Regulatory Impact Statement: Strengthening legal protections for victims of family violence and sexual violence

Coversheet

Purpose of Document	
Decision sought:	This analysis and advice has been prepared to support final Cabinet decisions to amend legislation to strengthen the legal protections for victims of family violence and sexual violence with a focus in three key areas.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	24 March 2023

Problem Definition

This Regulatory Impact Statement proposes legislative amendments to address three issues:

(1) minimising the risk of child victims of sexual violence being further traumatised when participating in court proceedings

(2) addressing barriers to adult victims of sexual violence exercising their autonomy by applying to the court to have their automatic name suppression lifted, and

(3) addressing the inappropriate use of court proceedings for the purposes of causing harm to another party.

Executive Summary

This paper proposes three discrete shifts in regulatory settings, intended to strengthen the legal protections afforded to victims of family violence and sexual violence. Tight timeframes mean that the proposals have not been tested with stakeholders.

Strengthening protections for child victims of sexual violence

The Crimes Act 1961 includes age-related sexual violence offences for children and young people. Specifically, s132(1) makes it an offence to have a sexual connection with a child (defined in s132(6)(a) as a person under the age of 12 years) and carries a maximum penalty of 14 years' imprisonment. Section 132(5) also states that it is not a defence to a charge under that section that a child consented to the sexual activity.

However, Ministry of Justice data shows the rape of, or unlawful sexual connection with, a child is typically charged as a sexual violation under s128B – primarily because of the culpability associated with the offence and its (longer) maximum penalty of 20 years' imprisonment. Under this section, lack of consent and lack of reasonable belief in consent are key elements that must be proved. As a result, child victims may be asked about their willingness, agreement to, or even enjoyment of alleged sexual offending against them. This process can further traumatise young victims.

There is a divergence in stakeholder views on the extent to which this line of questioning happens in practice. However, regardless of the scale, there is evidence that when it does happen the impacts on children can be significant.

We have considered four options for amending the status quo, with the intention of better protecting children under 12 years. In our assessment, the non-regulatory option will not, on its own, provide enough incentive for prosecutors to change their charging practice. The three legislative options considered are to EITHER:

(i) amend the Crimes Act to make it clear that children aged under 12 years cannot consent to sexual activity, in a way that directs prosecutors towards using the age-appropriate provisions; OR

(ii) align the maximum penalties applied to s132 to the maximum 20-year imprisonment penalty applied to s128B (removing the primary reason for charging under section128B); OR

(iii) make both amendments described in (i) and (ii), above.

The preferred option is (iii), and this is reflected in the Cabinet paper. The option makes the policy intent explicit – protecting the interests of young victims, while ensuring that the justice system is fair and robust. There may be a marginal reduction in the rate of attrition of sexual violence cases involving children, resulting in an increase in cases reaching trial. We do not anticipate that aligning the maximum penalties will drive the average length of custodial sentences up – rather, existing sentences applied under s128B would be transferred to the age-appropriate provisions under s132. These assumptions need to be tested with stakeholders.

Strengthening the autonomy of adult victims of sexual violence

The Criminal Procedure Act 2011 provides for the automatic suppression of the identities of sexual violence complainants. Provisions also exist for adult complainants to apply to the court to have their name suppression lifted, so long as certain conditions are met – including the court being satisfied that the complainant understands the nature and effect of their decision.

The policy intent of these provisions is to protect the complainants. However, some victims do not want or need such protection and may wish to speak publicly about their experience. In practice, victims are not consistently made aware of the option to request that their name suppression is lifted. It appears that processes for lifting automatic name suppression are not clear and can place procedural and financial burdens on victims.

We have considered three options for amending the status quo, with the intention of providing adult victims with a clear opportunity to apply to lift their name suppression. The non-regulatory option has been dismissed as not providing sufficient clarity or visibility of current provisions. The two legislative options considered are to EITHER:

(i) shift to an ‘opt in’ approach– in which complainant name suppression is no longer automatic, rather individual complainants are asked if they would like their name suppressed on a case-by-case basis; OR

(ii) give effect to an ‘opt out’ model by maintaining current legislative protections, but also ensuring that complainants are provided with an explicit opportunity to decide if they would like to apply to have their name suppression lifted as part of the court proceedings.

The preferred option is (ii), and this is reflected in the Cabinet paper. This option enhances the autonomy of complainants, while ensuring that current provisions remain in place for those aged under 18 years, alongside victims who would like to retain their name suppression. Final decisions would remain with the presiding Judge.

We anticipate the option will require a marginal increase in prosecutor and court time to facilitate applications and decision-making, as more complainants become aware of (and take up) the options to apply to lift their name suppression at the time of trial. These assumptions need to be tested with stakeholders.

Strengthening the legal framework to recognise and respond to litigation abuse

The Family Court system is responsible for dealing with disputes following the separation of a relationship, including matters regarding the care of children and the division of relationship property. It is important that people have access to the courts on these matters, particularly when it involves the care of children. However, where one party uses litigation as a way to harass, intimidate, or otherwise cause harm to the other, it can amount to family violence. For example, this can take the form of one party filing incessant applications.

There are several regulatory mechanisms that the courts can use in cases of "vexatious" proceedings, for example, under the Care of Children Act 2004, the Family Proceedings Act 1980 and the District Courts Act 2016. However, recent case examples indicate these settings may not be adequate to respond to the particular dynamics of coercive and controlling behaviour that constitutes family violence.

We have considered three options for amending the status quo, with the intention of providing the court with powers to address litigation abuse. The three legislative options considered are to EITHER:

(i) amend primary legislation to provide powers to restrain family-related applications where proceedings are being used to abuse the other party by:
   - enabling interlocutory applications and actions continuing proceedings to be used as a basis for making the order; and
   - extending the application of the order to allow the judge to make orders restricting the filing of future interlocutory applications or amendments, OR

(ii) clarify the threshold to capture applicants intending to cause harm, OR

(iii) amend primary legislation to provide power to restrain proceedings under the Family Violence Act 2018.

The preferred option is (i). This option directly addresses the legislative gap that recent cases have identified; allowing a civil restraint order to be made based on litigant behaviour in all types of proceedings, including interlocutory applications, appeals and responses. Final decisions would remain with the presiding Judge, and the ability for the restrained party to still make applications with leave upholds access to justice rights while providing better protection for victims.

We anticipate the option will have an impact on court time; initially through an increase to facilitate applications and decision-making. However, depending on when the application for restraint is made, this may be less than running an entire proceeding.

Limitations and Constraints on Analysis

Limitations and constraints on the analysis vary across the three issues canvassed in this document, as set out below.

Impact of time constraints on nature of proposals

Time constraints have been the greatest limitation in the development and analysis of these proposals, due to Ministerial direction to move quickly to address the identified issues. Broader issues with consent, name suppression, and litigation abuse are highly complex by nature. Time constraints have significantly reduced the scope of our analysis and the subsequent proposals under consideration.

Child victims of sexual violence and name suppression

While policy analysis on these two issues has been ongoing over several months, the timeframes for these specific proposals mean it has not been possible to examine a range of related matters

such as the definition, or age of, consent, or the broader cultural implications of automatic name suppression.

Litigation abuse

Analysis of this issue has been the most impacted by timeframes. Litigation abuse can present in a variety of ways. Due to time constraints, our analysis has focused on one known pain point within the broader issue – the ability for a party to file excessive family-related applications (including interlocutory applications) or responses to applications that are abusive in nature, without being restrained.

Lack of consultation on specific proposals

Consultation has not been possible on the specific proposals for which Cabinet agreement is sought. Subject to Cabinet decisions, we anticipate undertaking targeted engagement to inform the effective implementation of the proposals, consistent with the policy intent. This engagement will occur prior to final regulatory proposals being considered by the Cabinet Legislation Committee (LEG).

Treaty responsibilities

Our ability to consult with iwi or Māori has also been limited. Gaps in our analysis and engagement approaches may be able to be addressed in the next phase of work, should the proposals be agreed, prior to final proposals being submitted to LEG.

The evidence base and data analysis

Evidence supporting the problem definitions has been sourced from targeted discussions with some stakeholders, though the extent of this varies between the three issues. If time allowed, a wider range of legal and cultural perspectives would have been sought.

Child victims of sexual violence

We have reasonable data on the use of non-age-specific provisions to charge alleged offenders when the elements of the offence of sexual violation exist. However, the extent to which questioning of children aged under 12 years about matters of consent occurs in practice is not known – or systematically recorded. Analysis has highlighted the potential detrimental impacts on child complainants, regardless of scale.

We have undertaken targeted engagement with some stakeholders on this issue since mid-2022, including the Chief Victims' Advisor, specialist service providers, court victim advisors, and the New Zealand Police. Crown Prosecutors and the Public Defence Service have also been engaged in a much more limited way.

Name suppression

Data holdings on the use of name suppression provisions appear to be limited (and potentially do not accurately reflect the number of complainants who successfully apply to have their name suppression lifted). We do not have insights into the extent to which lifting name suppression may be desired, but not acted on. We intend to address this information gap through engagement with lawyers and advocates working closely with those impacted by automatic name suppression.

Further evidence has been sourced from past research (particularly research commissioned by the Chief Victims' Advisor) and targeted engagement with some stakeholders since mid-2022, including the Chief Victims' Advisor, specialist service-providers, academics and cross-government agencies. Crown Law has been engaged in a limited way.

Litigation abuse

There is limited court data available to quantify the scale of litigation abuse in New Zealand. However, the Backbone Collective's 2017 survey of women's experiences in the Family Court found that 50% of participants had experienced some form of litigation abuse. Forty seven percent of respondents experienced their abuser filing numerous submissions against them.[1]

Further evidence supporting our analysis has been sourced from academic articles, media reports, and initial conversations with both community-based stakeholders and the Principal Family Court Judge.

Assumptions underpinning impact analysis

Child victims of sexual violence

A key assumption underpinning our analysis is that aligning the maximum penalty applied to the s132(1) offence of 'sexual connection' with a child under 12 years to the maximum penalty applied to s128B, will not contribute to a substantive increase in the average length of custodial sentences. We intend to test this issue with Police and Crown prosecutors alongside members of the Judiciary.

Name suppression

We assume that most adult sexual violence complainants will want to keep their automatic name suppression in place at the time of trial, but that in explaining the options for lifting name suppression some will want to apply at that time, while others may choose to apply in the post-trial context.

Litigation abuse

We assume that targeted consultation with legal professionals, including the Judiciary, will inform how to implement the proposal (including which legislation to amend) so that the policy intent is achieved, and any unforeseen consequences are identified and mitigated.

Level of confidence

Ministers can be reasonably confident in the problem definitions provided for the three issues. While there are differing views on the scale of each issue, the existence of potential harm to even a small group of victims warrants action to strengthen the legal framework.

We have less certainty about the potential efficacy or potential unintended consequences of the proposals recommended in the paper, because of time constraints that have limited stakeholder engagement. Subject to Cabinet agreement, engagement with key stakeholders is planned to examine the strengths and weaknesses of specific proposals, with the intent of informing the final advice on regulatory proposals to be considered by LEG.

We also consider a robust Select Committee process will provide an important opportunity to further ensure there are no unintended consequences to these proposals. It will be critical to provide victim-survivors an avenue to safely and anonymously provide feedback on the proposed changes to the law. This is true of all three issues, but is of particular importance for the proposal targeting litigation abuse.

[1] The Backbone Collective. 2017. *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*.

Responsible Manager(s) (completed by relevant manager)	
Sally Wheeler Manager Harm Reduction and Public Safety Ministry of Justice 24/03/2023	Naomi Stephen-Smith Manager Family Law Policy Ministry of Justice 24/03/2023

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Regulatory Impact Statement prepared by the Ministry and associated supporting material and consider that the information and analysis summarised in the Regulatory Impact Statement **does not meet** the Quality Assurance criteria. This is due to the constraints the proposals were developed under, meaning that there is insufficient evidence to meet the convincing criterion and insufficient consultation on the proposals across all the issues. However, the Panel understand that should the proposals be agreed, officials will consult with the key stakeholders to ensure the best possible implementation of the policy intent.

