LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

LEGISLATION SCRUTINY COMMITTEE

Public Hearing Transcript

Sexual Offences (Evidence and Procedure) Amendment Bill 2019

10.20 am – 12.00 pm, Monday 2 March 2020

Litchfield Room, Level 3 Parliament House

Members:

Ms Ngaree Ah Kit MLA, Chair, Member for Karama
Ms Sandra Nelson MLA, Deputy Chair, Member for Katherine
Mrs Lia Finocchiaro MLA, Member for Spillett
Mr Tony Sievers MLA, Member for Brennan

Alternate Member:

Mr Jeff Collins MLA, Member for Fong Lim, in place of Mrs Robyn Lambley MLA, Member for Araluen

Witnesses:

Northern Territory Women's Legal Services
Caitlin Weatherby-Fell, Senior Solicitor, Top End Women's Legal Service

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 McWiliams, 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

Northern Territory Women's Legal Services

Madam CHAIR: Good morning, everyone. Thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public hearing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I also acknowledge my fellow committee members in attendance today. We have the Member for Fong Lim, Jeff Collins, Member for Brennan, Tony Sievers, Member for Spillett, Lia Finocchiaro and Member for Katherine, Sandra Nelson.

I welcome to the table to give evidence to the committee from the Northern Territory Women's Legal Services, Caitlin Weatherby-Fell, Senior Solicitor, Top End Women's Legal Service. Thank you for coming before the committee, again. We appreciate you taking the time to speak to the committee and look forward to hearing from you this morning.

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Could you please state your name and the capacity in which you appear and we will then proceed to the committee's questions.

Ms WEATHERBY-FELL: Caitlin Weatherby-Fell, Senior Solicitor, Top End Women's Legal Service. I am the representative for the Northern Territory Women's Legal Services, which is a coalition of the three women's legal services in the NT, being the Top End Women's Legal Service, the Katherine Women's Information Legal Service in Katherine as well as the Central Australian Women's Legal Service, which covers the Barkly and Alice Springs regions.

Madam Chair, the Women's Legal Services commend this Bill to this committee. It will bring the Northern Territory into line with all other jurisdictions in giving victims/survivors autonomy and control in situations where that has been taken from them. We endorse this legislation.

We note that and thank Madam Attorney-General for moving this legislation through to the policy team. She invited the Top End Women's Legal Service to put a submission to the policy team late last year and we are happy to report that the recommendations in our letter have all been reflected in this draft of the legislation. That is quite pleasing to see.

I note for the committee a number of stakeholder submissions were made. I draw your attention to submission number five of Knowmore, noting that practical support for victims/survivors is essential in respect of this space—not specifically in respect of this legislation, although it will be once it commences.

Specifically, access to independent, free, culturally-appropriate and trauma-informed support and legal advice in the Northern Territory is predominantly given by the Women's Legal Services. We put to this committee again our constant need for funding and further resources to ensure that all women who attend our services are able to receive prompt and necessary legal advice.

Mrs FINOCCHIARO: Just confirming this legislation allows them that right once a conviction has been recorded?

Ms WEATHERBY-FELL: That is right. That is the proviso, the asterisk lying over this legislation. We noted in our submission that that is the primary point of difference across the country. Half of the jurisdictions generally do not have it and half do. In the Northern Territory Women's Legal Service view legislation such as that, with that asterisk hanging over the top, is in accordance with natural justice principles. However, I understand that this committee this morning will be hearing from other stakeholders. We particularly note they have made strong submissions to this committee in respect of looking at that particular provision.

I understand that other jurisdictions which currently have similar legislation are undertaking a review in respect of whether or not that legislation is correct.

Mr COLLINS: My question is about the reference to retrials in that time period. Appeals can have an appeal period and once that is over, then the appeal is made and you have to wait for the end. But a retrial can come at some later stage because of some error …

Ms WEATHERBY-FELL: That is right. That would be a reason for this particular section. We are talking about section 6(2) either having a proviso, giving the victim/survivor autonomy to still speak of her experience following that, given that to put in place should there be any retrial for her not to be able to tell her story in the interim. That, effectively, means we are not making any change to the legislation at all.

That is consideration for this committee to be making this morning—whether or not that proviso in respect of that natural justice principle should not be within this legislation and, indeed, whether this legislation should look in a different way.

