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Dear Dr Cockburn,

Re: Response to Tasmania Law Reform Institute’s Issues Paper No. 18 regarding protecting the anonymity of victims of sexual crimes

Thank you for the opportunity to respond to the matters discussed in your 18th Issues Paper - Protecting the Anonymity of Victims of Sexual Crimes ("the paper").

As you may be aware, the Commissioner for Children is an independent officer appointed by the Governor of Tasmania pursuant to s78 of the Children, Young Persons and Their Families Act 1997. The Commissioner’s powers and functions are set out in Part 9 of that Act.

A major focus of my role is to promote the health, welfare, care, protection and development of children and young people and to provide advice to the Minister for Children on policy, practice and services provided to or for children and young people in Tasmania, which may include any laws affecting the wellbeing of children.

The Convention on the Rights of the Child (CROC) provides an appropriate framework for analysis of policy and legislative proposals which have the capacity to impact upon the rights and wellbeing of children and young people who are the victims of sexual offences.

A fundamental principle enshrined in CROC is that contained in Article 3, which makes it clear that the best interests of a child are the primary consideration in all actions taken with respect to the child.

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1 Those persons aged below 18 years of age.
Article 3 provides as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Consequently, in all matters affecting children and young people, their best interests must be a primary consideration. Implicit in this approach is the need to ensure that legislation and policy prioritise the protection of children from harm or the risk of harm wherever practicable, and promote their health and well-being.

A further principle enshrined in CROC is that contained in Article 12, which provides that children should be given the opportunity to express their views and for those views to be given due weight. Article 12 provides that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

States Parties are obliged to uphold this principle even where a child is adjudged not to have full legal capacity.

Article 19 imposes on States Parties the duty to protect the child from all forms of abuse and violence, including sexual abuse and violence. Article 19 provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 16 protects the privacy, honour and reputation of the child. It provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

States Parties must ensure their laws protect child victims of sexual crimes from violations of their right to privacy and from attacks on their honour or reputation. Laws can only provide such protection if they are clear and unambiguous.

Article 39 promotes the recovery of child victims including those who are victims of sexual crimes. It provides that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

My comments focus on how s194K of the Evidence Act 2001 (Tas) might be amended to better protect the rights and interests of children and young people in respect of whom a sexual crime is alleged to have been committed ("child victim(s)") and those of children and young people who are witnesses in those proceedings ("child witness(es)").

It must be acknowledged that in any consideration of this area of law, regard must be had to the need to balance the principle of open justice with the privacy interests of child victims and witnesses, including the need to protect them from avoidable harm or distress, clearly matters that go to "best interests".

Summary of key points

- I am of the strong view that s194K of the Evidence Act 2001 (Tas), as it currently stands, does not adequately protect the rights and interests of victims and witnesses and in particular those persons who are children. The varying responses to the newspaper article which formed the backdrop to the paper demonstrate that the section is open to widely divergent
interpretations with very different implications for victims and other persons potentially affected by the publication.

- At the very least, the section requires clarification to better explain what is meant by the term “likely to lead to identification”. As illustrated by the paper, there are conflicting views about the scope of this phrase. On the one hand, the phrase could be interpreted as meaning the publication itself must be likely to lead to the identification. Alternatively, it could extend to the situation where the published details, combined with prior specific knowledge about the circumstances of the case or other publicly available information are likely to lead to the identification.²

I am of the strong view that the meaning of ‘identification’ in this section should be given as wide a scope as possible. That is, “likely to lead to identification” should be defined to include (but not necessarily be limited to) identification by:

i. people with prior knowledge of the complainant or other details of the case; and
ii. general members of the public.

- Further, section 194K should be revised to accommodate changes in technology affecting the publication of information and images. It is important that all types of publication through electronic means such as the internet, including on social media sites, be covered by this provision. Specifically, it may be useful to include broad definitions for the terms “publish” and “picture” as described at p 47 of the paper.

- On balance, I prefer a two-pronged model which incorporates:

  i. a strengthened s 194K; together with

  ii the ability for the Court to make a non-publication order in relation to particular details of the case (not necessarily those likely to lead to identification):

     - to protect the safety of the victim or witness;
     - to avoid causing undue distress or embarrassment to the victim or witness; or
     - where it is otherwise in the public interest that such an order be made.

The Court should be permitted to make such order on the application of the prosecutor, victim or witness, or on its own motion.

² I understand that contempt proceedings against Davies Brothers Ltd are presently pending in the Supreme Court of Tasmania for an alleged breach of s 194K and that the decision, when ultimately handed down, is likely to contain the first detailed judicial consideration of s194K and is therefore likely to have significant implications for its interpretation.
The victim and witnesses – particularly those under the age of 18 – should be informed by the Court of their right to apply for a non-publication order relating to details other than of an identifying nature.

I favour this model because it would provide more robust protection to victims and witnesses than is presently provided by s194K but, unlike a blanket prohibition on publication of sexual crimes cases, it would not unduly impinge on the notion of open justice.

- s194K currently makes publication of potentially identifying information subject to a Court order. In my view, there is a strong need for the introduction of additional safeguards, when an application for a publication order is made, to protect the rights and interests of victims and witnesses (other than the defendant). This is particularly important where the persons affected by a potential publication order are below the age of 18. Presently, the only express limitation on an order for publication is that it cannot be made unless the Court is satisfied that it is in the public interest for the order to be made. In my opinion, the Court should also seek and consider the views of the complainant/victim before making such a publication order.

