

Jan Logie

Parliamentary Under-Secretary to the Minister of Justice
(Domestic and Sexual Violence Issues)

Proactive release – Sexual Violence Legislation Bill: approval for introduction

15 November 2019

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	Sexual Violence Legislation Bill- approval for introduction <i>Cabinet paper</i> Office of the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues)	Some information has been withheld in accordance with section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials. <i>The copy of the Sexual Violence Legislation Bill provided to Ministers with this paper has been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the OIA to maintain legal professional privilege. Legislative instruments are publicly available at www.legislation.govt.nz.</i> <i>The departmental disclosure statement attached to the paper is publicly available at http://disclosure.legislation.govt.nz/.</i>
2	Sexual Violence Legislation Bill – approval for introduction <i>Cabinet Minute: LEG-19-MIN-0151</i> Cabinet Office Meeting date: 15 October 2019	Some information has been withheld in accordance with section 9(2)(f)(iv) of the OIA to protect the confidentiality of advice tendered by Ministers of the Crown and officials.

In Confidence

Office of the Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues)

Chair, Cabinet Legislation Committee

Sexual Violence Legislation Bill: approval for introduction

Proposal

1. I seek approval for the Sexual Violence Legislation Bill (the Bill) to be introduced. The Bill will help improve the experiences of sexual violence victims in the justice system, and responds to certain Law Commission recommendations relating to court procedure and evidence law in sexual violence cases. It progresses policy approvals from March and August this year [CAB-19-MIN-0139 and CAB-19-MIN-0427 refer]. The Bill will ensure victims are better supported, respected, and protected from further harm, while upholding the fairness and integrity of the court process.

Policy

Rationale and overarching objectives

2. Around 24 percent of women and six percent of men will experience sexual violence in their lifetime, yet very few feel the court system will resolve their complaint without compromising their recovery. Elements of the trial process can unnecessarily exacerbate the already significant psychological impacts of sexual offending.
3. The Bill amends the Evidence Act 2006, the Victims' Rights Act 2002, and the Criminal Procedure Act 2011. It sits within and complements the range of initiatives being progressed as part of the Government's commitment to addressing sexual violence. The changes are designed to reduce the re-traumatisation sexual violence victims experience in court, lift reporting rates, and bolster confidence in the justice system's ability to appropriately deal with sexual offending.

Tightening the rules around evidence of sexual experience and disposition

4. Currently, the law restricts the admissibility of evidence about a complainant's sexual experience with people other than the defendant. The judge must give permission before the trial for that evidence to be presented, and can only do so if excluding it would be contrary to the interests of justice. These restrictions mitigate risks around the 'tarring' and traumatising of complainants, and impermissible reasoning based on factors that are irrelevant to whether the alleged offending is proved.
5. The Bill will apply these same restrictions to evidence about the complainant's sexual history with the defendant. The restrictions will also apply to evidence about the complainant's sexual 'disposition', which might include, for example, fantasies recorded in a diary. These changes will help to ensure a complainant's consent is not inferred just from the fact they may have thought about, or consented at a different time, to sexual contact in the same way or situation.

Applying rules around sexual reputation, experience and disposition evidence to civil cases

6. Restrictions on evidence about a complainant's sexual experience or disposition currently apply only in criminal proceedings. The Bill applies the same rules in civil cases.¹ The party seeking to present evidence of the complainant's sexual experience or disposition will need to apply for the judge's permission before the case is heard. The judge may grant permission only if the evidence is of such direct relevance to the case that excluding it would be contrary to the interests of justice. The pre-trial timing requirements for the application will be tailored to civil procedure.
7. In criminal sexual cases there is also a complete bar on evidence of a complainant's sexual reputation. This bar recognises that the complainant's sexual reputation will never be relevant to whether a sexual crime has been committed. It prevents that kind of evidence being used to smear the complainant's character or credibility, or to infer a defendant's 'reasonable belief' of consent based on what third parties have thought or said about the complainant's sex life.
8. Without expressing a view on whether evidence of a complainant's sexual reputation could be legitimately presented in a civil case, the possibility remains of civil litigation concerning the reputation itself. The Bill therefore applies the bar on reputation evidence to civil cases, but with a narrow exception applying where the alleged reputation is a core ingredient of the claim. This exception contemplates, for example, a defamation case where the defence of truth may be advanced (that is, that the reputation itself exists, rather than that the reputation is accurate). The fact of the reputation may *not* be used:
 - 8.1. to prove the truth of its contents (for example, it may not be argued that the complainant has many sexual partners just because people think so); nor
 - 8.2. to support a claim of consent or reasonable belief in consent (for example, a defendant cannot argue that it was reasonable to believe the complainant was consenting on the basis that the complainant is 'known' to often have sex with acquaintances).
9. If the exception applies, the admissibility of the reputation evidence will be subject to the heightened relevance and pre-hearing application requirements applying to sexual experience and disposition evidence (described in paragraph 6). This still represents a stricter admissibility threshold than the status quo in civil cases.

