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24 June 2020

Hon Andrew Little, Minister of Justice
Parliament
Wellington

By email: a.little@ministers.govt.nz

E te Minita, tēnā koe

Sexual Violence Legislation Bill – proposed amendments

Introduction

I am writing to you on behalf of the New Zealand Law Society | Te Kāhui Ture o Aotearoa in relation to the Sexual Violence Legislation Bill.

As you know, the Bill is a significant reform of the criminal justice system, intended to reduce the retraumatisation which sexual violence complainants experience in the criminal trial process. The Justice select committee recently released its report on the Bill and in the Law Society's view, the opportunity to make some important improvements to the Bill has been missed. In addition, some of the select committee's proposed amendments may unnecessarily complicate criminal trials, without achieving the intended objective of improving the experience of complainants and witnesses.

I have set out below some aspects of the Bill that warrant urgent attention and urge you to consider introducing amendments by way of supplementary order paper during the remaining stages of the Bill's passage in the House. 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 – and is willing and able to provide further information or drafting assistance if needed.

Overview

The Bill substantially changes the way sexual violence complainants and witnesses give evidence, including by allowing greater use of pre-recorded evidence and cross-examination. The Law Society acknowledges the significant policy work by the Law Commission and officials that underpins the Bill. The subject matter has invoked substantial interest from members of the legal profession and the public and will likely continue to do so.

The Law Society supports efforts to reduce retraumatisation for sexual violence complainants by easing the burden of giving evidence in sensitive cases. However, the proposed changes must also strike the right balance between ensuring complainants are treated fairly and upholding the

fundamental right to a fair trial. We acknowledge this is a difficult balance and there are some areas, such as pre-recording of cross-examination, where the legal profession is divided, with strong views on either side (as you'll be aware, pre-recording of evidence, particularly cross-examination, is opposed by many defence lawyers). It is necessary to ensure that any reform guarantees participants are treated fairly, justice is not only done but seen to be done *and* that fundamental rights and freedoms are upheld. The Law Society's primary interest is to ensure the legislation achieves that balance and is workable in practice.

Recommended changes to the Bill

The Law Society made written submissions[1] to the Justice select committee, recommending several changes to the proposed process for complainants and witnesses to give evidence in sexual violence trials.

The recommended amendments had been very carefully evaluated by experienced criminal practitioners from both sides of the bar, and we believe were constructive, balanced and necessary. We were disappointed to see most of them were not addressed (at all) in the committee's report. We remain concerned the Bill as reported back by the committee will cause serious difficulties in practice unless amendments are made to it in the House.

In particular, we want to draw your attention to the Law Society's key recommendations set out below:

a. **Clause 8:** Include a definition of "reputation" in new section 44AA (e.g. "the beliefs and opinions that other people hold about the complainant").

   This would clarify the prohibition (against giving evidence that relates directly or indirectly to the sexual reputation of the complainant) applies only to evidence that is about *reputation* (using that recommended definition). In contrast, evidence of both sexual experience and disposition (that could arguably include some aspect of reputation evidence) would be considered under the heightened admissibility threshold in new section 44(1).

   [see paragraphs 19 – 21].

b. **Clause 12:** 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 restrictions on defence counsel access had "given rise to concerns about the fair trial rights of defendants".

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[1] NZLS submission dated 17.2.2020, attached as Appendix A (and available at https://www.lawsociety.org.nz/__data/assets/pdf_file/0019/143614/Sexual-Violence-Legislation-Bill-17-2-20.pdf). The table of recommended amendments is at pages 31-33 of Appendix A.

The Law Society recommended three key changes to ensure that pre-recording evidence does not breach fair trial rights:

i. that the Commission's recommendation to amend section 106 is adopted;

ii. "secure access" is defined; and

iii. "secure access" to both pre-recorded examination-in-chief and cross-examination evidence extends to include providing soft copies to defence counsel. At the very least, *transcripts* of video evidence should be made readily available to the defendant.

[see paragraphs 42 – 50].

c. **Clause 14:** A range of concerns were identified around the pre-recording of evidence, including proposed section 106G (allowing a direction that sexual case complainants' or propensity witnesses' cross-examination evidence not be given by video record made before trial).

Section 106G(3) is an understandable attempt to strike the right balance, but we consider it is unlikely to be workable in practice. Section 106G(3)(a), for example, allows the judge to direct that a complainant's evidence be given in the ordinary way if pre-recorded cross-examination would force the defence to disclose its strategy early, but only if the defence has "shown clearly in the circumstances of the case" that this would "present a real risk to the fairness of the trial".

The effect of this amendment would be that the defence would need to reveal its trial strategy in order to prove there was a risk that pre-recorded evidence would force the defence to reveal its strategy.

The Law Society identified two alternative options to address this issue:

i. Option one would be to allow for the defence to file submissions without serving the prosecution and for argument to be heard in chambers without the prosecution present.

ii. Option two would be to require the Crown to be represented on such matters by counsel who is not taking any other part in the prosecution and is under a duty not to disclose matters to the trial prosecutor.

[see paragraphs 58 – 64].

d. **Clauses 22 and 24:** The Law Society broadly supports the amendments to the Victims' Rights Act and Criminal Procedure Act, but recommended that the select committee consider whether:

i. applications to present victim impact statements to the court in an alternative manner and to close the court during presentation should be made by the victim (rather than the prosecutor), to be consistent with the rest of the Victims Rights Act;

ii. the obligation on the Secretary for Justice to provide appropriate court facilities for sexual violence complainants should be extended to family violence complainants; and

iii. the current wording of new section 199AA(4) should be amended to allow the judge to incorporate the victim impact statement into a sentencing decision by reference.

[see paragraphs 71 - 80].

Select committee report

The Justice committee stated that it was unable to agree to recommend that the Bill be passed in its current form but set out in the report some recommended amendments.

The Law Society is concerned some of the committee's proposed amendments may unintentionally weaken the criminal trial process. For example, new section 106G(2) sets out the matters that judges would have to consider before deciding that a sexual case complainant's or propensity witness' cross-examination evidence not be given by a video record made before trial. The committee recommended removing the matters in new section 106G(2)(c) and (d)[2] and combining the matters in subsection (2)(a) and (b)[3] so that the judge would have to take into account only one explicit factor – whether the witness was likely to need to give further evidence after the video record had been made, for example due to further disclosure.

However, the question whether full disclosure by the prosecutor under the Criminal Disclosure Act 2008 will be, or is likely to be, completed before the making of the video record and whether the witness is likely to need to give further evidence after the making of a video record are, in the Law Society's view, two very distinct issues and should remain separate considerations for the judge. Problems caused by lack of adequate disclosure have been a significant concern for practitioners for some years. As such it would be prudent to allow judges to look at disclosure issues as a separate factor, distinct from whether the witness is likely to give evidence again (which may be due to many factors).

The criminal justice system – resourcing

A final, important point needs to be raised regarding current resourcing of the criminal justice system. As you will be well aware, delays have been a longstanding problem and work is underway looking at how to alleviate some of the pressures on the system. While in principle some of the proposed reforms in the Bill deliver workable provisions, the Law Society remains concerned the reforms 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 criminal jurisdiction of the district court.[4]

However, all criminal practitioners we consulted following introduction of the Bill expressed grave concerns about the need to ensure adequate resourcing. Current trial processes are routinely found wanting, with a shortage of key equipment and long waiting times for trial often the norm. The Covid-19 pandemic has exacerbated these problems. System-wide improvement is required before New Zealand's criminal justice system can be considered to be working properly. Respectfully, the government and legislators should not underestimate the scale of further resources that will have to

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2 Concerning the likelihood of the recording taking place substantially earlier than the trial (section 106G(2)(c)), and the impact on the witness of having to give evidence again (section 106G(2)(d)).

3 Concerning disclosure requirements (section 106G(2)(a)) and the likelihood of needing to recall the witness (section 106G(2)(b)).

