Victim Support Service

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The Honourable Vickie Chapman MP
Attorney-General
Attorney-General's Department
GPO Box 464
ADELAIDE SA 5001

And via email: Stephanie.Halliday@sa.gov.au

Dear Ms. Attorney-General,

Evidence (Reporting on Sexual Offences) Amendment Bill 2019

We are writing in response to the request for comment on the Evidence (Reporting on Sexual Offences) Amendment Bill 2019 which will amend the *Evidence Act 1929* (SA) ("Evidence Act").

Victim Support Service appreciates your consideration of the issues.

We make the following recommendations:

RECOMMENDATIONS

Recommendation 1: Further consideration be given to reform of Section 71A**,** including further consideration of procedures around 69A to include family members of an accused person, to prevent them becoming secondary victims of the alleged offending. An expanded definition of who is a victim might be also considered.

Recommendation 2: If 71A is to be repealed, further reform to s 69A (3) to allow for an increased period of time for an interim suppression order to allow for greater participation from those parties who might be at risk of undue hardship.

Recommendation 3: That guidelines be published to assist the judiciary and counsel in seeking and making appropriate orders in sex offence matters. This might in turn reduce inconsistencies, time and costs to the Courts. It is our view that this may in turn reduce the risk of trauma to victims of crime. Victim Support Service would be pleased to provide further comment in this context if sought.

We also provide the following detailed commentary.

The current law

Under existing law, any person accused of a sexual offence is entitled to anonymity automatically under section 71A of the *Evidence Act 1929* (SA) and their case cannot be made public unless there is an order from the Court which permits publication.

A suppression order may be an order prohibiting the publication of evidence, or an order forbidding the publication of the name or other information 'tending to identify' a child, party, witness, or person 'alluded to in the course of proceedings'.[i] Under this section, an order may be made to protect a victim who asserts that publication of particular information will cause him or her "undue hardship".

Section 69A of the Act provides that any person who has, in the opinion of the court, a proper interest in the question of whether a suppression order should be made, is entitled to make submissions to the court on the application. An order can be made subject to any exceptions and conditions as the court thinks fit.[ii]

Our Position

As an organisation that provides counselling and court support to victims/survivors[iii] of crime and abuse, Victim Support Service (VSS) contends that the paramount consideration in this context should be to protect the rights of victims of sexual offences, and minimise the risk of re-traumatisation of that person throughout the Court process.

For certain classes of persons, repeal of s 71A (1) – 3(e) and 71A (5) may be appropriate. For example, in cases of institutional abuse, where abuse is historical and where publication of the identity of parties might encourage other victims to come forward. For individual victims however, the requirement to make an application for an order pursuant to s69A may be less appropriate.

At the outset, there should not be a presumption that a victim will know that an application is required or that the victim have been given correct and relevant information by those who support and represent them. We suggest that information be readily available and accessible, and guidelines be in place regarding this process.

In our extensive experience supporting victims of sexual offences we raise the risks associated with requiring that an application for suppression be made by a party, as opposed to being automatic. The Court will now be required to hear an argument pre-trial as to why the order ought to be made to protect a party. There may be uncertainty when such application should be made (whether at Mentions or Committal Hearings) and given that Court lists will likely use names it may be difficult to suppress when the accused may already be identified.

The application process may be perceived as an additional barrier to justice for the victim. Where such an order is not granted, it may add to the trauma experienced by the victim. We therefore suggest that appropriate guidelines be in place to assist the judiciary with regard to this aspect.

In this context we also highlight increased Court time and cost to the State. There are likely to be appeals that result from the making of orders that will further delay proceedings and add to existing delays for victims. We note delays have a significant impact on victims of crime.

In terms of protections for victims, it is our view that additional reform might be contemplated around the adequacy of the law in affording protections that are appropriate for victims of sexual offences. These are discussed below.

We agree that the presumption of open justice is the appropriate starting point when considering publication or suppression of the names of accused persons. However where there is a risk that this will result in the identification of victims, that there should be appropriate protections in place.

We also suggest that protections be considered for family members of accused persons, who may be understood as secondary victims. The presumably detrimental effect on the family members of the accused does not currently outweigh the open justice principle in current case law, and while existing provisions may provide for them to make an application an order is unlikely to be made.[iv]

It is also our position that the law should be capable of contemplating those victims who do not seek anonymity but prefer be heard.[v] This should also be a consideration when an order to suppress is sought by an accused person and is opposed by the victim.

Victims of Sexual Offences

In our experience supporting victims of crime, fear of public scrutiny is often a factor in deciding not to report a sexual offence. Stigmatisation of victims of sexual offences is often a consideration when a victim

determines whether to remain anonymous. Where there is any risk that a victim might be discouraged from seeking justice in the absence of an order restricting publication of her or his identity, this should be weighed against the principle of open justice.

