



# LEGISLATION ASSEMBLY OF THE NORTHERN TERRITORY

13<sup>th</sup> Assembly

## LEGISLATION SCRUTINY COMMITTEE

### Public Briefing Transcript

10.50 am, Monday 9 December 2019

Litchfield Room, Level 3 Parliament House

#### **Members:**

Ms Ngaree Ah Kit MLA, Member for Karama (Chair)  
Mr Tony Sievers MLA, Member for Brennan  
Mrs Lia Finocchiaro MLA, Member for Spillett  
Ms Sandra Nelson MLA, Member for Katherine (Deputy Chair)  
Mrs Robyn Lambley MLA, Member for Araluen

#### **Witnesses:**

##### **Department of the Attorney-General and Justice**

Jenni Daniel-Yee: Director, Legal Policy

Leonique Swart: Principal Policy Lawyer, Legal Policy

## SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) AMENDMENT BILL 2019

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### Department of the Attorney-General and Justice

**Madam CHAIR:** Good morning everyone. Thank you for joining us. I am Ngaree Ah Kit, Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee I welcome everyone to this public briefing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I also acknowledge my fellow committee members in attendance today, Member for Brennan, Mr Tony Sievers; and on the phone we have the Member for Katherine, Ms Sandra Nelson; and the Member for Araluen, Ms Robyn Lambley.

I welcome to the table to give evidence to the committee from the Department of the Attorney-General and Justice, Jenni Daniel-Yee, Director, Legal Policy; and Leonique Swart, Principal Policy Lawyer, Legal Policy. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public briefing and is being webcast through the Assembly's website. A transcript will be made for use to the committee and may be put on the committee's website. If any time during the briefing you are concerned that what you will say should not be made public you may ask that the committee go in to a closed session and take your evidence in private.

I will ask each witness to state their name for their record and the capacity in which they appear before inviting you to make a brief opening statement and then proceeding to the committee's questions. Could you each please state your name and the capacity in which you appear today?

**Ms DANIEL-YEE:** Jenni Daniel-Yee, Director of Legal Policy, Department of the Attorney-General and Justice.

**Ms SWART:** Leonique Swart, Principal Policy Lawyer, Department of the Attorney-General and Justice.

**Madam CHAIR:** Ms Daniel-Yee, would you like to make an opening statement?

**Ms DANIEL-YEE:** Thank you. I will ask Leonique to give an opening statement.

**Ms SWART:** The Sexual Offences (Evidence and Procedure) Amendment Bill 2019 does four main things. Firstly, it provides for a mechanism for survivors of sexual offending which, in the bill are called complainants, to be able to be publicly identified or publicly identify themselves. This is done in new section 6 subsection (ii).

Secondly it repeals and redrafts sections 6–12 of the *Sexual Offences Evidence and Procedure Act 1983* and thereby consolidates and rationalises those offences.

Thirdly, it inserts a new requirement that when a person is applying to the court for an order permitting publication, that the court considers the wishes of the complainant.

Fourthly, it amends section 50 of the *Youth Justice Act* as amended by the *Youth Justice and Other Legislation Amendment Act 2019*, which I understand is to come into force in early 2020.

Turning first to the new offence. At the moment section 6 of the *Sexual Offences Evidence and Procedure Act 1983* makes it an offence for a report made or published concerning an examination of witnesses—commonly known as committal proceedings or a trial—to reveal the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of the complainant.

This offence is subject to exceptions in current section 9 which provides for a range of exempted reports to do with court proceedings. The offence is also subject to the ability to apply to the court for an order permitting publication.

There is also an offence in section 11B of the act, which makes it an offence to publish or make a statement or representation not in a report mentioned in section 6, which reveals the name, address, school or place of employment of a complainant at any time. There is no ability to apply to the court under this section. There

is an exception for an authorised purpose in section 12, which also relate to specific circumstances to do with court proceedings.

The bill will create a new defence to a prosecution for an offence of publication revealing the identity of the complainant if, firstly, no proceedings relating to a sexual offence are pending, when the statement of representation is made. This is to ensure that any comments or stories that are published are not done so while proceedings are pending, because this may prejudice the fair trial of the defendant.

The second requirement is that the complainant consented in writing. Consent needs to be in writing so as to provide time for the complainant to think about consequences of this kind of decision to allow publication.

Thirdly, if the statement or representation would identify another complainant—in a case where there might be multiple complainants, which in the bill is referred to as an ‘affected complainant’—that complainant has also consented in writing and that complainant is also an adult and has capacity, which I will return to in a minute. This ensures that any statements of representations that are made publicly do not directly or indirectly identify another complainant, where there are multiple, unless that complainant has also consented.

The fourth requirement is that the complainant is an adult when consenting. The decision to allow for publication is a significant one and it was considered that 18 years is the age of capacity to enter into contracts, for example, was an appropriate age. It is also noted that a number of other jurisdictions have provisions like this and provide for age of 18-years or over, except for New South Wales.

Also, that the complainant or complainants have capacity to consent, which means that the complainant needs to freely and voluntarily consent to the publication—such as not being under duress of any sort and also not have a mental impairment.

