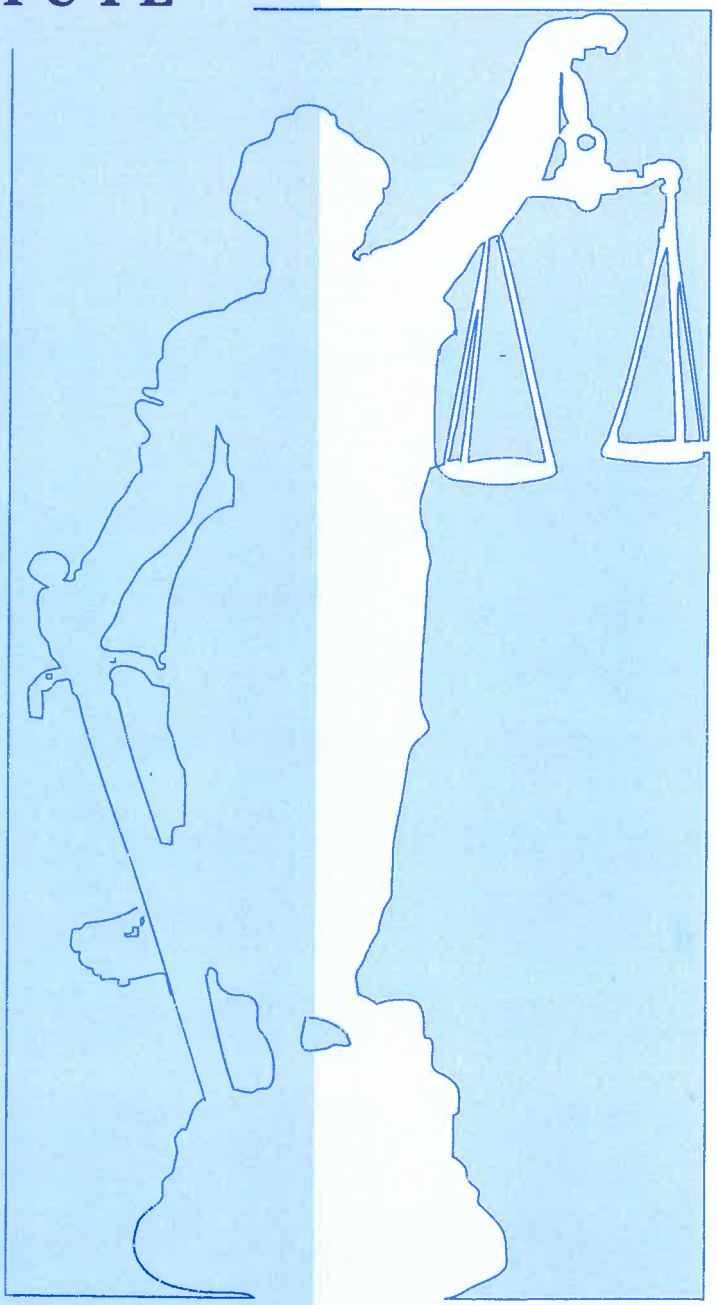
TASMANIA
LAW REFORM
INSTITUTE



Protecting the Anonymity of Victims of Sexual Crimes

ISSUES PAPER No 18
August 2012

TASMANIA
LAW REFORM
INSTITUTE

Protecting the Anonymity of Victims of Sexual Crimes

ISSUES PAPER NO 18

AUGUST 2012

CONTENTS

Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself. The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Terese Henning (appointed by the Council of the University), Mr Craig Mackie (nominated by the Tasmanian Bar Association), Ms Ann Hughes (community representative) and Mr Rohan Foon (appointed by the Law Society of Tasmania).

Acknowledgments

This Issues Paper was prepared for the Board by Honorary Professor George Zdenkowski. Research assistance in preparing the paper was given by Kate Stewart in the form of a supervised research paper undertaken as a component of the Bachelor of Laws degree at the Faculty of Law, UTAS. Valuable feedback was provided by the Institute's Director, Professor Kate Warner, members of the Board, Kim Baumeler and Emma Gunn as temporary Board appointees and Jenny Rudolf. Helen Cockburn and Bruce Newey edited and formatted the final version of the paper.

