



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Legislation Scrutiny Committee

**Inquiry into the Sexual Offences
(Evidence and Procedure)
Amendment Bill 2019**

March 2020

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Chair's Preface

This report details the Committee's findings regarding its examination of the Sexual Offences (Evidence and Procedure) Amendment Bill 2019. The primary purpose of the Bill is to amend the *Sexual Offences (Evidence and Procedure) Act 1983* to enable complainants of sexual offences to consent to being identified in a publication, statement or representation provided that consent is provided in writing; the complainant is an adult at the time of giving consent; and the proposed publication, statement or representation does not identify, directly or indirectly, another complainant unless that other complainant has also given consent.

The Committee received ten submissions to its inquiry, all of which supported the introduction of amendments to the *Sexual Offences (Evidence and Procedure) Act 1983*. However, several issues were raised regarding the drafting of the proposed amendments. In particular, concern was raised by a number of submitters regarding the extent to which the Bill, as drafted, achieves its objectives of modernising the legislation, bringing the Northern Territory "into line with other jurisdictions", and "giving the survivor a voice, autonomy and control in a situation where control has been taken away from them" as stated by the Hon Nicole Manison MLA in introducing the Bill.¹

While the Committee has recommended that the Assembly pass the Bill, it has proposed a number of amendments as set out in recommendations 2 - 6. To summarise, recommendation 2 proposes that the monetary penalty for the offence in section 6(1) be increased to more accurately reflect the seriousness of the offence and comparable offence provisions in other jurisdictions. Consistent with other jurisdictions, recommendations 3 and 5 propose amendments to remove the restriction on a complainant's ability to consent to the publication of their identity at any time in proposed section 6(2)(a), and the blanket prohibition on disclosure of a defendant's identity in proposed section 7. Recommendations 4 and 6 seek to ensure that the Bill is unambiguous and drafted in a sufficiently clear and precise manner.

On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their advice and commentary was particularly insightful and of great assistance to the Committee in its examination of the Bill. The Committee also thanks the Department of the Attorney-General and Justice for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Mr Tony Sievers MLA

Chair

¹ Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

Committee Members

	Mr Tony Sievers Member for Brennan	
	Party:	Territory Labor
	Committee Membership	
	Standing:	House, Public Accounts
	Sessional:	Legislation Scrutiny Committee
	Chair:	Legislation Scrutiny Committee
	Ms Sandra Nelson MLA Member for Katherine	
	Party:	Territory Labor
	Parliamentary Position	Acting Deputy Speaker
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Deputy Chair:	Legislation Scrutiny
	Mr Joel Bowden MLA Member for Johnston	
	Party:	Territory Labor
	Committee Membership	
	Sessional:	Legislation Scrutiny
	Mrs Lia Finocchiaro MLA Member for Spillett	
	Party:	Country Liberals
	Parliamentary Position:	Leader of the Opposition
	Committee Membership	
	Standing:	Privileges
	Sessional:	Legislation Scrutiny
	Mrs Robyn Lambley MLA Member for Araluen	
	Party:	Independent
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Standing:	Standing Orders and Members' Interests
	Sessional:	Legislation Scrutiny
Note: Pursuant to Standing Order 181, on Tuesday 10 March Member for Karama, Ms Ngaree Ah Kit MLA was discharged from the Committee and replaced by Member for Johnston, Mr Joel Bowden MLA.		

Committee Secretariat

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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Terms of Reference

Sessional Order 13

Establishment of Legislation Scrutiny Committee

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints a Legislation Scrutiny Committee.
- (3) The ordinary membership of the scrutiny committee will comprise three Government Members, one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

The Committee's membership will be supplemented by alternate members who may be nominated to participate at meetings and undertake a role on the committee in the place of ordinary committee members. The nomination of alternate committee members will be in writing by the ordinary member to the committee chair.

Alternate Committee members must be from the same category of Members of the Assembly as the ordinary member nominating them such as the same political party or a non-party aligned Member.

- (4) The functions of the scrutiny committee shall be to inquire and report on:
 - (a) any matter referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

- (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) The Committee will provide an annual report on its activities to the Assembly.

Adopted 27 November 2019

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Sexual Offences (Evidence and Procedure) Amendment Bill 2019 with the proposed amendments set out in recommendations 2 - 6.

Recommendation 2

The Committee recommends that proposed section 6(1) of the Bill be amended to increase the maximum monetary penalty to 50 penalty units.

Recommendation 3

The Committee recommends that proposed section 6(2) be amended to remove subsection 6(2)(a).

Recommendation 4

The Committee recommends that, if the Assembly does not agree to recommendation 3, proposed section 6(2)(a) be amended to include a definition of the term 'pending'.

Recommendation 5

The Committee recommends that the Bill be amended to remove proposed section 7.

Recommendation 6

The Committee recommends that section 50 of the *Youth Justice Act 2005* be amended to provide that a youth defendant in a sexual offence case must be an adult with capacity to consent when consenting to the publication of their identity.

1 Introduction

Introduction of the Bill

1.1 The Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Treasurer, the Hon Nicole Manison MLA, on behalf of the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA on 28 November 2019. The Assembly subsequently referred the Bill to the Legislation Scrutiny Committee for inquiry and report by 24 March 2020.²

Conduct of the Inquiry

1.2 On 29 November 2019 the Committee called for submissions by 29 January 2020. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 As noted in Appendix 1, the Committee received ten submissions to its inquiry. The Committee held a public briefing with the Department of the Attorney-General and Justice on 9 December 2019 and public hearings with nine witnesses in Darwin on 2 March 2020.

Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 - 6.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Sexual Offences (Evidence and Procedure) Amendment Bill 2019 with the proposed amendments set out in recommendations 2 - 6.

² Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, p. 9, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>

Report Structure

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

- 2.1 Noting that the Government had recently updated its *Charter of Victims Rights*³, Minister Manison advised the Assembly that the Bill:

works towards ensuring victims have the rights they deserve. ... The Northern Territory and Tasmania are the only jurisdictions in Australia which still prevent a sexual assault complainant from consenting to the publication of their identity in the media or otherwise.

In Tasmania, a complainant may apply to the court for an order to allow them to do so, but in the Territory the ability for a person to publicly identify as a sexual assault complainant is limited.

The #LetHerSpeak campaign has been urging legislative change in the Territory and Tasmania to enable sexual assault complainants to consent to the publication of their identity if they choose to. ...

The current law in the Territory, while having an important role to play to protect the privacy, safety and welfare of sexual assault survivors, can also reinforce stigma and shame associated with sexual assault. It also requires a person to go through the expensive and time consuming process of applying for a court order.