Issue one: Strengthening protections for child victims of sexual violence

Section 1: Diagnosing the policy problem

1.1 Context/Background

Sexual violence is a broad descriptor of all unwanted acts of a sexual nature perpetuated by one or more person(s) against another. While sexual violence occurs throughout society, some population groups are at an increased risk – Ministry of Justice data shows that women are six times more likely than men to be victims of sexual violence and Māori are overrepresented as both victims and offenders.[2]

In 2020, more than half of people who reported sexual violence victimisations were children and young people when the offending occurred – 41% of reported offences involved a child or young person (aged under 18 years) and a further 15% were historical childhood victimisations reported as an adult.[3] Notably, 22% of reported cases involved a child aged under 12 years at the time the alleged offending occurred.[4] Sexual violence is the primary reason for a young person participating in a trial as a complainant.[5]

Current regulatory framework

Sexual violence offences

Sexual crimes in New Zealand are dealt with in ss127 to 144 of the Crimes Act 1961. The primary offence is s128B – sexual violation, defined as rape and unlawful sexual connection. This offence comes with the highest maximum penalty (20 years imprisonment).

Sexual violation occurs when *person A rapes or has an unlawful sexual connection with person B.* Whether a rape or unlawful sexual connection occurred depends on consent – for a person to be convicted of this offence, the following two elements need to be proven:

- Person B did not consent to the sexual connection, **and**
- Person A did not reasonably believe person B consented.

This offence may be used to charge alleged offenders, regardless of the age of the victim. When the Crown lays charges under s128B, the prosecutor must prove the offending occurred, as well as the above two elements, beyond a reasonable doubt. This means the defence counsel may raise arguments that either the offending did not occur, OR any sexual activity that did occur was consensual.

Specific age-related sexual offences

There are also two age-related sexual offences set out in the Crimes Act 1961:

- Section 132 (sexual conduct with a child under 12), and
- Section 134 (sexual conduct with a young person under 16).

Overall, sexual offending against children aged under 12 years attracts greater maximum penalties than those applied to offences against young people aged under 16 years – although in both cases

2 Ministry of Justice. 2023. *Attrition and progression of reported sexual violence victimisations in the criminal justice system: Victimisations reported April 2017 – March 2022*. Wellington: Ministry of Justice.
3 Ministry of Justice. 2023. p 11.
4 Ministry of Justice. 2023. p.12.
5 Hanna, K., Davies, E., Henderson, E., Crothers, C., & Rotherham, C. 2010. *Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy*.

the maximum penalties are lower than those available under (non-age-specific) charges of sexual violation.

The defences available under these two sections also differ:

- for sexual conduct with a child under 12 – the law states it is not a defence that a child consented to sexual activity (s132(5)), and
- for sexual conduct with a young person under 16 – there is a defence available if the defendant proves they took reasonable steps to determine, and reasonably believed, that the young person was aged 16 or older at the time of the act and that the young person consented (s134A).

The distinctions between the defences available to different age groups appear to be designed to reflect societal norms about the capacity of children and young people to provide true and informed consent to sexual activity – as distinct from adults. However, the maximum penalties currently available may not align with societal views on the relative seriousness of sexual violence against children and young people, compared to adults.

Table one summarises these offences, maximum penalties, and relevant defences set out in legislation.

Table one: Summary sexual offences, penalties, and defences

Section		Offence	Max. penalty (imprisonment)	Defence in legislation
S 128B	Sexual violation	Rape	20 years	None
		Unlawful sexual connection	20 years	None
S 132	Sexual conduct with a child under 12	Sexual connection	14 years	None (s132(5) specifies it is explicitly *not* a defence that a child under 12 consented)
		Attempts a sexual connection	10 years	
		Indecent act	10 years	
S 134	Sexual conduct with young person under 16	Sexual connection	10 years	S134A: Defendant must prove: 1) they took reasonable steps to determine they were over 16, 2) reasonably believed they were over 16, and 3) that the young person consented

Sexual violence victims can experience further harm through the criminal justice system

The justice system's response to victims of sexual violence can exacerbate the effects of the initial trauma caused by the offending and slow or undo psychological recovery. The complainant's role as a witness during a criminal prosecution means that the trial process is likely to be a difficult experience. However, some aspects of the trial process unnecessarily contribute to poor experiences and can cause secondary victimisation, including intense psychological distress.[6]

Research into the justice system experiences of child and adolescent sexual violence complainants in New Zealand (2021) found that:

- sexual violence misconceptions were used to challenge the plausibility of evidence given by young people, and

6 Ministry of Justice. 2018. *Improving the justice response to victims of sexual violence: victims' experiences*. Gravitas Research and Strategy Limited.

- cross-examination was characterised by a leading style of questioning, with defence counsel controlling the content and narrative by routinely suggesting that complainants were lying.

As a result, complainants experienced heightened distress and, at times, the quality of the evidence that they were able to give was compromised.[7]

Low rates of reporting and high rates of attrition

Sexual violence incidents (across all age groups) have very low rates of reporting and prosecution compared to other criminal offences. While the number of reported sexual violence victimisations is growing steadily each year, the New Zealand Crime and Victims' Survey estimated that only 8% of sexual violence offences against adults were reported to Police.[8] (We do not have an equivalent rate for children).

It is likely that the risk of secondary victimisation in the justice system contributes to low reporting rates, and the high rates of attrition between the police investigation stage and trial stage.[9] Further, as noted above, stress and trauma negatively impact the quality of witnesses' evidence in court and may also contribute to difficulty in pursuing prosecution and conviction.[10]

Ongoing justice sector activities

The interests of victims are provided for through regulation and operational procedures. Victims' rights are established under the Victims' Rights Act 2002. The Evidence Regulations 2006 provide for witnesses (including child witnesses) to provide evidence in multiple ways, including by pre-recorded video.

The Ministry of Justice has made a range of operational changes designed to improve complainants' experiences of the justice system, and these are ongoing. Current initiatives include a focus on improving court procedures for both cases of family violence and sexual violence and contributing to actions that support *Te Aorerekura – the National Strategy for the Elimination of Family Violence and Sexual Violence in Aotearoa New Zealand*.

Recent regulatory initiatives include provisions under the Sexual Violence Legislation Act (2021), which amends legislation with the intention of reducing the trauma that sexual violence complainants can experience in court (eg by providing for the re-recording of evidence and providing judges with the ability to prevent harmful or `irrelevant lines of questioning). Updated guidelines for prosecutors engaged in sexual violence cases were provided by the Solicitor-General in December 2022.

1.2 What is the policy problem or opportunity?

Ministry data shows that most charges related to sexual connection with a child under 12 years are brought under s128B, regardless of the age of the complainant. Police and Crown prosecutors have told us that this is because of level of culpability associated with this offence, as reflected in the maximum (20-year) penalty available. The use of s128B makes consent a live issue and runs the risk of children being the subject of secondary victimisation through the trial process.

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7 Randell, I. 2021. *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants*.

8 Ministry of Justice. 2022. Survey findings – cycle 4 report: Descriptive statistics. Cycle-4-Core-Report-v0.20-20220628.pdf (justice.govt.nz)

9 Ministry of Justice. 2018. Gravitas Research and Strategy Limited.

10 Cashmore, J. & Shackel, R. 2018. *Evaluation of the Child Sexual Offence Evidence Pilot; Final Outcome Evaluation Report*.

Use of s128B to charge in cases involving children under 12 years

In practice, prosecutors are likely to charge alleged offenders under s128B when the elements of the offence of sexual violation exist – regardless of the age of the victim. The culpability associated with sexual violation, demonstrated by the corresponding maximum penalty of 20 years imprisonment, recognises the egregious nature of sexual crimes against children. While there are separate age-based offences that cover sexual conduct with children and young people, these are primarily used when the defendant is alleged to have done an indecent act on a child or young person (which is a lesser offence).

In 2021/2022, there were 673 charges of s128B/sexual violation against a child under 12 years old (meaning lack of consent would be an element of the offence that the prosecution needs to prove). In the same period, there were 14 charges made under s132(1)/sexual connection with a child under 12 (where it is not a defence that a child consented and is therefore irrelevant in court).

In the same year, the conviction rate for offending charged under s128B was 49% (vs. 46% 'not proved' – where the person was found not guilty, and where the charge is withdrawn or dismissed).

Ministry data shows that, for sexual offences against children under 12 reported in 2019 and charged under s128B - after two years, 62% had a perpetrator identified, 60% had court action, 20% had been convicted, 18% had a prison sentence, and 25% were still active in court.

In the 10 years prior to 2021/22, 862 people charged under s128B were sentenced to imprisonment for sexual offences against children under 12; the average sentence was for 7 years and 7 months; and sentences ranged from 9 months to 20 years.

Negative impacts on child victims

An unintended consequence of charging alleged offenders under s128B – sexual violation – is that children are not offered the same protection available under the age-related offence, in which consent is not a possible defence. Child complainants may therefore be vulnerable to a defence counsel's argument or line of questioning that implies the child wanted, asked for, or even enjoyed the sexual activity.

There are mixed views on the extent to which this line of questioning occurs when complainants are under 12 years old (see stakeholder views, below). Regardless of the scale of the issue, victims' advocates and others working in the field have reiterated this issue is significant, and potentially traumatising, for those children involved, who are extremely vulnerable. Parents of child victims of sexual violence have reported that they felt their children were violated through the trial and cross-examination processes and commented that they would not make the same choice to report the offending had they known how traumatising it would be for them and their children.[11]

As noted, complainants in sexual violence trials can experience considerable psychological impacts that can exacerbate pre-existing trauma. In addition to the immediate impacts on children at the time of trial, the incidence and severity of mental illness (such as PTSD, depression and anxiety) is related to a range of poor life outcomes, including mental health, education, and employment, which all carry significant private, social and governmental costs.[12]

We do not have insights into the rate of secondary victimisation that occurs in the court system – and note that data collection would be very complex – the insights we have are research-based. The

11 Ministry of Justice. 2018. Gravitas Research and Strategy Limited. Note that this research defined a child as being under 18 years.
12 For example, Henkhaus, L.E. 2022.The lasting consequences of childhood sexual abuse on human capital and economic wellbeing. *Health Economics,* 31(9), and Wilson, D.R. 2010. Health consequences of childhood sexual abuse. *Perspectives in Psychiatric Care*, 41(1).

negative impacts for some victims have been documented as a longstanding concern in academic literature and, more recently, raised as a concern and consideration by leaders within the justice system.[13]

Offending against young people aged under 16 years

While similar trends exist for young people aged under 16, the scope of this work has been limited to children under 12 years. This is because of the complexities related to consent for the under 16-year age group and the limited time for consultation. Case law has repeatedly upheld that young people under 16 are capable of consenting to sexual activity. Victim advocates and some legal professionals have also noted that young people can and do engage in consensual sex and should not be criminalised for doing so.

Range of stakeholder perspectives

There are differing perspectives on the extent to which children are subject to combative and/or harmful lines of questioning. Most of the New Zealand-based evidence of children being cross-examined about their (lack of) consent is based on the insights shared by advocates, the New Zealand Police, court victim advisors, and through high-profile cases reported by the media.

In contrast, the Public Defence Service does not consider that the use of s128B is causing issues in relation to children, or that the 'defence' is used inappropriately, noting that case law supports the notion that a child does not have the ability to give true consent.[14] However, despite this case law, research suggests that children can and do experience questioning around issues of consent.[15]

Root cause of the problem is regulatory failure (unintended consequences)

As noted, Police and Crown prosecutors have told us that they seek to charge alleged offenders under the offence of sexual violation (set out in s128B) when possible, regardless of the age of the complainant, due to the culpability associated with this offence as demonstrated by the maximum (20-year) penalty available. We consider this reality is an unintended consequence stemming from previous reforms:

- in 1993, the maximum penalty for the offence of sexual violation (s128B) was increased from 14 years' to 20 years' imprisonment. Penalties for other sexual offences were not considered at the time, and
- in 2004, the Government made most sexual offences gender-neutral and raised the maximum penalty available for sexual conduct with a young person under 16, among other changes.

