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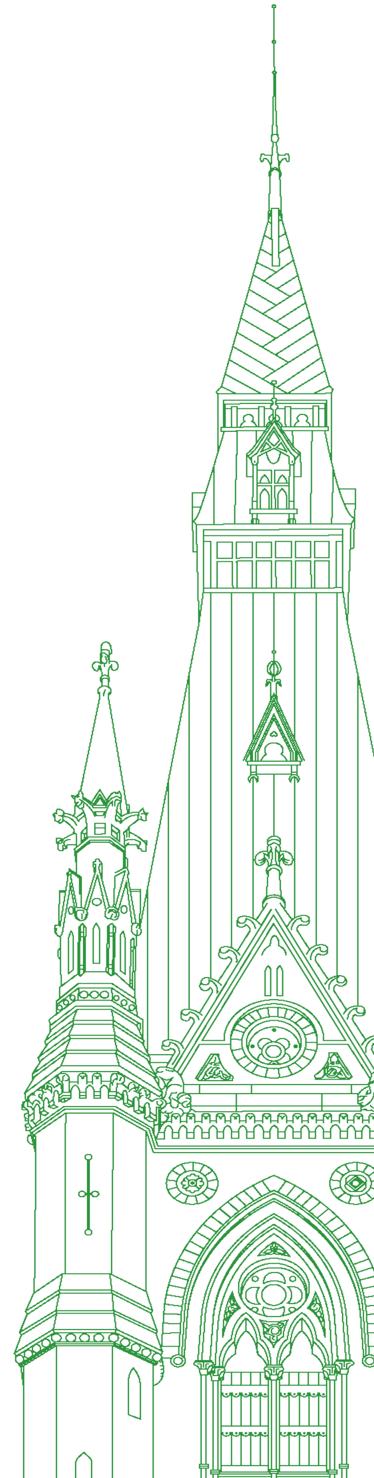

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Tuesday, October 17, 2023

● (1605)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): I call the meeting to order.

Welcome to Meeting No. 77 of the House of Commons Standing Committee on Justice and Human Rights. Two of our members are virtual today, and most should be in the room.

Pursuant to the order of reference from the House adopted by the House on October 5, 2023, the committee is meeting in public to continue its study of Bill S-12.

Today’s meeting is taking place in a hybrid format, pursuant to the House order of June 23, 2022. Members are attending in person in the room and remotely using the Zoom application. I have a few comments for the benefit of the witnesses and members. One witness is virtual and two are in the room for our first panel.

Please wait until I recognize you by name before speaking. For those participating by video conference, click on the microphone icon to activate your mike, and please mute yourself when you are not speaking. There is interpretation for those on Zoom. You have the choice, at the bottom of your screen, of the floor, English or French. For those in the room, you can use the earpiece and select the desired channel. I would remind you that all comments should be addressed through the chair.

For members in the room, if you wish to speak, please raise your hand. For members on Zoom, please use the “raise hand” function. The clerk is here and will assist me with that in case I miss someone. Thank you for your patience.

I have two very quick housekeeping items before we start with our first panel. A budget was circulated by email from the clerk to everybody, requiring a motion to approve the expenses to be paid to the witnesses for their costs to appear. It is moved by Mr. Housefather and seconded by Mr. Caputo. Thank you very much.

The second housekeeping item is similar. It is in relation to the hospitality expense related to the informal meeting with the United Nations High Commissioner for Human Rights yesterday, Monday, October 16. There were three committees involved in that meeting, and we were all asked to partake in paying part of that cost, which I'm told is less than $200.

Can someone please move a motion that we pay our share?

Thank you very much, Mr. Van Popta. I appreciate that. I think you were there yesterday as well.

Do I have a seconder? I don't need one. Thank you very much, though, Mr. Brock.

[*Translation*]

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): I second the motion, Madam Chair.

The Chair: Thank you very much.

● (1610)

[*English*]

(Motion agreed to)

The Chair: Thank you very much, everybody, for your indulgence.

I have one more reminder, if I may, on the deadline for Bill S-12. It is simply to let everyone know that, if there are any additional amendments to be distributed, I would remind you to please contact Mr. William Stephenson, legislative counsel, as soon as possible. He will ensure that amendments are properly drafted.

I would remind you that clause-by-clause is happening on Thursday, at the next meeting, and all amendments, including subamendments, must be submitted in writing and sent to our committee clerk.

Panellists, welcome. Thank you very much. We will have each of the three of you speak for five minutes. Due to the time restraints that we have, I will go with six minutes for each party and then conclude the first panel.

We have three witnesses: Ms. Robin Parker, counsel; Mr. Colton Fehr, assistant professor, faculty of law, Thompson Rivers University; and Ms. Janine Benedet, professor of law, Peter A. Allard school of law, University of British Columbia, by video conference.

I will have Ms. Robin Parker begin, please.

You will have five minutes, and the clerk will help me keep time as I take notes. I've seen it in other committees. If I hold up red, that means that the time is up.

Thank you very much.

Ms. Robin Parker (Counsel, As an Individual): Thank you, Madam Chair.

I'm going to speak on publication bans.

In 2021, sexual assault survivor C.L. was convicted of breaching her own publication ban. Her crime was texting the reasons for her abuser's conviction to her friends and family, a group of supporters. The trial judge described the assault as extremely serious and violent, and her children were in the home at the time it happened. The trial was long and difficult. She had a community of supporters—a network. Some of them were not in court the day the accused was convicted, so she sent them the reasons for judgment via Facebook Messenger. The accused learned of this and complained to the police.

C.L. was charged with violating the publication ban that had been put in place to protect her. The prosecutor reviewed the file and somehow determined it was in the public interest to prosecute her for this. They said they would seek jail if she was convicted. She took money from her savings account and hired a defence lawyer. Her lawyer explained that, if she pleaded guilty, she could avoid jail. Her lawyer would join the Crown in asking the judge to impose a $2,000 fine. Frightened and traumatized, she agreed. As a final insult, on the day she pleaded guilty to something that isn't actually a crime—I will come to that—the judge imposed a $600 victim fine surcharge, even though C.L. was the actual victim.

The law on publication bans is clear and settled. Texting a legal decision to a small group of supporters does not constitute intentional publication, broadcasting or transmission within the meaning of the Criminal Code. C.L. committed no crime, yet every justice system actor who touched the file failed her—the police, the Crown, her own lawyer and the judge.

I reached out to her after reading about her case in the news. With the help of my colleague Karen Symes, we successfully appealed the decision. C.L.'s conviction was quashed and her money, including the victim fine surcharge, was returned to her.

Her case made national news and galvanized a network of survivor advocates who were having difficulties of another kind with publication bans—getting them lifted. These brave women eventually formed the group that testified here, My Voice, My Choice. However, because of the media attention, survivors across the country started reaching out to me—since I happened to have my name in the paper—and my friend and colleague Megan Stephens, whom you met a couple of weeks ago.

In the intervening years, I have assisted many survivors in getting publication bans lifted and advised countless others. Today, I bring this practical experience to the committee, as well as almost three decades as a prosecutor, defence counsel, victims' rights advocate and survivor myself. I have seen the system deal with sexual assault cases from every side.

I share C.L.'s story with you because, in many ways, it was the genesis of these amendments. However, it's important to stress that her ban remains in place because she wants it. The principles underpinning these amendments must be knowledge and autonomy for complainants. These provisions were found constitutional in the Canadian Newspapers' case because of their laudatory purpose of encouraging reporting. It needs to be easy to have the ban imposed and easy to have it lifted. In all cases, there should be a meaningful duty to inform the complainant, so they can exercise their rights.