Madam Speaker, it is time the Territory's law was modernised and brought into line with other jurisdictions. This Bill will do that, and will give the survivor a voice, autonomy and control in a situation where control has been taken away from them.⁴

Purpose of the Bill

- 2.2 As noted in the Explanatory Statement, the primary purpose of this Bill is to amend the *Sexual Offences (Evidence and Procedure) Act 1983* to:

Enable complainants of sexual offences to consent to being identified in a publication or statement or representation provided that:

- (a) consent is provided in writing;
- (b) the complainant is an adult at the time of giving consent;
- (c) the proposed publication, statement or representation does not identify, directly or indirectly, another complainant unless that other complainant has also given consent.⁵

- 2.3 While the Bill retains the ability to apply to the court for an order permitting publication or the making of a statement or representation, a new requirement has been included that provides that the court take into account the wishes of the complainant in deciding whether to make the order. In addition, the Bill:

³ Department of the Attorney-General and Justice (Crime Victims Services Unit), *Northern Territory Charter of Victims Rights*, August 2019, <https://justice.nt.gov.au/justice-services/crime-victims-services-unit/charter-of-victims-rights>

⁴ Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

⁵ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.1

repeals and redrafts sections 6 to 12 of the *Sexual Offences (Evidence and Procedure) Act 1983* and generally maintains the existing policy in those sections, but rationalises the offences in current sections 6, 7, 11 and 11B.⁶

2.4 Consequential amendments are also made to section 50 (Restriction of publication) of the *Youth Justice Act 2005* to introduce:

a new exception to the offence in section 50 where a report or information contains particulars of a complainant as defined in the *Sexual Offences (Evidence and Procedure) Act 1983*, and who has consented to the publication in accordance with new section 6(2)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983* as introduced by this Bill.⁷

⁶ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.1

⁷ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.5

3 Examination of the Bill

Introduction

- 3.1 All of the submissions received supported the introduction of amendments to the *Sexual Offences (Evidence and Procedure) Act 1983* (NT). However, a number of issues were raised regarding the drafting of the proposed amendments with submitters making various suggestions as to ways in which the proposed legislation might be improved.
- 3.2 In particular, concern was raised by several submitters regarding the extent to which the Bill, as drafted, achieves its objective of modernising the legislation, bringing the Northern Territory “into line with other jurisdictions” and “giving the survivor a voice, autonomy and control in a situation where control has been taken away from them” as stated by the Hon Nicole Manison MLA when introducing the Bill.⁸
- 3.3 The following discussion considers the main issues raised in submissions and the subsequent advice provided by the Department of the Attorney-General and Justice (the Department).

Amendment of Sexual Offences (Evidence and Procedure) Act 1983

- 3.4 As noted in the Explanatory Statement, clause 4 of the Bill:

amends and replaces the existing sections 6 to 12 of the *Sexual Offences (Evidence and Procedure) Act 1983* (the Act) which prohibit the publication of information that identifies or is likely to lead to the identification of a complainant, or a defendant in a sexual offence proceeding.⁹

However, as detailed below, submitters raised a number of concerns regarding proposed section 6 ‘Disclosing identity of complainant’, proposed section 7 ‘Disclosing identity of defendant’, and proposed section 11 ‘Contempt’.

Penalty for disclosing identity of complainant

- 3.5 Proposed section 6(1) provides that it is an offence to disclose the identity of a complainant in a sexual offence case and carries a maximum penalty of 40 penalty units or 6 months imprisonment. Knowmore Legal Service (KLS) suggested that, compared to equivalent offence provisions elsewhere, the maximum penalty proposed for this offence is relatively low:

The maximum fine for individuals in the Northern Territory – 40 penalty units, or \$6,280 – is lower than those in the ACT, South Australia, Tasmania and Queensland, which range from \$8,000 to \$13,345. The median fine for all jurisdictions outside of the Northern Territory is \$8,000.

The maximum fine for body corporates in the Northern Territory – 200 penalty units, or \$31,400 – is lower than those in the ACT, New South Wales, Tasmania,

⁸ Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

⁹ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.2

South Australia and Queensland, which range from \$40,500 to \$133,450. ... The median fine for all jurisdictions outside the Northern Territory is \$55,000.

The maximum term of imprisonment in the Northern Territory – six months – is shorter than those in Tasmania (12 months) and Queensland (2 years). The median term of imprisonment for all jurisdictions outside the Northern Territory is six months.

We understand that the maximum penalty in new section 6(1) reflects the existing provisions and that the Bill is not intended to make any changes in this regard. However, given the higher penalties in other jurisdictions, especially for offences committed by corporations, we suggest that it would be timely for the Legislation Scrutiny Committee (the Committee) and the Legislative Assembly to consider the appropriateness of the penalties in the Northern Territory.

In Knowmore's view, it is essential that the penalties adequately reflect the gravity of publishing a complainant's personal information without their consent. Such conduct not only has serious adverse impacts on the individual complainant, but it can also deter other victims and survivors of sexual abuse from reporting their abuse and/or engaging in criminal proceedings. This is clearly not in the interests of justice. The legislation must also recognise the potential for "deliberate, flagrant or repetitive breaches" and provide for significant punishments in such circumstances. We consider that the maximum penalties currently proposed in Tasmania – 12 months imprisonment and/or a \$10,800 fine for individuals, and a \$67,200 fine for corporations – are appropriate in this regard, and we support similar penalties applying in the Northern Territory.¹⁰

- 3.6 The Committee subsequently sought advice from the Department as to what consideration was given to the penalties for equivalent offences elsewhere in the development of the Bill. The Department advised that:

It is acknowledged that the penalty for the offence under new section 6 is lower than a number of other jurisdictions. The maximum monetary penalty is 40 penalty units, which equates to \$6 280 (the current value of the penalty unit is \$157). The penalty for a body corporate is five times that amount at \$31 400, by virtue of section 38B of the *Interpretation Act 1978*.

The maximum penalty for the offence was originally \$5 000 for an individual (and \$25 000 for a body corporate) and set when the Act first came into force. That penalty was converted to 40 penalty units by the *Penalties Amendment (Miscellaneous) Act 2013*, which converted monetary penalties to penalty units using a formula for conversion rather than considering each penalty on a policy basis.

If the Scrutiny Committee were to make a recommendation to increase the maximum penalties for the offence, the Minister will consider it.¹¹

Committee's Comments

- 3.7 In light of the Department's response, and noting that the penalty for this offence has not been reviewed for over twenty years, the Committee is of the view that the penalty should be increased to more adequately reflect the seriousness of the offence and penalty provisions for comparable offences in other jurisdictions. The Committee has therefore recommended that the monetary penalty be increased to 50 penalty units

¹⁰ Knowmore Legal Service, Submission 5, pp.5-6

¹¹ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.1

or \$7 850 for an individual and, in accordance with section 38B of the *Interpretation Act 1978*, \$39 250 for a body corporate.

Recommendation 2

The Committee recommends that proposed section 6(1) of the Bill be amended to increase the maximum monetary penalty to 50 penalty units.