Requiring more detail in applications to admit sexual experience and disposition evidence

10. Applications to present evidence of sexual experience and disposition are required prior to trial, to ensure that the complainant can be as prepared as possible for what they may be asked at trial. Currently, the application is not required to include the reasons claimed in support of admissibility. The Bill adds in this requirement to ensure that the application can be dealt with efficiently.

¹ Examples of civil cases where evidence of a complainant's sexual reputation, experience, or disposition may be argued to be relevant include a claim for damages for sexual assault, a defamation claim, or a professional disciplinary dispute.

Encouraging alternative ways of giving evidence, including pre-recorded cross-examination

11. Alternatives to giving evidence in front of the entire courtroom, from the witness box, can help to shield witnesses from the most traumatic elements of the process. Common alternatives include the witness giving their evidence from behind a screen or from outside the courtroom using an audio-visual link, or recording their evidence before the trial so it can be played back in court.
12. Children under 18 are already entitled to give their evidence in alternative ways, but the prosecution must apply to the court and satisfy statutory criteria before any adult is permitted to do so. It is not uncommon in sexual violence cases for complainants to give their evidence-in-chief by way of pre-recorded video of their original police interview. However, court precedent has meant pre-recorded *cross-examination* (questioning by the defence lawyer) is used extremely rarely.
13. Under the Bill, sexual violence complainants have a specific right to be consulted on the way they wish to give evidence. Sexual violence complainants and propensity witnesses² will be entitled to give all their evidence in alternative ways. For child complainants and propensity witnesses, the provisions mirror the existing policy position that children are presumed to give their evidence in an alternative way, and an application is required if they wish to use the ordinary way. Once the prosecutor has notified the court of how the complainant or propensity witness is to give evidence, the defence can seek a court direction that a different way is used.
14. The Bill is clear that pre-recording cross-examination evidence is one of the permitted alternative ways that may be elected. To address concerns raised by the defence bar during policy consultation, and to ensure pre-recorded cross-examination can be implemented effectively, the Bill includes extra safeguards and procedural requirements governing how it will work. It specifies:
 - 14.1. the judge may order that a different way of giving evidence is used only if pre-recording the cross-examination would present a real risk to the fairness of the trial, and that risk cannot be mitigated in any other way;
 - 14.2. factors the judge must consider when deciding whether to make that order, including whether disclosure requirements have been or will be met before the recording is made and whether the witness is likely to need to give further evidence after the recording;
 - 14.3. factors that are not relevant to whether pre-recorded cross-examination presents a real risk to the fairness of the trial, unless they have a significantly greater impact than that which will necessarily be the case. The factors include the defence having to disclose some of its strategy prior to trial, and being unable to tailor its questions to the jury's reaction. These factors are inherent to pre-recorded cross-examination and should not be used routinely to frustrate the policy intent of the amendments;

² 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. Like other witnesses, they can give their evidence in alternative ways on application.

- 14.4. defence counsel may further cross-examine the complainant after the recording has been made only if it would be contrary to the interests of justice not to, having regard to the fairness of the trial and the effect on the complainant of giving evidence twice. Any further cross-examination must occur at the trial, to minimise the risk that the complainant is required to give even more evidence afterward; and
- 14.5. judges' decisions about whether pre-recorded cross-examination is to be used, and whether any further cross-examination may occur after the recording has been made, can be appealed before the trial with the appeal court's leave. This will help ensure consistency and bolster confidence in the new processes, especially in the early stages of implementation.

