

10 May 2019

Ms Brooke Craven
Director
Office of Strategic Legislation and Policy
Department of Justice
Email: haveyoursay@justice.tas.gov.au

Dear Ms Craven

Re: Discussion Paper – Section 194K Evidence Act 2001 (Tas)

Thank you for your invitation to provide feedback to the Department of Justice’s Discussion Paper: Section 194K of the *Evidence Act 2001* (Tas). As the peak body for the Tasmanian community services sector, TasCOSS welcomes the opportunity to provide our representative input into new legislation and amendments to existing Bills.

TasCOSS advocates on behalf of low-income Tasmanians who often live in vulnerable and disadvantaged circumstances. Our vision is for one Tasmania, free of poverty and inequality, where everyone has the same opportunity. We advocate for public policy that values and respects the diversity of Tasmanians and makes a real difference to the lives of people who are experiencing vulnerability. We work to ensure that the human rights of all Tasmanians are integrated into government consultation processes, policy approaches and budget allocations.

Our submissions and advocacy are strongly informed by the expertise of our members and the lived experiences of the Tasmanians we represent. For this submission, we consulted with our member organisations that work with both victims-survivors and perpetrators. We also consulted with members of the legal sector, both in Tasmania and other jurisdictions.

Background

In November 2013, the Tasmania Law Reform Institute (TLRI) released its final report titled *Protecting the Anonymity of Victims of Sexual Crimes*. The 54-page report followed an Issues Paper, consultation and considered in detail the operation of section 194K of the *Evidence Act 2001*, including amongst other things, the law prohibiting the publication of information which identifies a complainant in a sexual offence case. In summary, section 194K of the *Evidence Act 2001* provides that a person cannot publish anything which identifies an alleged victim of a sexual crime (or witness, or, in the case of incest, the accused) unless they have a court order - and if they do so publish without an order, it is punishable as a contempt of court.

We note that your department is only seeking discussion regarding whether section 194K strikes the proper balance between a complainant’s right to speak in sexual offence proceedings and the public interest in open justice. Our submission, therefore, focuses on the rights of complainants’ consent to publication.

Discussion

TasCOSS acknowledges that section 194K was drafted with the primary intention of protecting victims-survivors of sexual assault and other witnesses from being identified. Whilst it has been traditionally assumed by the legislature that victims-survivors fear stigma attached to identification and therefore need the State's protection by non-publication, a practical consequence has been that victims-survivors who do wish to tell their story are not able to without the order of the court. The legislation as it stands does allow for publication if an application to the court is made and an exemption granted. However, this process has been widely criticised as costly, overly laborious, legalistic and re-traumatising for victims-survivors.

A further problem with the current legislation, is that it does not allow – or denies - individuals the right to tell their own story. In 2018, End Rape on Campus (EROC) Australia and Marque lawyers began a high-profile campaign advocating for change to Tasmania's laws titled *#LetHerSpeak*¹. Whilst this campaign is gendered in its title as an issue affecting women, *#LetHerSpeak* has powerfully used the first-person, lived experience, written stories of female and male victims-survivors of sexual assault to advocate for changes to Tasmania's law.

In principle, TasCOSS supports legislative change that empowers victims-survivors of sexual assault of any gender to tell their story. TasCOSS encourages the Government to act on the TLRI's recommendations to reform Tasmania's laws, so that those who do want to tell their story can. We are strongly of the view that the stigma relating to victims-survivors of sexual crimes should not exist. The information held by victims-survivors of sexual crimes is owned by them, and as such, it is their decision as to who, when, how and if they choose to disclose this information.

However, we also acknowledge that these rights need to be balanced against the rights of others, most importantly, the rights of other victims-survivors of a perpetrator to remain unidentified if they so wish. TasCOSS submits that the law should be reformed to allow for publication with the consent of the victim-survivor, but with safeguards that allow victims-survivors to tell their story in a non-adversarial and more accessible way that does not impinge on the right of other victims-survivors to remain unidentified.

Taking into account these principles and our members' views, TasCOSS endorses law reform in line with Recommendation 4 of the TLRI report:

Recommendation 4

- (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.*

¹ <https://www.megaphone.org.au/petitions/let-her-speak> accessed 1/05/2019

(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.

(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.

In relation to the abovementioned safeguards, TasCOSS accepts there may be situations where publishing information about a court case may risk other parties being identified that do not want to be. As such, TasCOSS submits that in cases involving more than one victim, the identity of any non-consenting parties will not be disclosed. This recognises that it is not uncommon for there to be more than one victim-survivor of a perpetrator and therefore court oversight is required to ensure unintended identification of an unconsenting victim-survivor does not occur.

TasCOSS recommends procedural reforms to facilitate an accessible and sensitive process for those wanting to tell their story. To be a meaningful option for victims-survivors, we consider a court remains the best adjudicator to ensure safeguards and a process that must be:

- ***Well-communicated and publicly known***

We note that a member commented that in their service's experience, most 'clients' would not be aware of a right to apply to the court. This raises the question of whether community legal education could assist victims-survivors in learning about their rights and how to exercise them. We would therefore recommend funding for community legal education in this area of reform.

- ***Transparent in terms of process and steps involved***

If the victim-survivor's application meets the criteria set out in Recommendation 4, a procedure developed for publication applications to be granted by the Director of Public Prosecutions (DPP) would avoid the need for a new court hearing. If the DPP reviews an application made, the DPP should only be able to oppose such an application if their inquiries reveal other victims-survivors who do not want to be identified. TasCOSS considers oversight of the DPP (or Court) is necessary to avoid unintentionally identifying victims-survivors of the same perpetrator who do not wish to be identified. We are of the view that it makes sense for this oversight to remain as individuals and media outlets themselves may not be aware of other victims-survivors involving the same perpetrator.

- ***Not impose a financial cost***

A victim-survivor should be able to make an application for publication to the court without having to bear any costs. This could be done at the finalisation of proceedings, or if an application is made by individuals sometime after their case, free legal assistance should be made available through legal aid.

Conclusion

In summary, TasCOSS' view is that reform should be progressed in the spirit of the *#LetHerSpeak* campaign and in line with Recommendation 4 of the TLRI report, with procedural reforms that make it less intrusive for victims-survivors to tell their story and appropriate judicial oversight to ensure the rights of other victims-survivors to remain unidentified are protected.

I hope this feedback assists your office. Please do not hesitate to contact me if you have any queries about this submission.

Kind regards



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