Defence for Offence of Disclosing Identity of Complainant

- 3.8 Proposed section 6(2) then provides that it is a defence to a prosecution for the offence of disclosing the identity of a complainant if: (a) no proceeding in relation to the sexual offence is pending in a court when the statement or representation is published or made, and (b) the complainant has consented in writing to the publication of their identity, and is an adult with capacity to consent when consenting.
- 3.9 However, End Rape on Campus Australia (EROCA) and Australia's Right to Know (ARTK), expressed the view that this section should be drafted as an exemption from, rather than a defence to, a prosecution for the offence:

It should not be incumbent on a complainant, nor on a third party with the benefit of a complainant's written consent, to face the risk of prosecution and have to plead a statutory defence (presumably with the onus of establishing it on the criminal standard of proof) in order to avoid conviction. Rather, the existence of a valid consent should operate as an exemption from the offence provision. It would be more appropriate for section 6(2) to provide that section 6(1) does not apply in the relevant circumstances.¹²

- 3.10 The Northern Territory Women's Legal Services (NTWLS) noted that they endorsed the exemption provisions in Western Australia which:

provide that it is an exemption to an offence where a complainant (victim-survivor) gives their consent in writing, is over the age of 18 years, and has the capacity to give their informed consent.¹³

While exemptions to comparable offences are also provided for in the New South Wales, and South Australian legislation¹⁴, this is not the case elsewhere.

- 3.11 For example, similar to existing provisions in the Northern Territory, the Tasmanian legislation prohibits publication of a complainant's identity irrespective of whether the complainant consents to such. The only exception to this prohibition is by court order.¹⁵ In the ACT section 74(2) of the *Evidence (Miscellaneous Provisions) Act 1991* provides that it is a defence to a prosecution 'if the person establishes that the complainant consented to the publication before the publication happened.' In a similar vein, section 10 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) provides that it is a defence to a proceeding for an offence where the complainant authorised in writing the publication, was at least 18 years and had the capacity to give the authorisation.

¹² End Rape on Campus Australia, Submission 3, pp.2-3; see also Australia's Right to Know, Submission 8, p.1

¹³ Northern Territory Women's Legal Services, Submission 6, p.4; see also *Evidence Act 1906* (WA), s.36C

¹⁴ *Crimes Act 1900* (NSW), s. 578A; *Evidence Act 1929* (SA), s. 71A,

¹⁵ *Evidence Act 2001* (Tas), s.194K(1)

- 3.12 In Victoria, section 4 of the *Judicial Proceedings Reports Act 1958* provides that, where a proceeding in respect of the alleged offence is not pending when the publication was made, it is a defence to a charge for the accused to prove that the matter was published with the permission of the relevant court, or the person against whom the offence is alleged to have been committed. Where a proceeding in respect of the alleged offence is pending, it is a defence to a charge for the accused to prove that the matter was published in accordance with the permission of the court granted on an application by the person.
- 3.13 Given the lack of consistency in the approach taken in relation to this matter across the various jurisdictions, the Committee sought clarification from the Department as to why proposed section 6(2) was drafted as defence to a prosecution for an offence against subsection 6(1) rather than as an exemption from the offence provision.
- 3.14 Noting that it was a policy decision to make it a defence rather than an exemption, the Department explained that:

The difference between an exemption and defence is that an exception or exemption sets out the circumstances in which an offence does not exist, whereas a defence provides for a matter that a defendant needs to prove to avoid criminal responsibility. According to section 43BU(3) of the *Criminal Code* (NT), the defendant has an evidential burden in relation to all defences, exceptions and exemptions. This means that the defendant has a burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Technically, a prosecution should not be commenced if an exception or exemption exists, whereas a defence is raised by the defendant during a prosecution. However, in practical terms in the context of this type of offence, it is not likely that there would be a significant difference between having a defence and having an exemption. Ultimately, the Director of Public Prosecutions would need to be satisfied that there are reasonable prospects of conviction before proceeding with a prosecution, and usually this would require an analysis of whether there are any exemptions or defences available to the defendant, and whether they are capable of being rebutted on the evidence.

Where, in practical terms, there is a difference between a defence and exemption, a defence is likely to be more protective of the complainant particularly where it is a third party, such as a media outlet, which publishes the identity of the complainant. A defence places a burden on the defendant media outlet to show consent was obtained. This protects complainants from unscrupulous journalists.

It is noted that NSW and South Australian legislation provide for exemptions. Section 36C(6) of the *Evidence Act 1906* (WA) provides for a defence because section 36C(6) places the legal onus (as opposed to the evidential onus described above) on the publisher to prove that the consent of the adult complainant was obtained. This requires the publisher prove that consent was obtained on the balance of probabilities, which is a higher burden of proof than is required in the Bill.¹⁶

Committee's Comments

- 3.15 The Committee is satisfied with the Department's response.

¹⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, pp.5-6

Restriction on Disclosing Identity of Complainant

3.16 As noted previously, proposed section 6(2)(a) provides that it is a defence to a prosecution for the offence of disclosing the identity of a complainant if 'no proceeding in relation to the sexual offence is pending in a court when the statement or representation is published or made.' As clarified in the Explanatory Statement, this means that:

The publication or statement or representation must not be made until all the proceedings for the sexual offence, including any appeal or re-trial are finalised.¹⁷

EROCA, ARTK, the North Australian Aboriginal Family Legal Service (NAAFLS), and KLS expressed significant concern that this section is unduly limiting and recommended that it be removed from the Bill.¹⁸

3.17 As KLS pointed out:

With the exception of Victoria, no jurisdiction currently imposes restrictions on complainants in terms of when they can consent to having their identity disclosed. ... we support empowering survivors who want to share their story as much as possible given the healing effects this can have. ... we see no need to prevent a complainant from telling their story until after all proceedings have been finalised. Section 6(2) of the Bill should therefore be amended to omit paragraph (a), consistent with the comparable provisions elsewhere in Australia.¹⁹

3.18 EROCA expressed the view that:

In our submission there is no justification for maintaining any statutory prohibition on the disclosure of a complainant's identity with their consent, at any time (including while criminal proceedings are pending or in progress). This prohibition continues to withhold agency from the victim in relation to the control of his or her own story. The only justification for subsection 6(2)(a) is to protect the defendant's interests. That can be adequately protected by giving the defendant a right to apply for a suppression order, so that the court has the power to suppress the complainant's identity if its disclosure is likely to prejudice the defendant unfairly. However, the presumption should be in favour of allowing the complainant to self-identify under all circumstances.²⁰

3.19 ARTK and NAAFLS also raised concern that:

Section 6(2)(a) could result in consenting complainants being deprived of the ability to identify themselves for years after an accused person is charged. Proceedings may not cease to be pending until all avenues of appeal are exhausted. In the worst case scenario, a conviction could be appealed all the way to the High Court, overturned and require the retrial of the matter.²¹

3.20 ARTK further noted that:

Section 6(2)(a) also potentially deprives police of what can be their most effective tool in an ongoing investigation. As noted in the Tasmanian judgement which authorised Mr Fisher [a sexual assault survivor] to be identified, his affidavit

¹⁷ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.2

¹⁸ End Rape on Campus Australia, Submission 3, p.3; Australia's Right to Know, Submission 8, p.3; North Australian Aboriginal Family Legal Service, Submission 10, p.3; Knowmore Legal Service, Submission 5, pp.3-5

¹⁹ Knowmore Legal Service, Submission 5, pp.4-5

²⁰ End Rape on Campus Australia, Submission 3, p.3

²¹ Australia's Right to Know, Submission 8, p.2; North Australian Aboriginal Family Legal Service, Submission 10, p.3

evidence “suggests that his public disclosures led to his complaints being properly investigated and this prosecution being brought. From that affidavit I can, and do, infer that the publication of his name in connection with the proceedings may encourage other victims to come forward and that may well lead to the investigation and prosecution of other offenders who have remained undetected to date.

