Te Tari Ture o te Karauna
Crown Law

18 November 2021

Attorney-General

Supplementary Order Paper for the Sexual Violence Legislation Bill [PCO 21824-5/1.29] – Consistency with New Zealand Bill of Rights Act 1990
Our Ref: ATT395/300

1. The Minister of Justice seeks to introduce a supplementary order paper (**SOP**) to amend the Sexual Violence Legislation Bill (**the Bill**). This advice considers the consistency of the SOP with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**) and concludes that the SOP is consistent with the Bill of Rights Act.

Background

2. The Bill was introduced in November 2019 and responds to the Law Commission's recommendations in two reports relating to court processes and the laws of evidence.[1] It 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.

3. You received and approved advice from this office about consistency of the Bill with the Bill of Rights Act in October 2019. A copy of that advice is **attached** for your convenience.[2]

4. For the purposes of this advice, the key feature of the Bill is to create an entitlement for complainants in sexual cases or propensity witnesses to give any or all of their evidence in an alternative way, including through a video recording made before the trial. See paragraphs 13 to 24 of the attached advice for further detail about these changes. The Bill also restricts the use of evidence about a complainant's sexual history with the defendant by requiring such evidence to meet a heightened relevance test to be admissible.

5. The progress of the Bill was delayed due to COVID-19 and had its second reading in February 2021. The SOP proposes:

---

1 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 13 March 2019); Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 7 December 2015).

2 Also attached is a copy of the letter you wrote to the Justice Committee after it raised concerns about the consistency of the Bill with s 25(e) and (f) of the Bill of Rights Act. As you observed in that letter, while it is possible to view some of the aspects of the Bill through the lens of those rights, the same issues engage the overarching, fundamental (and absolute) right to a fair trial. The same reasoning and analysis applies, whatever lens is applied.

Level 3 Justice Centre 19 Aitken Street PO Box 2858 DX SP20208 Wellington 6140 New Zealand
Ph: +64 4 472 1719 Fax: +64 4 473 3482
www.crownlaw.govt.nz

5.1 amendments to the regime governing the pre-recording of evidence by:

5.1.1 Providing for "exceptional" cases when evidence may be pre-recorded a *second* time before trial;

5.1.2 Providing for regulations to be made about the recording process, and in particular who may be present. Notably, it is envisaged the regulations may authorise judges to limit or place conditions on the presence of the media when evidence is being pre-recorded;

5.1.3 Providing for the automatic suppression of any video record evidence until the trial; and

5.2 modifications to the definition of "sexual reputation", and moving it within the body of the Evidence Act.

6. We address each of these proposed amendments in more detail below.

7. The SOP also proposes numerous less significant amendments that do not raise any Bill of Rights Act concerns and are not discussed further in this advice.[3]

Amendments to alternative ways of giving evidence for complainants in sexual cases and propensity witnesses

Further cross-examination by video recorded before the trial

8. Section 106 of the Evidence Act covers the use of video record evidence as an alternative way for a witness to give evidence at the trial, typically as their evidence-in-chief. The Bill as introduced broadens the scope of s 106, and adds additional provisions, to *entitle* certain types of witnesses (sexual case complainants or propensity witnesses, both adult and child) to give *all* of their evidence by way of video record made prior to trial, including cross-examination.[4] However, the defence could apply to further cross-examine that witness, in certain circumstances where it was required. The Bill as introduced provided that any further cross-examination would occur during the trial itself.

