

SUBMISSION TO THE TASMANIAN GOVERNMENT IN DRAFTING THE EVIDENCE AMENDMENT BILL 2020

07 FEBRUARY 2020

End Rape on Campus (EROC) Australia and Marque Lawyers welcome the opportunity to make a submission to the Tasmanian Government in drafting the Evidence Amendment bill 2020.

End Rape on Campus Australia is a volunteer organisation that works to end sexual violence at universities and other educational institutions through prevention efforts, direct support for survivors and their advocates, and policy reform at the campus, state and federal levels. Since establishing in 2015, EROC Australia has worked closely with multiple sexual assault survivors in tertiary education settings around Australia including Tasmania.

Marque Lawyers is a Sydney-based commercial law firm with a strong passion for human rights. Marque engages extensively with cause-based pro bono and social justice work, including working directly with sexual assault survivor advocacy groups and not-for-profits like EROC Australia to support their work.

Currently, Tasmania and the Northern Territory are the only jurisdictions in Australia which have laws prohibiting all victims of alleged sexual offences from publicly identifying themselves. The only exception is if a court makes an order allowing them to do so. In Tasmania, regardless of whether a victim consents to be named, journalists and other individuals who publish the identities of sexual assault survivors can be prosecuted and fined.

There are currently no other crimes in Tasmania where adult victims are expected to gain a court order before they can speak about their experiences under their real identities to media. While this law was initially intended to protect victim- survivors from media exploitation, unfortunately it has had several unintended consequences including:

- silencing individual survivors who do wish to speak out publicly, thereby increasing their sense of isolation, powerlessness and voicelessness;
- maintaining and potentially increasing social stigma around sexual violence by keeping taboos intact, while treating survivors as nameless, faceless ‘others’;
- disempowering sexual assault survivors in the community more generally, by erasing from view individuals who they might otherwise draw strength from as powerful public role models;
- restricting survivor-led advocacy and education by placing conditions on how survivors can participate and be heard in public debates - including those debates which directly affect them;
- disempowering individual survivors and potentially exacerbating existing trauma, by denying them the opportunity to engage in certain activities which they may deem restorative, therapeutic, or healing.

That is, not only do current laws impact on individual survivors and their capacity to reclaim control and ownership of their own stories, but these laws also have flow-on effects for the survivor community more broadly, as well as the public, in terms of our wider understanding and conceptualisation of sexual violence, its causes and its consequences.

Across 2017, 2018 and 2019 EROC Australia and Marque Lawyers have supported and acted for a number of sexual assault survivors in Tasmania who wish to self-identify in the media. This has included:

- Individual advocacy: acting on behalf of individual sexual assault survivors by assisting them to apply for a court order exempting them from current 'gag' laws.
- Systems based advocacy: advocating for law reform via the #LetHerSpeak campaign, so that in future, sexual assault survivors who wish to self-identify in media will no longer be required to apply for a court order, which can be an expensive, time consuming and disempowering process for those who attempt it.

The following submission is written on behalf of victim-survivors who we have worked with, who have direct lived experience with existing 'gag laws'.

In general, we welcome the promptness of the Tasmanian government in drafting the Evidence Amendment Bill 2020: Publication of certain identifying particulars prohibited (section 194K) in response to the concerns raised by the #LetHerSpeak campaign. We are very grateful for this. We have a number of concerns regarding the draft bill, identified below. These issues aside, the draft bill is a major step forward in the cause of the rights of victims of sexual violence.

1. Section 194K has been drafted so that, in the situation where a complainant has consented to the disclosure of their identity, that fact creates a defence (under section 194K(3)) to what would otherwise be a criminal offence under section 194K(1). In our submission, this is inappropriate; it should not be incumbent on a complainant, nor on a third party with the benefit of a complainant's written consent (as required by section 194K(4)(b)), to face the risk of prosecution and have to plead a statutory defence (presumably with the onus of establishing it on the criminal standard of proof) in order to avoid conviction. Rather, the existence of a valid consent should operate as an exemption from the offence provision. It would be more appropriate for section 194K(3) to provide that section 194K(1) does not apply in the relevant circumstances.
2. We ask that further consideration is given to reframing section 194K(3) altogether. As currently drafted, the defence will not apply in circumstances where court proceedings are pending. In our submission, there is no justification for maintaining any statutory prohibition on the disclosure of a complainant's identity with their consent, at any time (including while criminal proceedings are pending or in progress). This prohibition continues to withhold agency from the victim in relation to the control of their own story. The only justification for subsection 3(b)(v) is to protect the defendant's interests.