4 The Chief District Court Judge has set up a cross-agency working group (the Criminal Process Working Group) that is tasked with addressing ways to minimise 'churn' and reduce delay in the District Court (criminal). The Law Society is currently involved in this work.

be allocated before the Bill's reforms can be implemented and said to be achieving the intended objective of reducing retraumatisation of complainants and witnesses in sensitive cases.

Conclusion

We hope you find these points helpful and the Law Society will continue to monitor progress of this important legislation. If further discussion would assist, I can be contacted in the first instance via the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz).

Nāku iti nei, nā

Tiana Epati
NZLS President
Appendix A: NZLS submission dated 17.2.2020 on the Sexual Violence Legislation Bill

Appendix A

Sexual Violence Legislation Bill

17/02/2020

Submission on the Sexual Violence Legislation Bill

A. Introduction

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to submit on the Sexual Violence Legislation Bill (**the Bill**).

2. The Law Society has previously responded[5] to the Law Commission's reviews and recommendations[6] on which the Bill is based. Where appropriate, this submission refers to the Law Society's previous submissions. The Law Society has consulted widely amongst the legal profession, including with senior prosecution and defence lawyers, and wishes to record its gratitude for their extensive input.

3. This submission is set out as follows:

   a. Introduction

   b. Executive Summary

   c. Overview of the Bill and Law Society position

   d. Part 1 – Amendments to the Evidence Act 2006

   e. Part 2 – Amendments to the Victims Rights Act 2002

   f. Part 3 – Amendments to the Criminal Procedure Act 2011

   The Law Society's recommendations are set out in Appendix A – Table of Recommendations (attached).

4. The Law Society seeks to be heard.

B. Executive summary

5. The Law Society makes the following key points:

   a. In principle, the Law Society supports efforts to ease the burden of giving evidence on sensitive complainants.

   b. Generally, the drafting of the proposed reforms delivers, in principle, workable provisions. Where amendments are proposed, these have been set out below.

   c. The profession is divided with respect to whether the proposed reforms strike the right balance between complainant/sensitive witness accommodations, and the defendant's fair trial rights. There are strong views on either side. Pre-recording of

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5 Alternative models for prosecuting and trying criminal cases, 3 May 2012; Sexual Violence Trials, 2 June 2017 (available at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0004/136732/l-MOJ-Sexual-Violence-Trials-Counsel-Competence-2-6-17.pdf), Evidence Act review, 21 June 2018 (available at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0003/123447/l-LC-Evidence-Act-Review-21-6-18.pdf), and Improving the justice response to sexual violence, 11 October 2018 (available at: https://www.lawsociety.org.nz/__data/assets/pdf_file/0005/136733/l-MoJ-SV-reforms-re-Law-Commission-recommendations-11.10.18.pdf).

6 The Justice Response to Victims of Sexual Violence (NZLC R136, 2015) and The Second Review of the Evidence Act 2006 (NZLC R142, 2019).

evidence is opposed by many criminal lawyers. Where appropriate the differing views have been highlighted below.

d. All criminal practitioners consulted have expressed grave concerns about the resourcing of the criminal justice system. Current trial courts and processes are routinely found wanting, with a shortage of key equipment and long waiting times for trial often the norm. System-wide improvement is required before the status quo could be considered to be working properly. Respectfully, legislators should not underestimate the scale of further resources which will have to be allocated before the proposed reforms could be feasible.

e. It is necessary to review this Bill in the context of wider reforms to the system overall to ensure that participants are treated fairly, justice is not only done but 'seen to be done' and fundamental rights and freedoms are upheld.[7]

C. Overview

Objectives of the Bill

6. The Bill amends the Evidence Act 2006 (**EA**), Victims Rights Act 2002 (**VRA**) and Criminal Procedure Act 2011 (**CPA**) "to reduce the retraumatisation victims of sexual violence may experience when they attend court and give evidence."[8] The Bill further seeks "to improve sexual violence victims' experiences in court, while preserving the fairness of the trial and the integrity of the criminal justice system."[9]

7. The effect of the amendments, on which the Law Society provides submissions, are as follows:

a. The existing rule that evidence of a sexual violence complainant's sexual experience is subject to a heightened relevancy test, is clarified to extend to evidence of sexual disposition. The same rule is also extended to civil proceedings. The prohibition in criminal proceedings on evidence of sexual reputation is maintained, and extended with limited exceptions to civil proceedings.

b. The judge has a mandatory obligation, rather than a discretion, to disallow unacceptable questions.

c. New provisions govern when and how sexual violence complainants and propensity witnesses may give evidence in alternative ways, including pre-recorded cross-examination. These provisions respond to the limits placed on such evidence by the Court of Appeal in *M v R*[10] (discussed below). Under the new provisions, the prosecution must advise the complainant of the alternative ways of giving evidence, file a notice confirming how such evidence is to be given, and the defence is able to

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7 Including for example the presumption of innocence, the burden on the prosecution to prove the charge beyond reasonable doubt, and the right to cross-examination.

8 Sexual Violence Legislation Bill, explanatory note p1.

9 Ibid.

10 *M v R* [2011] NZCA 303, [2012] 2 NZLR 485.

apply to have such evidence given in the ordinary way (i.e. at trial, in the courtroom, and able to see all parties).

d. The options for how victim impact statements are presented are widened, including in a closed court and by video record.

Overview of this submission

Part 1 – Amendments to the Evidence Act

8. The Law Society:

a. Broadly supports the amendments concerning sexual experience, disposition and reputation, but:

i. recommends that a definition of 'reputation' for new section 44AA of the EA should be included ("the beliefs and opinions that other people hold about the complainant"); and

ii. notes that the attempt to apply a heightened relevance test to the nature of the previous sexual experience may simply result in unnecessary pre-trial rulings.

b. Raises several issues for the select committee's consideration about the introduction of a mandatory obligation on judges to disallow unacceptable questions.

c. Summarises some of the issues raised by pre-recording of cross-examination, and recommends:

i. Although the Bill relies on the consultation and recommendations of the Law Commission in concluding that the amendments to the EA protect the defendant's fair trial rights, the Bill does not include the Law Commission's recommendation to amend section 106 to make copies of pre-recorded examination-in-chief video evidence available to defence counsel, despite the Law Commission's observation that restrictions on defence counsel access had "given rise to concerns about the fair trial rights of defendants".[11] The issue of access to copies of pre-recorded evidence is squarely raised by this Bill, as new section 106I would require all parties to have "secure access" to pre-recorded cross-examination, without defining "secure access". The Law Society considers the Law Commission's recommendation to amend section 106 should be adopted, and "secure access" to both pre-recorded examination-in-chief and cross-examination evidence should be extended to include providing soft copies to defence counsel, to ensure that pre-recording evidence does not breach fair trial rights. At the very least, transcripts of video evidence should be made readily available to the defendant.

ii. In the event the prosecution has given notice that cross-examination is to be given in one of the alternative ways in proposed section 106D(1)(a), and that

11 The Second Review of the Evidence Act 2006 (NZLC R142, 2019) at [9.7].

is no longer "possible or desirable" (see section 106(6)), the requirement to file an amended notice should be mandatory, not discretionary.

iii. An application by the prosecution, under section 106E, for a child witness to give evidence in the ordinary way (i.e. at trial, in the courtroom without a screen) should be heard in chambers, consistent with an application for an adult witness to give evidence in the ordinary way under section 106F(3)(a).

iv. It is not clear who is responsible for the funding of reports ordered by a judge before making a decision that a witness gives evidence in the ordinary way (see section 106E(3)(b) and section 106(3)(b)).

v. New section 106G(3), which responds to concerns about pre-recorded cross-examination raised by the Court of Appeal,[12] while an understandable attempt to strike an appropriate balance on a difficult issue, does not solve the Court of Appeal's underlying concern and is unlikely to be workable in practice. Section 106G(3(a), for example, allows the judge to direct that a complainant's evidence be given in the ordinary way if pre-recorded cross-examination would force the defence to disclose its strategy early, but only if the defence has "shown clearly in the circumstances of the case" that this would "present a real risk to the fairness of the trial". The effect of this amendment would be that the defence would need to reveal its trial strategy in order to prove that there was a risk that pre-recorded evidence would force the defence to reveal its strategy. Two alternative options may address the issues raised by the drafting of section 106G(3). Option one would be to allow for the defence to file submissions without serving the prosecution and for argument to be heard in chambers without the prosecution present. Option two would be to require the Crown to be represented on such matters by counsel who is not taking any other part in the prosecution and is under a duty not to disclose matters to the trial prosecutor. Members of the legal profession differ as to which is the most viable option. As such, the Law Society simply notes both alternatives and invites the select committee to consider these (as discussed further at paragraphs 58-63).

vi. Section 106H(3) should be amended to delete the words "despite section 99 of this Act", as section 99 is already explicitly subject to section 106H (see clause 10).

