16 February 2024

Submissions at Strategy and Support
Department of Police, Fire and Emergency Management
GPO Box 308
Hobart TAS 7001
By email: Redacted

Dear Department of Police, Fire and Emergency Management,

Consultation on the *Community Protection (Offender Reporting) Amendment Bill 2023*

Australia's Right to Know coalition of Australian media organisations (ARTK) writes in response to the consultation on the *Community Protection (Offender Reporting) Amendment Bill 2023* (**the Bill**). Our focus is on clause 30 of the Bill – which inserts new sections 34A and 34B into the *Community Protection (Offender Reporting) Act 2005 (Tas)* (**the Act**).

The most egregious effect of these new sections will be to implement the broadest automatic statutory restraint in relation to offenders or alleged sexual offenders anywhere in Australia. No other serious offence or charge attracts such an identification restraint anywhere in Australia. Murderers, child killers, terrorists and the like are all able to be identified at any time provided no other statutory restraint on publication applies to their cases. The move to enact this sweeping automatic statutory restraint comes at a time when other Australian jurisdictions have repealed similar provisions.

The proposed sections will result in a number of other undesirable outcomes including, but not limited to:

- Significantly curtail public interest journalism;
- Expose survivors of some reportable offences to the risk of committing an offence punishable by penalties including jail time should they wish to rely on section 194K of the *Evidence Act 2001* (Tas) (**S. 194K**) and share their stories with the public and/or with other victim-survivors;

- Expose all members of the Tasmanian public – including the media – to possible liability for the commission of an offence for engaging in public participation, both in relation to things they do after the Bill is enacted and things they have already done online. Again, the penalty applicable to such an offence includes jail time; and

- Result in Tasmania becoming an outlier in the worst possible way. No other Australian state or territory has laws of the breadth or effect that clause 30 of the Bill proposes. If enacted, these provisions would see Tasmania heading in the opposite direction of the most recent developments around Australia in relation to the identification of alleged sexual offenders – that being NOT to suppress the identities of sexual offenders, and to NOT provide sexual offenders with special protections not afforded to other offenders including for murder.

We provide detailed information below and recommend changes to the drafting to minimise the impact on reporting and the people of Tasmania's right to know what's going on in their communities and their state.

1. CLAUSE 30 OF THE BILL

As stated above, clause 30 of the Bill inserts two new sections into the Act. For ease of reference, these proposed new sections 34A and 34B are set out in full at **Annexure 1** to this letter but in summary:

- **Section 34A** introduces the offences of:
  a) Engaging in public conduct intending to create, promote or increase animosity towards, or harassment of, a person who is an identified offender **(the Vigilante Offence)**: s. 34(3); and
  b) Engaging in public conduct likely to create, promote or increase animosity towards, or harassment of, a person who is an identified offender **(the Victimisation Offence)**: s. 34(4); and

- **Section 34B** publishing, distributing or displaying identifying information without prior written approval of the Minister **(the Identification Offence)**: s. 34B(2).

None of these three offences are currently part of Tasmanian law; there are no relevant defences in the drafting; and the maximum penalty for a breach of each offence is a fine not exceeding 200 penalty units[1], imprisonment for a term not exceeding 2 years or both.

As the preparation and distribution of content for news reporting will undoubtedly constitute the public conduct or publication, distribution or display the offences respectively require, the only question for ARTK media organisations is whether or not their conduct fulfils the remaining elements of each of each offence.

DEFINITIONS

The starting point for that determination is to consider who is an "identified offender" and what constitutes "identifying information" where:

[1] Which at the date of this letter equates to $39,000.

- An "identified offender" is defined by s.34A(1) as meaning "a reportable offender, or a person who has been charged with a reportable offence, about whom information is accessed or disclosed under this Act; and
- "Identifying information" is defined by s. 34B(1) "means information in respect of a reportable offender, or a person who has been charged with a reportable offence, that identifies the person or that the person is a reportable offender".

The analysis these two questions requires is almost identical since both definitions turn on who is a "reportable offender" and what is a "reportable offence". In each case:

- A "reportable offence"[2] means (inter alia):
  a) A Class 1, Class 2 or Class 3 offence[3] (see **Annexure 2** to this letter for a list of these offences as amended by the Bill, for ease of reference); and
  b) For all Class 1, 2 and 3 offences:
     i. an offence under a law of a foreign jurisdiction which, if committed in Tasmania, would constitute a Class 1, 2 or 3 offence; or
     ii. the offence of intending to commit a Class 1, 2 or 3 offence; or
     iii. the offence of attempting, conspiring or inciting the commission of a Class 1, 2 or 3 offence; or
     iv. an offence that, at the time it was committed was a Class 1, 2 or 3 offence, or would be caught by section 12 but was committed before the commencement of the Act; or
  c) Murder or manslaughter if there are reasonable grounds to believe that a Class 1, 2 or 3 offence was committed by the offender in the course of or as part of that offending; or
  d) An offence that results in the making of an offender reporting order, namely an order made under sections 6, 7 or 9 of the Act or a corresponding offender reporting order[4];

- A "reportable offender" is (inter alia) a person who has been sentenced and is subject to an order under sections 6, 7 or 9 of the Act or who is a corresponding reportable offender[5]; and

- Both definitions include offenders the subject of orders made under section 7 of the Act (**Section 7 Offenders**). That section empowers the court to make an order under the Act when a person is sentenced for an offence that is not a Class 1, 2 or 3 offence which would not ordinarily result in the person becoming a reportable offender.