Specifically, in addition to the public interests test, no order should be made in relation to potentially identifying information regarding a child victim unless the Court is satisfied that:

- where the child is able to form and express views about the application, that his or her views have been sought and taken into account; and
- it is in the best interests of the child to make the order; and
- it would not violate the rights or interests of another victim who does not wish for such order to be made, particularly where that person is a child.

A similar approach might also be taken if the order sought relates to a child witness.

- It is not clear whether the section as currently drafted would permit a victim of any age to make an application for a publication order relating to relevant identifying material. I therefore make no comment on this issue.

- It is my strong view that the consent of a child complainant should not be a defence to publication in the absence of a court order.
Answers to specific questions

I provide specific comments in response to those questions that I consider of particular relevance to my role as Commissioner for Children below.

Question 1.

Should there be no change to s194K of the Evidence Act 2001 (Tas)?

No.

Section 194K is ambiguous, as shown by the conflicting views surrounding the article that gave rise to the Tasmania Law Reform Institute’s project, and consequently requires amendment. As long as there is uncertainty about the interpretation of the section, the rights of victims of sexual crimes are not adequately protected.

This lack of clarity is unacceptable, particularly with respect to child victims of sexual crimes, an especially vulnerable category of victims. In keeping with Article 16 of CROC, in order to protect the privacy, honour and reputation of child victims of sexual crimes the law must be clearer.

Question 2

(a) Should s194K be amended so that the words ‘likely to lead to the identification’ are defined?

Yes

The words ‘likely to lead to the identification’ should be defined as they are currently open to very different interpretations by different parties, with very serious implications.

(b) If so, should ‘identification’ be defined to mean ‘identification by persons with prior knowledge of the complainant’?

Yes

As indicated above, I am of the strong view that the meaning of ‘likely to lead to identification’ in this section should be given as wide a scope as possible. The appropriate test in my view is whether publication is likely to lead to identification by persons including those with prior knowledge of the complainant or access to other publically available information.

Section 194K has extremely limited scope if a ‘general reader’ test is applied. The prohibition on publication is arguably of most relevance to persons already connected to the victim in some way or those who may be motivated to try and piece together various details to identify him or her.
Only the wider ‘identification test’ would thus adequately protect the privacy of victims. As was noted by Gobbo J in Bailey v Hinch[3], “[t]he victim is not merely entitled to protection from the least astute members of the community”. This is particularly important in a small community such as Tasmania where, as is highlighted in the paper (p 42), there may be a greater likelihood that significant sections of the community have some knowledge of the parties to a case.

Publication of identifying details has the potential to cause victims of sexual crimes such grave distress that its prevention should prevail over other policy considerations.

(c) Should the term likely be defined?

No comment.

Question 3

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

No.

Automatic suppression of all details in all cases involving sexual offences impinges too strongly on the principle of open justice. In particular, it is in victims’ interests, including child victims, to know that the court process is available to prosecute sex offenders.

Question 4

(a) Do you favour the option of bolstering s194K by empowering the DPP and/or complainant to apply to the court for an order prohibiting publication of any details concerning the case.

As discussed above, I support an approach which couples a more robust s194K with the capacity for the Court to make a non-publication order on the application of the prosecutor, complainant or witness - or on its own motion - in relation to particular aspects of the case.

This two-pronged approach would in my view provide a much higher level of protection than is presently the case without impinging too far on the principle of open justice.

Orders could be aimed at providing extra protection against identification of the victim but could also be aimed at protecting the victim’s safety, avoiding undue distress or embarrassment to the victim or could be made where it is otherwise in the public interest and/or the interests of justice.

The Court would therefore be empowered to restrict the nature of the details published depending on the circumstances of the case. With regard to child victims,

it would appear in the interests of justice that as few details be published as possible.

Utilising this approach, the Court could for example make an order prohibiting the publication of potentially embarrassing and intimate information about a sexually transmitted disease contracted by the victim as a consequence of the crime.

The victim and witnesses – particularly those under the age of 18 – should be informed by the Court of their right to apply for a non-publication order which could provide protections over and above those pursuant to s194K.

**Question 5**

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

b) If so, should s194K (perhaps with clarifications) also be retained (as a ‘back-up’)?

While adoption of the Canadian model is not my preferred option, if it was to be introduced then it is my strong view that s194K (with modifications) should be retained to ensure all victims (and witnesses) are adequately protected, not only those in relation to whom a non-publication order is sought. Without retention of s194K victims and witnesses would potentially be left with fewer protections than is presently the case in Tasmania.

**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?

It is my strong view that where child victims or witnesses are concerned, consent is insufficient to allow publication of identifying information in the absence of a court order. I note that this appears to be the case in South Australia and Western Australia.

Control over the publication of identifying material should ultimately lie with the Court which should have to consider protection of the child’s best interests (CROC, Article 3).

In my view, no order should be made regarding the publication of identifying information, irrespective of any claims that the victim granted its consent to a particular publisher, unless the Court, having sought and considered the views of the child, is satisfied:

- it is in the best interests of the child to make the order; and
it would not violate the rights or interests of another victim who does not wish for such order to be made, particularly where that person is a child.

Question 7

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

I agree with all five suggestions set out in paragraph 5.4.2 of the paper.

In particular, I agree that the definitions of ‘publish’ and ‘picture’ need to be revised to accommodate publication on the internet.

Question 9

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

Of the suggested procedural reforms, I particularly support (i) which deals with the parties entitled to make an application for a publication or non-publication order:

“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”

I am of the strong view that the right to apply for a publication or non-publication order (as the case may be) must not be extended to persons without a sufficient interest, to be determined by the Court.

Conclusion:

I hope these answers, observations and comments are of assistance.

Yours sincerely,

[Signature]

Alleen Ashford
Commissioner for Children