

Hon Kiri Allan
Minister of Justice

Proactive release – Evidence (Video Records and Very Young Children’s Evidence) Regulations 2023

Date of issue: 6 July 2023

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 |
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| 1 | Sexual Violence Legislation Bill: approval for supplementary order paper, and approach to related Regulations <i>Cabinet paper</i> Office of the Minister of Justice <i>Meeting date: 25 November 2021</i> | Released in part. Some information has been withheld in accordance with the following sections of the OIA: <ul style="list-style-type: none">• section 9(2)(b)(ii) to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information, and• section 9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and officials. |
| 2 | Cabinet minute: LEG-21-MIN-0194 <i>Cabinet minute</i> Cabinet Office <i>25 November 2021</i> | Released in full. |
| 3 | Evidence (Video Records and Very Young Children’s Evidence) Regulations 2023 <i>Cabinet paper</i> Office of the Minister of Justice <i>Meeting date: 1 June 2023 (LEG) and 6 June 2023 (CAB).</i> | Released in full. |
| 4 | Cabinet minute: LEG-23-MIN-0076 <i>Cabinet minute</i> Cabinet Office <i>1 June 2023</i> | Released in full. |
| 5 | Cabinet minute: CAB-23-MIN-0215.01 <i>Cabinet minute</i> Cabinet Office <i>6 June 2023</i> | Released in full. |

In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Sexual Violence Legislation Bill: approval for supplementary order paper, and approach to related Regulations

Proposal

1. I seek approval to table a supplementary order paper (SOP) to the Sexual Violence Legislation Bill, progressing several technical improvements and corrections mainly relating to video evidence. I also seek approval to re-write the Evidence Regulations 2007, including an external consultation on an exposure draft.

Relation to government priorities

2. The Sexual Violence Legislation Bill (the Bill) aligns with the Government's stated priority of improving the wellbeing of New Zealanders and their families, including through reducing family and sexual violence. The Labour Party's 2020 Election Manifesto material committed to passing the Bill, and to continue making improvements to the justice system so everyone has appropriate access to justice.¹

Executive Summary

3. The Bill, which had its second reading on 11 and 25 February 2021, will help reduce the trauma that sexual violence complainants may experience when they attend court and give evidence. A key amendment is to entitle complainants to give their evidence in alternative ways, including via pre-recorded video.
4. Part 1 of this paper proposes additional technical changes to the Bill via SOP, mostly relating to video evidence. All changes are minor.
5. Part 2 of this paper proposes a re-write of the Evidence Regulations 2007. The re-write would add Regulations supporting the Bill's provisions around video evidence, as well as progressing the Law Commission's 2019 recommendation to review, modernise, and consolidate the Regulations. It would also make modest policy changes to ensure video evidence provisions are fit for purpose. I am seeking Cabinet's approval to conduct external consultation on an exposure draft of the new Regulations, to enable expert input from stakeholders. I will seek the Attorney-General's approval to release the exposure draft publicly, before bringing the Regulations back to Cabinet for approval after that consultation.

Background

The Sexual Violence Legislation Bill seeks to improve complainants' experiences in court

6. The Bill aims to make the experience of attending court and giving evidence in sexual violence cases less stressful and more responsive to complainants' needs. It also seeks to discourage jury decision-making based on irrelevant information or misconceptions about sexual violence.

¹ New Zealand Labour Party *Factsheet: Tackling the long term challenges in our law and order system*: at www.labour.org.nz/release-law-and-order-reform-focused-on-wellbeing.

7. The Bill, which was introduced in November 2019, amends the Evidence Act 2006, the Criminal Procedure Act 2011, and the Victims' Rights Act 2002. It progresses recommendations from the Law Commission's 2015 report *The Justice Response to Victims of Sexual Violence*, which found that elements of the trial process can both hinder sexual violence victims' recovery and significantly retraumatise them. It also includes amendments recommended in the Law Commission's 2019 report *The Second Review of the Evidence Act 2006* (the 2019 report), which was published shortly before Cabinet approved the Bill's policy [CAB-19-MIN-0139 refers].
8. For the purposes of this paper the Bill's most relevant amendment will entitle complainants, and witnesses giving propensity evidence,² to give their evidence in alternative ways. Alternative ways of giving evidence include by pre-recorded video, from behind a screen obscuring the defendant, or via video conferencing from outside the courtroom. The entitlement applies in respect of the witness's evidence-in-chief (in response to the prosecution's questions), and cross-examination (in response to the defence's questions). The greater availability of pre-recorded cross-examination has been subject to strong objection from the defence bar, given the significant shift it represents to standard trial procedure.

The Bill's slower passage has allowed consideration of technical issues

9. The Bill was originally expected to be passed in mid-2020. Due to COVID-19, and the previous Government's consideration of concerns raised at select committee, it only had its second reading in February 2021. In the intervening period officials have been working on new and supporting Evidence Regulations, which are centred on pre-recorded evidence. This process has uncovered a few technical issues with the Bill's clauses, which I propose to address via SOP as below.

Part 1: Supplementary Order Paper

The SOP would make technical changes to provisions in the Bill and Evidence Act

10. To ensure video evidence is kept as secure as possible, the SOP adds a judicial discretion to impose conditions on people's access to pre-recorded evidence, for example when preparing for the trial.
11. The SOP also adds a regulation-making power for the judge to restrict media attendance at a pre-recorded cross-examination. Pre-recording aims to limit complainants' exposure to strangers when telling their story [CAB-19-MIN-0039 refers]. Regulations may be required as under the Criminal Procedure Act, accredited media cannot be removed from court except on national security grounds. The change would not affect the media's right to attend the actual trial, including when the complainant's evidence is played back to the court.
12. Complementing that change, an automatic prohibition on reporting about the content of a pre-recorded cross-examination hearing until trial will also be added. Judges can already order suppression of trial-related information and evidence if it would risk prejudicing a fair trial. Imposing an automatic prohibition would recognise that risk as highly likely in the context of pre-recorded cross-examination. It would also be more efficient and avoid any cases slipping through the cracks.

² Propensity evidence aims to show that the defendant has a tendency to act in similar ways to what is alleged. In sexual cases, these witnesses are likely to be in a similarly vulnerable position to the complainant.

13. The SOP will also add a judicial discretion to allow a witness to give any further required cross-examination evidence at a second pre-trial recording, if the witness will not be able to attend the actual trial. Currently the Bill requires any further cross-examination to take place at the trial, to avoid the risk of recalling the witness repeatedly. However, there will be cases where that will not be possible – for example, due to a terminal illness.
14. Further technical changes included in the SOP would:
 - 14.1. add a definition of ‘sexual reputation’, evidence of which is banned in sex offence trials, to clarify the distinction from evidence of sexual experience and sexual disposition (which may be admitted in limited circumstances);
 - 14.2. consolidate 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. The substance of the existing offences remains the same;
 - 14.3. ensure pre-recorded cross-examination is protected in cases outside the criminal jurisdiction and Family Court, in the same way as EVIs are. In those cases, the judge or judicial officer will be able to order the video evidence to be disclosed to parties only after considering specified factors;
 - 14.4. update language in the Evidence Act relating to video evidence, and ensures regulation-making powers provide for the deletion of transcripts as well as video recordings themselves; and
 - 14.5. defer the commencement of more operationally-significant amendments in the Bill, including those relating to video evidence, to the earlier of 12 months after enactment or Order in Council.³ This will allow public consultation on new regulations required to support the Bill and ensure a coherent, fit for purpose video evidence regime.