Secondly, the bill rationalises the offences. Currently the offences in sections 6 and 11B with respect to complainants and sections 7 and 11B with respect to defendants, appear to have significant overlap. For example, section 6 applies to the publication of the identity of a complainant in a report about a committal proceeding, examination of witness or a trial. The offence in section 11B applies at any time and is not confined to a report about a committal or a trial.

It appeared that there was no need to retain both offences because in particular section 11B was quite broad in its application. In the end, as a result, sections 6–12 of the *Sexual Offences Evidence and Procedure Act 1983* are repealed by the bill and then redrafted. Overall, the intent is to maintain the policy intent of the offences, so there are no significant changes apart from the changes that I mention in this briefing.

New section 6 is the new offence of disclosing the identity of a complainant and combines the effect of current sections 6 and 11B(1)(c)(i).

New section 7 is the offence of disclosing the identity of the defendant before the defendant is committed for trial or sentence. This retains the effect of current sections 7 and 11B(1)(c)(ii).

The exceptions that are in current sections 9 and 12 are redrafted into the new section 8 and section 9(4). The other provisions of the act between sections 6 and 12 are retained but just have different numbers.

The third main amendment is new consideration for a court order. The bill retains the ability to apply to the court for an order permitting the disclosure of the identity of the complainant or a defendant before the defendant is committed for trial or sentenced. This will be new sections 9(1) to (3). The ability to apply to the court for this order will apply at any time. Arguably, at the moment, the ability to apply to court in section 6 applies only at the time of a report on a committal proceeding or a trial.

The bill also inserts a new consideration in section 9(2) so that when the court is making a decision to allow publication, it must take into account the wishes of the complainant when making that order. The court may also specify the particulars which may be disclosed and may place restrictions on the extent to which publication is committed. This is a current provision in section 6. The offence of contravening such a court order is retained and is now in section 10.

Finally, the bill amends the *Youth Justice Act* as a consequential amendment to the new section 50 of the *Youth Justice Act*. As the committee is probably aware, current section 50 of the *Youth Justice Act* will be amended when the Youth Justice and Related Legislation Amendment Bill, which was passed in the September 2019 sittings, comes into force, which I understand will be in early 2020. That Youth Justice and

Related Legislation Amendment Bill inserted a new section 50 which provided that it is an offence to publish a report or information relating to proceedings in the Youth Justice Court or in any other court arising out of proceedings in the Youth Justice Court that contains particulars that are likely to lead to the identification of, amongst other people, the youth offender or a witness in the proceeding. A complainant in a sexual offence proceeding is a witness in that proceeding and would be, therefore, caught by section 50 if the defendant was a youth at the time of the offending.

The Sexual Offences (Evidence and Procedure) Amendment Bill will amend that new section 50 to provide for another exception, if the complainant consents—provided that the complainant does not disclose the identity of the youth offender or another complainant who has not consented—sorry, the publication of the details of the complainant in that sexual offence—if that publication does not identify the youth offender at any time or another complainant who has not consented.

**Madam CHAIR:** Leonique, could I just check—is that for somebody who is over the age of 18 years—the complainant over the age of 18 years?

**Ms SWART:** Correct, yes.

**Madam CHAIR:** Thank you.

**Ms SWART:** Can I just double-check that? Yes, that is correct.

**Madam CHAIR:** So, if the complainant is ages 18 years or above ...

**Ms SWART:** They can consent.

**Madam CHAIR:** ... and has consented?

**Ms SWART:** Yes.

**Madam CHAIR:** Okay, thank you.

**Ms SWART:** That completes my opening statement. Does the committee have any questions?

**Madam CHAIR:** Thank you. I will now open to the committee for any questions.

**Ms NELSON:** Will the offender also need to apply to the court for permission for publication or to tell their story?

**Madam CHAIR:** Do you mean the complainant?

**Ms NELSON:** No, the offender.

**Ms SWART:** No, well in some circumstances ...

**Ms NELSON:** I think currently the way the law is, is that an offender can speak to the media and declare their innocence but the victim is not able to tell their story.

**Ms SWART:** That is correct. At the moment the state of the law, generally, is that a complainant cannot be identified, a defendant cannot be identified before the defendant is committed for trial or sentence. Basically the committal proceedings establish an evidential threshold for that person to be identified as a defendant in those proceedings.

Up until that point, no it is not permitted identify an alleged offender. After they have been committed to the Supreme Court for trial or sentence they are permitted to be identified and I guess before that point in time an application could be made to the court for an order permitting publication. That would be in the current state of the act, but also after the amendments are made as well. Does that answer the question?

**Ms NELSON:** Yes it does. It does in part. So they will also need to go through the same process that a complainant or victim will need to go through to be able to tell their story?

**Ms SWART:** Yes, until the point of committal for trial or sentence.

**Madam CHAIR:** How about if it is at that stage and they are under the age of 18? They are not allowed to be identified because they are a minor?

**Ms SWART:** At the moment I am not able to say with certainty. At the moment they potentially could be, but once the Youth Justice and Other Legislation Amendment Bill goes through they will not be able to be identified at all.

**Madam CHAIR:** It appears we have no further questions. Thank you very much for your time this morning.