

**Sexual Violence Legislation Bill, NZLS submission 17.2.2020 –
Key points for Justice Select Committee (20.2.2020)**

Overview

1. **Objective of the bill:** NZLS acknowledges the significant policy work by the Law Commission and officials that underpins the Sexual Violence Legislation Bill. The bill's objective is to reduce re-traumatisation for sexual violence complainants, but it's important to consider the bill in the context of the wider reforms to the criminal justice system.
2. **CJ system resourcing:** While in principle the proposed reforms in the bill deliver workable provisions, NZLS is concerned the reforms will place extra strain on the criminal justice system where resources are already stretched thin. All criminal practitioners we consulted expressed grave concerns about the need to ensure there is adequate resourcing. 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 can be considered to be working properly. Respectfully, legislators should not underestimate the scale of further resources that will have to be allocated before the bill's reforms can feasibly be implemented.
3. **Balance required:** NZLS supports efforts to ease the burden on vulnerable complainants of giving evidence. However, we are concerned about any reforms that may erode fair trial rights. 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 (pre-recording of evidence, particularly cross-examination, is opposed by many defence lawyers). It is necessary to ensure that any reform ensures participants are treated fairly, justice is not only done but 'seen to be done' *and* fundamental rights and freedoms are upheld.
4. Key recommendations are summarised below. (The full submission makes numerous other recommendations and observations, which we invite the committee and officials to consider.)

Key recommendations

Pre-recording of cross-examination [see submission paragraphs 58 – 64 for details]

5. The bill substantially changes 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.
6. The **new section 106G(3)** is an understandable attempt to strike an appropriate balance on a difficult issue, 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 that there was a risk that pre-recorded evidence would force the defence to reveal its strategy.
7. **Two alternative options** may address this:
 - Option one: allow the defence to file submissions without serving the prosecution and argument to be heard in chambers without the prosecution present.

- Option two: 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.
8. The legal profession is divided as to which is the most viable option. As such, NZLS simply notes the alternatives and invites the committee to consider them.

Video record evidence [paragraphs 41 – 50]

9. **Defence access to pre-recorded evidence:** 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”.
10. NZLS recommends three key changes, to ensure that pre-recording evidence does not breach fair trial rights:
- That the Commission’s recommendation to amend section 106 is adopted,
 - “secure access” is defined, and
 - “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.

Section 44 – clause 8 [paragraphs 19 – 21]

11. **Sexual “reputation” evidence:** Clause 8 seeks to clarify and extend restrictions on the admissibility of evidence about a complainant’s sexual experience and disposition (following concerns about the operation of section 44 in practice).
12. There is some uncertainty about how the new section 44(1) will operate where the proposed “experience” or “disposition” evidence also engages “reputation” evidence. The concepts of experience, disposition and reputation tend to overlap. It is unclear whether experience or disposition evidence that may also go to “reputation” will be absolutely prohibited. 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. There should be a hard line between purely reputational evidence (beliefs or opinions of others) as opposed to evidence of a person acting a certain way or expressing a disposition.
13. NZLS therefore recommends that “reputation” should be defined in section 44AA to clarify that the ordinary meaning applies: namely, “the beliefs and opinions that other people hold about the complainant.” This would clarify that the prohibition in section 44AA applies to evidence that is only about reputation, whereas evidence of both sexual experience and disposition (that could arguably include some aspect of reputation evidence) would fall to be considered under the new section 44(1).

Victims Rights Act, and Criminal Procedure Act [paragraphs 69 – 80]

14. NZLS broadly supports the amendments to the Victims Rights Act and Criminal Procedure Act. NZLS recommends that the committee consider whether:

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