

Your Ref: DOC/19/142136
Our Ref: 850

11 February 2020

The Secretary
Office of the Secretary
Department of Justice
Email: legislation.development@justice.tas.gov.au

Dear Secretary

Re: Draft Evidence Amendment Bill 2020: Publication of certain identifying particulars prohibited (section 194K)

Thank you for the opportunity to comment on the draft Evidence Amendment Bill 2020 (the draft Bill). I am grateful for the extension of time in which to provide my feedback.

According to the explanatory material for the draft Bill, it is intended that the current section 194K of the *Evidence Act 2001* (Tas) be replaced with a new section that, among other matters, provides for the publication of identifying information about a victim of, or witness to, a sexual crime in certain circumstances.

Role of the Commissioner for Children and Young People

As you are aware, the Commissioner for Children and Young People is an independent statutory office established under Tasmania's *Commissioner for Children and Young People Act 2016*. My functions and powers, and the principles to which I must have regard in carrying out these functions and exercising these powers, are set out in that Act.

Consistent with my statutory functions, my comments below focus on matters that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.¹

Comment

As I understand it, the draft Bill would have the effect of replacing the current section 194K of the *Evidence Act 2001* (Tas) with a new section which would, among other matters:

- Prohibit the 'publication' of 'identifying information' in respect of victims, witnesses and the defendant in cases of incest, and prohibit the 'publication' of 'identifying information' in respect

¹ Pursuant to section 3 of the CCYP Act, 'child' means a person who has not attained the age of 18 years; and 'young person' means a person, who has not attained the age of 18 years, as determined by the Commissioner in accordance with section 8(4).



of victims and witnesses (other than the defendant) in other sexual offences (see proposed new section 194K(1)).²

- Maintain the existing contempt of court provision for breaching the prohibition on publication and create a new offence punishable by fine or imprisonment (see proposed new sections 194K(1) and 194K(8)).
- Enable the Court to make an order for publication of identifying information, where there has been consultation with the victim, witnesses (and where relevant, the defendant), and where the making of the order it is in the public interest (see proposed new section 194K(5)).
- Provide a defence in proceedings for breaching the prohibition on publication where:
 - the defendant in those proceedings establishes that the publication was in accordance with a court order (see proposed new section 194K(3)(a)); or
 - the defendant in those proceedings establishes that, before the publication, the court proceedings had been finalised and the publication was made in accordance with the written consent of the victim or witness (please refer to the proposed new sections 194K(3)(b) & 194K(4) for further full details).
- Provide safeguards to ensure protections for victims and witnesses who do not wish to be identified, or who are children, or who have a mental impairment, to ensure they are not identified (see proposed new sections 194K(3)(b)(iv) and 194K(4)).

Outlined below are my specific comments in relation to the draft Bill and proposed reform:

1. There is, in my opinion, a degree of ambiguity in relation to the intended operation of the proposed section 194K(4) as it relates to children. For ease of reference, I have set out the proposed subsection in full:

194K(4) For the purposes of subsection (3)(b), a person has consented to the publication of identifying information in respect of the person if the person –

- (a) had attained the age of 18 years at the time the identifying information was so published; and
- (b) had consented, in writing, to the publication of the identifying information before the information was published; and
- (c) understood, at the time the consent was given, that he or she may be identified, or identifiable, as a result of the publication of the identifying information; and
- (d) was not coerced into consenting, in accordance with this subsection, to the publication of the identifying information.

On one reading of the above sub-section, a child *of any age* could provide consent to the publication of identifying information about the child provided the publication does not occur until after they attain the age of 18, they understand they may be identified as a result of the

² For the purposes of the new section 194K:

- the term 'identifying information', in relation to a person, includes – (a) the name, address, school, place of employment and any other reference or allusion that identifies, or is likely to lead to the identification of, the person; and (b) a picture or image of the person – see proposed new section 194K(9).
- the term 'publish' means 'to make available to the public, or a section of the public, by any means...' including but not limited to publication via the internet, in writing, by broadcast on radio or television etc. – see proposed new section 194K(9).



publication, and they were not coerced. If this is the intended practical operation of the subsection I would have some difficulty supporting it. As I said in my May 2019 [submission to the Discussion Paper](#), I would have strong reservations about any reform which would allow the consent of a complainant aged less than 18 years to be sufficient in and of itself to allow the publication of identifying details. Therefore, this aspect of the draft Bill would, in my view, benefit from clarification.

2. I note that sections 31 and 108 of the *Youth Justice Act 1997* restrict publication of identifying information in respect of proceedings involving a defendant aged less than 18 years at the time of the commission of the offence. It is not entirely clear to me how these provisions will operate in conjunction with the new section 194K. Perhaps this is a matter that could be clarified.
3. I note that the Tasmania Law Reform Institute (TLRI) made several recommendations for the reform of s194K in 2013 in its [Final Report, Protecting the Anonymity of Victims of Sexual Crimes](#). Consistent with my submission to the Discussion Paper and Recommendation 2(b) of the TLRI, I would support inclusion in the draft Bill of a provision that provides the court with the discretion to make an order prohibiting the publication of details that may cause harm, distress, humiliation or embarrassment to a child victim. Further, and consistent with recommendation 3(b) of the TRLI, I would support inclusion in the draft Bill of a right to appeal or seek a review, variation or revocation of a court order (if such a procedural right does not already exist).
4. To promote and protect the rights, wellbeing and best interests of children and young people affected by child sexual abuse, it will be essential for members of the public to be appropriately informed of the reforms to section 194K and their intended operation. I would therefore recommend that, before the commencement of the new section, clear and accessible information is distributed broadly through a variety of communication channels so that all members of the community, including victims of sexual offences and publishers of newspapers etc, are made aware of their rights and obligations under the new law.
5. Finally, in my respectful opinion it would be appropriate for a review of the operation of the new section 194K to be undertaken to ensure it is operating as intended, and that there are no unintended adverse consequences. Such a review should be undertaken no later than 2 years after the commencement of the new section.

Conclusion

Thank you for the opportunity to comment on the draft Bill. I would be very pleased to discuss my comments in more detail if this would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc *The Hon Elise Archer MP, Attorney General, Minister for Justice*
The Hon Roger Jaensch MP, Minister for Human Services