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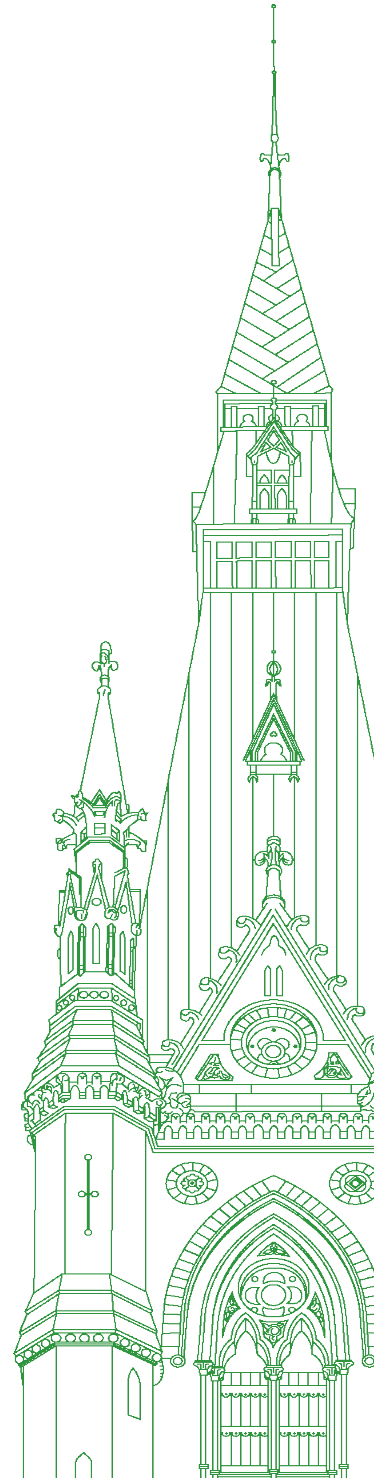

Chair: Ms. Lena Metlege Diab

Standing Committee on Justice and Human Rights

Thursday, October 5, 2023

● (1630)

[*English*]

The Chair (Ms. Lena Metlege Diab (Halifax West, Lib.)): Thank you very much, everybody. We appreciate everyone's patience. I know we're starting an hour late, but I've adjusted accordingly.

Given our first panel, there's no need for presentations because they were here last time. I simply want to thank you for coming back.

I'll announce your names. Matthew Taylor and Joanna Wells, you were here last time.

For Mr. Fortin, we have one person who is here virtually. He has been tested and it works fine.

Mr. Rhéal Éloi Fortin (Rivière-du-Nord, BQ): Thank you, Madam Chair.

I hope I'm not the only one who takes advantage of that.

The Chair: No. That's a fair point.

We will have a four-minute round with the witnesses. We'll start with that. Our apologies for the delay.

Welcome to meeting number 76 of the House of Commons Standing Committee on Justice and Human Rights.

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

After the first panel, I'll ask for a motion on Bill S-12, but I think right now, due to the fact that we're so delayed, we'll simply start with questioning the witnesses for four minutes each.

I will start with Mr. Van Popta, please.

Mr. Tako Van Popta (Langley—Aldergrove, CPC): Thank you, Madam Chair, and thank you, witnesses, for being here.

On behalf of all of us, I apologize for the delay. We had very important work in the House of Commons today, voting on precisely the bill we're discussing here, Bill S-12. Thank you for being here and thank you for lending your expertise to this very important discussion.

Bill S-12 is about amending the Criminal Code as it relates to the national sex offender registry. That discussion was instigated by a Supreme Court of Canada decision, R. v. Ndhlovu.

I just want to quote from the minority. It was a split decision of five to four. The minority cited evidence that was apparently before the trial judge. In their opinion, “offenders convicted of a sexual offence are five to eight times more likely to reoffend than those convicted of a non-sexual offence.” They also said that “it cannot be reliably predicted at the time of sentencing which offenders will reoffend.” Then the minority came to this conclusion: “In the face of that uncertain risk, Parliament was entitled to case a wide net.”

We had the Minister of Justice here just the other day. He made reference to social science data that, in his opinion, supported this current legislation, Bill S-12, which I would say has a lower standard when it comes to making it mandatory to have people registered on the sex offender registry.

Are you aware of the data he was referring to? Does it contradict the evidence that apparently was before the trial judge and that the minority judges refer to?

Ms. Joanna Wells (Acting Senior Counsel, Criminal Law Policy Section, Department of Justice): Thank you for your question.

I think I will start answering the question by reiterating what the minister said when he was here, which was that if Bill S-12 is enacted, everybody who receives a conviction for a sex offence will be required to register, unless they can demonstrate that the registry is overbroad or grossly disproportionate. It's a very strong presumption of registration for those offenders.

The data you cite, which the minority articulated, was the arguments that the Attorney General of Canada made before the Supreme Court when he intervened to defend the legislation when the Supreme Court heard arguments on that. That data was not sufficient to uphold the law. The data that is now being relied on for the two categories of automatic registration relates to repeat sex offenders. Those individuals pose an even higher risk of reoffending than first-time offenders, which was the target of the original legislation.

For the other category of automatic registration for children—victims under 18—a sexual interest in children is a very well-validated risk factor for sexual recidivism. Coupled with the two years or more on indictment, it is expected that this constellation of factors will provide the evidence that the government would use to justify those two automatic categories.

However, everyone will be presumed to be registered.

Mr. Tako Van Popta: I want to zero in on sexual offences against children.

