8 October 2019

Attorney-General

BORA Vet: Sexual Violence Legislation Bill — Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/300

1. We have examined version 1.28 of the Sexual Violence Legislation Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act").

2. We advise that while the Bill raises issues relating to the right to a fair and public hearing in s 25(a) and the right to freedom of expression in s 14, the Bill is consistent with the Bill of Rights Act.

The Bill

3. As stated in the explanatory note, the Bill responds to the Law Commission's recommendations contained in two reports relating to court processes and the laws of evidence.[1]

4. The Bill amends the Evidence Act 2006, the Victims' Rights Act 2002 and the Criminal Procedure Act 2011 to improve the experiences of complainants of sexual violence in the justice system, primarily by reducing the risk of re-traumatisation when they give evidence in court, while also preserving the fairness of the trial and the integrity of the criminal justice system. Better experiences for complainants may in turn improve rates of reporting and prosecution, and ensure trust and confidence in the ability of the justice system to deal with sexual offending.

Tightening the rules around evidence of the complainant's sexual experience and disposition

5. "Rape shield" laws place limitations on the ability to lead evidence or cross-examine complainants of sexual violence about their previous sexual experience. Provisions of this kind enhance the fairness of the hearing by precluding a party from presenting evidence that is either misleading or not significantly probative,[2] and to protect the security and privacy of complainants.[3]

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1 Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) and *The Second Review of the Evidence Act 2006* (NZLC R142, March 2019).

2 *R v Darrach* [2000] 2 S.C.R. 443 at [42].

3 *R v Seaboyer* [1991] 2 S.C.R. 577.

6. In Canada, the Criminal Code prohibits evidence about a complainant's past sexual activity when it is used to support inferences that the complainant is more likely to have consented to the alleged assault or is less credible as a witness by virtue of their prior sexual experience.[4] The Canadian Supreme Court has emphasised that the statutory provision is far from being a blanket exclusion, and only prohibits the use of evidence of past sexual activity when offered to support illegitimate inferences. Because the provision excludes material that is not relevant, it does not violate the fair trial protection in the Canadian Charter of Rights and Freedoms.[5] In the United Kingdom, the Youth Justice and Criminal Evidence Act 1999 precludes the court from giving leave to adduce evidence of a complainant's sexual behaviour, or allow cross-examination on it, unless the court is satisfied that limited exceptions apply.[6] The House of Lords has held that the test of admissibility is whether the evidence, and the questioning relating to it, is of such relevance to the issue of consent that to exclude it would endanger the right to a fair trial[7] - an absolute right that cannot be limited.[8] The relevant legislative provision, despite being an exclusionary provision of some breadth, could be duly read to permit a test of this kind, and was accordingly consistent with the fair trial right set out in the European Convention on Human Rights/UK Human Rights Act.

7. As such, it is clear that the right to a fair trial does not provide the defendant with an absolute right to put any evidence or question to a complainant. Section 44 of the Evidence Act currently restricts the admissibility of evidence and questions relating directly or indirectly to a complainant's sexual experience with people other than the defendant. The Judge must give permission before the trial for such evidence to be presented, and can only do so if excluding it would be contrary to the interests of justice.

8. Clause 8 of the Bill extends these restrictions to evidence and questions about the complainant's sexual disposition, and a complainant's sexual history with the defendant - save that evidence of the fact the complainant was in a sexual relationship with the defendant continues to be generally admissible[9] – with the same ability for a Judge to grant permission to adduce evidence or ask questions on these matters if it is of such direct relevance that it would be contrary to the interests of justice to exclude it.[10]

9. Relatedly, clause 8 provides that a party who proposes to offer this evidence is subject to new application requirements in s 44A, by which *reasons* must be given as to why the evidence or question meets the test set out above.

10. The purpose of these provisions is to protect against the re-traumatisation of complainants from unduly invasive questioning, to mitigate the risks around impermissible reasoning based on factors that are irrelevant to the alleged offending, and to ensure a complainant's consent is not inferred. After all, the notion of a fair

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[4] Section 276 Criminal Code.

[5] See *R v Darroch* [2000] 2 S.C.R. 443.

[6] Section 41(3) and (5) of the Youth Justice and Criminal Evidence Act 1999.

[7] *R v A* [2001] 3 All ER 1

[8] *R v A* [2001] 3 All ER 1 at [90] and *R v Hansen* NZSC 7, [2007] 3 NZLR 1 (SC) at [65].

[9] Further, evidence of a complainant's sexual experience with the defendant is also admissible where it is evidence of an act or omission that is one of the elements of the offence or the cause of action in the proceeding.