We note particularly, having had the benefit of reviewing the submissions made to this committee, that a number of submissions were made in respect of the drafting of the legislation, in and of itself, has been drafted, in the first instance, still as an offence and then, having victims/survivors being able to have the benefit of a defence to that offence, as opposed to having an automatic right and then having a proviso saying, 'But in this instance, it would be an offence'.

It is an interesting interplay, truly. It is not something that the Women's Legal Services had turned our minds to at the time of making the submission. However, we endorse that idea that to draft this legislation in such a way which is to give prevalence to a victim/survivor in the first instance. It would be far more preferable than what we have been presented with at this time, which is an offence, but there are defences. That is where victim survivors can fit it in. It should be victim survivors at the forefront and then offences in the latter.

Ms NELSON: Is that the intent?

Ms WEATHERBY-FELL: It is, absolutely. That is why we still give in principle support for this Bill. The intent is good.

It is about 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.

Ms NELSON: Yes.

Madam CHAIR: Caitlin, are there any final comments you wanted to leave with the committee that have not been covered?

Ms WEATHERBY-FELL: No final comments, Madam Chair, except to say that we are very heartened that this legislation is coming to the attention of the committee. We look forward to it being passed into fruition, in due course.

The committee suspended.

North Australian Aboriginal Family Legal Service

Madam CHAIR: Good morning, everyone and thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public hearing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I acknowledge my fellow committee members in attendance today, Jeff Collins, the Member for Fong Lim; Tony Sievers, the Member for Brennan; Lia Finocchiaro, the Member for Spillett; and Sandra Nelson, the Member for Katherine.

I welcome to the table to give evidence to the committee from the North Australian Aboriginal Family Legal Service, Melissa Coveney, Acting Principal Lawyer, and Sophie HANTZ, Solicitor. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

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Could you each please state your name and the capacity in which you appear before I open up to the committee for any questions.

Ms COVENEY: Melissa Coveney, Acting Principal Lawyer, North Australian Aboriginal Family Legal Service.

Ms HANTZ: Sophie HANTZ, Solicitor, North Australian Aboriginal Family Legal Service.

Madam CHAIR: Thank you very much. I now open up to the committee for any questions.

Ms NELSON: I do not have any questions based on your submission. However, I want to ask, out of my personal satisfaction and also from your experience because you deal with a lot of Indigenous clients, how beneficial would this sort of legislation and these opportunities be for some of the victims that you have worked with? From a cultural perspective?

Ms HANTZ: Broadly, we support the Bill. For our clients, it is difficult to say.

Ms COVENEY: I think so. Culturally, these sorts of things would not be disclosed as a matter of course anyway but everyone should have that right, regardless.

Madam CHAIR: In your submission you raised an issue in regard to proposed section 50 Restriction of publication. You were talking about—is it complainants and defendants have different ages in which they can agree to disclose?

Ms HANTZ: Yes, we had some concern about the requirement of the complainant consenting to the disclosure of their identity. There is a requirement that they are an adult and we had concerns about minors and their right to tell their story in a healing process and the like. There does not seem to be that same restriction for the disclosure of the identity of the defendant.

Similarly, and related, with the issue of minors being unable to consent when they are the complainant, we had concerns about the implications in terms of social media and whether some minors may be caught under this offence, when telling their story on social media, if they are unable to provide that consent.

Ms NELSON: It is funny, the social media aspect of it has reared its head a number of times in different pieces of legislation throughout the last two to three years. In particular, the most recent one was the closed courts in part of the youth justice amendment laws we scrutinised.

The conflict for me is that anyone can post anything on social media but there is absolutely no law or legislation that we can go to and say, 'you are in breach of'. Do you see what I am saying?

In regards to identifying people; the media have some strict laws, they have a healthy code of conduct that they have to abide by in their industry, regarding identifying minors. But anyone can post a photo of a screenshot of their CCTV footage on social media anywhere and there are no consequences whatsoever.

It is difficult to monitor and regulate on social media?

Ms HANTZ: I think so. It would be quite a challenge to strike the right balance between protecting minors from having their identity disclosed in such a way on social media, where that can happen more freely, but also giving those complainants the right to share their story as they see fit.

Ms NELSON: Yes, it is challenging. The bottom line is, the victim needs to be given the opportunity to tell their story, for whatever reason. That is the crux of this legislation.