Part 2 – Amendments to the Victims Rights Act

9. The Law Society:

a. Broadly supports the amendments to the VRA, but recommends:

i. Consideration is given to whether applications to present victim impact statements to the court in an alternative manner (new section 22A), or to close the court during the presentation of a victim impact statement (new

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12 Above n 7.

section 28D), should be made by the victim, not the prosecutor (to be consistent with the rest of the VRA).

ii. New Part 2A of the VRA should be drafted more clearly, so that sections 28A, 28B, 28C and 28D are all inserted into the Act immediately, but with different commencement dates (rather than have one clause insert section 28A and 28D, and another insert 28B and 28D).

iii. Consideration is given to extending new section 28C, which places an obligation on the Secretary for Justice to make appropriate court facilities available to sexual violence complainants, to family violence complainants.

Part 3 – Amendments to the Criminal Procedure Act

10. The Law Society notes:

a. Consideration should be given to whether the application to close the court under section 199AA should be made by the victim not the prosecutor.

b. New section 199AA(4) on its face would empower a judge to give no reasons for a "verdict" in order to avoid disclosing the content of a victim impact statement. Victim impact statements are not relevant to verdicts (as opposed to sentencing), but even where applied to sentencing, this subsection disproportionately compromises the transparency of the decision-making process. The preferred approach is to empower a judge to incorporate the victim impact statement into a sentencing decision by reference (e.g. "paragraphs 5-9 of the victim impact statement demonstrate the breach of trust involved in the offending").

D. <u>Part 1 – Amendments to Evidence Act 2006</u>

Complainants in sexual cases

Clause 8 – sections 44 and 44A replaced

11. The Law Society broadly supports the amendments to section 44 and 44A but recommends that section 44AA should include a definition of "reputation" ("the beliefs and opinions that other people hold about the complainant").

12. Clause 8 of the Bill seeks to address ambiguities present in the current wording of section 44, as highlighted by the Supreme Court in *B (SC12/2013) v R.*[13] In particular, the current lack of reference to sexual "disposition" evidence and scope of sexual "reputation" evidence.

13. Further, clause 8 seeks to expand the application of the heightened relevance test[14] in section 44 to evidence of the complainant's previous sexual experience with the defendant and to civil proceedings.

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13 *B (SC12/2013) v R* [2013] NZSC 151; [2014] 1 NZLR 261, at [56] – [57] per McGrath, Glazebrook and Arnold JJ and [112] per William Young J.

14 Section 44(3) of the EA states the "evidence must be of such direct relevance that it would be contrary to the interests of justice to exclude it."

Sexual disposition evidence

14. The Supreme Court in *B (SC12/2013) v R*[15] drew attention to the fact that while sexual "experience" and "reputation" are referred to in section 44, sexual "disposition" is not.[16] Disposition evidence captures evidence other than what is encompassed by the phrase "sexual experience … with any person other than the defendant" in section 44(1) or "reputation" in section 44(2). An example of such evidence would include sexual fantasies recorded in a diary,[17] or recorded on the complainant's mobile phone.

15. This lack of reference to evidence of a sexual "disposition" in section 44 creates uncertainty as to how the admissibility of such evidence is to be determined.

16. Clause 8 further amends section 44(1) to clarify that evidence of sexual disposition is admissible subject to the heightened relevance test, namely only if it is of such direct relevance that it would be contrary to the interests of justice to exclude it.

17. As per the Law Society's previous submission,[18] we agree that it is appropriate for section 44 to be amended to clarify that the admissibility of all evidence relating to a complainant's propensity in sexual matters is subject to section 44. This would be consistent with the policy reasons underlying section 44 and ensure that all evidence that engages section 44's policy is appropriately captured.

18. Given that there may be circumstances where the complainant's sexual disposition may well be relevant to trial issues, the Law Society also agrees that such evidence should not be subject to a blanket prohibition. Rather, it is appropriate that its admissibility is subject to the heightened relevance test as drafted in the proposed amendment.

Sexual reputation evidence

19. The Bill proposes a new section 44AA which retains the absolute prohibition on sexual reputation evidence. It further clarifies that reputation evidence includes, without limitation, the reputation of the complainant for having any particular sexual disposition. Given the prohibition on reputation evidence, as compared to experience and disposition evidence, we consider it sensible in the interests of clarity, for the provision regarding reputation evidence to be separated as proposed. The attempt is clearly to clarify that the *evidence* of previous experience or disposition is admissible (subject to the heightened relevance test), whereas a complainant's *reputation* for such experience or disposition is not.

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15 Above n 9, at [112].

16 Ibid at [55] per McGrath, Glazebrook and Arnold JJ. It appears that this was not the intention of the Law Commission when it reviewed and re-drafted s 23A of the Evidence Act 1908. Rather it was anticipated that sexual disposition evidence would have been captured by the redraft: see Law Commission "Second Review of the Evidence Act 2006 – Te Arotake Tuarua I te Evidence Act 2006" Issues Paper 42 NZLC IP42, March 2018, at 3.12.

17 Ibid.

18 Evidence Act review 21 June 2018 (https://www.lawsociety.org.nz/__data/assets/pdf_file/0003/123447/l-LC-Evidence-Act-Review-21-6-18.pdf) at p 2.

20. That said, we consider there remains some uncertainty in respect of the application of section 44(1) where the proposed "experience" or "disposition" evidence may also engage "reputation" evidence. This is particularly so given that, in practice, the distinct concepts of experience, disposition and reputation tend to overlap somewhat.[19] Where this occurs, it is currently unclear whether the absolute prohibition applies, or whether admissibility will fall for consideration under the heightened relevance test. A further ambiguity was highlighted by William Young J in *B (SC12/2013) v R*[20] and is clearly illustrated by the different interpretations of "reputation" adopted by the Chief Justice, the majority and William Young J.[21] Such uncertainty is significant because if an overly broad definition of "reputation" is adopted, it may result in the exclusion of evidence that would be admissible as "experience" or "disposition" evidence. William Young J preferred a narrow interpretation of the scope of section 44(2) that prohibits evidence that is only relevant to sexual reputation; but which does not prevent an analysis of admissibility of *behaviour* under sections 44(1) and (3).[22]

21. Accordingly, we recommend that "reputation" ought to be defined in section 44AA to clarify that the ordinary meaning applies, namely "the beliefs and opinions that other people hold about the complainant."[23] This would clarify that the prohibition in section 44AA applies to evidence of reputation only, whereas evidence of both sexual experience and disposition (that may also include reputation evidence) would fall to be considered under new section 44(1).

Complainant's sexual experience with the defendant

22. In the second review of the EA, the Law Society supported retaining the status quo[24] and submitted there is no need for any heightened restrictions on the admissibility of evidence of the fact of a previous sexual experience between the complainant and the defendant. This was because previous sexual interactions are generally relevant to at least one of the elements of the offence and such evidence still falls for consideration in any event under sections 7 and 8 of the EA.

23. As currently worded, the Bill proposes to admit the *fact* of any sexual experience between the complainant and defendant, but imposes heightened restrictions on the *nature* of the previous sexual experience. While not express, presumably the fact of the sexual encounter will still be subject to the sections 7 and 8 admissibility considerations.

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19 Above n 9, at [57].