Part 2: Evidence Regulations 2007

The Evidence Regulations 2007 need updating and consolidation

15. The Regulations deal mainly with video evidence. They are framed around EVIs; there are no regulations governing other forms of video evidence provided in the Bill, namely pre-recorded cross-examination and evidence recorded live in court. These provisions are subject to some contention, so detailed and transparent procedural arrangements will be needed to support the Bill’s implementation.
16. The Regulations currently provide strict rules governing how EVIs are to be made, stored, shared, and destroyed. The Regulations have not been substantially reviewed since they came into force, and mostly carry over provisions from the 1990s. The terminology was set in the time of VHS tapes, which is making compliance increasingly difficult. Piecemeal additions over time have also created repetition, confusion, and regulatory gaps.
17. In 2019, after canvassing these deficiencies, the Law Commission recommended a full review of the Regulations. In line with the Government’s acceptance of that recommendation [CAB-19-MIN-0427 refers] I propose a substantial redraft to:

³ This will supersede the change in SOP 540 (which was tabled in June 2020, and would have deferred commencement by 5 months following delays in the Bill’s passage due to COVID).

- 17.1. modernise and consolidate the Regulations, to ensure the procedural framework for video evidence is consistent, accessible, and future-proofed;
- 17.2. add regulations to support the Bill's provision for other forms of video evidence. These new regulations will align with the overall policy agreed to by Cabinet in April 2019 [CAB-19-MIN-0139 refers] and with the regulations governing EVIs where appropriate, while recognising the Court's role and judges' inherent jurisdiction to govern proceedings as they see fit; and
- 17.3. resolve three discrete issues, outlined below.

I propose to address three discrete issues in the Regulations

- 18. The first of those issues relates to accessing video evidence outside the criminal proceedings for which it was made. Currently, the Regulations govern access by authorised advisors in relation to applications for the prerogative of mercy and by parties in civil proceedings. The Family Court can access only children's evidence.
- 19. I propose to expand the current access provisions to ensure relevant bodies can access video evidence that is relevant to their activities, subject to the applicable procedural safeguards. Changes are required to include:
 - 19.1. the Criminal Cases Review Commission, which has replaced part of the function of the Royal prerogative of mercy; and
 - 19.2. Family Court access to EVIs of adults, not just children (for instance, to inform civil proceedings under the Family Violence Act 2018 or to assist in determining the child's care and protection needs).
- 20. The second issue is the obligation to destroy video evidence 10 years after the court proceeding is finally determined or discontinued (or 7 years after it was made, if not used in court). Those obligations do not reflect modern practice around appeals, which can be initiated significantly after the 10-year period, or the recording's potential value as propensity evidence⁴ in later cases.
- 21. I propose to remove the obligations so that, after the period the video evidence must be retained, it would be up to the Police or the Courts (as relevant) to determine whether to keep it for longer. Officials are considering whether further settings could help ensure destruction processes can be applied consistently and efficiently. Police is likely to deal with its EVIs consistently with the rest of the case file.
- 22. The final issue is the relationship between the Regulations dealing with access to video evidence, and Court Rules⁵ around access to court documents. I propose clarifying in the Regulations that the court may grant access to video evidence or transcripts under the Rules, but:
 - 22.1. where there is a conflict between the Regulations and the Rules, the Regulations will prevail (for example, the Rules allow parties to criminal proceedings to search and inspect any document relating to the proceeding unless the judge directs otherwise, while the Regulations allow defendants to view video evidence only in the presence of a lawyer); and

⁴ Propensity evidence in sexual cases may remain relevant for longer, as delayed reporting by victims is more common.

⁵ Senior Courts (Access to Court Documents) Rules 2017, and District Court (Access to Court Documents) Rules 2017. Court Rules are set through Order in Council, after being approved by the judiciary via the Rules Committee.

- 22.2. any person to whom access is granted under the Rules must use the video or transcript only for the purposes for which access was granted, and must comply with the applicable obligations and duties under the Regulations.

I propose to consult publicly on draft Regulations

23. The legal profession will have significant interest in, and valuable expertise to inform feedback on, the new and revised Regulations. Victims' advocacy groups have also expressed interest in the detailed settings for pre-recorded cross-examination.
24. I seek approval to publish an exposure draft of Regulations reflecting the proposals outlined above, before returning to Cabinet with a final draft. My plan is for an open, online consultation, with targeted requests for feedback from the judiciary, legal organisations, and victim advocacy groups (whom have made known their interest in the issues). Once drafted, the Attorney-General's approval to release the exposure draft outside the Crown will be sought in accordance with CO (19) 2.
25. Feedback on the exposure draft would be sought in early 2022, and any financial implications would be funded within baselines. I expect to report back to Cabinet with Regulations ready for Executive Council in mid 2022.

Interim changes to Regulations will be required so Police can begin to digitise their systems

26. **Section 9(2)(b)(ii)** [REDACTED]
[REDACTED] I therefore seek Cabinet's approval to draft 'bridging' Regulations, to allow technology upgrades to begin earlier in 2022. This drafting exercise is anticipated to be small, given the intent is only to enable necessary modifications to existing hard-copy requirements. I would return to Cabinet with proposed interim Regulations in the first quarter of 2022.

Consultation

27. Police, Crown Law Office, the Ministry of Social Development, the Office for Disability Issues, Oranga Tamariki, Te Puni Kōkiri, the Ministry for Pacific Peoples, the Ministry for Women, the Joint Venture Business Unit, the New Zealand Defence Force, the Chief Victims' Advisor and the Office of the Privacy Commissioner have been consulted on, and the Department of the Prime Minister informed of, this paper.
28. The Judiciary and the New Zealand Law Society's law reform committee has also been consulted on the proposed SOP.

Financial implications.

29. Police and the Courts' ongoing work toward digitised, secure storage and access systems for evidence is being funded through baselines, supplemented with Budget 2019 funding to implement the video evidence provisions in the Bill as introduced. That included funding for Courts to store new video evidence for a 10-year period.
30. The proposals in this paper therefore do not carry any further immediate costs for the Courts. **Section (9)(2)(f)(iv)** [REDACTED]
[REDACTED] storage for significantly longer than 10 years may require more funding. If

implementation monitoring indicates further funding is required, it will be sought in the intervening time through reprioritisation of existing funding or the Budget process.

Legislative Implications

31. The proposals in this paper would amend the Evidence Act 2006 and Criminal Procedure Act 2011, via SOP to the Sexual Violence Legislation Bill (proposed as a category three for the 2021 legislation programme). They would also involve repealing and replacing the Evidence Regulations 2007.