Bill S-12 requires it to be mandatory that a person's name be listed in the registry if they are convicted of a sexual offence against a child, but only if it was prosecuted by way of indictment and the sentence was at least two years.

Why is it not for offenders—child molesters—who were prosecuted by way of summary conviction? Aren't they equally dangerous?

The Chair: Answer very quickly, please.

Ms. Joanna Wells: They will be presumed to be registered under the proposals in Bill S-12. That is the answer. They're all presumed to be registered.

What the bill does is list risk factors, as well, for judges to use to exercise their discretion. Those factors were intended to counter the criticisms and concerns raised by the minority judgment to curb the risk they saw in judicial discretion.

● (1635)

The Chair: Thank you very much.

I'll now move on to Mr. Mendicino.

Hon. Marco Mendicino (Eglinton—Lawrence, Lib.): Thanks very much, Madam Chair.

Thank you to the officials for appearing today.

I understand, Mr. Taylor, that it was your birthday yesterday.

Mr. Matthew Taylor (General Counsel and Director, Criminal Law Policy Section, Department of Justice): It was the day before.

Hon. Marco Mendicino: Happy birthday.

I'd like to take a brief moment to thank the survivors and victims who are present here to testify. On behalf of the members of this committee and all parliamentarians, thank you for your advocacy. I can tell you that, in my experience—not only in this job on the Hill but also before, as an actor in the criminal justice system—your work is incredibly important to this legislation. We thank you very much for bringing forward the ideas you're going to articulate later today.

Colleagues, we know Bill S-12 proposes to do three things: strengthen the Sex Offender Information Registration Act, make certain amendments to the International Transfer of Offenders Act and, finally, strengthen some of the rights that ought to be afforded to victims in the context of criminal justice proceedings. I think we can all agree there is still a lot of work to be done there.

I want to zero in on the concerns that have been expressed by victims' advocates and survivors themselves about how we can ensure they are provided with timely and accurate information on applications that involve publication bans. A couple of days ago, we heard from the minister, who expressed concern about one of the amendments that were put forward by the Senate, which would require that Crown prosecutors communicate directly with victims about said publication bans.

Before I get into those concerns, I'm going to give the officials an opportunity to elaborate on that, Madam Chair. I think we can all agree that it is important for victims to be treated with professionalism, courtesy and, more importantly, sensitivity—in particular, taking a trauma-informed approach. That's regardless of who is communicating with them, whether it is a Crown prosecutor, a member of the law enforcement branch, a member of the profession, or any of the social service providers in the system. I think we can all agree we have to do better there.

That said, the minister said he was worried the Senate amendment as expressed would infringe on prosecutorial independence. I'd ask you—very briefly, in a matter of seconds—to tell us what the job of a Crown prosecutor is. I'll then come back to you and ask a follow-up question.

Mr. Matthew Taylor: Very briefly, the job of the Crown prosecutor is to present their case to the court concerning the guilt or innocence of somebody who's been charged with a crime. They represent the public interest. That encompasses, of course, the concerns of the victim, but it's not uniquely about the concerns of the victim.

Hon. Marco Mendicino: To be clear, the Crown does not act as a lawyer to any individual party. They are principally there to represent the public interest, as you said. That is part of the reason why the minister expressed that concern.

Let's get to the solution. How do we ensure that victims get timely, accurate information when it comes to publication bans, in order to ensure their rights are being upheld?

Mr. Matthew Taylor: That's a very good question.

The bill introduced tried to do that. It acknowledged the increased requirement for all those in the criminal justice system to do more to support the interests and rights of victims. The Senate amended the bill and felt it could be stronger in that respect. It did that. There are more onerous obligations on both the court and prosecutors vis-à-vis victims and publication bans.

The concern the minister spoke to is a concern that is not uniquely his own. It is a concern that's been identified by provincial attorneys general in other jurisdictions, such as Ontario and Nova Scotia. The concern is that the provision could be interpreted in a way that suggests a prosecutor is providing legal advice to a victim about what they can do.

Hon. Marco Mendicino: I know that we're on a very condensed timeline, but with regard to providing copies of publication bans to victims, if that's not something that's in the legislation, is there another way that we could provide support to victims?

Thanks very much.

Mr. Matthew Taylor: Yes, absolutely. I mean, victim support workers are able to provide information to victims, such as copies of publication bans.

● (1640)

The Chair: Thank you for that.

Next is Mr. Fortin.

[*Translation*]

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

Happy birthday, Mr. Taylor.

My Conservative Party friend didn't have that information, or I'm sure he, too, would have wished you a happy birthday.

Mr. Taylor and Ms. Wells, I, too, am concerned about that aspect of the information to be disclosed to victims, which I see as essential. Obviously, Bill S-12 covers more than just that. It also covers registration on the National Sex Offender Registry, which I believe almost everyone agrees on, so I don't want to waste time discussing that.

However, with respect to disclosure of information to victims, yesterday I heard the minister raise questions about conflict of interest. You even talked about that earlier with my Liberal party colleague.

I listened to the answer you gave Mr. Mendicino about the Crown prosecutor's role. My understanding is that the Crown prosecutor represents the public interest but that they're a disinterested party. Correct me if I'm wrong, but their role is to ensure that the facts are clearly and fully established before the court so that a just decision may be rendered. As such, I don't see how there could be a conflict of interest.

I can see that there might be a role conflict and the Crown prosecutor might wonder how to ensure that the victim has a good understanding of the situation so that, six months, a year or two years down the line, if they charge the victim for violating a publication ban, the victim can't say the Crown prosecutor or their colleague misinformed them at the time.