The overall objectives of the 2004 reforms included:

- ensuring that the law relating to sexual offences reflected changes in social attitudes towards sexual matters,
- improving the law's coverage of vulnerable groups (including children and young people),
- ensuring the law would be easier to understand and apply, and
- that the penalties for sexual offending were set at appropriate levels.[16]

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13 Chief District Court Judge Doogue, 2016; Randell et al., 2016 as cited in Randell, I. 2021. *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants*.

14 For example, *R* v *Cox* [1996] CA213/96, where the Court of Appeal noted that because consent must be full, voluntary, free and informed, it would only be in 'exceptional if not rare' cases that an 11- or 12-year-old girl could consent to sexual intercourse. Similarly, in *R* v *Accused* [1998] 16CRNZ 149, the Court of Appeal stated that a judge might dismiss entirely or downplay consent, where the complainant was a mere child (distinguishing this from those aged around 14).

15 For example, Randell et al., 2016 as cited in Randell, I. 2021, although the research covers children and young people and the age distinctions are not always clear.

16 Crimes Amendment Bill (No 2) 2003 (104-1) (explanatory note) at Stage 1.

Hansard records[17] mention that the 2004 Bill removed any doubt as to whether children under 12 could consent, and this was praised as one of its achievements. However, it appears that, based on the objectives and record of debate on the reforms, Parliament did not anticipate the unintended consequence that children under 12 would now be subjected to harmful lines of questioning about consent.

1.3 What objectives are sought in relation to the policy problem?

The two primary objectives are to:

- **reduce further harm to child victims of sexual violence,** particularly those participating in sexual violence proceedings, and
- **ensure a more fair and robust justice system** that adequately protects children and young people from sexual violence harm.

Section 2: Deciding upon an option to address the policy problem

2.1 What criteria will be used to compare options to the status quo?

The following criteria have been used to assess the options:

Two primary criteria

(1) **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, in particular access to justice and a defendant's right to a fair trial, and

(2) **Reduces trauma and other harm:** makes participating in the justice system less harmful for victims, thus reducing the risk of further trauma.

Three secondary criteria

(3) **Compatibility with pre-existing regulatory systems:** does not represent a significant departure from the current public policy intent of the law,

(4) **Best use of resources:** delivers best value for money and, where relevant, ensures efficient use of court and judicial time, and

(5) **Ease of implementation:** can be implemented quickly to give effect to the desired objectives.

Options that meet the secondary criteria identified above and criteria (2) will need to be weighed, and greater consideration given to criteria (1). Preserving defendants' fundamental rights *must* take precedence where (1) and (2) may conflict. This supports the robustness of the trial and outcome, which in turn support the broader justice interests (and in turn, the interests of victims).

2.2 What scope will options be considered within?

While stakeholder views have informed the problem definition, time constraints and limited stakeholder engagement mean that we have necessarily focused on actions that can be taken to improve the efficacy of current regulatory provisions, consistent with the underpinning policy intent. Subsequently, we have had not been able to consider the full range of options, including the possibility of addressing issues that are more complex or far-reaching in nature.

2.3 What options are being considered?

Option one - Status quo

Existing provisions in the Crimes Act 1961 mean that, in cases of sexual violence against children aged under 12 years, prosecutors may charge alleged offenders under either:

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17 Crimes Amendment Bill No (2) 2004 (first reading).

- s128B ‘sexual violation’ (which carries a maximum penalty of 20 years imprisonment), or
- s132 ‘sexual conduct with a child under 12’ (which carries a maximum penalty of 14 years imprisonment), or
- s134 ‘sexual conduct with a young person under 16’ (in practice, this offence is not often used when the victim is under 12 years but can be used as necessary when a case involves repeat offending that continues as a child grows older, or the exact age of the child at the time of offending cannot be determined).

When charges are laid under s128B, ‘consent’ is a live issue that may come up in questioning, as this is a critical element of the offence itself.

Maintaining the status quo does not fully deliver on the objectives of reducing further harm to child victims of sexual and a fair and robust justice system, from a victim-centred perspective.

Option two – Children under 12 cannot consent to sexual activity

This option seeks to clarify that children under 12 cannot give true and informed consent to sexual activity, ensuring that children are not questioned in court about whether they wanted, agreed to, or enjoyed sexual activity.

This could be achieved in several ways, including amending s128B to direct prosecutors away from using it as the primary offence to charge alleged offenders (and towards the age-related provisions of s132). It may also be possible to amend the definition of consent (s128A) to make it clear that a child aged under 12 years is not capable of consenting to sexual activity.

On its own, this option would reduce the further harm to child victims of sexual violence compared to the status quo. However, it would not fully achieve the objective of ensuring a fair and robust justice system, as the anomaly in maximum penalties available under s132 would remain. This would become a problem when, for example, there is a violent or otherwise egregious case that would normally result in a high penalty following conviction.

Option three – Align maximum penalties

Under this option, the maximum penalty associated with sexual connection with a child under 12 years (s132(1)) would be adjusted from 14 years to 20 years, to align the with maximum penalty available for the offence of sexual violation (s128B).

This option is intended to encourage the use of s132(1) of the Crimes Act – sexual connection with a child under 12 – as the primary offence for the rape of a child.

We do not anticipate that aligning the maximum penalties will drive the average length of custodial sentences up, rather it would serve to transfer existing sentences from s128B, to the age-appropriate provisions under s132. This option does not include increasing the penalties to other offences under this section – attempt to have sexual connection or indecent act (132(2) and 132(3), respectively).

Compared to the status quo, this option would assist to reduce the further harm to child victims of sexual violence and ensure a fair and robust justice system. While the ‘incentive’ of a higher penalty would be removed, the possibility of children being questioned about ‘consenting’ to sexual activity remains as a low but prevailing risk.

Option four – Combination of options two and three (preferred)

This option would amend the Crimes Act to both: (1) make it clear that children under 12 years old are not able to consent to sexual activity; and (2) align the maximum penalty for sexual connection with a child under 12 with that of sexual violation (20 years imprisonment).

This option would make it absolutely clear that s132 must be used as the primary offence for sexual connection with a child under 12, protecting vulnerable child witnesses and contributing to a fair and robust justice system.

Option five – education and training (non-regulatory)

This is a non-regulatory option, focused on improving the guidance and education provided to prosecutors, defence lawyers and the judiciary to encourage the use of the age-appropriate s132 offence and to reduce the likelihood of harmful lines of questioning. It may be possible to add to existing guidance, such as *The Solicitor-General's Guidelines for Prosecuting Sexual Violence* (2022).

This option has the potential to enhance the status quo through training awareness of the provisions available and how they can be used to better protect child victims from further trauma and contribute to a fair and robust justice system.

Distributional population impacts of options

The distributional impacts of all options reflect the demographic profiles of victims and perpetrators of sexual violence against children:

- 86% of people who reported sexual violence victimisation in 2020 were female,
- Māori are overrepresented as child victims of sexual violence (25% in 2020)[18],
- Māori are also overrepresented amongst those imprisoned for sexual offences against children under 12 (33% in 2021/22), and
- in 2020, 26% of identified perpetrators of sexual violence were family members (43% were known to each other but non-family members).[19]

18 There are significant limitations with data on the ethnicity of victims – as 37% are recorded as 'unknown'.

19 Ministry of Justice. 2023. *Attrition and progression of reported sexual violence victimisations in the criminal justice system: Victimisations reported April 2017 – March 2022.* Wellington: Ministry of Justice.

2.4 How do the options compare to the status quo/counterfactual?

	Option 1 – Status Quo	*Option 2 – children cannot consent*	*Option 3 – align penalties*	*Option 4 – combine options 2 and 3 (preferred)*	*Option 5 – education and training*
Fairness and justice	0	+ Maintains defendants' rights to a fair trial and may improve the victims' experience of the justice system – however, anomalies in penalties remain.	++ The alignment of maximum penalties is consistent with the policy intent. Defendants retain right to a fair trial.	++ The alignment of maximum penalties is consistent with the policy intent and there is enhanced clarity about the status of child victims. Defendants retain right to a fair trial.	+ Likely marginal impact on victims' experience of the justice system. Maintains defendants' rights to a fair trial. Anomalies in penalties remain.
Reduces trauma and harm	0	++ Would reduce secondary victimisation of child victims through removing possibility of questions about 'consent' to sexual activity.	+ Less likely that prosecutors would use s128B – therefore, 'consent' issues less likely to arise. However, does not make explicit that a child is not to be questioned in this way.	++ Clearly points prosecutors to the use of s132 for child victims and prevents the use of harmful practices.	+ Likely marginal impact on victims' experience of the justice system through improved persecutor and defence understanding and practices.
Compatibility	N/A	+ Consistent with the intent of current legislation – that a child under 12 cannot give true and informed consent.	+ Addresses current discrepancy in penalties, which is likely to change charging behaviours of prosecutors.	++ Addresses current discrepancy in penalties, while clarifying other aspects of the regime.	0 N/A
Use of resources	N/A	0 No significant impact.	0 No significant impact on court resources/time.	0 No significant impact on court resources/time (may be marginal time savings if questions of consent are removed).	0 No significant impact.
Ease to implement	N/A	0 Would require complementary education to raise awareness of prosecutors.	0 Would require complementary education to raise awareness of prosecutors.	0 Would require complementary education to raise awareness of prosecutors.	0 Would require appropriate resourcing to support education and training.
Overall assessment	N/A	**+1 1/2**	**+1 1/2**	**+2**	**+1**

2.5 What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Option four is the Ministry's preferred approach – amending legislation to (i) make it clear that children under 12 years are not able to consent to sexual activity; and (ii) align the maximum penalty available for sexual connection with a child under 12 years with that of sexual violation (20 years imprisonment). The approach makes the policy intent explicit – leaving no room for doubt – and balances the interests of young victims with a fair and robust justice system. There may be a marginal fall in the attrition of cases because of better use of the protections offered to children. As noted, we do not anticipate that aligning the maximum penalties would drive the average length of custodial sentences up, rather it would serve to transfer existing sentences from s128B, to the age-appropriate provisions under s132. However, these assumptions need to be tested with key stakeholders.

Option two, which would make it clear that a child under 12 could not consent to sexual activity alone, would not adequately address the issue of prosecutors seeking to utilise s128B as a means of accessing the longer maximum penalties. Option three, which focuses solely on aligning maximum penalties across s128B and s132 is more likely to change prosecutor behaviour but does not signal (to the defence) that children should not be questioned about 'consent'. Non-regulatory approaches (option five) are not likely to adequately incentivise the change in practice sought.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Police/Crown prosecutors	May result in ongoing additional costs as more cases come to trial (reduction in current attrition rates), requiring additional prosecutor time. Our assumption is that the increase in caseloads will be marginal. No immediate risks identified. Low certainty due to lack of consultation.	Monetisable (unquantified)	Low
Court system	Potential increase in cases going to trial will increase demands on court time with ongoing cost and timeliness implications. As above, our assumption is that the increase in caseloads will be marginal. No immediate risks identified. Low certainty due to assumptions about caseloads.	Monetisable (unquantified)	Low
Ministry of Justice	One-off implementation costs in the form of costs of preparing and delivering information on changes for prosecutors, defendants and court staff and the judiciary. Assumption that prosecutors will have a high-level of compliance with new provisions. No immediate risks identified. Medium certainty based on internal engagement.	Monetisable (unquantified)	Medium
Total monetised costs		N/A	
Non-monetised costs		N/A	

Additional benefits of the preferred option compared to taking no action			
Child complainants/ victims	Reduced personal costs resulting from secondary victimisation in the justice system, including potential adverse longer-term health, education, employment and justice outcomes. Medium certainty due to documented evidence base on potential harms.	Monetisable (unquantified) Non-monetisable (medium/high)	Medium
Justice system	Potential marginal benefits via reduced court and judicial time, resulting from shorter court proceedings, where examination of 'consent' issues not permitted. Reduced secondary victimisation may improve society's trust and confidence in the justice response to sexual violence. Low certainty due to limited implementation planning.	Monetisable (unquantified) Non-monetisable (unquantifiable)	Low Medium
Wider society	Over time, more sexual offenders may be held to account for their crimes and there may be fewer repeat offenders. Society as a whole will benefit from a reduction in the cumulative costs associated with the poor life outcomes experienced by victims who have been further traumatised. Certainty limited by understanding of medium to long term impacts.	Non-monetisable (unquantifiable)	Low/Medium
Total monetised benefits		N/A	
Non-monetised benefits		Medium/High	

Section 3: Delivering an option

3.1 How will the new arrangements be implemented?

We intend to introduce a bill this parliamentary term to strengthen the legal protections available to victims of family violence and sexual violence. Transitional arrangements will provide that the new provisions apply only to proceedings for which charges have been filed after commencement.

