

Briefing Note: Improving Orders Restricting Publication in Sexual Offences Through Amendments to Sections 486.4 of the Criminal Code of Canada

Priority Objectives

Introduce amendments to Criminal Code section 486.4 and provide victim-complainants of sexual offences with a remedy to easily lift their publication bans.

- Facilitate an adult victim-complainant with the ability to publish, broadcast, and transmit self-identifying information at any point in proceedings without seeking approval of the court, so long as publication is not likely to lead to the identification of another victim-complainant who does not give consent to publish.
- Facilitate an adult victim-complainant with the ability to provide one-time or ongoing consent through a simplified and publicly accessible *ex parte* memo/application to the court for a third-party (family member, media) to publish, broadcast, and transmit identifying information at any point in proceedings, subject to specific limits outlined by the victim-complainant, without consideration for the views or notification of the offender or accused, so long as publication is not likely to lead to the identification of another victim-complainant who does not give consent to publish.
- Facilitate the total removal of a publication ban at any point in or after proceedings at the request of an adult victim-complainant; or the spouse, parent, guardian, or adult child in the case of a deceased victim-complainant; through a simplified and publicly accessible *ex parte* memo/application to the court, without consideration for the views or notification of the offender or accused, so long as publication is not likely to lead to the identification of another victim-complainant who does not give consent to publish.
- Require the judge or justice and prosecutor to inform, explain, and remind an adult victim-complainant about their right to request a publication ban at any point in proceedings, as well as how to comply with the court order, and request a publication ban be removed completely if desired.
- Improve the [Department of Justice website on publication bans](#) by adding comprehensive and accessible information in multiple languages about the sanctions for breaching a publication ban, how they work, and how they can be removed without the services of a lawyer.
- Edit the [Victim Impact Statement form](#) under Criminal Code section 722.4 to allow victims opt out of a publication ban at the conclusion of their case, without having to justify the decision to the court or offender.

Background

- Victim-complainants of sexual offences have the right to request a publication ban under [section 486.4](#) of the Criminal Code of Canada. The purpose of this type of publication ban is to provide victim-complainants with privacy, and to ensure they do not suffer negative consequences by being publicly identified. They *do not* cover the identity of the accused or offender, though the question of whose identity is covered by the ban continues to be raised in court. A publication ban

must be ordered by a judge or justice when a prosecutor or sexual offence victim-complainant asks for it.

- Publication bans serve a critical function in Canada's legal system. They protect the interests of victim-complainants and must remain available to all victim-complainants of sexual offences.
- However, there are considerable issues with respect to how victim-complainants are informed of their publication bans under section 486.4, and whether they are provided the necessary information about how to comply with the terms of the ban and eventually have it removed, should they desire. Publication bans are inconsistently applied. In some cases, even those involving minors, there are no publication bans in place.
- While the Criminal Code states that "the presiding judge or justice shall at the first reasonable opportunity, inform any... victim of the right to make an application for the order" this does not happen in practice. Victim-complainants normally do not encounter a judge or justice in their case until it is far progressed; typically when they have the opportunity to attend a trial, plea, or sentencing hearing.
- In reality, many prosecutors ask the judge or justice for a section 486.4 publication ban upon the first appearance of the accused in court, long before a victim-complainant is involved and participates in proceedings. Prosecutors do not regularly ask, inform, or request the consent of a victim-complainant to have a mandatory ban placed on their identity, with victim-complainants normally not knowing that any such ban is available for them to request, or the terms of the court order to comply with it.
- There is no requirement for the court or prosecutor to inform a victim-complainant at any point in proceedings of a section 486.4 publication ban on their identity. Most victim-complainants do not know they have restrictions on their ability to transmit and publish information about their experience of sexual assault, human trafficking, luring, sexual exploitation, or incest, among other sexual offences. The maximum sanction for failing to comply with this type of publication ban is a \$5000 fine and two years less a day in jail, plus a victim surcharge. This sanction can be much more severe than the punishment convicted sexual offenders receive at sentencing.

Talking Points

- This issue is about choice and informed consent for victim-complainants of crimes that are defined by the violent absence of consent, choice, and respect.
- The current requirement to have the court supervise a victim-complainant's ability to speak about their own experience is not only paternalistic, but reinforces a sense of shame and the notion that victim-complainants require protection alone rather than agency, information, and assistance.
- Parliamentarians should act to:
 - Amend Criminal Code section 486.4 so that it is not an offence for a victim-complainant to share self-identifying information about their own case at any point in proceedings without the approval of the court; a victim-complainant can provide consent to a third-party to publish identifying information about their case, subject to limits, without the approval of the court; a publication ban can be completely removed at any point during or after proceedings at the request of a victim-complainant, or in the case of a deceased victim-complainant a family member, through a simplified *ex parte* memo/application to the court, making it clear that the views of the offender or accused *are not a factor* in the removal of a section 486.4 publication ban.
 - Request that the Department of Justice provide clear, multilingual, and public information about publication bans and how to comply with and lift them without involving the court or

requiring a victim-complainant to pay for legal help. Victim-complainants require assistance and tools to navigate the complexities of the legal system, as well as advocates that have accurate and up-to-date information about publication bans.