I welcome and support the amendments in Bill S-12, but I echo the comments of others to stress the need for properly funded counsel for the complainant. Most complainants don't even know there is a publication ban in their case and, I would venture to say, literally none are consulted before it's imposed. This is why, at earlier stages of drafting, together with a network of other lawyers—one of whom is here to testify later, Pam Hrick of LEAF—we are lobbying to impose a duty to inform the complainant of the existence of the publication ban.

● (1615)

A prosecutor cannot provide legal advice to a complainant. Every discussion a prosecutor has with the witness is subject to disclosure obligations. The provision as drafted can put the prosecutor in the position of harming the complainant by having to disclose new information they receive while explaining the publication ban. For example, if the complainant asks, “Can I speak to my counsellor?” or says, “I have told my counsellor the details of this assault”, that may then put an obligation on the prosecutor to disclose to defence something that they might or shouldn't already know, which is that there might be counselling records they could subpoena.

The Chair: Are you able to wrap it up?

Ms. Robin Parker: I'm almost done.

In closing, I just want to say that this is an issue that touches every Canadian. There's probably not a single household in this country that hasn't been touched directly or indirectly by sexual and gender-based violence. I urge the members of all parties to please work collaboratively to make these much-needed changes to the Criminal Code.

I thank you for the opportunity to participate in our democratic process.

The Chair: Thank you very much.

I will now go to Mr. Fehr.

Dr. Colton Fehr (Assistant Professor, Faculty of Law, Thompson Rivers University, As an Individual): Thank you.

The Chair: You have five minutes.

Dr. Colton Fehr: Thank you.

I'd like to focus on several of Bill S-12's features that respond directly to the Supreme Court's Ndhlovu decision.

At various points in Bill S-12, a disjunctive test is employed before determining whether an exception from the sex offender registry or a termination order is warranted. The test effectively employs the language of section 7 of the charter, in particular, the overbreadth and gross disproportionality principles. I suggest that this dual exception is unnecessary. Such an approach is only reasonable if there are circumstances where an overbroad law is not also grossly disproportionate.

If a SOIRA order doesn't further the law's purpose, the fact that the order has, per the majority of the Supreme Court, a “serious”, “onerous” and “considerable” impact on the offender's liberty strongly suggests that the effect is also grossly disproportionate. Notably, the original SOIRA legislation only employed the gross disproportionality exception. There's no indication that this exception was too narrow.

This is more than a semantic point, because allowing judges to avoid making a SOIRA order because they think there's no connection between the order's aim and the offender's conduct invites problematic speculation. As the dissent in the Ndhlovu observed, judges have frequently issued exemptions in highly inappropriate circumstances. They have excluded offenders because the judge thought they did not pose a future threat because they sexually assaulted people they knew, were viewers of child sex abuse materials, opportunistic offenders or historic offenders. These types of exclusions demonstrate that judicial bias in sexual offences is present in astonishing ways and with a disturbing frequency, as the dissent demonstrated with its overview of the jurisprudence.

While the proposed amendments provide factors to guide judicial discretion, these factors are stated quite broadly, I suggest. I agree with Professor Benedet, who suggested in 2012 that factors that are irrelevant should also be listed. These should include the fact that the victim knew the offender before the offence, that the act was opportunistic rather than predatory, that the offender has ceased the occupation or activity that brought him in contact with the victims, that he was intoxicated and that the offence did not involve multiple victims or additional bodily harm.

Discretion is also made available in other questionable circumstances. Amendments to subsection 490.012(1) would require that an offence be prosecuted by way of indictment and there be a sentence of two years, a penitentiary sentence, before a SOIRA order is mandatory for sexual offences against children. Does the available evidence establish that only child sex offenders sent to the most restrictive prisons in Canada are sufficiently likely to reoffend as a category to warrant a SOIRA order?

A review of the sentencing jurisprudence demonstrates that even cases of prolonged grooming with multiple assaults would not require an order, leaving the decision to the discretion of judges, which, again, has proven problematic.

With that said, Parliament likely wants to allow for judicial discretion not only to protect against section 7 challenges but also to keep SOIRA orders outside the purview of punishment under the charter. It's worth considering, though, whether the prior laws would be constitutional, the mandatory provisions, if conceptualized as serving investigative and punitive purposes.

In other words, could SOIRA orders not also and perhaps predominately be imposed as punishment, given the court's conclusion that an investigative model requires judicial discretion? Under such an analysis, it's not sensible to speak of overbreadth, because SOIRA orders will readily further the aims of denouncing and deterring offenders from committing further offences, nor is it clear that SOIRA orders would be grossly disproportionate, as the broader objectives of denunciation and deterrents would need to be given due weight alongside the investigative benefits these orders already serve.

While this approach may engage section 11(i) of the charter, this could be avoided. Retroactive application could be avoided by allowing offenders who committed an offence under the prior legislation to apply for exemptions where the impact on them is not inconsistent with Ndhlovu.

Thank you.

● (1620)

The Chair: Thank you very much.

[*Translation*]

Dr. Benedet, the floor is yours.

[*English*]

Dr. Janine Benedet (Professor of Law, Peter A. Allard School of Law, University of British Columbia, As an Individual): Thank you for inviting me to take part in this consideration of Bill S-12.

I'm sorry to say, because we're starting just a little bit late, that I do have to teach at 2 p.m. Vancouver time, which is 5 p.m. your time, but I hope I can be here for most of our discussion.

I'm going to focus my remarks today on the proposed changes to the sex offender registry. Not surprisingly, some of the things I'm going to say will track the points that Professor Fehr has made.

I conducted research a number of years ago that was referred to in the Supreme Court's decision in R. v. Ndhlovu. While I prefer the approach of the dissent in that case, at this point the decision for you is how to respond in a way that respects the charter, preserves the integrity of the registry and reflects the realities of how sexual offences are committed, prosecuted and sentenced.

The bill, as I read it, proposes making registration automatic in a few cases and strongly presumptive in others. I have two concerns about the current bill that track what you've just heard. One has to do with the trigger for mandatory registration. The other has to do with the factors the judge must consider in deciding whether to grant an exemption when registration is merely presumptive.

The first goes to a point that's already been raised with you, which is that this bill, as I read it, is saying that registration is mandatory for first offenders, and that it is triggered where the offence is prosecuted on indictment, the sentence is two years or more and the victim is under 18. This is a very high bar that is not, obviously, required by the Supreme Court.

The reality today is that major sexual assaults are often prosecuted by summary conviction for various operational reasons. The maximum penalty for sexual assault prosecuted summarily is only 18 months—there's an anomaly in the Criminal Code—unlike two years for other summary offences.

These serious sexual assaults against children will not attract the same mandatory registration, despite the fact that the circumstances of the offence and the risk of reoffence may be identical. Summary conviction offences are not invariably minor offences. I think it's important to stress that point.

The two-year threshold is also high. The resurgence of conditional sentences for sexual offences, including sexual offences against children, means that no offence where a conditional sentence is applied will attract mandatory registration either. You will see the avoidance of mandatory registration becoming a chip in plea bargaining, as well as a reason that some judges may sentence to less than two years to avoid that collateral consequence of conviction.

I would just say that if you are being sentenced to imprisonment for a sexual offence against a child, whether on summary conviction or by indictment, surely it cannot be unreasonable to also expect that you will be placed into the sex offender registry. To me, that trigger doesn't make a lot of sense. I think it could be lowered.

The second point—and it's one that has already been raised—is what happens if registration is not mandatory and only presumptive. Here we see the exceptions, and you've heard some concerns with those.

