SUBMISSION REGARDING THE *EVIDENCE AMENDMENT BILL 2020 (TAS)*

6 FEBRUARY 2020

Australia's Right to Know (ARTK) coalition of media organisations welcomes the opportunity to make a submission to the Tasmanian Government regarding the *Evidence Amendment Bill 2020* (the Bill).

As set out in the previous ARTK submission regarding this important matter, ARTK supports a legal framework that would allow adult asexual assault survivors/complainants affected by s194K to consent to being identified should they wish to do so.

While we acknowledge that the Bill is a positive development in relation to open justice which will give a voice to the relevant group of sexual assault complainants, we remain disappointed that the structure of the law maintains the stigma that sexual assault survivors speaking out remains an offence.

As ARTK has expressed in other jurisdictions, it should not be incumbent on a complainant, nor on a third party with the benefit of a complainant's written consent, to face the risk of prosecution and have to plead a statutory defence – 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. We note here that an exemption is not a "free-pass" and does not put media organisations – or the person them self if they choose to "self-consent" and self-publish – above the law. To the contrary the exempted party remains within the legal framework and responsible for their actions. We would encourage the Tasmanian Government to consider this issue.

Having said that, we make the following constructive comments regarding the Bill, and urge the Tasmanian Government to accept the following amendments to address the matters that remain of concern to ARTK in the Bill.

IDENTIFICATION OF WITNESSES IN SEXUAL OFFENCE PROCEEDINGS

ARTK maintains the view that prohibiting the identification of witnesses in sexual offence proceedings is a step too far and repeats the matters raised about this issue in our previous submission. In the alternative, any prohibition on the identification of witnesses in sexual offence proceedings should be limited to witnesses that if identified would likely lead to the identification of persons in sections (1)(a)(i) and (1)(a)(ii).

Recommendation 1

We recommend that the new section 194K(1) provided for by the Bill be amended by deleting sections (1)(a)(iii) and (1)(b)(ii) and (1)(c)(ii):

(1) A person, in relation to any proceedings in any court, must not publish identifying information, or course identifying information to be publishes, in respect of –
  (a) If a crime is alleged to have been committed under section 133 of the *criminal Code* –
    (i) any person in respect of whom the crime is alleged to have been committed; or
    (ii) any defendant in respect of those proceedings; or
    ~~(iii) any witness or intended witness in those proceedings; or~~
  (b) If a crime is alleged to have been committed under section 124, 125, 125A, 125B, 126, 127, 129, 185 or 186 of the *Criminal Code* –
    (i) any person in respect of whom the crime is alleged to have been committed; or
    (ii) ~~any witness or intended witness, other than the defendant in those proceedings; or~~
  (c) if an offence is alleged to have been committed under section 35(3) of the *Police Offences Act 1935* –
    (i) any person in respect of whom the offence is alleged to have been committed.~~; or~~
    (ii) ~~any witness other than the defendant, in those proceedings~~.

DELAY IN IDENTIFICATION OF COMPLAINANTS IN SEXUAL OFFENCE PROCEEDINGS

Subsection 194K(3)(b)(v) provides that consent from a complainant or witness who wishes to be identified is only good if the relevant information is published "*only after the proceedings in court, in respect of the relevant alleged crimes or offence, were finally determined or otherwise completed".* ARTK submits this subsection is unnecessary – and in fact detracts from the step forward the Bill otherwise represents – for the following reasons:

- No justification for ss. 194K(3)(b)(v) is given at https://www.justice.tas.gov.au/community-consultation/consultations/evidence-amendment-bill-2020 or in any of the documents linked to that page beyond, "*The draft Bill also provides for safeguards to ensure there are appropriate protections for victims who do not wish to be identified*". ARTK submits that ss. 194K(3)(b)(v) does not achieve this goal. The fact that identifying a complainant who does not consent attracts a substantial penalty covers that field.