We highlight particular risk for a victim who is related to an accused person, or may be identified by publication of the identity of the alleged offender due to their employment, or residential location, or any other identifying detail, who for such reasons may be discouraged from pursuing justice.

For this reason, we hold that where the identification of the accused might result in identification of a victim, there should be a procedural requirement that an interim suppression order[vi] be made to allow time for the victim to be heard regarding an order. We note that, [v]ictim empowerment and the reduction of secondary victimisation require procedural rights during both the pre-trial and trial stages".[vii]

We note that while a court may make an interim suppression order, if an interim suppression order is made, the court must determine the application 'as a matter of urgency' and 'wherever practicable, within 72 hours of making the interim suppression order. We consider that to hear appropriately from a victim would require a longer period of time.

We believe that the current legislation is sufficient to ensure an interim order can be made in this jurisdiction, though we note that 72 hours may not allow for sufficient time and therefore there may be a need for this to provide for a longer period of time. As such we respectfully suggest a period similar to that recommended recently in Victoria, five days, [viii] be considered for South Australia.

Victoria has recently undertaken a review of their legislation in this context, and it was reported that,

> "Victims' representatives told the review that victims were given little information about suppression orders and were rarely consulted as to whether they wanted their identities suppressed".[ix]

Similar concerns exist for victims of crime in South Australia.

In this context we also advocate for a process that provides proper representation for victims on this issue.

In the South Australian regional context

In the regional context, there may be even greater ramifications for victims of sex offences in the public naming of an accused person, as in smaller populations it is often easier to identify a victim from the information that is published.

In smaller regional communities identification may result in significant hardship. We support victims from across the state and understand the impact on victims who are identified, even by way of inference. There have been some who have had to relocate to avoid scrutiny from the community.

Where information is made public, the children of accused persons may also have to leave school or community and experience significant disruption.

We believe that particular care should be taken in determining what might constitute "undue hardship" in regional and remote communities for these reasons.

Public Safety and Policy Considerations

Also weighed against the rights of victims, witnesses and other parties with the principle of open justice, is the right of the public to know in order to be protected.

We consider the proposed amendments to be in line with community expectations. The safety of the South Australian community whose interests may be protected through publication of the identity of a person accused of a sexual offence must be considered also.

There will be cases where there is a need to publish what is occurring and this can be ordered by the court where South Australia Police requests that this occur.

We know from speaking with victims that they want to stop sexual offences from happening to others. We have heard from those we support in the context of the Royal Commission into institutional Responses to Child Sexual Abuse that some victims see it is important to encourage other victims to come forward, to identify themselves and be supported.

Publicising the identity of sexual offenders may act as a deterrent, although we would note that for this type of offending the deterrence value is likely to be low.

However we emphasise that it is imperative that these interests must not result in the subjection of victims or other parties to unnecessary additional harm, including embarrassment. We are concerned that public embarrassment continues to be a very powerful disincentive to the reporting of sexual offences.

Such amendments will bring South Australia into line with all other Australian jurisdictions.

Conclusion

Ultimately under s69A it will be the responsibility of the Court to determine whether a suppression order will be made, and judicial discretion will be important in this context. We suggest that guidelines be introduced to assist the Court.

We take the position that victim participation in this context essential. At the committal hearing stage, the process must provide an opportunity for victims to be consulted before any name of any person is released.

Noting that there are risks that will need to be managed around cost, timing and delays for the Courts, and risks for the victim we would be pleased to provide further assistance with drafting guidelines for working with victims in this context.

Yours faithfully,

Caroline Holmstrom
Chief Executive
Victim Support Service

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[i] Evidence Act 1929 (SA) s 68.
[ii] Ibid s 69A(4).
[iii] We refer to victims/survivors as victims throughout the submission as this is the language of the Act. We recognise and acknowledge that a person who has been subject to violence or abuse may identify as either a victim or survivor.
[iv] *Packer v Police* [2007] 15 March 2007.
[v] Victims who prefer to be identified should not be denied an opportunity, where they are adults. We know from experience that for some, telling their story may be part of the healing process.
[vi] Evidence Act 1929 (SA) s 69A(3).
[vii] Wolhuter, L., Olley, N. & Denham, D., 2009. Victimology: victimisation and victims' rights. London: Routledge-Cavendish, p.196.
[viii] Attorney General Victoria, "Suppression Orders Set For Major Overhaul", Media Release, 29 March 2018 < https://www.premier.vic.gov.au/suppression-orders-set-for-major-overhaul/> last accessed 9 July 2019.
[ix] Farrah Tomazin & Tammy Mills, "Sex offenders more likely to be 'named and shamed' in legal shake-up", *The Age*, January 9, 2019.< https://www.theage.com.au/politics/victoria/sex-offenders-more-likely-to-be-named-and-shamed-in-legal-shake-up-20190108-p50q7l.html > last accessed 9 July 2019.