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

29 JANUARY 2020

End Rape on Campus (EROC) Australia and Marque Lawyers welcome the opportunity to make a submission to the scrutiny committee inquiry into the Sexual Offences (Evidence and Procedure) Amendment Bill.

End Rape on Campus Australia is a volunteer organisation that works to end sexual violence at universities and other educational institutions through prevention efforts, direct support for survivors and their advocates, and policy reform at the campus, state/territory and federal levels. Since establishing in 2015, EROC Australia has worked closely with multiple sexual assault survivors in tertiary education settings around Australia including the Northern Territory.

Marque Lawyers is a Sydney-based commercial law firm with a strong passion for human rights. Marque engages extensively with cause-based pro bono and social justice work, including working directly with sexual assault survivor advocacy groups and not-for-profits like EROC Australia to support their work.

Currently, the Northern Territory and Tasmania are the only jurisdictions in Australia which have laws prohibiting all victims of alleged sexual offences from publicly identifying themselves. The only exception is if a court makes an order allowing them to do so. In the NT, regardless of whether a victim consents to be named, journalists and other individuals who publish the identities of sexual assault survivors can face up to 6 months jail time or fines in excess of $6000 under the Sexual Offences (Evidence and Procedure) Act.

There are currently no other crimes in the NT where adult victims are expected to gain a court order before they can speak about their experiences under their real identities to media. While this law was initially intended to protect victim- survivors from media exploitation, unfortunately it has had several unintended consequences including:

- silencing individual survivors who do wish to speak out publicly, thereby increasing their sense of isolation, powerlessness and voicelessness;

- maintaining and potentially increasing social stigma around sexual violence by keeping taboos intact, while treating survivors as nameless, faceless ‘others’;

• disempowering sexual assault survivors in the community more generally, by erasing from view individuals who they might otherwise draw strength from as powerful public role models;

• restricting survivor-led advocacy and education by placing conditions on how survivors can participate and be heard in public debates - including those debates which directly affect them;

• disempowering individual survivors and potentially exacerbating existing trauma, by denying them the opportunity to engage in certain activities which they may deem restorative, therapeutic, or healing.

That is, not only do current laws impact on individual survivors and their capacity to reclaim control and ownership of their own stories, but these laws also have flow-on effects for the survivor community more broadly, as well as the public, in terms of our wider understanding and conceptualisation of sexual violence, its causes and its consequences.

Across 2017, 2018 and 2019 EROC Australia and Marque Lawyers have supported and acted for a number of sexual assault survivors in both the Northern Territory and Tasmania who wish to self-identify in the media. This has included:

• Individual advocacy: acting on behalf of individual sexual assault survivors by assisting them to apply for a court order exempting them from current 'gag' laws.

• Systems based advocacy: advocating for law reform via the #LetHerSpeak campaign, so that in future, sexual assault survivors who wish to self-identify in media will no longer be required to apply for a court order, which can be an expensive, time consuming and disempowering process for those who attempt it.

The following submission is written on behalf of victim-survivors who we have worked with, who have direct lived experience with existing 'gag laws'.

In general, we welcome the prompt action taken by the Northern Territory government to prepare and put forward this bill addressing the concerns raised by the #LetHerSpeak campaign. We are very grateful for this.

However, we have a number of concerns regarding the draft bill, set out below. These issues aside, the draft bill is a major step forward in the cause of the rights of victims of sexual violence.

1. Section 6 has been drafted so that, in the situation where a complainant has consented to the disclosure of their identity, that fact creates a defence (under section 6(2)) to what would otherwise be a criminal offence under section 6(1). In our submission, this is inappropriate; 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.

2. We ask that further consideration is given to reframing the consent exception altogether. 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 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. That should be the starting point, as we have consistently advocated.

3. If subsection 6(2) 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.

4. We are opposed to the retention of a blanket prohibition on publication of a defendant's identity, as contained in the new section 7. Under existing law, individuals who are charged with sexual offences cannot be named until they are committed to stand trial. 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 circumstances of their case. The default position should be open justice, not suppression. We therefore recommend that the Committee review matter.

5. We submit that section 11 is unnecessary. It is a criminal offence to contravene the non-publication provisions already; there is no need to make it a contempt of court as well.

6. As a minor point, we noticed that, in Part 3 of the draft bill amending the Youth Justice Act 2005, the reference to section 50(2)(b) should actually be to section 51(2)(b).

If you would like further clarification on any of the issues we raise in our submission, please contact us via nina@endrapeoncampusau.org .

Kind Regards,

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