RESPONSE OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO THE LEGISLATION SCRUTINY COMMITTEE
Written Questions for Witnesses – Public Hearing: 2 March 2020

Sexual Offences (Evidence and Procedure) Amendment Bill 2019

Amendment of Sexual Offences (Evidence and Procedure) Act 1983

Proposed Section 6: Disclosing identity of complainant

1. **knowmore legal service (KLS) suggested that the maximum penalty for an offence under proposed section 6(1) is relatively low compared to penalties for similar offences in other jurisdictions. While the Bill provides for a maximum penalty of 40 penalty units ($6,280 for an individual and $31,400 for a body corporate) or 6 months imprisonment, the median fine for all jurisdictions outside of the Territory is $8,000 for an individual and $55,000 for a body corporate.**

    a. ***In developing the Bill, what consideration was given to the penalties for equivalent offences elsewhere?***

Response

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 gave rise to the need to redraft a number of other sections in that Act. However, policy changes to those other sections of the Act were beyond the scope of the Bill, including consideration of penalties.

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 $6280 (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 $5000 for an individual (and $25 000 for a body corporate) and set when the Act first came into force in 1996. 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 offences, the Minister will consider it.

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2. **End Rape on Campus Australia (EROC), Australia's Right to Know (ARTK), the North Australian Aboriginal Family Legal Service (NAAFLS) and knowmore legal service (KLS) considered proposed section 6(2)(a) to be unduly limiting. With the exception of Victoria and Queensland, it is noted that no other jurisdiction currently imposes restrictions on when complainants can consent to having their identity disclosed. Given that it may take several years before proceedings are concluded, it was suggested that this prohibition continues to withhold agency from the victim in relation to the control of his or her own story.**

    a. ***What is the justification for maintaining a statutory prohibition on the disclosure of a complainant's identity, at any time including while criminal proceedings are pending or in progress?***

Response

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 a complainant publicly, including:

- 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 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.

Sexual Offences (Evidence and Procedure) Amendment Bill 2019

b. In developing the Bill, was any consideration given to providing 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 as an alternative to maintaining the statutory prohibition on the disclosure of a complainant's identity while criminal proceedings are pending or in progress? If not, why not?

Response

The defendant may apply for a suppression order at any time under section 57(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 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.

c. ***How would it impact on the operation of the proposed legislation if the Bill was amended to remove section 6(2)(a)?***

Response

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.

3. **While the Northern Territory Legal Aid Commission (NTLAC) agreed that publication with the consent of the complainant should not be permitted unless and until the associated criminal proceedings have been finally determined, they suggested that to avoid any doubt, the Bill should be amended to define the term 'pending' to include the allowable appeal period following a judicial determination in a proceeding, or use an expression such as 'not finally disposed of' instead of 'pending'. EROC also suggested that if section 6(2)(a) is to be retained the terms 'proceeding' and 'pending' need to be narrowly defined as only referring to criminal proceedings, thereby avoiding any suggestion that it might include related civil proceedings or other proceedings that may be tangentially related to the sexual offence.**

   a. ***Was any consideration given to the inclusion of definitions for the terms 'proceeding' and 'pending'? If not, why not?***

Response

It was considered that the terms 'proceeding' and 'pending' were clear in meaning. The wording in section 4 of the *Judicial Proceedings Reports Act 1958* (Vic) was adopted.

b. To avoid any ambiguity, how would it impact on the operation of the legislation if these terms were defined in the legislation as suggested by NTLAC and EROC?

Response

There is a risk that defining the terms may inappropriately narrow or broaden the scope of the prohibition. As noted above, the Department of the Attorney-General and Justice (the Department) considers the concept to be clear. It is noted that the Victorian provisions were amended by the *Open Courts and Other Acts Amendment Act 2019* (Vic) but the concept of pending proceedings was not changed or defined.

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. However, it is noted that defining 'pending' in the manner suggested by the NT Legal Aid Commission is contrary to the submissions of End Rape on Campus, Australia's Right to Know and Knowmore Legal Service who advocate for the removal of new section 6(2)(a).

4. EROC, ARTK, NAAFLS and the Northern Territory Women's Legal Services (NTWLS) suggested that 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 in order to avoid conviction. Rather, it was suggested that a valid consent should operate as an exemption from the offence provision as is the case in equivalent legislation in the NSW, SA and WA.

a. Can you explain why section 6(2) was drafted as a defence to a prosecution for an offence against subsection 6(1) rather than as an exemption from the offence provision?

Response

The decision to make it a defence rather than an exemption was a policy one. See further below with respect to question b.

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b. How would it impact on the operation of the proposed legislation if the Bill was amended to provide that section 6 does not apply where the publication is made with the consent of the complainant similar to section 578A of the Crimes Act 1900 (NSW), section 71A of the Evidence Act 1929 (SA) or section 36C(6) of the Evidence Act 1906 (WA)?

Response

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 Australia 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 that is required in the Bill.

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5. **NTLAC and KLS raised concern regarding the definition of 'capacity' in section 6(4), noting that the phrase 'is capable of freely and voluntarily consenting' is not necessarily the same thing as actually giving free and voluntary consent.**

    a. ***As suggested by NTLAC and KLS, in developing the Bill was any consideration given to the approach taken in section 5 of the Sexual Offences (Amendment) Act 1992 (UK) or section 10(3) of the Criminal Law (Sexual Offences) Act 1978 (Qld)?***

Response

Consideration was given to both the UK and Queensland provisions, but neither was considered satisfactory.