- If the Bill were to pass, Tasmania would remain an outlier in this area of law as ss. 194K(3)(b)(v) is not present in the equivalent legislation of any other Australian jurisdiction. The only jurisdictions with similar provisions are:
  - Victoria, in which section (1B) of the *Judicial Proceedings Act 1958* only permits complainants in sexual offence cases to consent to be identified "if a proceeding in respect of the alleged offence is not pending in a court at the relevant time"; and
  - Queensland, in which the relevant legislation only allow for consent if the intended publication is not a court report.

  In each of the ACT, NSW, SA and WA a complainant can give consent at any time of his or her choosing. ARTK notes that at an appropriate time it intends to make submissions to both the Victorian and Queensland parliament that the above provisions should be repealed or amended to also allow for consent at any time and has recently objected to the Northern Territory adopting the same consent provision found in the Victorian legislation (at present, like Tasmania, NT law does not

allow for consent at all).

- The definition of "publish" not only includes traditional forms of media publication but also publication by a book, written document, by means of the internet in any format and by public exhibition, spectacle or event. While some of these latter classes of publication are engaged in by media publishers they are more likely to be formats in which a complainant independently communicates his or her own account.

  For example, before Garth Hawkins was convicted and before Steven Fisher obtained the Supreme Court order which authorised publications identifying him as a *"sexual offence victim"* (his words) (the Identification Order), Mr Fisher had already given interviews as part of the survivor's support groups he joined or founded and had spoken publicly about his experiences. The effect of ss. 194K(3)(b)(v) is such that even in the face of Mr Fisher's clear consent, not only could any media publisher who identified him be prosecuted for breaching s. 194K he too could be prosecuted for telling his own story in any of the formats referred to above.

- Subsection 194K(3)(b)(v) could result in consenting complainants and witnesses being deprived of the ability to identify themselves for years after an accused person is charged. Proceedings are not "finally determined or otherwise completed" until all avenues of appeal are exhausted. In the worst case scenario, a conviction could be appealed all the way to the High Court, overturned and require the retrial of the matter. In 2017-2018, the mean duration of criminal proceedings in Tasmania was 63.5 weeks[1]. Even allowing for a conservative estimate, the whole of the appeal process taken once to the High Court could take anywhere from 3 to 5 years.

  In addition to the potential appeals process, each of the offences set out in subsection 194K(1) (except for section 129 of the *Criminal Code 1924 (TAS)*) is a reportable offence pursuant to the *Community Protection (Offender Reporting) Act 2005 (TAS)*[2] which provides for offenders to be placed on the Community Protection Offender Register (the Registrar). Offenders are added to the Register by court proceedings which concern the relevant offence. If such proceedings did not concern the relevant offence there would be no means or justification for registering the offender.

  Garth Hawkins, Mr Fisher's assailant, was convicted in 2003 and was subsequently sentenced to seven and a half years in jail. However, the proceedings that saw him put on the Register did not occur until March 2008. Had Mr Fisher not obtained the Identification Order, s. 194K(3)(b)(v) in conjunction with *Community Protection (Offender Reporting) Act 2005* (TAS), would arguably have prevented reports identifying him to which he fully consented for more than five years after Hawkins was convicted.

- Subsection 194(3)(b)(v) deprives consenting complainants of a voice at the very time it may be most important to them. Last year Mr Fisher wrote a compelling editorial for *The Mercury* describing how he felt on discovering he would be unable to be identified at Hawkins' sentencing:

  > *When I was told by the Department of Public Prosecutions that when my abuser was sentenced I would not be able to be identified as one of his victims I was horrified. I had spent three long years lobbying the police to arrest this man.*
  > *In 2001 a law had been introduced and I wasn't going to be allowed to speak.*

[1] https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02017-18?OpenDocument, "9 Defendants finalised, Tasmania (Tables 36 to 39)" published 19/02/2019

[2] Section 35(3) of the *Police Offences Act 1935 (TAS)* being a Class One offence; sections 124, 125, 125A, 125B, 126, 127, 133 and 186 of the *Criminal Code* being Class Two offence; and section 185 of the Criminal Code being a Class Three offence.

