

**TASMANIA**  
**LAW REFORM**  
**INSTITUTE**

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

ISSUES PAPER NO 18

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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 Otlowksi (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), 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).

## **Acknowledgments**

This Issues Paper was prepared for the Board by Honorary Professor George Zdenkowski. Research assistance in preparing the paper was given by Kate Stewart in the form of a supervised research paper undertaken as a component of the Bachelor of Laws degree at the Faculty of Law, UTAS. Valuable feedback was provided by the Institute's Director, Professor Kate Warner, members of the Board, Kim Baumeler and Emma Gunn as temporary Board appointees and Jenny Rudolf. Helen Cockburn and Bruce Newey edited and formatted the final version of the paper.

## **Background to this Report**

This project arose out of a Tasmanian case in which a twelve-year-old girl was prostituted by her mother and her mother's male friend. The fact that only one of the girl's clients was prosecuted gave rise to controversy and criticism of both the Director of Public Prosecution's decision not to prosecute and the law relating to the crime of sexual intercourse with a young person. The Attorney-General responded to criticisms of the law by referring to the Institute (by letter dated 30 September 2010) a review of the defence of mistake as to age for the crime of sexual intercourse with a young person, together with any other legal issues raised by the case. Board member, Mr Craig Mackie also 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 Commissioner for Children (Tasmania). The Institute released an Issues Paper in May 2012, *Sexual Offences Against Young People*, Issues Paper No 17. This paper considers the related project, 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.

## **How to Respond**

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the paper. The questions are intended as a guide – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by 28 September 2012.

If possible, responses should be sent by email to: [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

Alternatively, responses may be sent to the Institute by mail or fax:

Tasmania Law Reform Institute  
Private Bag 89  
Hobart, TAS 7001  
Fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquiries should be directed to Helen Cockburn on the above contacts, or by telephoning (03) 6226 2069.

The Issues Paper is available at the Institute's web page at [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.



## Part 1

# Introduction

1.1.1 Victims of sexual crimes<sup>1</sup> often wish to remain anonymous, or at the very least not have people they know, or the wider community know about the fact that they were assaulted. Traditionally, one result of this has been reluctance by victims to report sexual assault. Partly in an effort to encourage victims to come forward, as well as wishing to respect a victim's wish for privacy, the law has introduced restrictions on the reporting (predominantly by the media) of the identity of victims. In other words, when reporting on police investigations, court proceedings, and so on, the media are not allowed to disclose the identity of a victim of sexual assault. In Tasmania this rule is primarily found in s 194K of the *Evidence Act 2001* (Tas). While this rule may seem straightforward, in practice difficulties can arise in determining exactly what information can and cannot be released. This was recently exemplified in the Tasmanian case concerning the prostitution of a 12-year-old girl by her mother and her mother's friend, Gary John Devine. Neither the girl's nor her mother's name was reported in the media, yet the reporting of Devine's name, as well as some other details relating to the case, could have led many people, particularly those who knew Devine, the mother or the girl, to identify her. In these circumstances, the Director of Public Prosecutions concluded that there had been no breach of s 194K (See Part 4 for a detailed discussion).

1.1.2 This Issues Paper will give detailed consideration to the background and policy behind the rule, how it has been interpreted and applied in the past, how it should be applied in the future, whether legislative reform is desirable to aid in its application, and if so, what kind of reform is appropriate.

1.1.3 This matter was referred to the Institute by Mr Craig Mackie by a letter dated 29 March 2010. The reference was supported by the then Commissioner for Children (Tasmania), Mr Paul Mason.

1.1.4 Some related matters which were referred to the Institute, but not included in this project, were:

- Comments on passing sentence by judicial officers in such cases – should these be published on the internet?<sup>2</sup>
- 'a general reference into legislative provisions, principles, practices and procedures relating to restrictions on publication of information concerning children and young people involved in the legal system, either as victims of crime, as (alleged) offenders or in the context of action taken under the *Children, Young Persons and Their Families Act 1997*'.<sup>3</sup>

1.1.5 Although there may be merit in considering these issues for reform, it was decided not to include them in this project. It may be desirable to investigate these matters (each of which potentially raises substantial and complex issues) in a subsequent inquiry. The child protection issues associated with the current matter have been the subject of a separate inquiry and government response.<sup>4</sup>

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<sup>1</sup> The word 'crime' is used loosely here and intended to include summary offences.

<sup>2</sup> This was raised by Mr Craig Mackie in his letter dated 29 March 2010 to Professor K Warner, Director TLRI.

<sup>3</sup> This was raised by Mr Paul Mason, the then Commissioner for Children, letter dated 28 June 2010 to the TLRI.

<sup>4</sup> Paul Mason, Commissioner for Children, *Inquiry into the Circumstances of a 12-year-old Child under Guardianship of the Secretary*, Final Report, July 2010; Government of Tasmania, *Government Response to Recommendations in the*

### ***Protecting the identity of the alleged victims of sexual crimes: section 194K***

1.1.6 Section 194K of the *Evidence Act 2001* (Tas) (the ‘*Evidence Act*’) provides that a person must not publish or cause to be published ‘the name, address, or any other reference or allusion likely to lead to the identification of’ the alleged victims of sexual offences. This restriction on publishing information is an exception to the general principle of ‘open justice’ – that is, courts are open to the public and court proceedings can be freely reported, allowing for (amongst other things) scrutiny of the justice system.

1.1.7 Questions to be considered by this Issues Paper in relation to s 194K include:

- What type of information is intended to be covered by this provision?
- Who has to be able to make the identification of the complainant (for example, is the provision contravened when people who already knew the complainant could identify him or her)?
- Is ‘self-regulation’ by the media or other publishers appropriate? (If not what alternatives are there?)
- Should publication be permitted if the complainant consents? If so, in what circumstances?

### ***The case leading to this project***

1.1.8 In 2010 the operation of s 194K was called into question after numerous media reports were published in relation to the case of Gary John Devine. Devine pleaded guilty to a number of sexually based crimes against a 12-year-old complainant. During Devine’s case *The Mercury* newspaper published an article entitled ‘Girl, 12, Sold for Sex’<sup>5</sup> which contained a number of intimate details about the complainant and her mother (who was also sentenced to imprisonment for her role in this matter). A more detailed account of the background to this case is set out in Issues Paper 17, *Sexual Offences Against Young People*.<sup>6</sup>

1.1.9 The article engendered considerable controversy and raised serious issues about the anonymity of sexual assault complainants in Tasmania. The matter was raised with the Director of Public Prosecutions (the DPP) by Mr Craig Mackie, who was the court-appointed children’s representative in care and protection proceedings relating to the girl in question. The DPP rejected the submission that the publication by *The Mercury* had breached s 194K, having regard to his interpretation of the provision.

1.1.10 In the light of these events it is necessary to determine whether s 194K operates effectively and fulfils its underlying purposes.

