

Submission to Tasmanian Law Reform Institute in relation to Section 194 (k) of Evidence Act (Tas). Issues Paper 18

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As a preliminary note the issues paper seems to be somewhat limited by its assertion that “Section 194K has not been the subject of judicial consideration in Tasmania.” p.21. In fact the section has been considered in detail in *Re An application by the Australian Broadcasting Corporation pursuant to section 194K of the Evidence Act 2001 [2005] TASSC 41 and Re ABC [2003] TASSC 118*.

It is also noted that although the questions refer to possible change to section 194 they are referring only to those parts of the section that relate to victims, not other parts of the section that refer to witnesses generally, which have not been addressed.

Question 1

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

Question 2

(a) Should s 194K be amended so that the words ‘likely to lead to the identification’ are defined?

(b) If so, should that ‘identification’ be defined to mean:

- identification by persons with prior knowledge of the complainant; or
- identification by the general reader or viewer?

(c) Should the term ‘likely’ be defined? If so, would you agree with the following definition: ‘an appreciable risk, more than a fanciful risk’?

(d) Should the court have power to determine whether or not information is ‘likely to lead to identification’ having regard to all the circumstances of the case?

The general experience of the Witness Assistance Service (WAS) is that victims of sexual assault do appreciate the fact that their identity will not be revealed because they have made a complaint, although there have been some exceptions to this. Although this is one factor that might cause a reluctance to proceed the research shows that it is only one of a wide range of reasons cited for the low rate of reporting and proceeding with sexual assault cases.

My view is that the current section is generally adequate for the protection of victims. It is reasonably well understood by the media. The current alleged breaches before the court seem to stem more from oversight than not understanding the law. The view expressed by the DPP that the general reader must be able to identify the person from the published materials before there will be a breach seems to make a great deal of sense. The discussion in relation to what some considered could be a possible breach does not seem to fit with the intention of parliament when they amended the previous section relating to identification.

The Act was amended in 2002. This was as a result of difficulties with the previous section 103AB. According to the Attorney-General’s second reading speech,

As a result of this change, an accused person in sexual assault proceedings can never be identified without the order of a court. This change was never intended.

The Attorney went on to say,

The naming of accused persons, provided it does not identify a complainant, is in the public interest. Criminal proceedings are open to the public. The public has a right to know what is being done in its courts in its own name. One of the major ways it finds out about what is going on in the courts is by the press publishing information regarding the name of the accused in criminal proceedings. However a further reason for returning the law which existed prior to the commencement of the Evidence Act 2001, is that it is not uncommon in sexual assault proceedings for further victims to come forward and report sexual abuse when they have seen the name of the accused person appearing in the media.

If in the case referred to, if there had been other victims then the publicity may well have encouraged them to come forward, or for someone to make a report to the police. In accordance with the principles of open justice set out in the discussion paper it would be preferable to have a clearer test rather than having to work out what degree of knowledge about a particular case is held by different people in the community.

In relation to question 2 it is felt that there is no advantage by using different wording and that identification by the general viewer or reader is the best test.

Question 3

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

No – this would not be the best approach. To begin with it would defeat the purpose of the legislation in regards to the naming of alleged offenders as discussed above.

Question 4

(a) Do you favour the option of bolstering s 194K by empowering the DPP and/or complainant to apply to the court for an order prohibiting publication of any details concerning the case?

(b) If so, what would be the test applied by the court in granting such an order?

For example:

(i) Should the court favour granting the application unless, for example, it is satisfied (on the balance of probabilities) that the interests of justice would not be served by the order?

(ii) Alternatively, should the court refuse such an order unless satisfied (on the balance of probabilities) that the interests of justice would be served by the order?

(iii) Should the court only make the order if it is satisfied that s 194K is inadequate in the circumstances of the case?

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

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

(vi) Should the court consider the circumstances of the complainant (for example, a complainant with a high-profile may be more easily identified, and may also be more affected by identification)?

(vii) Who should be able to make the application: any person; or only the

DPP and/or complainant (or their representative)?

No – same reasons as above.

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')?

No. Prefer current system with automatic protection of complainants.

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?

This is something to seriously consider and does give the victim a feeling of having some power in the process. There are clearly some issues as have already been raised by the cases in relation to multiple victims with differing views. It is also interesting to note that in both of the cases cited at the beginning of this submission that the Court has granted the application for publicity. The additional factor of public interest has been discussed in the decisions and might be an additional protection for anyone who might be being pursued by the media. The DPP must consider not just the individual victim but look at the broader picture on behalf of the State. For these reasons I would prefer the court order/public interest test to remain.

Question 7

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

I agree with (i) and (ii). (iii) has merit as there are already difficulties in that the current section does not include sections of the code dealing with production or possession of child exploitation material under section 130 of the Criminal Code. (This was pointed out to me by Crown Prosecutor Madeleine Wilson) This leads to the possibility that a child in such material, if the offender was not charged with other matters, would not have the protection of this section. (Though section 130G does give a Judge the power to exclude non-essential personnel from the court). If a catchall section is not included then there at least needs to be an amendment to add the child exploitation section. I agree with (iv) but have reservations about (v) particularly if the victim might have died as a result of suicide and the family does not want publicity.

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)?

As the issues paper points out there have not been any instances of breach prosecuted though there are two currently before the court. Given the low number I would favour maintaining the existing system.

Question 9

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

No to all. In the cases heard already these issues seem to have been resolved without all these additional complications.

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')*?

(a) Yes

(b) No – This has already been considered by the courts. In *Re ABC* [2003] TASSC 118 Justice Underwood at paragraph 5 weighed the benefits of a victim being able to speak publicly and how this helped in his healing process. In paragraph 6 he says how the complainant's affidavit suggested that his "public disclosures led to his complaints being properly investigated and this prosecution being brought." Justice Underwood also discussed the fact that this may well, "lead to the investigation and prosecution of other offenders who have remained undetected to date." He also said it will "lead to a greater understanding and compassion by the general public for the victims of the crimes specified in s 194K." Against this he weighs up in paragraph 7, "the risk that the publication of the victims name may deter others from bringing their complaints forward".

(c) The reasoning above seems quite clear and logical to me. I can't see the point of changing the legislation.