Background to this Report

This project arose out of a Tasmanian case in which a twelve-year-old girl was prostituted by her mother and her mother's male friend. The fact that only one of the girl's clients was prosecuted gave rise to controversy and criticism of both the Director of Public Prosecution's decision not to prosecute and the law relating to the crime of sexual intercourse with a young person. The Attorney-General responded to criticisms of the law by referring to the Institute (by letter dated 30 September 2010) a review of the defence of mistake as to age for the crime of sexual intercourse with a young person, together with any other legal issues raised by the case. Board member, Mr Craig Mackie also requested that, as part of the wider project, the Institute look at the operation of s 194K of the *Evidence Act 2001* (Tas). This reference was supported by the Commissioner for Children (Tasmania). The Institute released an Issues Paper in May 2012, *Sexual Offences Against Young People*, Issues Paper No 17. This paper considers the related project, the operation of s 194K of the *Evidence Act 2001* and the law prohibiting the publication of information which identifies a complainant in a sexual offence case.

How to Respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the paper. The questions are intended as a guide – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by 28 September 2012.

If possible, responses should be sent by email to: **law.reform@utas.edu.au**

Alternatively, responses may be sent to the Institute by mail or fax:

Tasmania Law Reform Institute
Private Bag 89
Hobart, TAS 7001
Fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquiries should be directed to Helen Cockburn on the above contacts, or by telephoning (03) 6226 2069.

The Issues Paper is available at the Institute's web page at www.law.utas.edu.au/reform or can be sent to you by mail or email.

Part 1

Introduction

1.1.1 Victims of sexual crimes[1] often wish to remain anonymous, or at the very least not have people they know, or the wider community know about the fact that they were assaulted. Traditionally, one result of this has been reluctance by victims to report sexual assault. Partly in an effort to encourage victims to come forward, as well as wishing to respect a victim's wish for privacy, the law has introduced restrictions on the reporting (predominantly by the media) of the identity of victims. In other words, when reporting on police investigations, court proceedings, and so on, the media are not allowed to disclose the identity of a victim of sexual assault. In Tasmania this rule is primarily found in s 194K of the *Evidence Act 2001* (Tas). While this rule may seem straightforward, in practice difficulties can arise in determining exactly what information can and cannot be released. This was recently exemplified in the Tasmanian case concerning the prostitution of a 12-year-old girl by her mother and her mother's friend, Gary John Devine. Neither the girl's nor her mother's name was reported in the media, yet the reporting of Devine's name, as well as some other details relating to the case, could have led many people, particularly those who knew Devine, the mother or the girl, to identify her. In these circumstances, the Director of Public Prosecutions concluded that there had been no breach of s 194K (See Part 4 for a detailed discussion).

1.1.2 This Issues Paper will give detailed consideration to the background and policy behind the rule, how it has been interpreted and applied in the past, how it should be applied in the future, whether legislative reform is desirable to aid in its application, and if so, what kind of reform is appropriate.

1.1.3 This matter was referred to the Institute by Mr Craig Mackie by a letter dated 29 March 2010. The reference was supported by the then Commissioner for Children (Tasmania), Mr Paul Mason.

1.1.4 Some related matters which were referred to the Institute, but not included in this project, were:

---

1 The word 'crime' is used loosely here and intended to include summary offences.

- Comments on passing sentence by judicial officers in such cases – should these be published on the internet?[2]
- 'a general reference into legislative provisions, principles, practices and procedures relating to restrictions on publication of information concerning children and young people involved in the legal system, either as victims of crime, as (alleged) offenders or in the context of action taken under the *Children, Young Persons and Their Families Act 1997*'.[3]

1.1.5 Although there may be merit in considering these issues for reform, it was decided not to include them in this project. It may be desirable to investigate these matters (each of which potentially raises substantial and complex issues) in a subsequent inquiry. The child protection issues associated with the current matter have been the subject of a separate inquiry and government response.[4]

Protecting the identity of the alleged victims of sexual crimes: section 194K

1.1.6 Section 194K of the *Evidence Act 2001* (Tas) (the '*Evidence Act*') provides that a person must not publish or cause to be published 'the name, address, or any other reference or allusion likely to lead to the identification of' the alleged victims of sexual offences. This restriction on publishing information is an exception to the general principle of 'open justice' – that is, courts are open to the public and court proceedings can be freely reported, allowing for (amongst other things) scrutiny of the justice system.

