New Zealand Law Society
Te Kāhui Ture o Aotearoa

Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill

20/10/2023

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1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (the **Bill**).

1.2 The Law Society supports the aims of the Bill to reduce the harms experienced by complainants and victims of sexual violence offending when participating in court proceedings. This submission raises some practical considerations to ensure the proposed amendments achieve the underlying objectives of the Bill.

1.3 This submission has been prepared with input from the Law Society's Access to Justice Committee and Criminal Law Committee.[1]

1.4 The Law Society does not wish to be heard on its submission.

2 Making section 132(1) the primary offence for sexual connection with a child

2.1 At the outset, the Law Society expresses our agreement that asking a child about consent in cases of sexual offending is inappropriate. We also agree that any endeavours to ensure the criminal justice system is supportive of complainants and victims is positive.

2.2 However, we question whether sufficient data has been collected to accurately assess the scale of the problem the Bill is trying to address. For example, we are not aware of any specific data regarding the number of trials where a child complainant has been subjected to questioning about consent.

2.3 We are aware of a case arising from Manukau in 2022 which received significant media attention, where a defence based around the claimed consent of a child victim was unsuccessfully raised.[2] However, feedback received from criminal practitioners has been that such lines of questioning are unusual, in part due to this approach being inherently offensive. In saying that, even if it is a rare occurrence, it remains an issue that should be addressed – one instance of the inappropriate cross-examination of a child on the topic of consent is a case too many and should be prevented.

2.4 We also note that the recent legislative amendments via the Sexual Violence Legislation Act 2021 which expanded the powers of a judge to prevent improper questioning of witnesses, may address some of the concerns raised. Given these changes are relatively new, it may be that further time is needed for them to be applied as intended.

2.5 Notwithstanding our concerns about the lack of evidence as to the scale of the problem, in the Law Society's view the proposed changes to the Crimes Act 1961 are appropriate. The proposed changes will prevent a charge being laid pursuant to section 128B (which is presently used for the majority of this type offending) when the complainant is under 12. This change will prevent a child complainant being asked about consent, given section 132(5)

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1 More information regarding these committees is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 Found here: https://www.theguardian.com/world/2022/aug/05/calls-for-changes-to-new-zealand-law-after-rapist-claims-sex-with-12-year-old-consensual

provides that the consent of a complainant is not a defence to a charge under section 132(1).

2.6 We also consider the proposed amendment to raise the maximum penalty for offending under section 132(1) to 20 years' imprisonment, which would bring it in line to the maximum penalty under section 128B, is appropriate. Taking the starting point that children under 12 are not capable of consenting to sexual activity, there does not appear to be any rational justification as to why the offence should have a lower penalty than sexual violation under section 128B. The two charges effectively have the same elements (being a form of sexual penetration against a complainant who does not or is not capable of consenting). The sole point of distinction between the two offences would be the age of the complainant for a charge under section 132(1), which would be an aggravating factor if it were charged under section 128B.

3 A more victim and complainant-centric automatic suppression provisions

3.1 The Bill also amends the automatic suppression provisions under section 201 and 203 of the Criminal Procedure Act 2011, to better recognise the complainant's autonomy in connection with the publication of their details and/or those of the defendant in cases where automatic suppression currently applies, although the final decision remains with the Court. The Law Society agrees this is an appropriate approach, given those sections exist for the complainant's benefit.

3.2 However, we are concerned the amendments proposed in the Bill do not give effect to the changes intended and do not, therefore, achieve the underlying policy aims of the Bill – to address "the barriers to adult victims of sexual violence exercising their autonomy by applying to the court to have their automatic name suppression lifted."[3]

3.3 We note that there is a difficult balance to be struck about when the issue of name suppression should be reconsidered.

3.4 On the one hand, a decision about whether to apply to lift automatic name suppression made during the proceedings may put more pressure on a complainant at a time that is inherently stressful. Imposing a greater duty on the prosecutor to advise the complainant of the availability of an application to lift the automatic name suppression also runs the risk of causing confusion for the complainant about the prosecutor's role – the prosecutor is not the complainant's lawyer.

3.5 On the other hand, applications to lift the automatic name suppression of a victim (in cases where the defendant is convicted) after the proceedings are concluded are likely to result in further time and expense for the victim. Such an application may also have the effect of retraumatising some victims. Having an application heard and determined during the court proceedings will also ensure that the defendant is appropriately represented by counsel who has an intimate knowledge of the case and any arguments which can be advanced in opposition to the application.

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[3] Ministry of Justice, Regulatory Impact Statement: *Strengthening legal protections for victims of family violence and sexual violence,* March 2023, at p 2.

3.6 These issues do not appear to be addressed by the proposed changes. The amendments simply introduce a change to the purpose of the provisions - "to protect the complainant's privacy and support the complainant's autonomy in connection with the publication of their details"[4]- and introduce the requirement that the Court take into account the views of the complainant when considering whether to lift automatic suppression (this is a significant change that is not addressed in any detail in either the Regulatory Impact Statement or the Explanatory note to the Bill).

3.7 The provisions also do not provide any detail in relation to the process by which a complainant may make an application to lift automatic name suppression, nor any indication of how or when a complainant should be advised of their opportunity to make such an application. The Bill simply refers to changes to the Criminal Procedure Rules 2012 (**Rules**) without providing any detail as to those changes. We note the Rules themselves do not currently have any specific provisions which deal with applications to lift name suppression.

3.8 Although the Crown Law advice on the Bill's consistency with the New Zealand Bill of Rights Act 1990 briefly commented on the issue of the lack of any real detail in relation to the proposed changes in the process for complainants to apply to remove automatic name suppression, we consider this is an area which would clearly benefit from further work.

3.9 As such, the Law Society is of the view the proposed amendments in the Bill are unlikely to have a significant effect by themselves. If more meaningful changes in the automatic name suppression regime are to come via upcoming changes to the Rules referred to in the Bill's explanatory note, that would be an appropriate response to address these concerns. We consider that any legislative amendments would best be made after any changes to the Rules are introduced so that the effect of those changes can be assessed and understood before determining: (a) whether legislative change is required; and (b) if so, what changes should be made. We encourage the Government to consult with interested parties and stakeholders once further details of these proposed changes are available.

4 General observations

4.1 As a general observation, the Law Society notes the Bill's title refers to "victims" as opposed to "complainants" or "witnesses". The same is true of the Bill's explanatory note. While we acknowledge the proposed amendments in the Bill appropriately refer to "complainant" where necessary, we invite the Committee to consider ensuring the Bill's title and explanatory note similarly use the correct terminology. Appropriately referring to a "complainant", when a matter has yet to be determined by a judge or jury, would avoid any risk of undermining the presumption of innocence and the right to a fair trial.

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[4] Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill, clause 7.