### ***Overview of the Issues Paper***

1.1.11 Part 2 of the Issues Paper will consider:

- The principle of open justice;
- competing policy considerations; and
- exceptions to the principle of open justice.

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*Commissioner for Children’s Report on his Inquiry into the Circumstances of a 12-year-old Child under Guardianship of the Secretary*, October 2010.

<sup>5</sup> Sally Glaetzer, ‘Girl, 12, Sold for Sex’, *The Mercury*, 30 September 2010.

<sup>6</sup> Tasmania Law Reform Institute, *Sexual Offences Against Young People* (Issues Paper No 17, May 2012).

Part 3 will review the current law relating to s 194K in Tasmania and equivalent provisions in some other jurisdictions, as well as considering how these laws have been interpreted by the courts. Part 4 will consider the need for reform, including procedural and terminology issues which may be relevant to any proposed reform of s 194K, as well as the appropriate sanction for its contravention. Finally, options for reform are proposed in Part 5.

## 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 that restrictions be imposed on publicity of various details relating to the proceedings.<sup>7</sup>

2.1.2 The principle of open justice is one of the most fundamental features of the Australian system of justice and the conduct of proceedings in public is an essential quality of the court system.<sup>8</sup> The general principle is justified on numerous grounds. In *Scott v Scott*, 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.’<sup>9</sup> In *Russell v Russell*<sup>10</sup> Gibbs J observed that:

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 p200).<sup>11</sup>

2.1.3 The principle of open justice has received international recognition. Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) states that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’<sup>12</sup>

2.1.4 One aspect 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 more widely information about the subject matter of the proceedings 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.’<sup>13</sup> Generally speaking, it will be improper for

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<sup>7</sup> *Scott v Scott* (1913) AC 417, 445 (Lord Loreburn).

<sup>8</sup> 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].

<sup>9</sup> *Scott v Scott* (1913) AC 417, 463 (Lord Atkinson).

<sup>10</sup> (1976) 134 CLR 495.

<sup>11</sup> *Ibid* 520 (Gibbs J).

<sup>12</sup> *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). Australia is a signatory to the ICCPR.

<sup>13</sup> *R v Davis* (1995) 57 FCR 512, 514.

the court to restrain the media from disseminating information heard by those present in court.<sup>14</sup> The principle has been incorporated in a statute in New Zealand.<sup>15</sup>

## 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 justice;
- secure and maintain public confidence and respect for the integrity and the independence of the courts; and
- provide an opportunity for public and media scrutiny to prevent undetected abuse from flourishing.

There are competing policy considerations which have led, in various circumstances, to the modification, restriction and, in exceptional cases, abrogation of the open justice principle.<sup>16</sup> These include:

- the privacy interest 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);
- protecting national security; and
- protecting the safety of certain witnesses.

2.2.2 The public interest in upholding the administration of justice normally supports the notion of open justice. However, for the reasons referred to above, the same overarching concern will sometimes dictate a different approach. This conflict has been discussed in a number of recent decisions of the NSW Supreme Court.<sup>17</sup> These cases involved balancing the notion of 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). 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

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<sup>14</sup> *R v Arundel Justices; Ex parte Westminster Press Ltd* [1985] 1 WLR 708.

<sup>15</sup> Section 196 *Criminal Procedure Act 2011* (NZ) provides that the general rule is that every hearing is open to the public.

<sup>16</sup> Justice Peter Johnson has noted that the tension between competing interests where the open justice principle is applied has been considered in extra-curial writings in Australia and the United Kingdom. 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](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>>.

<sup>17</sup> *R v Perish* (2011) NSWSC 1101; *R v Perish* (2011) NSWSC 1102; *Welker v Rinehart* (2011) NSWSC 1094.

Price has ruled that a fundamental principle of the administration of criminal justice is the principle of open 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.<sup>18</sup>

## 2.3 Exceptions to the principle of open justice

2.3.1 Notwithstanding the importance of the principle of open justice, it is not absolute in all cases.<sup>19</sup> 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 justice<sup>20</sup> and the courts and the legislature have created exceptions accordingly.<sup>21</sup> It is clear however, that limitations will only be imposed where they are necessary and the circumstances are exceptional.<sup>22</sup> 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*

2.3.2 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.<sup>23</sup> 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 information.<sup>24</sup> 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 to be heard by members of the public who are present.<sup>25</sup> 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

<sup>18</sup> *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*, 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.

<sup>19</sup> *R v Kwok* (2005) 64 NSWLR 325, [29] (Hodgson JA). See also *Witness v Marsden* (2000) 49 NSWLR 429, [14]–[17].

<sup>20</sup> *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1.

<sup>21</sup> *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).

<sup>22</sup> *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.

<sup>23</sup> *Scott v Scott* (1913) AC 417, 445–46 (Lord Loreburn).

<sup>24</sup> *Ibid* 445.

<sup>25</sup> *R v Socialist Worker Printers & Publishers Ltd; Ex parte Attorney General* (1975) 1 QB 637; *R v Tait* (1979) 46 FLR 386, 405.

employees, etc) while s 12 creates 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)).<sup>26</sup>

For similar powers in other jurisdictions, see Appendix One.

### ***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 3 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 stating that an order has been made. The penalty for breach is a fine and/or imprisonment of up to 6 months.<sup>27</sup>

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 6 months: s 13).

2.3.10 Section 195 of the *Evidence Act 1995* (Tas) 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 One.

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<sup>26</sup> See also *Witness Protection Act 2000* (Tas) s 16.

<sup>27</sup> See also *Family Violence Act 2003* (Tas).

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

2.3.12 A major development in this area is the enactment of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (the ‘*CSNO Act*’) which commenced operation on 1 July 2011. This legislation was introduced following recommendations by the NSW Law Reform Commission<sup>28</sup> 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.<sup>29</sup>

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’.<sup>30</sup>

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. According to the Agreement in Principle Speech it was the government’s intention ‘to promote transparency and a greater understanding of the justice system’ 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’.<sup>31</sup>

2.3.16 The *CSNO Act* in some respects echoes the terms of s 200 of the *Criminal Procedure Act 2011* (NZ). However, unlike the broad scope of the *CSNO Act*, s 200 is restricted to the protection of the identity of defendants.<sup>32</sup> Section 200(2) specifies a list of grounds on which the court may make such an order, namely if the publication would be likely to:

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<sup>28</sup> New South Wales Law Reform Commission (NSWLRC), *Contempt by Publication*, (Report No 100, 2003) <[www.lawlink.nsw.gov.au/lrc.nsf/pages/r100toc](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r100toc)>.

<sup>29</sup> This account is drawn from Johnson, above n 8.

<sup>30</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 October 2010, 27195.

<sup>31</sup> *Ibid.*

<sup>32</sup> 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.

- 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.

