

CLAUSE NOTES

Evidence Amendment Bill 2020

- Clause 1** **Short title**
Specifies the name of the proposed Act.
- Clause 2** **Commencement**
Provides that the Act commences on Royal Assent.
- Clause 3** **Principal Act**
Provides that the Principal Act that is being amended is the *Evidence Act 2001*.
- Clause 4** **Section 194K substituted**
The existing section 194K is repealed and replaced with a new section 194K.
- Section 194K(1)
The new subsection (1) inserts a summary offence for when a person breaches the prohibition on publishing identifying information without having obtained either an order from the court in accordance with subsection (5) or the victim's consent in line with subsections (3) and (4).
A person commits an offence if they publish, or cause to be published, 'identifying information' as defined in subsection (9) that identifies, or is likely to lead to the identification of a victim, defendant or witness or intended witness, in relation to any proceedings in any court in respect of the crimes listed in subsections (1)(a) and (b) and the offence in subsection (1)(c) unless, on the balance of probabilities, the publication was in accordance with a court order or the victim's consent.
At the time of introducing this Bill in the Tasmanian Parliament the crimes identified in section 194K(1)(a) and (b) from the *Criminal Code* are: s133 (Incest/Permitting incest), s124 (Sexual intercourse with a young person under the age of 17 years), s125 (Permitting unlawful sexual intercourse with a young person on premises, s125A (Maintaining a sexual relationship with a young person under the age of 17 years), s125B (Indecent act with or directed at a young person under the age of 17 years), s126 (Sexual intercourse with a person with a mental impairment), s127 (Indecent assault), s129 (Procuring by threats [or fraud]), s185 (Rape), s186 (Forcible abduction/ Abduction).
The offence identified in section 194K(1)(c) under s35(3) of the *Police Offences Act 1935* is where a person, with indecent intent, assaults any other person.
The maximum penalty for the offence for a body corporate is a maximum fine of 400 penalty units. For an individual, the maximum fine is 60 penalty units or a maximum term of imprisonment for 12 months, or both.
 - Section 194K(2)
The new subsection (2) provides a blanket prohibition on publishing 'identifying information' about a victim, defendant or witness or intended witness referred to in subsection (1). The prohibition continues whether or not criminal proceedings for the relevant crime or offence are, or have been finally determined or disposed of.

The prohibition on publication remains in place unless a victim has consented in accordance with subsections (3) and (4) or a court order has been issued under subsection (5).

- Section 194K(3)

The new subsection (3) provides that it is a defence to the summary offence under subsection (1) of publishing material that identifies, or is likely to lead to the identification of a victim, if the person charged with a breach can establish that when the 'identifying information' was published there was:

- o a court order allowing publication in accordance with subsection (5); or
- o the victim of a sexual crime had consented to the publication before publication occurred, consistent with the requirements in subsections (3) and (4).

To rely on a victim having validly and freely consented to the publication of their identity, the onus is on the person charged with the offence to establish all of the following:

- o That the identifying information that was published, such as the name, address, school, place of employment, relates to a victim of a crime or offence specified in subsection (1)(a)(i), (b)(i) or (c)(i); and
- o That the victim has consented in line with the requirements in subsection (4) to their identifying information being published; and
- o That the identifying information of the victim is published in keeping with that consent; and
- o That the publication of a victim's identifying information does not, 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 crime or offence, unless:
 - that other person is a victim in respect of the crime or offence in subsection (1)(a)(i), (b)(i) or (c)(i);
 - that other victim has consented in the same manner as the initial victim who wishes to publish their identity, in accordance with the requirements in subsection (4); and
- o the publication of the identifying information was done after the criminal proceedings in court for the relevant crime or offence have been exhausted. This clears the way for any civil proceedings that may be brought in respect of a crime or offence.

- Section 194K(4)

The new subsection (4) specifies the requirements that need to be satisfied for a person who is a victim, or a person who publishes identifying information about a victim, to reliably publish identifying information about a victim of a sexual crime and, if the need arises, to rely on the victim's consent to publish as a defence in proceedings for an offence against subsection (1).

For a victim to consent, they must meet the following conditions at:

- Paragraph (a) - that they are 18 years old at the time they consented to the publication and at the time the identifying information was published; and
- Paragraph (b) - that they consented in writing to their identifying information being published before it was published; and
- Paragraph (c) - that they understood, at the time they gave consent, that they may be identified, or identifiable, from their identifying information being published; and
- Paragraph (d) - that they were not coerced into consenting to identifying information about them being published.

- Section 194K(5)

The new subsection (5) provides that a court can make an order allowing the identifying information about a person referred to in subsection (1), such as a victim, a defendant or any witness or intended witness to be published. To do so, the court needs to be satisfied that:

- Each living victim of a sexual crime, who is identifiable, or is likely to be identified from the information being published under an order:
 - Has been consulted with their views sought about the order; and
 - Understands that they may be identified if the order is made and the information is published in line with the court order.
- In circumstances where a victim of a sexual crime or offence under subsection (1)(a)(i), (b)(i) or (c)(i) is deceased and is likely to be identified or identifiable when information is published under an order, the next of kin or legal representative of the deceased victim is to be:
 - Consulted regarding the order; and
 - Given a reasonable opportunity to inform the court of the wishes of the deceased person, if known, in respect of being identified or identifiable, if the order is made by the court and the information published in line with the court issued order.
- In determining whether to make an order the court is also to be satisfied that making an order is in the public interest.

- Section 194K(6)

The new subsection (6) provides that when a court makes an order under subsection (5) the court can include any conditions in the order such as the way the identifying information may be published.

- Section 194K(7)

The new subsection (7) provides that when a victim of a crime or offence listed in subsection (1)(a)(i), (b)(i) or (c)(i) applies to the court seeking an order to publish their identifying information in relation to a crime or offence covered by the section, that they are not required to pay the application filing fee. A media organisation

applying on behalf of a victim would still be required to pay the relevant application fee for the application.

- Section 194K(8)

The new subsection (8) retains the charge of contempt. A person who publishes, or causes to be published, identifying information in breach of the section commits a contempt of court and, if not prosecuted for the breach of the offence under subsection (1), is liable to a charge of contempt.

- Section 194K(9)

New subsection (9) inserts the definitions of “publish” and “identifying information” in the section.

Clause 5

Repeal of Act

This automatically repeals the amending legislation after the Act commences. The provisions that the amending legislation inserts into the Principal Acts still remain in force after the repeal of the Amending Act.