SUBMISSION TO THE NT LEGISLATION SCRUTINY COMMITTEE INQUIRY INTO THE *SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) AMENDMENT Bill 2019*

30 JANUARY 2020

Australia's Right to Know (ARTK) coalition of media organisations welcomes the opportunity to make this submission to the Northern Territory Legislation Scrutiny Committee inquiry into the *Sexual Offences (Evidence and Procedure) Amendment Bill 2019* (the Bill).

As set out in previous ARTK submissions regarding this important matter, ARTK supports a legal framework that:

(i) allows adult sexual assault survivors/complainants affected by section 6 of the *Sexual Offences* (*Evidence and Procedure) Act 1983 (NT)* (the Act) to consent to being identified should they wish to do so; and
(ii) ensures that the identity of the accused in sexual offence cases is not automatically restricted until they are committed for trial, as per section 7 of the Act.

ARTK recommended the following amendments to the Act to enable these outcomes:

(i) section 9 of the Act – exempted reports – be amended to add subsection 9(i)(d) as *'a report made with the consent of the complainant who is an adult at the time of giving consent;'* and
(ii) section 7 of the Act be repealed; and
(iii) all references to section 7 be deleted from section 9 (including the repeal of subsection 9(2)) and other sections of the Act.

While we acknowledge that the Bill is a positive development in relation to open justice which will give a voice to the relevant group of sexual assault complainants, we remain disappointed that the structure of the law maintains the stigma that sexual assault survivors speaking out remains an offence. Further, and as ARTK has expressed in other jurisdictions, it should not be incumbent on a complainant or a third party with the complainant's written consent, to risk prosecution and have to plead a statutory defence – with the onus of establishing the criminal standard of proof – in order to avoid conviction.

Rather, it is our preference that the existence of a valid consent should operate as an exemption from the offence provision. We note here that an exemption is not a "free-pass" and does not put media organisations – or sexual assault survivors/complainants if they choose to "self-consent" and self-publish – above the law. To the contrary, the exempted party remains within the legal framework and responsible for their actions. We would encourage the Northern Territory Government to consider this issue.

Having said that, we make the following constructive comments regarding the Bill and urge the Northern Territory Government to accept the following amendments to address the matters that remain of concern to ARTK in the Bill.

DELAY IN IDENTIFICATION OF COMPLAINANTS IN SEXUAL OFFENCE PROCEEDINGS

Section 6(2)(a) provides that consent from a complainant or witness who wishes to be identified is only good if "*no proceeding in relation to the sexual offence that was alleged to have been committed is pending in a court when the statement or representation is published or made".* Further, the Explanatory Statement to the Act says *"the publication or representation must not be made until all the proceedings for the sexual offence, including any appeal or trial, are finalised".* ARTK submits this subsection is unnecessarily restrictive for the following reasons:

- If the Bill were to pass, the Northern Territory would remain an outlier in this area of law as section 6(2)(a) is not present in the equivalent legislation of any other Australian jurisdiction. In each of the ACT, NSW, SA and WA a complainant can give consent at any time of his or her choosing. The only jurisdictions with similar provisions are: Victoria (in which section (1B) of the *Judicial Proceedings Act 1958* only permits complainants in sexual offence cases to consent to be identified "if a proceeding in respect of the alleged offence is not pending in a court at the relevant time") and Queensland (in which the relevant legislation only allows for consent if the intended publication is not a court report)[1].

- The publication or making of a statement by the complainant is not limited to traditional forms of media. It may be that the complainant communicates directly. Perversely, such a complainant would have had to give their own consent, to themselves, in writing.

- 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.

- Section 6(2)(a) deprives consenting complainants of a voice at the very time it may be most important to them. Steven Fisher – a sexual assault survivor who obtained an order from the Supreme Court of Tasmania permitting him to be identified as such[2] – wrote a compelling editorial for *The Mercury* describing how he felt on discovering he would be unable to be identified at the sentencing of his assailant:

  > *When I was told by the Department of Public Prosecutions that when my abuser was sentenced I would not be able to be identified as one of his victims I was horrified. I had spent three long years lobbying the police to arrest this man.*
  >
  > *In 2001 a law had been introduced and I wasn't going to be allowed to speak.*
  > *The things that went through my mind were incredible. I was distraught beyond belief. It was like my world came crashing down because it was so important to me to look into that camera and say my piece knowing everyone would know who I was talking about.*
  >
  > *I felt robbed of my right to further help and educate other people. I felt the power that I had slowly developed would be instantly taken away. I was crushed. I was angry at the system and I felt that once again the system was protecting the abuser, not me.*[3]