The New Zealand legislation provides that the identity of the defendant is automatically suppressed if the defendant is accused or convicted of incest or sexual conduct with a dependent family member (s 201). The purpose of this provision is stated to be to protect the complainant (s 201(2)). Section 202 allows orders to be made suppressing the identity of a witness, a victim, or a person who is connected with the defendant or the proceedings.

### *Guidelines for judicial officers*

2.3.17 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 ‘Identity 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 where non-publication orders have been made pursuant to s 486 of the *Criminal Code*, RSC 1985, c. C-46 are required to have a cover sheet with a warning notice to that effect.

## **2.4 Protecting the anonymity of sexual assault complainants**

2.4.1 The above review of a selection of statutory exceptions to the open justice principle provides a context for the consideration of the particular exception with which this inquiry is concerned – the protection of the anonymity of the sexual assault complainant by s 194K of the *Evidence Act 2001* (Tas).

2.4.2 Protecting the anonymity of sexual assault complainants is an important area in which the open justice principle has been modified. These provisions are discussed in detail in Part 3. The purpose of legislative provisions that protect the identity of sexual assault complainants is to encourage victims to report crimes committed against them and to protect them from the harm identification may cause, by respecting their privacy. As noted by the Heilbron Committee<sup>33</sup> in 1975, identification can cause great distress to a complainant. This may lead to revelations about his or her prior sexual history or other details which may exacerbate the complainant’s suffering.<sup>34</sup> 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. Second, that the media has a tendency to report cases of sexual assault ruthlessly and salaciously, with little

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<sup>33</sup> 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).

<sup>34</sup> Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2nd ed, 2005) 305.

regard to the harm this may cause to complainants.<sup>35</sup> 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.<sup>36</sup>

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<sup>35</sup> Ibid 306.

<sup>36</sup> *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.

## Part 3

# The Current Law in Tasmania and Other Jurisdictions

### 3.1 Tasmania: section 194K

3.1.1 Anonymity of sexual assault complainants in Tasmania is protected by s 194K of the *Evidence Act 2001* (Tas), which provides (in summary) that a person cannot publish anything to identify a 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, 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 says:

- (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.<sup>37</sup> Similar provisions are also included in legislation in Canada, the United Kingdom and New Zealand.<sup>38</sup> 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.

<sup>37</sup> *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.

<sup>38</sup> *Criminal Code*, RSC 1985, c C-46 s 486.4; *Sexual Offences (Amendment) Act 1992* (UK) s 1; *Criminal Procedure Act 2011* (NZ) s 203.

- (5) A Judge or Justice shall not authorise a publication under subsection (4)(a) unless the Judge or Justice:
  - (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, subject to a number of exceptions: ss 578A(4)(a)–(f) and 578A(3). Significantly, a judge or justice is not to authorise publication, under the exception provided pursuant to s 578A(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 has similarities to s 194K. 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 identified persons, including the complainant. In each case the court must not authorise publication unless it is in the public interest. However, the definition of the prohibited means of dissemination is broader in NSW and specifically refers to the internet. In NSW (unlike s 194K) the court cannot authorise publication unless it has sought and considered the views of the complainant. In NSW the prohibition continues after the proceedings have been finalised until the death of the complainant (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 *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 his or her 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.

3.2.6 The Canadian counterpart of s 194K is to be found in s 486.4 of the *Criminal Code*, RSC 1985, c C-46 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 terminology of ‘published’, ‘document’, ‘broadcast’ and ‘transmitted’ is 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 in the same terms as in s 486.4 if no order has been made under s 486.4 but, upon the application of the prosecutor, a victim or a witness the court is satisfied that the order is necessary for the proper administration of justice (s 486.5(1)). There is a similar discretion to make an order in favour of a 'justice system participant' (s 486.5(2)). 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.

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 could be regarded as 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 over 18 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 (section 486.4(1) *Criminal Code*, RSC 1985, c C-46), there is no automatic prohibition. The legislation empowers the court of its own motion to make a non-publication order. In relation to 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.

### ***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. Section 1 of the

*Sexual Offences Act 1992* (UK) 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’. The prohibition covers written publications available to the public in England and Wales as well as a programme for reception 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)).

### Summary

3.2.9 Legislation provides for automatic suppression of the identity of sexual assault complainants in Tasmania, New South Wales, New Zealand and the United Kingdom. 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 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 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. 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.

## 3.3 Interpreting s 194K and similar provisions

3.3.1 As s 194K has not been the subject of judicial consideration in Tasmania,<sup>39</sup> guidance as to how a court might interpret it can be taken from judicial consideration of similar legislation in other jurisdictions.

3.3.2 In Victoria s 4(1) of the *Judicial Proceedings Reports Act 1958* deals with the issue of complainant anonymity. In 1989, it was considered by the Victorian Supreme Court in *Bailey v Hinch*.<sup>40</sup> At that time, s 4 stated:<sup>41</sup>

<sup>39</sup> Proceedings in respect of contempt of court for an alleged breach of s 194K against Davies Brothers Limited (publishers of the *Sunday Tasmanian* and *The Mercury*) are pending in the Tasmanian Supreme Court. The allegation is that the defendant published a story and photograph which identified a sexual assault victim. The defendant’s legal representative Justin Quill submitted that external legal advice had been sought and obtained prior to publication and no potential breach had been identified. The acting editor, who was unaware of the story, took immediate steps to remove it once it came to attention. The DPP argued there was a clear breach and the purpose of the legislation was to protect the victims of sexual crimes and encourage reporting. Justice Helen Wood has reserved her decision. As the first detailed judicial interpretation of s 194K, the judgment is likely to have significant implications for an understanding of the scope and effectiveness of this provision: Zara Dawtrey, ‘Mercury in Court on Contempt Charges’, *The Mercury*, 18 April 2012.

<sup>40</sup> [1989] VR 78.

<sup>41</sup> Section 4 of the *Judicial Proceedings Reports Act 1958* has since been amended. The current provision (section 4) 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 personUnless 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.

3.3.3 In *Bailey v Hinch* it was held that ‘any other particulars’ in ss (1)(a) is not limited to particulars of the victim or the victim’s circumstances. If this was the case 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 phrase ‘any other particulars’ is tied to the phrase ‘likely to lead to the identification of any person’, this usually being the victim. The court also held that whether material is ‘likely to lead to identification’ is a question of fact in each case.<sup>42</sup>

3.3.4 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 relevant 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 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 new test based upon the conduct of a well-informed member of the community.<sup>43</sup> 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.<sup>44</sup>

3.3.5 In *Howe v Harvey*<sup>45</sup> the Victorian Court of Appeal was required to consider s 26(1)(a) of the *Children and Young Persons Act 1989* (Vic)<sup>46</sup> 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;

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<sup>42</sup> Ibid 92.

<sup>43</sup> Ibid 94.

<sup>44</sup> Ibid.

<sup>45</sup> [2008] VSCA 181.