That seems like a legitimate concern to me, but I humbly suggest that there must be a way to guard against that kind of situation. I think the information the Crown prosecutor discloses to a victim is essentially the same in every case. It might have to be adapted depending on the case, but there's probably a way to standardize the information to be disclosed to victims.

Can you comment on that? What do you think? Is there a way for the Crown prosecutor to make sure victims are properly informed without placing themselves in a conflict of interest?

Mr. Matthew Taylor: Thank you for the question.

In essence, you explained the Crown prosecutor's role. There are a number of ways to inform victims about the criminal justice system. I think the government recognized that it's important to strike a balance between adequately informing the victim and respecting the Crown prosecutor's role.

When Bill S-12 was in the Senate, there was debate about the connection between disclosure of information and the Crown prosecutor's role.

I think the issue has more to do with a phrase that appears in three different places in the bill.

[*English*]

The text reads, “in which they may disclose information that is subject to the order without failing to comply with the order”.

[*Translation*]

I think the issue is whether, for the Crown prosecutor, this phrase is compatible with the kind of information that can be disclosed to the victim.

The Chair: Thank you, Mr. Taylor and Mr. Fortin.

[*English*]

We will now move to Mr. Garrison.

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

I just want to say, for the record, that I feel my privileges as a member of this committee were breached by the early start of the committee. We have an agreement, which has always stood in this committee, that the committee will not begin until 10 minutes after a recorded vote in the House. I was in the House voting, so I apologize if some of the things I'm about to ask have been covered.

I'm prepared to let it go at that.

Thank you for being here again. It's always good to see you.

In the session the other day, when the minister was here, I asked about the number of times publication bans are applied, and I really think that I wasn't particularly clear. I'm asking two questions there: How many times are publication bans used and how many times are publications automatically used in these cases? I was really trying to ask two things there. I know somewhat what your answer is, but I'd like to hear it.

● (1645)

Mr. Matthew Taylor: Thank you for the question.

As I think the minister articulated on Tuesday, we don't have national statistics on that information.

After the committee appearance on Tuesday, we went back and asked Statistics Canada what information they do collect. The reason we were given as to why they don't collect the information is that this is a procedural order that is made in the course of a trial. They don't have that data. That's not to say that data can't be collected; it's just that currently they don't collect it. We would have to work with the provinces and courthouses to be able to collect that information.

I expect that publication bans are imposed routinely every day across Canada, but what that number is, I don't know. They do collect information on the offence for breaches of publication bans. That is fairly limited. If you want that information, I can provide it, but I know time is short.

Mr. Randall Garrison: They do collect information on the number of sexual assault cases that are dealt with. If publication bans are routinely applied, which we've heard a number of times, then we should know roughly how many times they're used, if we know the number of sexual assault cases.

Mr. Matthew Taylor: Absolutely, they do collect information on the number of charges that are laid by police officers and the number of outcomes reported by courts. I think your question speaks to the capacity to collect that information, but they don't currently collect that information.

Mr. Randall Garrison: They collect the information on the number of sexual assault cases that go to court—

Mr. Matthew Taylor: They do. They have a—

Mr. Randall Garrison: —so we should have that number.

Mr. Matthew Taylor: They don't currently collect it. That's all I can provide.

Mr. Randall Garrison: Okay. Let me move on from that.

I guess what we're establishing here is that we know anecdotally that these bans are routinely put in place, so victims of sexual assault are regularly subjected to the ban without being informed under the current regulations.

Are there any situations in which a ban on publication can be used under the current law to benefit the accused? Does this happen?

Mr. Matthew Taylor: I would answer it this way: Publication bans are imposed for the benefit of the victim or the witness, first and foremost. The interests of the accused are not taken into account in terms of determining whether the publication ban could be imposed.

Incidentally, the consequence of the publication ban imposed to protect a victim could also result in protecting the identity of the accused, if reporting on the identity of the accused would identify the victim.

Mr. Randall Garrison: Then we shouldn't be seeing cases in court in which the defence counsel for the accused is allowed to make representations on the publication ban.

Mr. Matthew Taylor: That's correct. The accused doesn't have standing on these matters. As I said, a publication ban doesn't benefit them.

We do have some case law. I would just have to dig it up for you.

Mr. Randall Garrison: It's just that, again, anecdotally, we have sometimes heard about how defence attorneys have made presentations in court on publication bans and their lifting or their variance.

That's something that should not be happening. Is that what I'm hearing?

Mr. Matthew Taylor: That's correct. The law is clear that a publication ban is in place to protect the identity of a victim or witness, not to benefit the accused.

Mr. Randall Garrison: Would the text of Bill S-12 do anything to clarify that situation?

Mr. Matthew Taylor: There are amendments in Bill S-12 that were passed by the Senate and that speak to the issue of the accused.

The concern that was discussed in the Senate when those amendments were debated was whether that would suggest to the courts or the criminal justice system that an accused currently has an interest in these proceedings and that Parliament is presumed to be acting for a reason. The counterpoint was made that this was really meant to reflect the status quo of the law.

Mr. Randall Garrison: In terms of the requirement that victims be informed when there's a publication ban, does the current text of Bill S-12 require that victims be informed if they have a right to request a publication ban, if they should so desire, or is this simply an after-the-fact notification?

Mr. Matthew Taylor: There are a number of different places in the bill that speak to the obligations of the court and the prosecutor to engage with the victim. There is language that speaks to the obligation to inform a victim or witness of their right to apply to revoke or vary a publication ban.

