of incest. Clearly the reason for this is that often (although not invariably) the accused and victim will share the same surname, thus making identification more likely by the mere publication of the accused's name (particularly of course combined with what would otherwise be non-identifying particulars of the victim such as gender or age).

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<sup>3</sup> and probably more – both the victim and the accused person might have told many people: that an allegation was made by a particular person to Police and resulted in a charge against a particular person often becomes well known within the parties' immediate circles without there having been any publication.

The existence of s 194K(1A) is a strong indication that the “absolutism” of the interpretation I presume Mr Mackie would contend for and which might follow wider models in other jurisdictions was not the Parliamentary intention in the enactment of s 194K(1).

## Second Reading Speech

Section 8B of the *Acts Interpretation Act 1931* permits recourse to certain extrinsic material to which consideration may be given in certain circumstances. One of those circumstances is “to confirm the interpretation conveyed by the ordinary meaning of the provision” (s 8B(1)(c)) and the extrinsic material includes (s 8B(3)(f)) the Second Reading Speech.

The predecessor of s 194K was s 103AB of the *Evidence Act 1910* (a fact apparently undiscovered by the author of the Paper who seems to assume all provisions dealing with the same subject are essentially the same). It was introduced in Act No. 55 of 1987, *The Evidence Amendment Act*. It remains in essentially the same form and structure, although with the inclusion of several more crimes, in s 194K of the 2001 Act.

The Second Reading Speech in the House of Assembly was given on 8 July 1987 by the Attorney-General the Hon. J M Bennett. In it he said, inter alia,

“The second matter dealt with by this Bill involves an amendment to the Evidence Act to prohibit publication of the names or other identifying characteristics of victims of sexual offences unless the Court grants leave to publish. The amendment is intended to tighten up the existing provisions which apply only to rape trials and which are susceptible to uneven application, depending on the victim’s knowledge of her rights, the attitude of the prosecution and the discretion of the judge.

This measure is designed to help overcome the reluctance of victims of sexual assaults to report attacks and to help relieve victims of further distress caused by publicity.

The amendment recognises the particular problems which arise from charges of incest where suppression of the identifying characteristics of the victim will often not achieve its purpose if the identity of the accused is revealed. In cases of incest the publication prohibition applies to the accused as well as the victim.”

This indeed confirms what I contend to be the “*interpretation conveyed by the ordinary meaning of the provision*”, that it is (as was said) “*the identifying characteristics of the victim*” which are suppressed. It is not a section which purports to suppress publication of the name of the accused nor even of some identifying characteristics of the victim where only prior and possibly intimate knowledge would enable the recipient of the publication to make the particular form of identification understood as recognition.

**Policy**

Properly understood and interpreted I believe s 194K achieves a reasonable balance of giving protection to the anonymity of the victim at least in the mass media and not unduly restricting the principles of open justice.<sup>4</sup> I don't believe it needs amendments to clarify it.

Yours faithfully

A handwritten signature in black ink, appearing to read 'T.J. Ellis', written in a cursive style.

T J Ellis SC  
**DIRECTOR OF PUBLIC PROSECUTIONS**

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<sup>4</sup> As to these “countervailing considerations” see *In the Matter of the Evidence Act 2001, s 194K and An Application by the Australian Broadcasting Corporation and Davies Brothers Ltd* [2003] TASSC 118 at [4]