

DISCUSSION PAPER:

SECTION 194K OF THE *EVIDENCE ACT 2001*

MINISTER'S FOREWORD



The Tasmanian Government welcomes feedback on the Discussion Paper into section 194K of the *Evidence Act 2001*.

The Government is open to considering changes to section 194K of the *Evidence Act 2001* to ensure it appropriately protects the rights of all victims of sexual assault.

It is imperative that any reform on these sensitive matters strikes the right balance between protecting all victims of sexual assault and the public interest in open justice.

It remains vitally important that appropriate checks are in place to ensure that where one victim may wish to publicly speak of their experience, that such action does not unduly impact on other victims who wish to remain anonymous.

The Government recognises that some have expressed concerns that this provision may not currently strike the right balance, and I look forward to hearing the views of stakeholders and community members.

A handwritten signature in blue ink, appearing to read 'Elise Archer'.

The Hon Elise Archer MP
Attorney-General
Minister for Justice

PURPOSE

PURPOSE OF THE DISCUSSION PAPER

The purpose of this Discussion Paper is to:

- Outline restrictions on the publication of details in sexual offence proceedings under section 194K of the *Evidence Act 2001*; and
- Promote discussion about whether section 194K strikes the proper balance between protecting complainants in sexual offence proceedings and the public interest in open justice.

The Discussion Paper is structured around the following sections:

1. Current system in Tasmania
2. TLRI recommendations
3. Jurisdictional overview

CURRENT SYSTEM IN TASMANIA

Section 194K of the *Evidence Act 2001* (the Act) prohibits the publication of certain identifying particulars in sexual offence proceedings without the order of a court. This helps to protect the anonymity of complainants in such proceedings.

A person who publishes or causes to be published anything in contravention of section 194K of the Act may commit a contempt of court and be liable to punishment for that contempt.

Section 194K of the Act 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.

TASMANIA LAW REFORM INSTITUTE’S RECOMMENDATIONS

The Tasmania Law Reform Institute (the Institute) released the report *Protecting the Anonymity of Victims of Sexual Crimes* (the Report) in 2013. The Report examines the rules governing restrictions on the publication of information which identifies complainants in sexual assault cases.

The Report recommends the replacement of section 194K with a new statutory regime designed to provide a comprehensive framework for the courts’ consideration of publication questions and to allow the interests of the court, the complainant and the media, as well as the public interest, to be taken into account.

A copy of the Report can be accessed at:
[http://www.utas.edu.au/ data/assets/pdf file/0005/461768/S194k Final 05 A4.pdf](http://www.utas.edu.au/data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf)

Table of TLRI recommendations

<p>Recommendation 1</p>	<p>(a) That legislation be enacted to provide as follows:</p> <p>In sexual offences cases,</p> <p>(i) publication of name, address or image (broadly defined) of the complainant or witnesses other than the defendant is prohibited;</p> <p>(ii) publication of the name, address or image (broadly defined) of the defendant is prohibited where it is likely to identify the complainant;</p> <p>(iii) publication of such other information as is likely to identify the complainant or witnesses other than the defendant is prohibited;</p> <p>(iv) the prohibitions in (i) and (ii) also apply to the defendant in cases under s133 of the <i>Criminal Code</i> (incest);</p> <p>(v) in determining (ii) ‘likely’ shall mean ‘an appreciable risk, more than a fanciful risk’;</p> <p>(vi) in making determinations pursuant to (ii) and (iii) the court shall have regard to potential identification by a reader, viewer or listener, equipped with knowledge in the public domain, in all the circumstances of the case;</p> <p>(vii) the court shall have a discretion to prohibit the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant;</p>
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	<p>(viii) in exercising this discretion the court is required to have regard to the fact (if it be the case) that the complainant is ‘especially vulnerable’;</p> <p>(ix) ‘especially vulnerable’ complainants shall include persons under 18, persons with a mental impairment and persons with an intellectual disability;</p> <p>(x) unless otherwise specifically provided, all determinations by the court shall have regard to the public interest.</p>
Recommendation 2	<p>(a) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of such information (as the court thinks fit) as may be likely to identify the complainant.</p> <p>(b) That the court may, at the commencement of proceedings relating to a sexual offence, or at any other time, make an order prohibiting the publication of any other details which may cause harm, distress, humiliation or embarrassment to the complainant.</p> <p>(c) Orders referred to in (a) and (b) may be made on the application of a party to the proceedings or the prosecutor or on the motion of the judge.</p>
Recommendation 3	<p>(a) That a statutory right to apply for both publication and nonpublication orders and to be heard in relation to the determination of applications be granted to the victim of the offence, the parties to proceedings, news media organisations and any other person considered by the court to have a sufficient interest in the making of the order.</p> <p>(b) That a similarly broad right be granted to apply for revocation or variation of orders and to appeal against a decision whether or not to make an order.</p>
Recommendation 4	<p>(a) That, with leave of the court, the publication of details which identify the victim is not prohibited if, prior to publication, the victim who has attained the age of 18 years and who has the capacity to consent and who has not been coerced, defrauded or otherwise manipulated into giving consent provides written consent to publication.</p> <p>(b) That in deciding whether to authorise the publication of details under (a) the court must give consideration to all the circumstances of the case including the risk that other victims may be identified without their consent.</p> <p>(c) That a court shall not make a non-publication order (as per Recommendation 2(a)) in relation to potentially identifying details without considering the views of the victim.</p>
Recommendation 5	<p>(a) That unless otherwise ordered by the court non-publication orders remain in force permanently.</p>