We know the problem is that, in the past, when judges were given discretion along these lines, they ordered exemptions frequently. My research showed that they did so in up to a third of cases, at least for those for which reasons were available. These exceptions weren't exceptional at all.

This is part of a pattern. When judges exercise unfettered discretion in the context of sexual offences, they fall into stereotypical reasoning. We've seen it in the context of sexual history evidence, private records in the hands of third parties and in the sentencing of offenders for both adult and child victims. There is the myth that opportunistic offenders are not real sex offenders, that men of good standing in the community are not real sex offenders, and that where no additional violence is used or children give de facto consent, these are not real sexual offences.

● (1625)

Bill S-12 does attempt to offer some conditions that must be considered by a judge in deciding whether to grant the order. However, most of them are vague and general and permit myth-based reasoning.

The Chair: Ms. Benedet, do you want to wrap it up, or can you leave it maybe for questioning? Thank you so much.

Dr. Janine Benedet: Yes, I'll leave it for questioning, except to say that I was going to support the point that Professor Fehr made. There needs to be a list of factors that the judge may not consider in deciding to grant the exemption. That's present in other parts of the Criminal Code, and it ought to be used here.

The Chair: Thank you very much.

Members, we will have one round of six minutes each per party, and I will start with Mr. Frank Caputo.

You have six minutes. Thank you.

Mr. Frank Caputo (Kamloops—Thompson—Cariboo, CPC): Thank you, Madam Chair.

If I could please, I would just address all of our participants here today.

Ms. Parker, I don't know if we've met before, but thank you. I thank you for your courage in speaking out as a survivor and as somebody who has been counsel on these publication ban matters. This is not the type of law that people probably think about when they go to law school. I know it probably doesn't pay very well, if at all, so I thank you for your sacrifice and for your contribution.

To Professor Fehr, it's nice to see you. Full disclosure, I spoke to his criminal law class. I used to teach at TRU law, so thank you for being here.

To Professor Benedet, it's nice to see you. You presented to us when I was a Crown prosecutor in B.C., so it's nice to see you there as well.

A voice: Do you have a question?

Voices: Oh, oh!

Mr. Frank Caputo: I have so much to go through here.

I'm going to start with Professor Benedet, talking about low risk versus no risk. As my colleague, Mr. Brock, points out, the best predictor of future behaviour is past behaviour. Given that issue, does it not follow that we should be considering a mandatory triggering, especially for a sex offence against a child?

Dr. Janine Benedet: I would say, yes. Certainly, a sexual offence against a child that attracts a sentence of imprisonment, whether custodial or conditional, is a serious offence. The route at which that is prosecuted, summary conviction or indictment, is really irrelevant. It's the facts of the offence and the penalty it attracts that speak for themselves.

Yes, it seems to me that it is a circumstance in which mandatory registration is justified and could be supported as constitutional if it were to be challenged.

Mr. Frank Caputo: One thing I was reflecting on...and anybody can chime in on this. Let's say we had a joint submission, which essentially ties the judge's hands except in very rare circumstances, where registration isn't mandatory. Theoretically, you could actually have a plea bargain that would say, this joint submission is such that we're not asking the judge to impose registration under SOIRA.

Would you agree with that, any of the witnesses?

Ms. Parker, you have a fair amount of knowledge in this area, so feel free.

Ms. Robin Parker: I don't feel I should speak to SOIRA here today.

● (1630)

Mr. Frank Caputo: That's fair enough.

Ms. Robin Parker: I'm actually going to defer to my friends who have studied this much more than I have.

Dr. Colton Fehr: I'll also defer to Professor Benedet.

Mr. Frank Caputo: Okay. If it's not within anybody's realm of knowledge, I'll just ask another question.

Dr. Janine Benedet: I'll just say, as I read the legislation the way you have structured it, I'm not sure that it could be plea-bargained away, because even where it's not mandatory it's presumptive. It's only the secondary offences where the application has to be made and that could be the subject of plea bargaining. It's a complex piece of legislation, but that's how I read it.

That was certainly a problem in the past where the prosecution had to request the order, but I don't read this legislation as going back to that model.

Mr. Frank Caputo: I'll just ask one more question, and then I'll give the floor to my colleague, Mr. Van Popta.

When we talk about child sexual abuse material, or child sex abuse and exploitation material—referred to in the code as "child pornography", but I don't want to use that term here—my understanding is that the research says that, of the number of people who consume this type of media, if memory serves, upwards of 80% will eventually offend against a child, not only over the Internet but in person.

Would that not itself be justification for mandatory registration for these types of offences?

Dr. Colton Fehr: The constitutional question turns on this very narrow principle of justice called overbreadth, so if you can find one case where this would apply in a way where that person particularly would not be able to offend or would not likely offend, then the Supreme Court says that this is a violation of section 7 of the charter.

I've written as to why I think, in fact, that principle of fundamental justice is not fundamental justice at all. However, then it goes to the section 1 justification and the question we would have to consider is whether, by getting rid of the discretion that's been so problematic, catching the offenders who will fall through the cracks would be worth catching one of those oddball cases where we might be able to find someone who is not unlikely to reoffend.

Mr. Frank Caputo: Mr. Van Popta.

The Chair: You have 50 seconds.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Professor Benedet, thank you for being here.

Thank you to all of you.

Professor Benedet, you said that you affirm or you agree with what Professor Fehr said about listing the reasons a judge cannot consider in determining whether or not somebody's name should be added to the sex offender registry. Could you expand on that? I think that's going to be important for us when we do our clause-by-clause.

Dr. Janine Benedet: Sure. I'll just give you an example.

Right now in the Criminal Code, when we talk about an application to access counselling records—third party records, private records of the complainant—there's a list of factors that the judge is not supposed to consider or, at least, is not sufficient justification for ordering production. That was done specifically to try to counter some of the problematic and myth-based reasoning that we had seen in the past, so—

The Chair: Ms. Benedet, I'm going to interrupt you now, and we'll go to our next questioner.

Dr. Janine Benedet: Sure.

The Chair: Perhaps you'll have an opportunity to pick that up.

Mr. Housefather, you have six minutes—unless it's Mr. Maloney.

Mr. Anthony Housefather (Mount Royal, Lib.): It's actually Mr. Maloney who's coming up.

The Chair: Go ahead, Mr. Maloney. Thank you.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): It's me, yes. Thank you, Madam Chair.

I want to thank all the witnesses for being here today. I echo what Mr. Caputo said, except I've not taught in any of your classes before.

Dr. Benedet, I'm going to start with you. You started by saying that you prefer the dissent, and then you went on to say that the trigger with respect to the mandatory bans is too high.

I'm not agreeing or disagreeing with you, but do you have specific suggestions for how the language of the legislation could be changed?

Dr. Janine Benedet: Yes. I would recommend that the trigger for mandatory registration get rid of the reference to prosecution on indictment and simply say that where it is an offence committed against a victim of under 16 or 18, depending on the offence, and a sentence of imprisonment is imposed, that ought to be enough as the mandatory trigger. I think that would help.

I understand that we're trying to keep that mandatory "no exceptions" ban for a limited range of circumstances, but to me that's more coherent than trying to make a distinction between indictable and summary, or federal sentences and provincial time.

● (1635)

Mr. James Maloney: That would include eliminating the two-year threshold, too.

Dr. Janine Benedet: I would as long as it was a sentence of imprisonment, whether conditional or custodial.

Mr. James Maloney: To the other witnesses, do you agree with that?

Mr. Fehr, I'll start with you.