This proposal aims to change the charging practice of prosecutors away from s128B and toward s132(1) when the victim is under 12 years old, meaning children in sexual violence trials would not be subject to harmful lines of questioning about consent. The judiciary would be responsible for the active enforcement of the new arrangements, for which guidelines will need to be developed.

The Ministry of Justice will be responsible for the education, and communication of this change by updating bench books, prosecutors, defence lawyers, the judiciary, Court Victim Advisors/Sexual Violence Victim Advisors, and the New Zealand Police. The Solicitor-General Guidelines for Prosecuting Sexual Violence may also be updated.

The Ministry of Justice will update the Court Management System with any potential amended penalties. While we will work closely with cross-agency colleagues on any integration issues/system changes, it is highly unlikely this will occur.

3.2 How will the new arrangements be monitored, evaluated, and reviewed?

Business-as-usual data collection and assessment processes (utilising the Case Management System) will support implementation monitoring. A monitoring plan will be developed as part of implementation planning.

We anticipate monitoring will include analysis of sentencing outcomes under the amended legislation compared to the current arrangements, alongside monitoring of the number of cases charged and attrition rates.

Issue two: Strengthening the autonomy of adult victims of sexual violence

Section 1: Diagnosing the policy problem

1.1 Context/Background

As noted in the context of the first issue, the justice system's response to victims of sexual violence can exacerbate the effects of the initial trauma caused by the offending, and slow or undo psychological recovery. The relatively low rates of reporting and prosecution of sexual violence incidents reflects, at least in part, victims' unwillingness to take part in the justice system – particularly if they perceive that they have little to gain from it.

Current regulatory framework

Sexual violence complainants' identities (and defendants' identities in certain sexual cases where publication would risk identifying the complainant) are automatically suppressed under sections 201 and 203 of the Criminal Procedure Act 2011. The policy intent is to protect the complainant (s203(5)).

The court may permit publication of the complainant's identity (by court order s203(3)) so long as:

- a complainant aged 18 years or older applies to the court for such an order, and
- the court is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order, and
- where publication of the complainant's identity may lead to the defendant being identified, the defendant's identity is not suppressed (s203(4)).

The impact of automatic name suppression is that no person can publish the name or any identifying details of the complainant, meaning that even if a victim wants to speak out about their experience, they are unable to do so.

The impact of lifting automatic name suppression is enhanced autonomy for the complainant, but there are complexities and potential risks that may arise in some cases, for example, if there are multiple victims in a case and not all want their suppression lifted, or if lifting suppression reveals the defendant's identity and causes them undue hardship.

Link to suppression of defendant's identity

The general suppression provisions also provide that one of the grounds for suppressing a defendant's identity is that publication would be likely to lead to the identification of another person whose name is suppressed by order or by law (s200(2)(f)). In sexual violence cases, a defendant's identity will sometimes be suppressed because identifying the defendant will lead to the complainant being identified in breach of s203.

A defendant's identity is also automatically suppressed in cases of incest or sexual conduct with a dependent family member – which is intended to protect the complainant (s201(2)).

Section 203(5) provides that where the court has permitted publication of the complainant's identity, that order will cease to have affect if it leads to the identification of the defendant and the defendant successfully applies to the court for a suppression order.

Victims' rights

Complainants have a right to receive information related to the case, under s12 of the Victims' Right Act 2002. In particular, s12(ca) specifies that victims should be provided with information about 'the possibility (if any) of the court making an order prohibiting the publication of identifying information about the victim, and the steps that the victim may take in relation to the making of that order'. However, the provision does not delegate whose responsibility this is, nor does it explicitly refer to automatic suppression in sexual violence proceedings (noting that it would be difficult for the legislation to list all possible scenarios in which information should be provided to victims).

Supporting guidance

The Solicitor-General's Guidelines for Prosecuting Sexual Violence[20] state that adult complainants should be advised of their ability to have automatic suppression of their own name lifted (paragraph 6.11). The Guidelines also recommend that responsibility for providing advice to the complainant may best sit with the prosecutor, or officer in charge, on the prosecutor's behalf (paragraph.6.2) – and should assume 'presumptive responsibility'.

Court victim advisors are available to complainants in sexual violence proceedings to provide support and information on the court process. However, this is an optional resource that some complainants may not use.

Ongoing Justice Sector activities

The Ministry of Justice, and wider Justice Sector, has a programme of work underway to improve the experience of victims in the justice system. This includes operational work to improve victims' experiences with court procedures in cases of family violence and sexual violence, contributions to *Te Aorerekura* and the wider implementation of *Te Ao Marama*, and giving effect to the new regulatory provisions introduced under the Sexual Violence Legislation Act (2021).

1.2 What is the policy problem or opportunity?

Automatic name suppression is not wanted by all victims

The policy intent behind automatic name suppression in sexual violence proceedings is to protect the complainant. However, some victims do not want or need such protection and may wish to speak publicly about their experience.

While it may be broadly accepted that privacy for sexual violence complainants is a valid exception to the principle of open justice, tensions do exist. High (2022) notes that there has been a gradual evolution towards recognising the rights of victims generally, and towards protection of both privacy and autonomy interests of sexual violence complainants specifically.[21]

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20 Crown Law. 2022. *Solicitor-General's Guidelines for prosecuting sexual violence*. Solicitor-Generals-Guidelines-for Prosecuting-Sexual-Violence-Offences-2022.PDF (crownlaw.govt.nz)

21 High, A. 2022. Constraints on sexual offence complainants. *New Zealand Law Journal*: 144.

The 2019 report of the Chief Victims Advisor to Government, *Te Tangi o te Manawanui Recommendations for Reform*, notes that "some victims believe some offenders use the excuse of 'protecting' the victims to keep the offender's name suppressed. These examples are particularly highlighted when the victim and offender have a close relationship".[22]

This sentiment has been reflected in other evidence, which highlights that the automatic nature of name suppression can leave victims feeling they have no power.[23] Victim advocates have noted that barriers to victims being able to exercise choice about name suppression can amplify the trauma they have already experienced, and the ability to lift name suppression is seen by some as an important part of a victim's healing process.

Media commentary[24] calling for regulatory reform reflects views that name suppression should be a choice and should be available to victims at no cost.

We do not have clear insights into the relative proportion of adult sexual complainants who may wish to lift their name suppression in the New Zealand context. However, Canadian research indicates that that while almost all sexual assault complainants favour anonymity at the onset of criminal proceedings, as many as 30% ultimately feel constrained by, and want to be free of, anonymity orders.[25]

Victims are not consistently made aware of options to request lifting of name suppression

Victims can have difficulty lifting name suppression at the time of trial and after proceedings have concluded. It is apparent that processes are not clear and place a procedural burden on complainants that can be difficult to navigate and costly.

In 2019, the Chief Victims' Advisor recommended that the Government review the name suppression process – to make it easier for victims to opt out of name suppression, and at no cost. It was also recommended that victims be provided with legal advice on their rights and the long-term implications of name suppression.[26]

Barriers to lifting name suppression while the trial is in process

Victims can request that their name suppression be lifted at the time of the trial. In this scenario, the prosecutor can take the necessary steps on behalf of the complainant – minimising the administrative burden on the victim (and at no cost).

However, it is not clear how consistently complainants are advised of their right to request that their automatic name suppression be lifted during the trial process. Discussions with those

22 Chief Victim's Advisor to Government. 2019. *Te Tangi o te Manawanui: Recommendations for reform*. https://chiefvictimsadvisor.justice.govt.nz/assets/Uploads/Te-Tangi-.pdf.

23 A submission on Section 194K of Tasmanian Evidence Act 2001 by End Rape on Campus Australia & Marque Lawyers includes accounts from 14 survivors describing experiences, either in not being able to tell their story publicly, or in being able to speak out about the abuse they experienced.

24 Articles that call for reform include, but are not limited to:

- https://www.stuff.co.nz/national/crime/106211394/advocate-sex-abuse-victims-shouldnt-have-to-pay-to-get-name-suppression-lifted
- https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11390990
- https://www.stuff.co.nz/national/crime/7329352/Incest-name-suppression-battle
- https://www.newstalkzb.co.nz/news/crime/high-court-lifts-name-suppression-on-sexual-slavery-victim/
- https://sst.org.nz/christchurch-sex-offender-protected-by-name-suppression-madness/

25 Taylor, L. How the criminal code 'protects' sexual assault complainants from themselves and constrains their participation in the news media. In Taylor, L. & O'Hagan, C. 2017. *The unfulfilled promise of press freedom in Canada*. Toronto University of Toronto Press.

26 Chief Victim's Advisor to Government. 2019, p 42.

closely involved with court processes suggest that approaches to lifting automatic name suppression are (at best) ad hoc and inconsistent in nature. For example, we heard of name suppression being lifted following a verbal request to a judge (and the judge confirming with the victim that was what they wanted). In other instances, victims have written letters, or memoranda have been prepared on their behalf, setting out why they want to lift their name suppression and confirming that they understand the impact. We also heard that requests to lift name suppression are typically initiated by individual complainants – rather than in response to advice that applying to lift name suppression is an option.

The Ministry of Justice's data holdings reflect that during the 2013/14 to 2021/22 period, the number of court directions to permit the publication of a victims' name and/or particulars while the trial is in process ranged between nil and four each year.[27] It is not clear how accurate these figures are, and the low numbers may reflect inconsistent processes and subsequent recording practices. Further, we do not have insights into the number of complainants who would have applied, had they known the option was available to them.

Barriers to lifting name suppression following a trial

Complainants may also apply to have their name suppression lifted post-trial – and there is no time constraint on this. We have heard that victims can find the process difficult and, at times, costly.[28] This may reflect the fact that there is no publicly documented process that advises potential applicants of the steps that should be followed. As a result, we have heard some victims seek legal advice alongside assistance to apply for a court order (legal aid is not available for this purpose). Concerns have also been raised that the process of requiring victims to return to court to obtain a s203 order may not be appropriate, particularly if they have been traumatised by the court trial.[29]

Ministry data holdings on lifting name suppression post-trial capture five instances of court directions for the publication of a victim's name and or particulars in the 2004/05 to 2021/22 period. It is not clear how accurate the data is, and it is otherwise difficult to gauge the scale.

If a victim wants to apply to lift their name suppression months or years after trial has concluded, the prosecutor, defence counsel, and judge familiar with the case are no longer guaranteed to be available for consideration of the application. This heightens complexities related to cases with multiple victims, defendant's rights, and cultural considerations (such as Te Ao Māori processes, and how automatic suppression may limit tino rangatiratanga). These complexities will require wider public consultation to consider appropriately, likely requiring shifts in funding settings and potentially unveiling additional options. While this is not possible in the constrained timeframe available, we do consider there are options that will both address barriers to lifting suppression at the time of court proceedings and mitigate some of the pain points associated with lifting suppression after trial has concluded.