	<p>(b) That court orders are binding on all those who have actual or constructive notice of them.</p>
<p>Recommendation 6</p>	<p>(a) That the sanction for breach of the statutory prohibition against publication pursuant to the legislation replacing s194K or for breach of any court order made under that legislation shall be a criminal offence in the following terms:</p> <p style="padding-left: 40px;">Any person who engages in conduct that contravenes the legislation replacing s194K who does so intentionally or who knew or ought to have known that the conduct amounted to such a contravention is guilty of a crime.</p>
<p>Recommendation 7</p>	<p>(a) That penalties for contravention of the rules relating to publication are clearly set out.</p> <p>(b) That the sanction for breach should be a penalty imposed following summary prosecution for a criminal offence.</p> <p>(c) That proceedings may be brought in the Magistrates Court or the Supreme Court at the discretion of the prosecution and that maximum penalties should be applied accordingly.</p> <p>(d) That the penalty structure should include a discretion for the Supreme Court to impose a custodial sentence in cases of deliberate, flagrant, repetitive or egregious breach.</p>
<p>Recommendation 8</p>	<p>(a) That the legislation replacing s194K include an introductory definition section which provides:</p> <p>In this section:</p> <p>‘likely’ means an appreciable risk, more than a fanciful risk.</p> <p>‘picture’ includes all drawings, images, representations, or photographs whether in the form of documents or electronic forms.</p> <p>‘publish’ means disseminate or provide access to the public or a section of the public by any means, including by:</p> <ul style="list-style-type: none"> (a) publication in a book, newspaper, magazine or other written publication, or (b) broadcast by radio or television, or (c) public exhibition, or (d) broadcast or publication by means of the internet, or (e) broadcast by means of telecommunications generally.

	For the avoidance of doubt, 'sexual offence' includes a child exploitation material offence.
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JURISDICTIONAL OVERVIEW

Other Australian jurisdictions permit publication of identifying details with a complainant's consent, albeit some require that other conditions such as age restrictions and mental capacity are met.

The Northern Territory, like Tasmania, make no express provision for consent by a complainant, and only allow publication with a court order.

The following table outlines key legislative provisions in each jurisdiction:

State/Territory	Act	Section	Details
Australian Capital Territory	<i>Evidence (Miscellaneous Provisions) Act 1991</i> (ACT)	Section 74(2)	It is a defence to prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.
New South Wales	<i>Crimes Act 1900</i> (NSW)	Section 578A(4)(b)	Publication is made with consent of the complainant (being a complainant who is of or over the age of 14 years at the time of publication).
Northern Territory	<i>Sexual Offences (Evidence and Procedure) Act</i> (NT)	Section 6	A report made or published concerning an examination of witnesses or a trial shall not reveal the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant, unless the court makes an order to the contrary.
Queensland	<i>Criminal Law (Sexual Offences) Act 1978</i> (Qld)	Section 10(2)	It is a defence to a proceeding for an offence for a person to prove that, before the relevant statement or representation was made or published, that the complainant authorised in writing the making or the publishing of the statement; and the complainant was at least 18 years; and had capacity to give the authorisation. ¹
South Australia	<i>Evidence Act 1929</i> (SA)	Section 71A(4)	A person must not publish unless the alleged victim consents to the publication (but no such consent can be given where the alleged victim is a child).

¹ The original Discussion Paper published 2 April 2019 omitted section 10(2) of the *Criminal Law (Sexual Offences) Act 1978 (Qld)*. This has subsequently been brought to the attention of the Department of Justice, with the amendment of information of Queensland's laws reflected in the table.

State/Territory	Act	Section	Details
Victoria	<i>Judicial Proceedings Reports Act 1958 (Vic)</i>	Section 4(1B)(b)(ii)	If a proceeding in respect of the alleged offence is not pending in a court at the relevant time, it is a defence that the person had permission of the person against whom the offence is alleged to have been committed.
Western Australia	<i>Evidence Act 1906 (WA)</i>	Section 36C(6)	Nothing prohibits the publication or broadcasting of matter identifying a complainant if the complainant authorises in writing the publication or broadcasting, and was at least 18 years old at the time of authorisation, and was not a person who, because of mental impairment, is incapable of making reasonable judgments in respect of the publication or broadcasting.