Dr. Colton Fehr: Yes. I also wonder, given the Ndhlovu decision, whether it would be possible to just get rid of "on discretion" at all in the context of child sex offences. Now, it may catch some offenders it ought not, but the Supreme Court has never said that a bright line rule is entirely unconstitutional. That goes to section 1 justification of the rule.

Again, given my concerns with the way that discretion has been exercised in the past, this might be something that could be upheld. The Supreme Court was dealing with a much broader application of a mandatory order in Ndhlovu, and this would be a much narrower mandatory order.

Mr. James Maloney: Ms. Parker, what about you? Do you agree as well?

Ms. Robin Parker: I actually agree with Professor Fehr. I think that it would be constitutional if you limited it that way. In fact, I could just refer back to, ironically, an old case, the 1988 Canadian Newspapers' case that I referred to in my...but in a different context, where there was a really specific reason for a removal of discretion, because that was the issue in that case—the discretionary nature of the ban versus mandatory. They found that when it's linked to a laudatory objective it's constitutional, so I think that limited approach that my friend is suggesting could withstand a constitutional challenge.

Mr. James Maloney: Okay. Thank you.

Dr. Benedet, I'm going to go back to you again.

You talked about the guiding factors in the legislation that judges are supposed to apply. I forget exactly how you characterized it, but I think the word "vague" was used. What criteria would you add to make it less vague or make it meaningful, in your opinion?

Dr. Janine Benedet: Right now, it says things like that the judge can consider the nature of the offence and the circumstances of the victim, but all of those invite or at least permit stereotypical reasoning. I would like to see an addition of a list of factors that the judge cannot consider or cannot rely on as a basis for exempting the offender from registration: that the offence was opportunistic or unplanned, that the offender was intoxicated, that the offender no longer practices the profession that gave them contact with the victim and that no additional violence was required to carry out the offence.

Those are the things we saw again and again that drove the decision to order exemptions, and they're all based on myth and stereotypes about what a real sexual offender looks like.

Mr. James Maloney: Do you have what you would consider an exhaustive list of criteria that should be excluded? You've given some examples, but if you have a detailed list, I'd like to see it. Perhaps you can send it to us.

Dr. Janine Benedet: Maybe I could forward that, and that would be more useful than trying to read out a long list here.

Mr. James Maloney: Mr. Fehr looks like he want to chime in on this too.

Dr. Colton Fehr: I would note that I have a copy of Professor Benedet's paper on my computer right now. It's on page 437 of her 2012 Queen's Law Journal paper where she has set out a list, so maybe that will be of help.

Mr. James Maloney: Okay. We're going to get a copy of page 437, and anything else you might like to add, Dr. Benedet.

Ms. Parker, how do you feel about that?

Ms. Robin Parker: I would commend her entire paper to you, not just that singular page.

Mr. James Maloney: That's a couple of pretty strong endorsements, Dr. Benedet.

Very quickly, as I don't have much time left, you talked about the Crown's ability to speak with individuals about the ban. How would you change the bill that's before us to ensure that your concerns are addressed?

Ms. Robin Parker: I guess it depends on how far you're going when you do your line-by-line amendments. We have all spoken about the need for robust or at least funded legal counsel for complainants.

Right now, people like Ms. Stephens and I are volunteers. We're both sole practitioners, so our ability to serve in that capacity is quite limited for very practical reasons.

If you want me to specifically go to a line-by-line analysis, perhaps I could send you a note as well.

Mr. James Maloney: If you do have a specific thought, yes, please, share it.

The Chair: For all witnesses, please feel free to send us anything that we don't have time to go over today. That would be very appreciated, but the sooner the better.

● (1640)

Ms. Robin Parker: We'd be happy to do that.

The Chair: That's terrific.

[*Translation*]

Mr. Fortin, you have the floor for six minutes.

Mr. Rhéal Éloi Fortin: Thank you, Madam Chair.

Dr. Benedet, Ms. Parker and Dr. Fehr, good afternoon. Your participation in this discussion is important. We're proud and fortunate to benefit from your insights.

I'm going to reiterate what the chair just said, that we'd be delighted to receive your notes. In particular, page 473 of your document, Dr. Benedet, seems to be a page worth reading, which I'd be happy to do. The same goes for you, Ms. Parker: You can send us the documents that you think will be useful.

I have questions about certain aspects of the bill, but I'd like to stick—at least for now—to the issue of publication bans and the potential conflict of interest that could arise for the Crown prosecutor when speaking to victims. You mentioned this, but I'm still puzzled. I wonder how we can articulate something useful and effective other than asking the prosecutor to explain things to the victims.

Ms. Parker, you mentioned the possibility of mandating private sector lawyers to offer advice to victims. Yes, it's a possibility, but is it the best way to go about it? I don't know. There are situations where it could become complex.

Is there anything else either of you would like to say about this? Is it the judge, the Crown prosecutor or an independent prosecutor who should be giving explanations to victims? If it's the latter, should there always be an independent prosecutor in trials involving publication bans?

I'd like to hear what you have to say first, Ms. Parker.

[*English*]

Ms. Robin Parker: I will answer you in English if you'll allow. Thank you.

I'm just going to turn to proposed subsection 486.4(3.2) in the legislation, and, just in the very simplest of ways, eliminate one problem but not solve the other.

You can simply delete the section that says the prosecutor has to advise of the ban's “effects and the circumstances in which they may disclose information that is subject to the order”. That would remove the giving of legal advice by the prosecutor, which we're saying is a serious problem.

In solving that, though, as we've said, somebody needs to explain it. The judge isn't really in a position to explain the effects because, of course, any good giving of legal advice involves receiving information. It involves a conversation that's privileged and confidential, so that someone can understand the scope of what they're being advised.

Independent legal advice is what's needed here. We even have cases where we've applied to lift publication bans, where we have tried to limit our involvement and asked the prosecutors to do this. Then the prosecutors come back to the complainant and say, “We can't agree to do it unless the complainant has independent legal advice.”

We say, “All right, then appoint me.” I want to say to the judge, “Then you need to appoint me as counsel.” The prosecutor can bring an application to do that. We do that in other areas of the code. Perhaps looking at that and importing that sort of concept from sections 276 and 278 into this area would be good, although you have to be careful about standing. That opens up a whole other mare's nest.

I can give you some answers. This duty to inform of the existence of the publication ban could also be equally imposed on the judge in the same way that a judge does a plea inquiry. That would also work. We also have to bear in mind when the bans are imposed. It needs to be easy to impose them early. When is that duty triggered? At some point, somebody needs to tell the complainant, and there needs to be a legal duty to do so.

The other thing I will just note is that a complainant can't mistakenly breach the publication ban. There is a *mens rea* element to this offence. You have to know that a publication ban exists, and the prosecutor would have to prove that beyond a reasonable doubt to successfully prosecute someone for breaching a publication ban. It's a little detail that gets lost when we have this sort of discourse. I just want to raise that for the committee's consideration when you're thinking about this in the amendments.

Thank you for the question.

[*Translation*]

Mr. Rhéal Éloi Fortin: Ms. Parker, you say that it can be helpful for victims to get a legal opinion about their rights, among other things. As I understand it, it's simply a matter of explaining what you're doing. The Crown prosecutor or the judge, as the case may be, can simply tell the victim that there's a publication ban, which means that they can't talk about that particular case and that, in given situations, they can't say this or that. There won't necessarily be an exchange between the victim testifying and the judge.

Isn't this objective explanation of the situation enough? Shouldn't we let every victim or witness be allowed to consult an independent prosecutor, if they so wish?