Requiring evidence to be recorded

15. The Bill requires sexual violence complainants' and propensity witnesses' evidence to be recorded (unless it has already been recorded prior to trial). The recording could be used, if appropriate, in any subsequent retrial as an alternative way of giving evidence, potentially avoiding the need to give evidence again.

Expanding witnesses' entitlements to communication assistance

16. Communication assistance (for example, a speech language therapist) can help witnesses understand what is being asked of them and give better quality evidence. Currently, witnesses are entitled to communication assistance only if they have insufficient proficiency in English or a 'communication disability'. The Bill allows communication assistance to be given to any witness who requires assistance (that is, not just witnesses in sexual cases) to understand court proceedings or give evidence, for whatever reason.

Requiring judges to intervene in improper questioning

17. Existing law permits judges to disallow, or direct that a witness is not obliged to answer, any question they consider to be inappropriate. The Bill changes this to a requirement to intervene. It also includes the witness's vulnerability as one of the factors the judge may consider in determining whether the questioning is inappropriate. These amendments are designed to encourage and provide surer footing for judges to protect witnesses from improper questioning, while retaining their discretion to control proceedings as they see fit.

Encouraging standardised directions to juries about sexual violence myths

18. There are a range of commonly-held myths and misconceptions about the nature of sexual violence and how 'real' victims and perpetrators act. While judges can direct the jury on the law at any time, the only judicial direction currently specified in the Evidence Act about misconceptions in sexual offence cases conveys there can be good reasons for a victim to delay making, or not making, a complaint.
19. The Bill provides that judges must give directions to the jury about any myth or misconception relating to sexual violence that they consider relevant to the case,

unless it has already been adequately addressed in evidence. It provides a non-exhaustive list of myths or misconceptions that may be relevant, including that:

- 19.1. a complainant is at least partially responsible for sexual offending if they dress provocatively, act flirtatiously, drink alcohol, or take drugs;
 - 19.2. sexual offending is committed only by strangers, is less serious when committed by a partner or acquaintance; or
 - 19.3. sexual offending involves force, or the infliction of physical injuries.
20. The Law Commission also recommended that the judiciary develops and publishes sample judicial directions about those misconceptions. Subject to the Chief Justice's views about progressing this recommendation, officials will work with the Institute of Judicial Studies with the aim of having the sample directions in place by the time the Bill comes into force. Standardised, publicly accessible directions for judges to use will help to ensure legitimate reasoning by the jury, as well as transparency and consistency across cases and courts.

Better protecting sexual violence victims when they present victim impact statements

21. Apart from giving evidence, the only other time a victim addresses the court is when they choose to give a victim impact statement at the offender's sentencing. It can be empowering for a victim to speak about how the offending has affected them, but it can also be a traumatic experience. This is especially so when the statement contains intimate and sensitive information, and must be read in front of the defendant and in a court full of strangers.
22. The Bill amends the Victims' Rights Act to make it clear that victim impact statements can be given in alternative ways, such as via audio-visual link or by pre-recorded video. It also amends the Criminal Procedure Act to allow judges to clear the court of the public, if necessary to avoid undue distress to a sexual violence victim when their victim impact statement is read.

Providing appropriate facilities for sexual violence victims at court

23. Going to court is a stressful experience for any witness. For sexual violence complainants especially, encountering the defendant or their supporters, or waiting to give their evidence in uncomfortable rooms or with strangers, can add significantly to that stress and the trauma of having to relive their experiences.
24. Amendments to the Victims' Rights Act require all reasonable efforts to ensure appropriate facilities are available for sexual violence victims when they attend court. In carrying out this duty, the Secretary for Justice will need to consider victims' physical and emotional comfort and safety, and the physical constraints posed by the court. The amendments provide possible examples of appropriate facilities, including alternative waiting areas and bathrooms away from the general public.

Making minor and technical changes

25. The Bill contains several amendments that support or are consequential to policy decisions and amendments. These include:
 - 25.1. new and amended definitions in the Evidence Act and Victims' Rights Act;
 - 25.2. clarification of the applicability of existing provisions; and
 - 25.3. transitional provisions preserving existing laws for proceedings that are underway before the Bill comes into force.
26. The Bill also makes minor and editorial changes, to ensure the clarity and workability of the statutory framework. They include, for example, replacing references to "audiotape or videotape" with "audio record or video record" in the Victims' Rights Act. These terms are technology-neutral, and more consistent with the language used for analogous purposes in other Acts.

