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Legislative Assembly of the Northern Territory
Legislation Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

BY EMAIL: LSC@nt.gov.au

Central Australian Aboriginal Family Legal Unit
ABORIGINAL CORPORATION

84 Hartley Street
PO Box 2109
Alice Springs NT 0871

ABN 98 302 021 142
ACN 302 021 142
ICN No. 4760

FREECALL: 1800 088 884
Phone: 08 8953 6355
Fax: 08 8953 6749
Email: caaflu@caaflu.com.au

Dear Sir/Madam

SUBMISSION TO THE LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY LEGISLATION SCRUTINY COMMITTEE | SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) AMENDMENT BILL 2019

The Central Australian Aboriginal Family Legal Unit (**CAAFLU**) welcomes the opportunity to make a submission to the Legislative Assembly of the Northern Territory (**NT**) Legislation Scrutiny Committee regarding the proposed *Sexual Offences (Evidence and Procedure) Amendment Bill 2019* (NT) (the **Bill**).

1. ABOUT THE CENTRAL AUSTRALIAN ABORIGINAL FAMILY LEGAL UNIT

CAAFLU was established in 2000 and is one of 13 Family Violence Prevention Legal Services currently operating in Australia. CAAFLU's mission is to provide culturally appropriate legal and support services to Aboriginal and Torres Strait Islander people who have experienced, or are experiencing, family violence or sexual assault in Central Australia and the Barkly Region.

2. THE BILL

The NT Government tabled the Bill in Parliament on 28 November 2019. The Bill creates a defence of informed consent to prosecuting the offence of publishing a victim's identity. Section 6(2) enables victims of sexual offences to provide consent to being identified in a publication, statement or representation where the following pre-conditions are satisfied:

(a) written consent is given by the complainant in advance of disclosure;

(b) the complainant is an adult at the time that consent is given;

(c) the complainant has capacity to provide consent; and

(d) the proposed publication, statement or representation does not identify, directly or indirectly, another complainant unless that other complainant has also given consent.

The ability to apply to the Court for an order permitting publication is retained. However, a new requirement mandates that the Court have regard to the complainant's wishes in determining whether to permit publication of identifying details.[1]

1 Explanatory Memorandum, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019* (NT)

The Bill (if passed) will bring the NT in line with other Australian jurisdictions, facilitating a consistent approach across the country and striking a balance between the conflicting interests of: protecting individual privacy, open justice and enabling individual choice.

3. SUBMISSIONS

CAAFLU recognises that there is an urgent need for legislative change to protect the rights of sexual assault victims in the NT to tell their stories. CAAFLU supports the introduction of the *Sexual Offences (Evidence and Procedure) Amendment Bill 2019* as currently drafted.

All Australian jurisdictions place some restrictions on publications that identify (or would lead to the identification of) a sexual assault victim (see Annexure A for a comparison of these laws). These laws are designed to safeguard victim's privacy and encourage reporting to authorities without fear of reprisal, unwanted victim blaming or media attention. The legislation varies slightly in each jurisdiction with respect to language, application and requirements including, for example, the minimum age victims must be to consent to the publication of their identity.

Only Tasmania and the NT preclude the publication of information which would identify a sexual assault victim, regardless of whether the victim consented to the publication. However, Tasmania has committed to a review of its existing laws and in April 2019 released a Discussion Paper seeking public submissions on this issue. It is expected that the Tasmanian government will repeal the laws in early 2020. If the Bill is passed, NT will remain as the only Australian jurisdiction stifling victims' rights.

The issues raised in this submission, and the examination of other jurisdictions' legislation demonstrate the need for, and widespread acceptance of, laws which allow for a victims' consent to make an otherwise impermissible disclosure. A comparison of the current laws in other Australian states and territories, justifies the wording proposed in the NT legislation, as it takes a broadly similar form.

4. BACKGROUND AND CONTEXT

Stories of sexual assault victims are unfortunately treated with scepticism, owing primarily to social attitudes and the nature of the criminal justice system and the presumption of innocence. Reform in this area needs to consider the psychological impact that these offences have on victims. Typically, sexual assault is accompanied by feelings of vulnerability, lower perceived control and self-efficacy. Studies speak to the value in permitting disclosure in circumstances where consent is given by victims. Psychological research into victim recovery outcomes indicate that infantilising victims and controlling how they are expected to respond to trauma, contribute to unhelpful self-perceptions that they are unable to cope. This, in turn, has been proven to result in a reduced capacity to heal.[2]