<sup>46</sup> This legislation was repealed by the *Children, Youth and Families Act 2005* (Vic).

## (iii) A witness in the proceeding

The court held that in determining whether material was likely to lead to identification s 26(1)(a) does not require the ‘ordinary reasonable reader or viewer’ test to be applied. Whether a person is likely to identify the venue of the Children’s Court, a child or other party to the proceeding or a witness in the proceeding is a question which should be determined based on the facts available.<sup>47</sup>

3.3.6 In South Australia the position in relation to victim anonymity is governed by s 71A(4) of the *Evidence Act 1929* which provides:

- (4) A person shall 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).

3.3.7 In *Channel Seven Adelaide Pty Ltd v Stockdale-Hall*<sup>48</sup> Vanstone J stated in relation to this section ‘[t]he 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.’<sup>49</sup>

3.3.8 In New Zealand the relevant legislation until recently<sup>50</sup> 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*<sup>51</sup> (where the court was considering the 1985 Act) the New Zealand Court of Appeal was dealing with the publication of the name and age of the offender, where the victim had been a child who had worked at the offender’s office on two occasions after school. Initially, the District Court refused a suppression order of the offender’s name. 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 victim’s identification. The High Court granted leave to appeal to the Court of Appeal. The Court of Appeal dismissed the appeal, and considered the meaning of ‘likely’ in this context, observed the prescriptive nature of the prohibition, and its aim to protect the victim, and stated:

[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.<sup>52</sup>

<sup>47</sup> *Howe v Harvey* [2008] VSCA 181, 64.

<sup>48</sup> [2005] SASC 307.

<sup>49</sup> *Ibid* 11.

<sup>50</sup> This legislation was repealed and replaced by the *Criminal Procedure Act 2011* (NZ). The relevant provision (s 203) is cast in narrower terms and only imposes an automatic suppression of the name, address and occupation of the complainant.

<sup>51</sup> [1998] 1 NZLR 35.

<sup>52</sup> *Ibid* 40.

In this case, it was already in the public arena that the victim was a 15-year-old schoolboy 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, connecting the victim and identifying him with the respondent. This was an unacceptable risk.

### **Summary**

3.3.9 The key terminology in s 194K which prohibits publication of material, 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. South Australia has slightly different terminology (‘from which the identity of a person ... might reasonably be inferred’). As mentioned earlier, the Tasmanian courts have not considered in any detail the interpretation to be given to s 194K.<sup>53</sup> However, similar 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. In broad terms, it would appear that courts in the jurisdictions mentioned, applying largely similar legislative tests, have ruled that the threshold for breach is lower than that which appears to have been embraced by the Tasmanian DPP in the case which provided the catalyst for this Issues Paper. While case law from other jurisdictions may point to one way of interpreting s 194K, it is acknowledged that it is nevertheless possible to interpret the section in different ways (as demonstrated by the case leading to this project). Such lack of clarity is not desirable in legislation designed to protect victims.

## **3.4 Complainant’s consent to publication**

3.4.1 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.<sup>54</sup> In New South Wales publication is allowed if the complainant consents and is of or over the age of 14.<sup>55</sup> In South Australia publication may occur if the complainant consents and the victim is not a child.<sup>56</sup> 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 occurred the complainant was not, because of a mental impairment, incapable of making reasonable judgments in respect of publication of such matters.<sup>57</sup> 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.<sup>58</sup> In the United Kingdom, a 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) s 5(2) and (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 being the victim of a sexual assault attracts a stigma in the community and that the complainant is entitled to be shielded from such so-called odium. But there is a compelling

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<sup>53</sup> See above n 41.

<sup>54</sup> *Evidence (Miscellaneous Provisions) Act* (ACT) s 40(2); *Judicial Proceedings Reports Act 1958* (Vic) s 4(1B) (b) (ii).

<sup>55</sup> *Crimes Act 1900* (NSW) s 578A(4)(b).

<sup>56</sup> *Evidence Act 1929* (SA) s 71A(4). Section 4 provides that a child means a person under the age of 18 years.

<sup>57</sup> *Evidence Act 1906* (WA) s 36C(6)(b).

<sup>58</sup> *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.

argument that the existence of the stigma – because of historical community prejudice against sexual assault victims based on notions of blaming the victim – 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 stigma attached to sexual assault complainants. In *R v Ali*<sup>59</sup> Berman DCJ made this 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.<sup>60</sup> A counter argument is that encouraging complainants to self-identify might be seen as using them as vehicles to achieve a social end.

3.4.3 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 Given the apparent prevalence and persistence of the community prejudice against sexual assault victims,<sup>61</sup> there are likely to be victims who do not feel comfortable about revealing their identity and who require the protection of the law.<sup>62</sup> In these circumstances, a protective provision which allows for a consent defence appears to strike a reasonable balance.

3.4.5 It should be noted that problems have occurred in situations where there are multiple victims and only one or two consent. 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). This issue was recognised in *R v The Age Company*<sup>63</sup> 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*<sup>64</sup> 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 protective legislation. 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 broadcasting 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).

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<sup>59</sup> [2008] NSWDC 318.

<sup>60</sup> Ibid 6-7.

<sup>61</sup> See Heilbron Committee, above n 33; Temkin, above n 34; Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Australian Law Reform Commission Report No 114, New South Wales Law Reform Commission Report No 128 (2010).

<sup>62</sup> 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].

<sup>63</sup> [2000] TASSC 62, 181.

<sup>64</sup> [1993] 3 NZLR 421.

## Part 4

# The Need for Reform

## 4.1 Introduction

4.1.1 This Part of the Issues Paper considers whether there is a need for reform. It concludes that there is such a need, due to the uncertainty of the current law. Having concluded that reform is necessary to clarify the law, this Part also considers whether additional measures should be introduced to better protect the anonymity of victims of sexual crimes and to ensure a fair court process for decisions in relation to s 194K.

## 4.2 Uncertainty as to interpretation of s 194K

### *Was there a breach of s 194K in the recent child prostitution case?*

4.2.1 On 24 March 2010, a member of the Department of Public Prosecutions was asked by Mr Craig Mackie<sup>65</sup> to consider whether an article published by *The Mercury* newspaper on 23 March 2010, had breached s 194K. The article entitled 'Girl, 12, Sold for Sex'<sup>66</sup> reported numerous details of the case which may have led certain readers to identify the complainant. It named Devine as the perpetrator and included a photograph of him. It also revealed his address and that he was a close friend of the mother of the complainant. Although neither the name of the mother nor that of the complainant was mentioned, the information may have led those who already knew Devine, the mother or the complainant, to identify the complainant as the alleged victim.