● (1650)

Mr. Randall Garrison: I know I'm perilously close to the end. I have just one more brief question.

In the current legislation, are there any restrictions on varying or lifting publication bans?

Mr. Matthew Taylor: The bill seeks to codify a process for revocation or modification. Today, it is a common law process. It applies where it can be shown that there is a material change in the circumstances.

The courts have acknowledged that if the recipient of the publication ban no longer wishes to have the publication ban, that constitutes a material change in circumstances. The bill would codify a practice that would require the publication ban to be revoked or modified at the request of the victim or the witness, provided it doesn't impact on the privacy interests of another person protected by a publication ban.

The Chair: Thank you, Mr. Taylor.

Thank you so much to both of you for coming. We really appreciate that.

You're free to go—subject to anybody contacting you outside of the committee.

I have probably only 60 seconds, given what just happened in the House and the bill now coming to our meeting.

I need someone to move a motion that all testimony received in our study on the subject matter of Bill S-12 be deemed heard in our study of the said bill.

Mr. James Maloney (Etobicoke—Lakeshore, Lib.): So moved.

The Chair: Mr. Maloney, thank you very much.

Please take a look if you have not; I think this was sent to you. Also on your desks there is a calendar. We really worked very hard in anticipation of this coming so that we don't waste any time, because we kind of foresaw that we might be starting late.

If you take a look, we have a break week—happy Thanksgiving, by the way, to everyone. When we return the week after that, on the 17th, the deadline will be noontime to submit amendments for Bill S-12. Then, on October 19, we will have our study of Bill S-12, our clause-by-clause. On the 17th, we'll have a meeting as usual, with witnesses on Bill S-12. Does that work for everyone?

Some hon. members: Agreed.

The Chair: Thank you very much.

We now have three witnesses.

Yes, Mr. Garrison.

Mr. Randall Garrison: Madam Chair, on the calendar circulated, on the 19th it says that there's a meeting. What you're saying, just so I'm clear, is that the testimony will conclude on the 17th.

The Chair: Yes.

Mr. Randall Garrison: My point, then, is that the testimony will conclude after the deadline to submit amendments, and that's problematic.

The Chair: Yes. What do you propose?

Mr. Randall Garrison: Well, I don't wish to cause an inordinate delay here, but I think that at the very least, at the end of the day that day, we would allow, if something comes up at that meeting, for people to give notice of their intent to do amendments. I just think it's not fair to witnesses who appear on that day not to have their testimony affect what we might be doing in amendments.

Mr. Rhéal Éloi Fortin: I agree.

The Chair: The clerk is telling me that they require 48-hour notice but there's always a possibility to bring amendments on the day as well.

Mr. Randall Garrison: Thank you. That was the assurance I was seeking.

The Chair: Thank you. That's perfect. Obviously, you would send them probably ahead of time.

Go ahead, Mr. Brock.

Mr. Larry Brock (Brantford—Brant, CPC): Thank you, Madam Chair.

Just for clarification, then, for October 24 and 26 on this calendar, are we suggesting that we'll move into another study, the next study?

● (1655)

The Chair: What we will probably do is have a steering committee meeting—and we'll decide that on the 17th, because we haven't gone beyond Bill S-12 at the moment—so that we can decide on what needs to happen.

Are you okay with that?

Mr. Larry Brock: Yes. Thank you.

The Chair: Welcome to our witnesses.

My apologies, today was not a normal day in terms of timing. We appreciate all three of you being here. I will introduce all three of you. You were with us before, and we very much appreciate it. I concur wholeheartedly with Mr. Mendicino's remarks earlier. We very much appreciate all the work that you have done with the study.

With us we have Megan Stephens, criminal and constitutional lawyer at Megan Stephens Law; Morrell Andrews, member of My Voice, My Choice; and Suzanne Zaccour, director of legal affairs, National Association of Women and the Law.

I'm going to leave it up to you. I know you understand the time constraints we're under.

Mr. Garrison, apologies, but I had five people come to me before we started and say we need to conclude at 5:30 today. We shrank it as much as we could.

I'm going to leave it up to you. I know you all have prepared statements. Take whatever time you need, up to five minutes, and if you take less, that's quite all right as well. Then we'll move into questioning. Thank you very much.

I will ask Ms. Stephens to please commence.

Ms. Megan Stephens (Criminal and Constitutional Lawyer, Megan Stephens Law, As an Individual): Thank you so much.

Good afternoon. Thank you for having me here today.

In my limited time, I want to focus on the treatment of publication bans in this bill.

My view, in relation to publication bans, has been informed by my work over the last two decades in criminal and constitutional law. I was a Crown attorney for more than 10 years. I was then the executive director and general counsel at LEAF, and, in January 2021, I launched my own practice to assist women and gender-diverse people in their encounters with the criminal justice system.

I now routinely represent complainants in sexual assault proceedings, including in relation to the lifting of publication bans—often on a pro bono basis—and also act for criminal defendants, predominately in the appellate context.

Through that work, I have seen first-hand that our legal system really struggles to respond in a trauma-informed way to prosecutions of sexual offences. It's no surprise to me that sexual assault remains among the most highly gendered and under-reported of crimes.

When publication bans were first introduced some decades ago, they were meant to encourage the reporting of sexual offences. Knowing that a publication ban is available does help some complainants come forward to report.

However, not every complainant wants a publication ban. Many find comfort in being able to share their experiences publicly with others. For those complainants, a publication ban that impedes their ability to do that can be retraumatizing—all the more so when those bans are imposed without their knowledge or agreement, or when they realize that the ban could actually lead to their criminalization.