When considering the form that legislative amendment will take in Tasmania and the NT, consent to publication is an integral element. Laws which permit disclosure (where consent is given and the legitimacy of the trial procedure is unaffected) will likely strike the most favourable balance between two competing concepts - principles of open justice and the interests of the individual victim. The psychological impact of sexual assault cannot be understated and as a society, victim blaming still pervades certain societal groups.[3] It is

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2 Liana C Peter-Hagene and Sarah E Ullman. "Social reactions to sexual assault disclosure and problem drinking: mediating effects of perceived control and PTSD." *Journal of interpersonal violence* vol. 29,8 (2014), 1418-37

3 See the following article for a more general discussion on the negative responses to disclosure that

therefore important to understand and respect that not all victims wish to come forward or may wish to delay their disclosure. It is similarly integral to note that negative responses to disclosures can unduly prejudice recovery outcomes.[4] The victim is best placed to make an informed decision about whether speaking out is the best approach for them.

The fundamental message of the call to arms, sparked by the #LetHerSpeak campaign,[5] is that victims should have the choice to determine how and to whom the details of their story are communicated. The likely consequence will be better recovery trajectories. Choice begets empowerment and individuals who have been riddled with feelings of vulnerability should be given the opportunity to retain control over their experience and their response. The gag laws represent an impermissible intrusion into the choices of individuals who have already had the fundamental decision of consent taken away from them.

5. THE CURRENT POSITION IN THE NORTHERN TERRITORY

We have identified two relevant statutes that may prevent a victim of sexual assault from speaking out in the NT: *Sexual Offences (Evidence and procedure) Act 1983* (NT) (**SOEPA**) and *Evidence Act 1939* (NT) (**EA**). Irrespective of the circumstances (including a victim's willingness to speak out), sexual assault survivors can only publicly disclose their experience with a court order.

There is no provision in the SOEPA or the EA to the effect that the prohibition of publication of a complainant's identifying information can be removed by the complainant's free and informed consent. As a result, a complainant could be facing up to 6 months imprisonment and proceedings for contempt of court if they wish to share their story without an order of the court allowing them to do so.

Section 6 of SOEPA prohibits any report concerning a sexual offence which reveals the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant, unless the court makes an order to the contrary. Section 7 places a similar restriction on the publication of information related to a defendant until the conclusion of the trial. "Report" in this context means an account in writing or an account broadcast by wireless telegraphy in sound or in visual images.[6]

Section 9 of SOEPA provides some exceptions to ss 6 and 7 including reports made for the purpose of a trial, or publication of a judgment.

A person who contravenes ss 6 or 7 or an associated court order, or otherwise engages in conduct at any time revealing identifying information related to a complainant, is subject to 40 penalty units or 6 months' imprisonment.[7] The person may also be in contempt of court.[8]

Furthermore, under s 57 of the EA, when it appears to any court:

(a) that the publication of any evidence given or used (or intended to be given or used) in any proceeding before the court, is likely to offend against public decency; or

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victims may experience - Susan Rees, Lisa Simpson, Clare A McCormack, Batool Moussa and Sue Amanatidis; *'Believe #metoo: sexual violence and interpersonal disclosure experiences among women attending a sexual assault service in Australia: a mixed-methods study' BMJ Open* (2019)

4 Above, n 2

5 Nina Funnell, #LetHerSpeak: Amend the laws which prevent sexual assault survivors from telling their story <https://www.megaphone.org.au/petitions/let-her-speak>

6 SOEPA, s 3

7 SOEPA, ss 11, 11A and 11B

8 SOEPA, s 11C

(b) that, for the furtherance of or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, the proceeding;

the court may, either before or during the course of the proceeding or thereafter, make an order forbidding the publication of the evidence or the name of any party or witness. Publication is given a wide meaning and extends to any publication that is sufficient to disclose the identity of the party/witness.[9]

Contravention of s 57 is an offence with a maximum penalty of 40 penalty units or 12 months' imprisonment.[10]

As the court's order under s 57 can apply after the proceeding, there is a real risk that such an order will run in perpetuity unless an application to vary the order is made – which requires expenditure on legal fees and which may not ultimately be successful. This creates an additional obstacle for victims of sexual assault as not only are they prohibited by the SOEPA from revealing their identity, they may also be prohibited (by a discretionary court order) from disclosing their experience, to the extent that they have been referred to in any evidence at trial.

6. THE POSITION IN OTHER AUSTRALIAN STATES AND TERRITORIES

All Australian states and territories have enacted legislation which proscribes the publication of certain material that could identify a sexual assault survivor in particular cases. A detailed comparison of these schemes is included at **Annexure A** of this report.