Lastly, and further to paragraph 1 above, while ARTK accepts that the intention of the drafters was to protect complainants, section 6(2)(a) can also be read as perpetuating both a double-standard and the now old-fashioned belief that some complainants in sexual offence cases lie. Unlike the complainant, an accused is free to say whatever he or she likes about a case in his or her own name, at any time. Further, if the complainant cannot be identified then the accused can disregard any potential defamation risk since identification is an element of that course of action. Given consent can only be given once a conviction or acquittal is ultimately confirmed, section 6(2)(a) also tends to suggest that confirmation by the court of the true state of affairs pertaining to the case is required before the complainant can be allowed to speak in his or her own name. Again, ARTK accepts that these effects were unintended by the drafters but, nonetheless, plainly arise.²²

- 3.21 During the public hearing, Ms Caitlin Weatherby-Fell (Senior Solicitor: Top End Women’s Legal Service) noted that while supporting the intent of the legislation, the restriction it places on the complainant regarding when they are able to tell their story “effectively means we are not making any change to the legislation at all.”²³ Ms Weatherby-Fell further noted that the intent of the Bill is:

Bringing us into line with all other jurisdictions, in accordance with the Let Her Speak movement. However, this is also an opportunity for us to go the extra mile and to reframe the legislation to give accordance to that idea.²⁴

Ms Sophie Hantz (Solicitor: North Australian Aboriginal Family Legal Service) also noted that:

The proceedings take an extremely long time. For someone to be restrained from speaking out for such a long time, when storytelling can be such an important part of healing, is a concern for us.²⁵

- 3.22 In response to the Committee’s questions regarding the proposed restriction and the potential for disclosures on the part of the complainant to impinge on the defendant’s right to a fair trial, Mr Warren Strange (Executive Officer: Knowmore Legal Service) stated that:

In our view, that restriction, in certain circumstances, would lead to continued and prolonged uncertainty for survivors and an inability to tell their story until some time later. We think that it is only likely to exacerbate the stress and anxiety they might be experiencing in those circumstances and compound disappointment and frustration with the criminal justice system. It tends to withhold agency. It is not giving victims and survivors the full capacity to make that choice and tell their story.

We understand the point that is made, but retrials following successful appeals can happen in other very high-profile matters and courts have generally been able to deal with that. Serious criminal offences often attract significant publicity when the matter goes to trial. Occasionally, there are appeals where the original

²² Australia’s Right to Know, Submission 8, p.3

²³ Committee Transcript, Public Hearing, 2 March 2020, p.3

²⁴ Committee Transcript, Public Hearing, 2 March 2020, p.3

²⁵ Committee Transcript, Public Hearing, 2 March 2020, p.5

verdict is set aside and a retrial is ordered. Judges' directions are able to communicate to juries about the impact of the matter being a retrial. I do not have the exact statistics in front of me.

A significant number of appeals are not successful and do not result in an acquittal or a retrial, so it will only be relevant in a limited number of cases. We would have faith in the courts being able to issue appropriate directions to address any of the potential prejudice that might arise through publicity surround the outcome of the first trial.

One unintended consequence of the way the Bill is drafted at the moment is that it may, perhaps, influence some convicted accused to appeal knowing that might help to protect their identity for at least some further period until all those avenues of appeal are exhausted.²⁶

3.23 As noted in the Explanatory Statement, proposed section 9:

allows a court to order that a person is authorised to publish or make a statement or representation that would otherwise be an offence against new sections 6 and 7. This section will enable a complainant, defendant or other person to make an application to the court for an order.²⁷

However, Ms Gina McWilliams (Senior Legal Counsel: News Corp Australia speaking on behalf of Australia's Right to Know) questioned the notion that enabling complainants to seek a court order is a sufficient counterbalance to the restriction on when they can consent to and publish their story:

I can tell you from experience, having been through one of these applications, or assisting a client to do so, what you would be looking at, as a bare minimum, is the drafting of a notice of motion and at least one supporting affidavit. ... Depending on where the application is being made, you might additionally need to file some formal written submissions.

As you can see, there is a layer of paperwork which means it would be very difficult for a complainant to undertake these steps without the assistance of a lawyer. That, obviously, comes with attendant cost. Also, you could not guarantee when the matter might be listed. You assume it would probably be quite prompt, but it could take some time to complete the legal steps that would be required in order to make such an application.

Because of that level of complexity and introducing one additional step which a complainant in other circumstances would not have to go through, it is amongst the reasons we submit they should be able to consent at any time of their choosing.²⁸

3.24 Given the concerns raised by submitters, the Committee sought clarification from the Department as to the justification for proposed section 6(2)(a); a defendant's ability to apply for a suppression order; and how it would impact on the operation of the proposed legislation if the Bill was amended to remove this section. In response, the Department advised the Committee as follows:

The requirement that proceedings not be pending was included to address a number of factors and risks arising out of a complainant or media making a statement or representation that discloses the identity of the complainant publicly, including:

²⁶ Committee Transcript, Public Hearing, 2 March 2020, p.6

²⁷ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.3

²⁸ Committee Transcript, Public Hearing, 2 March 2020, p.9

- it could compromise the ability of the defendant to receive a fair trial, for example because the jury may be influenced by the story in the media;
- it could have an impact on any future prosecution of the offence, for example because the defendant may apply to stay proceedings on the basis that he or she cannot ever have a fair trial;
- the complainant may make statements in the media that may be, or may be interpreted to be, contradictory to the evidence they will give or have given in court, and so the complainant may be cross examined on those media statements.
- given the complexities of criminal procedure, suppression orders and the law of contempt, the inclusion of the requirement that proceedings not be pending in new section 6(2)(a) provides clarity to complainants who want to make public statements themselves as to when it is appropriate to make those statements. Large media organisations would likely be familiar with the rules surrounding contempt of court, but the same is not necessarily the case for everyday social media users.

Further, the restriction on publication of the complainant's identity while proceedings are pending is not absolute as the complainant will still have the ability to apply to the court for an order under new section 9, at any time.

The defendant may apply for a suppression order at any time under section 45(1)(b) of the *Evidence Act 1939*. That section allows a suppression order to be made if it appears to the court that for the furtherance of or otherwise it is in the interests of the administration of justice to prohibit publication. The court may make orders prohibiting publication of evidence, or any part of evidence, or the publication of the name of any party or witness.