Range of stakeholder perspectives

We have had ongoing conversations with specialist service providers, victim advocates, Te Puna Aonui, the New Zealand Police, Ministry of Social Development, Oranga Tamariki, Accident Compensation Corporation, and Crown Law about issues with automatic name suppression in sexual violence proceedings. Enhancing autonomy for adult victims in this area

27 Higher rates were recorded for the 2004/05 to 2012/13 period – ranging from a low of four, through to high of 22 in 2006/07 – although these reflect several cases involving multiple victims.

28 For example, engagement undertaken by the Chief Victim's Advisor to inform the 2019 report, *Te Tangi o te Manawanui: Recommendations for reform*, found that "some victims have spent many thousands of dollars attempting to have their name suppression lifted so that the public can know who harmed them", p 17.

29 High, A. 2022.

is largely supported across these stakeholders. However, we are aware that there are mixed views on the cultural implications arising from automatic name suppression – and options to lift it. These will need to be further examined and consulted on through the Bill process, as discussions to date have been limited in scope.

Root cause of the problem is a lack of awareness/information

The root cause of the problem is a lack of information provided to adult complainants about their option to apply to lift name suppression. While the Criminal Procedure Act 2011 makes provision for name suppression to be lifted, this option is not routinely explained to complainants at the time of the trial (despite the supporting provisions in the Victims' Rights Act 2002). The Solicitor-General's guidance (both the latest 2022 version and the 2019 version) states that adult complainants should be advised of their ability to apply to have their name suppression lifted – but this does not appear to routinely happen. Further consultation is required to understand why this is the case.

There is also little information available for those who have a suppression order already in place and have decided they would now like to be able to speak out. This can prompt victims to seek legal advice and support in applying to lift name suppression, at their own cost.

1.3 What objectives are sought in relation to the policy problem?

The three primary objectives are to:

- **give effect to the law**, by providing adult victims of sexual violence with a clear opportunity to apply to lift their name suppression,
- **reduce trauma experienced by adult victims of sexual violence**, by supporting victims to navigate the court process to exercise their choice to request to lift their name suppression, and
- **ensure a more fair and robust justice system** that maintains adequate protections for victims of sexual violence.

Section 2: Deciding upon an option to address the policy problem

2.1 What criteria will be used to compare options to the status quo?

The following criteria have been used to assess the options:

Two primary criteria

(1) **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, in particular access to justice and a defendant's right to a fair trial, and

(2) **Reduces trauma and other harm:** makes participating in the justice system less harmful for victims, thus reducing the risk of further trauma.

Three secondary criteria

(3) **Compatibility with pre-existing regulatory systems:** does not represent a significant departure from the current public policy intent of the law,

(4) **Best use of resources:** delivers best value for money and, where relevant, ensures efficient use of court and judicial time, and

(5) **Ease of implementation:** can be implemented quickly to give effect to the desired objectives.

Options that meet the secondary criteria and criteria (2) need to be weighed against, and greater consideration given to, criteria (1). Preserving defendants' fundamental rights *must*

take precedence where (1) and (2) conflict. This supports the robustness of the trial and outcome, which in turn support the broader justice interests (and in turn, the interests of victims).

2.2 What scope will options be considered within?

While stakeholder views have informed the problem definition, time constraints and limited stakeholder engagement mean that we have necessarily focused on actions that can be taken to improve the efficacy of current regulatory provisions, consistent with the underpinning policy intent. Subsequently, we have not been able to consider the full range of options, including the possibility of addressing issues that are more complex or far-reaching in nature.

2.3 What options are being considered?

Option one - Status quo

Under existing legislative provisions sexual violence complainants' identities are automatically suppressed (s201 and s203 of the Criminal Procedure Act 2011). Provision is made for adult complainants to apply to have their name suppression lifted via court order, subject to criteria being met (ss203(3) and 203(4)).

This option helps to meet the objective of a fair and robust justice system by maintaining adequate protections for victims of sexual violence, but has limited ability to support victims to exercise their choice to request that their name suppression be lifted.

Option two – An 'opt-in' approach to name suppression

This option represents a fundamental shift in the approach to complainant name suppression – rather than being automatic, individual complainants would be asked if they would like their name suppressed on a case-by-case basis (c.f. the Canadian approach).

The approach places an emphasis on complainants' ability to exercise free choice, over and above the objective related to a fair and robust justice system that maintains adequate protections for victims of sexual violence. It would not offer complainants' the same level of protection afforded under the status quo, nor would it guarantee the rights and interests of defendants are appropriately considered.

Option three – An 'opt out' model with an explicit process for decision-making (preferred)

Under this option, the Criminal Procedure Act would be amended to ensure that complainants are provided with an explicit opportunity to indicate if they would like to apply to have their name suppression lifted as part of the court proceedings. The final decision would remain with the presiding judge.

This approach would enhance the autonomy of complainants, while ensuring that current provisions remain in place for those aged under 18 years, alongside other victims who would like to retain their name suppression – ensuring adequate protections are in place. It would strengthen and 'codify' the status quo through the introduction of clear processes with legislative backing.

Option four – enhanced information, training and education (non-regulatory)

Under this option, a range of operational actions would be implemented to improve adult complainants' awareness of their ability to apply to have their name suppression lifted. It may include initiatives to raise prosecutors' awareness of existing legal provisions and guidance, together with improvements to information available to complainants (eg on government administered victims' information websites.

This approach would go some way to enhancing the status quo through raising the awareness of key players.

Distributional population impacts of options

The distributional impacts of all options reflect the demographic profile of victims and offenders of sexual violence against adults, Ministry of Justice data provides:

- 86% of people who reported sexual violence victimisations in 2020 were female,
- Māori are overrepresented as victims of sexual violence - 22% in 2020 (although ethnicity data is not always collected from victims and 31% were recorded as 'unknown' in this period), and
- 26% of identified offenders of sexual violence were family members (43% were known to each other but non-family members).

2.4 How do the options compare to the status quo/counterfactual?

	Option 1 – Status Quo	*Option 2 – 'opt-in' model*	*Option 3 – 'opt-out' model (preferred)*	*Option 4 – training and education*
Fairness and justice	0	+ Would retain defendant's right to a fair trial (as retains Judge's ability to apply discretion). Enhances autonomy of victims – may be seen as aspect of a 'just' process – but places others at potential risk.	++ Would retain defendant's right to a fair trial (as retains Judge's ability to apply discretion). Enhances autonomy of victims – may be seen as aspect of a 'just' process – while also retaining privacy protections for those who want it.	0 Likely marginal impact on victims' experience of the justice system. Maintains defendants' rights to a fair trial.
Reduces trauma and harm	0	-- Would not guarantee privacy protections for victims, who may be vulnerable at the time of trial. (Noting that some victims may be highly motivated to exercise their choice as a priority.)	++ Retains overall protections for victims, while also providing a clear choice and process for those who choose to exercise their autonomy.	+ Likely marginal impact on victims' experience of the justice system through improved awareness of option to lift name suppression.
Compatibility	N/A	-- Represents a significant departure from the current approach.	++ Seeks to clarify and strengthen current provisions – does not represent a shift in policy settings.	0 N/A
Use of resources	N/A	-- Would require additional prosecutor and judicial time to make determinations on a case-by-case basis (particularly if most victims choose to 'opt in').	- Impact on court resources/time unknown – more applications to lift name suppression may result in more objections from defence counsel and additional hearings or trial time. Conversely, there may be some downstream savings in court time if more applications to lift name suppression are made as part of the trial process (rather than later).	0 No significant impact.
Implementation ease	N/A	0 Would require complementary education and training to raise awareness of prosecutors, the judiciary, and courts staff.	0 Would require complementary education and training to raise awareness of prosecutors, court staff and potentially the judiciary.	0 Would require appropriate resourcing to support education and training.
Overall assessment	N/A	**-2**	**+1 1/2**	**+1/2**

2.5 What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Option three is the Ministry's preferred approach – strengthening current provisions by amending the Criminal Procedure Act to ensure that adult complainants are provided with an explicit opportunity to apply to have their name suppression lifted as a part of the court proceedings. The approach retains the current safeguards in place for all victims of sexual violence, recognising that for the majority, name suppression is likely to provide welcome privacy at the time of trial. Defendants' rights and interests would remain a consideration for all presiding judges.

Option two, which would require a proactive decision by a complainant to apply for name suppression, represents a significant shift away from the current policy intent and carries related risks of some complainants 'missing out' on the protections currently offered. Non-regulatory approaches (option four) are, on their own, unlikely to achieve the consistency in approach sought.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Police and Crown prosecutors	Marginal ongoing additional costs related to prosecutors taking the time to explain option to complainant and act on direction given (where lifting of suppression requested). Assumption that there will be a high compliance rate (supported by education and information). Low risk of high uptake, resulting in significant additional costs. Low certainty due to lack of consultation with prosecutors.	Monetisable (unquantified)	Low
Court system	Potential marginal ongoing increase in court time for judges to respond to request to lift name suppression – also potential for request to be challenged by defendant, resulting in delays in proceedings and additional court time. Assumption that there will be a high compliance rate (supported by education and information). Risk of significant number of defendants challenging applications. Low certainty due to lack of consultation with judiciary.	Monetisable (unquantified)	Low
Ministry of Justice	One-off implementation costs in the form of costs of preparing and delivering information on changes for prosecutors, defendants and court staff, the judiciary and the media. Information for victims would also be updated (eg sexualviolence.victimsinfo.govt.nz). Assumption that existing information and communication platforms can be used. Medium certainty based on internal engagement.	Monetisable (unquantified)	Medium
Total monetised costs		N/A	
Non-monetised costs		N/A	

Additional benefits of the preferred option compared to taking no action			
Adult complainants/ victims	Ability to give effect to personal choice and 'reclaim power' in a timely way and potential reduction in severity of trauma experienced and long-term impacts. Victims may feel better supported and heard in the justice system. Risk that some victims may be overwhelmed by the need to make a decision. Medium certainty due to documented evidence base.	Non-monetisable (high)	Medium
Justice system	Potential marginal ongoing benefits via reduced court and judicial time, resulting from clear in-trial processes. Assumption that in-court processes can be streamlined and will be relatively straightforward. Risk that this will be offset by longer proceedings resulting from challenges by defendants. Low certainty due to limited implementation planning.	Monetisable (unquantified)	Low
Wider society	Over time, more sexual offenders may be held to account for their crimes and there may be fewer repeat offenders. Society as a whole will benefit in an ongoing way from a reduction in the cumulative costs associated with the poor life outcomes experienced by victims who have been retraumatised. Certainty limited by understanding of medium-longer term impacts.	Non-monetisable (unquantifiable)	Low/Medium
Total monetised benefits		N/A	
Non-monetised benefits		High	

Section 3: Delivering an option

3.1 How will the new arrangements be implemented?

We intend to introduce a Bill this parliamentary term to strengthen the legal protections available to victims of family violence and sexual violence. Transitional arrangements will provide that the new provisions apply only to proceedings for which charges have been filed after commencement.

The proposal related to name suppression codifies existing operational practice, meaning there will be little to no change to current responsibilities for the Crown prosecutor and court registry staff. Subject to consultation with the judiciary, a new step may be added to the process, which could have the judge presiding over the case ensure the complainant has been advised of their options relating to the lifting of suppression orders and confirm their decision.

The Ministry of Justice will be responsible for communicating the codified process by updating court staff guidance, media guidelines, bench books, the Victims Information website, sexualviolence.victimsinfo.govt.nz, and NGOs and specialist service-providers. This will likely be covered by baseline funding, but additional funds may be required to ensure public-facing information is available in te reo Māori and accessible formats.

The net result of this change may result in more complainants seeking to lift their name suppression both before and at the time of trial. There is a risk this could elongate disposal rates, as applications made pre-trial will require additional court proceedings, and applications could be appealed, meaning a conference in chambers is required. This extent of this potential impact on disposal rates is unknown, as is the potential impact on the number of post-trial applications. However, if increased awareness does result in more complainants seeking to lift

suppression before or during trial, this could lessen the number of people who pursue post-trial applications.