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[2] Section 12 of the Act

[3] See the lists in Schedules 1, 2 and 3 of the Act

[4] Pursuant to section 3 of the Act, where a "corresponding offender reporting order" is an order made under a corresponding Act that is prescribed by regulation to be corresponding offender reporting orders for the purposes of the Act and "corresponding Act" means a law of a foreign jurisdiction – prescribed by the regulations as a corresponding Act – that provides for people who have committed specified offences to report in that jurisdiction information about themselves and to keep that information current for a specified period.

[5] Pursuant to section 11 of the Act, a "corresponding reportable offender" means a person who – whether before or after the commencement of the Act – had been in a foreign jurisdiction and at that time had been required to report to the corresponding registrar in that jurisdiction; and, who would, if he/she were currently in that foreign jurisdiction, be required to report to the corresponding registrar in that jurisdiction for a longer period than he/she would be required to report under the Act.

Whether or not a person is a reportable offender or a person charged with a Class 1, 2 or 3 offence can be determined with certainty (the former because it cannot occur unless the person has been sentenced; the latter because the offence will be on the list in Annexure 2). However, the inclusion of Section 7 Offenders in the meaning of "reportable offence" means that a person charged with an offence other than a Class 1, 2 or 3 offence could, nonetheless, be a person charged with a reportable offence but there is no way of knowing this until the person is sentenced and the opportunity to make an order under section 7 of the Act arises.

The repercussions of this uncertainty – which are exacerbated by the lack of single publication rule in relation to the Act as discussed below – differ when considering who is an "identified offender" and what is "identifying information":

Identified Offenders

A reportable offender will also be an Identified Offender. However, the Act and the Bill are unclear about whether a charged person is also an Identified Offender for two reasons:

- As outlined above, it may not be clear whether a person who is not facing a Class 1, 2 or 3 offence has been charged with reportable offence until the point of sentencing; and
- In order to meet the definition of Identified Offender a person not only has to be charged with a reportable offence, he or she also has to be a person "about whom information is accessed or disclosed under" the Act. The Act does not currently deal with information about people who have been charged but not convicted but it will do so if clauses 15 and 36 of the Bill are enacted. Those two clauses insert a number of new provisions into the Act relevantly including:
    - Section 15C, which empowers the Commissioner to require that a charged person make certain disclosure in relation to "child-related services" (which does not appear to be defined anywhere) or "reportable contact"[6];
    - Section 15D, which requires a person who is already working in a child-related service, or who applies to work at a child-related service, who is charged with a reportable offence to disclose the charge to his or her employer or potential employer;
    - Section 15E, which empowers the Commissioner to develop guidelines about when the Commission can disclose the fact that a person has been charged with a reportable offence to any employer or prospective employer of the accused "and" any parent, guardian or carer of a child with whom the Commissioner reasonably believes the accused has reportable contact; and
    - Section 44C, which allows a parent, guardian or carer to apply to the Commissioner for information about whether a person has been charged with a reportable offence.

  If introduced, each of these new sections will require information about a person who is charged – but not convicted – of an offence to be "accessed or disclosed" the Act.

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[6] Pursuant to section 17(4) of the Act, a reportable offender is taken to have reportable contact with a child if the reportable offender –

(a) generally resides in the same premises as the child, for at least 3 days (whether or not consecutive) in a period of 12 months; or

(b) is unsupervised and cares for, or supervises, the child for at least 3 days (whether or not consecutive) in a period of 12 months; or

(c) provides his or her contact details to the child or receives the child's contact details from the child; or

(d) engages with the child, for the purpose of inviting any further contact or communication with the child, in any form of actual physical contact; any form of oral communication (whether face-to-face, by telephone or by use of the internet); or, any form of communication made in a document (whether by writing or printing).

However, information used and disclosed under the Act is the subject of strict confidentiality requirements[7]. Consequently, it is likely to be impossible for a third party to confirm whether a person charged with a reportable offence is also a person "about whom information is accessed or disclosed under" the Act and thus an identified offender.

DEFINTION – *Identifying Information*

There is no requirement in the definition of "identifying information" that the relevant information be about a charged person – or a reportable person for that matter – "about whom information is accessed or disclosed under" the Act. Unlike Identifiable Offenders, identifying information is not required to have any connection to the Act at all. Lastly, to constitute identifying information, the relevant data must be information "that identifies the person **or** that the person is a reportable offender" [emphasis added]. That being the case:

- Identifying information includes information about people charged with offenses that are not Class 1, 2 or 3 offenses but ultimately become reportable offenders due to a section 7 order which, as explained above, are unpredictable and difficult for third parties to confirm;
- Any identifying information about a reportable offender or a person charged with a reportable offence obtained from any source whatsoever – whether in relation to the Act or otherwise – will meet this definition; and
- The use of just the name and/or photograph of a reportable offender, or a person charged with a reportable offence, alone – without any other information or context – meets the definition, as would any other piece of information which is unique enough to identify such a person.

These unworkable definitions underpin the three new offences and, as alluded to above, have ramifications for ARTK's members and also for the general Tasmanian public, particularly for survivors of sexual offending:

THE VIGILANTE OFFENCE – Engaging in public conduct intending to create, promote or increase harassment of a person who is an identified offender

We note that the Tasmanian government has announced that it intends to remove the words "animosity towards" where they appear in the Bill and, consequently, these submissions say nothing further about that part of the new offences.