The defendant would need to persuade the court that disclosure of a complainant's identity (and/or other evidence or information) would be in the interests of the administration of justice, if disclosed publicly.

Removal of new section 6(2)(a) would allow a complainant to consent to publication of their identity at any time. However, police, prosecutors and witness assistance staff counsel and warn witnesses and complainants of the risks of discussing their evidence with other people (including private discussions with other witnesses) while there are criminal proceedings pending.

Further, the timing and extent of any publication would be restricted by the law regarding contempt of court, and by any suppression order made under section 57 of the *Evidence Act 1939*.

However, it may not always be possible for a defendant to pre-empt circumstances where a complainant may consent to publishing their story while proceedings are pending. Additionally, there may be instances where not only the defendant but also the prosecution would oppose the publication of the complainant's identity (and/or other information) while criminal proceedings are pending. As a result, more suppression orders may be applied for, and made.²⁹

Committee's Comments

3.25 In the absence of any compelling evidence to the contrary, the Committee considers that the restriction on publication of a complainant's identity as proposed by section 6(2)(a) is unduly limiting and significantly weakens the Bill's capacity to achieve its

²⁹ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, pp.2-4

objective of “giving survivors a voice, autonomy and control in situations where control has been taken away from them.”³⁰

- 3.26 In introducing the Bill, Minister Manison advised the Assembly that “it is time the Territory’s law was modernised and brought into line with other jurisdictions”³¹ However, as highlighted in the preceding discussion, with the exception of Victoria, the Committee notes that inclusion of this restriction is out of step with all other jurisdictions. The Committee also notes it did not receive any evidence to suggest that the absence of this type of restriction in other jurisdictions has proven to be problematic.
- 3.27 While the Committee notes that the restriction on publication of the complainant’s identity while proceedings are pending is not absolute given that they may apply to the court for an order under proposed section 9 at any time, as the Minister and witnesses to this inquiry acknowledged, this is an “expensive and time consuming process”³² and is therefore not an option that would necessarily be available to many complainants.
- 3.28 As highlighted by the Department, irrespective of proposed section 6(2)(a), a complainant’s ability to make public statements may still be restricted by the laws of contempt, suppression orders, or the advice of police, prosecutors, witness assistance staff or lawyers. As such, the Committee is of the view that there is no justification for the additional restriction on publication as provided for in proposed section 6(2)(a).

Recommendation 3

The Committee recommends that proposed section 6(2) be amended to remove subsection 6(2)(a).

Definition of the Terms ‘Pending’ and ‘Proceeding’

- 3.29 While the Northern Territory Legal Aid Commission (NTLAC) expressed their support for section 6(2)(a), they recommended that it be amended to clarify the meaning of the term ‘pending’:

According to the Explanatory Statement this [‘pending’] means that “the publication or representation must not be made until all the proceedings for the sexual offence, including any appeal or retrial, are finalised.” The Commission submits that the words in the Bill may not live up to the claim made in the Explanatory Statement. ... Accordingly, the Commission recommends that the Bill be amended to define the term “pending” to include the allowable appeal period following a judicial determination in a proceeding; or to use an expression such as “not finally disposed of” instead of pending.³³

³⁰ Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

³¹ Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

³² Hon Nicole Manison MLA, Treasurer, *Draft Daily Hansard – Thursday 28 November 2019*, <https://www.territorystories.nt.gov.au/jspui/handle/10070/755088>, p.8

³³ Northern Territory Legal Aid Commission, Submission 2, pp.1-2

3.30 EROCA raised a similar concern noting that:

If subsection 6(2)(a) is to be maintained, we note that it applies only where no “proceeding” is “pending”. Neither of these terms is defined. We submit that “proceeding” should be narrowly defined as only a criminal prosecution proceeding of the particular sexual offence in question, to avoid any suggestion that it might include related civil proceedings or other proceedings that may be tangentially related to the sexual offence.³⁴

3.31 The Department subsequently advised that:

It was considered that the terms ‘proceeding’ and ‘pending’ were clear in meaning. ... There is a risk that defining the terms may inappropriately narrow or broaden the scope of the prohibition. ...

It is not considered necessary to define ‘proceeding’ as a ‘criminal’ proceeding. This is because the surrounding words in new section 6(2)(a) provide meaning to the word. The relevant proceeding in that subsection can only be a criminal proceeding because it refers to proceedings ‘relating to the sexual offence that was alleged to have been committed.’

With respect to the word ‘pending’, the Explanatory Statement evidences the intention to cover any appeal period or possible retrial. The alternative wording suggested by the NT Legal Aid Commission may also give effect to that intention.³⁵

However, during the public hearing, Ms Leonique Swart (Principal Policy Lawyer, Legal Policy: Department of the Attorney-General and Justice) acknowledged that:

Through listening to the testimony and reading the submissions, the issue of proceedings pending might be considered to be a bit unclear about when it stops and starts. ... Potentially, there is a bit of ambiguity. Courts in one jurisdiction might deal with it slightly differently than in another jurisdiction.³⁶

Committee’s Comments

3.32 While the Department noted that inclusion of the requirement that proceedings not be ‘pending’ sought to provide clarity to complainants who want to make public statements as to when it is appropriate to do so, it was also acknowledged that it may be unclear as to when proceedings pending start and stop.³⁷ Although the Department noted that there may be a risk that defining the term may inappropriately narrow or broaden the scope of the prohibition, the Committee is of the view that if proposed section 6(2)(a) is to be retained, the term ‘pending’ ought to be defined. In addition to providing clarity for complainants, inclusion of a definition of ‘pending’ will ensure that the Bill is unambiguous and drafted in a sufficiently clear and precise manner.

³⁴ End Rape on Campus Australia, Submission 3, p.3

³⁵ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.5

³⁶ Committee Transcript, Public Hearing, 2 March 2020, p.11

³⁷ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.2; Committee Transcript, Public Hearing, 2 March 2020, p.11

Recommendation 4

The Committee recommends that, if the Assembly does not agree to recommendation 3, proposed section 6(2)(a) be amended to include a definition of the term ‘pending’.

Capacity to Consent

3.33 Proposed section 6(2)(b)(ii) requires that the affected complainant was an adult with capacity to consent when consenting. Proposed section 6(4) then defines the concept of having ‘capacity’ to consent as meaning that the person is (a) capable of freely and voluntarily consenting; and (b) is not incapable of consenting because of mental impairment as defined in section 43A of the *Criminal Code Act 1983* (NT). However, NTLAC and KLS raised concern regarding the definition of ‘capacity’ in section 6(4)(a).