Aspects of the bill that are likely to be contentious

27. During policy development, strong concerns were expressed by the defence bar, both within and outside Government, about pre-recorded cross-examination. These concerns centred on the potential risk to defendants' fair trial rights, the potential for complainants needing to give further evidence after the recording is made, and the significant change to the way criminal trials currently operate. As outlined at paragraph 14, the Bill sets out a procedural framework with safeguards that recognise and mitigate legitimate risks to the fairness of the trial, and also ensure the policy of enabling pre-recorded cross-examination can be effectively implemented.
28. To a lesser extent, other amendments the Bill progresses may also attract criticism from defendant-oriented stakeholders. Reducing the harm that the justice process can cause victims necessarily involves shifting existing practice. I am confident the Bill strikes the right balance: it preserves trial fairness, while recognising the legitimate needs and interests of victims and bolstering the public's trust and confidence in the justice system.

Impact analysis

29. A regulatory impact statement (RIS) was prepared in accordance with the necessary requirements and submitted when Cabinet policy approvals were sought [CAB-19-MIN-0139 refers]. The Ministry of Justice's independent quality assurance panel considered the RIS met the Treasury's quality assurance criteria.
30. Two proposals – the application of section 44 of the Evidence Act to civil cases, and the additional requirements for applications under section 44A of that Act (outlined above at paragraphs 6 – 10) – were added to the Bill after the RIS was completed. Treasury confirmed the proposals were exempt from regulatory impact assessment requirements as they present only minor impacts to businesses, individuals, or not-for-profit entities.

Compliance

31. The Bill complies with:

31.1. the principles of the Treaty of Waitangi:

31.1.1. Policy development included consideration of the social context and disproportionate effects on Māori of both sexual violence and the courts. Studies have found that Māori women and girls are nearly twice as likely to experience sexual violence in New Zealand as the general population. In light of this over-representation, the Bill aligns with the Government's ongoing commitment to honour our Treaty obligations, in particular to protect Māori interests under Article Three.

31.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993:

31.2.1. In line with standard practice, the Crown Law Office will be advising the Attorney-General on the Bill's consistency with NZBORA.

31.2.2. I note the policy proposal around pre-recorded cross-examination has been argued to limit fair trial and criminal procedural rights protected by NZBORA. The Bill's content has been informed by a continued focus on criminal procedural rights, and the use of pre-recorded cross-examination is subject to an explicit overriding consideration of ensuring a fair trial. I consider any remaining limits on defendants' NZBORA rights are demonstrably justified in light of the importance of reducing the re-traumatisation of sexual violence victims and the success of pre-recorded cross-examination in other jurisdictions.

31.2.3. Allowing judges to clear the court for the reading of sexual violence victims' impact statements may be seen to limit the freedom of expression (which includes the freedom to seek and receive information), or the right to a fair and public hearing. I consider any such limitation is justified, again considering the importance of the provision's intent and the societal impact of court processes that do not adequately protect sexual violence victims from further harm.

31.3. the disclosure statement requirements (a statement is attached to this paper):

31.4. the principles and guidelines set out in the Privacy Act 1993:

31.5. relevant international standards and obligations:

31.5.1. sexual violence disproportionately affects more vulnerable members of our society. Improving the court system's response to sexual violence victims assists Government to meet human rights obligations, including the Conventions on the Rights of the Child, the Rights of Persons with Disabilities, and the Elimination of Discrimination Against Women; the International Covenant on Civil and Political Rights; and the Universal Declaration of Human Rights.

31.6. the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Consultation

32. A wide range of agencies and stakeholders, including the Chief Victims Advisor, victim-focused NGOs, and legal professional organisations, were consulted on some or all of the policy proposals the Bill will implement. Consultation on proposals stemming from Law Commission's 2019 review of the Evidence Act was limited to Government, noting the Commission consulted extensively in developing its report.
33. The following agencies and organisations were consulted on this paper and Bill:
 - 33.1. Crown Law, New Zealand Police, the Ministries of Social Development, Health, and Business, Innovation and Employment, Department of Corrections, ACC, Ministries for Women and for Pacific Peoples, Te Puni Kōkiri, Office for Disability Issues, Oranga Tamariki, the Treasury, the Joint Venture Business Unit, and the Chief Victims' Advisor. The Law Commission and Department of the Prime Minister and Cabinet have been informed.
 - 33.2. The government caucus and other parties represented in Parliament.
34. No further consultation outside Government has occurred on this paper or Bill. I consider the select committee process will provide an appropriate avenue for public and organisational feedback on, and input into, the Bill.