6.1 General themes and principles

The themes and practices discussed below would likely influence any potential law reform in the NT. There is generally a broad acceptance of the principles which underpin the need for this legislation and its importance for victims, with some variations in language and practical operation.

Outside of the NT, we have identified some general themes which are common across each of the jurisdictions, namely:

(a) Each jurisdiction prohibits the publication of a wide range of information which could either identify a sexual assault victim on their own, or could lead to the identification of a victim when combined with prior knowledge or other available information;

(b) The purpose of these laws is largely to safeguard individual privacy, and to encourage complaints to be brought forward under the protection of anonymity (without fear of reprisal, victim blaming conduct, or unwanted media attention);

(c) In some jurisdictions, courts have a discretion to make orders authorising publication where it is in the public interest to do so;[11] and

(d) With the exception of Tasmania (and the NT), all other Australian states and territories provide that it is a defence to publication if the victim has given

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9 EA, s 57(2)

10 EA, s 59

11 In Tasmania, publication is only permitted if it is in the public interest. In NSW, disclosure can also be made in the public interest, provided that the complainant's views are taken into account beforehand.

their prior consent (although the defence is expressed with minor variations in statutory language).

6.2 **Variations**

The laws, however, are not uniform and there are some fundamental differences between how the laws operate in each of the jurisdictions, namely:

(a) in respect of the scope of consent, some jurisdictions such as NSW, South Australia and Western Australia, impose age restrictions on that consent;[12]

(b) victims who lack the capacity to consent, for example because of a mental impairment, expressly cannot consent to disclosure in jurisdictions including WA;[13] and

(c) in some jurisdictions such as Queensland, consent must be given in writing.[14]

These features have influenced the scope of the consent defence set out in the Bill.

Please let us know if you have any questions or require further information about our work.

Yours faithfully
CAAFLU Aboriginal Corporation

Carol Smith
Principal Legal Officer

12 In NSW, a victim can only consent to publication if they are over the age of 14. In WA and SA, the complainant must be over the age of 18 years old.

13 In WA, a complainant cannot give consent if because of a mental impairment, they are incapable of making reasonable judgments in respect of publication of such matters. The Tasmanian Law Reform Institute recommended replacing existing laws in Tasmania with a consent defence, which would only be available if the victim had capacity to consent and had not been coerced, defrauded or otherwise manipulated into giving consent.

14 In Queensland, it is only a defence to publication if the victim has given written authorisation.

ANNEXURE A

1. JURISDICTIONAL COMPARISON

Legislation	Overview	Commentary
AUSTRALIAN CAPITAL TERRITORY		
Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 74	A person must not publish, in relation to a sexual offence proceeding, the complainant's name, protected identity information about the complainant, reference/allusion that discloses the identity, or a reference/allusion from which the complainant's identity might reasonably be worked out. 50 penalty units and/or 6 months' imprisonment: s 74(1). "Protected identity information" means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person: s 74(4). It is a defence to the offence if the complainant consented to the publication before the publication happened: s 74(2).	This provision has existed in substantially the same form in the ACT since 1985 where it was inserted into the *Evidence Act 1971* (ACT) as s 76E, by *Evidence (Amendment) Act (No 2) 1985* (ACT). The Explanatory Memorandum stated that *The fact of publication is stated by rape crisis centre workers to be one of the major considerations inhibiting the reporting of sexual offences.* Even in its original form the prohibition does not apply when the complainant consents to the publication. In 2003 it was relocated to s 40 of the *E(MP) Act*, and in 2018 it was renumbered as s 74 following the suite of reform brought in response to the Royal Commission (see *Royal Commission Criminal Justice Legislation Amendment Act 2018* (ACT)). It does not appear that there was ever a blanket prohibition in the ACT preventing sexual assault complainants from speaking out.
Evidence (Miscellaneous	A court may make an order forbidding publication of the name of a party/witness and their evidence if it considers	Section 111 provides an additional layer of protection for sexual assault victims, as the court may make a s