Harassment is defined in s. 34A(1) as including "threat, serious and substantial abuse and severe ridicule", none of which are further defined in the Act or the Bill. However, "severe ridicule" is a term that is already deployed in Tasmania and interstate anti-discrimination legislation.[8] TASCAT precedent on the meaning of "severe ridicule" is well established and notes the qualification of ridicule by the requirement that it be "severe":

> *The words "hatred", "contempt" and "ridicule" are to be given their ordinary meaning noting that the latter two are qualified by the adjectives "serious" and "severe" respectively. Thus the public act must be capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn*

[7] See section 45 of the Act and proposed section 15F in clause 15 of the Bill.

[8] See *Anti-Discrimination Act 1998* (Tas) s. 19

for a person or extreme derision of a person or group of persons. The conduct must be capable of arousing reactions at the extreme end of the scale. [emphasis added][9]

Given the meaning of identified offender and harassment are uncertain, exactly how the Vigilante Offence will be applied in practice is unclear in relation to both media organisations and to members of the Tasmanian public. That said, media organisations publish, broadcast and communicate material to inform the public; our conduct is never "intended" to harass generally or within the Bill's specific proposed meaning of that term.

We suspect that the Vigilante Offence is not directed at news reporting or at the majority of the Tasmanian public, but rather to conduct by some who are not content to let the justice system do its work. In addition to refining the definitions applicable to the Vigilante Offence, ARTK's concerns for ourselves and those members of the Tasmanian public who should not be caught by the offence could be significantly reassured by the inclusion in the Bill of an exception in the same style as section 55 of the Anti-Discrimination Act, which is discussed in greater detail below.

THE VICTIMISATION OFFENCE – Engaging in public conduct likely to create, promote or increase harassment of a person who is an identified offender

The same definition of harassment applicable to the Vigilante Offence applies to the Victimisation Offence. "Likely", in relation to similar legislation in WA, does not require that an applicant show the public conduct did create, promote or increase harassment but rather is applied "*in its ordinary usage*" and "*means a substantial chance and not a remote chance; more than just a mere possibility*".[10]

ARTK has greater concerns about the Victimisation Offence for the following reasons:

- As noted above, the definitions applicable to this offence are unclear and as a result no one – ARTK media organisations or otherwise – can ever be certain that public conduct they intend to engage in that concerns an identified offender or constitutes harassment;

- Because the Victimisation Offence only requires that public conduct be "likely" to have the outcomes prescribed, this is an offence that could easily be breached by media organisations in the ordinary course of publication, broadcasting or communicating and by members of the Tasmanian public who choose to engage in what would otherwise be entirely lawful acts of public participation;

- The Victimisation Offence has no exception for news reporting. A series of court reports or reports of parliamentary proceedings about or referring to an identified offender – all fair, accurate and defensible for defamation purposes – "are very likely to create or increase harassment of the subject of those reports". In fact, in the WA case of Re ETE[11], the District Court found that one, unidentifiable news report that made a serious racial slur against ETE was sufficient to breach of a

[9] *Wood v Gerke & Ors* [2007] TASADT 3 at [85]

[10] *Re ETE* [2023] WADC 137 at [67] – [69] citing *Boughey v The Queen* [1986] HCA 29; (1986) 161 CLR 10 [15] - [18] (Mason, Wilson & Deane JJ)

[11] [2023] WADC 137

section of the WA Criminal Code equivalent to the Victimisation Offence in relation to harassment on the basis of race[12];

- The Victimisation Offence has no exception for acts of public participation. Public advocacy at any level, including but not limited to letter writing or email campaigns to government officials or corporations, petitions, being a party to litigation, or engaging in peaceful protests or boycotts are all acts of public life that should be lawful. However, again, if done in relation to an identifiable offender would very likely create, promote or increase harassment of that person and thus constitute an offence;

- Whether they choose to be identified pursuant to S. 194K or not, survivors of sexual offences will be amongst those who want to engage in the acts of public participation described above. If enacted without any protection for such activities, the Victimisation Offence will inevitably lead to the silencing of survivor voices at a time when the rest of Australia (and indeed the world) is engaging in meaningful public debate about important matters pertaining to sexual violence such as affirmative consent and coercive control. The alternative possibility – that a survivor could choose to speak and then find themselves being re-victimised by facing criminal prosecution for the Victimisation Offence – is self-evidently reprehensible; and

- Both news reporting and public participation often intersect with government and politics. Without an exception allowing for this to occur, s. 34B(4) could infringe the *Lange v Australian Broadcasting Corporation*[13] freedom of communication and become the subject of challenges as to whether the provisions are contrary to the Commonwealth Constitution resulting in costly court challenges and unnecessarily taking up public resources including court time and resources.

In the circumstances, ARTK recommends that if the Victimisation Offence is to be enacted, that it too be the subject of amendments including the addition of an exception akin to section 55 of the Anti-Discrimination Act as discussed below.

THE IDENTIFICATION OFFENCE – Publishing, distributing or displaying identifying information without prior written approval of the Minister

The Identification Offence is the cause of ARTK's greatest concerns in relation to the Bill. We cannot stress highly enough that is s. 34B is enacted unamended it would equate to the *most regressive step* taken by any legislature anywhere in Australia since 2005 when defamation's contextual truth defence was annihilated by poor drafting.

Our specific concerns with the Identification Offence are as follows:

- We have already outlined the problem with the definition of "identifying information" above. In addition, because the meanings of "publish" and "distribute" or "display" are directed at the

[12] *Criminal Code Act Compilation Act 1913* (WA) s. 78: any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years.