20 Ibid at [114].

21 In *B (SC12/2013) v R* [2013] NZSC 151; [2014] 1 NZLR 261, at [15]-[17] Elias CJ adopted a broad approach finding that the evidence of the complainant's actions in the past was evidence indirectly going to reputation and thus was prohibited under s 44(2), whereas the majority and William Young J preferred the term's plain meaning, namely "the beliefs or opinions that other people held about the complainant" - at [61] per the majority and [115] – [117] per William Young J.

22 Above n 9, at [116] per William Young J.

23 This was a recommendation of the Law Commission in *Second Review of the Evidence Act 2006 – Te Arotake Tuarua I te Evidence Act 2006 Issues Paper* 42 NZLC IP42, March 2018 at 3.31 – 3.33 where the Law Commission noted, as set out in the body of these submissions, the differing interpretation of "reputation" adopted by the Supreme Court in *B (SC12/2013) v R* [2013] NZSC 151.

24 Above n 14, Evidence Act review 21 June 2018 at p 2.

24. Given the purpose of the Bill, namely to improve the experience of complainants in sexual violence matters, the Law Society acknowledges that the proposed amendments attempt to reach a balance between the assumed relevance of the fact of a previous sexual relationship while ensuring that the complainant will not be unduly questioned about matters of an intimate nature. Taking into account these considerations, we consider clause 8 strikes an appropriate balance.

25. That said, from a practical perspective, we note that previous sexual interaction between the complainant and defendant on its own, is unlikely to be sufficient. For instance, if the fact of the previous sexual encounter is relevant to issues of consent and reasonable belief in consent, then it will likely be necessary for the jury to also be appraised of the surrounding circumstances. This would be particularly so if both the previous experience and the allegations involve 'non-normative' sex, or occurred in the context of violence, arguments or where both parties were intoxicated. Indeed, such evidence of the surrounding circumstances or the nature of the sexual experience will likely be required by both prosecution and defence for context and to lay a foundation for the appropriate submission. Accordingly, the attempt to apply a heightened relevance test to the nature of the previous sexual experience may simply result in unnecessary pre-trial rulings.

Extension to civil proceedings

26. We support the extension of section 44 to civil proceedings given the same policy considerations underpinning section 44 apply in both the civil and criminal jurisdictions.

Notice requirement in section 44A

27. Section 44A sets out the requirements for an application to admit evidence under section 44(1). As currently worded, it does not require the party proposing to offer that evidence to provide reasons as to why the evidence is of such direct relevance that it justifies admission.

28. Clause 8 proposes section 44A is amended to require the party proposing to offer section 44(1) evidence to provide such reasons.

29. As submitted previously,[25] while noting that the omission was likely a legislative drafting oversight, we suggested that it was unnecessary to amend section 44A given that rule 2.13(c) of the Criminal Procedure Rules 2012 requires an applicant to set out the grounds for an application.

30. While we maintain that position, we do not oppose the proposed amendment in the interests of clarity and accessibility.[26]

Trial Process: Questioning of Witnesses (clause 9)

Section 85 amended – Unacceptable questions

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25 Ibid at p 3.

26 Noting the comments of the Law Commission in *The Second Review of the Evidence Act 2006* (NZLC R142, March 2019), at 3.90.

31. Clause 9 proposes an amendment to section 85 which would require a judge to disallow an unacceptable question or direct the witness not to answer it. The stated purpose of the amendment is "to strengthen the basis on which judges can control the nature and content of questioning".[27]

32. As the legislation stands, judges have a discretion to either disallow the question or direct that the witness is not obliged to answer it. This accords with the general wide discretion of a judge to control the nature of questioning in civil and criminal trials. The proposed amendment raises the following issues:

    a. Under the proposed amendment, the judge will be required to make the same assessment of the same question, using the same criteria[28] already in place. In practice, having decided a question is unacceptable, a trial judge will rarely go on to allow the question to be asked or leave it to the witness to decide whether to answer. To remove the judicial discretion and impose a mandatory duty would make little practical difference to the implementation of the section and would give little effect to the stated purposes of the Bill.

    b. Removing the judicial discretion and replacing it with a mandatory duty does not "strengthen the basis on which judges can control the nature and content of questioning"; it simply removes the option to do anything except disallow the question or direct the witness not to answer it. A judge is best placed to make an assessment of a witness's personal characteristics and to allow or disallow questions accordingly.

    c. Whether a witness is directed that he or she is not obliged to answer a question or is simply directed not to answer it, the question is still put to the witness. Under present legislation, a jury may or may not draw an inference a witness is being evasive by declining to answer a question. Where credibility is an issue, the opportunity to make these assessments should not be unfairly limited. Under clause 9, the jury may perceive the trial judge has formed a view and is shielding a witness from questioning.

    d. The witness-protective function of this section will be strengthened by the proposed amendment. If this amendment proceeds, an accompanying direction or explanation may be necessary in order to counteract the perception at (c) above.

    e. An alternative approach might be to impose a mandatory duty, but retain the option of directing that the witness is not obliged to answer the question, rather than imposing a direction not to answer. This may assist with striking a reasonable balance between ensuring fairness and justice, and preserving fair trial rights for a defendant, whilst meeting the underlying purpose of the reforms.

33. The Law Society recommends the select committee consider these issues.

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27 Sexual Violence Legislation Bill, explanatory note, p2.

28 Section 85(1) Evidence Act 2006. Any question that the judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

Section 85(2) – addition of "vulnerability of the witness"

34. The current list of factors a judge may take into account in deciding whether a question is unacceptable (in section 85(2)) is non-exhaustive. Accordingly, the proposed amendment to include the words "vulnerability of the witness" makes little practical difference.

Trial process: alternative ways of giving evidence

Background

35. The Departmental Disclosure Statement states:[29]

> "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. 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."

36. The amendments in this part of the Bill therefore substantially change the way complainants and propensity witnesses in sexual violence cases give evidence, including by removing existing restrictions on the availability of using pre-recorded cross-examination. Those existing restrictions are based on the Court of Appeal decision in *M v R*.[30] Several new provisions appear to be intended to respond directly to concerns articulated by the Court of Appeal. Although members of the legal profession differ on the merits of the proposed reforms to allow pre-recording, including an assumption that *M v R* accurately represents both the stresses on, and stressors of, complainants and fair trial concerns, we have identified areas below where we consider the Bill does not respond adequately to the issues set out by the Court of Appeal or the underlying policy intent in the supporting materials to the Bill.

The existing sections 103-106 and M v R

37. Currently, sections 103-106 provide for alternative ways of giving evidence. Although not explicit, this could include pre-recorded cross-examination. The Bill would change section 106 so that it governs alternative ways of giving evidence-in-chief only, and inserts new, separate provisions governing alternative ways of giving evidence under cross-examination in sexual violence cases specifically. *M v R* would arguably still apply to applications to use pre-recorded cross-examination for non-sexual violence cases, for which an application under section 103 would still need to be made.

38. In *M v R*, the Court found that pre-recorded evidence was problematic and raised fair trial concerns because of the following reasons:

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29 Departmental Disclosure Statement at [4.6].