Legislation	Overview	Commentary
Provisions) Act 1991 (ACT) s 111	that the publication will prejudice the administration of justice. The court may attach any condition to the order, or make the order last for any period. Publication of a reference or allusion will be taken as publication if it allows the person's identity to be reasonably worked out. Noncompliance attracts 50 penalty units and/or 6 months' imprisonment: s 112	111 order covering the evidence given in the trial. A s 111 order is not automatically made. The victim cannot unilaterally remove the order by giving consent to publish the evidence. Thus, if a s 111 order was of indefinite operation (which is not uncommon), and a victim decided to speak out in future about their evidence/trial experience/identity, the victim may in theory be criminally liable. It is difficult to ascertain whether a s 111 order was made for a given proceeding as the courts do not have a consolidated database. But the court has power to amend/vacate the order even after the matter is finalised: *R v Kivalu* [2017] ACTSC 33 at [11]-[12]. We are not aware of any recorded prosecution against a victim under this section. The provision first appeared as ss 82-3 of the *Evidence Act 1971* (ACT) and has been relocated to *Court Procedures Act 2004* (ACT) before moving to *Evidence (Miscellaneous Provisions) Act* in 2006 as s 90, and re-numbered as s 111. The provision remained substantially unchanged.
Criminal Code 2002 (ACT) s 712A	A person commits an offence if they publish information that identifies someone else as a person who is or was a child (<12 years) or young person (<18 years) the subject of a children proceeding, with maximum penalty	This section is relevant for the victims of child sexual abuse. The section prohibits the publication of the identity of a child "the subject of a children proceeding", which arguably does not apply to the criminal proceeding in which they are victims (it

Legislation	Overview	Commentary
	of 300 penalty units and/or 3 years' imprisonment: s 712A(1). The section does not apply if the person the subject of the proceeding is an adult and consents: s 712A(3)(a). "children proceeding" includes a proceeding under the *Children and Young People Act 2008* (ACT) (e.g. a Care and Protection Order) which may apply to children who are victims of sexual abuse, and a proceeding under the *Family Violence Act 2016* (ACT) or *Personal Violence Act 2016* (ACT) which may apply to children who are victims of sexual abuse in these contexts.	applies when the child is the defendant in a criminal proceeding). Nevertheless, a victim of child sexual assault can be subject to ancillary proceedings such as a care and protection order proceeding, family/personal violence order proceeding etc. Their involvement in these proceedings (which may be a part of story they wish to tell) is captured by s 712A. Nevertheless, provided they are now adults, they can give consent to remove the protection of s 712A.
NEW SOUTH WALES		
Crimes Act 1900 (NSW) s 578A	Sub-section 4 of s 578A allows a publication to be made which identifies, or is likely to lead to the identification of, the complainant in prescribed sexual offence proceedings provided that the publication is made with the consent of the complainant (being a complainant who is of, or over, the age of 14 years at the time of the publication). A "prescribed sexual offence" is defined in s 3 the *Criminal Procedure Act 1986* (NSW). Proceedings in respect of this section, must be brought within 2 years of the date of the alleged offence and where the publication has unlawfully occurred carries a penalty of: 50 penalty units or 6 months imprisonment	Unlike in Queensland and South Australia where the age at which consent can be given is 18 years of age, in New South Wales, consent can be given from 14 years of age. The proper construction of the provision was considered in the case of *Jane Doe v Fairfax Media Publications Pty Ltd & Anor* [2018] NSWSC 1996 where, amongst other things, a claim was made for common law damages in response to a breach of s 578A. It was found that the provision does not confer a right to sue for common law damages for breach of the prohibition on publication.[1] The provision is punitive to perpetrators, which does not compensate

[1] *Jane Doe v Fairfax Media Publications Pty Ltd & Anor* [2018] NSWSC 1996, [209]

Legislation	Overview	Commentary
	(or both) in the case of an individual; or in the case of a corporation 500 penalty units.	victims, who have had their stories shared without their consent. **<u>Likely identification under s 578A(2)</u>** For publication to occur in circumstances where the identification of the victim is "likely" for the purposes of s 578A(2), it must be more probable than not that a complainant can be identified. Material which is likely to lead to the identification of the plaintiff by persons who have actual knowledge of the plaintiff and their family's circumstances, "*without being closely or intimately connected with him/her.*".[2]
QUEENSLAND		
Criminal Law (Sexual Offences) Act 1978 (QLD) s 10(2)	Section 10(2) of the Act allows a person to publish a complainant's name, address, school, place of employment or other statement, from which a complainant is likely to be identified, provided that the complainant: (a) authorises the making or the publishing of the statement or representation in writing; (b) is over 18 years of age and; (c) has capacity to give authorisation at the time that written authorisation is provided.	This section was introduced in its current form in 2008 with a view to allowing adult complainants to consent to the publication of their identifying particulars. The changes arose in response to the paper *"Seeking Justice: An inquiry into how sexual offences are handled by the Queensland Criminal Justice System (2003)".*

[2] *Jane Doe v Fairfax Media Publications Pty Ltd & Anor* [2018] NSWSC 1996, [207]