3.34 NTLAC suggested that to ensure that consent has not been vitiated by fraud, mistake, duress or inducement, consideration be given to the approach taken by the British Parliament:

Section 5 of the *Sexual Offences (Amendment) Act 1992* (UK) establishes that the written consent of a complainant is a defence to a prosecution for publishing a complainant’s identity unless “it is proved that any person interfered unreasonably with the peace or comfort of the person giving the consent, with intent to obtain it.” The Commission recommends that the offence provision further provide that the publisher is guilty if the publisher knows about or is reckless as to the interference.³⁸

3.35 Alternatively, KLS suggested that consideration be given to the approach taken in Queensland:

In Queensland, capacity is defined to mean that the person is capable of understanding the nature and effect of decisions, and can freely and voluntarily make decisions and communicate these in some way, as per the *Guardianship and Administration Act 2000* (Qld). A similar approach in the Northern Territory, such as one based on the meaning of decision-making capacity in the *Guardianship of Adults Act 2016* (NT), may provide greater assistance to the Court in determining whether a person has capacity to consent, particularly in circumstances of mental impairment.³⁹

3.36 The Department advised that, in developing the Bill, consideration was given to both the UK and Queensland provisions. However, neither was considered satisfactory. It was also noted that the meaning of decision-making capacity as provided for in section 5(1) of the *Guardianship of Adults Act 2016* (NT) is more complex than is required in the context of the Bill.⁴⁰

The way the definition of consent is currently drafted was considered appropriate to implement the policy that the adult complainant must freely and voluntarily consent to disclosure and must not have a mental impairment that prevents their free and voluntary consent. The Department considers the current drafting achieves its purpose.

³⁸ Northern Territory Legal Aid Commission, Submission 2, pp.2-3

³⁹ Knowmore Legal Service, Submission 5, p.4

⁴⁰ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.7

New section 6(2)(b)(ii) states that in order for the defence to be made out, firstly the adult has to have 'capacity to consent' at the relevant time, which is 'when consenting'. Secondly, the adult, at the relevant time, has to be capable of freely or voluntarily consenting. If the person was under some sort of duress at the time of giving consent such that they could not be said to be giving free and voluntary consent, they would not be 'capable of freely and voluntarily' consenting.⁴¹

Committee's Comments

3.37 The Committee is satisfied with Department's response.

Disclosing identity of defendant

3.38 Proposed section 7 provides that it is an offence to intentionally publish or make a statement or representation that results in the disclosure of a defendant's name, address, school, place of employment, or any other particular likely to lead to the identification of the defendant if the disclosure occurs before the defendant is committed for trial or sentence upon a charge of having committed the sexual offence to which the statement or representation relates. As with proposed section 6, the offence carries a maximum penalty of 40 penalty units or 6 months imprisonment.

3.39 Submitters raised significant concern regarding the Bill's retention of a blanket prohibition on publication of a defendant's identity. As EROCA pointed out:

This is the only crime in the NT where charged individuals are offered a special protection. The policy justification for this is unsound; it is rooted in a historical and baseless assumption regarding that women in particular often make false accusations of sexual violence, and therefore those who stand accused deserve a special level of protection. This justification is out of step with current evidence and thinking. It is misogynistic and baseless. Other jurisdictions including NSW, Victoria, ACT, Tasmania, and Western Australia do not offer this especial protection. South Australia is currently reviewing their law on this matter. Should they amend it to bring it into alignment with most other Australian jurisdictions this will leave the NT and Queensland as the last remaining hold outs. It is commonly believed that this protection is in place because sexual offences are ruinous to a person's reputation. Arguably charges of murder are as ruinous if not more ruinous. In reality this outdated law was introduced based on unsound logic. It favours the interests of the accused. If a defendant wishes to have their identity suppressed once they have been charged with a sexual offence, then the onus should be on them to convince the court that that is necessary or appropriate in the particular circumstance of their case. The default position should be open justice, not suppression. We therefore recommend that the Committee review this matter.⁴²

3.40 ARTK expressed a similar view:

This section of the Act is undeniably anachronistic and Northern Territorians should rightly be puzzled as to why an automatic restriction on publishing the identity of alleged sex offenders applies in 2019. ... Section 7 of the Act is out of step with New South Wales, Victoria, Western Australia, Tasmania and the ACT regarding this law.

There have been no ill-effects of the ability to publish the names of those charged with sex offences in those jurisdictions. To the contrary, as Australian society has

⁴¹ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.7

⁴² End Rape on Campus Australia, Submission 3, p.3

taken a more open and honest approach to talking about and tackling sexual and domestic violence, it is widely reported in research and by survivors that fulsome publication and broadcast of details about sexual offence prosecutions are powerful tools in educating and tackling these society-wide issues.

We also note that while we recommend the repeal of section 7 it would remain open to a sex offence defendant to apply for a suppression order pursuant to section 57 of the *Evidence Act 1939* (NT) in relation to his (or her) name. The court can then exercise the usual process of deciding whether or not to grant a suppression order and in what terms.⁴³

- 3.41 On 3 March 2020, the South Australian Parliament passed the Evidence (Reporting on Sexual Offences) Amendment Bill 2020 which removes the blanket prohibition on publication of a defendant's identity. However, rather than removing the prohibition altogether, the South Australian Bill retains the restriction on publication until the conclusion of the accused person's first court appearance.⁴⁴ In speaking on the Bill, Attorney-General the Hon Vicki Chapman MHA, noted that the Bill gave effect to the 2011 review conducted by the Hon Brian Martin AO QC. In recommending the repeal of restrictions on the publication of the identity of those charged with sexual offences, the Attorney-General noted that in his review Justice Martin stated that:

In my opinion the interests of the few who would be adversely affected by removing automatic prohibition currently mandated by section 71A do not justify the constraint on the principle of open justice affected by section 71A. To the extent that the few adversely affected by a publication of identity, their personal interests are outweighed by the greater public interest in adhering to an open system.

Removal of the automatic prohibition on publication of identity in these cases will remove the source of rumour and innuendo which currently accompanies the charging of sexual offences in any cases which attract media interest. Publication of identity might also promote the possibility of witnesses coming forward.⁴⁵

- 3.42 Given that proposed section 7 is now inconsistent with comparable legislation in all other jurisdictions apart from Queensland, the Committee sought clarification from the Department as to the justification for this prohibition and was subsequently advised that:

The purpose of the Bill is to lift the blanket prohibition on disclosure of a complainant's identity in circumstances where an adult complainant consents to the disclosure. The amendments to the *Sexual Offences (Evidence and Procedure) Act 1983* required to give effect to this policy have required the redrafting of a number of sections of that Act. However, policy changes to other sections of the Act were beyond the scope of the Bill. Amendment to section 7 is an example. It has been redrafted in the Bill but with the same policy effect as under the current Act.

The policy basis of defendant anonymity was to protect them from reputational damage that could be caused if an allegation was false or if charges were subsequently dropped. It is acknowledged that this policy treats defendants charged with sexual offences differently from persons charged with any other offence and that it runs counter to the principle of 'open justice.'