[10] New section 44(2).

trial involves a triangulation of interests of the accused, the victim and society (discussed further below at [21]).[11]

11. Taking a similar approach as the House of Lords and Canadian Supreme Court, we do not consider these provisions are inconsistent with the concept of a fair trial as guaranteed in s 25(a) of the Bill of Rights Act. In addition to confirming the general admissibility of evidence that the complainant has sexual experience with the defendant, they are not blanket prohibitions but rather have inbuilt flexibility, and operate to ensure that only genuinely and directly relevant evidence of the kind described is admitted (with an explanation as to why that is the case), with that assessment being controlled by the Judge.

12. The new s 44AA also amends s 44(2) to clarify that evidence of a complainant's reputation is inadmissible unless a Judge gives permission in a "specified civil proceeding" in which the complainant's sexual reputation is directly relevant to a cause of action or defence in that proceeding. Needless to say, this does not raise issues in relation to criminal procedure rights under the Bill of Rights Act.

Entitlement to give evidence in alternative ways, including pre-recorded cross-examination

Status quo and provisions of the Bill

13. The ordinary way of giving evidence is by appearing in the witness box to give evidence-in-chief and to be cross-examined. Alternative ways of giving evidence include giving evidence from behind a screen, from outside the courtroom using an audio-visual link, or recording evidence before trial that is then played back in court. The Judge, jury (if any), lawyers and defendant can, however, still see and hear the complainant. As matters currently stand, it is not uncommon in sexual violence cases for applications to be granted for complainants to give their evidence-in-chief in an alternative way, often by a pre-recorded video of their original police interview. But permission for pre-recorded cross-examination has been very rare, due to concerns raised about such a practice by the Court of Appeal in *M v R*.[12]

14. Clause 14 of the Bill seeks to change this position by inserting ss 106C to 106J into the Evidence Act. Section 106D *entitles* a sexual case complainant or propensity witness (adult or child)[13] to give any or all of their evidence (i.e. evidence-in-chief and cross-examination) in an alternative way, including by a video record made before trial.[14] A prosecutor must give a written notice of the intended way/s of giving evidence, having taken the complainant's preferences into account.[15]

15. The Bill also contains several controls on the use of this regime. First, any other party may apply to the Judge for a direction that the complainant or witness give evidence or part of their evidence in the ordinary way or in a different alternative way under s 106D.[16] The Judge must hear from the parties and may receive reports on the effect of giving evidence in the ordinary or alternative way. When considering whether to give a direction, the Judge must have regard to whether the interests of

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11 *R v A* [2001] 3 All ER 1 at [38].

12 *M v R* [2012] 2 NZLR 485 (CA).

13 A propensity witness gives evidence that the defendant has behaved or offended similarly to the offence charged, but is not a complainant in the trial.

14 New section 106D(1)(a).

15 See clause 23, which inserts new Part 2A into the Victims' Rights Act 2002.

16 New section 106F.

justice require a departure from the usual procedure in the particular case, and to the other relevant factors set out in s 103(3) and (4) of the Evidence Act (including the need to ensure a fair criminal trial and the need to minimise the stress on a witness).

16. Specific provisions apply when a party seeks a direction that all or any of the complainant's or witness's cross-examination evidence not be given by video record before trial. A Judge may give a direction that pre-recorded cross-examination not be used only if giving evidence in this way would present a real risk to the fairness of the trial and the risk cannot be mitigated adequately in any other way.[17] In deciding whether this requirement is met, and in addition to any other matter the Judge considers relevant, the Judge must have regard to: whether full disclosure will be, or is likely to be, completed before the making of the video record; whether the witness is likely to need to give further evidence after the making of the video record; whether the video record is unlikely to be made substantially earlier than the trial; and the impact on the complainant or witness of having to give their evidence again (if the application for a direction is made after the video record is made).[18] Further, when assessing whether to make a direction, it must be shown clearly in the circumstances of the case that the following consequences of cross-examination before trial would present a real risk to the fairness of the trial: the video record will require the defence to disclose its strategy earlier than if the evidence was given in the ordinary way or in a different alternative way; the defence will be unable to tailor its cross-examination to a jury's reaction; a video record will involve preparation and other efforts extra to that required for the trial, and it may involve more difficulty for the parties than if the evidence were given at trial.[19]

17. Second, the defendant may apply to the Judge for a direction that the defendant be permitted to further cross-examine the complainant or propensity witness after a video record is made of their cross-examination evidence.[20] The Judge may give the direction only if it would be contrary to the interests of justice not to do so, and must have regard to whether further relevant evidence has come to light and any ways in which that could be addressed without requiring further cross-examination.