● (1645)

[*English*]

Ms. Robin Parker: I'm strongly in favour of independent advice because the meaning of “broadcast”, “transmit” or “distribute” has become more complex with the arising of social media. For example, on the Department of Justice's website, on the page about publication bans, they actually have something that's incorrect in advising complainants, saying that they can't talk about the publication ban with reporters.

The Chair: I'm really sorry. We're quite a bit over time.

Our last questioner would be Mr. Garrison for six minutes.

Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP): Thanks very much, Madam Chair.

I will let you finish that thought you were on, if it hasn't disappeared already.

Ms. Robin Parker: I think it has. I'm a little nervous being at the committee. I'm not as used to it as you all are.

Mr. Randall Garrison: I want to start then by thanking you for being here and for the work that you do, largely on a volunteer basis, and also for doing it as a survivor. I know it takes a toll and I know being here today will take a toll, so I thank you for that.

I'm going to ask all my questions of you, because we have a shortened time and not another round. When we talked to officials and we asked them about the number of publication bans, there was a little bit of confusion. I guess what I'm asking you is whether it's normal and almost always the case that a publication ban is imposed.

Ms. Robin Parker: I was here that day as well, and I think the Department of Justice official, answering quite correctly in his role as Crown, wanted to give you very specific and precise answers.

They don't keep those statistics, but if you had statistics for the number of sexual assault charges, then you would have the answer to that question because they are imposed in each and every case at the earliest opportunity. In fact, if the Crown were not to ask that they be imposed, they'd probably be in breach, in Ontario at least, of their own Crown policy manual, and in other jurisdictions like the Northwest Territories as well.

Mr. Randall Garrison: Thank you for that clarification.

In all of these cases, what would you say is the number of cases in which a complainant is actually notified, in current practice? Does this actually take place?

Ms. Robin Parker: I think the complainant is generally notified in and around the time they come to court to testify. If the case is resolved before there's any testimony given, the complainant isn't notified of the publication ban. I speak to that on the basis of my experience representing complainants, but also in my own case. I was never informed whether or not there was a publication ban in my own case.

Mr. Randall Garrison: If a case is resolved before going to court, the publication ban would continue. Am I correct?

Ms. Robin Parker: You are correct.

Mr. Randall Garrison: Therefore, we have people who may have never been informed, the case is resolved and they still don't know that they're subject to a ban.

Ms. Robin Parker: Yes, exactly. I've represented some of those people, and we've often had a very difficult time trying to find out whether there's a publication ban at all. Sometimes we have to resort to ordering transcripts of every appearance at the cost of the complainant.

Mr. Randall Garrison: I take your point about there being a *mens rea*, that there has to be a deliberate violation, but can you say a little about where those who are subject to the ban have gotten into trouble? What are they trying to accomplish when they're talking to other people or informing other people about their case?

Ms. Robin Parker: I think there's a bit of a misunderstanding—and I think C.L.'s prosecution, unfortunately, increased that—about what actually constitutes breaching the publication ban. People are often given advice, because of her case, not to speak to anyone about it.

For example, after our testimony two weeks ago, we were here with survivors. There was a woman here who was trying to get her publication ban lifted. We took a photo of all of us with her, and then we took a photo of all of us without her so that the My Voice, My Choice people could use the photo on social media. She was worried that would breach the publication ban, so it's quite broad.

People want to speak, write, speak in private groups, speak to counsellors—these are the things that are worrying them. Whether or not those are violations, advice would have to be given on a case-by-case basis.

● (1650)

Mr. Randall Garrison: Could we amend Bill S-12 to maybe put some of that advice into Bill S-12 by saying that, in the case of talking to counsellors or medical professionals or trusted persons—some kind of list of people—it's definitely not a breach?

Ms. Robin Parker: Yes, you could. There is a section in here that speaks to the intent and about prosecuting the complainant and what would be required to do so, which I think just restates the law as it presently exists. However, you could also carve out exceptions and circumstances under which someone should never be prosecuted.

You could carve out an exception to never prosecute a complainant at all. Some would say that might go too far because there may be situations where there are multiple complainants and the public good would require that someone have a ban when they might personally not have wanted one.

Mr. Randall Garrison: I think that's an important point you raise. There are often multiple victims involved in a case, and there may be different opinions about publication bans.

Ms. Robin Parker: Yes, exactly.

Mr. Randall Garrison: In my view.... I think the suggestion, which came from My Voice, My Choice, was that we might be more specific in the law about some of those circumstances in which it's never going to be prosecuted.

One of the other things I know, certainly from people I've met, constituents who have been subject to bans, has been the public safety aspect from their point of view. One of the reasons they didn't like the publication ban and one of the reasons they wanted it lifted was that they wanted people to know that there was a predator, and the publication ban on their name inadvertently protected the perpetrator.

Ms. Robin Parker: Yes, exactly. That's, of course, a benefit that the accused receives, in the context of sexual assault cases, that is unique in the Criminal Code, so survivors who have the ban lifted in those circumstances are very brave.

The Chair: Thank you very much.

Thank you very much to the panellists.

Professor, you can go to your class. We very much appreciate your being here with us today virtually. Thank you very much for coming.

That concludes the panel. We will now suspend for a minute because I believe the panellists who are with us for the next round are here with us in person.

Please come on up.

● (1650)

_____________________(Pause)_____________________

● (1655)

The Chair: I call the meeting back to order.

[*Translation*]

I'd like to welcome our two witnesses Benjamin Roebuck, federal ombudsperson for victims of crime and, from the Women's Legal Education and Action Fund, Pam Hrick, executive director and general counsel.

[*English*]

Welcome to both of you. You have five minutes each.

When you have 30 seconds, I will do this. When there is absolutely no time, I will go like this. I will do my best.

The floor is yours. I will begin with Ms. Hrick.

Ms. Pam Hrick (Executive Director and General Counsel, Women's Legal Education and Action Fund): Thank you, Madam Chair.

Good afternoon. As has been mentioned, my name is Pam Hrick. I'm the executive director and general counsel of the Women's Legal Education and Action Fund, or LEAF. We use litigation, law reform and public legal education to advance the equality of women, girls, trans and non-binary people. We've been at this since 1985.

I'd like to thank you for inviting me here to speak with you today about Bill S-12. I was pleased to also have the opportunity to appear before the Senate committee studying this bill earlier this year. I am going to focus my remarks today as I did before the Senate committee on the publication ban portion of Bill S-12.

We were very encouraged to see the willingness of parliamentarians to improve how publication bans are imposed, varied and revoked. This work has been driven to the forefront of public attention by sexual assault survivors, including those involved with My Voice, My Choice, with support from feminist lawyers, advocates and organizations like LEAF who echo the calls for change to centre survivor choice.

LEAF was very glad to see the Senate amend the legislation in response to concerns that were raised at committee. We had several overarching recommendations for amendments to strengthen the bill in the Senate. These included, first, ensuring victims are not criminalized for failing to comply with a publication ban on their own identity; second, ensuring that people whose identities are protected by a publication ban can still disclose their identity in contexts such as with a therapist or a support group; and third, clarifying and simplifying the process for revoking or varying a publication ban.

These recommendations were put forward by a coalition of organizations and individuals with deep expertise on sexual violence and the legal system. They included LEAF, the National Association of Women and the Law, the Canadian Association of Elizabeth Fry Societies, the Ending Violence Association of Canada, Legal Advocates Against Sexual Violence, Possibility Seeds, Megan Stephens, Pamela Cross and Robin Parker.

Of course, I'm here today speaking for LEAF. We would urge you, by and large, to maintain the amendments to the legislation that were adopted by the Senate, which were responsive to our recommendations.