With that in mind, I welcome the spirit underlying the proposed changes that would follow from enacting this bill.

Complainants need more agency when it comes to the imposition of publication bans, and they need more information to exercise that agency. If a publication ban has been imposed but a complainant doesn't want it, varying or revoking it needs to be easy. Perhaps most importantly, a complainant should never be criminalized for failing to comply with a publication ban on their own identity.

I think Bill S-12, as passed by the Senate in June, appropriately targets most of these concerns. It's much improved, but I want to talk about one key problem that I think remains today, and I heard some of this coming out in the questions for the Justice officials.

Bill S-12 would amend the code to impose a duty on prosecutors to inform the judge, after a publication ban has been ordered, that they have taken steps to inform the complainant or witness of a number of key things: currently, the existence of the order; its effects and the circumstances in which they may disclose information without being in non-compliance of the order; determining whether the person wishes to be the subject of the order; and informing them of their right to apply to revoke or vary the order.

I agree 100% that a prosecutor is well placed to inform a complainant about two key facts: that the publication ban has been imposed and that they have the right to apply to revoke or vary that order. That information isn't currently being shared routinely with complainants, even though a publication ban is routinely being imposed on almost every single sexual assault case that happens in this country. They need that information.

I'm concerned that the current language goes beyond a duty to inform by blurring the lines between a discussion about factual issues and an update and a discussion that requires them to dispense legal advice. The prosecutor is not the complainant's lawyer, and they are not in a position to give a complainant independent legal advice. I've worn both hats, and one is not the same as the other.

Requiring a prosecutor to explain the effects of the ban or the circumstances in which they can speak without risking liability is crossing the border into legal advice. A complainant may have questions before deciding whether they want the ban to remain in place. They really need independent legal advice to weigh those competing considerations. They can't get it from a prosecutor. A discussion like that would be risky, not just for prosecutors but also for complainants. It could trigger disclosure obligations on the part of the prosecutor, and it could put complainants and prosecutors into a potential conflict of interest, since choices a complainant might make could affect the strength of the prosecution.

The bill really needs to be amended to impose a more limited duty to inform, which would require prosecutors to inform complainants that the ban exists, that it can be varied or revoked, and that they are entitled to get independent legal advice to make an informed decision about whether they want it to continue.

● (1700)

That brings me to my final point: You must accompany this bill with meaningful funding to improve access to free independent legal advice for complainants and better resourcing of organizations that support them. Complainants who can access independent legal advice from trauma-informed lawyers and community supports are much better equipped to manage the stresses of criminal proceedings.

Thank you. I look forward to your questions.

The Chair: Thank you very much. That was exactly five minutes.

Next we have Ms. Andrews, please.

Ms. Morrell Andrews (Member, My Voice, My Choice): Thank you.

I would like to thank the Algonquin Anishinabe people, whose land we gather upon today. I will once again encourage this committee to integrate the calls to action from the Truth and Reconciliation Commission into your report.

I'll be quick. I'll skip over some things, but I want to make it clear that I do not speak for all victims and cannot come close to encompassing the lived perspectives of those who face a number of barriers in accessing the system and accountability for the crimes committed against them.

I think the Senate did good work on Bill S-12, but we're here to ask you to be even more ambitious. From our perspective, a better bill would feature amendments that do a few more things, like ensuring that prosecutors are directed to immediately inform the victim of their right to request a publication ban before it is ordered. Right now, the bill talks about judges doing that. It's not realistic. It doesn't happen in real life. Someone needs to tell victims before the ban has been put on their identities that they have the right.

You should clarify, in section 486.4, that publication bans are available for witnesses under the age of 18 and victims of sexual offences, because there's still confusion about this in the system.

The bill should also require prosecutors to act in accordance with the wishes of the victim. We like to use the word “consent”, but for some people that might not make sense in the context of the Criminal Code. The wishes of the victim should matter. You need to make sure that this is in the bill and that there aren't justice system actors like judges or Crowns who are acting without the consent or the wishes of the victim being taken into account.

We want to make sure that publication bans are not put on the identities of victims who have made it clear that they do not wish to be subjected to such an order.

We want to make sure that victims are provided a copy of their publication ban. Victim services simply do not give us that information. They don't know about publication bans. They are not equipped to do so. It doesn't happen in real life.

I also want to make sure that the way applications are dealt with for sexual offence victims is separated from section 486.5 of the Criminal Code. Right now, Bill S-12 lumps discretionary bans for any justice system participant with this type of publication ban for sexual offence victims. It doesn't make sense to have them combined. You should separate them and make it clear that there are only limited factors that a judge can consider when someone comes to them and asks them to remove their publication ban if it has to go to a hearing. Ideally, victims should just be allowed to have their publication bans lifted without having to go to a hearing.

Finally, we want to make sure that you expand the limitations section to ensure that trusted people, including professionals who provide support to victims, are not criminalized for communicating. Right now, the bill carves out a limitation for victims sharing their own information, but people who have to converse back and forth with victims when they need support should not be criminalized.

We want to make sure that there are no more egregious delays for victims removing their bans, like what happened to Patty or Maarika. We don't want any more victims having to hunt for and go to the court to try to find their publication ban orders, like what happened to “Deborah Lyn” this very week. We want to make sure that there are no more defence attorneys who are reintroducing publication bans on the names of victims who have already had their publication bans removed, like what happened to “Cassandra” last month, and we want to make sure that Crowns are no longer acting on assumptions without involving victims, like effectively every single person we have been connected to.

