New Zealand Law Society
Te Kāhui Ture o Aotearoa

Sexual Violence (Strengthening Legal Protections) Legislation Bill - Amendment Papers 215 and 216

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

23 December 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on Amendment Papers No 215 (**AP 215**) and 216 (**AP 216**) on the Sexual Violence (Strengthening Legal Protections) Legislation Bill (**Bill**).

1.2 The Law Society previously submitted on the Bill[1] and was confidentially consulted during targeted consultation on the proposal contained in AP 216.[2] In the Law Society's view, AP 216 is unnecessary, given the existing presumption of open justice and the requirement to take into account a victim's views when determining an application for name suppression.

1.3 This supplementary submission has been prepared with input from the Law Society's Criminal Law Committee and Human Rights and Privacy Law Committee.[3] It focuses on AP 216, which proposes to amend name suppression settings in sexual violence cases to require a victim's consent when an offender has made an application to suppress their identity.[4]

1.4 AP 215, on the other hand, proposes to amend section 203 of the Criminal Procedure Act 2011 to enable automatic name suppression of complainants in all offences of a sexual nature.[5] This submission does not offer further feedback on the proposals contained in the Bill as introduced.

1.5 The Law Society **wishes to be heard** on this submission, should the Select Committee hold further hearings.

AP 216

2 General comments

2.1 AP 216 proposes a significant change to the current legislative settings for name suppression in cases involving sexual offending. As noted in the Law Society's feedback during targeted consultation, it raises rule of law concerns. A key concern is the prospect of similar offenders being treated markedly differently, due to the naturally varying perspectives of victims. Further, the introduction of the amendment in this way means that there is no assessment of consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).

2.2 We note our concern that this is the second occasion of an Amendment Paper being used to make significant policy changes, in the area of criminal justice, to a Bill after the select committee has concluded public consultation.[6] While we applaud the decision to

1 A copy of that submission is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/law-reform-submissions/bills/.
2 As referenced at para 54 of the Regulatory Impact Statement (RIS).
3 More information about the Committee can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/criminal-law-committee/.
4 AP 216, explanatory note.
5 AP 215, explanatory note.
6 See also AP 51 on the Gangs Legislation Amendment Bill.

undertake further select committee consultation on the Amendment Papers, we note that this is not an adequate replacement for the benefits of following proper policy and legislative process. It is not clear that there is any time pressure necessitating an expedited process, and this appears to have restricted consideration of the objective need for these specific changes, assessment of the nature of any changes required, and the drafting of those changes.

2.3 As noted in the Regulatory Impact Statement (**RIS**) to the Amendment Paper:

(a) the Ministry of Justice was unable to clarify the policy problem intended to be addressed by the proposal;[7]

(b) only 4% of sexual violence charges in 2023 resulted in a conviction and the granting of permanent name suppression;[8] and

(c) the status quo best meets the objectives of the described policy problem and is the Ministry's preferred approach.[9]

2.4 The RIS also identifies the impact of both time and resource constraints on policy development. The Law Society is concerned this may be part of a developing pattern in the area of criminal justice reform. A recent analysis by Newsroom described the Ministry of Justice 'as a clear outlier, with all six of its documents (official advice) displaying both time and evidential constraints.'[10]

2.5 As the RIS identifies, the proposal may 'undermine the rule of law, appeals process, and impartial decision-making; and has an inherently punitive element which could subject defendants to inconsistent and disproportionately severe punishment beyond the sentencing decision.'[11] The Law Society is of the view that proposals risking such impacts – and representing a fundamental shift in the criminal justice system – necessitate a full and proper process, including scrutiny by the Attorney-General for Bill of Rights consistency.

3 Rule of Law and Bill of Rights considerations

3.1 As referenced, the RIS sets out some of the proposal's implications for the rule of law, as well as rights protected by the Bill of Rights. In respect of the rule of law concerns, the RIS notes that the proposal:[12]

- *requires agreement from a person who may not have access to all the relevant information, such as psychological reports and submissions filed by counsel, and who is a non-party to proceedings – disrupting the fundamental structure of the criminal*

7 Page 8.
8 Page 11.
9 Page 22.
10 Fox Meyer and Laura Walters "Official concerns about haste and dearth of evidence in Govt's first year" (27 November 2024) Newsroom < https://newsroom.co.nz/2024/11/27/official-advice-finds-time-and-evidence-in-short-supply-in-govts-first-year/ >
11 Page 19.
12 See para 51. assessing 'option 1' (no safeguard for those victims who do not wish to, or cannot, participate). The option pursued in AP 216 (victim consent with a single safeguard for cases where victims do not wish to, or cannot, participate) raises the same concerns, see para 101.

justice system where the Crown investigates and prosecutes criminal behaviour, with a judge or jury acting as an impartial arbitrator

- *is likely to undermine public confidence in justice outcomes, as outcomes of victim-agreed decisions could be unpredictable, inconsistent across similar cases, and reliant on the personal views of a victim, which can be based on subjective factors and means victims may not be able to exercise impartiality in the way judges are trained to, and*
- *effectively removes the general right of appeal (by the Crown, defendant, or other person) – which removes a key check and balance on judicial decisions.*

3.2 The Law Society agrees with this assessment. The likelihood of inconsistent and unpredictable decision-making, based not on the impartial assessment of a judicial officer nor established legal principle, and without any effective recourse to review or appeal, risks arbitrary and unequal outcomes.