Impact analysis

Regulatory Impact Statement

32. The Treasury has determined that the proposals contained within the SOP to make technical changes to the Bill and Evidence Act regarding video evidence, are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have minor impacts on businesses, individuals, and not-for-profit entities.
33. A regulatory impact summary (RIS) in relation to the re-write and update of the Regulations is attached to this paper. The Ministry of Justice's independent quality assurance panel considers the RIS meets the quality assurance criteria, noting:

The Panel considers the RIS provides a comprehensive description of the impacts of the relatively minor proposed changes to the Evidence Regulations. Quantified information on the costs and benefits of the proposals is relatively limited. The Panel is satisfied that sufficient consultation has taken place around the options and that the proposed consultation on an exposure draft of the regulations will enable any further issues to be addressed.

Climate Implications of Policy Assessment

34. The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to these proposals as the threshold for significance is not met.

Population Implications

Gender Implications

35. Sexual violence is gendered; the Ministry of Justice's 2018 New Zealand Crime and Safety Survey indicates 12 percent of men and 35 percent of women will experience one or more incidents of sexual violence during their lives. The figure is 52 percent for LGBTQIA+ people. In supporting the Bill's implementation and operation, the proposals in this paper promote the rights and interests of women, girls, and LGBTQIA+ people on a general level.
36. Video evidence is most commonly used for vulnerable witnesses, particularly in sexual and family violence cases. Ministry of Justice data shows that 77 percent of recorded applications for alternative modes of evidence over the last five years were made in sexual or family violence cases.
37. As well as the general benefits of a modern and workable regime for video evidence, some of the specific proposals may also have modest positive implications for complainants. These include allowing use of video evidence as propensity evidence in cases more than 10 years after the original proceedings, and minimising the impact of media attendance at pre-recorded cross-examination hearings.

Disability Perspective

38. As noted above, video evidence is more commonly used for vulnerable witnesses and complainants in family and sexual violence cases; disabled people are over-represented as both. The proposals in this paper will have the same impacts on disabled witnesses as those identified above in relation to gender.

Treaty of Waitangi analysis

39. Māori are over-represented as both complainants and defendants in sexual and violent cases. The proposals in this paper, as with the Bill itself, aim to preserve both complainants' and defendants' interests in a way that promotes the overall justice and fairness of the trial process. This aim aligns with the Government's ongoing commitment to honour our Treaty obligations, in particular to protect Māori interests under Article Three of te Tiriti.
40. The opportunity for public feedback on the draft regulations, and subsequent further analysis, will help to ensure the Regulations do not create adverse or unforeseen impacts for tangata whenua.

Human Rights

41. I consider the proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 (NZBORA). In line with standard practice, the Crown Law Office will be advising the Attorney-General on the SOP's consistency with NZBORA. Prior to its introduction in 2019, Crown Law considered the Bill complied with NZBORA.

Compliance

42. The SOP complies with:
- 42.1. the principles of the Treaty of Waitangi:
 - 42.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993:
 - 42.3. the disclosure statement requirements (a revised statement is attached to this paper):
 - 42.4. the principles and guidelines set out in the Privacy Act 2020:
 - 42.5. relevant international standards and obligations:
 - 42.6. the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.
43. For the Regulations, compliance with these requirements and the matters in the following sections of this paper will be formally confirmed when I return to Cabinet to seek approval for their submission to Executive Council.

Binding on the Crown

44. The SOP binds the Crown.

Creating new agencies or amending the law relating to existing agencies

45. The SOP does not create new agencies or amend law relating to existing agencies.

Allocation of decision-making powers

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

Associated regulations

47. As outlined in part 2 of this paper, regulations will be required to support the Bill's provisions around video evidence. Those regulations will reflect the SOP's amendments, as well as Cabinet's decisions on part 2 of this paper. I expect to bring draft Regulations to Cabinet for approval in 2022 to ensure they can come into force at the same time as the Bill's commencement. No waiver of the 28-day rule is anticipated to be needed.

Other instruments

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

Definition of Minister/department

49. The SOP does not contain a definition of Minister or Department.

Commencement of legislation

50. The SOP amends procedural provisions in the Bill that will come into force the day after Royal assent. It also inserts provisions that will come into force on the earlier of 12 months after Royal assent or an Order in Council to that effect. This will align with existing provisions in the Bill related to video evidence, which will also be deferred as they involve complex process changes. Delayed commencement will ensure all stakeholders and services are prepared for a smooth implementation based on the finalised amendments.

Parliamentary stages

51. I propose the SOP is tabled as soon as possible following Cabinet approval, so the Bill can proceed through its remaining House stages without further delay.

Proactive Release

52. I propose that this Cabinet paper be proactively released subject to any redactions appropriate under the Official Information Act 1982.

Recommendations

53. I recommend that the Committee:

1. note that the Sexual Violence Legislation Bill was proposed to be category three on the 2021 Legislation Programme (to be passed if possible in the year);
2. note that the Bill aims 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;

Part 1: SOP to the Sexual Violence Legislation Bill

3. approve the attached Supplementary Order Paper, which would:
 - 3.1. make technical improvements and corrections to the Bill and the Evidence Act 2006, relating to video evidence and the rules around evidence of a complainant's sexual reputation; and
 - 3.2. supersede the change to the Bill's commencement dates currently contained in the already-tabled SOP 540, to allow public consultation on new Regulations;

Part 2: Re-writing the Evidence Regulations

4. agree to modernise and consolidate the Evidence Regulations 2007, in line with the Government's initial response to the Law Commission's *Second Review of the Evidence Act 2006*, by way of a full re-write;
5. agree the re-write will include regulations supporting the Bill's provision for pre-recorded cross-examination and recordings of evidence given live in court, which will align with the overall policy agreed to by Cabinet in April 2019 [CAB-19-MIN-0139 refers], and with the updated regulatory settings for existing video evidence where appropriate;
6. agree to the Regulations re-write also making changes to:
 - 6.1. allow the Family Court and the Criminal Cases Review Commission to access video evidence where relevant outside the proceedings for which it was made, subject to procedural safeguards;
 - 6.2. remove the mandatory destruction dates for video evidence; and
 - 6.3. clarify that where there is a conflict between the Regulations and Court Rules for accessing court documents, the Regulations will prevail, and that any person granted access under the Court Rules must comply with all applicable obligations prescribed by the Regulations;
7. agree to Parliamentary Counsel Office being instructed to draft Regulations in accordance with recommendations 4 – 6 above;
8. authorise the Minister of Justice to make any detailed policy decisions consistent with the policy outlined in this paper, that may arise during the drafting of the regulations;
9. approve consultation outside Government on an exposure draft of Regulations, drafted in accordance with recommendations 4 – 8 above, subject to the Attorney-General's approval of its release outside the Crown;