Madam CHAIR: At the moment they can, but they have to seek permission, an order from the court to be able to tell their story.

Ms HANTZ: Yes, if they are a minor, they do not have the right to provide that written consent, it is more of a challenge.

Ms NELSON: It is part of the therapy, I guess.

Madam CHAIR: The one thing I keep coming back to is that the non-disclosure of the defendant, while the court proceedings are happening, can be an extensive, long and traumatic process for a victim and they are not able to disclose the defendant's name through that. But there was a lot of references, in all the submissions, which make sense about if it was a common assault, then you could. Why domestic violence, not? Could I get your thoughts on that?

Ms HANTZ: We agree. 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.

We also had concerns about the interaction between domestic violence charges, say an aggravated assault, when there might also be an accompanying sexual assault charge. How does the victim navigate what they are able to speak about and what they are not. It may be a spousal relationship or something like that, where it is very easily identifiable who the parties are, they are restrained from talking about the entire process altogether, for fear of identifying whom they are not meant to.

The committee suspended.

Knowmore Legal Service

Madam CHAIR: Good morning. My name is Ngaree Ah Kit. I am the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public hearing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I acknowledge my fellow committee members in attendance today: Jeff Collins, the Member for Fong Lim; Tony Sievers, the Member for Brennan; Lia Finocchiaro, the Member for Spillett; and Sandra Nelson, the Member for Katherine.

I welcome via teleconference to give evidence to the committee from Knowmore Legal Service, Warren Strange, Executive Officer and Lauren Hancock, Law Reform and Advocacy Officer. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

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Could you each please state your name and the capacity in which you are appearing before I open to the committee for any questions.

Mr STRANGE: Good morning. Warren Strange is my name. I am the Executive Officer for Knowmore Legal Service.

Ms HANCOCK: I am Lauren Hancock and I am the Law Reform and Advocacy Officer.

Madam CHAIR: Thank you very much. I will now open to the committee for any questions they have for you.

Mr COLLINS: It is Jeff Collins, Member for Fong Lim. I would like to hear some more of your thoughts on the changes you propose to section 6(2).

Ms HANCOCK: That is in relation to any particular part of our submission? In omitting paragraph (a), is that correct?

Mr COLLINS: Yes, that is right. About allowing consent to disclosure at any time.

Ms HANCOCK: Yes. The point we made there is we think having that restriction is unnecessarily restrictive for survivors. We note a couple of the comments made in some of the other submissions that we think will support our reasoning there. We note that End Rape on Campus has referred to that prohibition continuing to withhold agency from the victims.

Also, Australia's Right to Know was talking about complainants being deprived of the ability to identify themselves for years after an accused person is charged. 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 sometime later. We think that 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 to tell their story.

Mr COLLINS: Fair enough. What do you have to say about the other submissions that talk about a fair trial and the disclosure impinging on that?

Mr STRANGE: 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 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 surrounding 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.

Madam CHAIR: I want to ask you about whether you think that the increase in the maximum penalties would be deterrent, I guess, to people who may consider offending?

Mr STRANGE: Potentially, yes. We have set out in our submission some comparative analysis of the maximum penalties in other jurisdictions. When a maximum penalty is increased, that is a clear indication that parliament wishes to see heavier sentences imposed for a particular type of offence. That really is an issue for the committee and the parliament ultimately to determine whether you want to go in that direction. It is recognised as a clear indication to the courts that by increasing the maximum penalty parliament is viewing the offence with greater seriousness and is seeking that higher penalties be imposed.

We do not think that the increased penalties of the type foreshadowed in our submission would be unduly onerous, particularly in relation to the reality of the issue here and the likely involvement of media organisations as corporations in any potential breach. It needs to carry some significant weight to impact on those types of defendants.

Madam CHAIR: Thank you. My final question—it is Ngaree—is in regard to practical support for victims and survivors that you raised in your submission. I thought you worded that quite well in saying that it is essential for complainants to have access to independent, free, culturally-appropriate and trauma-informed support and legal advice, especially when they are considering whether or not to give their consent to having their identity published. In your jurisdiction, is there a good model that already operates?