30 Above n 6.

a. Pre-recording cross-examination would require the defence to "show their hand" prior to trial.[31]

b. Full disclosure is continuous and "haphazard" up to trial. The defence should be allowed to consider all of the evidence carefully before they are required to cross-examine a complainant.[32]

c. An aim of pre-recording evidence is to reduce the stress on the witness.[33]

d. The cost to the court increases. A judge, court staff, recording equipment and courtroom are required. The trial process itself will take longer, with the inclusion of the filming of the evidence, and the viewing of the footage of the evidence to assess if it is suitable. An assessment of any footage of viva voce evidence recorded at trial will also be required.[34]

e. Legal counsel for the prosecution and defence will be required to prepare twice for trial. This is a higher cost for the New Zealand public and the defendant.[35]

f. An avoidance of delay for the complainant will mean a greater delay for all other witnesses. This is because the trial cannot progress until the complainant's evidence is suitably recorded. The defendant has a delayed resolution. The current court practice is to prioritise cases that involve child complainants. With the introduction of pre-recording evidence, the rationale for prioritising those case is removed. These factors leave relationships in limbo especially if the complainant and the defendant are members of the same family.[36]

g. The jury are unable to ask questions in relation to the complainant.[37]

h. Pre-recording will often result in the complainant giving evidence twice. It is very rare for an issue or evidence that emerges shortly before trial that does not affect the questioning of the complainant. It would offend fair trial rights not to allow questioning on any of these issues.[38]

39. As noted previously, the legal profession differs on the merits of the reforms to pre-recording cross-examination. Defence lawyers have raised the following general issues with pre-recording:

a. Pre-recording may fail to reduce stress to complainants, as the environment will likely be the same during the pre-recording and again at trial. Key differences between pre-recording, and giving evidence via another mode (CCTV), include that the jury will not be present and it would occur at an earlier date. These factors may not have a significant impact on reducing stress to complainants.

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31 Ibid, at [34].
32 At [35].
33 At [36].
34 At [36(a)].
35 At [36(b)].
36 At [36(c)].
37 At [39].
38 At [40].

b. Pre-recording does not remove the need for a complainant or a propensity witness to give evidence about a traumatic event. Regardless of any amendment, the requirement will always exist because of the nature of a criminal trial.

c. The potential for the jury to want to ask for a question to be put to a witness who has given pre-recorded evidence is an important consideration that does not appear to have been addressed by the proposed amendments.

d. The current iteration of section 105(1)(a)(iii) makes allowance for what the Court of Appeal in *M v R* described as the "rare" cases in which pre-trial cross-examination is necessary because of a witness's particular circumstances.[39] It observed that allowing cross-examination in advance is not the answer to improving the experience of complainants and witnesses.

e. The current legislation already provides adequately for the protection of vulnerable witnesses including complainants, even with the restrictions noted in *M v R*. Pre-recording a complainant's or witness's evidence in a sexual case should not become the default procedure. Each case should continue to be assessed by the judge on the merits of the circumstances. If the current alternative methods are not being utilised, it is arguably due to the lack of awareness about the availability of such options by witnesses. The best solution that provides a satisfactory position between preserving fair trial rights, and the personal comfort of the witness, is the current scheme of a case by case assessment.

40. Alternatively, other members of the legal profession hold opposing views and wish to note the following general points:

a. The court environment is different between pre-recording and at trial: there is no jury in the former, no media, and research suggests the more people that are present, the harder it is for some complainants to fully disclose their experiences. That knowledge in itself is likely to have a substantial impact on the complainant.

b. The current "case-by-case" assessment necessarily involves greater uncertainty for complainants as to how the process will operate and in turn creates extra stress. Further, there may be a greater degree of reluctance on the part of complainants to continue to participate in the process. "Case-by-case" assessments may also mean the recording of evidence takes place later than would be the case with a prima facie pre-recording rule.

Trial process: video record evidence (clause 12)

Access to video evidence: practical issues with disclosure and the impact on fair trial rights

41. The current provisions regarding video recorded evidence have resulted in serious difficulties in practice. These issues were identified in the second review of the EA, but the Law Commission's recommendations for defence counsel to have copies of video evidence have not been included in the Bill.

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39 At [41].

42. For the reasons set out below, the Law Society recommends that:

a. defence counsel should be given a soft copy of any video evidence made before trial (whether evidence-in-chief or cross-examination) as recommended by the Law Commission;

b. both defendants and defence counsel should be given a transcript of any video evidence made before trial; and

c. the term "secure access" in new section 106I(3) should be defined.

Access to video evidence: existing issues and the Law Commission's recommendation

43. Section 106 currently governs how the defence is able to view pre-recorded video evidence before trial. The usual rule is the video must be offered for viewing by the defendant and his or her lawyer (subsection (3)) and that a copy must be provided to the defendant's lawyer (subsection (4)). However, if the video is of a child complainant or of any witness in a sexual case or violent case, then subsection (4) does not apply and the defendant's lawyer is not entitled to a copy. A judge may order that a copy of a video record or a part of a video record to which subsection (4A) applies be given to the defendant's lawyer before it is offered in evidence but the Law Society understands that typically counsel will have to view it at a police station, court or prosecutor's office.

44. The Law Society has previously addressed the issues concerning access to video evidence noting:[40]

> "The Law Society recognises that, as with current legislation, there are likely to be certain categories of pre-recorded evidence which it will be inappropriate for the defendant in person to retain, such as a video recording of a complainant's evidence and cross-examination in a sexual case. In such cases, the defendant should be provided with a full transcript of the evidence …, subject to appropriate safeguards to minimise potential misuse of the transcript, such as photocopying or circulation on social media. As a safeguard, regulations could be enacted, preventing counsel from providing a copy of the original recorded evidence to the defendant. **Defence counsel should however remain entitled to be provided with a copy of the recorded evidence**. This is evidence given in the proceedings and counsel are entitled to full access to it, in order to obtain instructions and prepare the defence case." (emphasis added)

45. In the Law Commission's report *The Second Review of the Evidence Act 2006*, the Commission recommended this problem be addressed through an amendment to section 106:[41]

> In this chapter, we recommend replacing section 106(4)–(4C) with a provision requiring a video record of the complainant's evidence in sexual and family violence cases to be given to the defendant's lawyer before it is offered in evidence (unless the judge directs otherwise). Consultation confirmed that the Act's restrictions on defence counsel access to such videos have made it

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40 Above n 14, Evidence Act review, 21 June 2018, at p 27.

41 Law Commission *The Second Review of the Evidence Act 2006* (LC R142, 2019) at 9.7.

difficult for the defence to properly prepare its case and have given rise to concerns about the fair trial rights of defendants.

46. The Law Society acknowledges the government's response that "further consideration of this recommendation is needed to assess the operational implications, such as secure and accessible storage of the video records",[42] however, we consider this amendment is necessary and should be included in the Bill. The issues of access to video evidence are already engaged by this Bill in section 106I(3), which provides that "all parties must be given secure access to the recording [of the cross-examination evidence made before trial]". "Secure access" is also not defined (as discussed below).

Secure access: current issues in providing access

47. Clarity needs to be provided on what would be included as "secure access" under section 106I(3). Some lawyers have raised issues with the current cloud-based system (Evidence.com), which is currently on trial by the Police for use with mobile video records in family violence cases. Issues include the ability to review the contents of the video with the defendant and the ability to track and trace access to the video. However, anecdotally the Law Society also understands there have been some instances where defendants may have shared the material with other persons.

48. Cross-examination of the complainant is an essential part of the defence case. It is important evidence which the defendant should be entitled to view and instruct their lawyer on in order to present an effective defence case. Defendants in sexual cases are often held in custody on remand because of the seriousness of the charge. Security measures within remand prisons place heavy restrictions on access to the internet. The Evidence.com program currently on trial does not allow the defence to download a copy of any recording. Therefore, the ability for the defendant to be able to view and instruct counsel on significant evidence in relation to their defence, is severely restricted.

49. If practical issues already exist, it would be apt to make amendments rectifying the issues before (or at least at the same time as) further pressure is put on the system due to the increased need to record evidence. The current practical issues identified by the Law Commission raise concerns for the fair trial rights of defendants. Any concern for the rights of defendants will be magnified, with the increased scope of the recorded evidence from the recorded interviews of complainants to portions of the trial itself.

Other general points about recording video evidence

50. The Law Society also raises the following general points about the process for recording evidence before trial, under section 106H which the select committee may wish to consider:

    a. Who is responsible for the in-court filming of evidence?

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[42] Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006, at p 8.

b. Who is responsible for holding the master copy of the evidence, and for how long? (see paragraph 67 on the issue of re-trials)

c. What happens to the evidence if a trial is abandoned? Do witnesses have an entitlement to view that evidence?

d. Do all parties (including juniors) have to be present during recording?

e. Does the same judge who will preside over the trial have to be present during the pre-recording of the evidence?

f. Does the defendant have the right to be present during the pre-recording of evidence, as he or she would be if evidence was given at trial?

g. What is the procedure if counsel changes between pre-recording and trial?

h. Does the pre-recording need to take place in a court?