10. agree to Parliamentary Counsel Office being instructed to draft any interim Regulations required to ensure Police can begin to digitise their recording, storage, and access system for video evidence as soon as possible; and
11. invite the Minister of Justice to report back to Cabinet in 2022 with finalised Regulations for Cabinet's approval.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice



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 Supplementary Order Paper and Approach to Related Regulations

Portfolio Justice

On 25 November 2021, the Cabinet Legislation Committee:

- 1 **noted** that the Sexual Violence Legislation Bill was proposed to be category three on the 2021 Legislation Programme (to be passed if possible in the year);
- 2 **noted** that the Bill aims 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;

SOP to the Sexual Violence Legislation Bill

- 3 **approved** the Supplementary Order Paper [PCO 21824-5/1.31] attached to the submission under LEG-21-SUB-0194, which will:
 - 3.1 make technical improvements and corrections to the Bill and the Evidence Act 2006, relating to video evidence and the rules around evidence of a complainant's sexual reputation; and
 - 3.2 supersede the change to the Bill's commencement dates currently contained in the already-released SOP 540, to allow public consultation on new Regulations;
 - 3.3 Re-writing the Evidence Regulations
- 4 **agreed** to modernise and consolidate the Evidence Regulations 2007 (the Regulations), in line with the Government's initial response to the Law Commission's *Second Review of the Evidence Act 2006*, by way of a full re-write;
- 5 **agreed** the re-write will include regulations supporting the Bill's provision for pre-recorded cross-examination and recordings of evidence given live in court, which will align with the overall policy agreed to by Cabinet in April 2019 [CAB-19-MIN-0139], and with the updated regulatory settings for existing video evidence where appropriate;
- 6 **agreed** to the Regulations re-write also making changes to:
 - 6.1 allow the Family Court and the Criminal Cases Review Commission to access video evidence where relevant outside the proceedings for which it was made, subject to procedural safeguards;

- 6.2 remove the mandatory destruction dates for video evidence; and
- 6.3 clarify that where there is a conflict between the Regulations and Court Rules for accessing court documents, the Regulations will prevail, and that any person granted access under the Court Rules must comply with all applicable obligations prescribed by the Regulations;
- 7 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to draft Regulations in accordance with paragraphs 4 – 6 above;
- 8 **authorised** the Minister of Justice to make any detailed policy decisions consistent with the policy intent, that may arise during the drafting of the regulations;
- 9 **approved** consultation outside government on an exposure draft of Regulations, drafted in accordance with paragraphs 4 – 8 above, subject to the Attorney-General's approval of its release outside the Crown;
- 10 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to draft any interim Regulations required to ensure Police can begin to digitise their recording, storage, and access system for video evidence as soon as possible; and
- 11 **invited** the Minister of Justice to report back to Cabinet in 2022 with finalised Regulations for Cabinet's approval.

Rebecca Davies
Committee Secretary

Present:

Hon Chris Hipkins (Chair)
Hon David Parker
Hon Poto Williams
Hon Kris Faafoi
Hon Jan Tinetti
Hon Kiri Allan
Hon Dr David Clark
Keiran McNulty, MP (Senior Government Whip)

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

In Confidence

Office of the Minister of Justice

Cabinet Legislation Committee

Evidence (Video Records and Very Young Children's Evidence) Regulations 2023

Proposal

- 1 I seek agreement to final policy decisions on, and authorisation for submission to the Executive Council of, the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 (the Regulations).

Background

- 2 The Regulations will replace the Evidence Regulations 2007, which deal mainly with procedural matters associated with video evidence recorded by the Police for later use in criminal proceedings.
- 3 In December 2021, Cabinet agreed to a re-write of the Evidence Regulations 2007 to ensure the video evidence framework is consistent, future-proofed and accessible [LEG-21-Min-0194]. The Regulations were intended to enter into force alongside the commencement of the parts of the Sexual Violence Legislation Act 2022 (SVL Act) relating to the use of video evidence in sexual violence cases.
- 4 Cabinet agreed the focus of the re-write was to:
 - 4.1 modernise and consolidate the regulations, addressing the outdated terminology and repetition highlighted by the Law Commission in its Second Review of the Evidence Act 2006, and
 - 4.2 make a small number of policy changes including: expanding Family Court access to adult video evidence, providing the Criminal Cases Review Commission (CCRC) with access to video evidence for the purpose of a review application, and removing current obligations on Police to destroy the videos after a set time period.
- 5 The approach agreed by Cabinet also involved adding new regulations managing the new forms of video evidence in the SVL Act (evidence recorded in court before, and at, trial). Regulations were to prevail over any Court Rules.
- 6 Cabinet agreed to release an exposure draft of the re-written Regulations and invited me to report back with finalised Regulations for approval in 2022.

The new Regulations set out an updated regime for managing Police video evidence

- 7 The Regulations apply to Police video records that may be later offered by the prosecution as evidence in a criminal proceeding.¹ They set out strict rules on how these videos are to be made, stored, shared and destroyed. The Regulations have been updated and the changes described in this section give effect to decisions Cabinet has already agreed to.

Modernising terminology and language

- 8 The new Regulations move away from using language which envisages physical copies of video evidence (e.g. DVDs) to better reflect the different ways video evidence can now be created, stored and shared.

Presumption of electronic access

- 9 The new Regulations introduce a presumption of electronic access for accessing Police video evidence. This supports the principle that all reasonable steps should be taken to keep video evidence secure by reducing the use of physical copies, such as evidence stored on DVDs, that are at greater risk of being lost, tampered with, or accessed by unauthorised people.
- 10 This is a 'default' setting rather than a hard rule. The Regulations also account for circumstances when digital access is not reasonably practical. They allow Police to provide a physical copy to a person on request, after having considered the privacy of the witness and determining that electronic access is not reasonably practicable. The Regulations allow for a transition period as Police move from using hard copy videos to fully digitised technology.²

Consolidating the definition of Police video record

- 11 The new Regulations remove the distinction between current Part 1 (Police evidential video records) and Part 4 (mobile video evidence) of the Evidence Regulations 2007. This change reflects a key objective of the re-write to modernise and consolidate the Regulations [LEG-21-MIN-0192] and is consistent with the Evidence (Digital Video Records) Amendment Regulations 2022 which authorised the use of digital recordings.
- 12 The Regulations clarify that a 'Police video record' is a Police interview with a witness made and recorded on any device for the purpose of a criminal proceeding. The reference to any device is intended to be technology neutral about how the video evidence is recorded (recognising that digital recording can occur on a range of devices, including mobile devices).

¹ The Regulations mostly concern use of these videos in criminal proceedings but also regulate access outside them, including by the Family Court and parties in civil proceedings, by Oranga Tamariki in relation to care and protection matters, and by the Ministry of Justice in relation to Royal Prerogative of Mercy applications.

² This will also allow the New Zealand Defence Force to continue using existing methods for video recording and playback.

I N C O N F I D E N C E

- 13 The strict framework in the Regulations for recording, storing, sharing, and retaining video records applies regardless of the device used to make the video evidence. The admissibility of the video evidence in court is determined separately.
- 14 These changes will support the Police's Reframe programme by enabling digital evidence gathering to occur onto the future. The approach also offers benefits in terms of reducing trauma for victims, capturing accurate and reliable evidence, and saving time for complainants and the Police.