1.1.7 Questions to be considered by this Issues Paper in relation to s 194K include:

- What type of information is intended to be covered by this provision?
- Who has to be able to make the identification of the complainant (for example, is the provision contravened when people who already knew the complainant could identify him or her)?

2 This was raised by Mr Craig Mackie in his letter dated 29 March 2010 to Professor K Warner, Director TLRI.

3 This was raised by Mr Paul Mason, the then Commissioner for Children, letter dated 28 June 2010 to the TLRI.

4 Paul Mason, Commissioner for Children, *Inquiry into the Circumstances of a 12-year-old Child under Guardianship of the Secretary*, Final Report, July 2010; Government of Tasmania, *Government Response to Recommendations in the Commissioner for Children's Report on his Inquiry into the Circumstances of a 12-year-old Child under Guardianship of the Secretary*, October 2010.

- Is 'self-regulation' by the media or other publishers appropriate? (If not what alternatives are there?)
- Should publication be permitted if the complainant consents? If so, in what circumstances?

The case leading to this project

1.1.8 In 2010 the operation of s 194K was called into question after numerous media reports were published in relation to the case of Gary John Devine. Devine pleaded guilty to a number of sexually based crimes against a 12-year-old complainant. During Devine's case *The Mercury* newspaper published an article entitled 'Girl, 12, Sold for Sex'[5] which contained a number of intimate details about the complainant and her mother (who was also sentenced to imprisonment for her role in this matter). A more detailed account of the background to this case is set out in Issues Paper 17, *Sexual Offences Against Young People*.[6]

1.1.9 The article engendered considerable controversy and raised serious issues about the anonymity of sexual assault complainants in Tasmania. The matter was raised with the Director of Public Prosecutions (the DPP) by Mr Craig Mackie, who was the court-appointed children's representative in care and protection proceedings relating to the girl in question. The DPP rejected the submission that the publication by *The Mercury* had breached s 194K, having regard to his interpretation of the provision.

1.1.10 In the light of these events it is necessary to determine whether s 194K operates effectively and fulfils its underlying purposes.

Overview of the Issues Paper

1.1.11 Part 2 of the Issues Paper will consider:

- The principle of open justice;
- competing policy considerations; and
- exceptions to the principle of open justice.

Part 3 will review the current law relating to s 194K in Tasmania and equivalent provisions in some other jurisdictions, as well as considering how these laws

5 Sally Glaetzer, 'Girl, 12, Sold for Sex', *The Mercury*, 30 September 2010.

6 Tasmania Law Reform Institute, *Sexual Offences Against Young People* (Issues Paper No 17, May 2012).

have been interpreted by the courts. Part 4 will consider the need for reform, including procedural and terminology issues which may be relevant to any proposed reform of s 194K, as well as the appropriate sanction for its contravention. Finally, options for reform are proposed in Part 5.

Part 2

The Principle of Open Justice and its Exceptions

2.1 The principle of open justice

2.1.1 Legislative provisions that prohibit the publication of material likely to lead to the identification of sexual assault complainants represent an exception to the general principle of open justice. That principle ensures that justice will be administered in open court unless the subject matter of the action requires that the court be closed or that restrictions be imposed on publicity of various details relating to the proceedings.[7]

2.1.2 The principle of open justice is one of the most fundamental features of the Australian system of justice and the conduct of proceedings in public is an essential quality of the court system.[8] The general principle is justified on numerous grounds. In *Scott v Scott*, Lord Atkinson noted that public trials are 'the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.'[9] In *Russell v Russell*[10] Gibbs J observed that:

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of

7 *Scott v Scott* (1913) AC 417, 445 (Lord Loreburn).

8 Writing in the context of the recently introduced *Court Suppression and Non-publication Orders Act 2010* (NSW), Justice Peter Johnson has stressed the fundamental importance of the open justice principle: Peter Johnson, 'The *Court Suppression and Non-publication Orders Act 2010* Commences' (2011) 23(6) *Judicial Officers' Bulletin* 3. His Honour cites a recent curial analysis of the open justice principle in the context of suppression orders, by French CJ in *Hogan v Hinch* (2011) 85 ALJR 398, [20]-[27].

9 *Scott v Scott* (1913) AC 417, 463 (Lord Atkinson).

10 (1976) 134 CLR 495.