3.3 In terms of the Bill of Rights implications, the Law Society is of the view that the proposal is likely to engage the right not to be subject to disproportionately severe punishment (section 9). As the RIS notes, the proposal is 'inherently punitive' and likely to 'subject defendants to inconsistent and disproportionately severe punishment beyond sentencing decisions.' This right has been described by the Courts as so fundamental that that limitations on it cannot be reasonably justified.[13] In *R v Hansen*, Anderson J remarked (in respect of both section 9 and the protected fair trial rights) that 'there are some rights and freedoms in respect of which no limitation could be justified in a free and democratic society.'[14]

3.4 The proposal will likely also engage the fair trial rights protected by section 25 of the Bill of Rights, because it effectively vests the decision-making power on an application for name suppression with a victim. In particular:

(a) the right to a fair and public hearing by an independent and impartial court, noting here the reference to open justice, which is reflected in the existing presumption that the details of an offender and their offending will be made public. The proposal undermines the right to a fair hearing by an independent and impartial court.

(b) where an individual is declined name suppression where there are other charges pending or underway, the right to be presumed innocent until proved guilty according to law may be infringed.

(c) given the effective inability to appeal a decision to decline name suppression where that decision is based on a victim's non-consent to an order, the right to appeal.

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13 *R v Fitzgerald* [2021] 1 NZLR 551, at [78], citing United Nations Human Rights Committee CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) at [3]; *R v Taunoa* [2008] 1 NZLR 429, at [77] per Elias CJ; and *R v Hansen* [2007] 3 NZLR 1 at [65] per Blanchard J and [264] per Anderson J.

14 Above, n 13, at [264]. The test under section 5 of the Bill of Rights therefore does not apply. For example, where section 25(a) is breached by reason of the decision-making power vesting with the victim (rather than an independent and impartial court), then the trial is unfair – and it cannot be 'reasonably' unfair.

3.5 Even if sections 9 and 25 are conceived as capable of reasonably justified limitation, the proposal must also be rationally connected to its intended purpose and limit the engaged rights no more than is reasonably necessary. It remains in doubt whether there is a policy problem to be addressed. Permanent name suppression is granted in only a small minority of sexual violence cases, and the views of a victim must already be taken into account before an order for permanent name suppression is made.[15] Given the intended purpose remains unclear, it is difficult to assess whether the proposal meets that requirement of rational connection. Assuming the proposal is intended to address public perception of the use of name suppression (including safety) and the prioritisation of victims' views, it seems likely the proposal will limit the engaged rights more than is reasonably necessary to address this.

3.6 At a minimum, further and more targeted safeguards such as those presented in Option Four of the RIS, would be required. Retaining some judicial discretion, even in the event of a victim's non-consent to name suppression, could help to ensure that the proposal does not operate in such a way as to infringe protected rights and the rule of law, and could mitigate the risk of the harms outlined below.

4 The amendment risks harm to victims and other individuals

4.1 If enacted, the amendment will preclude the granting of name suppression for individuals convicted of certain offences, unless the victim consents to suppression, is unable or unwilling to engage in the process, or is otherwise uncontactable. This removes from a judge the discretion to grant name suppression in circumstances in which it could be necessary and justifiable, for example, where:

(a) An individual is convicted of a relevant offence and is identified, but has other charges pending or underway. Identification may prejudice their fair trial rights, risk the progress of that trial or the security of subsequent convictions, to the detriment of all parties, including victims.

(b) Identification could result in hardship or danger to the family of the victim, including where the sexual offending has occurred within a family.

(c) Identification could result in hardship or danger to the family of the offender.

(d) There would be a serious risk of physical harm to the offender, due to the circumstances of the offending or, for example, the nature of the relevant community in which it occurred.

4.2 The nature of criminal proceedings is such that discretion is essential in order to both deliver justice and ensure the safety of all involved in a case. This is why the current name suppression settings begin with a presumption of open justice, but allow for the accommodation of competing priorities, being those harms set out in section 200 of the Criminal Procedure Act.

4.3 Further, proposed subclause (8), as drafted, is inadequate to protect those victims who wish to consent to name suppression. The court will only be able to make an order for name suppression in respect of the complainant(s) who have agreed and the charges

15 Section 200(6) Criminal Procedure Act.

relating to them, but cannot make an order preventing identification of the person convicted.