Expanding Family Court access to adult video evidence

- 15 Currently, the Family Court can only request access to Police-recorded video evidence of child complainants. As agreed by Cabinet, the new Regulations expand the Family Court's access to also include the video evidence of adult complainants.
- 16 The Regulations provide that the Family Court may request access to video evidence of adult complainants for the purpose of allowing parties (or the lawyer of any of those parties) to a proceeding under the Care of Children Act 2004 or the Family Violence Act 2018 to view the video evidence.
- 17 I am advised that the video statement is often the victim's primary evidence in the criminal court. Without access to that video evidence the Family Court may require the same victim to detail their account of the same incident (when seeking a protection order, for example). If the video evidence is available to the Family Court, it will support the victim's credibility and case.

Removing mandatory destruction dates for video evidence

- 18 The new regulations remove the mandatory destruction period from the Evidence Regulations 2007. Instead, they require Police video evidence to be retained for at least ten years after the criminal proceeding to which the evidence relates is finally determined, or if the evidence was not used, then for at least ten years after the date on which it was made.
- 19 This change was made to reflect modern practice around appeals and retrials, which can be initiated significantly after the current ten-year mandatory destruction period. This is particularly relevant in sexual cases, where delayed reporting by victims is more common. It gives Police the discretion to set procedures around destruction after the ten-year retention period. The obligation to keep the video evidence secure, and restrictions on access, will continue to apply.

I N C O N F I D E N C E

Providing the Criminal Cases Review Commission access to video evidence

- 20 The CCRC has replaced part of the Royal prerogative of mercy and carries out the function of investigating and reviewing convictions and sentences for potential miscarriages of justice. Currently, there is no specific reference to the CCRC in the Regulations which means the CCRC must rely on less direct mechanisms for accessing information in the Criminal Cases Review Commission Act 2019.
- 21 The new Regulations expand the definition of 'authorised advisor' to include members of the CCRC. The Regulations expressly allow members of the CCRC to request access to Police video evidence from the relevant court for the purpose of a review application.

I am seeking agreement to three changes to the Family Court provisions

- 22 I seek agreement to three additional policy changes to accompany the expanded Family Court access described above. These changes have been included in the Regulations at my direction and respond to concerns raised by stakeholders during targeted consultation.

Additional matters a Family Court judge must consider before disclosing video evidence

- 23 The Regulations enable the Family Court to require Police to provide it with access to video evidence of adults so that the court can consider whether it should be disclosed to parties to proceedings under the Care of Children Act 2004 and the Family Violence Act 2018.
- 24 During targeted consultation, victims' advocacy groups expressed concern about the potential for adult video evidence to be used against victims to perpetuate further abuse within the context of Family Court proceedings. There can be complex dynamics and risk of harm to the complainant in cases involving family violence and/or risk of litigation abuse. I agree with these concerns and consider that a high bar is required for disclosure.
- 25 The matters a Judge is currently required to consider before disclosing video evidence in the Family Court are more limited than those a Judge is required to consider when ordering the disclosure of the same video evidence in other civil proceedings. To provide a similar level of protection for complainants, I recommend that the Regulations provide additional criteria for a Family Court judge to consider before the judge can order disclosure of video evidence in the specified Family Court proceedings.
- 26 I propose that the additional criteria are:
- 26.1 the extent to which the video evidence is relevant to the proceedings before them;
- 26.2 the likely extent of harm to the complainant whose evidence is contained in the video evidence from disclosure of that record;

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- 26.3 the public interest in protecting the privacy of complainants;
 - 26.4 any other matter that the Judge or judicial officer considers relevant;
 - 26.5 reasonable steps have been taken to ascertain any view of the complainant on the proposed disclosure; and
 - 26.6 if the complainant is a child, the disclosure ordered serves the welfare and best interests of the complainant.
- 27 With the exception of the final two criteria, the additional criteria are drawn from section 119B of the Evidence Act, which sets out the matters a Judge must consider before ordering disclosure of video evidence in other civil proceedings. For consistency, these matters will be considered by a Judge considering the disclosure of both an adult's and a child's video evidence.

Providing flexibility for viewing video evidence and transcripts in Family Court proceedings

- 28 Currently children's video evidence can only be viewed within Family Court premises. As noted above, the Regulations will enable the Family Court to order disclosure and viewing of adult video evidence. Enabling the Family Court to order disclosure and viewing of adult video evidence will significantly increase the volume of video evidence that can be disclosed in this way.
- 29 During targeted consultation, representatives of the legal profession expressed concerns that requiring all video evidence to be viewed in the Family Court may be unnecessarily restrictive for lawyers and parties. Requiring all video evidence to be viewed in the Family Court and supervised by a Registrar could also increase demand for limited room space and registrar capacity in the Family Court.
- 30 I would like to address these concerns while also retaining strict control over the videos, so they are kept as secure as possible. I recommend, therefore, retaining the default position that video evidence must be viewed within the premises of the Family Court. However, I propose the following two changes:
- 30.1 allowing a party's lawyer to supervise a viewing of the video evidence, in place of supervision by a registrar, on Family Court premises; and
 - 30.2 providing a discretion to the Judge, when considering whether to order disclosure of video evidence or transcripts, to authorise the viewing of certain video evidence or transcripts outside of Family Court premises. This would not apply to the most sensitive video evidence (children's evidence and witnesses' evidence in sexual or violent cases), to align with the principle in the Evidence Act (relating to criminal proceedings) that additional precautions should be taken when viewing this evidence.
- 31 In recognition that this represents a slight loosening of controls over video evidence in the Family Court, I have been very careful to retain safeguards and maintain alignment with the Evidence Act, including:

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- 31.1 ensuring any decision to depart from default onsite viewings is taken by a Judge on a case-by-case basis, and with an ability to impose further restrictions (for example the lawyer may be required to keep a log documenting all movements of the video evidence including date, time, who is viewing the video and where it is viewed),
 - 31.2 excluding especially sensitive video evidence (video evidence of a child complainant, or a witness in a sexual or a violent case) from being able to be viewed offsite. This is a more cautious approach than in criminal proceedings, where a Judge may order that a defendant's lawyer be given access to an especially sensitive video record,³
 - 31.3 only providing the lawyer, not the parties, with access to use the videos and transcripts offsite (the lawyer may 'show' material to their clients under supervision), and
 - 31.4 imposing duties on lawyers when supervising viewings offsite to ensure material is kept secure and there is no misuse.
- 32 I understand the Chief Victims Advisor does not support allowing Police video evidence to be viewed outside the Family Court due to safety concerns and potential for misuse. I note that where the prosecution intends to offer the video record as evidence in criminal proceedings, lawyers can already be given access to the video evidence and may view it outside Police, Crown or Court premises.
- 33 The Ministry will prepare guidance which sets out the expectations on family lawyers when viewing and managing Police video evidence whether in or outside the Family Court. The Ministry will engage with victims' groups when preparing this guidance. The Ministry will also work with the Principal Family Court Judge (PFCJ) on whether a judicial protocol could be developed to support this guidance.
- 34 I consider that the above safeguards, in combination with including additional criteria a Family Court Judge must consider before ordering disclosure, enable greater access to justice by parties and provide assurance that viewing video evidence in these circumstances is appropriate and legitimate.