[13] HCA 25, (1997) 189 CLR 520

provision of information "to the public or a section of the public" or "in or within view of a public place respectively" the offence is not limited to conduct that would be engaged in by media organisations and/or members of the Tasmanian public. Conduct online by people outside Tasmania could readily cause publication of identifying information inside Tasmania, thus triggering the Identification Offence;

- There is no qualification on where the identifying information must come from before the relevant publication, distribution or display constitutes an offence: all that is required to breach the section is to identify a reportable offender or a person charged with a reportable offence. The name or photograph of such a person alone, published, distributed or displayed in any context, will breach irrespective of whether the use is by a media organisation or any other member of the Tasmanian or Australian public. That, coupled with the fact that the offence does not require the publisher, distributor or displayer to intend to identify an identified offender – or even that that person knew or ought to reasonably have known that the publication, distribution or display would identify – makes s. 34B a hairpin offence, easily breached, by anyone;

- As previously stated in relation to the Victimisation Offence, ARTK's particular concerns lie in the fact that court reports, reports of parliamentary proceedings and other news reporting that otherwise enjoys the protection of the Defamation Act are not exempted. Moreover, even if the Tasmanian or Australian Federal Police urgently asked a media organisation to publish information in the furtherance of a case, we could not do so if what we were being asked to circulate included identifying information unless and until the Minister authorised publication;

- As discussed in relation to the Victimisation Offence, the Identification Offence is likely to disproportionately apply to survivors of sexual offences engaging in otherwise lawful acts of public participation. One offender's name on a placard outside parliament; one offender's name in an email to members of parliament urging statutory reform; one offender's photograph on a website warning others about predatory conduct. Each of these example breaches s. 34B as currently drafted. Yet, these are everyday acts of public participation that should not require the paternalistic oversight of the Minister's permission before they can be engaged in;

- If enacted unamended, the Identification Offence will weaken the S. 194K right of survivors to choose to be identified for the majority of the group of brave individuals who engage with the courts. By way of example, it is well understood that women are more likely to experience sexual violence than men. Those women are "*more likely to experience sexual violence since the age of 15 by a male they knew than by a male stranger*"[14] and where a survivor and assailant are related or acquainted identifying one often leads to the identification of the other.[15] A survivor who has waited until all "*criminal proceedings in court, in respect of the relevant alleged crime or offence, were finally determined or otherwise disposed of*"[16] to self-identify or authorise others to tell her story

[14] https://www.abs.gov.au/statistics/people/crime-and-justice/sexual-violence/latest-release

[15] Noting that this is an issue ARTK's members already face on a daily basis when reporting not only sexual violence but other court proceedings where automatic statutory restraints prohibiting a class of people from being identified apply.

[16] S. 194K

won't be able to do so if s. 34B is enacted unamended; her assailant is her husband, partner, father, brother, uncle or other family member or friend; and, that assailant is a reportable offender;

- In some circumstances, both media organisations and members of Tasmanian public could find themselves charged twice with both the Victimisation and Identification Offence. That risk is particularly exacerbated by the deficiencies in the definition of "identified offender" and "identifying information" outlined above and the lack of single publication rule in relation to the Act which is discussed below;

- Because the relevant "identifying information" can be derived from any source but also applies to people who have only been charged with, but not convicted of, a reportable offence, the Identification Offence will be the broadest automatic statutory restraint in relation to offenders or alleged offenders anywhere in Australia. No other serious offence or charge attracts such an identification restraint anywhere in Australia. Murderers, child killers, terrorists and the like are all able to be identified at any time provided no other statutory restraint on publication applies to their cases;

- Moreover, the move to enact this sweeping automatic statutory restraint comes at a time when other Australian jurisdictions have repealed similar provisions. Prior to 2020 only three Australian jurisdictions had legislation that prohibited the identification of an accused in a sexual offence case. Since that time, both SA and Queensland have accepted that such laws are antiquated, being based on the premise that complainants in sexual offence cases lie and amended their legislation in favour of allowing for suppression/non-publication orders.[17] Even when SA and Queensland did prohibit the identification of the accused in a sexual offence case:
    - the restraint fell away once the accused was committed to stand trial in relation to the relevant sexual offending, as is currently the case in the NT; and
    - the sexual offending to which the interstate legislation applied was a much smaller set than the wide range of offences set out in Annexure 2 to this letter;[18] and

- The unrestrained nature of the Identification Offence – particularly in light of the fact there is no other Australian jurisdiction with comparative legislation – raises the same Lange concerns and potential outcomes as the Victimisation Offence.

2. OTHER AUSTRALIAN JURISDICTIONS

While there is no uniformity in this area of law across Australian jurisdictions, as stated above there is nowhere else in Australia has legislation as restrictive as the three new offences, largely because interstate laws target specific conduct and information.

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[17] *Evidence Act 1929* (SA) s. 71A prohibits identification of the accused in a sexual offence case up until the time of his or her first court appearance specifically to preserve the ability of that person to apply for a suppression order while Queensland repealed their ban on identifying the offender in a prescribed sexual offence case entirely and enacted a non-publication order making regime: see *Crimes (Sexual Offences) Act 1978* (Qld) ss. 7 – 7F. Such orders must lapse in the event that the accused is committed to stand trial for the prescribed sexual offence: Crimes (Sexual Offence) Act s. 7(2).