Mr STRANGE: We would be strongly advocating for the type of multidisciplinary model that Knowmore operates to provide support to survivors and that many other community legal centres also utilise in providing assistance to people. We think, particularly in the Northern Territory, the cultural support is (inaudible) critical for Aboriginal complainants. They may need interpreters to be able to fully understand the issues. We have raised, in our submission, the benefit of having counselling assistance to talk with the survivor about the likely impact upon them of consenting to publication of their information. We have worked with survivors in a variety of ways to help them to tell their stories.

I am thinking of some cases where we have assisted survivors and their stories have been publicised. It is quite complex often to work through what that would really mean for them and the potential impacts; understanding that the world at large, their friends and family will become aware, or potentially could become aware, of their status as a survivor and working through all the implications of that.

They need to get legal advice, but it needs to be provided in a supportive environment that takes into account their wellbeing and ongoing support needs and particularly their cultural support needs.

Mr SIEVERS: I notice in your submission on section 7 on restricting the publication of accused in sexual offence cases. Could you talk us through that? You would rather section 7 be taken out of the Bill?

Ms HANCOCK: I do not think we specifically made comment on section 7; we referred to section 7 in advocating for paragraph (a) of section 6(2) to be taken out. We have not made any particular comment on section 7 regarding identifying defendants.

Mr STRANGE: We favour the retention of a broad offence provision for publishing details at an inappropriate stage.

Ms NELSON: I think what the committee member, Tony Sievers, is talking about in the recommendations to the Bill on page 4, it says:

While we acknowledge the importance of ensuring a fair trial, we consider that any risks to this posed by the disclosure of a complainant's identity is adequately addressed by new section 7 which makes it an offence to disclose a defendant's identity prior to them being committed for trial or sentence. Provided that the publication of a complainant's identity does not disclose the defendant's identity in breach of section 7, we see no need to prevent a complainant from telling their story.

Is that the one you are referring to, Tony?

Mr SIEVERS: Yes.

Ms NELSON: That is the one he is referring to and that he had asked for a comment.

Mr STRANGE: Yes, we support the general offence provision up until the stage the matter is resolved at trial; someone who is at the stage of being committed for trial or sentence, we support that.

What we are then saying is that there should be an opportunity for informed consent for identification after that stage, rather than post-trial; pending the resolution of any appeal proceeding which could go from the trial court to the court of appeal to potentially even the high court, which would operate in a way that stops any identification with the complainant's consent.

Mr SIEVERS: Thank you.

Ms NELSON: I do not have anything further, I am supporting this legislation.

Madam CHAIR: Thank you. It appears the committee has no further questions. I would like to thank you for your submission to this Bill and for taking part in the public hearing, Warren and Lauren. We hope you have a lovely rest of your day.

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The committee suspended

Australia's Right to Know

Madam CHAIR: Good morning, Georgia and Gina. My name is Ngaree Ah Kit. I am the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public hearing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I acknowledge my fellow committee members in attendance today: Jeff Collins, the Member for Fong Lim; Tony Sievers, the Member for Brennan; and Sandra Nelson, the Member for Katherine.

I welcome to give evidence to the committee from Australia's Right to Know, Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia; and Gina McWiliams, Legal Counsel, News Corp Australia. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

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Could you each please state your name and the capacity in which you are appearing before I proceed to the committee's questions.

Ms McWILLIAMS: Gina McWilliams, Senior Legal Counsel for News Corp Australia. I am here speaking with Georgia-Kate on behalf of Australia's Right to Know.

Ms SCHUBERT: Georgie-Kate Schubert, Head of Policy and Government Affairs at News Corp Australia, speaking on behalf of Australia's Right to Know Media Coalition.

Madam CHAIR: Thank you very much. I will now open to the committee for any questions they may have for you.

Ms NELSON: I do not have any questions right now. I am supportive of this legislation, supportive of the Australia's Right to Know campaign as well.

Madam CHAIR: I will get you to recap some of the main issues you have with the legislation and get you to walk through those please.

Ms McWILLIAMS: We appreciate the opportunity to be heard again. It is fantastic that you have included us and thank you for that.

There are three primary issues that we raised in our petition dated 30 January 2020. The first of these issues is in relation to the proposed amended section 6 of the act which deals with disclosing the identity of the complainant. As is said in our submission, it is our strong view that there should not be a restraint on the complainant being able to give that consent until no proceeding in relation to the sexual offence that was alleged to have been committed is pending in a court when a statement or representation is published or made. That is what is currently in subsection 6(2)(a).