Legislation	Overview	Commentary
	Capacity is defined in the definition section of *Guardianship and Administration Act 2000* (QLD) at Schedule 4. It states that capacity means that the person is capable of – understanding the nature and effect of decisions about the matter; and freely and voluntarily making decisions about the matter; and communicating the decisions in some way. The penalties for failing to comply with this section are: - 100 penalty units (or 2 years imprisonment) for an individual or; - 1000 penalty units for a corporation.	
SOUTH AUSTRALIA		
Evidence Act 1929 (SA)	In accordance with s 71A(4), it is impermissible to publish the name of a sexual assault victim, or provide a statement or representation from which the identity of the person can reasonably be inferred, unless: (a) Either: (i) The victim consents or; (ii) The judge authorises the publication of the information and; (b) The victim is over the age of 18 at the time that publication is to take place.	**Purpose of the provision** The purpose of s 71A(4) is to protect victims of sexual assault from unsolicited disclosure of their identity. Chief Justice Kourakis in *Trenton John Wickers v DPP* (SA) highlighted that s 71A(4) intends to reflect the public concern for victims and the effects that unwanted disclosure of details of sexual offending committed against them, may cause.[3] Unlike the corresponding laws in Tasmania[4] and NT,[5] consent of the victim excuses a publisher from contempt of court,

3 *Wickers v Director of Public Prosecutions (DPP) (SA) [2018] SASCFC 126*
4 *Evidence Act 2001* (Tas) s 194K
5 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) ss 6 – 13

Legislation	Overview	Commentary
	The maximum penalties for a failure to comply with s 71A(4) are: (a) $10,000 in the case of a natural person and; (b) $120,000 in the case of a body corporate.	by publication. Except, in circumstances where that consent is given by a person aged under the age of 18 at the time of publication. **Application of the section** S 71A(4) applies to any legal proceedings in which it has been alleged that a person is the victim of a sexual offence – both criminal and civil proceedings.[6] Therefore, this would apply, to protect a victim's identity, if a defamation proceeding were brought by a defendant in a civil suit in response to a public claim of sexual assault. S 71A(4) can similarly be used to remove the need to apply for suppression orders, under s 69A, to protect a victim's identity. **Media Industry Support for the Law** The existence of s71A(4) has industry support. The "Australia's Right to Know" committee (comprising 13 of Australia's most influential media outlets)[7] made a recommendation on 23 August 2019 to the Attorney-General. The recommendation called for the removal of elements of s 71A which grant anonymity to *defendants* involved in sexual offences. However, the recommendation expressly states that the victim protections in s 71A(4) should remain. This evidences an acceptance by the media industry that s71A(4) is desirable and reflects a view that protection of victims

6 *X v South Australia, O'Shea, Humphreys and Spurr* [2002] SASC 53

7 These include: HT&E; AAP; SBS; ASTRA; Nine; Bauer Media, FreeTV Australia, Commercial Radio Australia, Community Broadcasting Association of Australia (CBAA); ABC; The West Australia; News Corp Australia and The Guardian.

Legislation	Overview	Commentary
		is important (unless the victim themselves expresses an opinion to the contrary). **Therapeutic justification for permitting disclosure, where victim consents** The process of sharing details of sexual assaults has been proven to help victims come to terms with their experience and ultimately, to reclaim a level of control.[8] Sexual assault is often accompanied by feelings of shame. However, permitting publication by those who are willing enables others who are suffering in silence to accept that their experience is shared, with the potential of reducing feelings of shame. **Justification for imposing an inability to provide consent to disclosure until the age of 18** A person under the age of 18 years of age who is a victim of sexual assault cannot consent to their publication of their details. This is primarily based on a need to protect children, as they are a vulnerable segment of society. In addition, research on brain development shows that children are not sufficiently able to comprehend the consequences of their actions. This lack of capacity for abstract thought deems children unable to provide

8 For example: Mary de Young and Barbara A. Corbin, 'Helping early adolescents tell: A guided exercise for trauma-focused sexual abuse treatment groups' (1994) 73(2) *Child Welfare*

Legislation	Overview	Commentary
		informed consent, in the same way that adults can.[9] This is reflected in the age of sexual consent in South Australia - which is 17,[10] or 18 years where the individual is in a position of authority over the person who is under 18 years old.[11] Whilst there is a level of arbitrariness to the exact age at which consent to publication can be given (due to differing developmental rates between individual children) cognitive development occurring during adolescence involves an increased sensitivity to future consequences of actions.[12] The ability to speak out about the experience is powerful. However, there can be unpredictable effects of doing so, which may not be appreciated by individuals earlier in their adolescence. For example: as mentioned previously, a defendant may counter-claim in defamation if the offender's identity can reasonably be inferred in the course of the victim's story being disclosed.
TASMANIA		
Evidence Act 2001 (Tas)	Section 194K prohibits the publication of: • the name, address, or any other reference or allusion likely to lead to the identification of:	**The current reform movement in Tasmania** The impetus for recent reform has been led by the impact of the #LetHerSpeak campaign, which has gained significant traction in Tasmania. The campaign