[18] See meanings of "sexual offence" in *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s. 3; "prescribed sexual offence" in Criminal Law (Sexual Offences) ACT s. 3; and, s. sexual offence in Evidence Act 1929 s. 4.

In relation to the Vigilante and Victimisation Offences, should Tasmania enact the Bill unamended it will join the minority as only SA[19] and WA[20] have legislation in substantially the same terms.[21] In each case, we have been unable to find any precedent citing the SA and WA provisions[22] which were enacted in 2013 and 2012 respectively: before ARTK routinely made submissions to state and territory governments in response to consultation requests. Should the opportunity arise to comment on these laws in either state, ARTK would welcome the opportunity to do so and will make submissions in substantially the same terms set out here.

Importantly:

- The SA provision applies to conduct in relation to an "identified offender" who is a registrable offender whose personal details are published or provided by the Commissioner under Part 5B of the Act. "Registrable offenders"[23] are people who have either been sentenced for a class 1 or 2 offence or who have been made the subject of a paedophile restraining order under s. 99AA of the *Criminal Procedure Act 1921* (SA); and
- Similarly, the WA provision applies to conduct in relation to an "identified offender" who is a person whose particulars have been published or provided by the Commissioner under ss. 85F through 85G of the WA act. The Commissioner is only authorised to publish/provide such information about a "reportable offender"[24] which – subject to certain clearly identifiable exceptions – means "a person whom a court, on or after the commencement day, sentences for a reportable offence".

There is no uncertainty in either jurisdiction about who the legislation applies to because they do include people who have only been charged, with the one clear exception in SA of a person who is the subject of a paedophile restraining order. In all other circumstances, the Vigilante and Victimisation Offence equivalents only apply to those who have been sentenced.

In relation to the Identification Offence, NSW[25], Queensland[26] and Victoria[27] have no equivalent. The two territories equivalents of the Identification Offense can only be breached if the relevant publication is in relation to "*a proceeding on an application for an order for the person under this chapter*"[28] or "*any proceeding relating to a prohibition order*"[29], respectively. Lastly, SA and WA both limit their respective

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[19] *Child Sex Offenders Registration Act 2006* (SA) s. 66I

[20] *Community Protection (Offender Reporting) Act 2004* (WA) s. 85L

[21] Noting that *Sex Offenders Registration Act 2004* (Vic) s. 61G the offence in Victoria only applies to the publication of information about an identified person causing the requisite animosity or harassment; that the publisher "*knows, or ought reasonably to know*" that the publication would have that effect; and, that the relevant information that is publish be "information about a registrable offender that has been published by the Chief Commissioner of Police under section 61A(1)". In that respect, this Victoria offence is more similar to the Identification Offence than the Vigilante or Victimisation Offences.

[22] Although we accept that in the case of the equivalents to the Victimisation Offence in both states that may be because they are summary offences.

[23] *Child Sex Offenders Registration Act 2006* (SA) s. 6

[24] *Community Protection (Offender Reporting) Act 2004* (WA) s. 6

[25] *Child Protection (Offenders Registration) Act 2000* (NSW)

[26] *Child Protection (Offender Reporting and Offender Prohibition Order) Act* (Qld)

[27] As is often the case, Victoria has prescribed non-publication order making powers instead which are directed at restraining publication of information about proceedings: *Serious Offenders Act 2018* (Vic) s. 279 and *Sex Offenders Registration Act 2004* (Vic) s. s. 66ZZB

[28] *Crimes (Child Sex Offenders) Act 2005* (ACT), s. 132ZH

[29] *Child Protection (Offender Reporting and Registration) Act 2004 (NT), s. 88*

equivalents to the Identification Offence via the definition of "identifying information". In SA[30], "*information that is identifiable as the personal details of a person published by the Commissioner under section 66F*" of the Act; and, in WA[31] it is the personal details, photograph and locality, or information that a person is a reportable offender, published or provided by the Commissioner under sections 85F through 85J of the Act.

Without even turning to whether a person who has been charged but not convicted could be the subject of any of the interstate identification offences – which ARTK doubts is the case – each interstate offence limits the type of information or the way in which it is disclosed to tailor their offences and avoid the broad application s. 34B of the Bill will have if enacted. ARTK submits that this is a more appropriate approach to an offence of this kind and one which balances the rights of the offender against the Australian public's right to know by way of news reporting and the ability of Tasmanians to engage in acts of public participation.

3. LACK OF SINGLE PUBLICATION RULE

Lastly, all three offences raise the problem of ongoing publication identified in *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575. As you may recall, in that case the High Court held online material is published at the time it downloaded and comprehended by a recipient, with the result that as long as that material remains available to be downloaded from the internet, it continues to be published anew each time it is accessed. This was remedied in relation to defamation by the introduction of single publication rule in the six Australian jurisdictions who enacted the Stage 1 reforms to their respective defamation legislation.[32]

Single publication rule does not, and will not, apply to the Act. That being the case:

- Material about identified offenders or identifying information that was lawful at the time it was first uploaded since the inception of the Internet will, after the Bill is enacted, become illegal; and
- This issue applies across to board to both media organisations and the general public, whether they are in Tasmanian or elsewhere in Australia.

While they are by no means perfect, the amendments recommended below should assist in curtailing this effect.

RECOMMENDATIONS

ARTK is not aware of any particular instance or increase in the victimisation of sexual offender in Tasmania and, that being the case, our principle position is that the three new offences are not required at all.