These suggestions are crowdsourced. They are based on the lived experience of victims. We have done our very best to consult on these recommendations very widely, but it is literally impossible to capture the nuance of every individual's issues, perspectives and interactions with the legal system.

We've done everything humanly possible to give you amendments on paper and to help you in this process, but the reality is that this should not be our responsibility as victims. We are not lawyers, but we are trying to do our very best to help you. Inevitably, some people will say that it's not good enough, but we're here now and we're doing what we can.

Quite honestly, the last year and this process have left so many of us feeling retraumatized, depleted and extremely tired. We have been placed in the very unenviable position of wondering if tweaking on the margins of the current Criminal Code will be good enough.

For that reason, these recommendations are not a panacea. This Parliament will still be confronted with the fact and the reality that complainants face a shameful amount of barriers throughout the continuum of seeking help and accountability, and long after.

● (1705)

Your police still don't believe us. Your Crown attorneys are not trauma-informed. Your judges don't understand how to properly apply the law, at our expense. You have not invested sufficiently in the resources outside of the system that can be there to provide important support that is culturally appropriate for victims of all different kinds of backgrounds. After Bill S-12 is complete, you will still have work to do, including educating Crown attorneys and judges, implementing guides for the provinces and territories, reviewing legislation to make sure you get it right and producing accessible information for victims, who deserve to know what is happening to them in the system.

The people behind My Voice, My Choice have done everything expected of us—and far beyond that, to be honest. I know you are facing tough deadlines and I know this is not the ideal way to write a bill, but here we are, and this is what we have. I want you to continue to consider our amendments, as many of you have, and I want to know that they matter. I want to know that the stories we've shared with you matter, so please do the honourable work and collaboration across party lines and take this seriously. If you do and if you amend the law so it's at least a bit better, we can finally rest and take some time to do the healing that a lot of us still need to do.

Thank you.

The Chair: Thank you, Ms. Andrews.

The clerk tells me you've sent something in just recently. We will get it translated and circulated to everyone on the committee.

Ms. Zaccour, go ahead.

[*Translation*]

Ms. Suzanne Zaccour (Director of Legal Affairs, National Association of Women and the Law): I'll be brief because I think everything has been said.

My name is Suzanne Zaccour, and I'm the Director of Legal Affairs for the National Association of Women and the Law.

NAWL is a not-for-profit organization that works to advance women's rights in Canada, including in the legislative process.

I'm always happy to come here and talk to you about legal issues that are gendered and that affect women in Canada.

We worked with other feminist lawyers and organizations to submit a brief when Bill S-12 was in the Senate. We collaborated to highlight three important objectives.

[*English*]

We highlighted the need to ensure that victims are not criminalized for failing to comply with a publication ban. We highlighted the need to clarify and simplify the process for revoking or varying a publication ban. Quite frankly, it needs to be much clearer. These are not necessarily lawyers who are engaging with this process. We also highlighted the need to ensure that victims are adequately informed throughout the process.

Our position is that the Senate amendments are positive and have brought about a lot of progress in this bill to fulfill these three objectives.

I will call to your attention a minor detail. It's the language about a person being “subject to the order” rather than “subject of the order” in the “Limitation” section of the bill. I'm not so concerned, since the French version is correct, but we know how difficult this process is, so perhaps we can avoid litigation or having to do complex interpretation by just clarifying that the limitation applies to people who are “subject of the order”, whose identity is protected by the order, rather than to those who are “subject to the order”, which is everybody, because everyone needs to respect a publication ban.

I have more to say, but I know we're pressed for time, so I'm going to stop here. We'll be happy to answer questions.

Thank you.

● (1710)

The Chair: Thank you very much.

If it's okay with everyone, for the first round—maybe the only round—we will go with four minutes each. Does that work for all of you?

Some hon. members: Agreed.

The Chair: Okay.

Mr. Brock, go ahead.

Mr. Larry Brock: Thank you so much, ladies, for your sage advice and information, and the passion with which you bring such intelligence to this study.

It is extremely disappointing to me, as a parliamentarian, that we're trying to shove through the passage of this bill literally at the eleventh hour, when the government had an entire year to get this right. We have 13 days to get this passed. We have one more day of witnesses. It's unfortunate that we are cutting short a very important study in this fashion.

Ms. Andrews, you've brought nothing but courage to every committee you've appeared at where I've had the privilege of hearing from you and questioning you. You bring the truth. You bring strength. I have nothing but high praise for the resilience you have shown, not only as a survivor but also now as an advocate for change. Every parliamentarian should be listening to your words, because this is an opportunity for us to get this right.

I have very limited time. You mentioned a number of amendments. You talked about amendments you spoke to at the Senate stage. What is the most important amendment you think we should seriously give consideration to in order to strengthen this bill?

Ms. Morrell Andrews: Thank you.

It's hard to choose just one, quite honestly. I'll go really quickly. You all have the package I sent around, and I think there are really four things that you need to lend your minds to.

First, make sure that prosecutors inform victims and act according to their wishes.

Second, allow for the application process to be clarified. It's really important that you get that right and that judges are given as narrow a scope as possible for potentially denying a victim their freedom of expression. Everyone who wants to speak should be able to speak, and there should no longer be the ability for judges to deny victims the ability to actually talk about their experience.

Those are the two, off the top, that I think are really the most important, because if you get consent right, people can make a decision before they have a publication ban put on their name. If they do have a publication ban put on their name and you get the application to remove the publication ban correct, you won't have addressed every problem but you'll have done good work.