Giving of evidence by family violence complainants (clause 13)

51. Clause 13 re-enacts existing provisions in the EA but in a slightly different form. Although the changes, which respond to technical drafting issues, raise no significant issues in the Law Society's view, the wording of new section 106AA is unnecessarily complicated and we suggest it should simply read:

> Sections 106A and 106B apply to a family violence complainant, who is not a child and who is to give or is giving evidence in a family violence case (not including a sexual case).

52. Although the Law Society acknowledges the substance of section 106A, which allows Police video records of family violence complainants to be used as evidence-in-chief, is already in force, we wish to note the following concerns with the use of such evidence:

a. The videos are recorded for an investigative purpose. The questions asked by a lawyer at trial are very different in style and purpose to those required to investigate an allegation. Given the questioning in the video is by Police officers with varying levels of experience, some questioning may be later deemed inadmissible and inappropriate.

b. The video is recorded at a time when the complainant is often emotional. Their evidence is not always clear. Often videos involve irrelevant or inadmissible statements made as an emotive response rather than a factual account. These can be prejudicial to the extent that the video cannot be played in court.

c. The video record is provided via a link to a cloud-based platform. It requires a lawyer to agree to the terms and conditions of a private company not based in New Zealand before being able to view key evidence.

d. To view the evidence an internet connection is essential. If a defendant is remanded in custody, further restrictions are placed on the defence lawyer by the Department of Corrections before the defendant is able to view the video and give instructions.

e. The Law Society understands lawyers have had numerous technical difficulties or inadequate resources to play the videos as evidence at trial resulting in substantial delays to an already stretched court system.

f. Evidence is delivered to the defence lawyer via a hyperlink in an email that has an expiry date for access. When access expires, another request is required for further disclosure. This is inconsistent with the Criminal Disclosure Act 2008.

Giving of evidence by sexual case complainants or propensity witnesses (clause 14)

Section 106D – prosecution's obligation to notify the defence of means of giving evidence

53. Section 106D creates the underlying presumption that a specified complainant or propensity witness is able to give his or her evidence in one or more alternate ways. The proposed amendment creates a mandatory obligation on prosecutors to provide written notice of the intended mode. The Law Society recommends that:

    a. in section 106D(1), after the words "is entitled to give evidence", the words "including cross-examination evidence" should be inserted;

    b. in section 106D(6), the word "may" should be replaced with "must".

54. The first change is simply intended to clarify the obvious purpose of section 106D, to make pre-recording of cross-examination evidence more available in sexual cases.

55. The second change deals with the obligation of a prosecutor where a notice has been given as to how the evidence is to be presented, and that means is no longer "possible or desirable". On the current drafting, there is a discretion but no obligation on the prosecutor to file an amended notice. The Law Society recommends there should be a mandatory requirement to file an amendment notice to inform the defence if the mode of evidence changes for the complainant or witness. The defence should have notice of the correct mode of evidence, and have an opportunity to object to any change.

Section 106E – Application by prosecutor for sexual case complainant or propensity witness who is child to give evidence in ordinary way

56. The Law Society recommends section 106E(3) is amended so that any application under section 106E is to be heard in chambers. This would be consistent with an application from defence for evidence to be given in an ordinary way under section 106F, which is required to be heard in chambers (section 106F(3)(a)). This issue may be an error, as the reason for the distinction is not evident in the Bill's supporting materials. Either the hearing involving a child should be heard in chambers, or for consistency both applications should be held in chambers.

57. In addition, the Law Society makes the following general observations for the select committee's consideration:

    a. The procedure envisaged does not enable a judge to simply acquiesce to a complainant's request. Section 106E empowers the judge to make the order sought only if the complainant or witness "fully appreciates the likely effect" of giving evidence in the ordinary way, and allows a report about the "effect on the complainant" to be ordered by the judge.

b. Section 106E(3)(b) would allow a judge to receive a report from any person the judge considers qualified to advise on the effect of a witness giving evidence in a particular way. The wording of the provision clearly envisages that 'any person' does not have to be a qualified expert. They would not be subject to any rules of conduct, which may give rise to further concerns. Practical issues may also arise including who would be responsible for completing the report to the judge or funding the report, and what, if any, repercussions exist if the witness refused to co-operate for such a report.

Section 106G – Direction that sexual case complainant's or propensity witness's cross-examination evidence not be given by video record made before trial

58. For the reasons set out below, the Law Society considers the proposal in section 106G(3) is unlikely to be workable in practice, and invites the select committee to consider two alternative solutions. Differing views from the legal profession have been highlighted where appropriate.

59. The current approach adopted in section 106G(3) is:

a. to allow the defence to raise one of the section 106G(3) consequences as a reason for concluding that pre-recording cross-examination would present a real risk to the fairness of the trial; but

b. "it must not be presumed, and must be shown clearly in the circumstances of the case, that the following consequences of cross-examination before trial would present a real risk to the fairness of the trial".

60. Section 106G provides the procedure for challenging a notice by the prosecutor that a complainant or witness's cross-examination be recorded pre-trial. It creates a high threshold to override this method, as a defendant must show that giving evidence in this way "would present a real risk to the fairness of the trial", and "that risk cannot be mitigated in any other way".

61. Section 106G(3) deals with some of the risks that might arise from pre-recording cross-examination, some of which were raised by the Court of Appeal in *M v R* (set out above at paragraph 38):

a. that it requires the defence to reveal its trial strategy;

b. that the defence will be unable to tailor its cross-examination to a jury's reaction;

c. that it duplicates preparation; and

d. the practical and technical requirements will involve more difficulties for the parties than if evidence were given at trial.

(the section 106G(3) consequences).

62. The underlying policy decision to prevent any presumption that any of the section 106G(3) consequences arise is understandable: pre-recording cross-examination always carries a risk that the defence will have to reveal their strategy, and on that basis a defence application to have evidence heard in the ordinary way would always succeed, defeating the purpose of the provision. However, members of the defence bar are concerned the

requirement to show "a real risk" would defeat the purpose of the defence application: to show that the pre-recording of cross-examination would require the strategy to be revealed, the defence would have to reveal its strategy.

63. It is difficult to see how this could work in practice. Lawyers have raised two possible alternative amendments to assist with the workability of section 106G(3). First, the defence is able to make submissions on section 106G(3)(a) without an appearance from the prosecution. Alternatively, the Crown could be required to be represented on such matters by counsel who is not taking any other part in the prosecution and is under a duty not to disclose matters to the trial prosecutor. The Law Society invites the select committee to consider these two alternative solutions.

64. Lawyers have also raised the following general points regarding section 106G(3):

a. Crown Law's advice to the Attorney-General under section 7 of the New Zealand Bill of Rights Act 1990 downplays the risks associated with a defendant having to "show" his or her hand before trial. It suggests that the fact that, in some instances, this already happens (using "alibi" notices as an example) means that the risk to the minimum standard of trial procedure is not "undue". However, that conclusion does not sit comfortably with the concerns expressed by the Court of Appeal in *M v R* regarding the fair trial risks associated with the pre-recording of evidence. The Court of Appeal explicitly stated that while there are "some exceptions" (using alibi as an example), "the general rule under our criminal law as it currently stands is that the accused is not required to show his or her hand before the start of the trial". It went on to state that:[43]

> [The] general rule is not lightly to be countermanded. A defendant is generally entitled to hear the prosecution's opening before taking any step in the trial. To that extent, as we said previously, we consider s 367 of the Crimes Act [now s 107 of the Criminal Procedure Act 2011] does bear upon the exercise of the power, as part of "the need to ensure … that there is a fair trial".

b. Section 106G applies a higher threshold ("real risk") to cross-examination evidence to be given in the ordinary way, than the threshold for evidence-in-chief in sections 106E and 106F ("in the interests of justice"). Setting the two thresholds at different levels in favour of the prosecution, risks breaching sections 25(f) and 25(e) of the NZBORA (minimum standards of criminal procedure).