> *The things that went through my mind were incredible. I was distraught beyond belief. It was like my world came crashing down because it was so important to me to look into that camera and say my piece knowing everyone would know who I was talking about.*
>
> *I felt robbed of my right to further help and educate other people. I felt the power that I had slowly developed would be instantly taken away. I was crushed. I was angry at the system and I felt that once again the system was protecting the abuser, not me.*[3]

For the sake of completeness, ARTK notes that it is no answer to simply say a complainant can still get an order permitting identification from the Supreme Court. On that subject Mr Fisher wrote:

> *The DPP explained to me why the victim gag law was brought in and agreed with it in certain circumstances. The DPP then dropped another bombshell. I could try to seek a court order. That was my only option. They were honest and told me one had never been granted in Tasmania. My stomach dropped and I nearly cried. Then they also advised that after the fees and lawyers charges it would cost as much as $10,000. I felt deflated and further abused by the system.*
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> *With media support, we applied for the court order. Then began a whirlwind of emotions I have never experienced all at once: hope, anxiety, sadness, to name but a few. I was required to attend yet more meetings with lawyers, doing affidavits, and basically reliving in my mind the whole story again. I was exhausted and was feeling more and more that I was losing the strength and courage I had built up over the years. I was finding it hard to understand why the system that I thought was in place to protect me was now basically re-traumatising me. Then came the day of the hearing. I did not sleep at all the night before. I did not know whether the magistrate would make a decision on the day or reserve his decision which would mean more stress and waiting.*
> *Then finally a decision was made. The exemption was granted. The elation and relief I felt was incredible. I could do all the things I needed to do to help my healing process and help others.*
> *This was a great outcome but one I hope no other survivor ever has to go through.*

- Subsection 194(3)(b)(v) also potentially deprives police of what can be their most effective tool in an ongoing investigation. As noted in the Identification Order Supreme Court judgment, Mr Fisher's affidavit evidence "*suggests that his public disclosures led to his complaints being properly investigated and this prosecution being brought. From that affidavit I can, and do, infer that the publication of his name in connection with the proceedings may encourage other victims to come forward and that may well lead to the investigation and prosecution of other offenders who have remained undetected to date*"[4].

- Lastly, and further to paragraph 1 above, while ARTK accepts that the intention of the drafters was to protect complainants ss. 194(3)(b)(v) can also be read as perpetuating both a double-standard and the now old-fashioned belief that some complainants in sexual offence cases lie. Unlike the complainant, and with the exception of crimes alleged to have been committed under section 133 of the *Criminal Code 1924* (TAS), an accused is free to say whatever he or she likes about a case in his or her own name, at any time. Further, if the complainant cannot be identified then the accused can disregard any potential defamation risk since identification is an element of that cause of action.

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[3] https://www.themercury.com.au/news/opinion/talking-point-time-to-remove-the-gag-so-victims-can-live-on/news-story/f1c1b6a0aaef2b7b773b1af14f22c9b0

[4] Re Evidence Act 2001, s194K and an Application by the Australian Broadcasting Corporation and Davies Bros Limited [2003] TASSC 118 at [6]

Given consent can only be given once a conviction or acquittal is ultimately confirmed, ss. 194(3)(b)(v) also tends to suggest that confirmation by the court of the true state of affairs pertaining to the case is required before the complainant can allowed to speak in his or her own name. Again, ARTK accepts that these effects were unintended by the drafters but, nonetheless, plainly arise.