3.2 How will the new arrangements be monitored, evaluated, and reviewed?

A monitoring plan will be developed as part of implementation planning. We anticipate that the introduction of a 'codified' process for asking victims if they would like to apply to have their name suppression lifted will support improved data collection (utilising the courts' Case Management System). Business as usual data collation and assessment processes will support implementation monitoring.

Issue three: Litigation abuse

Section 1: Diagnosing the policy problem

1.1 Context/Background

Family Proceedings: the usual case-flow

Separation is a major life event. People are required to decide how to separate assets and, if applicable, how to divide childcare responsibilities in the interim and longer-term. In some cases, family violence may be occurring or begin to occur. Any of these issues can lead to court proceedings which may be heard in different courts (the most common being the district court and family court) depending on the issue.[30]

Family Court proceedings can be lengthy. The average time to resolve Family Court proceedings ranges from 87 days for undefended Oranga Tamariki Act applications, to 537 days for defended Property Relationship Act applications. The time taken to a final hearing depends on things like the type of proceeding (priority is given to those where the subject is care of children), evidence gathering and whether the matter is defended or undefended.

Procedure of a case

Each case has a main claim (eg for an order dividing relationship property) and may have a number of secondary claims. Secondary claims are relatively likely given the time it can take before a case is ready to be heard. They can involve issues such as interim occupation of a property, interim care arrangements or filing of updating or further evidence.

Interlocutory applications may also be made in both the main case and secondary issues, to amend the usual or agreed procedure of the case (such as leave to file further evidence, requesting extensions on time, making amendments to applications and notices of response).

In addition to all of the standard events there is likely to be ongoing engagement with the Court or other party around matters such as availability, supervision arrangements if required, value of property, offers to settle, interim arrangements and payments.

Care of children matters have greater complexity

Unlike issues arising around relationship property, as children's needs and capabilities change over time (eg starting school, eligibility for vaccination etc), new decisions need to be made

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[30] For example; family court to settle relationship property, district court to seek payment of debt relating to the relationship property order or agreement.

and existing decisions may need to be reviewed.[31] This means these cases can see multiple applications over a period of years. This is why the Care of Children Act imposes a bar on substantially similar proceedings being brought for only two years and allows for proceedings to be brought earlier with leave from the Court.

Family Proceedings: when it crosses into litigation abuse

Litigation abuse, however, is where the court system is used as a way of continuing to contact and harass someone, rather than settling disputes.[32]

After separation, litigation abuse might be used to maintain coercive control over a victim; affecting the wellbeing and finances of them and their family.[33, 34] Examples we are aware of include continued requests for extensions or changes, or including potentially unnecessary evidence with the intent to distress the other party.[35]

However, a recent case indicates high volumes of meritless applications and amendments to documents are not enough for the Court to use its power to restrain proceedings. The party also has to be *initiating* applications rather than continuing proceedings.[36]

Access to Justice

The Courts have some legislative and inherent powers to restrain proceedings. However, these are balanced against a requirement to ensure access to the courts and justice.

Access to justice is fundamental to our constitutional system. It ensures that people can access the courts to enforce their rights. In the Family Court system, access to justice allows people to bring concerns regarding the care of children to the court. The impact on children means the consequences of limiting access to justice can be severe. Parties in Family Court proceedings may legitimately need to access the courts multiple times, such as to vary parenting orders as children grow older.[37] Restrictions on access to justice may also deter people from pursuing justice, when they have an important case to be heard.

However, the principle of access to justice is not absolute, and can be balanced against the harm that may be caused by allowing some applications in the court to proceed. Careful consideration is needed to balance the importance of whānau accessing the courts, with the

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[31] Section 16 of the Care of Children Act 2004 outlines that guardians are required to continue to work together after any separation to make decisions on matters important to the child, including but not limited to:

- The child's name and any changes to it;
- Changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians);
- Medical treatments for the child (if that medical treatment is not routine in nature); and
- Where and how the child is to be educated; and the child's culture, language and religious denomination and practice.

Where guardians cannot agree, either one can make an application to the Court for a decision.

[32] Also referred to as paper abuse, procedural abuse, litigation abuse, vexatious litigation and legal abuse.

[33] Kaspiew, Rae, et al. 2015. 'Evaluation of the 2012 Family Violence Amendments' Synthesis Report. *Australian Institute of Family Studies*.

[34] Easteal, P & Fitch, E. 2017. *Vexatious litigation in family law and coercive control: Ways to improve legal remedies and better protect the victims.* 7 Fam L Rev 103.

[35] For example, see *KM v TL* [2016] NZHC 1327 where the judge noted the respondent's 'protracted history of [KM's] unsuccessful attempts to discharge the protection order [TL] has against her', and Johnston, K. 2022. *'The court can't stop him': How a woman's abusive ex-husband filed 100 court claims against her and counting*. Stuff. https://www.stuff.co.nz/national/crime/300665850/the-court-cant-stop-him-how-a-womans-abusive-exhusband-filed-100-court-claims-against-her-and-counting; Johnston, K. 2021. *Mum abused by ex-husband in Family Court litigation denied police help*. Stuff. https://www.stuff.co.nz/national/crime/127291176/mum-abused-by-exhusband-in-family-court-litigation-denied-police-help.

[36] *Khatri* v *Tomar* [2021] NZHC 3091 at [31].

[37] Westlaw New Zealand. CC141.02 "Problems cause by repeated and unmeritorious applications". 141 Power to restrict commencement of proceedings [if vexatious proceedings previously instituted] | Secondary Sources | New Zealand | Westlaw (thomsonreuters.com).

need to ensure that access is not causing additional harm to those affected by the proceedings. The impact on children is an important consideration in this balancing.

Litigation abuse is used as a means of perpetuating family violence

Litigation abuse is a tactic used by one party to gain an advantage over or to harass, intimidate, discredit or otherwise control the other party.[38] It can be a form of coercive control, whereby a party using litigation to cause harm to a victim who has or is leaving a relationship, for example by forcing them into distressing face-to-face contact, attacking the victim's parental rights or visitation times, threatening a child's safety, publicly denigrating the victim's capabilities as a parent, and/or exerting financial abuse against the victim through the process.[39] The law recognises that coercive and controlling behaviours are features of family violence, however it does not explicitly recognise litigation abuse as a form of family violence.[40]

Examples of litigation abuse in family proceedings could include a perpetrator presenting fabricated allegations of parental neglect, filing incessant interlocutory applications, or weaponizing mental health and addiction to present their victim as an unfit parent.[41] Media reporting outlines one case where a traumatic background was repeatedly brought up in a way that was re-traumatising.[42]

Litigation abuse may present via originating applications (eg an application for a parenting order), interlocutory applications (eg seeking an order that property be re-valued for the purposes of resolving a relationship property dispute), responses to applications (eg responding to an application for a protection order), or appeals (eg an appeal against a decision the Family Court refusing to make an order removing a person as a guardian of a child). It can involve a party filing an excessive number of court documents – each time requiring the recipient to be served the documents (notices of proceedings, affidavits etc.) and decide whether they wish/need to respond to preserve their position. Engaging in these proceedings is likely to require the recipient to seek and fund ongoing legal advice and advocacy. Litigation abuse may also present as of threats of proceedings, or costs. [43]

Family violence victims may obtain a protection order which prevents the respondent to the protection order contacting the protected person.[44] However, the justice system still requires them to be served notice of legal proceedings. As the respondent is not contacting the victim themselves and litigation abuse is not included within the definition of 'family violence', the continuous filing of proceedings cannot be considered a breach of a protection order.

In addition to the emotional and financial burden on the victims and those around them, litigation abuse can also impact on the courts' resources, and on judges and court officials' time.[45]

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[38] Australian Institute of Judicial Administration. 2022. National Domestic and Family Violence Bench Book: Systems Abuse.

[39] Gutowski, E.R. 2021. *Coercive Control in the Courtroom: Legal Abuse and its Correlates*. Boston College. Miller S & Smolter N. 2011. *Paper Abuse: When All Else Fails, Batterers Use Procedural Stalking. Violence Against Women*. 7(5). 637-650.

[40] Section 9, Family Violence Act 2018.

[41] Mandel, D, Mitchell, A & Mandel, R S. '*How Domestic Violence Perpetrators Manipulate Systems'*: Why systems & professionals are so vulnerable & 5 steps to perpetrator-proof your system. @SafeandTogether.

[42] Johnston, K. 2021. *Mum abused by ex-husband in Family Court litigation denied police help*. Stuff.

https://www.stuff.co.nz/national/crime/127291176/mum-abused-by-exhusband-in-family-court-litigation-denied-police-help.

[43] Leonetti, C. 2022. *Litigation Abuse in the Family Court Memorandum*. University of Auckland.

[44] Section 90, Family Violence Act 2018.

[45] Zealand Bar Association. 2014. *Submission to Justice and Electoral Select Committee on the Judicature Modernisation Bill* at [34].

Current regulatory framework

The Court has several legislative options to deter and restrain vexatious litigation

Outside of the family violence context, litigation abuse can sometimes be described as 'vexatious litigation'. That is, litigation that is initiated without sufficient grounds where the purpose is to cause annoyance to the other party.[46] Current legislation provides several ways the District or Family Court can manage vexatious litigation, but data on the use of these provisions is limited.

Legislation	Powers
Care of Children Act 2004	• Requirement to seek leave of the court in order to commence substantially similar proceedings (s 139A). • Power to dismiss proceedings that are contrary to the welfare and best interests of the child or are frivolous or vexatious or an abuse of the court's procedure (s 140). • Power to restrict commencement of proceedings under the Act if satisfied a person has persistently instituted vexatious proceedings, except with leave of the court (s 141).
Family Proceedings Act 1980	• Power to dismiss proceedings that are frivolous or vexatious or an abuse of the court's procedure (s 163(1)). • Power to restrict proceedings under the Act if satisfied a person has persistently instituted vexatious proceedings, except with leave of the court (s 163(2)).
District Court Act 2016	• Power to make a limited order restricting commencement or continuation of civil proceedings where 2 or more proceedings about the same matter were or are totally without merit (ss 213 – 216). Leave of the court is required to commence or continuation an application once an order is made. • Power to make an extended order restricting commencement or continuation of civil proceedings where 2 or more proceedings about any matter were or are totally without merit (ss 213 – 216). Leave of the court is required to commence or continue an application once an order is made.
Family Court Rules 2002	• Power to strike out pleadings where there is no reasonable basis for the application or defence or other pleading, it is likely to cause prejudice, embarrassment, or delay, or is otherwise an abuse of the court's process (r 193). • Power to stay or dismiss proceedings where there is no reasonable basis for the proceedings or application, or the proceedings are frivolous or vexatious, or the proceedings are an abuse of the court process (r 194).
District Court Rules 2014	• Power to stay or dismiss proceedings where it discloses no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of the court process (r 15.1).

The Court also has inherent jurisdiction to control proceedings.

It has been accepted that, in addition to powers provided by legislation, the Court retains a power to dismiss proceedings on the grounds that they are vexatious, frivolous or an abuse of process.[47] However, recent case law demonstrates that the Family Court does not have

[46] As defined in the Oxford English Dictionary, "vexatious" in law.