The reasons we hold that view are set out thoroughly in the submission. We try not to overlap with the Territory which I know will be covered by survivors groups in this area because that is really not our role. We are media entities; we are not survivors groups.

However, we were able to include in our submission some very salient quotes from Mr Steven Fisher who is a survivor of sexual assault. Mr Fisher is in a unique position in Tasmania because he has gone through the process of applying and receiving a court order from the Tasmanian Supreme Court which permits him to be identified as the victim of a sexual assault. He has written expressively on this point and on related issues for *The Mercury*, which is News Corp Australia's daily newspaper in Tasmania.

I defer to how strongly he holds the opinion that he very much wanted to be able to consent at the time of his choosing. In particular, in his case on the day of sentencing of his assailant, he wanted to be able to stand on the steps of the court house and give a presser at that point and make a statement on his own behalf. It is for those reasons and the others set out in our submission that we hold the view that a complainant should be free to consent at any time they choose to, provided of course that they are an adult and capable of consenting. We also agree that getting consent in writing is, in most cases, a sensible thing to do. That is issue one.

Issue two is the inclusion of section 7 in the proposed legislation. That is the section which prohibits the identification of the defendant in the proceedings up until that person is committed for trial and that is the operation of section 7 and sub section 8(2) working together there. The Northern Territory is only one of three Australian jurisdictions that has this particular provision in its sexual offences legislation. The other two are Queensland and South Australia.

We hold the firm view that these jurisdictions are outliers. The fact that the defendant is able to be identified at any time has not caused any risk to the administration of justice in any other Australian jurisdiction where that is not the case. As we say in our submission, whether it is intended to or not, it has the effect of seeming to indicate that the defendant should in some way be protected, and we say at length that that is not the case. We hold the view that they should not. Our firm recommendation is that section 7 and the part of the amending legislation which refers to section 7 are not subsequently enacted to bring the Northern Territory in line with the majority of Australian jurisdictions and the law that they have passed in this area.

Ms SCHUBERT: I also add that the South Australian parliament is currently considering a similar provision that exists in that state legislative framework and it is likely that will be changed in the very near future, in which case it would leave Northern Territory and Queensland as the two—the state and territory—with that type of provision.

Ms McWILLIAMS: The third point we raised only summarily was that we regard the fact that a breach of the proposed sections 6 or 7 could be dealt with either as an offence or a contempt, as something that was not to be preferred. We have explained why that is in the 30 January submission. The example we gave there is quite a large issue for us, where both contempt and an offence could rise. It may be a situation where a media publisher, having taken proper legal advice, decides there is a real risk that they could be found in contempt of court and chooses to make an early apology to the court in order to ameliorate that risk. An apology of that kind could very well be regarded as an admission of liability and used against the publisher if a charge of contempt was to follow.

If that is an area you require further information about, then I am sure we can speak to some of our more experienced criminal lawyers and perhaps provide you with some additional material. I will not claim to have significant expertise in how the two necessarily work together past that one example.

Sorry, if I could go back to the first point I raised, there was one additional thing I wish to raise with you. It has been suggested that because the act that truly allows for a complainant to go to court—as Mr Fisher did—and to obtain a court order, that that is sufficient balancing to a section which limits their ability to consent until, perhaps, no proceedings have concluded.

Mr Fisher talked about this in the article he wrote to *The Mercury*. We have extracted that information, I believe, in the submission. 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, at a bare minimum, is the drafting of a notice of motion and at least one supporting affidavit. You would not, obviously, attempt such an application without the consent of the complainant, because one of the affidavits would need to be from the complainant explaining why it is that they want to be able to authorise people to identify them. 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 circumstance 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.

Ms SCHUBERT: I think that covers it. I just add to Gina's point that that the opposite is the circumstance which applies in most other states and territories without unintended consequences or evidenced unintended consequences. That is another reason why we believe that what we have proposed is a better outcome.

Madam CHAIR: Thank you very much. That was very helpful recapping the main points raised in your submission. As you would appreciate, a number of those points have already been raised by other people in their submissions and in the testimony we have also heard this morning. I will now check with the committee to see if there are any questions in regards to that testimony. There are no questions.

Ladies, thank you for your time and submission. It is obvious that the information you gave was well understood at our end.