That can be adequately protected by giving the defendant a right to apply for a suppression order, so that the court has power to suppress the complainant's identity if its disclosure is likely to prejudice the defendant unfairly. However, the presumption should be in favour of allowing the complainant to self-identify under all circumstances. That should be the starting point, as we have consistently advocated.

3. We are also concerned that section 194K(3)(v) may discourage Tasmanian victims from reporting to the police, opting instead to maintain control of their story. Armed with the knowledge that commencement of court proceedings will result in a blanket prohibition on publication until after all proceedings (including potential appeals) are completed. We remain hopeful that any final amendment to section 194K will avoid presenting victims with this ultimatum.
4. In our submission, subsection 3(b)(v) should be removed from the draft bill. Annexure A to these submissions compares the publication offences and exceptions in the Australian states and territories. The following states and territories prioritise the consent of the complainant and do not require that proceedings be finalised for the exception to offences to apply:
 - a. ACT;
 - b. NSW;
 - c. QLD;
 - d. SA; and
 - e. WA.
5. In our submission, it serves the public interest and the interest of justice to allow sexual assault survivors to be identified prior to the completion of court proceedings. When survivors speak to media under their real names it can encourage other survivors of the same or other offenders to report to police. A clear case study of this involves Tasmanian sexual abuse survivor, Steven Fisher. Mr Fisher, first went public about the abuse he experienced within the Anglican church, prior to the completion of court proceedings. As a result of doing so several other complainants came forward and reported their own abuse within the Anglican church to the police. In 2018, Mr Fisher told news.com.au:

I came forward in 2000 to the police.... Me being able to speak about [my offender] has kept his profile in the public eye and it has protected other people. Every time we did a story, another person came forward. So it went from just my word against his to nine boys words against his. (See: <https://www.news.com.au/lifestyle/let-her-speak-shocking-reason-woman-cant-tell-her-sexual-assault-story/news-story/718ad770a25833970f961c551f3eaab1>)

6. If subsection 3(b)(v) is to be maintained, the defence can only apply in circumstances where the information is published after “proceedings in court” are “finally determined” or “otherwise completed”. The type of proceedings which must be finalised is not defined, other than to link the proceedings to the alleged crime or offence. We submit that “proceeding” should be narrowly defined as only a criminal prosecution proceeding of the particular sexual offence in question, to avoid any suggestion that it might include related civil proceedings or other proceedings that may be tangentially related to the sexual offence.
7. We are opposed to the retention of a blanket prohibition on publication of a defendant’s identity, as contained in section 194K(1)(a)(ii), section 194K(1)(b)(ii) and section 194K(1)(c)(ii). The policy justification for this is unsound; it is rooted in a historical and baseless assumption regarding the risk of false accusations of sexual violence. It favours the interests of the accused. If a defendant wishes to have their identity suppressed once they have been charged with a sexual offence, then the onus should be on them to convince the court that that is necessary or appropriate in the particular circumstances of their case. The default position should be open justice, not suppression.

8. As currently drafted, section 194K(4)(c) requires the victim to understand the effect of their consent. We submit that this requirement is not necessary in circumstances where section 194K(4)(a) already requires a victim to be at least 18 years old to be capable of consenting to publication. In our view, section 194K(4)(c) should be removed.

Annexure A

Jurisdiction	Legislation	Explanation	Can the exception apply whilst proceedings are in progress?
Australian Capital Territory	Evidence (Miscellaneous Provisions) Act 1991, s74(2)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the victim/ complainant consents to publication.	Yes
New South Wales	Crimes Act 1900, s578A(4)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the complainant is over 14 at the time of publication and consents.	Yes
Queensland	Criminal Law (Sexual Offenses) Act 1978, s10(2)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the victim/ complainant is over the age of 18, has the capacity to consent, and authorises that consent in writing.	Yes
South Australia	Evidence Act 1929, s71A(4)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the victim/ complainant is not a child and consents. (A child is defined as someone under 18).	Yes
Western Australia	Evidence Act 1906, s36C(1)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the victim/ complainant is over 18, not incapable by mental impairment, and authorised consent in writing.	Yes
Victoria	Judicial Proceedings Reports Act 1958, s4(1B)	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The only exception is if the victim/ complainant consents and no proceedings are pending.	No
Northern Territory	Sexual Offences (Evidence and Procedure) Act, s6	Publications are prohibited from publishing the identity or material likely to identify a victim/ complainant. The	-

		<p>only exception is by court order where the court makes an order to the contrary. We have also made submissions to the NT Government regarding the content of a draft amendment to this legislation.</p>	
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If you would like further clarification on any of the issues we raise in our submission, please contact us via [REDACTED].

Kind Regards,

Nina Funnell Director - End Rape on Campus Australia