If it is the case that Bill will proceed and include these new offences, then in the circumstance – and taking all of the above comments into account together with the fact that ARTK routinely advocates against applying jail terms to offences that are particularly likely to apply to journalism – we recommend the following amendments be made:

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[30] *Child Sex Offenders Registration Act 2006* (SA) s. 66J

[31] *Community Protection (Offender Reporting) Act 2004* (WA) s. 85M

[32] See *Defamation Act 2005* (Tas) Part 4, Division 1

34A. Conduct intended to incite ~~animosity towards, or~~ harassment of~~,~~ reportable offenders

(1) In this section –

~~animosity towards means hatred of or serious contempt for;~~

harassment means ~~includes~~ threat, serious and substantial abuse and severe ridicule;

identified offender means a reportable offender~~, or a person who has been charged with a reportable offence,~~ about whom information is accessed or disclosed under this Act;

public place includes –

(a) a place to which the public, or any section of the public, has or is permitted to have access, whether on payment or otherwise; and

(b) a privately owned place to which the public has access with the express or implied approval of, or without interference from, the owner, occupier or person who has the control or management of the place; and

(c) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access.

(2) In subsection (3) or (4) –

(a) reference to conduct includes a reference to conduct occurring on a number of occasions over a period of time; and

(b) conduct is taken not to occur in private if it –

(i) consists of any form of communication with the public or a section of the public; or

(ii) occurs in a public place or in sight or hearing of people who are in a public place.

(3) A person must not engage in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a person who is an identified offender.

Penalty: Fine not exceeding 200 penalty units ~~or imprisonment for a term not exceeding 2 years, or both~~.

(4) A person must not engage in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a person who is an identified offender.

Penalty: Fine not exceeding 200 penalty units ~~or imprisonment for a term not exceeding 2 years, or both~~.

(5) This section does not apply if the person's conduct is –

(a) a fair report of a public act; or

(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

(ii) any purpose in the public interest.

34B. Publication, display and distribution of identifying information of reportable offender

(1) In this section –

display means display in or within view of a public place, as defined in section 34A;
distribute means distribute to the public or a section of the public;
identifying information means information in respect of a reportable offender~~, or a person who has been charged with a reportable offence,~~ that identifies that the person ~~or that the person~~ is a reportable offender and:

i. is in relation to proceedings for orders under this Act; or
ii. was published by the Commissioner under this Act;

publish means publish to the public or a section of the public.

(2) A person must not, without having first obtained the written approval of the Minister, publish, distribute or display any identifying information.
Penalty: Fine not exceeding 200 penalty units~~ or imprisonment for a term not exceeding 2 years, or both~~.

(3) Subsection (2) does not apply to a person who publishes, distributes or displays information in accordance with the provisions of this Act.

We trust this submission is useful. Please do not hesitate to make contact should there be questions about any of these matters.

Yours sincerely

Georgia-Kate Schubert
On behalf of Australia's Right to Know coalition of media organisations

ANNEXURE 1 – PROPOSED SS. 34A & 34B

34A. Conduct intended to incite animosity towards, or harassment of, reportable offenders

(1) In this section –

animosity towards means hatred of or serious contempt for;

harassment includes threat, serious and substantial abuse and severe ridicule;

identified offender means a reportable offender, or a person who has been charged with a reportable offence, about whom information is accessed or disclosed under this Act;

public place includes –

(a) a place to which the public, or any section of the public, has or is permitted to have access, whether on payment or otherwise; and

(b) a privately owned place to which the public has access with the express or implied approval of, or without interference from, the owner, occupier or person who has the control or management of the place; and

(c) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access.

(2) In subsection (3) or (4) –

(a) reference to conduct includes a reference to conduct occurring on a number of occasions over a period of time; and

(b) conduct is taken not to occur in private if it –

(i) consists of any form of communication with the public or a section of the public; or

(ii) occurs in a public place or in sight or hearing of people who are in a public place.

(3) A person must not engage in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a person who is an identified offender.

Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both [noting that 200 penalty units currently equates to $39,000].

(4) A person must not engage in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a person who is an identified offender.

Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both.

34B. Publication, display and distribution of identifying information of reportable offender

(1) In this section –

display means display in or within view of a public place, as defined in section 34A;

distribute means distribute to the public or a section of the public;

identifying information means information in respect of a reportable offender, or a person who has been charged with a reportable offence, that identifies the person or that the person is a reportable offender;

publish means publish to the public or a section of the public.

(2) A person must not, without having first obtained the written approval of the Minister, publish, distribute or display any identifying information.

Penalty: Fine not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both.

(3) Subsection (2) does not apply to a person who publishes, distributes or displays information in accordance with the provisions of this Act.

ANNEXURE 2 – CLASS 1, 2 & 3 OFFENCES AS AMENDED BY THE BILL

Key
Green text will be inserted by the Bill
Red struck through text will be deleted by the Bill
Blue highlighted text are the offences that are caught by s. 194K of the Evidence Act 2001 (Tas)

Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)

- ~~Section 72A, Making or reproducing child exploitation material, causing or permitting child exploitation material to be made or being in any way involved in the making or reproduction of child exploitation material (C2)~~
- Section 72, Make or produce bestiality (C2)
- Section 72A(a), Make or reproduce child exploitation material (C2)
- Section 72A(b), Cause or permit child exploitation material to be made or reproduced (C2)
- Section 72A(c), Be involved in the making or reproduction of child exploitation material (C2)
- Section 73, Procuring, or inviting or attempting to procure, child to be involved in making child exploitation material (C3)
- Section 73A, Distributing child exploitation material or facilitating the distribution of child exploitation material (C2)
- ~~Section 74A, Possessing, accessing or attempting to access child exploitation material (C1)~~
- Section 74, Possessing bestiality product (C1)
- Section 74A(a), Possessing child exploitation material (C1)
- Section 74A(b), Accessing or attempting to access, child exploitation material (C1)