- 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 judgment which authorised Mr Fisher to be identified, his affidavit evidence "*suggests that his public disclosures led to his complaints being properly investigated*

[1] ARTK notes that at an appropriate time it intends to make submissions to both the Victorian and Queensland parliament that the above provisions should be repealed or amended to also allow for consent at any time.
[2] At present, Tasmanian law also does not allow a sexual assault complainant to consent to being identified.
[3] https://www.themercury.com.au/news/opinion/talking-point-time-to-remove-the-gag-so-victims-can-live-on/news-story/f1c1b6a0aaef2b7b773b1af14f22c9b0

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"[4].

- 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 cause 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 allowed to speak in his or her own name. Again, ARTK accepts that these effects were unintended by the drafters but, nonetheless, plainly arise.

Recommendation

We recommend section 6(2)(a) be deleted.

Specifically, delete: "*no proceeding in relation to the sexual offence that was alleged to have been committed is pending in a court when the statement or representation is published or made; and"*

AUTOMATIC RESTRICTION OF PUBLICATION OF IDENTITY OF DEFENDANT

ARTK has previously detailed how section 7 of the Act automatically restricts publication pertaining to the identity of the accused in sexual offence cases until they are committed for trial or sentence. We are disappointed that the automatic suppression of the defendant's identity been retained in the Bill at the new section 7. We urge the Northern Territory Government to reconsider this as a matter of utmost importance. We recommend section 7 be deleted in its entirety.

For the benefit of this submission we briefly outline the issues which makes the deletion of section 7 required:

- Section 7(b) automatically gags reporting about sex offences

  Section 7 prohibits reports concerning an examination of witnesses which reveal the name, address, school, place of employment or any other particular likely to lead to the identification of a defendant unless the court makes an order to the contrary. ARTK is not aware of any permissive orders ever having been made.

  Such protection is not afforded to any other accused in Northern Territory. Rather, all other individuals charged with an offence are subject to the usual process which is reporting which includes he or her name and identifying features is permitted unless an application for a suppression order or non-publication order is granted.

- The law is anachronistic and out-of-date

  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.

[4] **Re Evidence Act 2001, s194K and an Application by the Australian Broadcasting Corporation and Davies Bros Limited** [2003] TASSC 118 at [6]

The Act was assented to in November 1983 as part of suite of bills making consequential amendments which gave effect to the new Criminal Code. Unfortunately, there is nothing in the second reading speech for the *Sexual Offences (Evidence and Procedure) Bill 1983* which indicates why parliament deemed it necessary to protect the accused from being identified until committal[5]. To the contrary, everything said by the then Attorney General about the Bill is focused on minimising the complainant's embarrassment and encouraging sexual assault victims to complain.

What is undeniable, however, is that the 1983 Bill had its genesis when the attitudes of Australian society were quite different to today and when the public's access to news was limited to newspapers, radio and the nightly television news.

- NT is out of step with other Australian jurisdictions

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 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.

We also note that the risk of identifying the complainant/s in such circumstances is very low, even in small communities, which is often the case in relation to reporting in the Northern Territory. Avoiding identification of the complainant is something managed in the usual course of news reporting and, as we have expressed above, has not been an issue in other jurisdictions that have had this process for some time. ARTK is not aware of it ever being problematic to the reporting of Northern Territory cases after committal.

- Unjustifiable protection for sex offence defendants

The combination of the above would justifiably prompt Northern Territorians to wonder what type of society they live in when sex offence defendants enjoy a protection from being identified which is not extended to any other person or class of person charged with a criminal offence.

This should not continue and we urge the Northern Territory Government to make this important change to deliver a consistent approach and process for the issuing of suppression orders.

Northern Territorians have a right to know what is happening in their communities. Defendants charged with sex offences in the Northern Territory should not enjoy special treatment and automatic anonymity any longer.

Recommendation

Delete section 7 of the Bill in its entirety, and all references to section 7 in the Bill also be deleted.

[5] http://www.territorystories.nt.gov.au/jspui/bitstream/10070/221002/1/D_1983_08_25.pdf

PENALTY FOR INFRINGING SECTION 6

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 uncertainly 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.

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

RECOMMENDATION 3

We recommend that the contempt provision at section 11 be deleted.