

Departmental Disclosure Statement

Sexual Violence Legislation Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

October 2019

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information.....	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features.....	9

Part One: General Policy Statement

This Bill amends the Evidence Act 2006, Victims' Rights Act 2002, and Criminal Procedure Act 2011, to reduce the retraumatisation victims of sexual violence may experience when they attend court and give evidence. It responds to Law Commission recommendations relating to court processes and evidence laws in its reports *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) and *The Second Review of the Evidence Act 2006* (NZLC R142, 2019).

The Law Commission's 2015 report found that the justice system often fails to respond appropriately to victims of sexual violence. The requirements of the court process are not aligned with victims' needs or recovery, and risk further traumatising those who come forward. These features, and the experiences of victims who have participated in prosecutions, can deter others from reporting offences and lead to fear and mistrust of the criminal justice process. Low reporting rates mean sexual offenders may not be held to account, resulting in missed opportunities to reduce reoffending and provide victims with a just resolution.

The Bill seeks to improve sexual violence victims' experiences in court, while preserving the fairness of the trial and the integrity of the criminal justice system. Key amendments in the Bill –

- clarify and extend restrictions on the admissibility of evidence about a complainant's sexual experience and disposition, to protect complainants from unduly invasive questioning. These amendments also help to dispel the idea that consent, or reasonable belief in consent, can be derived from a complainant having thought about or consented to similar sexual activity in a different context:
- apply the criminal case restrictions on evidence of a complainant's sexual reputation, experience, and disposition, to civil cases too – with a narrow exception to the complete bar on reputation evidence. Cases of a sexual nature carry similar dynamics irrespective of their jurisdiction, and the rationale of protecting complainants and ensuring legitimate reasoning applies equally in civil cases:
- require Judges to intervene in inappropriate questioning of witnesses, and include a witness's vulnerability as one of the factors a Judge may consider in determining whether the questioning is unacceptable. This strengthens the basis on which Judges can control the nature and content of questioning:
- entitle sexual violence complainants and propensity witnesses to give their evidence in alternative ways. These amendments make it easier to shield witnesses from some of the stress of appearing in the witness box and may also improve the quality of their evidence, while still ensuring it can be heard and tested:
- make it clear that the entitlement to use alternative ways of giving evidence extends equally to pre-recorded cross-examination evidence, which is used very rarely under current law, and create a procedural framework with requirements and safeguards to ensure recording can happen effectively and fairly:
- require Judges to direct the jury on any myth or misconception relating to sexual violence that they consider relevant to the case, unless it has been adequately

addressed in evidence already. Judicial directions addressing commonly held myths and misconceptions about sexual violence and the way victims and perpetrators “normally” behave will help support the jury to discharge properly its role as the fact finder:

- allow the court to be cleared of the public when a sexual violence victim’s victim impact statement is presented, and clarify that victim impact statements may be presented to the court in alternative ways. These amendments will empower victims to exercise their rights to convey the impact of the offending to the offender and court, which can be an important part of the healing process, without having to suffer through unnecessary distress.

The Bill is introduced under Standing Order 263(a). That Standing Order permits an omnibus Bill to amend more than 1 Act to be introduced if the amendments deal with an interrelated topic (namely, sexual cases) that can be regarded as implementing a single broad policy (namely, improving the courts’ response to sexual violence victims). The Bill is currently not intended to be divided, by select committee or committee of the whole House, into 3 separate amendment Bills.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>The Justice Response to Victims of Sexual Violence</i> (New Zealand Law Commission, R136, published 14 December 2015): https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf</p> <p><i>The Second Review of the Evidence Act 2006</i> (New Zealand Law Commission, R142, published 13 March 2019): https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/EA2%20-%20FINAL%20REPORT%20R142%20-%20Web%20Publishing.pdf</p> <p><i>Improving the justice response to victims of sexual violence: victims' experiences</i> (Gravitas Research and Strategy Limited, August 2018): https://www.justice.govt.nz/assets/Documents/Publications/Improving-the-justice-response-to-victims-of-sexual-violence-victims-experiences.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
--	-----------