Criminal Code (Tas)

- Section 105A(2), Fail to report the abuse of a child (C2)
- Section 122, Bestiality (C2)
- Section 124, Penetrative sexual abuse of a child [*or* young person] (C2)
- Section 124A, Penetrative sexual abuse of a child [*or* young person] by a person in a position of authority (C2)
- ~~Section 125, Permitting penetrative sexual abuse of a child [*or* young person] on premises (C2)~~
- ~~Section 125A, Persistent sexual abuse of a child [*or* young person] (C2)~~
- Section 125(a), Permit penetrative sexual abuse of child or young person on premises – owner or occupier (C2)
- Section 125(b), Permit penetrative sexual abuse of child or young person on premises – manager or controller (C2)
- Section 125A, Persistent sexual abuse of a child or young person (C3)
- Section 125B, Indecent act with or directed at a child [*or* young person] (C2)
- Section 125C(2), Procuring a child [*or* young person] for penetrative sexual abuse (C3)
- Section 125C(3), Procuring a child [*or* young person] for indecent act (C2)
- Section 125E(2), Fail by a person in authority to protect a child from a sexual offence (C2)
- Section 125D(1), Grooming with intent to procure a child *or* young person] for sexual abuse (C3)
- Section 125D(3), Grooming with intent to expose a child [*or* young person] to indecent material (C1)
- Section 126, Penetrative sexual abuse of a person with a mental impairment (C2)
- Section 127(1), Indecent assault (C2)
- ~~Section 127A(1), Aggravated sexual assault (C2)~~
- ~~Section 127A(1), Aggravated sexual assault (if the person against whom the offence is committed is a child) (C3)~~
- Section 129(a), Procure a person for penetrative sexual abuse by threat or intimidation (C3)

- Section 129(b), Procure a person for penetrative sexual abuse by false pretence (C3)
- Section 130, Involving a person under the age of 18 years in the production of child exploitation material (C3)
- Section 130A, Producing child exploitation material (C2)
- Section 130B(1), Distributing child exploitation material (C2)
- Section 130C, Possessing child exploitation material (C1)
- Section 130D, Accessing child exploitation material (C1)
- ~~Section 133(1), Incest (if the person against whom the offence is committed is a child) (C3)~~
- Section 133(2), Permit incest (C2)
- Section 137, Indecency (C1)
- Section 138, Exhibiting obscene matter (C1)
- Section 133(1), Incest (C2)
- Section 139(b), Interfering (indecently) with human remains (C2)
- Section 165A, Infanticide (C3)
- Section 169, Administering a drug with intent to facilitate the commission of an offence (C2)
- Section 169, Administering a drug with intent to facilitate the commission of an offence (if the person against whom the offence is committed is a child) (C3)
- Section 170A, Persistent family violence (the commission of which involved an unlawful family violence act involving an offence against another provision listed in this Schedule) (C2)
- Section 178, Ill-treatment of child (C2)
- Section 178A, Female genital mutilation (C3)
- Section 178B, removal of child from state for performance of female genital mutilation (C3)
- Section 185, Rape (C3)
- Section 186(1), Forcible abduction (C2)
- Section 186(2), Abduction (C2)
- Section 189, Abduction of a young person under the age of 17 years (C2)
- Section 191(1), Abduction of a child (C3)
- Section 191(2), Harbouring an abducted child (C3)
- Section 191A(a), Kidnapping (C3)
- Section 192(1), Stalking and bullying (C2)
- Section 192(1), Stalking and bullying (if the person against whom the offence is committed is a child) (C3)

Customs Act 1914 (Cth)

- Section 233BAB, Special offences relating to tier 2 goods (if the offence involves items of child pornography or of child exploitation material) (C1)

Criminal Code Act 1995 (Cth)

- Section 271.4, Trafficking in children (C3)
- Section 271.7, Domestic trafficking in children (C3)
- Section 272.8, Sexual intercourse with a child outside Australia (C3)
- Section 272.9, Sexual activity (other than sexual intercourse) with a child outside Australia (C2)
- Section 272.10, Aggravated offence – child with mental impairment or under care, supervision or authority of defendant (C3)
- Section 272.11, Persistent sexual abuse of child outside Australia (C3)
- Section 272.12, Sexual intercourse with young person outside Australia – defendant in position of trust or authority (C2)
- Section 272.13, Sexual activity (other than sexual intercourse) with young person outside Australia – defendant in position of trust or authority (C2)
- Section 272.14, Procuring child to engage in sexual activity outside Australia (C2)