---

3 These include:

- Consolidating offences and penalties relating to video evidence, which currently sit across the Evidence Act and Regulations, and ensure they cover pre-recorded cross-examination as well as evidence-in-chief - cl 15A.
- Ensuring pre-recorded cross-examination is protected in cases outside the criminal jurisdiction and Family Court, in the same way as EVIs are – cl 15B. In those cases, parties will be able to access all video evidence only if a judge has ordered disclosure, after considering specified factors
- Removing a transitional provision proposed in one of the new sections proposed by the Bill on the basis that it is no longer necessary or desirable – cl 14 of the SOP which amends s 106IA(4) proposed in the Bill.
- Updating s 119A of the Evidence Act which sets out the requirements for disclosure of video records in proceedings other than under s 106 or Family Court Proceedings to reflect the broader use of pre-recorded video evidence proposed in the Bill – cl 15B of the SOP.
- Deferring the commencement of the more significant amendments, including those relating to video recorded evidence, in the bill until the earlier of 12 months after enactment or Order in Council. The purpose of this is to allow time for new regulations to be consulted on and put in place, to facilitate the new video evidence regime.

4 This feature of the Bill was discussed in our advice on the Bill as introduced at paragraphs [13]-[24]. The SOP provides that this entitlement will come into force the earlier of 12 months after Royal Assent or an Order in Council.

9. Clause 14 of the SOP proposes to provide that further cross-examination can also occur, in "exceptional circumstances", by video record before the trial, instead of at the trial itself. A Judge may make this direction if "satisfied that exceptional circumstances make it impossible or impracticable for the further cross-examination evidence to be given at trial". The "exceptional circumstances" criterion is a high threshold. The example provided in the Cabinet paper of when this threshold might be met was if the witness had a terminal illness and therefore it was unlikely they would be available to be cross-examined at the hearing.

10. We do not consider this amendment creates any Bill of Rights implications not already considered during the initial advice you were provided in respect of the Bill as introduced. The principal concerns identified regarding this aspect of the Bill was that pre-recorded cross-examination would require the defendant to "show his or her hand" before the start of the trial, in circumstances where a defendant is generally entitled to hear the prosecution's opening before taking any steps. The inability to tailor cross-examination to the reaction of the jury, or for the jury to observe the defendant's response to the cross-examination when it first unfolds, were also identified. However, because the pre-recording regime is subject to judicial discretion and flexibility, the regime does not infringe upon s 25 of the Bill of Rights Act, or the fundamental right to a fair trial.

11. We do not consider clause 14 of the SOP would alter this position. It provides for exceptional cases when as a matter of "impossibility" or "impracticability", a second round of pre-recorded cross-examination is necessary. The issue is one of judicial discretion, bearing in mind the practical conditions of the particular trial. Any such cross-examination would, in any event, take place after a first round of pre-recording had already occurred. Accordingly, we consider the proposed amendment is consistent with fair trial rights and the Bill of Rights Act.

Governor-General regulations

12. Clauses 16A and 16B of the SOP propose to clarify and broaden the Governor-General's powers to make regulations relating to video record evidence under s 201 of the Evidence Act. Relevantly for this advice, cl 16B of the SOP enables regulations to be made that authorise a Judge to restrict attendance by, or exclude, media at, pre-trial hearings at which a sexual offence complainant or a propensity witness gives evidence.

13. Clause 16B engages ss 14 and 25(a) of the Bill of Rights Act, which respectively protect the freedom to receive information, and the right to a fair and *public* hearing. As to s 14, the ability of media to attend and report on court proceedings is an important aspect of its freedom of expression. As to an accused person's right under s 25(a), the ability of media to attend trials from which the public are otherwise excluded – as is currently possible under s 199(1)(g) of the Criminal Procedure Act 2011 – is an important safeguard of open justice. The media can be the eyes and ears of the public at such hearings. In that sense the rights of media in s 14 and the right of an accused to a public hearing in s 25(a) significantly overlap.

14. We do not consider either right is infringed by cl 16B, however, for the following reasons:

14.1 The default setting in every case where a complainant gives evidence is that media are entitled to attend. The regulations that cl 16B empower will enable a judge to impose restrictions or an exclusion on media presence at the making, before trial, of a video record of a sexual case complainant's or propensity witness's evidence.

14.2 That regulation-making power will be read as subject to the Bill of Rights.[5] This means that the regulations will need to be framed so as to empower only such decisions by a judge as are consistent with s 14 and s 25(a). Further, any judge then exercising the powers so conferred will similarly need to make only such decisions as are consistent with those rights.