One modification we would encourage you to consider at this stage was spoken to by Ms. Stephens on October 5, and it was just spoken to by Ms. Parker today. That concerns the requirements the bill places on prosecutors. As you've heard, the current version of the bill requires prosecutors to inform complainants of the existence of a publication ban and their right to apply to revoke or vary it. These are practical and important information requirements that should be maintained. However, the bill goes further and requires prosecutors to share information about the publication ban's effects, and when and how the complainant can disclose information without violating the order. That verges on putting the prosecutor in a position of giving legal advice.

I agree with Ms. Stephens' and Ms. Parker's submissions that the bill should impose a more narrow requirement to inform a complainant of the ban's existence, that they can seek to have it varied or revoked, and that they are also entitled to get independent legal advice to make an informed decision about whether they wish to do so.

As I said before the Senate standing committee, we need investments in independent legal advice and education to ensure that survivors fully understand what a publication ban does, how it can be imposed and how it can be removed. We need these investments to ensure that survivors can make informed choices about what's best for them in their circumstances.

We've heard loud and clear from survivors that they want the ability to speak about their own experiences—or at least some of them do. We also know that some survivors wish to avail themselves of the privacy protections provided by a publication ban. As one expert, Anu Dugal of the Canadian Women's Foundation, said earlier this year, publication bans can serve as “one layer of support and protection for racialized women in a system that does nothing to actually support them or protect them—and in fact goes out of its way to blame them”.

I want to highlight that, unfortunately, it seems like the committee may be moving into clause-by-clause without having heard directly from any racialized survivors or legal experts concerning the impact of the proposed amendments.

I'll conclude though by stressing that both choices are valid—to have a publication ban in place or not. The important thing for this committee to keep in mind is that amendments related to publication bans must seek to give effect to survivors' choices and make it as easy as possible to exercise agency in making those choices.

Thank you, and I look forward to your questions.

● (1700)

The Chair: Thank you very much.

Mr. Roebuck.

Dr. Benjamin Roebuck (Federal Ombudsperson for Victims of Crime, Office of the Federal Ombudsperson for Victims of Crime): Thank you. It's nice to see you again.

[*Translation*]

Madam Chair and members of the committee, thank you for inviting me to speak on Bill S-12, an act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act.

I acknowledge that we are on the traditional unceded, unsurrendered territory of the Anishinabe Algonquin nation. I honour the leadership, strength and wisdom of indigenous peoples, and I accept personal responsibility for pursuing justice and reconciliation.

[*English*]

The Office of the Federal Ombudsperson for Victims of Crime is an independent federal agency at arm's length from Justice Canada. We provide information to the public on victims' rights, review complaints from victims about federal agencies and advise on criminal justice legislation and policy. Our recommendations are informed by conversations with survivors and stakeholders across the country and around the world, and by our indigenous, academic and service provider advisory circles.

The volume of inquiries and complaints to our office continues to grow. We project a 128% increase in files opened this year versus 2017.

Our office has also prepared a comprehensive response to this committee's study on improving support for victims of crime, which we will submit to you shortly.

To the courageous survivors who have advocated for Bill S-12, thank you. I also recognize survivors who continue to be silenced by publication bans, and I have heard how painful it is to be excluded from this process—not being allowed to speak to Parliament with your own voices and names.

One survivor provided consent for me to share their silence for 30 seconds. Please join them in silence.

[*A moment of silence observed*]

In June, I appeared before the Senate standing committee to discuss Bill S-12. I am pleased to see how the senators incorporated feedback from survivors and other stakeholders.

I continue to support recommendations from My Voice, My Choice and other survivors who have contacted our office, including on better education for prosecutors and judges on how trauma affects memory and information processing; how important autonomy over identity is for recovery; collecting reliable court data on publication bans; informing sexual assault survivors about their rights, respecting their choices and offering independent legal assistance, where available; treating Criminal Code provisions for victims of crime with the same weight as measures for the accused; and better protecting the therapeutic records of sexual assault survivors who need unconditional safety to externalize and process the violence imposed on their bodies.

Some of these recommendations are addressed in the bill, while others will require more work. We've heard about numerous rights violations, barriers and contradictions in how the criminal justice system responds to sexual violence. Our office is in the early stages of planning a systematic investigation into these challenges in order to propose more comprehensive and trauma-informed remedies to Parliament.

In a recent discussion with Crown prosecutors, we heard that the requirement to consult on publication bans in Bill S-12 occurs prior to their regular first contact with complainants. This raises the concern that the implementation of Bill S-12 could lead to rushed decisions on publication bans. We've also heard concerns that some survivors may choose to reject or lift a publication ban without understanding potentially long-term consequences.

I understand the need to pass Bill S-12 quickly, so I will limit my recommendations to a few key areas that could easily be written into the legislation or included in implementation.

Number one is informed consent. Decisions about publication bans have significant consequences for survivors. The pros and cons should be clearly presented with supporting resources that provide information in plain, easy-to-understand language. Trauma can make it difficult to process and recall information, so having something to review can help with decision-making.

We propose an addition under “Duty to Inform" in proposed subsections 486.4(3.2) and 486.5(8.2) requiring the prosecutor to inform the judge or justice that they have provided a resource on publication bans to explain the law, safety considerations and how to have a ban varied or revoked.

● (1705)

Finally, on victim-centred information.... I can summarize it to shorten my time here.

It's wonderful that we've included a measure for victims of crime to finally be asked whether they'd like to receive information about the sentence and its administration. That's very important, but it still remains offender-centred in the way it's presented. It's not clear that, if a victim doesn't check that box, they will not be told about a parole hearing or about when the person who harmed them has been released. There are consequences to that as well. We need to improve some of those measures.

The Chair: Thank you very much.

Colleagues, we will do one round of six minutes each. I won't shorten that. We have enough time for that.

I will start with Mr. Van Popta.

Mr. Tako Van Popta: Thank you, Madam Chair.

Thank you to the witnesses for being here.

You've given very important evidence about one aspect of Bill S-12. Your focus has been on publication bans, which is very important legislation, and we are generally supportive of it.

However, I just wanted to get on the record how profoundly disappointed I am that the government side of the House has delayed this legislation and is now rushing it through. We have a deadline of October 28 in response to a Supreme Court of Canada decision that said that the sex offender registry was unconstitutional, so Bill S-12 intends to fix that.

Now, on top of that, we also have this second add-on of the publication ban. Listening to your evidence today, Ms. Hrick, you say that there are a lot of voices that haven't been heard, and here we are in a big rush with October 28 to get this whole bill passed. I don't feel that we're giving just time to this very important piece of legislation.

That said—that's off my chest now—I want to thank you for your testimony, but we've heard from other witnesses who have said that there should be a simplified process for revoking the publication ban in simple cases. Perhaps you could tell us what, in your mind, constitutes a simple case.

Ms. Pam Hrick: I'd say perhaps a case where there is a very narrow scope of individuals who are covered by the publication ban, such as a single individual, a single victim or complainant, where nobody else's interests are impacted. It juxtaposes, of course, with cases where there are multiple complainants, where there are different privacy interests that may be competing or where you have different desires among those individuals to have the privacy protections of a publication ban and those who do not want those privacy protections. I think that's the kind of case that might be a little bit simpler.

I do think the amendments that have been proposed and adopted by the Senate to simplify the process are a great improvement over what we have now and a great improvement over what Bill S-12 initially proposed.

Mr. Tako Van Popta: Thank you.

There are often cases where there's more than one victim. Of course, there might be disagreement among the victims as to whether the publication ban is important or harmful. A case like that would be more complex.

What would be the process, then, for revoking the publication ban for one victim but not the others?