⁴³ Australia's Right to Know, Submission 8, p.4

⁴⁴ Evidence (Reporting on Sexual Offences) Amendment Bill 2020, Part 2, Amendment of Evidence Act 1929; Parliament of South Australia, *South Australian Legislative Tracking, Evidence (Reporting on Sexual Offences) Amendment Bill 2020*, <https://www.parliament.sa.gov.au/Legislation/SALT>

⁴⁵ Parliament of South Australia, *Hansard, House of Assembly, Tuesday 3 March 2020*, <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-37361>, p.380

Removal of section 7 would not significantly impact the operation of the amendments made in the Bill which relate to publication of a complainant's identity. However, it is not recommended that section 7 be repealed without wider stakeholder consultation.⁴⁶

3.43 The Committee also sought the Department's views on the recent amendments to the South Australian legislation. As the Department noted:

Current section 71A(2) of the *Evidence Act 1929* (SA) operates similarly to current sections 7 and 11B(1)(c) of the *Sexual Offences (Evidence and Procedure) Act 1983*, or proposed new section 7 in the NT Bill. The South Australian section prohibits the publication of the identity of a defendant in sexual offence proceedings until the 'relevant date', which is at the time of a plea of guilty or a finding or guilt for minor indictable sexual offence matters. The Evidence (Reporting on Sexual Offences) Amendment Bill 2019 (SA) will amend section 71A(2) of the *Evidence Act 1929* (SA) so that the prohibition on publication of the identity of the defendant in a sexual offence proceeding is restricted to the time before the conclusion of the accused's first court appearance.

The South Australian Treasurer, the Hon Rob Lucas MP, in his second reading speech for the SA Bill, stated that the reasons for the prohibition applying until the time of the first court appearance are:

- preserving the integrity of an on-going police investigation and future criminal proceedings by ensuring there can be no reporting on a potential arrest before it happens;
- the existing prohibition can fuel rumour and innuendo impacting on the ability of the defendant to receive a fair trial;
- enabling a victim who is an adult and who consents to speak publicly about what they allege the defendant did after the first court hearing; and
- ensuring that there is no inadvertent identification of an alleged victim.

It is not clear to what extent these reasons are applicable in the Northern Territory context to justify only adjusting the timeframe for the prohibition rather than removing the prohibition completely. It is noted that the effect of the South Australian Bill is to preserve the status of the defendants of sexual offences as a special category of defendant. The Department reiterates its recommendation that whether to retain or amend proposed section 7 be the subject of wider consultation.⁴⁷

Committee's Comments

3.44 As acknowledged by the Department, the policy basis of defendant anonymity as provided for under section 7 treats defendants charged with sexual offences differently from persons charged with any other offence in the Northern Territory, runs counter to the principle of 'open justice', and has not been reviewed since the Act came into operation in 1983.

3.45 However, as submitters pointed out, societal attitudes in relation to sexual offence cases have changed significantly in the intervening 37 years. As highlighted in the preceding discussion, with the exception of Queensland, comparable provisions no longer exist in equivalent legislation in any other jurisdiction. The Committee also

⁴⁶ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.8

⁴⁷ Department of the Attorney-General and Justice, *Answer to Question Taken on Notice*, 6 March 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.1

notes that it did not receive any evidence to indicate that the absence of similar provisions elsewhere have proven to be problematic.

- 3.46 Given that the defendant can apply for a suppression order at any time; the court may make orders prohibiting publication of evidence or the name of any party or witness; and, as the Department pointed out, removal of section 7 would not significantly impact the operation of the proposed legislation, the Committee is of the view that in 2020 there is no justification for maintaining the blanket prohibition on disclosure of a defendant's identity in sexual offence cases.

Recommendation 5

The Committee recommends that the Bill be amended to remove proposed section 7.

Contempt

- 3.47 Proposed section 11 retains the effect of repealed section 11C to provide that if a person is charged with or found guilty of an offence against the aforementioned proposed sections 6 and 7, or proposed section 10 'Contravention of an order', the Court may also deal with the person for contempt of court.

- 3.48 However, EROCA and ARTK expressed the view that, given the Bill provides that it is a criminal offence to contravene sections 6, 7, or 10, there is no need to provide that the Court may also deal with the person for a contempt of court, and recommended that section 11 should be removed from the Bill.⁴⁸ As ARTK stated:

We note that the Northern Territory is an outlier in prescribing prosecution for contempt as the penalty applicable in legislation protecting complainants in sexual offence cases.

We note here that Tasmania is currently consulting on a similar issue which will retain the dual contempt/offence penalty provision in that jurisdiction. ARTK has recommended that Tasmania delete the contempt penalty provision. We make the same recommendation here and recommend that section 11 of the Bill be deleted in full.

We recommend the deletion of the contempt provisions in the outlier jurisdictions of the Northern Territory and Tasmania because prescribing conduct as punishable as a contempt of court exposes a potential defendant to unnecessary uncertainty given the penalty ultimately applied will be at the court's discretion. That said, prescribing conduct as both a potential contempt and an offence is worse as it combines both the element of uncertainty with the risk of self-incrimination.

For example, should a media publisher identify a complainant in a sexual offence case and a complaint follow that either the publisher did not have consent at all or had not met all of the requirements of sub-section 6(2), it would be prudent to apologise to the court in the face of a potential contempt charge. Any such apology could be regarded as an admission of liability and used against the publisher once charged with an offence.

⁴⁸ End Rape on Campus Australia, Submission 3, p.3; Australia's Right to Know, Submission 8, p.5

ARTK submits that the risk of a penalty provision will sufficiently deter to enforce compliance with section 6 and recommends that the penalty provisions be retained and all reference to contempt removed.⁴⁹

3.49 The Committee sought clarification from the Department regarding the anticipated operation of this provision, and was advised that:

New section 11 has existed (with slight changes to its wording or section number) since the initial passage of the *Sexual Offences (Evidence and Procedure) Act* in 1983. The Bill only renumbers that section.

New section 11 is a saving provision to make it clear that the legislation does not override the application of the common law of contempt. It is noted that similar provisions exist in Tasmanian and Queensland legislation, and that the Tasmanian Government proposes to retain the provision in its draft Evidence Amendment Bill 2020 which was released for public consultation in late 2019.

The law of contempt aims to prevent interference with the administration of justice and to maintain the order and integrity of courts as a matter of public interest. More particularly, contempt prohibits publication of material that tends to interfere with legal proceedings (known as sub judice contempt), and publications which interfere with justice as a continuing process, for example because the publication denigrates judges or courts so as to undermine public confidence in the administration of justice ('scandalise the court' contempt). There are special procedures for contempt proceedings and usually the Attorney-General or Registrar of the court formulates the charges.

The offences in new sections 6, 7 and 10 are different and distinct offences from contempt of court. Not all conduct that will breach proposed sections 6, 7 or 10 will constitute contempt of court. For example, publication of a complainant's identity in breach of new section 6(1) will not be a contempt of court unless the court considers the publication also created a substantial risk of prejudice to the administration of justice.

An analogous situation arises under the *Juries Act 1962*. The Act creates a number of offences. There may be circumstances where conduct by a juror may be a contempt of court, and concurrently constitute a breach of the *Juries Act 1962*. The conduct can constitute both a statutory and a common law offence, including contempt of court. The offender may be liable for both, but other legal principles would ensure the offender is not liable to be punished more than once for the same act or omission.