Delayed commencement of the provisions relating to the Family Court's access to video evidence

- 35 I recommend waiting six months before bringing the new regulations that enable Family Court access to video evidence, and the accompanying changes set out above, into force.
- 36 I have been advised that Ministry of Justice modelling indicates that expanded access could result in a significant increase in requests for video evidence, and a six-month period is needed to operationalise the changes.

³ Evidence Act 2006, s 106(4B).

I am also seeking agreement to refine the scope of the re-write

I propose that the Regulations do not cover court information, including video evidence recorded in court before, and at, trial

- 37 I recommend that the new Regulations focus solely on video evidence made of Police interviews. They do not address the new forms of video evidence introduced by the SVL Act (evidence recorded in court before or at trial, or otherwise produced in court), as was originally agreed by Cabinet when the re-write was agreed. I directed officials to narrow the scope of the Regulations to exclude Court made video evidence, in response to feedback provided by the judiciary after the original Cabinet decisions were made. Subject to your agreement, this change will require Cabinet to rescind its original decision on the scope of the re-written Regulations.
- 38 During early consultation on an initial draft of the Regulations, the judiciary raised concerns about the proposed inclusion in the regulations of content that directs the courts how to make, use and manage “court information”. The statutory information framework established under the Senior Courts Act 2016 and the District Court Act 2016 recognises that the management and use of court information is a judicial responsibility. Video evidence recorded by the courts as part of a trial (either before or during the trial) and Police video records which have been produced in evidence to the court are court information and, therefore, come under the supervision and control of the judiciary in terms of use, access, and storage.

The absence of Regulations on court recorded video evidence will not affect implementation of the Sexual Violence Legislation Act 2021

- 39 Prior to the SVL Act’s video evidence provisions coming into force on 20 December 2022, evidence pre-recorded in court was able to occur under the Evidence Act in a small number of cases. Although rarely used, the process for using such video records is determined by judges on a case-by-case basis. The absence of Regulations specifically relating to court video records therefore does not affect the ability to lawfully use such records in court.
- 40 The Ministry of Justice will work with the judiciary to consider whether there may be benefit in developing Court Rules on the management of video records held by the courts. As is appropriate, this ensures a judicial-led approach to the management of court information.

The Regulations will not prevail over any Court Rules

- 41 Cabinet had previously agreed that in the event of conflict, the Regulations would prevail over Court Access Rules. I have reconsidered this approach based on the judiciary’s feedback and the narrowed scope of the Regulations. I do not consider it appropriate for the Regulations to dictate the management of court information or override Court Rules. Judicial responsibility for the

custody and control of court information is a key element of the constitutional principles of separation of powers and judicial independence.

- 42 Consequently, I recommend that the Regulations do not attempt to clarify the relationship between the Regulations and Court Access Rules, as originally agreed by Cabinet. Subject to your agreement, this change will require Cabinet to rescind its original decision.
- 43 If, in due course, the judiciary consider Court Rules are required for videos that are court information, the Ministry of Justice will work with the judiciary to ensure there is alignment between the Regulations and Court Rules.

The Ministry of Justice will review how the Regulations are operating

- 44 The implementation of the Regulations will be closely monitored. The key method of monitoring the impacts will be direct feedback from the courts, Police and victims' representatives (including the CVA).
- 45 To ensure they are operating as intended, the Ministry of Justice will commence a review of the operation of the Regulations two years after they fully enter into force. If significant unintended consequences or impacts arise, an earlier review will be considered.

Timing and 28-day rule

- 46 If agreed by Cabinet, the Regulations will be submitted to the Executive Council on 6 June for the Governor-General's approval and published in the Gazette on 8 June. Allowing for the requisite 28 days, the majority of the Regulations will come into force on 6 July 2023.
- 47 The provisions relating to the Family Court's access to video evidence, and the associated changes described above will come into force on 6 January 2024 (six months after the rest of the Regulations).

Compliance

- 48 These regulatory changes comply with:
- 48.1 the principles of the Treaty of Waitangi;
 - 48.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 48.3 the principles and guidelines set out in the Privacy Act 2020;
 - 48.4 relevant international standards and obligations; and
 - 48.5 the Legislation Guidelines (2021 edition).

Treaty of Waitangi analysis

- 49 The Regulations aim to preserve both complainants' and defendants' interests in a way that promotes justice and fairness. This aim aligns with the Government's ongoing commitment to honour our Treaty obligations, in particular to protect Māori interests under Article Three of te Tiriti.
- 50 I consider that the additional safeguards around disclosure of adult video evidence in the Family Court will help to ensure the Regulations do not create adverse or unforeseen impacts for tangata whenua.

New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993

- 51 The Regulations engage NZBORA rights, including the minimum standards of criminal procedure and the right to justice.
- 52 The Regulations engage the right to prepare for and present a defence, and the right to examine the witness for the prosecution, as they limit the ways in which defendants and their lawyers can view and access some types of video evidence. For example, in cases involving child complainants, and witnesses in sexual and violent cases, unless a judge orders otherwise, the defendant and their lawyer may only view the video evidence at premises under the control of, or agreed to by, the Police or a Crown lawyer.
- 53 Similarly, while the Regulations expand the Family Court's access to a complainant's video evidence, they limit the access to and viewing of that video evidence by parties and their lawyers. This limitation engages the right to justice.
- 54 The objective of these limitations is to protect the strong privacy interests of child complainants, and witnesses in sexual and violent cases, and ensure the video evidence is not misused. Video evidence often shows complainants in a vulnerable state while discussing highly personal and sensitive matters. These limitations are consistent with section 106(4A) of the Evidence Act.
- 55 I consider that these limitations are proportionate to the objectives the Regulations seek to achieve. They do not restrict the access to, or viewing of, the evidence more than is reasonably necessary to achieve the objectives.

Regulations Review Committee

- 56 There are no apparent grounds for the Regulations Review Committee to draw the amendment regulations to the attention of the House of Representatives under Standing Order 327.

Certification by Parliamentary Counsel

- 57 Parliamentary Counsel has certified the attached amendment regulations as being in order for submission to Cabinet.

Impact analysis

- 58 A regulatory impact statement *Rewriting the Evidence Regulations 2007* was prepared in 2021. It was developed in accordance with the necessary requirements and submitted at the time that LEG approval of the policy relating to the Regulations was sought [LEG-21-MIN-0194].
- 59 A supplementary annex to the impact statement has been produced to reflect the amended scope of the Regulations and policy changes discussed in this paper. This is attached in Appendix 1.
- 60 The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Annex to Impact Summary prepared by the Ministry of Justice. The Panel has concluded that the Annex **meets** the Quality Assurance criteria. While the Annex was prepared under tight time constraints which precluded wide consultation, two rounds of targeted consultation were undertaken, which has clearly influenced the policy development. The Panel notes that the proposed review of the regulations two years after commencement provides an early opportunity to revisit the regulations.