18. Third, both parties have a right of appeal against a decision of a Judge granting or refusing to grant an application for a direction that evidence be given in the ordinary way or a different alternative way; and against a decision granting or refusing to grant an application for further cross-examination after cross-examination has been pre-recorded.[21]

Consistency with Bill of Rights Act

19. Provisions that entitle a sexual case complainant or propensity witness to give evidence by way of pre-recorded cross examination raise issues relating to a defendant's right to a fair and public hearing in s 25(a) of the Bill of Rights Act. They involve a defendant "showing his or her hand" before the start of a trial, in circumstances where a defendant is generally entitled to hear the prosecution's opening before taking any step in the trial. Further, as the jury will not be present for the cross-examination, defence counsel will be unable to tailor their cross-examination depending upon the reaction of the jury and the jury will be unable to

[17] New section 106G(1).

[18] New section 106G(2).

[19] New section 106G(3).

[20] New section 106H.

[21] See clause 29, amending ss 215 and 217 of the Criminal Procedure Act 2011.

assess the defendant's reaction to the evidence as it is given. These factors were discussed by the Court of Appeal in *M v R* and described as matters not lightly to be countermanded.[22]

20. As mentioned above at [6], the right to a fair trial is an absolute protection which is not capable of limitation.[23] Thus the question is whether the regime set out in the Bill directs or requires a Judge to conduct an unfair trial. We do not consider this is the case.

21. At the outset, one should be cognisant that in determining what constitutes "fair" under s 25(a) regard must be had to the interests of all parties and the aim of the hearing (i.e. the adjudication of guilt for an offence and protecting the public from harm).[24] The Court of Appeal recognised this in *R v Hines*, holding that an assessment of the values underlying the right to a fair trial must also recognise the public interest in the effective prosecution of criminal charges and protect the criminal process and witnesses and their families from intimidation or other means of influencing their evidence.[25]

22. We acknowledge that the proposed regime changes the 'established' way in which cross-examination occurs and that some may view this as highly undesirable, but it does not change the fact a Judge is ultimately responsibility for ensuring a defendant's fair trial. Indeed the Bill reiterates in several places that it is incumbent on the Judge to ensure the fairness of the trial. That being so, and given the matters discussed below, we cannot conclude the Bill is inconsistent with the Bill of Rights Act.

23. In addition to any matter the Judge considers relevant, the Bill sets out factors the Judge must consider when determining whether pre-recorded cross-examination should be permitted (whether disclosure has taken place, the likely need for further evidence to be given by the complainant or witness after the recording, the timing of the pre-recorded video, and the impact of having to give evidence again). These are some of the factors set out by the Court of Appeal in *M v R* as relevant to determining the appropriateness of pre-recorded cross-examination. The Bill has thus extracted some of the matters highlighted by the Court and explicitly directed Judges to take them into account, providing a right of appeal against a Judge's decision on the matter. The Bill also provides for a Judge to allow further cross-examination after the making of a video record, and a right of appeal in relation to this too. The scheme thus has flexibility rather than rigidity, with the Judge retaining responsibility for fairness. We do not overlook the fact the Court in *M v R* also expressed serious concern regarding the 'showing of the defence hand',[26] the jury not being present for the cross-examination, and potential delays to trials due to the pre-recording procedure; and suggested that it will require a compelling case to overcome these considerations. As noted, the Bill provides that a Judge can have regard to these latter factors if it is clearly shown that they would present a real risk to the

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22 *M v R* and *R v E* [2011] NZCA 303 at [34] and [38].

23 *R v Hansen* NZSC 7, [2007] 3 NZLR 1 (SC) at [65].

24 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (1st ed, Oxford University Press, South Melbourne, 2003) at 666; *R v Darrach* [2000] 2 S. C. R. 443 at [70].

25 *R v Hines* [1997] 3 NZLR 529 at 549.

26 We note that this is not the only circumstance in which there is a degree to which the defendant must "show their hand" prior to trial. Under s 22 of the Criminal Disclosure Act 2008, if the defendant intends to adduce evidence in support of an support, he or she must give written notice to the prosecutor of the particulars of the alibi; and s 23 requires the defendant to disclose to the prosecutor any brief of evidence if he or she proposes to call an expert witness.

fairness of the trial (with such not being presumed). But the Court did not hold that pre-recorded cross-examination is always or inherently unfair, or determine exactly where the threshold lies, and we do not consider the construct of the proposed regime falls below the minimum standard required for a fair trial.

24. We conclude that this regime does not authorise or compel an unfair trial and is therefore consistent with the Bill of Rights Act.

Communication assistance and unacceptable questions

25. Clause 4(2) of the Bill broadens the definition of "communication assistance" in s 4(1) of the Evidence Act to include assistance to a person who "for any reason" requires assistance to understand the court proceedings or to give evidence. This provision is intended to make trials fairer for all parties involved.

