Supplemental Testimony: Lisa Senecal, H707
April 13, 2017

Following my testimony on H.707 on Thursday, April 12, 2017, several witnesses addressed key elements of the bill. I offer the following for additional consideration:

1. It was argued that, because prior victims can be deposed or subpoenaed to testify, that there is no need to release victims from their NDAs. That wuld be true if the goal wasn't to settle these cases long before they reach the point of taking depositions and testifying in court. That argument also does not address a duty to warn. If each subsequent case against a serial harasser ends in silence, the perpetrator is free to victimize again and again. It was raised by one Senator during my testimony that I probably wasn't the first victim of the man who assaulted me. I'm sure that's true. No on wakes up at 58 years old and decides to begin this behavior. I do not know how many women before me have had silence forced upon them or how many times I could have been warned.

2. The issue of criminal versus civil actions against harassers/assaulters was raised. I assume all are in agreement that criminalizing all forms of harassment is a non-starter. The forms of harassment that are inappropriate touching or sexual assault are already criminal. However, the burden of proof in criminal proceedings is far greater than in civil matters. Criminal proceedings are also far more expensive for both the defendant and the State. And in the vast majority of cases, including mine, it is extremely unlikely that a prosecutor would agree to take the case – again the burden of proof and he said/she said nature of so many of these incidents. The statistics for criminal prosecutions of rape and sexual assault are abysmal: For every 1,000 rapes, 310 are reported, 57 lead to arrest, 11 cases are referred to prosecutors, 7 lead to a felony conviction, and only 6 will be incarcerated. Unfortunately, the criminal route is not only a bad option, it's really no option at all. Victims are nearly guaranteed a lengthy, painful process that leads to their attacker walking free.

3. It is true that a provision prohibiting mandatory arbitration in sexual harassment suits would initially be inoperable due to currently Federal law. However, were it included in the bill, it would become immediately operable were the Federal statute be repealed, altered, or with a relevant court ruling. Rather than needing to revisit the Sexual Harassment law in an attempt to add a prohibition on arbitration, it would already be there. We are experiencing a moment of public, legislative, and executive attention and support for new sexual harassment legislation. There is no way to predict where we could be even a year from now. Forced arbitration in sexual harassment cases is against public policy. I ask that you consider having H.707 reflect just that.

4. "Do not darken my door" clauses and irrevocable NDAs – I do understand that these are tools are currently part of negotiations, but all testimony in support of these tools is backwards looking. What is needed now is an ability to imagine a

different way of seeing harassment and pursuing and resolving claims. The mere fact that tools that potentially harm victims have always been used, is not a persuasive argument in support of their continued use.

Instances of a complainant in a sexual harassment case having been a destructive force inside the company prior to the complaint being filed must to be an extremely rare occurrence. Rarer still would be cases where those complainants attempt to gain reemployment, do not receive a position, and then file suit for retaliation. It would be helpful for the State to provide the number of times that this has occurred in the last 20 years. What is being argued is that every victim of sexual harassment who files a complaint and wants to settle should understand that they may need to agree to a ban for life from not only that particular company, or division of State government, but the entirety of State government and all parent, affiliates, and partners of private businesses. Asking that these clauses continue to be allowed is requesting permission to punish people who already been victimized in order to prevent a business or the State from ever having to deal with the rare ill-intentioned employee. That must be viewed as against public policy. We cannot reduce opportunity for the many because of a theoretical risk from a few.

Much of the argument in favor of irrevocable NDAs follows the same logic used in defense of the “do not darken my door” clauses. There was testimony yesterday that serial harassers are rare. The committee was also told that serial harassers are almost always fired for their behavior. If that is true, and I take the testimony to be so, then we are talking about a rare situation when a victim would even have the option of being released from her NDA. If businesses are taking all appropriate corrective measures to make their employees more safe, which should be a basic expectation, what is the great need for silence? What is the legitimate argument against allowing a victim to be released from her NDA if she becomes aware that there is an additional victim or victims? It is a rare situation and would affect only companies who continued to employ a serial harasser or failed to investigate properly so that his conduct was identified. Continued silence is not deserved in those cases and it is not in the public’s best interest. But there should be no assumption that, merely because I would could speak about her harassment, that she would choose to. A survivor with an NDA would need to be willing to potentially go public with her story in the event she needed to testify. That becomes more unlikely as time passes and the harassment and settlement move farther into the past. Again, these cases are rare occurrences, but when they do occur, a duty to warn should be more important than ensuring silence for the employer or the perpetrator.

It was suggested in testimony that businesses only see a value in settling if victims’ attorneys can have their clients agree to these two provisions that harm victims, put other women at risk, and impede victims’ future ability to find jobs and support themselves. If that is true, then the business culture against women is so toxic right now, that employers should not have access to these tools.

Businesses and attorneys need to see doing right by victims as having benefits unrelated to silence, banishment, or protecting harassers. Employers must recognize that the culture is shifting; it is the willingness to use tools that silence and punish victims that is becoming the new source of actual risk to an employer's reputation and company value.

It is time that we recognize that neither silencing victims, nor viewing them as being the source of the problem has worked to reduce incidence and harm, or made for good public policy. Is this the way sexual harassment has always been handled? Sure, but that doesn't make it right for 2018. Since the Supreme Court's *Meritor Savings Bank v.* Vinson ruling in 1986, corporate-side employment attorneys have advised clients, programs have educated employees, and employers have interpreted sexual harassment claims as a threat to the employer. Responses to claims and treatment of victims have followed that line of thinking: victims coming forward is a threat to the company. But this isn't 1986 and we need to completely cast aside an out-of-step view of sexual harassment merely being a threat to the wellbeing of the organization. Most importantly, it is a risk to the wellbeing of the employees who just want to do their jobs. Viewed through that 2018 lens, legislative, legal, and cultural responses to victims who come forward must shift from blaming and silencing, to supporting and correcting. If we lived by the "we've always done it this way" argument, I shudder to think the type of world in which we would be living.

We cannot legislate morality, but the rules we make reflect our values as a society. Cultural change influences our laws, but our laws also influence the culture as we have seen in the fights for Civil Rights, Worker Rights, Marriage Equality, Interracial Marriage, Women's Suffrage, and so on. Sexual harassment has a significant and direct negative impact on nearly half the population of our country. Our entire population is harmed by the secondary economic impact of harassment. I implore this committee to take a bold and firm stand against not only sexual harassment, but the traditional ways in which we have viewed victims and the lack of fairness, justice, and respect they have been afforded to this point.