14.3 So far as the regulation-making power in cl 16B is concerned, then, the relevant question for assessing its consistency with the Bill of Rights is whether the fact that cl 16B contemplates there being at least *some* cases where media may be excluded or restricted means it is facially inconsistent with s 14 and s 25(a).

14.4 We do not consider that to be the case.

14.5 The right of media to receive information by being present in the courtroom during a public hearing – is acknowledged to be of great importance. It is recognised as a component of the principle of open justice.[6]

14.6 But that general principle of open justice is recognised to permit exceptions for good and sufficient reasons.[7] That has long been explicit in the common law of criminal procedure.[8] More recently, it is explicit in article 6(1) of the European Convention on Human Rights which says that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

14.7 In New Zealand, s 5 of the Bill of Rights similarly permits limits on the affirmed rights so long as they are prescribed by law and demonstrably justified in a free and democratic society. The right to freedom of expression and the right to a public trial are not in the category where it is said that no limitation is possible. (Plainly, the right to a "fair" trial *is* an

---

5 See *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

6 See *A v British Broadcasting Corporation* [2015] 1 AC 588 at paragraphs [23] to [41].

7 In *Canadian Broadcasting Corporation v New Brunswick Attorney-General* [1996] 3 SCR 480 the Supreme Court of Canada upheld the constitutionality of s 486(1) of the Canadian Criminal Code which allows a court to be closed when such was "in the interests of the proper administration of justice". The Court observed that any use of the power is discretionary and so must conform to the requirements of the Canadian Charter of Rights and Freedoms – meaning that there must be a sufficient evidentiary basis of weighty reasons for displacing the general rule and that any exclusion or restrictions be no more than proportionate to those reasons (at page 515-6, paragraph 69 to 72).

8 See *A v British Broadcasting Corporation*, above, at [27] et seq, observing that the courts have had a recognised inherent jurisdiction since the 17th century to determine the circumstances in which it is justified in departing from the principle of open justice.

absolute right but it is recognised that any trial that, for good reason, is not wholly in public is not, for that reason, less than "fair".)[9]

14.8 So, restrictions on or the exclusions of media may be justified in particular cases. As such, regulations empowering such restrictions or exclusions are not inherently inconsistent with s 25(a) and s 14.

14.9 The salient point is that the proposed regulations, and exercises of judicial power thereunder, will need to respect the importance of the rights in s 14 and s 25(a) and ensure the proportionality of any exclusions or restrictions imposed in a particular case. That will entail considering any application for restriction or exclusion of members of the media in light of the importance of those rights, and ensuring that any exclusions or restrictions made are justified as being necessary and proportionate to the proper administration of justice in sexual offence cases.

14.10 The regulations can be expected to set out the applicable considerations for making decisions that are consistent with ss 14 and 25(a).

14.11 Clause 16B does not empower regulations to be made about media attendance at the trial itself when the evidence will be replayed (at which time no restrictions will operate).

14.12 The ability of media to disseminate publicly the information in a video record will be limited until trial by operation of automatic suppression rules, designed to protect fair trial rights (see paragraphs [23]-[25] below). That factor does not directly justify any restriction or limit on media when a video record is being made, but it provides context. While media who are present may *receive* the information at the pre-trial phase, their ability to share it is limited until the time of trial (when no limitations on attendance apply), or when the charges are otherwise determined.

14.13 The right to a fair and public hearing in s 25(a) operates within the same context, meaning that the protection of a defendant's fair trial rights similarly requires the pre-recorded evidence remain suppressed until the time of trial. Limits on the number of media who may attend at the pre-trial setting will not, in that context, jeopardise a defendant's overall right to a fair trial.