26. Clause 9(1) of the Bill amends s 85 of the Evidence Act to provide a mandatory requirement (as opposed to the current discretion) for a Judge to intervene if the Judge considers that a question is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand. Clause 9(2) adds the vulnerability of the witness to the factors that a Judge must consider in making this evaluation. These amendments are designed to encourage and provide a clearer basis for a Judge to protect witnesses from improper questioning, while retaining their discretion to control proceedings as they see fit.

27. We do not consider these provisions raise issues relating to compliance with the Bill of Rights Act.

Encouraging standardised directions to juries about sexual violence myths

28. Clause 16 of the Bill inserts s 126A into the Evidence Act. This section provides that a Judge must give the jury any direction the Judge considers necessary or desirable to address "any relevant misconception" relating to sexual cases that has not already been addressed by evidence. (The only judicial direction currently specified in the Evidence Act about misconceptions relates to good reasons for a victim to delay making, or not make, a complaint.)

29. If there is an issue raised on the facts and evidence, it will be for the Judge to decide the nature of any direction that may be required (to ensure fairness for all parties involved). There is no inconsistency with the Bill of Rights Act.

Better protecting complainants when they present victim impact statements

Alternative manner of presenting the victim impact statement

30. Clause 22 of the Bill replaces s 22A of the Victims' Rights Act. The new provision lists the alternative ways in which all or part of a victim impact statement may be presented to the court at sentencing (if the victim, via the prosecutor, requests an alternative manner). The Judge retains a discretion to control this process and we consider it is consistent with the Bill of Rights Act.

Power to clear the court when victim impact statement presented

31. Clause 28 inserts s 199AA into the Criminal Procedure Act 2011 to allow the Judge, on application by the prosecutor, to clear the court of the public when a victim

impact statement is presented to the court in cases of a sexual nature.[27] Prescribed persons must not be excluded, including the defendant, lawyers, and media. The order may be made only if the court is satisfied the order is necessary to avoid causing the victim undue distress,[28] and certain mandatory factors must be taken into account.[29]

32. Even if an order is made, the decision of the court and the passing of sentence must take place in public. But if there are exceptional circumstances, the court may decline to state in public all of the matters it has taken into account in reaching its decision or determining the sentence.[30]

33. These provisions present prima facie limitations on the right to freedom of expression in s 14 (which includes the right to *receive* information) and the right to a *public* hearing in s 25(a) of the Bill of Rights Act.

34. Section 5 of the Bill of Rights Act permits legislation to impose a limit on a right or freedom if it is reasonable, prescribed by law, and demonstrably justified in a free and democratic society. The criteria for what is reasonable and justified under s 5 are set out in the "*Oakes* test",[31] adopted by the Supreme Court in *Hansen v R*:[32]

    34.1 Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

    34.2 Do the means chosen to achieve the objective pass a proportionality test – that is:

        34.2.1 is the limiting measure rationally connected with its purpose;

        34.2.2 does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose; and

        34.2.3 is the limit in due proportion to the importance of the objective?

35. In our view the prima facie inconsistencies/limitations can be justified under s 5. The provisions serve an important objective of empowering the victim to exercise their rights to convey the impact of the offending to the offender and the court without having to experience undue distress. And there is a rational and proportionate connection between that objective and the limits on the rights.

36. There is a logical connection between reducing the number of people present while a victim explains the impact of sexual offending in a victim impact statement, and reducing undue stress and anxiety to the victim. The measures go no further than reasonably necessary to meet this purpose in that the vacation of the court is limited both in time and substance (i.e. only when the statement is being presented) and in

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27 Relatedly, cl 23 inserts s 28D into the Victims' Rights Act to allow the court, on an application made by the prosecutor under s 199AA of the Criminal Procedure Act, to make an order that the courtroom be cleared while the victim impact statement is presented.

28 New s 199AA(2).

29 New s 199AA(3).

30 New s 199AA(4).

31 *R v Oakes* [1986] 1 SCR 103.

32 *R v Hansen* [2007] 3 NZLR 1 (SC), at [103] and [104].

scope (in that certain people cannot be excluded, including the defendant and media). Subject to any other reporting restrictions, the media will be able to share the information with members of the public outside of the courtroom who are therefore able to "receive" the information for the purposes of s 14 and for the purposes of a public hearing. The Judge retains control over the process and the making of an order. Overall the provisions are a proportionate limit on the right to receive information and a public hearing. They are not, in our view, inconsistent with these rights.

37. We conclude the Bill is consistent with the Bill of Rights Act.

38. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.

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Alison Todd
Senior Crown Counsel

Noted / Approved /Not Approved

Encl

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Hon David Parker
Attorney-General
/ /2019