[47] *KM v TL* [2016] NZHC 1327 at [53].

inherent jurisdiction to make orders in respect of proceedings which are yet to have commenced.[48] In that case, depriving an alleged vexatious litigant of the right to commence proceedings was described as an "exceptional step" and a drastic restriction on an individual's civil rights.[49] Brown J said such a power was not an ancillary power and consequently the Family Court would only have power to impose a restriction on an individual's ability to institute proceedings if it is specified in statute.[50]

Current rules do not appear to extend to address litigation abuse

As set out in the table above, the Court's general restraint rules set out in the District Court Act 2016 are only able to be used where two or more proceedings are totally without merit. Section 214 sets out two parts to this test – that the party has "commenced or continued" two or more proceedings (this does not include interlocutory applications or appeals) that are also "totally without merit" (this does not consider the purpose, context, or content of proceedings). The section goes on to outline that:

> *'(3) in determining whether the proceedings are or were totally without merit, the Judge may take into account the nature of any other interlocutory application, appeal, or criminal prosecution involving the party to be restrained, but is not limited to those considerations.'*

The High Court has interpreted commencing or continuing proceedings as not including interlocutory applications or notices of response. They adopted this position based on the legislation which draws a distinction between the "proceedings" and the matters the court can take into account in subsection (3) which include interlocutory applications. The High Court also relied on the legislative history and comments in the Law Commission's 2012 review of the Judicature Act that "the courts should be able to take into account interlocutory proceedings". This has been interpreted as meaning they can be considered, but not form the basis for a restraint.[51, 52]

"Totally without merit" is also a high threshold and commentary outlines that it "has to be given full effect".[53]

Even if a case meets both requirements, judges still have discretion about whether to make the order.[54] In some cases judges have refused on the grounds that other forms of relief (such as striking out applications, making summary judgements, and higher costs awards) were available.[55] Striking out applications requires the recipient to receive the initiating documents and may require them to respond and/or make the necessary applications. Costs awards may require the recipient to make further applications to force payment, where it is not forthcoming.

Having both requirements is a high standard and may not be met in circumstances of litigation abuse. For example, in the case *Khatri v Tomar*, despite 88 applications in total, including a

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48 *KM* v *TL* [2016] NZHC 1327.

49 *KM* v *TL* [2016] NZHC 1327 at [55] citing *Attorney-General v Jones* [1990] 1 WLR 859 (CA) at 865.

50 For example, s 139A of the Care of Children Act 2004.

51 *Khatri* v *Tomar* [2021] NZHC 3091 at [29]-[31].

52 *Khatri* v *Tomar* [2021] NZHC 3091 at [29]-[31].

53 Roderick Joyce (ed) Civil Procedure: District Courts and Tribunals (online ed, Thomson Reuters) at [DA 214] 214 Grounds for making section 213 order | Secondary Sources | New Zealand | Westlaw (thomsonreuters.com)

54 Section 167 of the Senior Court Act reads "A judge *may* make ..." – this was highlighted at [56] in *Khatri* v *Tomar* [2021] NZHC 3091.

55 *Khatri* v *Tomar* [2021] NZHC 3091.

number of arguably meritless interim applications, the court was only able to find that a small number of initiating applications were also without merit.[56]

Current rules for addressing vexatious proceedings only apply to proceedings under specific Acts and do not apply across proceedings. This means, for example, an order restricting the commencement of proceedings under s141 of the Care of Children Act 2004 would only have considered whether proceedings under that Act were vexatious and would only restrict the commencement of further proceedings under that Act. The order would not prevent a litigant from commencing proceedings under other legislation, such as the Family Violence Act 2018 or the Property (Relationships) Act 1976.

1.2 What is the policy problem or opportunity?

In late August 2022, the media reported on a case where a man filed over 88 applications against his ex-partner and was not restrained from filing further proceedings.[57] We were then asked to look at the issue of litigation abuse in family-related proceedings.[58] Given the time constraints and related inability to consult on the issue and its root cause, we have focused on the legislative difficulties that are apparent in case law; the grounds for making an order and the high threshold.[59]

The Court's current powers to restrain all types of family proceedings from being commenced or continued can currently only be based on proceedings that are totally without merit.[60] The District Court and Family Court do not have inherent powers to prevent an alleged litigation abuser from initiating applications.[61] There are some more specific instances in which the Court may require a vexatious litigant to seek leave of the Court before commencing an application.[62] However, these powers are inconsistently available across family law, and the threshold for what is considered vexatious appears to be high; the policy rational being to protect the right to access justice.[63,64] The limited powers of the Court to restrain proceedings which are commenced or continued for the purposes of causing harm mean that, even where litigation abuse is identified, it is often able to continue to be perpetuated.

There is limited data about the prevalence of litigation abuse in New Zealand due to difficulties identifying (both by the victims and the courts), and recording instances of abuse (i.e. cases where litigation abuse is identified cannot be recorded as such on court systems). International evidence suggests that it is widespread,[65] and impacts all aspects of the victim's (and their families) life.[66]

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56 *Khatri* v *Tomar* [2021] NZHC 3091.

57 Johnston, K. 2022. *'The court can't stop him': How a woman's abusive ex-husband filed 100 court claims against her, and counting*. Stuff. https://www.stuff.co.nz/national/crime/300665850/the-court-cant-stop-him-how-a-womans-abusive-exhusband-filed-100-court-claims-against-her-and-counting.

58 Family-related proceedings in this document refers to those defined in s 11(1), Family Court Act 1980.

59 *Khatri* v *Tomar* [2021] NZHC 3091.

60 Section 214, District Court Act 2016.

61 *KM* v *TL* [2016] NZHC 1327.

62 For example, s141 of the Care of Children Act 2004.

63 For example, there are no equivalent provisions in the Family Violence Act 2018 or the Property (Relationships) Act 1976.

64 *KM* v *TL* [2016] NZHC 1327.

65 Vollans, A. 2010. *Court-Related Abuse and Harassment: Leaving an abuser can be harder than staying*.

66 Ward, D. 2016. In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors. *Seattle Journal for Social Justice*. 14 (2), Article 11 and Vollans, A. 2010. *Court-Related Abuse and Harassment: Leaving an abuser can be harder than staying*; Gutowski, E.R. 2021. *Coercive Control in the Courtroom: Legal Abuse and its Correlates*. Boston College.

There are a number of academic articles, websites, and reports from concerned academics, outlining that litigation abuse is an issue.[67] These sources also outline significant financial and emotional impacts on the targets of litigation abuse.[68]

Anecdotal evidence from media reporting suggests that litigation abuse in family proceedings predominantly (but not exclusively) affects women.[69] In 2017, The Backbone Collective reported that 50% of respondents to its survey had experienced litigation or legal abuse.[70] Early discussions with the judiciary indicate that it considers litigation abuse in family proceedings to be of a small scale. However, this may not take account of the spread of litigation across courts, legislation and judges, or the threats of litigation.

In addition to the target, protracted litigation compromises the welfare and best interests of children through "the continuing uncertainty and anxiety generated by frequent Court hearings and professional interventions. The time, energy, and resources of the parties will be drained on (arguably) fruitless litigation at a time when the children are particularly in need of stability, parental attention, and emotional support."[71] Older children may also be aware of, and feel responsible for, the proceedings and resulting impacts on their parents.[72]

Commentary on the topic highlights that "[r]epeat applications are usually counterproductive from the child's point of view in that they deepen the conflict between the parties and exacerbate and prolong the strain and anxiety experienced by the children, hindering their adjustment and returning to normal family life."[73]

Internationally, data on litigation abuse in family proceedings is also limited due to difficulties in identifying and collecting information on instances of the abuse.[74]

Stakeholder perspectives

Legal and judicial perspectives have not been canvassed in any detail due to time constraints. In particular, we have not been able to test our understanding of the issue, assess the scale

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[67] Miller S & Smolter N. 2011. *Paper Abuse: When All Else Fails, Batterers Use Procedural Stalking. Violence Against Women*. 7(5). 637-650. Vollans, A. 2010. *Court-Related Abuse and Harassment: Leaving an abuser can be harder than staying*. Abusive Litigation (legalvoice.org), Litigation Abuse | WomensLaw.org; The Backbone Collective. 2017. *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*.

[68] Miller S & Smolter N. 2011. *Paper Abuse: When All Else Fails, Batterers Use Procedural Stalking. Violence Against Women*. 7(5). 637-650; Leonetti, C. 2022. *Litigation Abuse in the Family Court Memorandum*. University of Auckland.

[69] See the following examples of reported cases of litigation abuse:

- 'The court can't stop him': How a woman's abusive ex-husband filed 100 court claims against her, and counting | Stuff.co.nz
- Mum abused by ex-husband in Family Court litigation denied police help | Stuff.co.nz
- New Zealand's 'brutal' family court system has to change - campaign | RNZ News
- Mother who won significant ruling in Hague Convention case continues legal fight | RNZ News
- A domestic violence victim was ordered to pay her abuser's court fees. Is that fair? | Stuff.co.nz

[70] The Backbone Collective. 2017. *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court*.

[71] Westlaw New Zealand. CC141.02 "Problems cause by repeated and unmeritorious applications" 141 Power to restrict commencement of proceedings [if vexatious proceedings previously instituted] | Secondary Sources | New Zealand | Westlaw (thomsonreuters.com)

[72] Example outlined in Johnston, K. 2021. *Mum abused by ex-husband in Family Court litigation denied police help*. Stuff. https://www.stuff.co.nz/national/crime/127291176/mum-abused-by-exhusband-in-family-court-litigation-denied-police-help.

[73] Westlaw New Zealand. CC141.02 "Problems cause by repeated and unmeritorious applications" 141 Power to restrict commencement of proceedings [if vexatious proceedings previously instituted] | Secondary Sources | New Zealand | Westlaw (thomsonreuters.com)

[74] Ward, D. 2016. In Her Words: Recognizing and Preventing Abusive Litigation Against Domestic Violence Survivors. *Seattle Journal for Social Justice*. 14 (2), Article 11.

of the problem, understand the risks of unintended consequences, or seek views on solutions. However, we have had an initial scoping discussion with the Principal Family Court Judge.

We have also had initial conversations about litigation abuse with some victim-advocates and non-government organisations. These stakeholders call for fulsome reform of the Family Court to provide a separate and specialist response for victim-survivors. They also expressed strong concerns that legislative changes to the current settings will not address the abuse that victim-survivors experience, and that relying on legislation may result in unintended consequences.

1.3 What objectives are sought in relation to the policy problem?

The primary objectives are to:

- protect individuals, including children, from unnecessary harm or distress in family proceedings,
- balance all parties' right to access justice, and
- limit the misuse of court processes to ensure efficient and functioning court systems.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

The following criteria have been used to assess the options:

Two primary criteria

- **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, including any children impacted by the proceedings. In particular, weighing up the benefits of finality against the needs to have access to the court to resolve issues, and
- **Reduces trauma and other harm:** makes participating in the justice system less harmful for victims and any children impacted by the proceedings, thus reducing the risk of further trauma.

Three secondary criteria

- **Compatibility with pre-existing regulatory systems:** does not represent a significant departure from the current policy intent of the law,
- **Best use of resources:** delivers best value for money and where relevant, ensures efficient use of court and judicial time, and
- **Ease of implementation:** can be implemented quickly to give effect to the desired objectives.

Options that meet the secondary criteria identified above and primary criteria (2) will need to be weighed, and greater consideration given to criteria (1). Preserving defendants' fundamental rights *must* take precedence where criteria (1) and (2) may conflict. This supports the robustness of the trial and outcome, which in turn support the broader interests of justice (which should also indirectly support witnesses' broader interests).

2.2 What scope will options be considered within?

Due to time constraints and limited engagement, we have focused on actions that can be taken to address legislative gaps in existing regulatory provisions in the civil restraint regime. This narrow focus has meant that we have not considered a wider range of options regarding abusive behaviour in the court system.

In particular, we have not considered operational options, for example, training for court staff and the judiciary on family violence and coercive control.

We have also not considered other regulatory changes that are outside the scope of the civil restraint regime. We are aware of two possible options of this nature:

- amending the definition of family violence in the Family Violence Act 2018 to specifically include litigation abuse, and
- Including obligations on parties when filing, such as an obligation to file applications in good faith, along with accompanying penalties for breaches.

We consider these options raise complex issues regarding the wider regulatory regime. We have not had time to fully work through the implications of these options and consider the risks of unintended consequences to be too high.