9 See for example, with specific reference to the age of sexual consent: Rachel Simpson and Honor Figgis, NSW Parliamentary Library Research Service, 'The age of consent' (1997) <https://www.parliament.nsw.gov.au/researchpapers/Documents/the-age-of-consent/bf21-1997.pdf>

10 *Criminal Law Consolidation Act 1935* (SA) s 57(2)

11 *Criminal Law Consolidation Act 1935* (SA) s 57(1)

12 Donald Coch, Kurt W Fischer and Geraldine Dawson, Human Behaviour, Learning and the Developing Brain: Atypical Development, (Guildford Publications, 2017)

Legislation	Overview	Commentary
	• any person in respect of whom a crime is alleged to have been committed under section 124, 125, 125A, 125B, 126, 127, 127A, 128, 129, 185 or 186 of the *Criminal Code 1924* (Tas). Each of those sections of the Criminal Code referred to above contain offences relating to: • sexual crimes against minors, indecent assault, rape and forcible abduction. Any person who publishes or causes to be published anything in contravention of section 194K is guilty of contempt and is liable to punishment for that contempt. Publication of this information, however, is permitted only with authority of the court (section 194K(1A)). In making such an order, the court will consider factors including: • whether disclosure is in the public interest; • whether the public interest weighs in favour of disclosure, might include considerations of whether the survivor has consented to the disclosure, and the importance of allowing the victim to speak about their experiences as part of the healing process; and • protecting the identity of other victims who might be revealed by disclosure. See: *Re Evidence Act 2001, s194K and the Application by the Australian Broadcasting Corporation and Davies Bros Ltd* [2003] TASSC 118; *Re an Application by the Australian Broadcasting Corporation pursuant to section 194K of the Evidence Act 2001* [2005] TASSC 41.	was initiated by a survivor, Grace Tame, who made a successful application to the Tasmanian Supreme Court to publish details of her story. Important concepts underpinning the campaign in Tasmania concern the empowerment of victims, changing the stigma associated with sexual crimes, and recognising that sharing experiences is an important aspect of the healing process for many victims. **Policy justifications for section 194K** Section 194K is a limited exception to the "open justice" principle that criminal proceedings should be conducted in public. The purpose of section 194K is to: • protect the survivor's privacy; • encourage survivors to come forward and report complaints to police under protection of anonymity; and • protect survivors from improper or unwanted media attention, or from perceived stigma (see *R v Age Company Ltd* [2000] TASSC 62, [13]). Although aimed primarily at media reporting, the Tasmanian laws also do not permit survivors to reveal information about their identity, even with their consent. As such, a survivor or media outlet may be guilty of contempt for publishing information that might reveal a survivor's identity. This issue was considered by the Tasmanian Supreme Court in *R v Age Company Ltd* [2000] TASSC 62. In that case, the identity of a survivor's sexual assault experiences was published with her consent, despite it being prohibited. Evans J held that this constituted

Legislation	Overview	Commentary
		contempt, and imposed a fine of $20,000 on the editor, and the newspaper company. His Honour remarked that, unlike other jurisdictions, the current Tasmanian provision does not recognise the survivor's consent because (at [13]): > Such a provision may encourage representatives of the media to pester victims to consent to publicity. It is undesirable to expose victims to this pressure at a time when they are likely to be in considerable emotional turmoil and may be ill-equipped to weigh up and assess the consequences of publicity. These views were later accepted by Underwood J in *Re Evidence Act 2001, s194K and the Application by the Australian Broadcasting Corporation and Davies Bros Ltd* [2003] TASSC 118. **Review of section 194K** The Tasmanian Law Reform Institute (**TLRI**) conducted a review of the operation of section 194K in 2013. To date, the Tasmanian government has not enacted any of the TLRI's recommendations. The Tasmanian government recently announced that it will commit to reforming the laws by 2020, and released a Discussion Paper in April 2019 inviting submissions on the direction of reform, whether the law strikes an appropriate balance, and the TLRI recommendations. In their 2013 report, the TLRI raised issues with section 194K relating to:

