

COMMUNITY LEGAL CENTRES TASMANIA

10 May 2019

Department of Justice
Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,
Re: Section 194K Evidence Act 2001 (Tas)

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the Discussion Paper reviewing section 194K of the *Evidence Act 2001* (Tas).¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly believe that section 194K of the *Evidence Act 2001* (Tas) does not provide adequate protections for sexual assault complainants and should be amended to better protect sexual assault complainants. This is because a large number of studies consistently demonstrate that only a small proportion of sexual assaults are reported to the police and even fewer result in a charge, prosecution or conviction when compared with other criminal offences.²

It is of great concern that substantial under-reporting of sexual offences remains and that many complainants continue to feel uncomfortable about giving evidence in sexual offence trials. It is important that sexual assault reforms are implemented

¹ CLC Tas would like to acknowledge Katherine Sproule and Erin Moore who assisted in the preparation of this response.

² See for example Australian Institute of Criminology, *Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents* (2007); Australian Bureau of Statistics, *Personal Safety Survey, Australia Catalogue 4906.0* (2006); Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005); Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

that encourage more complainants to report sexual assault and which ensure that complainants are appropriately protected in giving evidence. It is likely that deficiencies and uncertainties in the existing law may lead to less reporting of sexual assault and discourage complainants from giving evidence at trial.

Section 194K of the *Evidence Act 2001* (Tas)

With specific reference to the issues raised in the Discussion Paper we support clarification of the phrase ‘likely to lead to the identification of any person’ within section 194K of the *Evidence Act 2001* (Tas) as has previously been recommended by the Tasmanian Law Reform Institute.³ In *Protecting the Anonymity of Victims of Sexual Crimes*, the TLRI recommends the definition of ‘likely’ as ‘an appreciable risk, more than a fanciful risk’. The adoption of this interpretation will ensure that the threshold test is identification by readers, viewers and listeners equipped with knowledge in the public domain, in all the circumstances of the case.⁴ This will provide much needed clarity as the term ‘likely’ in other jurisdictions has been interpreted broadly as being “more probable than not”⁵ and “a real or substantial and not remote chance of [identification]”.⁶

We also recommend that the test not only be applied to stand alone information but also of “information which could lead to identification when combined with prior knowledge, or other publicly available information”.⁷ This view has been judicially adopted in Victoria following the Supreme Court decision of *Bailey v Hinch* where Gobbo J observed that “[t]he victim is not merely entitled to protection from the least astute members of the community”.⁸

As well as judicial support for a broader interpretation of ‘likely to lead to identification’ there are also policy considerations in support of this reform including most importantly that family members, friends or other people known to the victim, most frequently commit sexual offences.⁹ The sexual abuse perpetrated by a trusted family member, friend or acquaintance may be exacerbated for the complainant if extended family members, friends or acquaintances were able to piece together publicly available information about the sexual assault with information already known to them. Appropriate protections of the complainant’s identity are particularly important in Tasmania, as the TLRI has noted, “where there

³ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendations 1(a)(v), 8.

⁴ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendation 1(a)(vi).

⁵ *Jane Doe v Fairfax Media Publications Pty Limited & Anor* [2018] NSWSC 1996 at para. 202.

⁶ *Howe v Harvey* [2008] VSCA 181, [37], citing *Boughey v R* (1986) 161 CLR 10 at 21 per Mason, Wilson and Deane JJ; *TSL v Secretary, Department of Justice* (2006) 14 VR 109 at 112–3 per Callaway AP.

⁷ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013) at 28.

⁸ [1989] VR 78 at 94.

⁹ According to the Royal Australian College of General Practitioners, in 2011, almost half of all victims were sexually assaulted by a ‘known other’ and 31 per cent by a family member. As found at <https://www.racgp.org.au/clinical-resources/clinical-guidelines/key-racgp-guidelines/view-all-racgp-guidelines/white-book/sexual-assault#ref-num-231> (Accessed 8 May 2019).

may be a greater likelihood that significant sections of the community have some knowledge of the parties”.¹⁰ We therefore endorse the TLRI’s recommendation prohibiting the publication of the name, address and/or image of the defendant where it is ‘likely’ to identify the complainant.¹¹ This may lift the barrier of the concern for privacy, and encourage more complainants to report sexual offences.

We are also firmly of the view that section 194K of the *Evidence Act 2001* (Tas) should be amended to provide complainants with the right to waive their anonymity and consent to publication. We strongly support the TLRI’s recommendation that would permit the publication of the complainant’s details, if the complainant is over the age of eighteen, not considered ‘especially vulnerable’¹² and their consent has been provided without coercion, fraud or manipulation.¹³ In our view, these are important safeguards ensuring that consent has been legitimately provided and that the publication is in the best interest of the complainant. It also ideally ensures that the media has not unduly pressured the victim to consent to publicity.

In the alternative, the court in determining whether to permit publication could also consider other discretionary factors. As identified by the TLRI (and endorsed by the Women’s Legal Service Tasmania),¹⁴ these factors, include the time elapsed since the offence, and the complainant’s reason for disclosure.

We strongly believe that providing the complainant with the power to consent to the publication of their identity will not only have the effect of empowering the victim and potentially assisting them in the healing process, but it may also encourage other victims to report sexual crimes committed against them. Importantly, victims of sexual offences are also in support of amendments section 194K of the *Evidence Act 2001* (Tas) with *The Mercury* newspaper recently publishing stories from a number of sexual assault victims, including notably the complainant in the *State of Tasmania v Nicolaas Ockert Bester*,¹⁵ who has publically advocated under the pseudonym ‘Jane Doe’ that the law:¹⁶

should be amended on the basis that it perpetuates inequality. The fact that victims are criminalised for identifying themselves publicly but perpetrators

¹⁰ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013) at 28.

¹¹ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendation 1(a)(ii).

¹² The TLRI defines ‘especially vulnerable’ as including persons with a mental impairment and persons with an intellectual disability. See Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendation 1(x).

¹³ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendation 4.

¹⁴ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013) at 39.

¹⁵ See *State of Tasmania v Nicolaas Ockert Bester*, Comments on passing sentence per Wood J (12 August 2011).

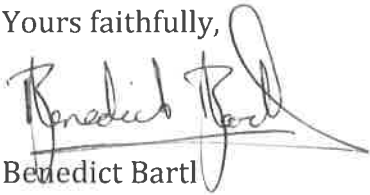
¹⁶ Jane Doe, ‘Offenders can use their new platform but gagged victims are just pronouns’, *The Mercury*, 3rd May 2019 at 24-25.

are not, is simply unjust. Survivors should have the right to publicly speak about their experiences, whether they choose to exercise it or not.

Finally, we concur with the TLRI that in deciding whether to authorise publication the court must give consideration to the possible risk that other victims may be identified without their consent.¹⁷ For example, in *R v The Age Company Ltd* where Evans J found the newspaper editor in contempt of court for publishing the identity of a complainant without considering the risk of this leading to the identification of other victims.¹⁸ Additional safeguards could be included within the amendment, including that all victims of the relevant perpetrator must be over the age of eighteen and not considered 'especially vulnerable'. The adoption of these safeguards will provide clarification around permissible publication, ensure the protection of non-consenting victims and deter the media from undertaking similar conduct in the future.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

¹⁷ Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, Final Report No. 19 (November 2013), recommendation 4(b).

¹⁸ [2000] TASSC 62 at 9.