Publicity

- 61 The Regulations will be published in the *New Zealand Gazette* as soon as they have been made.

Proactive release

- 62 I propose to proactively release this paper after the Regulations have been gazetted.

Consultation

- 63 The following agencies were consulted on this paper and the draft regulations: New Zealand Police, Crown Law Office, the Public Defence Service, Oranga Tamariki, the New Zealand Defence Force, the Chief Victims' Advisor, the Privacy Commissioner, the Criminal Cases Review Commission, Te Puna Aonui, the Ministry of Social Development, Te Puni Kōkiri, the Ministry for Pacific Peoples, the Ministry for Women, Whaikaha - Ministry of Disabled People, the Department of Corrections, and the Treasury. The Department of the Prime Minister and Cabinet was informed.
- 64 Early consultation with the judiciary in August 2022 required the Ministry of Justice to reconsider the approach to the Regulations and led to the exclusion of content relating to Court produced and held video records. Reconsidering the approach has had knock-on impacts for timeframes, which has meant full public consultation on an exposure draft of the Regulations was not able to be undertaken.
- 65 The Ministry has, however, undertaken two rounds of targeted consultation on the Regulations. These consultations allowed the Regulations to be tested with the judiciary, representatives of the legal profession and victims' rights representatives.

- 66 The judiciary is satisfied that its concerns about the scope of the regulations has been addressed. Stakeholders were generally supportive of the intent to update the Regulations. No issues were raised concerning the definition of Police video record in the Regulations.
- 67 In relation to the proposed changes to the Family Court access provisions the Ministry tested the proposals with the Principal Family Court Judge (PFCJ), the Chief Victims Advisor, legal representatives, and victims' rights representatives (both family violence and sexual violence representatives).
- 68 The CVA and the PFCJ support including the additional criteria that a Family Court judge must consider before ordering disclosure of Police video evidence and the proposal that a party's lawyer may supervise the viewing of video evidence on Family Court premises in the place of a Registrar.
- 69 While the PFCJ supports the proposal to allow judicial discretion to allow video evidence to be accessed outside the Family Court, the Chief Victims Advisor, Dr Kim McGregor, does not due to the potential for video evidence to be misused if the viewing can occur outside of Family Court premises.

Recommendations

- 70 The Minister of Justice recommends that the Committee:
- 1 **note** that Cabinet agreed in December 2021 to a re-write of the Evidence Regulations 2007 and invited the Minister of Justice to report back with finalised Regulations for approval in 2022 [LEG- 21-Min-0194];
 - 2 **note** that in line with Cabinet's agreed approach to the re-write, the updated Regulations set out a modern and accessible regime for Police-recorded evidential video interviews, expand access to the Criminal Cases Review Commission and the Family Court, and remove mandatory destruction obligations;

Additional policy decisions relating to expanded Family Court access

- 3 **agree** that the Regulations:
 - 3.1 prescribe the following additional criteria that a Family Court judge must consider before allowing parties (or the lawyer of any of those parties) to a proceeding under the Care of Children Act 2004, the Family Violence Act 2018 or the Oranga Tamariki Act 1989 to view the video evidence;
 - 3.1.1 the extent to which the video record is relevant to the proceedings before them;
 - 3.1.2 the likely extent of harm to the complainant whose evidence is contained in the video record from disclosure of that record;
 - 3.1.3 the public interest in protecting the privacy of complainants;

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- 3.1.4 if the complainant is a child, the disclosure order serves the welfare and best interests of the complainant;
 - 3.1.5 reasonable steps have been taken to ascertain any view of the complainant on the proposed disclosure; and
 - 3.1.6 any other matter that the Judge or judicial officer considers relevant.
- 3.2 preserve the default position that video evidence must be viewed within the premises of the Family Court, but a party's lawyer will be able to supervise viewing of the video evidence of a child or adult complainant in place of supervision by a Registrar;
- 3.3 provide discretion to a Family Court Judge to authorise the viewing of video evidence or transcripts (but **excluding** videos of a child complainant, or a witness in a sexual or a violent case) outside of Family Court premises;
- 4 **agree** that the Regulations relating to the Family Court's access to video evidence, and the associated changes described in recommendation 3 above, will come into force six months after the rest of the Regulations;

Narrowing the scope of the Regulations and rescinding previous decisions

- 5 **note** that the approach to the re-write of the Regulations, agreed by Cabinet in 2021, involved including regulations managing the new forms of video evidence in the Sexual Violence Legislation Act 2021 (evidence recorded in court before, and at, trial) [LEG-21-MIN-0194];
- 6 **agree** to recommend that Cabinet **rescind** the decision referred to in recommendation 5 above and instead **agree** that the scope of the re-write of the Evidence Regulations will be limited to Police video evidence;
- 7 **note** that the approach to the re-write of the Regulations, agreed by Cabinet in 2021, included a decision that where there was a conflict, the Regulations will prevail over Court Access Rules [LEG-21-MIN-0194];
- 8 **agree** to recommend that Cabinet **rescind** the decision referred to in recommendation 7 above and instead **agree** that the re-write of the Regulations will reflect the Judiciary's responsibility for the management of court information and seek to complement Court Access Rules;
- 9 **note** that a full public consultation on an exposure draft of the Regulations has not been undertaken but that the Regulations have been tested with the judiciary and representatives of the legal profession and the victims' advocacy sector;

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Other recommendations

- 10 **authorise** the submission to the Executive Council of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023;
- 11 **note** that the majority of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 will come into force on 6 July 2023 and the provisions relating to the Family Court's access to video evidence will come into force on 6 January 2024.

Authorised for lodgement

Hon Kiri Allan
Minister of Justice



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.