- Section 272.15, "Grooming" child to engage in sexual activity outside Australia (C2)
- Section 272.18, Benefiting from offence against this Division (C3)
- Section 272.19, Encouraging offence against this Division (C3)
- Section 272.20, Preparing for or planning offence against this Division (C2)
- Section 273.5, Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia (C1)
- Section 273.6, Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia (C1)
- Section 273A.1, Possession of child-like sex dolls etc. (C1)
- Section 273B.4, Fail to protect child at risk of child sexual abuse offence (C1)
- Section 273B.5(1), Fail to report child sexual abuse offence – reasonable belief (C1)
- Section 273B.5(2), Fail to report child sexual abuse offence – reasonable suspicion (C1)
- Section 273.7, Aggravated offence – offence involving conduct on 3 or more occasions and 2 or more people (C2)
- Section 471.16, Using a postal or similar service for child pornography material (C1)
- Section 471.17, Possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service (C1)
- Section 471.19, Using a postal or similar service for child abuse material (C1)
- Section 471.20, Possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service (C1)
- Section 471.22, Aggravated offence – offence involving conduct on 3 or more occasions and 2 or more people (C2)
- Section 471.24, Using a postal or similar service to procure persons under 16 (C1)
- Section 471.25, Using a postal or similar service to "groom" persons under 16 (C1)
- Section 471.25A(1), Using a postal or similar service to "groom" persons under 16 – procurement for sender (C1)
- Section 471.25A(2), Using a postal or similar service to "groom" persons under 16 – procurement for another person (C1)
- Section 471.25A(3), Using a postal or similar service to "groom" persons under 16 – procurement for sexual activity in presence of sender or other person (C1)
- Section 471.26, Using a postal or similar service to send indecent material to person under 16 (C1)
- Section 474.19, Using a carriage service for child pornography material (C1)
- Section 474.20, Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service (C1)
- Section 474.22, Using a carriage service for child abuse material (C1)
- Section 474.22A, Possessing or controlling child abuse material obtained o accessed using a carriage service (C1)
- Section 474.23, Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service (C1)
- Section 474.23A, Conduct for the purposes of electronic service used for child abuse material (C1)
- Section 474.24A, Aggravated offence – offence involving conduct on 3 or more occasions and 2 or more people (C2)
- Section 474.25B, Aggravated offence – child with mental impairment or under care, supervision or authority of defendant (C2)
- Section 474.25A, Using a carriage service for sexual activity with person under 16 years of age (C1)
- Section 474.25C, Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16 years of age (C1)
- Section 474.26, Using a carriage service to procure persons under 16 years of age (C1)
- Section 474.27, Using a carriage service to "groom" persons under 16 years of age (C1)

- Section 474.27AA(1), Using a carriage service to "groom" another person to make it easier to procure person under 16 years of age – procurement for the sender (C1)
- Section 474.27AA(2), Using a carriage service to "groom" another person to make it easier to procure person under 16 years of age – procurement for another person (C1)
- Section 474.27AA(3), Using a carriage service to "groom" another person to make it easier to procure person under 16 years of age – procurement for activity in the presence of sender or other person (C1)
- Section 474.27A, Using a carriage service to transmit indecent communication to person under 16 years of age (C1)

Police Offences Act 1935 (Tas)

- Section 7A, Loitering near children (C1)
- Section 8(1A)(a), Exposing person (C1)
- ~~Section 13A, Observation or recording in breach of privacy (C1)~~
- Section 13A(1), Observation or recording in breach of privacy – private place or private act (C1)
- Section 13A(2), Observation or recording in breach of privacy – genital or anal region (C1)
- Section 13B, Publishing or distributing prohibited visual recording (C1)
- Section 13C, Possession of prohibited visual recording (C1)
- Section 21, Indecent or offensive behaviour (C1)
- Section 35(3), Assaulting with indecent intent (C1)

Sex Industry Offences Act 2005 (Tas)

- Section 7(1)(a), Intimidating, assaulting or threatening to assault a sex worker (C2)
- Section 7(1)(d), Administering to a sex worker, or causing a sex worker to take, any drug or other substance with the intent to stupefy or overpower that sex worker (C2)
- ~~Section 7(2), Intimidating, assaulting or threatening to assault person or threatening to cause person to be deported for purpose of inducing provision or continued provision of sexual services in a sexual services business; or, fee or reward derived from provision of sexual services in a sexual services business (C2)~~
- Section 7(2)(a), Intimidating, assaulting or threatening to assault person to induce provision of sexual services or fee or reward derived from provision of sexual services (C2)
- Section 7(2)(d), Administer to a person, or cause a person to take, any drug or other substance with the intent to stupefy or overpower that person to induce provision of sexual services or fee or reward derived from provision of sexual services (C2)
- Section 8(2), Accosting a child (C3)
- Section 9(1), Procuring or otherwise causing or permitting a child to provide sexual services in a sexual services business (C3)
- Section 9(2), Receiving a fee or reward from sexual services provided by a child in a sexual services business (C3)
- Section 11(1), Permitting child on premises – sex worker (C1)
- Section 11(2), Permitting child on premises – person receiving sexual services (C1)

Community Protection (Offender Reporting) Act 2005 (Tas)

- Section 15B(1)(a), Apply to engage in provision of child-related service (C1)
- Section 15(1)(b), Engage in provision of child-related service (C1)
- Section 15C, Fail to comply with notice to disclose (C1)
- Section 15D(1), Fail to disclose charge to employer(C1)
- Section 15D(2), Fail to disclose charge to prospective employer(C1)
- Section 21(2A), Fail to comply with requirement to be photographer or undergo non-intimate forensic procedure (C1)

- Section 33, Fail to comply with obligations (C1)
- Section 33A, Fail to comply with community protection order (C1)
- Section 34, Provide false or misleading information (C1)
- Section 45D, Fail to comply with Act (C1)

Children, Young Persons and Their Families Act 1997 (Tas)

- Section 91, Fail to protect child from harm (C2)
- Section 95, Habour or conceal child (C2)
- Section 96, Remove, counsel or induce child to be absent without lawful authority (C2)