Ms. Pam Hrick: I'd have to give you a blanket answer, and I think the legislation provides for a process that allows those voices to be heard and for courts to consider whether a tailoring of a publication ban could address those various privacy interests. I think it would be a case-by-case determination, and Bill S-12 does give tools to the court to be able to make that kind of decision, one that hopefully, to the greatest extent possible, allows for every victim's or complainant's wishes to be taken into consideration and to ultimately be respected.

● (1710)

Mr. Tako Van Popta: Does the court have the resources to be able to do this in an effective manner?

Ms. Pam Hrick: I think the courts are under-resourced, as a blanket statement.

Mr. Tako Van Popta: That's fair enough. I would agree with you, certainly from the evidence that we've received in this study and others.

I have a question about Crown prosecutors being given this additional task of having to deal with victims and publication bans. I don't know which one of you said it, but I think you were indicating that there might be a conflict of interest for the Crown prosecutor to have to give what effectively becomes legal advice. Perhaps you could expand on that.

Maybe you, Mr. Roebuck, could talk about that and tell us what needs to be amended in the draft legislation.

Dr. Benjamin Roebuck: I have sympathy for that conflict of interest that I've been hearing about. I think independent legal advice is one of the most important components for survivors. It's a complaint that we have—that even though programs providing independent legal advice exist, nobody has the responsibility to inform victims when they report a sexual assault that they can access those programs. It's a gap that we don't tell victims about their rights up front, so they miss out on exercising them.

For multiple survivors, I don't understand why somebody, in cases with multiple publication bans, would need to retain theirs to respect someone else's. I think, in cases with multiple bans, that somebody should be able to have their own removed and still respect any bans that remain in effect. I think that's a clear distinction. Otherwise, we have a system where people are still trapped by these silencing measures, and I think that needs to change.

The Chair: Thank you very much.

Ms. Dhillon.

Ms. Anju Dhillon (Dorval—Lachine—LaSalle, Lib.): Thank you, Chair.

Thank you to our witnesses for being here.

I'll start with Madam Hrick.

We've talked with very good reason, under Bill S-12, about victims who wish to lift their publication bans. I'm going to ask my question in two parts, if you can answer them, please.

I want to ask you about the victims who want a publication ban to protect their privacy. Are there parts of Bill S-12 that could create barriers or confusion for people who do want a publication ban? How can we balance the interests of both?

Ms. Pam Hrick: I think that Bill S-12 right now centres that issue in ensuring that survivors can exercise choice and agency in determining what choice is best for them in the circumstances.

Bill S-12 allows for publication bans to be put in place right off the bat, which, as acknowledged and heard at this committee, can feel like a suffocating or retraumatizing experience for some survivors. Putting in those mechanisms to easily allow for the ban to be lifted, varied or revoked is an important measure to give effect to those survivors' choices.

Having the discretion or the ability present in the amendments to Bill S-12 to allow for that protection to exist and persist for survivors who wish to avail themselves of the privacy protections of the ban is also something that this bill, as drafted currently, achieves.

I want to also re-emphasize the court resourcing point. It's not just that courts are under-resourced. It is that resources need to be directed in a way that will allow survivors to be supported in the process if they choose to report, and will allow them to make choices about whether to report in the first place.

I could go on and take up most of the committee's time talking about ILA programs that exist for survivors, for example, in Ontario, to help them make those choices and about the need to expand those across the country and properly fund them.

Ms. Anju Dhillon: Thank you for your answer.

How do the provisions of Bill S-12 better reflect victims' rights to information under the Canadian Victims Bill of Rights?

● (1715)

Ms. Pam Hrick: I would actually defer to my co-panellist on that.

Dr. Benjamin Roebuck: Thank you.

I think that a victim's right to privacy is often interpreted for them and not in a way that benefits them. It helps to bring more choice to the way that privacy is exercised and allows people to choose whether they want those measures in place. Some people certainly want them and some people definitely don't.

I think that we need to respect that people have different trajectories and different things that help them heal and feel protected, so choice is really important under the Canadian Victims Bill of Rights.

Ms. Anju Dhillon: Perfect.

My question is for both of you. Either one of you can answer.

How can the information on the justice website and the victim services materials be improved to better educate the public on publication bans? What kind of information would you like to see in those resources?

Ms. Pam Hrick: I would like to see a plain language explanation of exactly what the law is, once and if Bill S-12 is passed by the House of Commons back to the Senate, with any amendments of course. If the Parliament approves that, I'd like to see plain language resources for survivors to explain exactly what the legislation requires.

I would like to see one-stop shopping, ideally, for resources that survivors can avail themselves of to receive support, guidance and hopefully independent legal advice where it exists.

Those are the kinds of things that I'd like to see housed in one place. Again, the plain language nature of it is so important, especially when people are accessing those resources in a time of intense trauma.

Dr. Benjamin Roebuck: The risks of removing a publication ban need to be clearly explained. What does this mean in terms of media engagement, people taking your story and your experience and broadcasting that without your consent if the ban has been removed? It's really important that's understood.

Within the justice system we have this opportunity to provide better information across the board. Someone who's accused has legal advice to walk them through the whole process and explain everything. We don't do that with victims and complainants. We could at least have a set of resources that, at a bare minimum, explains the process that's provided proactively to people as they navigate the system—plus independent legal advice.

Ms. Anju Dhillon: To follow up on your comments just now, we often use the word “trauma-informed” or “victim-centric” to refer to our aspirations for the justice system and what we'd like to see.

In the context of publication bans, how can we make this a reality?

Dr. Benjamin Roebuck: It's taking a step back and saying, who is this about? The system exists because someone was harmed, and often they're peripheral to the process. That really has to be the starting point—that we look at who was harmed, what justice looks like and what's required—and have that be centred in the process. That will lead to different decisions and a different investment of resources.

The Chair: You have 30 seconds.

Ms. Pam Hrick: If I can piggyback onto that point within 30 seconds, it also calls for looking at ways, other than the criminal system, to provide that kind of justice to survivors, to look at restorative justice or transformative justice options, to look at centring survivors' healing in the process and to giving them choice in how they go about that healing path.

The Chair: Thank you very much.

Mr. Fortin, you have six minutes.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Madam Chair.

I'd like to thank the witnesses for being with us today. Their participation is valued.

We're dealing with a subject in Bill S-12 that I think is important. It's a bit incidental initially, because there's a rush with the sex offender registry part of the bill, but the bill also addresses the issue of publication bans. This seems to me to be a serious matter. Victims who have testified before us on all kinds of bills and situations have often talked about these orders.

Correct me if I'm wrong, but I think a number of things will be repeated in every case. What is a publication ban? I know that not everyone will read the part of the Criminal Code amended by Bill S-12 and be able to understand what it's about or what can or can't be done. It should be possible to produce informational material. In fact, Ms. Dhillon just asked the question. We're all on the same topic. This material could be distributed to victims beforehand. Before victims decide whether they want a publication ban issued in their case, they need to be able to understand the implications of such a ban.

Of course, each case is unique. The Crown prosecutor would probably have to add specific details for each case or answer questions. In addition, courts or courthouses could make resources available to victims to answer their questions. This is already being done in different ways on different subjects. In short, there's surely a way to organize more specific information.

Generally speaking, do you think it would be possible to produce a kind of tutorial, even if it meant that victims would have to enlist the services not only of a lawyer, but also of an educator, to develop materials that would adequately inform them of their rights and obligations in connection with a publication ban?