15. For these reasons, we consider Clause 16B is consistent with the Bill of Rights Act.

Suppression

16. As referred to above, the SOP proposes to add a new section to the Criminal Procedure Act to create an automatic suppression on the publication of pre-recorded video evidence until the evidence is presented at trial or until the

[9] Neither the United Kingdom Supreme Court in *A v British Broadcasting Corporation* (above, note 11) nor the Canadian Supreme Court in *Canadian Broadcasting Corporation v New Brunswick Attorney-General* (above, note 10) considered that restrictions or exclusions on media in appropriate cases made those hearings "unfair". A fair hearing will permit restrictions and exclusions of the public and media in appropriate cases after proper consideration of the rights involved.

relevant charges are withdrawn, dismissed, stayed, or otherwise disposed of. This again engages the right to freedom of expression and a public hearing under ss 14 and 25(a) of the Bill of Rights Act respectively. However, for the same reasons set out above, we consider that suppression in this context is consistent with both rights.

17. Most importantly, the suppression of pre-recorded evidence protects a defendant's fair trial rights by ensuring that aspects of the trial are not published before the trial itself starts. Further, given the pre-recorded evidence may be edited for admissibility purposes, suppression prevents irrelevant and prejudicial information entering the public arena and thereby jeopardising the fairness of the trial. The operation of suppression in this context is consistent with the usual practice of the courts in suppressing pre-trial litigation pending the determination of trial.

18. Accordingly, while suppression temporarily places limits on the degree to which the hearing is "public", it does so in order to protect compelling fair trial rights concerning the integrity of the trial itself. By the same token, the temporary limit that suppression creates on the s 14 right to receive information is justifiable in order to protect that same overarching (and fundamental) interest.

19. Finally, we note that the provision retains a judicial discretion to lift suppression or vary its conditions and effect. That in-built flexibility further contributes to the consistency of the provision with the Bill of Rights Act.

Amendments to the definition of "sexual reputation"

20. A second major feature of the Bill is its proposed restrictions on whether, or when, evidence of sexual reputation, disposition and a sexual case complainant's or propensity witness's prior sexual history may be introduced in evidence. The Evidence Act 2006 already restricts the admissibility of evidence of a complainant's sexual experience with persons other than the defendant to cases when it would be contrary to the interests of justice to exclude it. The Bill proposes to extend the same "heightened relevance" threshold to evidence of a complainant's sexual history with the defendant (except for evidence of the fact itself that the complainant and defendant were in a sexual relationship).

21. The Bill as introduced also provided for a definition of "sexual reputation" (evidence of which kind is subject to an absolute bar) that was to be included in a new s 44AA. That provision read:

> … the reputation of the complainant in sexual matters, and includes, without limitation, the reputation of the complainant for having a particular sexual disposition.

22. The SOP proposes amending the definition and moving it to the interpretation section of the Evidence Act, rather than placing it in its own separate provision (s 44AA). It will now read:

> **sexual reputation**, of a complainant, for the purposes of section 44AA,—

(a) means the way in which the complainant is regarded, by others, in sexual matters (including, without limitation, as having a particular sexual disposition or experience); but

(b) excludes any witness's evidence that is derived from the witness's personal sexual experience with, or personal knowledge of the sexual disposition of, the complainant (evidence of which is subject to section 44)

23. We do not consider these amendments effect any significant change to the original proposal, which was assessed in the attached advice to you on the Bill, at paragraphs 5 to 12. The amended definition clarifies when evidence should be considered "reputation" (which is never admissible), and expressly distinguishes that from evidence derived from a witness' personal knowledge or experience (which must meet the heightened relevance test to be admissible).

24. Given the amendments clarify, rather than develop upon, this aspect of the Bill as introduced, we do not consider they engage any Bill of Rights issues beyond those already considered in the original vetting advice.

Conclusion

25. We conclude that the SOP is consistent with the Bill of Rights Act.

26. In accordance with Crown Law's policies, this advice has been peer reviewed by Paul Rishworth QC, Barrister.

Alison Todd
Senior Crown Counsel

Encl

Noted

Hon David Parker
Attorney-General
/ /2021