The committee suspended

Department of the Attorney-General and Justice

Madam CHAIR: Good morning, everyone. Thank you for joining us. I am Ngaree Ah Kit, the Member for Karama and Chair of the Legislation Scrutiny Committee. On behalf of the committee, I welcome everyone to this public hearing on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

I also acknowledge my fellow committee members in attendance today. We have the Member for Fong Lim, Jeff Collins; the Member for Brennan, Tony Sievers; the Member for Spillett, Lia Finocchiaro; and the Member for Katherine, Sandra Nelson.

I welcome to the table to give evidence to the committee from the Department of the Attorney-General and Justice, Leonique Swart, Principal Policy Lawyer, Legal Policy; and Jane Bochmann, Senior Policy Lawyer, Legal Policy. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you this morning.

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Could you each please state your name and the capacity in which you appear before I invite you to make a brief opening statement and then we will proceed to the committee's questions.

Ms SWART: Leonique Swart, Principal Policy Lawyer, Legal Policy.

Ms BOCHMANN: Jane Bochmann, Senior Policy lawyer, Legal Policy.
Madam CHAIR: Thank you. I will now proceed to the committee, if they have any questions.

Mr COLLINS: Not so much a question, but I would like your comments on the evidence that was given—you were here and heard that—on sections 6, 7 and 11 specifically. What are your responses to that?

Ms SWART: Thank you. We also covered these issues in our response to the questions on notice.

First of all, with respect to subsection 6(2)(a), which is the issue about proceedings pending and inclusion of that, we have heard and read the submissions and heard the testimony this morning. We outlined in our responses to the questions, that there were a number of risks which we thought were managed by including that. They were to ensure that the defendant gets a fair trial which, from what I understand, was raised this morning by the Top End Women's Legal Service as well; these natural justice principles.

Also if a story was published during a trial, it could be sub judice contempt of court. It could jeopardise the trial, resulting potentially in a mistrial, the need for retrial or the complete abortion of the trial.

That is to point out that this provision does not exist in a vacuum—the prohibition on the publication of the victim's identity. There are a number of pressures placed on what information is published, the information that is out there—things like contempt of court but also police, the DPP and Witness Assistance Service will be working with the complainant to talk to them about what they should and should not say, who they should and should not talk to. For all those reasons, from their point of view, it could jeopardise the proceedings. That is one point.

The other point is that the law has entered into this space, that sexual assault proceedings are a special type of proceedings. The point was raised earlier today as to why this does not apply in the context of other types of assault. It has for a long time. There is a whole act devoted to procedures to do with sexual assault. There was a royal commission into institutional responses to child sexual assault that made a raft of recommendations, strengthening the procedures for sexual assault.

Once you enter into the space, you need to make things clear. We were trying to ensure that the defence that was crafted was clear enough for a person to understand if they picked it up. 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.

The department's view might be that the committee might have three options. One is to keep the provision as it is, that is, proceedings pending without its definition. Potentially, there is a bit of ambiguity. Courts in one jurisdiction might deal with it slightly differently than in another jurisdiction.

The second option is potentially to put some definition around that. The NT Legal Aid Commission provided the submission that they think that it should be until all proceedings are finished, including a retrial. That is what was intended by the bill and that was evidenced in the explanatory statement.

The third option is get rid of it altogether. We say that while the other jurisdictions do not necessarily have it in their legislation, it is not the case that there is complete agency for the victim to publish when they want to. There are other issues which I have described about contempt of court, that there is potential for mistrials, things like that. If there is a retrial, they could get cross-examined on the story that was published, whether they were paid for that story, and those kinds of things.

Removing it is not necessarily giving complete agency to the complainant. It also leaves unclear for the ordinary person that picks up the piece of legislation and says that is the defence that applies to me. That is why we wanted to include it.

I note that the Victorian government made amendments to its legislation last year after an independent review of open justice, and did not remove it. My understanding is that the Tasmanian government is intending to introduce it because they have released a consultation bill with a provision that is quite similar in it, as well. It is a tricky issue and is something that we also grappled with when we were developing the policy for the Bill.

Mr COLLINS: Are there any jurisdictional idiosyncrasies for the Territory? According to the submissions, we seem to be outliers. We are often outliers. In terms of jurisdictions, with regard to sections 7 and 11, we seem to be the only one with the provision in section 11 and we are with South Australia and Queensland on section 7. South Australia seem to be moving towards removing it.