c. Further, it is unclear what would constitute a "real risk" and the criteria for its determination. It is envisaged there would need to be significant case law developed in this area as the proposed amendment is silent on how this is defined.

d. The wording of section 106G(3) is not clear whether all four of the consequences must exist or only one. If all four are required then the unfairness created by the different thresholds for cross-examination and examination-in-chief is magnified. Further, the consequences listed in section 106G(3)(a) – (c) are very specific. In the interests of fairness, it is suggested that the following consequence should be

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[43] Above n 6, at [34].

included: “pre-recording cross-examination would prevent the ability to present an effective defence”. This addition would help to preserve fair trial rights for the defendant.

e. Section 106G(3)(b) requires the defence to clearly show that being unable to tailor cross-examination to a jury’s reaction would present a real risk to the fairness of the trial. This appears to be a very high threshold in the absence of a jury. Tailoring questions to the jury’s reaction is dependent on the jury selected. It is a decision, made in the moment at trial, to proceed with more questioning on a topic, or move away from a topic, depending on how a jury reacts to evidence as it hears it from the witness. It can shape the evidence completely. It also cannot be predicted before trial and cannot be illustrated without a jury.

f. The routine pre-recording of cross-examination may provide the prosecution with the opportunity to remedy any gaps in its case prior to trial. This has the potential to undermine the presumption of innocence and burden of proof.

g. It is difficult to conceive how a defendant is meant to show that:

   i. it “will be unable to tailor its cross-examination to a jury’s reaction”; or

   ii. the “making of a video record before the trial will involve preparation and other effort extra to that required for the trial”. We observe that both were factors that the Court of Appeal was prepared to presume will occur in most instances.

h. It is possible that significant pre-trial litigation, and associated appeals, will be generated under section 106G.

Section 106H – relationship with section 99

65. The wording of section 106H(3) has the potential to be confusing:

   a. Section 99 (empowering a judge to recall a witness during trial) is already explicitly subject to section 106H, through clause 10 of the Bill; and

   b. Section 106H limits recalls of witnesses who have given all of their evidence in a pre-trial video. A judge may only recall such a witness “if the judge considers it would be contrary to the interests of justice not to do so”.

66. Although section 106H(3) explicitly says that it applies “despite section 99 of this Act”, we recommend these words are deleted as section 99 is already explicitly subject to section 106H(3).

Section 106J – Making of video record of sexual case complainant’s or propensity witness’s evidence given at trial and not given by video record made before trial

67. The Law Society does not make any specific amendment to the wording of section 106J, but makes the following observations:

   a. Under section 106J(1), it is mandatory to make a video record of all evidence given by a complainant or a propensity witness at trial, that was not given by video record made before trial. Some practitioners worry that the recording will inevitably be

used for re-trial, and that the application process may not prove robust enough for defence counsel to successfully challenge use of the recording at any retrial(s).

b. A re-trial will not necessarily involve the same lawyers for the defendant as the original trial. Issues of fairness arise by only allowing the re-trial to use the original trial's evidence.

c. A re-trial can sometimes occur significantly later than the original trial e.g. David Bain's original trial was in 1995, his re-trial was in 2009; Malcolm Rewa's original trial was in 1998, and his re-trial was in 2019. In the interim period significant new evidence can emerge (Rewa), or the laws of evidence can change (Bain, Rewa). With advances in the types of evidence available due to technological improvements the capacity for more historic cases to be revisited is more likely. In this situation the original trial evidence would not be adequate, and it would be wrong to restrict the trial to its use.

Trial Process: Judicial Directions (clause 16)

68. The Law Society does not make any substantive comment in relation to clause 16 other than referring the select committee to our previous submissions on this issue. The Law Society noted:[44]

> "In *DH v R*, the Supreme Court set out in general terms the type of direction which is appropriate in jury trials, and trial courts are following this direction. However, directions are also dependent on the particular facts of the case which, in turn, depend on the evidence led by the Crown and the contentions raised on behalf of the defendant. The case may not raise any myths or misconceptions, or it may raise a number. The matter of direction, or not, in any particular case is a matter for judicial discretion, and the categories or examples of 'myths and misconceptions' are not necessarily closed, nor agreed. Consequently, the Law Society does not consider that it is appropriate to seek to list in legislation the misconceptions that should be the subject of direction. The Law Society's view is that the decision in *DH v R* is a sufficient non-legislative guideline for the present, and any directions could be contained in judicial jury trial bench books."

E. <u>Part 2 – Victims' Rights Act</u>

69. The Law Society generally supports the amendments to the VRA, subject to the following points:

a. consideration is given to whether applications by the victim under new sections 22A and 28D should be made by the victim, not the prosecutor, consistently with the rest of the VRA;

b. the staggered commencement dates of the amendments should be clearer; and

c. the obligation placed on the Secretary for Justice to make appropriate court facilities available to sexual case complainants, should be extended to family violence complainants.

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[44] Above n 14, Evidence Act review, 21 June 2018, p 22.

New section 22A – giving victim impact statement using an alternative means

70. Clause 22 replaces existing section 22A, dealing with how a victim impact statement may be presented in court in a manner other than by reading it. The changes made:

    (i) emphasise that section 22A deals with methods of presenting some or all of the victim impact statement other than as provided for in section 22; and

    (ii) give further examples of alternative ways of presentation than currently under section 22A.

71. Proposed new section 22A repeats the current wording that it is for the prosecutor to make the request. This sits rather awkwardly with the approach taken in section 22, where it is the victim who makes the relevant request to the judicial officer. There is no obvious reason for the difference. If the aim of the Bill is to enhance the position of sexual violence victims, it would be appropriate to align section 22A with section 22.

New Part 2A – the rights of victims who are sexual case complainants

72. Clause 23 inserts a new Part 2A containing new provisions enhancing the rights of victims who are sexual case complainants. The new Part 2A will initially only include two sections (new sections 28A and 28D), while the proposed new sections 28B and 28C will be inserted when new section 24 comes into force (if enacted). While the purpose of the drafting is clear (to achieve staggered commencement dates) we recommend it is clearer and more straightforward to enact new sections 28C and 28D along with sections 28A and 28D but with a different commencement date (rather than inserting two new sections and replacing section 28A when section 24 comes into effect).

New section 28B

73. Proposed new section 28B enhances the position of sexual violence complainants in that it will require positive action by the prosecutor to ensure the complainant is fully informed about the ways in which they may give evidence. It further ensures the complainant's views are ascertained and put before the court, when the issue of how evidence will be presented is before the court under sections 106C to 106J of the EA. The Law Society supports these amendments.

New section 28C – obligation to provide appropriate facilities for sexual case complainants

73. Proposed new section 28C is unusual in that section 28C(1) will make the Secretary for Justice responsible for ensuring all reasonable efforts are made to ensure that appropriate facilities are available to sexual violence complainants when attending court or otherwise participating in the trial. The Secretary will be required by the proposed section 28C(2) to take into account (in addition to other matters the Secretary considers relevant) both the victims' physical and emotional comfort and safety and any physical constraints posed by the courtroom or courthouse. Some guidance is given to the Secretary by subsection (3) which gives examples of facilities that may be appropriate.

74. The Law Society commends the inclusion of this section, in light of the surrounding research that highlights complainants may be exposed to undue stress and – not

infrequently – have concerns for their well-being by encounters with the defendants or the defendants' supporters at a courtroom.

75. However, the select committee may wish to consider whether the principle underlying new section 28C should similarly extend to family violence cases (given several of the existing proposals apply equally to both types of cases). While sexual violence cases arguably require more resources and support, the principled reason for restricting the obligation to provide appropriate facilities to sexual case complainants only is not obvious. Applying section 28C only in sexual violence cases may lead to disparities in the handling of family violence cases depending on whether there is a sexual offence included in the charges or not.

