Northern Territory
Legal Aid Commission

SUBMISSION BY NORTHERN TERRITORY LEGAL AID COMMISSION TO NORTHERN TERRITORY LEGISLATION SCRUTINY COMMITTEE INQUIRY INTO THE *SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) AMENDMENT BILL 2019*

The Northern Territory Legal Aid Commission supports the Bill, and commends the government for moving swiftly in response to the #letherspeak movement. Although the Commission agrees that the general prohibition on the publication of particulars likely to lead to the identification of a complainant should be retained, the current provisions are out of step with current best practice, insofar as they require a survivor of a sexual offence to obtain a court order permitting publication, which would in most cases be both costly and complex.

The Commission also commends the Attorney-General and Minister for Justice for informing the Commission at an early stage of her intention to introduce this Bill, and for providing the Commission with an opportunity to make submissions on its content. The Commission took up that opportunity, and we are pleased to see that the following issues we raised have been effectively addressed in the Bill:

- the complainant must be aged 18 or over;
- the complainant's consent must be in writing;
- the complainant must not have been suffering from any mental impairment (at the time the consent was given) which rendered the complainant incapable of making reasoned judgments in respect of the publication sought to be made; and
- the consent occurred prior to the publication.

However, the Commission raised two further issues which it submits the Bill does not adequately address, namely:

- publication with the consent of a complainant should not be permitted unless and until the associated criminal proceedings have been finally determined; and
- the consent must not have been vitiated by fraud, mistake, duress or inducement.

Pending proceedings

The Bill addresses the first of these issues by providing that publication is prohibited while "no proceeding… is pending in a court". According to the Explanatory Statement, this 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.

To take a hypothetical example, Mr A (for accused) is accused of raping Ms C (for complainant), tried in the Supreme Court and convicted by a jury. Immediately after the conviction, Ms C gives a television interview about her complaint, the trial and the verdict. The interview is broadcast and widely circulated on social media. Three weeks later – within the time allowed by the Supreme Court Rules – Mr A appeals against his conviction, and subsequently his appeal is allowed and the case is sent back to the Supreme Court for a re-trial. It would be unfair and prejudicial, and indeed contrary to the s6 of the Act for a media outlet to republish Ms C's interview after the appeal had been lodged, because when that occurs, the proceeding is clearly (again) "pending".

However, once the interview has been aired, the reality is that it is all but impossible to prevent its further circulation and publication on social media – the genie is out of the bottle. And that in turn could prejudice Mr A at his second trial, if jury members have been seen Ms C's interview. In the relatively small jury district of Darwin, and the even smaller jury district of Alice Springs, such a scenario is reasonably foreseeable.

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".

Vitiated consent

The Bill provides that publication of a complainant's identifying particulars is permitted if the complainant is an adult who has consented in writing to publication, and had the capacity to consent when consenting. The Bill defines "capacity" in this context to include "is capable of freely and voluntarily consenting".

The Commission has some concerns about this, as being capable of freely and voluntarily consenting is not necessarily the same thing as actually giving free and voluntary consent. By way of another hypothetical example, Ms C is a mentally fit adult survivor of sexual abuse by her father, committed against her when she was a child. Ms C is capable of freely or voluntarily consenting to identify herself as a survivor of sexual abuse. However, her mother, siblings and other family members have strongly conflicting views about whether Ms C should publicly identify herself as a survivor of sexual abuse. One of her sisters is strenuously opposed to the idea, because of the shame and antagonism she fears will be directed at the family. Another sister is just as strenuously of the view that Ms C must identify herself, as an example to others, and to ensure that their father's offending is brought to light. She and a journalist harass Ms C continuously about this, and eventually Ms C succumbs, and tells her story to the media (which, by the way, have offered the family a substantial sum of money for their story).

In this situation, if the Bill is passed, publication would be lawful: Ms C was capable of freely and voluntarily consenting, and she consented. However, it may be that she did not in fact freely and voluntarily consent.

The Commission recommends that the Bill address this difficult problem by following the approach of 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 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.

The Bill fixes 18 years as the minimum age for which a complainant can consent to publication of their identifying particulars. This conforms to what has been adopted in most Australian jurisdictions, as well as New Zealand and Canada. In the UK and in NSW, however, this age is fixed at 16 and 14 years respectively. Under the Bill, complainants under 18 years of age can apply to the court for an order permitting publication of their identifying particulars, and the court must consider their wishes. The Commission does not submit that the Bill be amended to set an age of less than 18 years.

A broader problem – and a potential solution

The #metoo movement and the #letherspeak movement are, as their hashtags proclaim, made possible by the proliferation of social media. Social media platforms have provided a liberating and empowering opportunity for survivors of sexual offences to expose their abusers and have them brought to justice. Unfortunately, however, social media platforms have also served as a serious threat to the criminal justice system. That is because the system depends on those persons burdened with the duty of judging the facts of a case not to be influenced by gossip, rumour or fake news, but to confine their deliberations to consideration of the evidence lawfully admitted at trial.

The Commission submits that, subject to the two matters raised above, the Bill strikes an appropriate balance between giving survivors the opportunity to speak about, and protecting the rights of an accused to a fair trial. However, the Commission further submits that in some cases – and the recent trial of Cardinal Pell, currently pending before the High Court of Australia – may be one such case, it may be impossible to keep the "noise" of social media out of the jury room, and in turn to avoid contaminating the trial.

Accordingly, the Commission submits that the Northern Territory Legislative Assembly should give serious consideration to introducing the option of judge alone trials, at the election of an accused, with appropriate constraints to ensure that justice is administered fairly, as an alternative to jury trials for serious offences. Judge alone trials have long been available in NSW, SA, WA and the ACT. This issue is of course beyond the scope of the Terms of Reference of this inquiry, but nevertheless, the Commission encourages the Members of the Committee, as legislators, to consider this broader issue.