Binding on the Crown

35. The Bill binds the Crown.

Creating new agencies or amending the law relating to existing agencies

36. The Bill does not create new agencies or amend law relating to existing agencies.

Allocation of decision making powers

37. The Bill does not affect the allocation of decision-making powers between the executive and courts or tribunals.

Associated regulations

38. New and amended regulations will be needed to support the Bill's amendments to the Evidence Act. These will be developed during the Bill's passage through Parliament, and in conjunction with the planned review of the Evidence Regulations 2007 to which Cabinet recently agreed [CAB-19-MIN-0427 refers].
39. In particular, regulations are required to provide for the detail and process around pre-recording of cross-examination prior to trial, and the recording of evidence in court. They will include rules for how and by whom the videos are made, edited, accessed, used, securely stored, and played to the court. The nature of those requirements will be more precisely determined once the final shape of the Bill, and detailed service design, becomes clearer.

Other instruments

40. The Bill does not include any provisions empowering the making of deemed legislative or disallowable instruments.

Definition of Minister/department

41. The Bill does not contain a definition of Minister or Department. It employs the existing definition in the Victims' Rights Act of 'Secretary' (for Justice).

Commencement of legislation

42. The Bill will come into force on 1 July 2021, or 6 months after Royal assent, whichever is later. Several amendments involve complex process changes, and delayed commencement will ensure all stakeholders and services are prepared for a smooth implementation based on the finalised amendments.

Parliamentary stages

43. I propose the Bill is introduced, and referred to the Justice Committee, as soon as possible following Cabinet approval, s9(2)(f)(iv)

Proactive Release

44. In consultation with the Minister of Justice, I propose to proactively release this paper once the Bill has been introduced to the House, with any necessary redactions.

Recommendations

45. I recommend that the Committee:
 1. s9(2)(f)(iv)
 2. note that the Bill is designed to improve the court experiences of sexual violence victims, through changes to processes and evidence laws that both reduce re-traumatisation and maintain the fairness and integrity of the justice system;
 3. approve the Sexual Violence Legislation Bill for introduction, subject to the final approval of the government caucus' and sufficient support in the House of Representatives;
 4. agree that the Bill is introduced in October 2019 or as soon as practicable thereafter;
 5. agree that the Government propose the Bill is:
 - 5.1. referred to the Justice Committee for consideration; and
 - 5.2. s9(2)(f)(iv)

Authorised for lodgement

Hon Jan Logie

Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues)



Cabinet Legislation Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Sexual Violence Legislation Bill: Approval for Introduction

Portfolio Justice (Domestic and Sexual Violence)

On 15 October 2019, the Cabinet Legislation Committee:

- 1 **noted** that in April 2019, the Cabinet Social Wellbeing Committee agreed to a package of legislative and operational changes to improve the experience of sexual violence victims in the justice system [SWC-19-MIN-0031];
- 2 s9(2)(f)(iv)
- 3 **noted** that the Bill is designed to improve the court experiences of sexual violence victims, through changes to processes and evidence laws that both reduce re-traumatisation and maintain the fairness and integrity of the justice system;
- 4 **approved** the Sexual Violence Legislation Bill [PCO 21824/1.29] for introduction, subject to the final approval of the government caucus' and sufficient support in the House of Representatives;
- 5 **agreed** that the Bill be introduced in October 2019, or as soon as practicable thereafter;
- 6 **agreed** that the government propose that the Bill be:
 - 6.1 referred to the Justice Committee for consideration;
 - 6.2 s9(2)(f)(iv).

Gerrard Carter
Committee Secretary

Hard-copy distribution: (see over)

Present:

Rt Hon Winston Peters
Hon Andrew Little (Chair)
Hon Iain Lees-Galloway (part of item)
Hon Tracey Martin
Hon Kris Faafoi (part of item)
Hon Eugenie Sage
Jan Logie MP

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

Hard-copy distribution:

Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence Issues)

RELEASED BY THE PARLIAMENTARY UNDER-SECRETARY TO THE MINISTER OF JUSTICE