



# TOP END WOMEN'S LEGAL SERVICE INC.

FREE LEGAL ADVICE FOR WOMEN

Advice | Information | Referral | Advocacy

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22 November 2019

Ms Jenni Daniel-Yee  
Director, Legal Policy Division  
Department of the Attorney-General and Justice  
GPO Box 1722  
Darwin NT 0801

*By email to Policy.AGD@nt.gov.au*

Dear Ms Daniel-Yee,

## **Support for legislative amendment – *Sexual Offences (Evidence and Procedure) Act 1983* (NT) – #LetHerSpeak campaign**

The Top End Women's Legal Service Inc. (**TEWLS**) writes regarding the operation of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) (**the Act**), colloquially referred to as "gag-law" legislation for victim-survivors of sexual violence.

Noting the recently announced review of comparable legislation in Tasmania and the national #LetHerSpeak campaign, as well as the intentions of the Northern Territory Government, TEWLS writes in support of amending the Act to allow for victim-survivors to share their story, should they wish to do so. In its current operation, the Act bars victim-survivors from the opportunity to reclaim their narrative without significant court proceedings being undertaken, where TEWLS advocates for victim-survivors to be able to consent, or not consent, to publishing their identities.

### About TEWLS

TEWLS is a community legal centre focused on the advancement of women's rights. Established in 1996 following the Australian Law Reform Commission's Inquiry into Equality before the Law, TEWLS is a not for profit, specialist women's legal service providing free legal services for women in the Top End of the Northern Territory. We provide high quality, responsive, and culturally appropriate free legal advice, information, casework and representation services, community legal education and advocacy in civil and family law.

TEWLS provides a vital role for women in the Top End. At an individual level, the service responds to and facilitates women's experiences and realities on a personal basis, with specialist and holistic legal services. At a systemic level, client's collective experiences establish a salient foundation and platform for informed service advocacy and systemic improvement via law reform submissions.

TEWLS' service area and targeted outreach services include Darwin, Palmerston, the Royal Darwin Hospital, Dawn House Women's Shelter, six Indigenous communities in the Greater Darwin region, at Adult Migrant English Programs, and women incarcerated at the Darwin Correctional Centre. We provide advice and representation services in areas including family law, domestic and family violence, housing and tenancy, consumer law, credit and debt, fines,

sexual assault, discrimination, employment law, compensation for victims of crime, and complaints.

### The current Act

The Act currently prohibits the publications of a sexual assault complainant's identity, except where a court makes an order permitting same identification.<sup>1</sup> A publication contrary to section 6 of the Act may incur a maximum penalty of 40 penalty units or imprisonment for six months.<sup>2</sup> The Northern Territory and Tasmania stand as the only two Australian jurisdictions that prevent victim-survivors from identifying themselves without court order.

The current operation of the Act creates the peculiar circumstance where while journalists and offenders can address an assault in a publication, a complainant (victim-survivor) is barred from doing same. Whilst a court may make an order that a complainant be identified, we understand that this is not common in the Northern Territory.

On 5 May 2019, End Rape on Campus Australia and Marque Lawyers made a submission to the Tasmanian Attorney-General in respect of comparable legislation (**the EROC Submission**).<sup>3</sup> The EROC Submission provides insight into the experiences and concerns of victim-survivors in relation to corresponding "gag-laws" in Tasmania, including the views of persons who had joined the #LetHerSpeak petition.<sup>4</sup> For your review, we **enclose** a copy of this submission.

TEWLS endorses the core principle of the EROC Submission that while the existence of a legislative regime restraining the free disclosure of information relating to the identity of victim-survivors of sexual violence is essential for the protection of the privacy, safety and welfare of same, the agency of the respective victim-survivor is of equal importance. This is because,

[T]he nature of sexual violence is that it strips a person of power and control. Processes which further strip sexual assault survivors of their agency and control are likely to increase existing trauma by exacerbating feelings of powerlessness and helplessness. By contrast, trauma informed, survivor-centric approaches seek to recognise and restore the agency of victim-survivors.<sup>5</sup>

### Protections for victim-survivors in other Australian jurisdictions

TEWLS notes the work undertaken by End Rape on Campus Australia and Marque Lawyers regarding the collation of comparable legislation across Australia. For your reference, please see **Annexure A** for an updated version of this cross-jurisdictional analysis.