Repealing current section 11C (or removing section 11 from the Bill) may make it unclear whether the *Sexual Offences (Evidence and Procedure) Act 1983* intends to override the common law of contempt, though it is generally considered that clear and unambiguous words are required to override the Supreme Court's inherent jurisdiction to deal with contempt of court.⁵⁰

Committee's Comments

3.50 The Committee is satisfied with the Department's clarification.

Consequential Amendment of Youth Justice Act 2005

3.51 Clause 8 amends section 50 of the *Youth Justice Act 2005* (as amended by the *Youth Justice and Related Legislation Amendment Act 2019*) which provides that a person

⁴⁹ Australia's Right to Know, Submission 8, p.5

⁵⁰ Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>, pp.10-11

who publishes any information relating to proceedings in the Youth Justice Court or proceedings in any other court arising out of proceedings in the Youth Justice Court that is likely to lead to the identification of the youth, witness or other party in the proceeding is guilty of an offence.

3.52 However, as noted in the Explanatory Statement, given that this offence could prevent a complainant in a sexual offence matter from being publicly identified where the defendant is a youth, this clause introduces a new exception to the offence where a report or information contains particulars of a complainant, as defined in the *Sexual Offences (Evidence and Procedure) Act 1983*, who has consented to the publication in accordance with proposed section 6(2)(b) of that Act as introduced by the Bill.

This means that a complainant in a sexual offence proceeding where the defendant was a youth at the time of the offence may consent in writing to the publication of the report or information provided the complainant is an adult and has capacity to consent. According to new section 50(2)(c)(ii) however, the report or information must not identify the youth offender unless the youth has consented to the publication. According to new section 50(2)(c)(iii) it also must not identify another witness who is a complainant unless that witness has consented in accordance with new section 6(2)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983*.⁵¹

3.53 However, as NAAFLS pointed out, while proposed section 6(2)(b) of the Bill requires that the complainant is at least 18 years of age in order to provide consent, unless the Court authorises disclosure pursuant to proposed section 9, the same age threshold does not apply in relation to defendants that are minors. As such, NAAFLS sought clarification regarding the disparity between a complainant's right to disclose and that of a defendant.⁵²

3.54 The Department subsequently advised that:

Section 50 of the *Youth Justice Act 2005* will come into force in March 2020. It is introduced by the *Youth Justice and Related Legislation Amendment Act 2019*, was considered by and reported on by the former Social Policy Scrutiny Committee, and was ultimately debated and passed by the Legislative Assembly in September 2019.

Section 50 addresses recommendation 25.25 of the Northern Territory Royal Commission into the Protection and Detention of Children, that proceedings under the *Youth Justice Act 2005* should be heard in closed court with the court retaining a discretion to publish all or part of a proceeding upon application. It is also based on section 534 of the *Children Youth and Families Act 2005* (Vic) with the additional ability for the youth to consent to publication.

The intended policy of permitting the youth to consent was for youth defendants to be able to 'own' their stories generally. The two provisions arise out of different policy circumstances. One provision applies to victims and alleged victims of sexual offences for whom, as evidenced by the protections in the Bill and in numerous other jurisdictions, the law will provide special protection, and the other applies to youth defendants.

If the Committee were to make a recommendation with respect to the age at which a youth may consent, the Minister will consider it.

⁵¹ Explanatory Statement, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>, p.5

⁵² North Australian Aboriginal Family Legal Service, Submission 10, pp.3-5

Committee's Comments

- 3.55 The Committee acknowledges and supports the policy intent regarding a youth defendant being able to 'own' their story. However, the Committee is of the view that, as is the case for a complainant, a youth defendant in a sexual offence proceeding should also be an adult with capacity to consent when consenting to the publication of their identity. To ensure consistency, the Committee has therefore recommended that section 50 of the *Youth Justice Act 2005* be amended accordingly.
- 3.56 While not within the scope of the current inquiry, the Committee also expressed some concern that the *Youth Justice Act 2005* does not stipulate a minimum age for youth defendants who may wish to consent to their identity being published. Given the potential for a young person to consent to their identity being made public, only to regret the decision later in life, the Committee is of the view that the Government may wish to consider whether any further amendments are required in this regard.

Recommendation 6

The Committee recommends that section 50 of the *Youth Justice Act 2005* be amended to provide that a youth defendant in a sexual offence case must be an adult with capacity to consent when consenting to the publication of their identity.

Appendix 1: Submissions Received

Submissions Received

1. Victims of Crime NT
2. Northern Territory Legal Aid Commission
3. End Rape on Campus Australia and Marque Lawyers
4. Central Australian Aboriginal Family Legal Unit
5. knowmore legal service
6. Northern Territory Women's Legal Services
7. Northern Territory Council of Social Service
8. Australia's Right to Know
9. Rape & Domestic Violence Services Australia
10. North Australian Aboriginal Family Legal Service

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/LSC/117-2019>

Appendix 2: Public Briefing and Public Hearings

Public Briefing – 9 December 2019

Department of the Attorney-General and Justice

Jenni Daniel-Yee: Director, Legal Policy

Leonique Swart: Principal Policy Lawyer, Legal Policy

Public Hearing – 2 March 2020

Northern Territory Women’s Legal Services

Caitlin Weatherby-Fell: Senior Solicitor, Top End Women’s Legal Services

North Australian Aboriginal Family Legal Service

Melisa Coveney: Acting Principal Lawyer

Sophie Hantz: Solicitor

Knowmore Legal Service

Warren Strange: Executive Officer

Lauren Hancock: Law Reform and Advocacy Officer

Australia’s Right to Know

Georgia-Kate Schubert: Head of Policy and Government Affairs, News Corp Australia

Gina McWilliams: Legal Counsel, News Corp Australia

Department of the Attorney-General and Justice

Leonique Swart: Principal Policy Lawyer, Legal Policy

Jane Bochmann: Senior Policy Lawyer, Legal Policy

Note

Copies of hearing transcripts and tabled papers are available at:

<https://parliament.nt.gov.au/committees/LSC/117-2019>

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Department of the Attorney-General and Justice, *Answer to Question Taken on Notice*, 6 March 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>

Department of the Attorney-General and Justice, *Responses to Written Questions*, 27 February 2020, <https://parliament.nt.gov.au/committees/LSC/117-2019>

Evidence Act 1906 (WA)

Evidence Act 1929 (SA)

Evidence Act 1939 (NT)

Evidence Act 2001 (Tas)

Evidence Amendment Bill 2020 (Tas)

Evidence (Miscellaneous Provisions) Act 1991 (ACT)

Evidence (Reporting on Sexual Offences) Amendment Bill 2020 (SA)

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Sexual Offences (Amendment) Act 1992 (UK)

Sexual Offences (Evidence and Procedure) Act 1983 (NT)

Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117), <https://parliament.nt.gov.au/committees/LSC/117-2019>

Statement of Compatibility with Human Rights, *Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (Serial 117)*, <https://parliament.nt.gov.au/committees/LSC/117-2019>