4.2.2 In response to this request the Director of Public Prosecutions, Mr Tim Ellis SC, stated that in his opinion the provision had not been contravened. He 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. Mr Ellis SC stated that in his view, for a breach of s 194K to occur the publication itself must be likely to lead to identification. That identification must be correct and must not lead the reader to identify a number of people, of whom the complainant could be one.<sup>67</sup> According to this interpretation, a breach of s 194K only occurs if a general reader with a general knowledge of facts available to the public is able to identify the complainant from material published. A breach will not occur if only those with prior knowledge of the case or the parties can identify the complainant. The problem with this interpretation is that a general 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 Gary Devine were) this could lead to a large number of people making the identification from the published details without the publication breaching the provision, thus arguably undermining the intended operation of the legislation and the purpose of victim protection. The relatively small

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<sup>65</sup> The court appointed children's representative in relation to care and protection proceedings involving the complainant.

<sup>66</sup> Glaetzer, above n 5.

<sup>67</sup> Letter from Tim Ellis SC to Craig Mackie, 24 March 2010. Mr Mackie took a different view, which prompted his reference to the TLRI.

population of Tasmania may enhance the risk of identification. 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 might also be argued that the law is much simpler to apply if one interprets the law as prohibiting a publication which is itself likely to lead to identification, rather than prohibiting a publication which might lead to identification by those with prior knowledge. That is because the publisher is unlikely to know the extent of anyone else's prior knowledge, and so the publisher will inevitably have difficulty in trying to assess how much information can be published before someone with some prior knowledge will be likely to identify the victim.

### ***Summary: Need for Legislative Clarification***

4.2.3 It has been submitted to the TLRI that the article published by *The Mercury*, 'Girl, 12, Sold for Sex', did breach s 194K.<sup>68</sup> As discussed in paragraph 3.3.9, the fact that the DPP reached a different conclusion suggests that the provision is open to a number of interpretations. Where a law is open to different interpretations there is clearly uncertainty, which is not desirable. While such uncertainty may be resolved by future judicial pronouncements,<sup>69</sup> when such clarification might come cannot be known, and in the meantime, it can be argued that victims are not being sufficiently protected. It is arguable that the law is inadequate if it purports to proscribe the publication of material which leads to identification, but then allows for identification of the complainant to be made by those (possibly a relatively large number of people) who have prior knowledge of the complainant or other parties involved in the case. It is also arguable that the extent of the protection to be afforded victims by this provision is a policy matter, and hence more properly dealt with by the Parliament than the judiciary. Arguably, there is a need to clarify this law by legislative reform, specifically to make clear:

- What information is prohibited by the section (information which itself is likely to lead to identification? Or is information prohibited if it would be likely to lead to identification when combined with other readily available information)?
- Who should be prevented from making the identification (does it include people with prior knowledge of the case or parties)?

## **4.3 Need for additional protections**

4.3.1 If reform to clarify the law is necessary, it may be desirable to make other changes (improvements) to this area of law.

Issues to be considered include:

- Is it appropriate that the section effectively allows the media or other publishers to determine whether or not information can be published?
- Complainants cannot currently consent to publication – should that be altered?
- Internet – does the provision adequately take the effect of the internet into account?
- Terminology in s 194K (relating to the scope of the protection offered to complainants) and various procedural aspects which relate to the effective operation of s 194K and publication orders.
- Breaches: should these continue to be dealt with via contempt proceedings or should a breach be prosecuted as an offence?

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<sup>68</sup> See above n 2.

<sup>69</sup> See above n 39.

### ***Uncertainty for the media and other publishers***

4.3.2 The current operation of s 194K effectively allows for self-regulation by the media and others seeking to publish information.<sup>70</sup> The provision requires a person to obtain a court order if they wish to publish information likely to lead to identification. Arguably, the problem with this is that it places the onus on the media outlet (or other publishers) to determine what information is likely to lead to identification. This allows the media to decide what information they will publish about sexual assault complainants. If they publish information that is likely to lead to identification contempt proceedings may ensue but the publication damage has already occurred.

4.3.3 One issue is whether it is appropriate for the media to decide whether the information is likely to lead to identification. Media outlets have an obvious interest in publishing material that will attract readers or viewers. A story that identifies the victim of sexual assault is likely to attract greater consumer interest than one that does not. There is a strong incentive for the media to publish such details. It may therefore be difficult for media outlets to be objective when deciding whether to publish information that could identify a complainant.

4.3.4 On the other hand, any mechanism which seeks to restrict publication of complainant details short of a complete prohibition will involve a degree of discretionary decision making by the media. A complete prohibition with a court process involving application by the media (or other publishers) for advance authority from the court to publish certain details might be regarded as a drastic incursion on freedom of expression and open justice.

### ***Publication with victim consent***

4.3.5 Reform may also be desirable to allow for publication when the complainant consents. As was discussed at 3.4 above, a number of other jurisdictions allow for publication when the complainant consents. Section 194K is silent as to the operation of consent. Arguably, when considering an application to publish details, a complainant's consent could be taken into account by a court as part of a 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 (as in New South Wales), nor is the court given any guidance as to how much weight it should give this factor (among many other possible factors) in making a decision. Uncertainty about how a court might deal with such an issue may well cause reluctance in both publishers and complainants to make such an application. In appropriate cases, allowing publication when victims consent may strike a reasonable balance between open justice and the protection offered to complainants by s 194K. On the other hand, it may be considered that the special vulnerability of victims means that they should not be able to consent to publication or that such consent may only be validly given in limited circumstances. To explain further, it may be thought necessary 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. It has been noted that it may be desirable to limit effective consent to complainants who have attained a certain age, are properly informed and are not vulnerable because of, for example, a form of mental impairment, pressure or manipulation. Also, any reform may need to consider the situation where there are multiple complainants, only some of whom consent or only some of whom have the capacity to consent. A residual court discretion to disallow the operation of consent in certain circumstances may be appropriate.

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<sup>70</sup> While the traditional media are principally involved in such decision-making, it is recognised that publication on the internet (via social media, individual bloggers etc) is a significant issue.

## *Terminology and procedural matters*

### *Methods of publication*

4.3.6 Two aspects may require consideration. First, whether there is a need to include a broader definition of the various modes of dissemination of the publication. The existing terminology: ‘any newspaper, journal, periodical or document or in any broadcast by means of wireless, telegraphy or television’ may not be ideal for modern conditions. Arguably, it should be clear that publication by all electronic means, including the Internet and all types of telephonic communication (including by text message, etc) is captured. It is arguable that this requires express reference to such techniques. Second, it must be considered whether s 194K is effective given the advent of the Internet. The first provision which granted anonymity to rape complainants was inserted into the *Evidence Act* in 1976.<sup>71</sup> In 1987 the provision was amended to provide protection to all sexual assault complainants by including reference to all specified sexual assault offences. Since that time the provision has remained relatively unchanged. While the statute may have been adequate in 1987, this may no longer be the case as the Internet has made it far easier to access news and information. Information is also available for longer as it is up to the media organisation which posts the information to take it down. Moreover, there is no control of the sites to which information may have been transmitted or copied while it was available. The Internet also makes it possible, when given a small piece of information about a person, to find out a great deal more by using various search engines such as Google. This means that while a media organisation may not publish the identity of a complainant, it is possible that any information they do publish could be used by the public to discover further information about the complainant (including his or her identity). It is noteworthy that s 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 *Court Suppression and Non-publication Orders Act 2010* (NSW) 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.’ The New South Wales Court of Criminal Appeal recently considered the provisions in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*.<sup>72</sup>

### *Pictures*

4.3.7 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 the form of documents or electronic forms.