Recommendation 2

We recommend that the new section 194K(3) provided for by the Bill be amended by deleting section 194K(3)(v):

(2) It is a defence in proceedings for an offence against subsection (1) if the defendant establishes –
- (a) that the publication of the information is in accordance with a court order made for the purposes of this section; or
- (b) that –
  - (i) the identifying information published by the defendant relates to a person referred to in subsection (1)(a)(i), (b)(i) and (c)(i), other than the defendant to the crime referred to in the relevant paragraph; and
  - (ii) the person has consented, in accordance with subsection (4), to the publication of identifying information in respect of the person; and
  - (iii) the identifying information is published in accordance with that consent; and
  - (iv) the publication of the information does not identify, or is not likely to lead to the identification of, another person referred to in subsection (1)(a), (b) or (c), other than the defendant to the relevant crime or offence, unless the other person has consented under subsection (4) to the publication of identifying information in respect of the other person.~~; and~~
  - (v) ~~the information was published only after the proceedings in court, in respect of the relevant alleged crime or offence, were finally determined or otherwise completed~~.

PENALTY FOR INFRINGING S. 194K

ARTK made no comments about the appropriate penalty for a breach of s. 194K in the previous submission. However, we note that Tasmania is also an outlier in this respect being the only jurisdiction other than the Northern Territory to prescribe prosecution for contempt as the penalty applicable in legislation protecting complainants in sexual offence cases.

We note here that the Northern Territory is currently consulting on the *Sexual Offences (Evidence and Procedure) Amendment Bill 2019* (NT) which will retain the dual contempt/offence penalty provision in that jurisdiction. ARTK has recommended the NT delete the contempt penalty provision. We make the same recommendation here, and recommend that section 8 of the Bill be deleted in full.

We recommend this in the outlier jurisdictions of Tasmania and the Northern Territory because prescribing conduct as punishable as a contempt of court exposes a potential defendant to unnecessary uncertainly given the penalty ultimately applied will be at the court's discretion. That said, prescribing conduct as both a potential contempt and an offence is worse as combines both the element of uncertainty with the risk of self-incrimination.

For example, should a media publisher identify a complainant in a sexual offence case and a complaint follow that either the publisher did not have consent at all or had not met all of the requirements of ss. 194K(3), it would be prudent to apologise to the court in the face of a potential contempt charge. However,

any such apology could be regarded as an admission of liability and used against the publisher once charged with an offence.

Further, as the table below shows the penalties Tasmania is proposing be applicable to a breach of s. 194K are the most severe as against individuals when compared to other Australian jurisdictions having the most equivalent legislation and the second most severe as against corporations (noting that the South Australian penalty is a clear outlier in this regard)[5]:

JURISDICTION	CORPORATE PENALTY	INDIVIDUAL PENALTY
ACT	$40,500 fine, 6 months imprisonment or both	$8,000 fine, 6 months imprisonment or both
NSW	$55,000 fine	$5,500 fine, 6 months imprisonment or both
NT[6]	$6,280 fine or 6 months imprisonment	$6,280 fine or 6 months imprisonment
SA	$120,000 fine	$10,000 fine
TAS	$67,200 fine	$10,080 fine, 12 months imprisonment or both
WA	$25,000 fine	$5,000 fine

ARTK submits that the risk of a penalty of this magnitude is a sufficient deterrent to enforce compliance with s. 194K. and recommends that the penalty provisions within s. 194K be retained and all reference to contempt removed.

We also note that the individual penalty provisions shows Tasmania to be an outlier regarding the duration of imprisonment – being double that of other states where imprisonment is an element of the penalty. ARTK recommends this be reduced to 6 months to align with similar penalties in other jurisdictions.

RECOMMENDATION 3

We recommend that the new subsection 194K(8) provided for by the Bill be deleted in full.

We also recommend that the imprisonment penalty be reduced to 6 months.

[5] Penalty section when read with s. 133, Legislation Act 2001 (ACT), s. 17, Crimes (Sentencing Procedure) Act 1999 (NSW), r. 2, Penalty Unit Regulations 2010 (NT) and https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation

[6] Based on proposed new section 6 of the Sexual Offences (Evidence and Procedure) Amendment Bill 2019