



28 September 2012

Prof. Kate Warner  
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By email

Dear Kate,

**Protecting the Anonymity of Victims of Sexual Crimes -  
Submission to TLRI Issues Paper No. 18**

Thank you for inviting the Tasmanian Bar Inc to make submissions in relation to this issues paper.

Our view is that a model similar to the approach taken in Canada should be adopted (Option 5). It would empower the court to make an order directing that any information that could identify the complainant or a witness not be published either of its own initiative as a matter of discretion, or on application by the prosecution. The court should also have an obligation to inform the complainant of their right to seek such an order. In the event that such an order is sought by the complainant, the court *must* make it. If an order is granted, the media would be required to apply to the court and justify the grounds for variation or revocation of the order.

The Canadian model finds a balance between the prohibition of any information without court order, and the insufficient protection currently afforded by s194K.

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**The Tasmanian Bar Inc.**  
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The suggestion made in the Issues Paper at page 44, that a version of s194K be retained as a 'back-up' seems eminently sensible. The inclusion of a modified version of s194K retains a level of protection for complainants even in circumstances where a non-publication order is not made.

This approach removes the power of decision-making from the media, who have a clear vested interest, without placing the same cost burden on public resources, and without impinging as heavily on the principle of open justice as that outlined in Option 3 (prohibiting publication without a court order).

**Question 1 - Should there be no change to s 194K of the *Evidence Act 2001* (Tas)?**

For the reasons outlined at pages 29 – 31 of the Issues Paper, the Tasmanian Bar agrees with the view put forward by the TLRI that the current level of protection afforded to victims of sexual crimes is insufficient. In particular, the decision on whether and what may be published in respect of these matters should not be left in the hands of the media, who have an obvious vested interest in publication.

Section 194K should be clarified, and additional measures should be introduced to protect the anonymity of victims of sexual crimes.

**Question 2**

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

Yes.

**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?**

Identification should be defined to mean either identification by the general reader or viewer, or by those with some prior knowledge of the complainant. The threshold for the general reader or viewer should not be set too high. A possibility, viewed objectively, that identification might be made, should trigger the discretion. It is the view of the Tasmanian Bar that this is consistent with the interpretation of similar provisions in other jurisdictions, and is the appropriate level of protection that should be afforded to victims of sexual crimes.

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

The definition suggested above is appropriate and should be included. The risk should not be fanciful, but a real possibility of identification should be threshold.

**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?**

Yes.

**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?**

While this option clearly provides the greatest level of protection, for the reasons outlined at pages 40 – 42 of the Issues Paper, the view of the Tasmanian Bar is that this is not the most desirable option, given the availability of other models of reform that should provide adequate protection to victims of sexual crimes.

In particular, this option may increase the burden on public resources and media outlets that could cause delay in the court process. It also encroaches on principles of open justice.

**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?**

As discussed above, it is the view of the Tasmanian Bar that Option 5 – reform based on the Canadian model is the preferred approach. This would enable the court to make such an order, either of its own motion, or on application from the complainant or the prosecutor.

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

See above.

**Question 5**

**(a) Should Tasmania introduce reform based on the Canadian model?**  
**(b) If so, should s 194 K (perhaps with clarifications) also be retained (as a ‘back-up’)?**

Yes. See above.

## **Question 6**

### **(a) Do you agree that publication should be permissible when a complainant consents?**

For the reasons discussed at pages 44 – 45 of the Issues Paper, and in particular the following, it is the view of the Tasmanian Bar that consent of a complainant should not enable publication where it would not otherwise be allowed:

- a complainant may be pressured or coerced into giving consent;
- it may be difficult to determine if consent was freely given and fully informed;
- sexual assault complainants are a vulnerable class of victims; and
- complainants may not consider the long-term implications of giving consent.

Once a Court order is made, a person seeking relief from that order (including the complainant), should provide the Court with evidence to justify the departure. The complainant's informed consent may be a powerful reason (but not the only reason) for lifting the suppression.

### **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 for publication?**

See above.

## **Question 7 – Do you agree with any or all of the above five suggestions regarding terminology in, and scope of, s194K?**

The Tasmanian Bar's view is that all of the suggested changes listed at 5.4.2 of the Issues Paper should be made. These are as follows:

1. the inclusion of a definition of 'publish' as suggested;
2. the inclusion of a definition of 'picture' as suggested;
3. the term 'sexual offence' being changed to a generic definition, rather than a list of specific offences;
4. the automatic suppression of identity details protecting complainants be geographically unrestricted in its application; and
5. that the prohibition operate during the complainant's lifetime unless otherwise ordered.

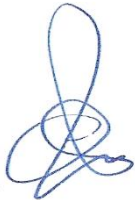
**Question 8 – Should the sanction for breach of s 194 K lie in contempt proceedings (as at present) or in prosecution for an offence (as in South Australia, Victoria, NSW, Canada, New Zealand and the United Kingdom)?**

To avoid uncertainty, and to bring Tasmania into line with other jurisdictions, the sanction for breach of orders protecting the anonymity of sexual assault complainants should be a summary criminal offence. Provision (as in NSW) that the matter may be prosecuted in the Magistrates Court or the Supreme Court with suitable maximum penalties is appropriate. The provision of higher maximum penalties for corporate offenders is also appropriate.

I would like to thank Robert Meredith, barrister, for the time and consideration he has given this matter on behalf of the Tasmanian Bar.

Please let me know if we can be of any further assistance.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Michael O'Farrell', with a stylized, looping design.

Michael O'Farrell SC  
President