Legislation	Overview	Commentary
		• uncertainty regarding the scope of information that is protected; and • that the Tasmanian provisions do not provide for a defence to publication based on the survivor's consent. In relation to the issue concerning consent, the TLRI (at [3.4.2]) noted that there is a compelling argument that: • permitting victims to tell their stories helps to address systemic problems of stigma and victim-blaming associated with sexual violence; and • in such cases, there is a strong public interest in publishing the identity of victims as it helps to overcome the perceived shame that may attach to those experiences. However, the TLRI also noted that encouraging complainants to self-identify may be subverting their individual interests in pursuit of the greater social good (at [3.4.4]). The TLRI recommended that a protective provision which allows for a consent defence strikes a reasonable balance between these competing interests. In particular, the TLRI recommended that: • the publication of details which identify victims over 18 years old should be permitted with the leave of the court, if the victim has provided their consent, has the capacity to consent, and their consent was not coerced; • in making such an order, the court must consider all the circumstances of the case, including the views of the victim, and the risk that other victims may be identified.

Legislation	Overview	Commentary
		Comment A potential issue with this reform option proposed by the TLRI is that it did not recommend that consent alone was sufficient to permit publication. The recommendation still requires victims to seek leave of the court before they can tell their story. Given Grace Tame's experience,[13] having to go through a lengthy, traumatic, and costly court application process, it would seem to be inappropriate and inefficient to require survivors to first make an application to the court.
VICTORIA		
Judicial Proceedings Reports Act 1958 (Vic)	**Offence** Section 4 sets out the restrictions on publication of reports of judicial proceedings of proceedings involving sexual offences: A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the Crimes Act 1958, is alleged to have been	Victoria commenced a review of its suppression laws in 2016. A final report was delivered in September 2017. Amendments to the *Judicial Proceedings Reports Act 1958* (Vic) and the *Open Courts Act 2013* (Vic) received royal assent in July 2019 with the aim of improving the openness and transparency of the legal system. The amendments are intended to reinforce that open justice and freedom of communication are the default position and can only be displaced in specific circumstances where it is necessary to do so.

13 See for example: Lorna Knowles, 'Finally she can speak', *ABC Investigations,* (12 August 2019) < https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044>

Legislation	Overview	Commentary
	committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court. **Defence** The defence for the above offence differs if there is a pending procedure court or no pending procedure in court. The different scenarios are outlined below. *No pending proceeding in court* If there is no pending proceeding in court for an alleged offence at the relevant time, it is a defence to the above offence where the accused proves that: a) no complaint about the alleged offence had been made to a police officer before that time; or b) the matter was published or caused to be published in accordance with the permission of— a. the Supreme Court, the County Court or the Magistrates' Court granted on an application by a person; or b. the person against whom the offence is alleged to have been committed. *Pending procedure in court* If a proceeding in respect of the alleged offence is pending in a court at the relevant time, it is a defence to	The review found that in general in Victoria courts and tribunals made relatively few suppression orders in comparison to their overall caseloads, but that further work was needed to ensure future orders were clear and made only when necessary. The data collected showed that there was an issue with suppression orders failing to specify the grounds on which the order was made, and identifying what was actually suppressed. One of the recommendations made was that in each matter where a suppression order is made, the court be required to prepare a written statement of its reasons for the order, including the justification for its terms and duration. Another recommendation was that adult victims of sexual assault or who as children have been so subjected should, on the conviction of the offender, be able to opt for disclosure of their identity. The Victorian Report noted that the NT has the lowest threshold for making a suppression order in any Australian jurisdiction. The report comments on the NT Court of Appeal comments in *Australian Broadcasting Corporation v L* that while the principle of open justice remains a significant matter to be considered, the fundamental principle is the requirement that the accused receive a fair trial.

Legislation	Overview	Commentary
	the above offence for the accused to prove that the matter was published or caused to be published in accordance with the permission of that court granted on an application by a person. **Penalty** The penalty is a summary criminal offence with a maximum of 6 months imprisonment.	The report was based on amending these provisions to give proper attention to the principle of open justice. There was no focus on the impact to victims of being able to publicly announce that they were victims of sexual assault.
Open Courts Act 2013 (Vic)	**Information to be specified in an order** Section 13 provides the information that must be specified in a suppression order being that: a) the order is limited to achieving the purpose for which the order is made; and b) the order does not apply to any more information than is necessary to achieve the purpose for which the order is made; and c) it is readily apparent from the terms of the order what information is subject to the order. A suppression order: a) must specify the purpose of the order; and b) in the case of a proceeding suppression order or an order under section 26(1) (*see below*), must specify the applicable ground or grounds on which it is made.	