Mr. Larry Brock: You identified in your opening statement an issue that needs to be fleshed out a little bit. That was in response to the question from my colleague Mr. Garrison to the officials about how many times these publication bans are granted.

As a former Crown attorney, I can tell you—and I can speak only on behalf of the Province of Ontario—that every single time I was in bail court or in remand court for the first time dealing with a sexual offender on behalf of an adult victim or a child victim, the policy was to ask for those publication bans.

I see Ms. Stephens shaking her head, because she's a former colleague of mine.

It's something that federally we cannot work on; provincially we can. We need to broker a relationship between the feds and the provinces to ensure that best practices are adopted across this country so that there is uniformity, at the very earliest stage, in the use of all the tools we have as prosecutors. Getting that input from the complainant very early is key.

I thank you for raising that as an issue.

That's probably my time. Thank you.

● (1715)

The Chair: Thank you very much, Mr. Brock.

[*Translation*]

Ms. Brière, you have the floor.

[*English*]

Mrs. Élisabeth Brière (Sherbrooke, Lib.): Thank you, Madam Chair.

Good afternoon, everyone.

I just want to say that I admire you, Morrell—we met at a previous meeting—and all these women for coming out of the shadows.

[*Translation*]

We know there are connections between publication bans and many other elements that are essential to a more survivor-centred, victim-centred process. One of those elements may be free, independent legal services. You mentioned education for Crown lawyers and judges.

How can that kind of help be better integrated into the process?

[*English*]

Ms. Morrell Andrews: I actually think Megan would be really well suited. I know she's done a lot of work with judges on education, and I would pass it over and defer to her as an expert.

Ms. Megan Stephens: I do think there needs to be more thought given to the role of independent counsel. The role of complainant counsel is a relatively new and unusual role in the criminal justice system. Typically, we think of prosecutor and defence counsel. There is a huge need to provide, at the very beginning of this stage of the process, independent legal advice to people who have survived sexual violence. I come across a lot of clients who, if they had known what the process would be like, might not have chosen to come forward and report.

I know that publication bans are intended to encourage reporting, but I think that the most important thing is agency. They've experienced something where they had no control. They come forward and report because they're told that's what they should do, and they end up in a process where they lose complete control of everything again. They don't get a voice; they don't get a say. They don't get informed about what's happening, even by well-meaning prosecutors and victim services; everyone is so busy.

I think that, at the very outset, they need to be able to access independent legal advice. I'm in Ontario, so I only know about the program that exists in Ontario. There is a program that started as a pilot project that the provincial government rolled out across the province. Every victim of sexual violence in the province of Ontario is, in theory, entitled to access four hours of independent legal advice. If you apply for a voucher, you can get it. There are 26 lawyers, maybe 27 lawyers, in the whole province who are on that list right now. I'm not one of them; I can't get on the list because the list was put together in 2016, when I was a Crown attorney. People are told that they have access to something, but they can't even access it. That's just in Ontario.

I do think there's a real need to have people help guide you through the system to explain what the process will be—whether or not that's in relation to publication bans—and to be a conduit of information to the Crown, because Crown attorneys don't want to talk to you and turn themselves into witnesses or potentially trigger disclosure obligations. That's just one way of thinking about it.

I do think that further training for everyone in the system, including Crown attorneys and judges as well, about what it actually means to be trauma-informed is an important thing.

There has been training that has been implemented for federal judges, and when people are applying, they have to agree to that training. However, the majority of cases actually proceed through provincial courts. That's outside your jurisdiction, but it is a problem in terms of making sure that the training hits at all the right points in the system.

● (1720)

The Chair: Thank you very much.

Mr. Fortin, go ahead.

[*Translation*]

Mr. Rhéal Éloi Fortin: Thank you, Chair.

I thank the three witnesses for being here. Their testimony is extremely important.

We don't have much time, so I won't waste any more than I have to, but I agree with what my colleague, Mr. Brock, said. I can't figure out why it took six months for Bill S-12 to be introduced in the Senate after the Supreme Court's decision. We literally wasted six months. Now we find ourselves rushing you to testify, which is just rude, if you ask me. I apologize on behalf of all my parliamentary colleagues. I'm sure they're no happier about this than I am.

That said, we don't have much time, so I won't look at every aspect of the bill. Pretty much everything has been covered. However, there's one thing we haven't really looked at, and I'd like to hear what you have to say about it, Ms. Stephens.

Just a side note, Ms. Andrews, I have your proposed amendments in both French and English. That's good, and I can assure you I'll take them into account.

Ms. Stephens, the issue is publication bans when there are multiple victims. For example, there might be a 14-year-old girl, a 20-year-old woman and a 30-year-old woman. Some want a publication ban for their and their family's peace of mind, but others want to talk about it because that's therapeutic. There are many different points of view, all of them equally valid.

How should a publication ban be set up when different victims have different perspectives and different needs?

I realize that a 14-year-old girl needs to be protected whether she wants that or not.

Would you please comment on that, Ms. Stephens?

Ms. Megan Stephens: I could try answering you in French, but it would take a long time, so I'll answer in English.

[*English*]

I think that organizing them can be difficult and complicated, and no one has really turned their mind to this option. I also think it's important to recognize that there is a perception that there is a formality to these publication ban orders, which is not reflective of reality; they are very casual.

As Mr. Brock pointed out, people walk into bail court and, as I understand the Crown policy in Ontario, you are supposed to ask for these at the first possible appearance. I don't actually think that's wrong. I think that is erring on the side of protection, but there needs to be information and communication to find out if it needs to stay. When they happen, there tends to be.... There is no formal order. There's no form that gets issued, even when we talk about someone who needs to be mailed the order. If a clerk is organized in court, it gets written on the information or the indictment that there is a publication ban in place.