### *Scope of ‘sexual offences’*

4.3.8 It is important that all relevant sexual offences are covered by s 194K. If this is not the case, some complainants are not the beneficiaries of the protections afforded and the provision should be amended accordingly. One method of achieving this would be to express the definition of sexual offences in generic terms (as in some other jurisdictions).<sup>73</sup> This would mean that any new sexual

<sup>71</sup> *Evidence Act (No 3) 1976* (Tas) s 3.

<sup>72</sup> [2012] NSWCCA 125. The court was considering an appeal against the validity of certain orders made under the *Court Suppression and Non-publication Orders Act 2010* (NSW) purporting to prevent the publication of material referring to any other criminal proceedings in which the respondents were parties or witnesses. Amongst other things, the court held that an order preventing public access to existing material, including a publication on a website, clearly falls within the Act. Moreover, a suppression order may be made in relation to material on the Internet. However, no offence is committed under the Act unless the person has had the order brought to their attention.

<sup>73</sup> 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’).

offence would be automatically covered by the protective provision without further amendment of s 194K and could not be inadvertently overlooked.

*To whom does the statutory prohibition or the publication order apply?*

4.3.9 It would appear that an order authorising publication is binding not only on the parties but on ‘the entire world’. However, in light of the comments of His Honour Chief Justice French in *Hogan v Hinch*<sup>74</sup> (speaking about suppression orders) that, at common law, it is ‘contentious’ whether a court can make binding non-publication orders on anyone not present in the courtroom, it may be desirable to make specific provision for the scope of the application of the statutory prohibition imposed by s 194K and of any order authorising publication under that provision. Section 194K is currently silent on these issues. It may be desirable, for abundant caution, to provide that both the statutory protection of the complainant and any court order authorising publication are unrestricted and apply throughout the world and to all persons. In the age of the Internet this may often be appropriate.<sup>75</sup> A court should retain a discretion to make a publication order in less sweeping terms where this is suitable. This could be achieved by providing for an unrestricted order as the default position, so that the order is unrestricted in scope unless the court otherwise orders.

*Section 194K(2) Guidelines for public interest?*

4.3.10 A possible issue for consideration is whether it is preferable to retain the broad judicial discretion as to what constitutes the ‘public interest’ or whether it is desirable to make provision for criteria to provide guidance to the court. Some assistance as to possible criteria may be gleaned from s 8 *CSNO Act*; s 202(2) *Criminal Procedure Act 2011* (NZ); or s 486.5(5) *Criminal Code*, RSC 1985, c C-46 (Canada).

*Who may apply for a publication order?*

4.3.11 Section 194K is silent as to who may seek a publication order. It would appear that this initiative has been regarded as the responsibility of the media or other publisher in the relevant proceedings. While this may be appropriate, it could be argued that the entitlement to seek an order should be expanded. The *CSNO Act* (dealing with the right to apply for a non-publication order) provides a useful guide. According to s 9,<sup>76</sup> orders may be sought:

- on the court’s own initiative;
- on the application of a party to the proceedings; or
- on the application of any other person considered by the court to have a sufficient interest in the making of an order.

*Who may appear?*

4.3.12 A further issue is who is entitled to appear in any proceedings related to an application for a publication order. 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 as to the range of persons or agencies who might claim an interest. A useful model is provided by s 9(2)

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<sup>74</sup> (2011) 85 ALJR 398, [20]–[27].

<sup>75</sup> Although doubt has been expressed recently about whether such orders can bind the world at large: see *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125, [59]–[60]. In that case, the NSW Court of Criminal Appeal also considered the problems created by publication of material on Internet sites of which the defendant is unaware or over which there is no control: at [64]–[70].

<sup>76</sup> *Court Suppression and Non-publication Orders Act 2010* (NSW) s 9.

CSNO<sup>77</sup> which provides a statutory right to appear (in respect of persons seeking a non-publication order) to a group of persons or entities including:

- the applicant for the order;
- a party to the proceedings concerned;
- the government (or an agency of the government) of the Commonwealth or a State or Territory; and
- a news media organisation.<sup>78</sup>

#### *Duration of the prohibition or publication order*

4.3.13 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. However, 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. It may be desirable to clarify the duration of the legislative prohibition as well as making express provision for a court’s powers in relation to duration of a publication order. First, this may be desirable to enhance certainty. Second, it may be appropriate for a court to make short or lengthy or unlimited orders depending on the circumstances of the case.

#### *Review and appeal*

4.3.14 Section 194K is silent on whether a court has power to review, vary or revoke a publication order. 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 who are 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.<sup>79</sup>

<sup>77</sup> See paragraphs 1.4.13–1.4.17.

<sup>78</sup> There is a wide definition of the term ‘news media organisation’ in s 3 CSNO 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.

<sup>79</sup> See also *Criminal Procedure Act 2011* (NZ). A recent illustration concerned criminal proceedings against a football coach for sexual offences against a junior team member many years earlier. The defendant was convicted and sentenced

Section 14 *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.

### *Reasons*

4.3.15 In New Zealand, there is a statutory obligation to give reasons for making, varying or revoking a suppression order (*Criminal Procedure Act 2011* (NZ) s 207(1)). However, if the court is satisfied exceptional circumstances exist, it may decline to state in public all or any of the facts, reasons or other considerations that it has taken into account in reaching its decision. Because there is a right to appeal against any order made under s 194K there is a corresponding obligation to give reasons for such order.<sup>80</sup> Accordingly it may not be necessary to make specific provision in this respect.

### ***Breaches: punishment for contempt versus summary criminal offence?***

4.3.16 A further matter which may require consideration is whether the sanction for breach of s 194K should remain that of contempt or whether it should be a criminal offence, as is the case in some other jurisdictions. In favour of the status quo it might be said that the proceedings will be expeditious. However, at common law, there is no upper limit to the fine or term of imprisonment which may be imposed for contempt. This has been recognised as unsatisfactory and unfair because of the uncertainty occasioned by the indefinite (and potentially harsh) punishment available (even though it is rarely exercised).<sup>81</sup> Other jurisdictions (such as New South Wales, Victoria, South Australia, Canada, New Zealand and the United Kingdom) have opted to make the sanction for breach of orders protecting the anonymity of sexual assault complainants a summary criminal offence. The penalty is normally a fine (with the usual upper limit) or sometimes also imprisonment for up to six months. It may be appropriate to provide that the summary offence may be prosecuted in the Magistrates Court or the Supreme Court with suitable maximum penalties, as in NSW. Usually, higher maximum penalties are provided for corporate offenders. It may be, for example, appropriate that a media corporation alleged to have committed an offence should be prosecuted in the Tasmanian Supreme Court at the election of the prosecution. On the other hand, an alleged offence by an individual may often be adequately dealt with in the Magistrates Court.