● (1720)

[*English*]

Dr. Benjamin Roebuck: I think a lot of those resources already exist. The provinces, territories and the federal government have resources that explain the justice process, but nobody has a requirement to provide them. It's a simple bridging mechanism: We can say that people who experience harm should at least be provided with this information.

People don't know what to ask for. The CVBR requires them to ask for information, but they don't know what's available. We need to reverse that onus to say that, when somebody reports a sexual assault, this is information that should be provided to them. When they experience a homicide in their family, this is important information.

I think that's an easy thing that's low cost. The resources already exist. We just need a mechanism to provide them proactively.

[*Translation*]

Mr. Rhéal Éloi Fortin: I agree with you, Mr. Roebuck. This is more or less what Bill S-12 does, whereby Crown prosecutors will have to answer the judge's questions and say whether they have taken into consideration what the victims want. If a Crown prosecutor feels that this puts them in an awkward position, they can produce those documents and simply answer the questions.

There's probably a way of articulating something useful. Publication bans are issued to protect victims, but what the victims want isn't taken into account, which strikes me as absurd, and it makes no sense in our criminal system.

The obligation imposed on the Crown prosecutor doesn't place them in a conflict of interest, particularly since, in principle, there is no case to win. The Crown prosecutor is there to establish the truth.

There are about two minutes left, and I would like to hear more about the potential conflict of interest a Crown prosecutor might have in answering victims' questions about the ins and outs of a publication ban.

[*English*]

Ms. Pam Hrick: I've seen this a bit, not just with my LEAF hat on but also with the experience of having advised complainants with section 276 and 278.1 applications before the court.

You don't want complainants and survivors having in-depth conversations with the Crown that are unnecessary to the process, because that triggers, as you've heard from multiple people here, disclosure obligations.

I have seen, in my own practice, examples of young women, in particular, who are experiencing a trauma and who are in an unfamiliar and hostile environment in many respects, not being in a position to understand that the Crown is not their lawyer and that victim witness assistance program practitioners here in Ontario are not their counsellors and are not their specific advocates. The things that are told to them are then disclosed to the defendant and that creates really awful knock-on effects that we want to avoid. That is why we go back to independent legal advice being incredibly important, by providing that solicitor-client privileged space for complainants and survivors to have those conversations and get the advice that they need.

On the issue of education, I do want to quickly say that there is such a need to invest in that in a way that brings experts into the conversation. Otherwise, you leave it to not-for-profit organizations—I could talk about this more—to provide these resources, and we're just not adequately resourced to do it.

The Chair: Thank you, Ms. Hrick.

Our last questioner is Mr. Garrison for six minutes.

Mr. Randall Garrison: Thank you, Madam Chair.

Thank you to both the witnesses for being here.

Mr. Roebuck, I know that at the end you kind of ran out of time, and I was very interested in the path you were starting down. Maybe you could say a little bit more.

I've been focusing my questions on publication bans, which are the front end, and you were talking a little bit about the back end, if you like, of the process. Could you just maybe give us a bit more on that, which you ran out of time to talk about?

Dr. Benjamin Roebuck: Yes. Thank you.

Can you imagine if, in your family, someone was murdered and the federal government didn't think that it was appropriate to let you know that the offender was being released, or if you could participate in a parole hearing but they didn't tell you that it was happening. That's the problem. Nobody has a legal responsibility, prior to Bill S-12, to inform people, certainly on the federal side, about how to register to receive information. That's a major source of complaints to our office.

There are women who participated in the National Inquiry into Missing and Murdered Indigenous Women and Girls, who have family members who disappeared or were killed, and still, after all of that process, they aren't being told about these hearings and about the release of people back into their communities, so this change has to happen.

I think we need to improve overall information. I'll just highlight why independent legal advice is really important in sexual assault.

We had a complaint recently where somebody said, “I wish that someone had told me to speak to a lawyer before I reported it to the police, because I told them that I had seen a counsellor and that I was journaling.” Both of those things became part of the disclosure and were subpoenaed by the offender. In the end, the complainant stayed their charges because it felt like such a personal invasion.

This is happening across the board, where survivors' experiences are not being protected in the way that we do justice. That is certainly the case with this issue of therapeutic records, which I know has passed through the Supreme Court and has had different perspectives. However, I don't think that a survivor-centred perspective has been fully considered on that, and it could be better protected with independent legal advice.

● (1725)

Mr. Randall Garrison: The suggestion has been made that we certainly could amend Bill S-12, at least on the prosecution possibility, to add a list of circumstances that would not result in prosecution. That would include things like counsellors, legal advice and trusted individuals for minors. Would you say that it would be an addition that would be important?

Dr. Benjamin Roebuck: Yes. I don't think that a survivor should be criminalized through a measure that the federal government thinks is respecting their right to privacy. It just doesn't make sense. I think sometimes we arrive at these spaces that don't make sense when we step back and consider them.

We can do better than that for people who experience violence. We can be respectful, honouring and helpful. Even the possibility of criminalizing someone for talking about their body and their experiences is violating. It's not respectful.

Mr. Randall Garrison: Maybe Ms. Hrick, you can talk about what happens in practice. Even though all of us might look at the bill and say that this shouldn't happen in cases of prosecution, we are actually hearing that it does happen because of that misunderstanding of the law.

Ms. Pam Hrick: Absolutely, and I think you've heard the best kind of evidence on that point from people like Robin Parker and Megan Stephens. I urge you to listen to that, based on their decades of experience representing survivors and also their experiences with Crown and criminal defence lawyers as well.

I think one of the good things about Bill S-12 as it's currently drafted is that it makes it much clearer. A line Crown prosecutor can go to the legislation and see it's not appropriate for them to pursue charges because the three criteria there are not met. It doesn't have to be something that is a matter of discretion as they are figuring it out, in some cases really quite poorly, as evidenced by the examples we have heard about. It's setting it out much more clearly and being very narrow about the circumstances in which it would ever be appropriate to pursue that.

I think that is another good thing about this legislation—that clarifying element of it.

Mr. Randall Garrison: I want to go back to you, Mr. Roebuck.

In terms of victims services being provided, you made a remark about legal aid and people not knowing legal aid is available. My impression is that it's not always available, and maybe that's because I'm from a different province.

Could you say something about that? Then I will go to Ms. Hrick on whether legal aid is actually available.

Dr. Benjamin Roebuck: I think the federal government, through the victims fund, has done a pilot project across the country to fund independent legal assistance in cases of sexual assault and is piloting it as well in cases of domestic violence.

For now, we have a system that we can use, but we certainly need to consider how to better embed those rights and services for survivors into the justice system.

Mr. Randall Garrison: As of this point, it's only a pilot though. It's not—

Dr. Benjamin Roebuck: It's not permanent funding, from my understanding.

Mr. Randall Garrison: Yes.

Ms. Pam Hrick: Legal aid is also drastically underfunded and something I would like to see governments at the provincial and the federal level increase investments in. We saw in Ontario recently the announcement of the first tariff increase—I believe I'm getting this right—in maybe over 10 years, and it's just 15%. Legal aid certificates, where they are even available, certainly do not pay those who are taking them very well. That narrows the scope of people who will take them. It also results in the narrowing of fields for which they are available and the charges or matters, for example, family matters, for which they are available.

Underfunding of legal aid is another major justice issue.

● (1730)

Mr. Randall Garrison: Thank you.

I'm about to get the red flag. Thanks very much.

The Chair: Thank you very much to our panellists. If there is anything you wanted to say and you were not able to, please send that to us as soon as you can.

Thank you, colleagues. As a reminder, if you have amendments, please see the legislative clerk. Otherwise, thank you very much. Have a nice evening. We will see everybody here on Thursday.

We are adjourned.

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