F. Part 3 – Criminal Procedure Act amendments

76. The Law Society generally supports the amendments to the CPA, save for the following two issues:

a. Consistently with paragraph 69(a) above, consideration should be given to whether the application to close the court under new section 199AA (clause 30) should be made by the victim not the prosecutor; and

b. New section 199AA(4) is oddly drafted: the effect is to compromise the transparency of the judge's decision (including as to verdict). The Law Society considers there are more appropriate ways to avoid discussion of the content of the victim impact statement in the judge's decision.

Proposed section 199AA – subsection (1)

77. Subsection (1) provides for the making of an order to clear the court and lists the persons who may remain in court once such an order is made. Under section 22 of the VRA it is the victim who may request that a victim impact statement be made in a form other than it being read by the victim. The Law Society recommends that the same underlying principle be applied to section 199AA.

Proposed section 199AA – subsection (4)

78. Subsection (4) is oddly worded, and the breadth of the effect of subsection (4) is perhaps unintended. The supporting materials to the Bill[45] do not refer to this subsection and offer no guidance as to the rationale for including it in proposed section 199AA. Subsection (4) states:

> Even if an order is made [that the victim impact statement may be read in a closed court] under subsection (1), the announcement of the decision of the court, and the passing of sentence, must take place in public; but, if the court is satisfied that exceptional circumstances exist, it may decline to state in public all or any of the facts, reasons, or other

[45] The Regulatory Impact Statement, the Crown Law Bill of Rights advice, the Departmental Disclosure Statement, and the two Law Commission reports.

considerations that it has taken into account in reaching its decision or verdict, or in determining the sentence.

79. The current wording of subsection (4) would lead to decisions in which the reasoning for the decision lacked transparency. The Law Society recommends a simpler mechanism for avoiding distress to the victim arising from the inclusion of the content of the victim impact in sentencing; namely that the judge should be able to refer to the victim impact statement without disclosing the content (e.g. "paragraphs 5-9 of the victim impact statement demonstrate the breach of trust involved in the offending").

80. The Law Society makes the following points:

a. Section 27 of the New Zealand Bill of Rights Act 1990 enshrines the right to natural justice in judicial proceedings. A judge who does not disclose the matters which underpinned some or all of the judgment rendered may deny the defendant or his or her counsel the opportunity to challenge the judge's reasoning on particular matters, which inevitably prevents that matter being properly argued on appeal.

b. The question is then whether the limitation to "exceptional circumstances" represents an appropriate balancing of the fair trial rights (and of the public's right to receive information) with the potential harms against which the subsection is designed to protect ("undue distress" to the complainant). Section 28(2) Sentencing Act 2002 allows one or more parts of a pre-sentence report to be withheld from a convicted defendant if "the disclosure would be likely to prejudice the offender's physical or mental health or endanger the safety of any person". The select committee may wish to consider whether a similar criteria could be added to the proposed section 199AA(4).

c. Proposed subsection (4) does not make clear whether or not the judge may refuse to make a full statement of "facts, reasons, or other considerations" etc to the defendant and/or the defendant's counsel. It might be appropriate to mention the regime for withholding, in a sentencing judgment, information relating to assistance given to the authorities from a defendant, and in exceptional cases sometimes even from defendant's counsel (see Sentencing Practice Note 2013, paragraphs 9 and 10). The Practice Note regime does require that the judge's reasons be stated in a form which can be considered by an appellate court in due course if necessary.

d. As currently drafted, it is not clear whether the word "decision" in subsection (4) refers to the preceding decision to clear the court (made in accordance with subsection (3)), or another "decision" of the court. The Law Society considers that further clarification is necessary.

e. There should also be clarification that the decisions cannot be withheld from the defendant, even if they are not released publicly. The wording "… state in public …" is the same as sections 197(3)/207 of the CPA. The Law Society has not been able to find any instances under sections 197/207 where reasons have been withheld and whether that has meant withheld from the defendant.

f. Victim impact statements are not relevant to verdicts and referring to verdicts in this context creates confusion (this may be the result of a copy paste from section 197(3)).

Herman Visagie
NZLS Vice President

17 February 2020

Attached: **Appendix A – Table of Recommendations**

Appendix A – Table of Recommendations

Relevant Clause	Proposed reform	Recommendation
Clause 8	New section 44AA EA – Evidence of sexual reputation of complainants in sexual cases	Include a definition of "reputation" in new section 44AA (e.g. "the beliefs and opinions that other people hold about the complainant"). [see NZLS submission, paragraph 21]
Clause 9	Section 85 EA amended – unacceptable questions	Consider the issues raised at paragraph 32.
Clause 12	Section 106 EA amended – Video record evidence	Adopt the Law Commission's recommendation to amend section 106 to require a video record of the complainant's evidence in sexual and family violence cases be given to the defendant's lawyer before it is offered in evidence (unless the judge directs otherwise). [see paragraphs 42 – 46]' Consider the issues around 'secure access' and 'video record' generally raised in paragraphs 47-50'.
Clause 13	Section 106AA EA replaced – Sections 106A and 106B apply to a family violence complainants	Re-word section 106AA to state: "Sections 106A and 106B apply to a family violence complainant, who is not a child and who is to give or is giving evidence in a family violence case (not including a sexual case)." [see paragraph 51]
Clause 14	Section 106D EA – Giving of evidence by sexual case complainants or propensity witnesses	In the event the prosecution has given notice that cross-examination is to be given in one of the alternative ways in proposed section 106D(1)(a), and that is no longer "possible or desirable" (see section 106(6)), the requirement to file an amended notice should be mandatory, not discretionary. [see paragraph 53]
	Section 106E EA – Application by prosecutor for sexual case complainant or propensity witness	An application by the prosecution, under section 106E, for a child witness to give evidence in the ordinary way (i.e. at trial, in the courtroom without a screen) should be heard in chambers, consistent with

	who is child to give evidence in ordinary way	an application for an adult witness to give evidence in the ordinary way under section 106F(3)(a). [see paragraph 56]
	Section 106G EA – Direction that sexual case complainant's or propensity witness's cross-examination evidence not be given by video record made before trial	Two alternative options may address the issues raised by the drafting of section 106G(3). We invite the select committee to consider these alternative amendments. Option one would be to allow for the defence to file submissions without serving the prosecution and for argument to be heard in chambers without the prosecution present. Option two would be to require the Crown to be represented on such matters by counsel who is not taking any other part in the prosecution and is under a duty not to disclose matters to the trial prosecutor. [see paragraph 63]
	Section 106H EA – Further cross-examination if all evidence of sexual case complainant or propensity witness has been or is to be given by video record made before trial	Amend section 106H(3) to delete the words "despite section 99 of this Act", as section 99 is already explicitly subject to section 106H (see clause 10). [see paragraph 66]
Clause 22	Section 22A VRA replaced – victim impact statement may be presented to court in some other manner	Consider whether applications to present victim impact statements to the court in an alternative manner (new section 22A), or to close the court during the presentation of a victim impact statement (new section 28D), should be made by the victim, not the prosecutor, consistent with the rest of the VRA. [see paragraph 71; a similar recommendation applies in respect of the CPA: see paragraph 77]
Clause 23	New Part 2A VRA inserted – provisions relating to rights of victims who are sexual case complainants	Re-draft new Part 2A of the VRA so that sections 28A, 28B, 28C and 28D are all inserted into the Act immediately, but with different commencement dates (rather than have one clause insert section 28A and 28D, and another insert 28B and 28D). [see paragraph 72]

Clause 24	New section 28C inserted – availability of appropriate facilities when attending court	Consider extending new section 28C, which places an obligation on the Secretary of Justice to make appropriate court facilities available to sexual violence complainants, to family violence complainants. [see paragraph 75]
Clause 30	New section 199AA CPA inserted (court may be cleared when victim impact statement read or otherwise presented to court in cases of sexual nature)	Amend section 199AA to allow a judge to incorporate the victim impact statement into a sentencing decision by reference (e.g. "paragraphs 5-9 of the victim impact statement demonstrate the breach of trust involved in the offending). [see paragraphs 79 – 80]