Ms SWART: Section 7 is the provision about defendant anonymity up until the time of committal for trial or sentence. My understanding is that we adopted our provisions from the Queensland legislation historically. That is probably why we are on par with what Queensland has. I am not aware of any decision being made in South Australia to remove it, although I am aware that it is consulting on that issue. Tasmania, being the recent review as well, do not have that provision in there. From that perspective, we could be considered as outliers.

The purpose of the Bill was not to review that section or the policy of that section; it was simply because when we were considering including the consent defence, we notice that the offences were a bit confusing so we tried to consolidate them. We consolidated them in a way that was only amending the policy of what will now be section 6 but not section 7. We are just regurgitating or re-enacting what section 7 currently is. We did not consider the policy. I guess it would be up to the committee to make a determination about whether it should remain or not. The department's recommendation would be that it not be removed without further stakeholder consultation.

There are issues, potentially, about whether or not there should be any protections for defendants that the department has not considered in the development of the Bill. So, in fairness to those other stakeholders, it might be worth maybe making a recommendation that we consult further or something like that.

Current section 11C is a savings provision. The Supreme Court has inherent jurisdiction to deal with contempt as a common law offence. Current section 11C and new section 11 simply saves that. All it does is say it is not intended by these provisions that we are ousting the jurisdiction of the Supreme Court to deal with contempt. By removing that section, we would not be removing the law of contempt and its applicability in this space.

Again, we were not considering the policies behind whether we should have contempt in this area. That is a huge issue and one that is being ventilated nationally. The Victorian Law Reform Commission has considered this issue very recently. It was due to hand a report to the Victorian government on Friday. If you remove that section, it would probably exist anyway, it might be slightly less clear. It was not the intention to make inroads into the Supreme Court's jurisdiction.

Ms NELSON: I need some clarification so that the average person has a good understanding of this, especially people who supported the Let Us Speak campaign and the Australia's Right to Know campaign.

It colloquially comes across as if we are saying, 'Yes, go ahead and tell your story. You are allowed to tell your story, but there are restrictions.' That does not seem to apply to the defendant.

Ms SWART: Yes, there is some truth to that. There are some other restrictions for defendants anyway that exist, such as contempt of court. Also it is quite unusual for a defendant to tell their story publicly, particularly during the trial. Their lawyer would be telling them not to because it could prejudice their trial. But, yes, this act does not place those restrictions on a defendant.

The provision to do with complainants is a protective provision. It is there to protect their anonymity. There is a tension between protecting the anonymity of those who want to be protected and those who, by themselves, want to publish their own story and those who might be approached by the media to tell their story. The provision is intended to try to balance those competing needs and interests and, in particular, protect vulnerable people at a time where they might be the most vulnerable, while allowing agency to those who want to take things into their own hands. It is a tricky balance to find.

Ms NELSON: It is a safe assumption though that the complainant would be getting the same advice from their legal representation that the defendant would be getting, in that they would be told, 'Hey, stay away from this because you might prejudice any proceedings or outcomes.'

The core intent of this is to give victims a voice, yet we are seeing more restrictions being placed on them to do that, than we are seeing on the defendants. That is my concern. I know it is a difficult balance, but how do we

Ms SWART: I am not sure. I am not sure what restrictions you would want to put on a defendant. That circumstance of being a defendant in a trial would be enough restriction on what they are able to publish.

I think there was a suggestion in one of the submissions that a defendant would be able to come out and say whatever they liked about the situation but they would not be able to do so if it would be contempt of court. They cannot make comment on the proceedings as they are going through and also they cannot identify the complainant themselves.

Madam CHAIR: They can; they just have to cop the consequences.

Ms SWART: Yes, that is right, they can.

Madam CHAIR: In the NT Legal Aid Commission submission, they raised whether judge-alone trials could be used in the Territory. Is that something the department looked at or entertained, because of the small jurisdiction—the three degrees or two degrees of separation we have that other jurisdictions do not encounter?

Ms SWART: that is a good point, but no, it was not considered. That again is a big issue as well, that would need considerable time to consider all the issues and consultation. It is not currently permitted. It would be quite a big change to the way that trials are done at the moment. This is not the vehicle for that kind of change, because it is quite substantial. It would need significant consultation, not only with members of the public but also the legal profession and the judiciary themselves.

The committee concluded