Otherwise, you might have to go and get the transcript of that day's court proceedings to know whether it has been imposed, which also speaks to the problems with tracking how many of these exist. There isn't really a coordinated approach that deals with it. If we have five victims and these bans all exist, it is complicated if one wants to apply later to revoke it and others don't—

[*Translation*]

Mr. Rhéal Éloi Fortin: Sorry to interrupt. I don't mean to be rude, but I'm trying to understand your point of view.

When there are several victims and one of them talks about their experience, that could potentially make jeopardize the protection of another victim's identity.

How can a publication ban be written in such a way as to be effective and to uphold each victim's rights?

[*English*]

Ms. Megan Stephens: I think it is certainly possible to do that, assuming that the publication ban gets applied to everyone at the outset and there is a publication ban on everyone, but if two people decide, “I want to be able to speak about this going forward”, I think this is the only situation where a judge should hesitate to immediately revoke all the publication bans. The judge should say, “I want to think about this and see if there is a way we can have the publication ban lifted in relation to the two of you and not the other three.” If, for example, they are siblings and share a last name, and one person wants to speak out publicly, they might still be able to have the publication ban lifted in relation to them, as long as they agree to protect their sibling's interest—

Mr. Rhéal Éloi Fortin: Is it possible?

Ms. Megan Stephens: There are some cases where it's going to be more challenging, and that is why there will need to be a judge who can weigh those countervailing concerns and decide whether or not the publication ban could be lifted.

● (1725)

The Chair: Thank you very much, Ms. Stephens.

Mr. Garrison is next.

Mr. Randall Garrison: Thank you very much, Madam Chair.

I want to start by saying thanks to all the survivors, not just Morrell but the others who are in the room today, and all those who have come forward. It's a very difficult thing to talk about. Some of you may know that I'm also an adult survivor.

I also thank Laurel Collins, the member for Victoria, because when we started our study on victims, Laurel came to me and said, “I don't think they were thinking about this when they were studying victims, so I really want to make sure that you, as the justice committee, include this in your study, and I can tell you whom you need to talk to.” So Laurel Collins, the member for Victoria, was very influential. She had a private member's bill, which is running faster, and I guess I am frustrated by timing.

Both halves of Bill S-12 are urgent, and I think, Morrell, your comments today really underlined that for me when you were talking about how many times.... I've been trying to get somebody to admit how frequent this is in our society, because this is the most under-reported crime, yet we have dozens and dozens of cases before the courts all the time. I wonder if you could say a bit more about the frequency and the number of people who are subjected to the bans, not just subjected to sexual assault—I don't want to skip over that—but subjected to those bans.

Ms. Morrell Andrews: We, as a group, receive DMs, Facebook messages and various types of correspondence from victims almost every single week from across the country that ask “Do I have a publication ban? How do I find out?” or “I have a publication ban, but my court case ended four years ago. How do I take it off?” No one understands how to remove them, how to figure out if they have one, or how to find help.

I am not a lawyer, but I've been very fortunate to be connected with lawyers like Megan, Robin and others to whom we refer victims because we simply can't do that work. It's so prevalent, but it's so hard to even know how they're being put in place. The ability for someone to just get help and figure out what's going on with their own identity.... It's absurd, honestly.

As Megan mentioned, it's very casual. If you're a victim, there's nothing casual about being told that you can't talk about your own experience. It's casual for everyone else except for us. It's extremely prevalent. It doesn't make sense how the current regime works. We can't keep doing the work of helping victims ourselves. The law just needs to be changed and clarified so that you take the work away from us, because it's not sustainable. It also shouldn't be done in the shadows because people fear criminalization or have various issues in accessing justice.

Mr. Randall Garrison: Thank you for the work that you're doing. I hope the message that all of you have delivered today—that we need more resources and not just law applied to this—is being heard around the table.

I want to come back to the question of legal aid that you raised, Ms. Stephens. In the legal aid agreements that exist, is this even listed in the categories of things? If people are looking at legal aid programs.... I don't remember ever seeing this as a category of legal aid or as something that people would even find out if they're looking at brochures and things, something that it would be possible to have legal aid for.

Ms. Megan Stephens: You couldn't get a legal aid certificate for this, for sure. You absolutely couldn't. In fact, legal aid certificates get issued to represent complainants in sexual assault cases when there are third party records applications or applications to admit personal records or sexual history at trial. In Ontario, those are administered by legal aid, so you do get a legal aid certificate. However, it's not paid for out of legal aid funding; it's paid for by the Province of Ontario.

I can only speak about Ontario. It is different, but it's not a category of legal aid. Most of this work gets done for free by lawyers like myself and Robin Parker.

Mr. Randall Garrison: I know I'm out of time, but I would guess that this would be the same or worse in all of the other provinces.

Ms. Megan Stephens: I would guess so, too.

Mr. Randall Garrison: Again, thank you.

The Chair: Thank you very much to the three of you.

I know you've circulated documents to us. We have them, but if there's anything else you want to let us know after today, please do. We really want to thank you. I know that you came to us months ago, and we very much appreciate it. We've learned from you. It's a topic that, as you mentioned, affects so many. You're right: It should not be incumbent upon you to be helping. Thank you so much for coming.

Thank you to all members of the committee. I wish you a very happy Thanksgiving weekend with your loved ones.

We'll see you after the break.

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