4.4 Without a residual judicial discretion, there remains a real risk that a victim who does not wish to be identified is identifiable as a consequence of other complainants and/or offences being made public. In such cases, subsections (8)(b)(i) and (ii) will be in conflict: information cannot be published which identifies a victim who has agreed to name suppression, while at the same time, the judge cannot suppress the very information (identification of the offender in respect of another complainant) which in some cases could lead to the identification of that victim. These cases can be highly complex: media and members of the public commenting on social media and other online platforms may struggle to navigate the conflict between subsections (8)(b)(i) and (ii), and inadvertently cause significant harm to a victim. That victim may be further harmed by the public identification and discussion of the offender, even where the offending discussed pertains to another victim. The provisions as drafted are too individualistic and unprincipled to ensure just and safe outcomes for the many lives that are affected by criminal offending. No additional policy or legislative amendments have been signalled to ensure, for example, that victims have access to the supports (such as legal aid) necessary to help them consider the implications of the decision they will be asked to make.

4.5 The Law Society recommends that the Bill is paused to enable the provision of evidence from relevant experts, including those working with both offenders and victims. If the AP is to proceed, it must include provision for a residual discretion, exercisable by a judge in exceptional circumstances and/or where the safety or wellbeing of any individual necessitates it.

5 Additional drafting and policy issues

5.1 The RIS indicates it is intended that the AP will apply only to permanent name suppression. However, this is not reflected in the drafting of proposed new section 200(7) and (8). It would not be appropriate for the amendment to apply to interim name suppression, which can be granted for a variety of reasons, including where an appeal against conviction is signalled, or where arrangements are required to ensure the safety and wellbeing of individuals impacted by the conviction (such as family). If the AP proceeds, we recommend that specific reference to permanent name suppression is included.

5.2 In addition:

(a) The legislation refers to *complainants*, however it applies upon conviction. If the defendant has been convicted of the offending, reference should be made to "victims" rather than complainants. Use of the term "complainant" would raise issues where the original complaint was made by someone other than the victim. For example, if an older relative of the victim makes the original complaint, they could be interpreted under this drafting as having to consent to suppression.

(b) Although the intention of the legislation is clear that subsection (7) is meant to apply in respect of a *conviction in respect of which the person is applying for name*

suppression, the legislation as it reads simply refers to conviction. That is, it currently reads that if a person has previously been convicted of rape, and wishes to apply for name suppression in respect of a completely unrelated arson, subsection (7) applies.

(c) It is unclear whether reference to "an adult who is convicted […]" applies to:

(i) A person who is young person at the time they were convicted, but an adult when they apply for suppression;

(ii) A person who is young person at the time they committed the offence, but an adult when they are convicted/apply for suppression.

(d) It is not clear what is meant by "unable" in subsection (7)(a). A narrow reading would suggest restriction to those unable to communicate their views, while a more purposive reading would suggest a test of mental capacity. In the case of the latter, it is unclear where the line would be drawn (for example, would it simply be a specified age?), and what level of impairment or incapacity would render a person 'unable' to make the decision. It is also unclear what level of support should be provided to encourage a victim to participate in the decision, within what could be an extremely stressful and traumatic time for them. The highly individualised experiences of victims could make it difficult to ensure their wellbeing.

5.3 Finally, and importantly, it is not clear what information will be provided to the complainant or victim to enable them to make their decision. When such an application is before a judge, a broad range of personal information is considered, and this information is not personal only to the defendant or offender. It may be personal information about their family and whānau, or information relating to other victims and complainants. Would the victim, for example, be provided with information about possible extreme hardship to a connected person?

5.4 The provision of this information risks breaching the privacy of individuals, while non-provision of relevant information risks uninformed and unjust outcomes. In the case of information which went to a risk of an unfair trial, what information could be provided to the complainant? Disclosure of such information could itself risk prejudice to fair trial rights, as well as breaching privacy of other complainants. The risk of information being improperly released in the public sphere would be high. The lack of clarity as to provision of information is matched by the lack of clarity as to any sanctions for misuse of information provided.

6 Recommendations if AP 216 is to proceed

6.1 The Law Society recommends that AP 216 **does not proceed**.

6.2 If, AP 216 does proceed despite our primary recommendation, we include the recommendations listed below, which the Law Society considers will lessen the harmful impact the amendment is likely to have:

(a) Include a residual discretion, allowing for permanent name suppression to be granted by a Judge, despite a victim's non-consent, in exceptional circumstances.

(b) Specify that subsection (7) only applies to applications for permanent name suppression.

(c) Restrict the application of proposed subsections (7) and (8) to applications which would not pass the section 200(2)(a), (b), (d) and (e) criteria.

(d) Replace the reference to 'complainants' with 'victims' where a conviction follows a complaint by someone on behalf of the victim and the victim is competent (under guidelines to be included in the legislation) to indicate consent or otherwise to name suppression.

(e) Clarify that subsection (7) only applies in respect of a name suppression application concerning the conviction for the related sexual violence offending.

(f) Clarify what an 'adult' is for the purpose of the amendment.

(g) Define what 'unable' and 'unwilling' means for the purposes of subsection (7).

(h) Clarify whether the victim will be given access to personal information about the offender in order to inform their decision and, if so, by whom the information will be provided and with what restrictions on its use.

AP 215

6.3 The Law Society supports AP 215.

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