Evidence (Video Records and Very Young Children's Evidence) Regulations 2023

Portfolio **Justice**

On 1 June 2023, the Cabinet Legislation Committee:

- 1 **noted** that in November 2021, the Cabinet Legislation Committee (LEG) agreed to a re-write of the Evidence Regulations 2007 and invited the Minister of Justice to report back with finalised Regulations for approval in 2022 [LEG-21-MIN-0194];
- 2 **noted** that in line with Cabinet's agreed approach to the re-write, the updated Regulations set out a modern and accessible regime for Police-recorded evidential video interviews, expand access to the Criminal Cases Review Commission and the Family Court, and remove mandatory destruction obligations;

Additional policy decisions relating to expanded Family Court access

- 3 **agreed** that the updated Regulations:
 - 3.1 prescribe the following additional criteria that a Family Court judge must consider before allowing parties (or the lawyer of any of those parties) to a proceeding under the Care of Children Act 2004, the Family Violence Act 2018 or the Oranga Tamariki Act 1989 to view the video evidence;
 - 3.1.1 the extent to which the video record is relevant to the proceedings before them;
 - 3.1.2 the likely extent of harm to the complainant whose evidence is contained in the video record from disclosure of that record;
 - 3.1.3 the public interest in protecting the privacy of complainants;
 - 3.1.4 if the complainant is a child, the disclosure order serves the welfare and best interests of the complainant;
 - 3.1.5 reasonable steps have been taken to ascertain any view of the complainant on the proposed disclosure;
 - 3.1.6 any other matter that the Judge or judicial officer considers relevant;
 - 3.2 preserve the default position that video evidence must be viewed within the premises of the Family Court, but a party's lawyer will be able to supervise viewing of the video evidence of a child or adult complainant in place of supervision by a Registrar;

- 3.3 provide discretion to a Family Court Judge to authorise the viewing of video evidence or transcripts (but excluding videos of a child complainant, or a witness in a sexual or a violent case) outside of Family Court premises;
- 4 **agreed** that the Regulations relating to the Family Court's access to video evidence, and the associated changes described in paragraph 3 above, will come into force six months after the rest of the Regulations;

Narrowing the scope of the Regulations and rescinding previous decisions

- 5 **noted** that in November 2021, LEG agreed that the re-write of the Evidence Regulations 2007 include regulations managing the new forms of video evidence in the Sexual Violence Legislation Act 2021 (evidence recorded in court before, and at, trial) [Paragraph 5, LEG-21-MIN-0194];
- 6 **agreed to recommend** that Cabinet:
- 6.1 rescind the decision referred to in paragraph 5 above; and instead
- 6.2 agree that the scope of the re-write of the Evidence Regulations will be limited to Police video evidence;
- 7 **noted** that in November 2021, LEG agreed that the re-write of the Evidence Regulations 2007 would clarify that where there is a conflict between the Regulations and Court Rules for accessing court documents, the Regulations will prevail, and that any person granted access under the Court Rules must comply with all applicable obligations prescribed by the Regulations [LEG-21-MIN-0194];
- 8 **agreed to recommend** that Cabinet:
- 8.1 rescind the decision referred to in paragraph 7 above; and instead
- 8.2 agree that the re-write of the Regulations reflect the Judiciary's responsibility for the management of court information and seek to complement Court Access Rules;
- 9 **noted** that a full public consultation on an exposure draft of the Regulations has not been undertaken but that the Regulations have been tested with the judiciary and representatives of the legal profession and the victims' advocacy sector;

Submission to the Executive Council

- 10 **authorised** the submission to the Executive Council of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 [PCO 24446/5.0];
- 11 **noted** that the majority of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 will come into force on 6 July 2023 and the provisions relating to the Family Court's access to video evidence will come into force on 6 January 2024.

Rebecca Davies
Committee Secretary

Present:
Hon Kiri Allan
Hon David Parker
Hon Kieran McAnulty (Chair)
Tangi Utikere, MP (Chief Government Whip)

Officials present from:
Office of the Prime Minister
Officials Committee for LEG



Cabinet

Minute of Decision

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Evidence (Video Records and Very Young Children's Evidence) Regulations 2023

Portfolio **Justice**

On 6 June 2023, following reference from the Cabinet Legislation Committee (LEG), Cabinet:

- 1 **noted** that in November 2021, LEG agreed to a re-write of the Evidence Regulations 2007 and invited the Minister of Justice to report back with finalised Regulations for approval in 2022 [LEG-21-MIN-0194];
- 2 **noted** that in line with Cabinet's agreed approach to the re-write, the updated Regulations set out a modern and accessible regime for Police-recorded evidential video interviews, expand access to the Criminal Cases Review Commission and the Family Court, and remove mandatory destruction obligations;

Additional policy decisions relating to expanded Family Court access

- 3 **agreed** that the updated Regulations:
 - 3.1 prescribe the following additional criteria that a Family Court judge must consider before allowing parties (or the lawyer of any of those parties) to a proceeding under the Care of Children Act 2004, the Family Violence Act 2018 or the Oranga Tamariki Act 1989 to view the video evidence;
 - 3.1.1 the extent to which the video record is relevant to the proceedings before them;
 - 3.1.2 the likely extent of harm to the complainant whose evidence is contained in the video record from disclosure of that record;
 - 3.1.3 the public interest in protecting the privacy of complainants;
 - 3.1.4 if the complainant is a child, the disclosure order serves the welfare and best interests of the complainant;
 - 3.1.5 reasonable steps have been taken to ascertain any view of the complainant on the proposed disclosure;
 - 3.1.6 any other matter that the Judge or judicial officer considers relevant;
 - 3.2 preserve the default position that video evidence must be viewed within the premises of the Family Court, but a party's lawyer will be able to supervise viewing of the video evidence of a child or adult complainant in place of supervision by a Registrar;

- 3.3 provide discretion to a Family Court Judge to authorise the viewing of video evidence or transcripts (but excluding videos of a child complainant, or a witness in a sexual or a violent case) outside of Family Court premises;
- 4 **agreed** that the Regulations relating to the Family Court's access to video evidence, and the associated changes described in paragraph 3 above, will come into force six months after the rest of the Regulations;

Narrowing the scope of the Regulations and rescinding previous decisions

- 5 **noted** that in November 2021, LEG agreed that the re-write of the Evidence Regulations 2007 include regulations managing the new forms of video evidence in the Sexual Violence Legislation Act 2021 (evidence recorded in court before, and at, trial) [paragraph 5, LEG-21-MIN-0194];
- 6 6.1 **rescinded** the decision referred to in paragraph 5 above; and instead
- 6.2 **agreed** that the scope of the re-write of the Evidence Regulations will be limited to Police video evidence;
- 7 **noted** that in November 2021, LEG agreed that the re-write of the Evidence Regulations 2007 would clarify that where there is a conflict between the Regulations and Court Rules for accessing court documents, the Regulations will prevail, and that any person granted access under the Court Rules must comply with all applicable obligations prescribed by the Regulations [LEG-21-MIN-0194];
- 8 8.1 **rescinded** the decision referred to in paragraph 7 above; and instead
- 8.2 **agreed** that the re-write of the Regulations reflect the Judiciary's responsibility for the management of court information and seek to complement Court Access Rules;
- 9 **noted** that a full public consultation on an exposure draft of the Regulations has not been undertaken but that the Regulations have been tested with the judiciary and representatives of the legal profession and the victims' advocacy sector;

Submission to the Executive Council

- 10 **authorised** the submission to the Executive Council of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 [PCO 24446/5.0];
- 11 **noted** that the majority of the Evidence (Video Records and Very Young Children's Evidence) Regulations 2023 will come into force on 6 July 2023 and the provisions relating to the Family Court's access to video evidence will come into force on 6 January 2024.

Rachel Hayward
Secretary of the Cabinet

***Secretary's Note:** This minute replaces LEG-23-MIN-0076. Cabinet agreed to the rescinding decisions in paragraphs 6.1 and 8.1.*