Notably, TEWLS endorses the protections for victim-survivors currently available in Western Australia, where comparable provisions provide that is an exception to an offence where a complainant (victim-survivor) gives their consent in writing, is over the age of 18 years, and has the capacity to give their informed consent.<sup>6</sup> We note that the current Northern Territory provisions are most closely aligned with the corresponding Queensland provisions, which in our view, present as confusing and inaccessible to victim-survivors seeking information about the legal system.

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<sup>1</sup> *Sexual Offence (Evidence and Procedure) Act 1983* (NT), ss 6 – 12.

<sup>2</sup> *Sexual Offence (Evidence and Procedure) Act 1983* (NT), s 11B

<sup>3</sup> Submission to the Discussion Paper: Section 194 of the Evidence Act 2001 (Tas), End Rape on Campus Australia, Marque Lawyers, 5 May 2019.

<sup>4</sup> *Ibid*, pg 7 – 9.

<sup>5</sup> *Ibid*, pg 13.

<sup>6</sup> *Evidence Act 1906* (WA), s 36C.

### Support for legislative amendment

TEWLS supports the intention of the Northern Territory Government for the Act to be amended to reflect comparable rights available to victim-survivors in all other Australian jurisdictions, except Tasmania. TEWLS proposes that any legislative amendment/s would include particular focusses upon:

- Retaining the restraint on the free disclosure of information regarding to the identity of victim-survivors of sexual violence, with exceptions; and
- Ensuring that exceptions to the offence be two-fold, being with the consent of the complainant or by order of the relevant court (i.e. publication, including self-publication via means including social media, and/or broadcast of the relevant information).

TEWLS proposes that the consent of the complainant would be by reference to the following indicia:

- **The age of the victim-survivor**, where TEWLS would advocate for the victim-survivor seeking to consent to the publication and/or broadcast of the information to be over the age of 18;
- **The capacity of the victim-survivor**, where any changes to the Act should specify that the victim-survivor must not be incapable by reason of mental or physical impairment of giving informed consent and making reasonable judgements in respect of the publication of such matters, regardless of their age;
- **Consequential identification of a victim-survivor**, where similar to existing principles in the Northern Territory, the publication and/or broadcast of the information would not identify a victim-survivor who does not consent to same and is interconnected with the consenting victim-survivor, i.e. where the publication and/or broadcast would identify the non-consenting victim-survivor as a consequence. In TEWLS' experience, the Court is currently able to give effect to this principle, where our service has previously successfully advocated on behalf of a Mother for her to be de-identified so that her child, who was already de-identified, was not identifiable as a consequence of the Mother's identity.

TEWLS advocates that the agency of the victim-survivor be held as a guiding principle, and that in practice, a standard form or consent-giving document (in plain English and available in different languages) be developed for victim-survivors to access in line with any amendments made to the Act.

Further, TEWLS advocates for any offence provisions to specifically preclude application to a victim-survivor, as per the domestic and family violence mandatory reporting penalties. We note that the current provisions apply only to the small number of sexual violence matters where court proceedings have been initiated, where the application of publication offences would stand as the antithesis of the protections themselves.

### Response sought

We would be grateful to receive your response regarding any proposed changes to the Act in due course and confirm that we would support a Discussion Paper or similar public consultation being undertaken regarding this matter.

We thank you for your consideration of this correspondence. Should you require further information or wish to discuss this matter further, please contact TEWLS by phone on (08) 8982 3000 or email to [admin@tewls.org.au](mailto:admin@tewls.org.au).