2.3 What options are being considered?

Option one – Status quo

Existing provisions and the courts' inherent jurisdiction provide some powers for judges to restrain parties where there is evidence of vexatious litigation as described in section 1.1 of this RIS. Some laws provide the power to make an order that leave of the court must be sought before commencing new proceedings where a litigant is vexatious (eg the Care of Children Act 2004), while others provide the power to dismiss vexatious proceedings (eg Family Court Rules 2002, which apply to all family proceedings). The District and Family Courts have inherent powers to dismiss proceedings that are vexatious, but do not have inherent powers to deprive an alleged vexatious litigant of the right to commence proceedings.[75]

The current threshold for determining whether proceedings are vexatious and using those powers appears to be high; in *Khatri v Tomar* there were over 88 applications at the time of the application for a civil restraint order.[76] The judge in that case found there were only a small number of initiating applications that were "totally without merit". In addition, the judge found that the court is not able to exercise those powers based solely on interlocutory applications.

Option Two (preferred) – Amend primary legislation to provide power to restrain family-related applications where proceedings are being used to abuse the other party

This option would amend relevant court legislation in two ways:

- enable interlocutory applications and actions that continue proceedings to be used as a basis for making the order, and
- extend the application of the order to allow the judge to make orders restricting the filing of future interlocutory applications or amendments.

These amendments would enable the Court to make a limited effect order or extended effect order restricting the commencement or continuation of family proceedings, mirroring s 213 of the District Court Act 2016 and for those types of orders, extending the restriction to filing interlocutory applications and amending applications.

The order would require the party to seek leave of the court before their application/response is accepted for filing and the notice requirement is activated.

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[75] *KM* v *TL* [2016] NZHC 1327 at [54].

[76] *Khatri* v *Tomar* [2021] NZHC 3091.

A ‘family proceeding’ would be defined as a proceeding under or by virtue of provisions in the Acts set out in s11(1) of the Family Court Act 1980 and would make clear that it includes interlocutory applications and appeals.

The Court would be able to make a limited effect order or extended effect order if, viewing all other proceedings holistically, it considers that the applicant or respondent (as appropriate) is commencing or continuing proceedings as a means to cause harm or distress to the other party.

This option would enable the Court to restrain proceedings where they are being used for the purposes of litigation abuse. It would encourage the Court to take a holistic view of all proceedings between the parties, and enable the Court to use all types of applications (including interlocutory applications), as well as responses, as a basis for making an order which it is not currently able to do. Currently they can take these into account but the order must be based on there being two or more meritless initiating applications. This option balances access to justice rights, as the applicant/respondent (as appropriate) can apply for leave of the court to commence/continue proceedings which have been the subject of an order.

Option Three – Clarify the threshold in order to capture applicants intending to cause harm

This option would amend all relevant family legislation to allow the court to restrain proceedings where litigation has been “used for the purposes of harming the other party”. Currently the Court can only do this where the applications are “totally without merit”. [77]

Focusing on the intent of the party is a lower threshold that allows the court to consider whether the court’s process is being properly used, which is closer to the purpose of the restraint.

This option would not introduce new powers to control proceedings in those pieces of legislation that do not already have such powers (e.g. the Family Violence Act 2018), and would not alter what is defined as a ‘proceeding’ (i.e. would not capture interlocutory applications).

Option Four – Amend primary legislation to provide the power to restrain proceedings under the Family Violence Act 2018

This option would insert new provisions into the Family Violence Act 2018 akin to sections 139A, 140 and 141 of the Care of Children Act 2004, with relevant amendments as required. This would:

- require leave of the court to initiate new proceedings if those proceedings are substantially similar to a proceeding previously filed in the Family Court, and the proceeding is to be commenced less than 2 years after the final direction or order was given in the previous proceeding
- give the court the power to dismiss proceedings if it is satisfied that, taking a holistic view of proceedings, the proceedings have been commenced or continued as a means to cause harm or distress to the other party (instead of replicating current s140 of CoCA), or that the proceedings are frivolous, vexatious or an abuse of the procedure of the court, and
- give the court power to require that a person may only commence proceedings under the Family Violence Act 2018 with leave of the court, where the court is satisfied that a

[77] Section 214, District Court Act 2016 and Section 167 of the Senior Courts Act 2016.

person has persistently instituted proceedings of the kind outlined above, and has given the person a reasonable opportunity to be heard.

This option would enable the court to restrain the commencement of proceedings under the Family Violence Act 2018 where the proceedings have been initiated for the purposes of litigation abuse. There is precedent for this approach under the Care of Children Act 2004. This option balances access to justice rights, as the applicant is given reasonable opportunity to be heard before an order can be made and may apply for leave of the court to commence proceedings which have been the subject of an order.

This option could require parties to sight a document outlining that they must file in good faith and the penalties for not doing so, giving them pause. It would give judges a new relief to use, however this could overlap with the existing ability to order costs.

2.4 How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	*Option Two (preferred) – Amend primary legislation to provide the power to restrain family-related applications where proceedings are being used to abuse the other party*	*Option Three – Clarify the threshold for 'vexatious' to capture applicants intending to cause harm*	*Option Four – Amend primary legislation to provide the power to restrain proceedings under the Family Violence Act 2018*
Ensures fairness and justice	0	+ Access to justice rights preserved by allowing parties to file with leave of the court. Promotes proper use of the courts for the purpose of resolving disputes, rather than perpetuating harm.	+ Access to justice rights preserved by allowing parties to file with leave of the court. Promotes proper use of the courts for the purposes of resolving disputes, rather than perpetuating harm.	+ Access to justice rights preserved by allowing parties to file with leave of the court. Promotes proper use of the courts for the purposes of resolving disputes, rather than perpetuating harm.
Reduces trauma and other harm	0	++ Provides the Court with powers to restrain both the commencement and continuation of all types of family proceedings, protecting victims from the harm of continuous proceedings being brought against them.	+ Gives greater scope for restraining vexatious litigants who do so for the purposes of causing harm. Unlikely to address all aspects of the issue as it will only apply to proceedings that already contain provisions for controlling vexatious proceedings, and will not capture all types of proceedings (eg will not include interlocutory applications).	+ Will allow the court to dismiss and restrain proceedings that are for the purposes of harming the other party or are vexatious. Limited only to proceedings under the Family Violence Act and not other family proceedings which could be used to abuse a party.
Compatibility with pre-existing regulatory	0	+ Mirrors existing provisions for restraining proceedings in the District Court Act 2016. Introduces a new ground for making orders and looks at the intent/effect of the proceedings rather than the substance of proceedings.	- Vexatious is not otherwise defined in legislation. There may be unintended consequences of altering the term 'vexatious', including potential flow-on impacts to non-family proceedings (even if those pieces of law aren't explicitly amended).	+ Mirrors existing provisions for restraining proceedings in the Care of Children Act 2004. Adds additional ground for restricting commencement of proceedings meaning some inconsistency created.
Best use of resources	0	+ A judge will still need to review each application and response; however, less intensive as not ongoing full process as occurs under the status quo.	0 Similar impact as status quo, interpretation of vexatious will change but the process for considering such applications will remain the same.	+ A judge will still need to review each application and response; however, less intensive as not ongoing full process as occurs under the status quo.

	Option One – Status Quo	*Option Two (preferred) – Amend primary legislation to provide the power to restrain family-related applications where proceedings are being used to abuse the other party*	*Option Three – Clarify the threshold for 'vexatious' to capture applicants intending to cause harm*	*Option Four – Amend primary legislation to provide the power to restrain proceedings under the Family Violence Act 2018*
Ease of implementation	0	+ Requires amendments to primary legislation. IT changes required to allow orders to be recorded in Case Management System. There may still be difficulties in identifying where litigation abuse is occurring.	++ Requires amendments to primary legislation. No IT system changes required. May still be difficulties in identifying where litigation abuse is occurring.	+ Requires amendments to primary legislation. IT changes required to allow orders to be recorded in Case Management System. May still be difficulties in identifying where litigation abuse is occurring.
Overall assessment	N/A	+11/2	+1	+1

2.5 What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Option two is the Ministry' preferred option as it directly addresses the legislative gap that recent cases have highlighted; allowing a civil restraint order to be made based on litigant behaviour in all types of proceedings, including interlocutory applications, appeals and responses. This ensures that proceedings can be restrained at any stage, abusers cannot continue to file secondary claims to cause harm, and that those proceedings can be taken into account when determining whether a person should be restrained from commencing/continuing applications.

It is important that any option that is progressed balances the right of access to justice against the right to be safe from harm. Access to justice rights of those committing the litigation abuse will be upheld by ensuring that legitimate applications are still able to be made where the court grants the applicant leave to do so. This puts the judiciary in a type of 'oversight' role that can be likened to ongoing case management.

What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Court system	One-off costs will be incurred in instituting new court processes, including changes to the court Case Management System. Potential marginal ongoing increase in court time for judges to identify and/or consider applications. Assumption that the number of applications is likely to be low, but that some may be significant in scale. Low risk of high uptake, resulting in significant additional costs. Low certainty due to limited implementation planning.	Monetisable (unquantified)	Low
Ministry of Justice	One-off implementation costs in the form of costs for preparing and delivering information on changes for lawyers and the judiciary. Information for victims would also be updated Assumption that existing information and communication platforms can be used. Medium certainty based on internal engagement.	Monetisable (unquantified)	Medium
Total monetised costs		N/A	
Non-monetised costs		N/A	
Additional benefits of the preferred option compared to taking no action			
Adult complainants and their children	Reduced personal costs resulting from emotional and financial harm and other impacts of impacts of litigation abuse. Medium certainty due to documented evidence base on potential harms.	Monetisable (unquantified) Non-monetisable (medium)	Medium

Court system	Potential marginal benefits via reduced court and judicial time spent on cases that are abusive in nature (noting that a pattern will need to be established first). Low certainty due to insufficient information on likely incidence and ability to intervene early.	Monetisable (unquantified)	Low
Wider society	Over time, more offenders may be held to account and there may be fewer repeat offenders. Society as a whole will benefit from a reduction in the cumulative costs associated with the poor life outcomes experienced by victims. Certainty limited by understanding of medium to long term impacts.	Non-monetisable (unquantifiable)	Low/Med
Total monetised benefits		N/A	
Non-monetised benefits		Medium	

Section 3: Delivering an option

3.1 How will the new arrangements be implemented?

We intend to introduce a bill this parliamentary term to strengthen the legal protections available to victims of family violence and sexual violence.

Due to time constraints, we have not considered in detail how to implement the preferred option. While we have a high-level understanding of the implementation considerations that need to be worked through, other implementation challenges may be identified as we further develop the option.

We have identified different options in relation to the specific legislation that should be amended. Further consultation will highlight the best legislative design for the preferred option. Consultation will also clarify the extent to which the preferred option will assist the situation. It may also highlight whether there are other matters that need to be considered.

In addition to the preferred option, as described above, the legislative amendments must provide that:

- judges can make these orders on their own initiative as well as on application,
- respondents must have the opportunity to be heard prior to an order being made, and
- respondents must be able to make applications with the leave of the Court.

We have also identified that the following implementation matters need to be considered to ensure the preferred option is effective:

- information sharing provisions may be needed to ensure judges have enough information to make these orders (to enable a holistic view of all other proceedings). We will raise this implementation question during consultation
- the Case Management System will need changes to capture these orders. This will help with data gaps and ongoing monitoring,
- measures to support training and awareness will need to be available to judges, and lawyers around the new provision and litigation abuse in family proceedings more generally, and
- if a new provision specifically relating to civil restraints in family proceedings, based on separate grounds, is required, then a new court process may need to be set up (this may

depend on the approach taken to the legislative design and whether a new provision is developed or an existing provision is amended).

The net result of this change may result in more applications for a civil restraint order. There is a risk this could elongate case disposal rates generally, as applications will require additional court proceedings, and applications could be appealed. The extent of potential impact on disposal rates is unknown.

The changes may also have budget implications. We will work through this following consultation.

3.2 How will the new arrangements be monitored, evaluated, and reviewed?

A monitoring plan will be developed as part of implementation planning. We anticipate that changes to the Case Management System could capture the number of orders made. We note there will still be difficulties with identifying instances of litigation abuse due to the likely spread of the type of proceedings (relationship property, family violence etc) and court, as well as where the target is unaware that what is happening to them is abuse.