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to a maximum term of five years imprisonment by Judge James Bennett 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* (Sydney), 19 February 2012.

<sup>80</sup> *Pettit v Dunkley* (1972) NSWLR 376, 382; *Soulemezis v Dudley (Holdings)* (1987) 10 NSWLR 247, 259.

<sup>81</sup> Australian Law Reform Commission, *Contempt*, Report No 35 (1987); New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43 (2000).

## Part 5

# Options for Reform

## 5.1 Overview

5.1.1 The purpose of this Issues Paper is to elicit comment as to the desirability or otherwise of reforming the law protecting the anonymity of sexual assault victims (s 194K *Evidence Act 2001* (Tas)). This Part sets out several options for reform. These options are not necessarily comprehensive, and are not exclusive of each other. It may also be that elements of one model may be usefully combined with another. The TLRI invites responses to the questions posed below, as well as general comments or suggestions for alternative methods of reform.

5.1.2 The reforms considered below are grouped into three categories:

- scope of s 194K (five separate options for reform are considered here);
- consent by the complainant;
- terminology and procedural aspects.

## 5.2 Scope of s 194K

### *Option 1 – No change*

5.2.1 The first option is to retain the current provision. The benefit of retaining the current provision is that it is known and arguably understood by the media. Only a handful of cases concerning s 194K have come before the court in Tasmania which may suggest the provision has been working effectively. However, as is apparent from the earlier discussion (see Part 3), there is potential uncertainty as to the interpretation of s 194K. This is demonstrated by the conflicting points of view about the newspaper article which led to this project. As stated above, there are grounds for arguing that legislative reform to clarify the correct interpretation of s 194K is required.

#### **Question 1**

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

### *Option 2 – Clarify s 194K*

5.2.2 The second option for reform is to clarify s 194K, by better explaining what is meant by the phrase ‘likely to lead to identification’.

5.2.3 One way that this could be achieved is by including in s 194K a definition of ‘identification’. This definition could state that for the purposes of s 194K, identification means identification either by a general reader or viewer, or identification by those with prior knowledge of the case or the parties involved. It could also be stated that a court should decide whether material is likely to lead to identification having regard to all the circumstances of the case. Alternatively, a definition might state

(following the New Zealand decision of *R v W*<sup>82</sup>) that there must be no ‘appreciable risk’ of identification (‘appreciable risk’ being defined as a ‘risk other than a fanciful one’), or in some other way provide guidance as to the degree of risk which is permissible.

### 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?

### *Option 3 –Prohibit publication of any information without a court order*

5.2.4 A third option would be to repeal s 194K and insert a new provision prohibiting the publication of any information relating to proceedings, in all sexual assault cases, unless a court order is obtained. This would take the determination of the issues out of the hands of the media, who have an obvious vested interest in publication. In applying to the court for an order allowing publication it could be a requirement that the media outlet provide details of what they intend to publish to assist the court in determining whether to grant the order. The court could then decide whether to allow publication of the whole piece, some parts of the piece or to deny publication altogether. One advantage of this power is that a court could permit publication of a general outline of the offence including particulars of the parties, if thought appropriate, but could suppress irrelevant (to the public) but potentially embarrassing or hurtful (to the complainant) collateral details (for example descriptions of sexually transmitted diseases which may have resulted from the offence in question).

5.2.5 The benefit of prohibiting publication in all cases is that the court would always be given the option to review what the media outlet intends to publish before this occurs. The complainant would not have to rely on the prosecution to apply for an order for non-publication and they would not have to be concerned with whether the court will make an order or not. By requiring the media to apply for an order before they can publish information about sexual assault cases, the decision about whether certain material is likely to lead to the identification of the complainant is taken out of their hands. It would be for the judicial officer, who is arguably in a more objective position, to make this determination. Having an independent arbiter make this decision would arguably result in greater protection from identification for complainants. Another likely benefit would be that it should be simple to determine whether or not a breach has occurred (that is, wherever a publication is not authorised, or is different from that authorised by, a court).

5.2.6 While providing greater protection for complainants, this option would arguably impinge too heavily upon the principle of open justice. Such an incursion may be difficult to justify given the importance of the concept and the fact that other options for reform are available. A provision such as this could also increase the burden on the court system substantially and involve an additional cost to the public (court resources, DPP and/or legal aid costs) and media outlets because it may result in many applications to the court. Such proceedings could cause delay in the court process (particularly if heard by the same judge who would otherwise have been dealing with an on-going trial) and resulting concern in the media and the community.

<sup>82</sup> [1998] 1 NZLR 35.

5.2.7 However, the drastic effect of such a provision might be mitigated if it were qualified by a provision that a court must permit publication if the complainant seeks such an order. This is the position in New Zealand and Canada. Consent by complainants is discussed below. Delay might be reduced if written consent by the complainant was a defence (as in the UK).

### 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?

### *Option 4 – Prohibition on publication in cases where an application is made*

5.2.8 Another option for reform is to keep the current s 194K (or probably an improved version of it), but to strengthen the protection it affords by empowering the prosecution or the complainant to apply to the court, for an order prohibiting publication of *any* details concerning the case.<sup>83</sup> The media could make representations against the granting of such a prohibition order, or could later apply to the court to have the order revoked or varied.<sup>84</sup>

5.2.9 It may be thought that this option is less desirable than the previous one as it does not ensure as much protection to complainants and it relies on both the prosecutor and the court exercising their discretion. Another criticism might be that it would lead to some complainants being given greater protection than others. On the other hand, it may well be thought that this is appropriate if it is shown (or thought by the complainant or DPP) that the risk of identification (or harm caused by identification) in a particular case is greater than in others, and therefore that a greater level of protection is needed.

5.2.10 Consideration should be given to the criteria to which a court might have regard in reaching its determination. The benefit of this option is that it balances more evenly the need to protect complainants and the need to observe the open justice principle. It would also consume less time and fewer resources as the media would not be required to go to court and obtain an order in every case which it wished to report. There is also no reason why the court should not be empowered to restrict the nature of the details published (see discussion under Option 3, 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.

### 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?

<sup>83</sup> This would be a variation on the model in the *CSNO Act*.

<sup>84</sup> This is, effectively, the situation in NSW where s 578A *Crimes Act 1900* (NSW) (the equivalent of s 194K) continues in force despite the enactment of the comprehensive *CSNO Act*.

- (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)?