- Request the Minister of Justice and Attorney General to provide clear direction to prosecutors and judges that memos/applications to lift a publication ban should be filed on an *ex parte* basis to protect the interest of victim-complainants. Direct prosecutors to inform and fully explain the purpose and scope of publication bans to victim-complainants, and seek their consent before asking a judge or justice to issue a section 486.4 publication ban.
- Edit the [Victim Impact Statement form](#) under Criminal Code section 722.4 to allow victims opt out of a publication ban at the conclusion of their case, without having to justify the decision to the court or offender.
- This isn't just about victim-complainants who have had their case proven in court. Of every 1,000 sexual assaults in Canada, only three cases will result in a conviction, but publication bans remain in place for a complainant even when there is no finding of guilt. This is a burden, is re-traumatizing, and creates barriers for victim-complainants in accessing justice through the Canadian legal system. It also gives the impression that offenders and the accused are protected and actually serve to benefit from publication bans and the limits placed on victim-complainants to pursue public forms of accountability outside of the legal system for the harm they have experienced.

Context

- In January 2020, Matthew McKnight was found guilty of five counts of sexual assault. His 13 victims in [Alberta](#) (anonymous) have not lifted their publication bans, though a number continue to speak out publicly about their experience to champion change. At least one never consented to having a publication ban.
- In March 2021, a victim in [Kitchener-Waterloo](#) (anonymous) was prosecuted and convicted of breaching the terms of her publication ban for sharing a court transcript with close supporters. The conviction was overturned on appeal, but this example shows how prosecutors do not understand the purpose of a section 486.4 ban.
- In May 2021, a victim in [Ottawa](#) (Morrell Andrews) applied to have her publication ban removed in court, but the offender's defence attorney opposed the application and was permitted to make submissions as to why the ban should not be removed. She never consented to having a publication ban.
- In June 2021, a victim in [Toronto](#) (Maarika Freund [nee Pinkney]) applied to have her publication ban removed. She learned about her publication ban in February of 2021 two years after the trial. She had the help of two lawyers in order to successfully lift the ban. First one to find a copy of the ban, and a second to help submit the application. This all occurred after her victim/witness protection officer let her know in December of 2020 that her crown attorney had become a judge and could no longer help her. The second lawyer that was hired was revealed the crown attorney had never become a judge. The ban on her name was not lifted until October 2021 because the former accused was granted an extra seventy days (in total) to come up with a valid argument as to why the ban should not be revoked. She never consented to having a publication ban.
- In June 2021, a victim in [Victoria](#) (Kelly Favro) represented herself in court to have her publication ban removed. She learned about her publication ban four years after her court proceedings concluded. She never consented to having a publication ban.

- In October 2021, a victim in [Dartmouth](#) (Carrie Low) had to retain her own lawyer to lift a publication ban she did not want. The judge noted he would not have revoked the ban without the Crown's consent. She never consented to having a publication ban.
- In May 2022, a victim in [Richmond Hill](#) (Danielle Han) lifted the publication ban in her case to help others feel less alone.
- In June 2022, a victim in [Toronto](#) (Roslyn Talusan) wrote about her experience attempting to lift a publication ban on her name, and the frustration and re-traumatization she experienced as a result.
- In August 2022, a victim in [Nanaimo](#) (Jade Neilson) had her publication ban lifted. Her application to remove the ban was initially denied and she was told she should have asked to have it lifted before the matter was complete. Jade asked to have her ban lifted three times before the matter was resolved. She never consented to having a publication ban.
- In November 2020, Australia made changes to the [Judicial Proceedings Reports Act](#) which meant that victim-complainants do not need to involve the court to share their own story, and that other people could publish identifying information with the permission of the victim-complainant.
- In May 2021, the Ombudsman for Victims of Crime, [sent a letter](#) about publication bans to Minister Lametti. She outlined the need to update Criminal Code section 486.4 to "ensure complainants have increased personal agency in matters related to the protection of their own identity. The process to remove an order restricting publication must be simplified... we must ensure that publication bans cannot be used to criminalize or punish victims."