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Improving the justice response to victims of sexual violence: Regulatory Impact Statement, prepared by the Ministry of Justice. To be published once the Bill is introduced at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/regulatory-impact-statements/ and https://treasury.govt.nz/publications/legislation/regulatory-impact-assessments</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statement did not meet the threshold for receiving an independent opinion on quality from the Regulatory Impact Analysis Team based in the Treasury.</p> <p>The Regulatory Impact Statement was assessed internally by the Ministry of Justice Regulatory Impact Assessment Quality Assurance Panel. It was determined to meet the quality assurance criteria.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
<p>The RIS did not address minor, technical or consequential amendments progressed in the Bill. Two proposals were added to the Bill after the RIS was completed. The first applies the existing restrictions in criminal cases on the admissibility of evidence about a complainant's sexual reputation, experience, or disposition, to civil proceedings, with a narrow modification to preserve legitimate causes of action and defences in the civil jurisdiction. The second adds a requirement to include additional information in an application to present evidence about the complainant's sex life. Treasury confirmed those proposals were exempt from RIA requirements as they present no or only minor impacts on businesses, individuals or not-for-profit entities.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
---	-----------

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>Section 5.1 (from page 33) of the RIS estimates the size of potential costs and benefits. The funding received to implement the Bill through Budget 2019 totals \$37.8 million.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>Assumptions and risks in respect of individual proposals are outlined in the impact analysis sections of the RIS. Section 5.2 (page 34) of the RIS summarises risks of cost estimates, and factors that may influence uptake and compliance (and therefore costs and benefits). Section 6.2 (page 35) of the RIS summarises implementation risks.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
--

The Ministry of Justice did not identify any inconsistency with New Zealand's international obligations during policy development. The Bill's policy was formulated and evaluated against best practice in sexual violence cases, which is consistent with our international obligations in relation to human rights, rights of the child, rights of persons with disabilities, and eliminating discrimination against women.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice did not identify any inconsistency with the principles of the Treaty of Waitangi during the development of the Bill and its policy. Policy development included consideration of the social context and disproportionate effects on Māori of both sexual violence and the courts, and how the Bill can align with and honour the Government's obligations under Article Three of the Treaty to protect Māori and Māori interests.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
---	------------

Advice will be provided to the Attorney-General by the Crown Law Office. If the Attorney-General agrees to waive legal privilege, advice on the Bill's compliance with the New Zealand Bill of Rights Act 1990 will be published shortly after introduction at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/ .
--

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
--	--

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
---	-----------

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
--	-----------

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
---	------------

The Bill amends provisions relating to the recording of and access to sexual violence complainants' and propensity witnesses' evidence, for use in court proceedings.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	NO
<p>The provisions relating to personal information replicate, refine, or align with existing provisions and practice, and do not result in any new privacy implications. The relevant personal information is provided directly by the person concerned for the purpose of the proceeding, must be stored and accessed securely by only a small number of specified persons, and may be used only for a small number of specified purposes.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>In mid-2018, most policy proposals were tested with a group of key organisations and experts across the sexual violence sector, who were supportive of the proposed amendments. Legal professional organisations were consulted at the same time on the proposals relating to pre-recorded cross-examination and specialist sexual violence training for defence counsel. Strong concerns were expressed by the defence bar, both within and outside Government, about pre-recorded cross-examination.</p> <p>The Law Commission consulted extensively in developing the recommendations the Bill progresses.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The Bill's policy and drafting has been iteratively tested with prosecution and defence practitioners and courts operational expertise within Government.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
--	-----------

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
--	-----------

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
---	-----------

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
---	-----------

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Several elements of the Bill modify what and how evidence may be presented in both criminal trials and civil cases. These provisions may be seen to involve determinations about a person's rights and interests, for example minimum standards of criminal procedure or natural justice rights to test evidence and present a defence.</p> <p>The decision-making powers in question are exercised by or under the supervision of a judge, who is bound to observe the principles of justice and rule of law. More specifically, the relevant provisions are explicit in their deference to the interests of justice and/or rights to a fair trial, and contain safeguards preserving natural justice and procedural fairness that are tailored to the determination in question.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
---	-----------

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
--	-----------

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
--	-----------