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.

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.

    b. ***How would it impact on the operation of the proposed legislation if section 6(4)(a) of the Bill was amended to provide that the term 'capacity' has the same meaning as section 5(1) of the Guardianship of Adults Act 2016 (NT)?***

Response

Section 5(1) of the *Guardianship of Adults Act 2016* (NT) is more complex than is needed in this context.

Section 5(1) of the *Guardianship of Adults Act 2016* provides that 'decision making capacity' means the person needs to 'understand and retain information about the adult's personal matters and financial matters', to 'weight the information in order to make reasons and informed decisions about those matters', and be able to 'communicate those decisions'. The matters required to be proved in section 5(1) of the *Guardianship of Adults Act 2016* did not appear have direct relevance to the decision whether or not to agree to publish the person's identity. It was considered the most relevant considerations to determining whether or not the person had were whether the person was under some sort of pressure of duress (the question of free and voluntary consent) or whether the person was subject to a mental illness or intellectual or cognitive vulnerability.

6. ***As requested in the submission from NAAFLS, can you clarify how the offence provision in proposed section 6 is intended to operate where sexual assault occurs in the context of domestic violence?***

Response

The offence in section 6 of the Bill (which enacts the effect of current sections 6 and 11B) would apply to any sexual offence proceeding regardless of whether the offending is alleged to have occurred in the context of domestic or family violence, and regardless of whether the proceedings relate to other alleged offences. Under section 3 of the *Sexual Offences (Evidence and Procedure) Act,* 'complainant' means a person against whom a sexual offence is alleged to have been committed, and 'sexual offence' is also defined broadly in section 3.

It would not be permitted to publish the name of the defendant in the proceedings if it would identify the complainant of the sexual offence. It would be possible for the complainant, under new section 6(2), to consent to identification, provided the factors in section 6(2) are fulfilled, including that the complainant freely and voluntarily consented.

Proposed Section 7: Disclosing identity of defendant

7. **EROC, ARTK and NAAFLS opposed the blanket prohibition on publication of a defendant's identity before they have been committed for trial or sentence. Submitters expressed the view that the policy justification for this provision is unsound and rooted in a historical and baseless assumption that women, in particular, often make false accusations of sexual violence.**

    a. ***What is the justification for this prohibition given that this is the only crime in the NT where charged individuals are offered a special protection and other jurisdictions including NSW, Victoria, the ACT, Tasmania and Western Australia do not offer this especial protection?***

    b. ***In developing the Bill, was any consideration given to providing the defendant with a right to apply for a suppression order if they consider that disclosure of their identity will prejudice them unfairly? If not, why not?***

c. ***How would it impact on the operation of the proposed legislation if the Bill was amended to remove section 7?***

Response

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.

It is acknowledged that the NT, Queensland and South Australia are the only jurisdictions in Australia that retain a prohibition on identification of an adult defendant charged with a sexual offence (other than where such identification could disclose the identity of the complainant).

The policy basis of defendant anonymity was to protect them from the 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'.

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.

8. **As requested in the submission from NAAFLS, can you clarify how the offence provision in proposed section 7 is intended to operate where sexual assault occurs in the context of domestic violence?**

Response

See above with respect to Question 6.

Proposed Section 11: Contempt

9. **Proposed section 11 retains the effect of repealed section 11C and provides that if a person is charged with or found guilty of an offence against proposed sections 6, 7, or 10, the Court may also deal with person for contempt of court. EROC and ARTK raised concern that prescribing conduct as punishable as a contempt of court exposes a potential defendant to unnecessary uncertainty given the penalty ultimately applied for a charge of contempt will be at the Court's discretion.**

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a. Can you clarify why the Court may also deal with these offences as a contempt of court?

Response

As has been noted, the purpose of the Bill was to lift the blanket prohibition on publication of identifying details of adult complainants who consent to disclosure. The surrounding sections and offences were redrafted to consolidate the offence provisions while retaining the policy intent.

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 a 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.

b. How would it impact on the operation of the proposed legislation if the Bill was amended to remove section 11?

Response

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.

Consequential Amendment of Youth Justice Act 2005

Proposed section 50: Restriction of publication

10. Pursuant to section 50(2)(b), the restriction of publication regarding identification of the youth who is the subject of the proceedings does not apply if the youth has consented to the publication. However, as NAAFLS pointed out, whilst clause 6(2)(b) of the Bill requires that the complainant is at least 18 years of age in order to provide consent (with the exception of an application to the Court), the same age threshold does not apply in relation to defendants that are minors.

a. Can you explain why there is a disparity between a complainant's right to disclose and that of a defendant?

Response

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 jurisdiction, 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.

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Additional Issue

11. **While acknowledging that the Bill attempts to strike an appropriate balance between giving survivors the opportunity to speak out, and protecting the rights of an accused to a fair trial, NTLAC noted that in some cases it may be difficult to keep the 'noise' of social media out of the jury room, and in turn avoid contaminating a trial.**

    a. ***What, if any, consideration has been given to introducing the option of judge alone trials, at the election of an accused, as has long been the case in NSW, SA, WA and the ACT?***

Response

The issue of whether the Northern Territory should have judge alone trials was not considered as it is beyond the scope of the Bill. The implementation of judge alone trials is a significant policy change that would need extensive consideration and stakeholder consultation.