Yours faithfully,

**TOP END WOMEN'S LEGAL SERVICE INC.**



Vanessa Lethlean  
Managing Solicitor

**Enclosed:** Submission of End Rape on Campus Australia and Marque Lawyers

## ANNEXURE A

Where	Legislation	Impact of relevant provision
ACT	Section 74 <i>Evidence (Miscellaneous Provisions) Act 1991 (ACT)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a person to publish a complainant's identity in relation to a sexual offence proceeding.</li> <li>It is a <u>defence</u> to prosecution if the person establishes that the complainant consented to the publication before same occurred.</li> </ul>
NSW	Section 578A <i>Crimes Act 1900 (NSW)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a person to publish any matter which identifies the complainant in prescribed sexual offence proceedings or any matter that may lead to same.</li> <li>It is an <u>exception to this offence</u> for publication to be: authorised by the relevant juridical officer; or made with the consent of the complainant (over 12 years at time of publication), among others.</li> </ul>
NT	Sections 6 – 12 <i>Sexual Offences (Evidence and Procurement) Act 1983 (NT)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a report made or published to identify the complainant.</li> <li>It is an <u>exception to this offence</u> if the court makes an order to the contrary.</li> </ul>
QLD	Sections 6, 10 <i>Criminal Law (Sexual Offences) Act 1978 (QLD)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a report made or publication to identify the complainant or any matter that may lead to same.</li> <li>It is an <u>exception to this offence</u> where the court, for good and sufficient reason, makes an order to the contrary.</li> <li>It is a <u>defence</u> to a proceeding for an offence that the complainant authorised in writing the publication, where the complainant was at least 18 years and had capacity to give the authorisation.</li> </ul>
SA	Section 71A <i>Evidence Act 1929 (SA)</i>	<ul style="list-style-type: none"> <li>It is an offence to publish any statement or representation by which the identity of a person alleged to be the victim of a sexual offence to be revealed or reasonably inferred.</li> <li>It is an <u>exception to this offence</u> where the judge authorises, or the alleged victim consents to, the publication (alleged victim can only give consent if over 18 years).</li> </ul>
TAS	Section 194K(1) <i>Evidence Act 2001 (Tas)</i>	<ul style="list-style-type: none"> <li>It is a <u>contempt of court</u> for a person to publish or cause to be published the identity or information likely to lead to the identification of any person that is the victim of a sexual offence.</li> <li>The <u>exception to this prohibition</u> is by court order.</li> </ul>
VIC	Section 4 <i>Judicial Proceedings Reports Act 1958 (Vic)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a person to publish or causes to be published any particulars likely to lead to the identification of a person against whom a sexual offence is alleged to have been committed.</li> <li>It is a <u>defence</u> for the accused to prove that the matter was published with the permission of a relevant court or the person against whom the offence is alleged to have been committed, amongst others.</li> </ul>
WA	Section 36C <i>Evidence Act 1906 (WA)</i>	<ul style="list-style-type: none"> <li>It is an <u>offence</u> for a person to publish or broadcast the identity of a complainant or matters likely to lead members of the public to identify the school the complainant attends (if relevant).</li> <li>It is an <u>exception to this offence</u> where leave is granted by the court with relevant jurisdiction or where the complainant, in writing, authorised the publication prior to same, where the complainant was at least 18 years and was not a person who, because of mental impairment, is incapable of making reasonable judgements in respect of the publication of such matters.</li> </ul>



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Top End Women's Legal Service  
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Via email: [cweatherbyfell@tewls.org.au](mailto:cweatherbyfell@tewls.org.au)

Dear Ms Weatherby-Fell *Caitlin*

I write to you in relation to the #letherspeak movement and recent media reports regarding this topic.

As a Government we understand there is often a stigma attached to a sexual assault complaint. The current law in the Northern Territory prohibits the publication of details which would identify a sexual assault complainant, and are designed to protect the complainant's privacy. However we also appreciate that there may be sexual assault survivors who want to tell their stories publicly.

The Northern Territory Government intends to make amendments to the *Sexual Offences (Evidence and Procedure) Act 1982* to allow survivors of sexual offences to consent to publishing their identities.

If you would like any further information or would like to provide feedback, I encourage you to contact the Legal Policy Division within the Department of Attorney-General and Justice at [Policy.AGD@nt.gov.au](mailto:Policy.AGD@nt.gov.au).

Yours sincerely

*Natasha*

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~ 4 NOV 2019