

25 February 2021

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Wellington

By email: Matthew.Mitchell@justice.govt.nz

Tēnā koe Matthew

Re: Sexual Violence Legislation Bill – proposed amendments and draft Supplementary Order Paper

Thank you for your email of 4 February 2021. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) is grateful for the further opportunity to comment on proposed amendments to the Sexual Violence Legislation Bill (**the Bill**).

We appreciate the careful consideration the Minister and officials have given to the Law Society's concerns about the need for further amendments to the Bill. The Law Society is interested in achieving a constructive outcome – legislation that is clear and workable and achieves the right balance as between all participants in the criminal justice system.

The proposed amendments and a copy of the confidential draft Supplementary Order Paper (**SOP**) have now been reviewed by the Law Society's Criminal Law Committee. In principle, the Law Society supports the proposed amendments, and makes the following brief comments.

Criminal justice system: resourcing issues

As the Ministry is aware, delays in the criminal jurisdiction are a longstanding problem and work is underway looking at how to alleviate pressures on the system. Some of the further amendments to the Bill will deliver more workable provisions, but the Law Society remains concerned the reforms introduced by the Bill will place extra strain on the criminal justice system where resources are already stretched thin.

We acknowledge and support the cross-agency work that has begun to address the substantial delays in the District Court criminal jurisdiction. We also welcome the deferred commencement of the more operationally significant aspects of the Bill such as those relating to pre-recorded cross-examination. Consideration of the significant additional resourcing required to implement the Bill's reforms will need to be prioritised once the Bill has been enacted.

Definition of sexual 'reputation'

The draft SOP sets out a definition of sexual reputation that distinguishes reputation based on its 'second-hand' nature. The amended definition will ensure that:

“the sexual reputation of a complainant—

- includes, without limitation, the reputation of the complainant for having a particular sexual disposition; but
- excludes any witness’s evidence that—
 - relates directly or indirectly to the complainant and sexual matters; and
 - 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 new section 44, inserted by clause 8).¹

In its second Review of the Evidence Act 2006 the Law Commission noted the differing interpretation of “reputation” adopted by the Supreme Court in *B (SC12/2013) v R*,² and said the Commission’s preliminary view was that “reputation” should be given its ordinary definition – the beliefs and opinions that other people hold about the complainant. The Commission noted that this is the commonly understood meaning of the word, and therefore most consistent with the Act’s purpose of enhancing access to the law of evidence.³

While the draft definition doesn’t adopt the plain meaning of “reputation” as originally recommended by the Law Society,⁴ we consider it will still help to clarify that the prohibition in section 44AA applies to evidence of reputation only. Evidence of a witness’ direct sexual experience with a complainant, and/or observed disposition evidence about a complainant, would fall to be considered under the new section 44(1). We consider that the proposed definition is compatible with a plain meaning of “reputation” and the majority’s interpretation of “reputation” in *B (SC12/2013) v R*.⁵

Video record evidence

The Law Society welcomes the repeal of the restrictions on defence counsel access to video record evidence, currently contained in sections 106(4A) - (4C) of the Evidence Act 2006.

The proposed amendment aligns with the Law Society’s concerns noted in our previous correspondence that restricted access to video record evidence, particularly evidence in chief, has created significant problems in practice. It also aligns with the Law Commission’s report that reached the same conclusion and the Commission’s recommendation to remove the automatic restrictions on defence counsel access to evidential video interviews (**EVIs**) of children and complainants in sexual and violence cases.⁶

¹ Draft SOP, PCO 21824-5/1.6 (185-2), Explanatory Note at p3.

² *B (SC12/2013) v R* [2013] NZSC 151; [2014] 1 NZLR 261.

³ Law Commission’s Second Review of the Evidence Act 2006 – Te Arotake Tuarua I te Evidence Act 2006, 42 NZLC IP42, at 3.31 – 3.33.

⁴ New Zealand Law Society submission, Sexual Violence Legislation Bill, 17 February 2020 at [21] accessed here: https://www.lawsociety.org.nz/_data/assets/pdf_file/0019/143614/Sexual-Violence-Legislation-Bill-17-2-20.pdf

⁵ Above n 2. The majority and William Young J preferred the term’s plain meaning, namely “the beliefs and opinions that other people held about the complainant”.

⁶ As noted in our letter of 24 June 2020 at p2: “The current provisions regarding video recorded evidence have resulted in serious difficulties in practice. New section 106I would require all parties to have “secure access” to pre-recorded cross-examination. The Bill relies on the Law Commission’s recommendations concluding that the Evidence Act amendments protect defendants’ fair trial rights, but it does *not* include the Commission’s recommendation to amend section 106 to make copies of pre-recorded video evidence available to defence counsel – despite the Commission’s observation that

The Law Society agrees that judges should be able to place conditions on access to any evidential video interview, over and above those contained in the Evidence Regulations.

We also note the Ministry's intention to update the Evidence Regulations 2007, to:

- place a stricter obligation on defence counsel to take all reasonable steps to ensure the defendant does not misuse the EVI. This would be more explicit than current regulation 32(5), which states that the "defendant may view the EVI only in the presence of a lawyer". It would likely include a duty of active supervision, and to take reasonable steps to ensure the defendant is not left alone with the recording even if it isn't playing; and
- require a log of who has accessed the EVI and when, to be kept by anyone facilitating or supervising access.

We recommend that any proposed amendments should include a clear statement of what counsel's obligations are, what the 'duty of active supervision' would entail, and possible direction on what 'reasonable steps' includes. We would appreciate the opportunity to review the proposed amendments to the Evidence Regulations in due course.

Next steps

We hope these comments are helpful. If you have any questions or further discussion would assist, please contact the Law Society's Criminal Law Committee via our Law Reform and Advocacy Advisor, Amanda Frank (amanda.frank@lawsociety.org.nz).

Nāku noa nā,



Tiana Epati
President

restrictions on defence counsel access had "given rise to concerns about the fair trial rights of defendants".