### ***Option 5 – Reform based on the Canadian model***

5.2.11 The Canadian approach (discussed above at paragraph 3.2.6) empowers the court to take the initiative and make non-publication orders of its own motion, as a matter of discretion, or upon application by the prosecution, if the court is satisfied that it is necessary for the proper administration of justice. 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. In the event that either the complainant or such a witness seeks such an order the court *must* make it. The Canadian model arguably has the advantage of conferring a proactive role on the court. However, unless an order is made, a 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 to remedy this problem would be to retain a version of s 194K as ‘back-up’, similar to the approach taken in the previous option.

5.2.12 This Option would place control over applications for non-publication orders to protect the anonymity of sexual assault complainants squarely within the power of the prosecution or the complainant’s legal representative, rather than the media. The media would, in the case where an order is sought and granted, be required to apply to the court and to justify the grounds for variation or revocation of the order. It would allow a balanced approach which provided satisfactory protection to victims without intruding unnecessarily on the open justice principle. In addition, if Option 4 is implemented, and s 194K (with its wording reformed in accordance with Option 2) is retained as a default position, complainants will remain protected even if a non-publication order is not made. The balance in terms of the open justice principle would be maintained, especially if the recommended reform as to the defence of consent by the complainant is introduced (see below).

#### **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’)?

## **5.3 Consent by the complainant**

5.3.1 A further key issue is whether Tasmania should adopt a provision that allows for publication where the complainant consents (as is the case in numerous other jurisdictions, see discussion above at 3.4; discussion of the need for reform is at 4.3.5). While the justifications for allowing publication where the complainant consents are compelling (preserving open justice, complainant autonomy and empowering complainants to resist stigmatisation when they choose to do so), there are several

considerations that must be weighed against them. A complainant may be pressured or coerced into giving consent. They may be given misleading information, financial inducement or may potentially be blackmailed and as a result the consent may not be freely given or fully informed. Moreover, there may be cases where mental impairment could affect the capacity to give a valid consent. Even if there is no mental impairment there is a high likelihood that a complainant would be suffering from stress which may impair decision-making. Sexual assault complainants are recognised as a vulnerable class of victims given the emotional trauma that crimes of a sexual nature can cause. It is possible that this vulnerability could be exploited by media outlets with a vested interest in publishing the identity of the complainant. Further, complainants may not consider the long-term implications of giving consent. Also, as noted in *R v The Age Company*<sup>85</sup> and *TV 3 Network Services Ltd v R*<sup>86</sup> complications can arise when there are multiple complainants and they do not all consent.

5.3.2 One potential way to address the concerns about victims consenting to publication would be to make it necessary for the media to obtain a court order allowing publication, even when the complainant consents. This is because a judicial officer will be more objective when weighing the relevant considerations than will a media outlet whose primary interest is in publication. This is the position in NSW.

5.3.3 An option for amending s 194K to incorporate a consent provision might be based on s 36C (6)(b) of the *Evidence Act 1906* (WA), which provides:

- (6) Nothing in this section prohibits the publication or broadcasting of matter identifying a complainant if —
- (a) prior to the publication or broadcasting that complainant authorised in writing the publication or broadcasting of the matter; and
  - (b) at the time the complainant authorised the publication or broadcasting, he or she was at least 18 years old and was not a person who, because of mental impairment (as defined in The Criminal Code), is incapable of making reasonable judgments in respect of the publication or broadcasting of such matters,
- proof of which lies on the publisher or broadcaster.

5.3.4 If this reform were introduced it would mean that publication could occur if the complainant consents. It is suggested that this should be subject to the following conditions aimed at ensuring that the consent was informed and effective:

- the consent must be in writing;
- the complainant must be aged 18 or over;<sup>87</sup>
- the complainant must not have been suffering from any mental impairment (at the time the consent was given) which rendered the complainant incapable of making reasoned judgments in respect of the publication sought to be made;
- the consent must not have been vitiated by fraud, mistake, duress or inducement; and
- the consent occurred prior to the publication.

5.3.5 If the complainant consents to publication it may be wise to ensure the court retains a discretion to order non-publication despite the consent of a complainant. This would cover the situation (among others) where multiple complainants are involved and not all of them consent or not all of them are capable of consenting. Such a provision could empower a court not to authorise

<sup>85</sup> [2000] TASSC 62, 181.

<sup>86</sup> [1993] 3 NZLR 421.

<sup>87</sup> In NSW the threshold age for consent is 14 and in South Australia the complainant must not be a child (defined as a person under the age of 18 years).

publication, despite consent by a complainant, where it would not be in the public interest to do so. This would appear to strike a reasonable balance between protection of vulnerable complainants and complainant autonomy.

**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?

## 5.4 Terminology and procedural matters

5.4.1 The Institute has identified a number of matters relating to the terminology of s 194K which may require, or at least benefit from, clarification. Issues have also arisen as to the scope of the court’s powers and whether the sanction for contravention should be prosecution for an offence (as in other jurisdictions) or punishment via contempt proceedings. Finally, the Institute is considering whether procedural reforms could improve the effective operation of s 194K. Set out below are suggestions for procedural reforms which might usefully be introduced. Some of these are based on the model legislation adopted in New South Wales: the *CSNO Act*.

### *Terminology and scope of s 194K*

5.4.2 The following constitute possible changes to s 194K of the *Evidence Act 2001* (Tas) (or to a revised version of it):

- (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 7**

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

### ***Sanction for contravention***

5.4.3 The Institute is considering whether the method of dealing with contravention should be prosecution for an offence rather than proceedings for contempt to ensure fairness and to avoid the prospect of indefinite punishment (see discussion at 4.3.16).

#### **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)?

### ***Procedural reforms***

5.4.4 For the reasons set out at 4.3.9–15, s 194K of the *Evidence Act 2001* (Tas) and legislation implementing any other reform option might specify that (in relation to publication orders or non-publication orders, as the case may be):

- (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 9**

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

***Guidelines for ‘public interest’***

5.4.5 Under s 194K(2) a court is not to make an order authorising publication of details which identify a sexual assault complainant unless satisfied that it is ‘in the public interest’ to do so. An issue arises as to whether the court would be assisted by the specification of criteria to guide its decision. Potentially relevant criteria are canvassed in paragraph 3.2.6.

**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 One

### 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’.<sup>88</sup> Also in NSW, a court may exclude from criminal proceedings involving children anyone not directly interested in the proceedings.<sup>89</sup> Any ‘family victim’ is entitled to remain.<sup>90</sup> Media representatives may remain unless the court otherwise directs.<sup>91</sup> 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.<sup>92</sup> 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 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 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

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<sup>88</sup> 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).

<sup>89</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 10.

<sup>90</sup> *Ibid* s 10(1)(c).

<sup>91</sup> *Ibid* s 10(1)(b).

<sup>92</sup> *Ibid* s 15A.

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.

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.