Legislation	Overview	Commentary
	Power to make an order Section 26 grants the Magistrates' Court the power to make an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the Court if the Court is satisfied that: a) the order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means; or b) the order is necessary in order to protect the safety of any person. **Review of orders** The court or tribunal that made a suppression order may review the order: a) on the court's or tribunal's own motion; or b) on the application of: a. the applicant for the order; b. a party to the proceeding in connection with which the order was made; c. the Attorney-General; d. the Attorney-General of another State or Territory or of the Commonwealth;	

Legislation	Overview	Commentary
	e. a news media organisation; f. any other person who, in the opinion of the court or tribunal, has a sufficient interest in the question of whether the order should be confirmed, varied or The applicant for the review of the suppression order is entitled to appear and be heard by the court or tribunal on the review of a suppression order. Following a review the court or tribunal: a) may confirm, vary or revoke the suppression order; and b) in addition, may make any other order that the court or tribunal may make under the Act.	
WESTERN AUSTRALIA		
Evidence Act 1906 (WA) s 36C	**Offence** Section 36C(1) states that "after a person is accused of a sexual offence no matter likely to lead members of the public to identify the complainant and, in the case of a complainant who is attending a school, no matter likely to lead members of the public to identify the school which the complainant attends, in relation to that accusation shall be published in a written publication available to the public or be broadcast, except by leave of the court which	The *Guidelines for the Media - Reporting in Western Australian Courts*, published on the Western Australia Supreme Court Website, provide guidance for media representatives reporting on court outcomes. These guidelines include s 36C in its list of legislative restrictions on reporting to ensure that reporters are aware that nothing that could identify the complainant in respect of an alleged or proven sexual offence can be published, including the school which a complainant attends. The guidelines further state that in certain circumstances, the name of the accused

Legislation	Overview	Commentary
	has or may have jurisdiction to try the person accused for that offence." Section 36C(2) imposes the criminal offence of summary conviction and a possible fine of $5,000 (for an individual) and $25,000 (for a body corporate) where a matter is published in contravention of section 36C(1). The offence can apply to both the broadcaster and the person who transmits or provides the program for broadcast or any person who exercises similar functions to the editor of a newspaper. **Defence** Section 36C(6) allows a complainant to be identified in the media provided that the complainant provides written authorisation and is over 18 at the time of providing that authorisation (and capable of making reasonable judgements).	also cannot be published due to the relationship between the accused and the complainant.[14] The requirements of section s 36(1) are discussed in *ZYX (pseudonym initials) v JD (pseudonym initials)* [2019] WADC 164, where the plaintiff's identity was not disclosed in the context of child sexual abuse as a matter of public policy. Importantly, Sleight CJDC considered whether any of the parties objected to the suppression of the plaintiff's identity before making the order to restrict publication: "Given the public policy consideration I have identified above, I am satisfied that such an order should be made restricting the publication of the identity of the plaintiff and that in all subsequent court documents the plaintiff's identity is to be anonymised by the use of a pseudonym. In making this order I am conscious of the fact that neither party nor the interveners has argued against the identity of the plaintiff being suppressed."[15] The case of *Ex parte Ibbs; WA Newspapers Ltd* (1996) 90 A Crim R 392 discussed the exception where leave of the court is obtained for the publication and Scott J held that such leave will be granted only in exceptional circumstances. In this case, the "victim"

[14] Supreme Court of Western Australia, Guidelines for the Media - Reporting in Western Australian Courts <https://www.supremecourt.wa.gov.au/_files/Guidelines%20for%20the%20Media.pdf >

[15] *ZYX (pseudonym initials) v JD (pseudonym intials)* [2019] WADC 164, [89].

Legislation	Overview	Commentary
		had admitted to conspiracy to pervert the course of justice by a false report of rape.[16]
Criminal Procedure Act 2004 (WA)	**Offence** Section 171(4)(c) states that, on application by a party to the case or on the court's own initiative, a court may order the prohibition or restriction of publication outside the courtroom of any matter that is likely to lead the public to identify a victim of an offence, if the court is satisfied that it is in the interests of justice to do so. Section 171(10) states that a person who contravenes the order commits an offence. **Defence** Section 171(11) provides the defence of consent, if the the victim (who has reached 18 years of age and is not incapable of making reasonable judgments by reason of mental impairment) authorised the publication.	This applies to the identification of a victim of any offence and is at the court's discretion, if it is in the interests of justice to make such an order to prohibit or restrict the publication. However, the defence of consent is available as long as the victim is an adult with capacity to make reasonable judgements in respect of authorising the publication.

[16] *Ex parte Ibbs; WA Newspapers Ltd* (1996) 90 A Crim R 392, 396.