

# Sexual Violence Legislation Bill

Government Bill

## Explanatory note

### General policy statement

This Bill amends the Evidence Act 2006, Victims' Rights Act 2002, and Criminal Procedure Act 2011 to reduce the retraumatisation victims of sexual violence may experience when they attend court and give evidence. It responds to Law Commission recommendations relating to court processes and evidence laws in its reports *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) and *The Second Review of the Evidence Act 2006* (NZLC R142, 2019).

The Law Commission's 2015 report found that the justice system often fails to respond appropriately to victims of sexual violence. The requirements of the court process are not aligned with victims' needs or recovery, and risk further traumatising those who come forward. These features, and the experiences of victims who have participated in prosecutions, can deter others from reporting offences and lead to fear and mistrust of the criminal justice process. Low reporting rates mean sexual offenders may not be held to account, resulting in missed opportunities to reduce reoffending and provide victims with a just resolution.

The Bill seeks to improve sexual violence victims' experiences in court, while preserving the fairness of the trial and the integrity of the criminal justice system. Key amendments in the Bill—

- clarify and extend restrictions on the admissibility of evidence about a complainant's sexual experience and disposition, to protect complainants from unduly invasive questioning. These amendments also help to dispel the idea that consent, or reasonable belief in consent, can be derived from a complainant having thought about or consented to similar sexual activity in a different context:
- apply the criminal case restrictions on evidence of a complainant's sexual reputation, experience, and disposition, to civil cases too – with a narrow exception to the complete bar on reputation evidence. Cases of a sexual nature carry simi-

lar dynamics irrespective of their jurisdiction, and the rationale of protecting complainants and ensuring legitimate reasoning applies equally in civil cases:

- require Judges to intervene in inappropriate questioning of witnesses, and include a witness’s vulnerability as one of the factors a Judge may consider in determining whether the questioning is unacceptable. This strengthens the basis on which Judges can control the nature and content of questioning:
- entitle sexual violence complainants and propensity witnesses to give their evidence in alternative ways. These amendments make it easier to shield witnesses from some of the stress of appearing in the witness box and may also improve the quality of their evidence, while still ensuring it can be heard and tested:
- make it clear that the entitlement to use alternative ways of giving evidence extends equally to pre-recorded cross-examination evidence, which is used very rarely under current law, and create a procedural framework with requirements and safeguards to ensure recording can happen effectively and fairly:
- require Judges to direct the jury on any myth or misconception relating to sexual violence that they consider relevant to the case, unless it has been adequately addressed in evidence already. Judicial directions addressing commonly-held myths and misconceptions about sexual violence and the way victims and perpetrators “normally” behave will help support the jury to discharge properly its role as the fact finder:
- allow the court to be cleared of the public when a sexual violence victim’s victim impact statement is presented, and clarify that victim impact statements may be presented to the court in alternative ways. These amendments will empower victims to exercise their rights to convey the impact of the offending to the offender and court, which can be an important part of the healing process, without having to suffer through unnecessary distress.

The Bill is introduced under Standing Order 263(a). That Standing Order permits an omnibus Bill to amend more than 1 Act to be introduced if the amendments deal with an interrelated topic (namely, sexual cases) that can be regarded as implementing a single broad policy (namely, improving the courts’ response to sexual violence victims). The Bill is currently *not* intended to be divided, by select committee or committee of the whole House, into 3 separate amendment Bills.

### **Departmental disclosure statement**

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2019&no=185>

### Regulatory impact assessment

The Ministry of Justice produced a regulatory impact assessment on 25 March 2019 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact assessment can be found at—

- <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/regulatory-impact-statements/>
- <http://www.treasury.govt.nz/publications/informationreleases/ria>

### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* relates to commencement. *Clause 2(1)* ensures listed provisions come into force on whichever is the last to occur of the following dates:

- the date immediately after the end of the 6-month period that starts on the date of Royal assent:
- **1 July 2021.**

*Clause 2(2)* ensures the rest comes into force on the day after Royal assent.

## Part 1

### Amendments to Evidence Act 2006

#### *Preliminary provisions*

*Clause 3* indicates that the Part amends the Evidence Act 2006.

*Clause 4* amends section 4(1), which contains definitions.

*Clause 4(1)* replaces the definition in section 4(1) of communication assistance. That term is used in sections 80 and 81. They are about the provision of communication assistance to a defendant in a criminal proceeding (which may, but need not, be a sexual case), or a witness in a civil or criminal proceeding (which, again, may, but need not, be a sexual case). The assistance is provided on an application or on the initiative of the Judge, and subject to the Judge being satisfied that it is necessary, and also to the Judge's direction as to the kind of assistance to be provided. (No regulations have been made under section 201(j) regulating the provision of communication assistance to defendants and witnesses.) The replacement definition ensures that the term means any assistance (for example, oral or written interpretation of a language, written assistance, or technological assistance) that enables or facilitates communication with a person who *for any reason* (for example, age, or a disability that is not a communication disability) requires assistance to understand court proceedings or give evidence (*emphasis added*). As currently defined, the term is confined to assistance that enables or facilitates communication with a person who is either—

- a person who does not have sufficient proficiency in the English language to understand court proceedings conducted in English or give evidence in English; or
- a person who has a communication disability.

*Clause 4(2)* amends section 4(1) by replacing the definition of sexual case. The new definition of that term ensures that *new sections 44 to 44A* apply in civil (as well as criminal) proceedings, in line with R5 of (NZLC R142, 2019). See also *new sections 44 to 44A* inserted by *clause 8*. This extension to civil proceedings applies for the purpose of *new sections 44 to 44A* only, and so does not apply, for example, for the purposes of—

- section 88 (restriction on disclosure of complainant’s occupation in sexual cases); or
- section 95 (restrictions on cross-examination by parties in person); or
- *new sections 106C to 106J* (trial process: alternative ways of giving evidence: sexual case complainants or propensity witnesses).

*Clause 4(3)* inserts in section 4(1) a new definition of sexual case complainant or propensity witness. That term is used, for example, in *new sections 102(b) and 106C to 106J* (see *clauses 11 and 14*). That term means a person who is 1 or both of the following:

- a complainant who is to give or is giving evidence in a sexual case;
- a witness for the prosecution who is to give or is giving evidence in a sexual case that is or includes propensity evidence (as defined in section 40(1)) of a sexual nature about any 1 or more defendants.

*Clause 5* inserts *new section 4A*, which is about *new Schedule 1AA* (transitional, savings, and related provisions) inserted by *clause 17*.

#### *Veracity: application*

*Clause 6* amends section 36. Section 36 is about the application of subpart 5 of Part 2 to evidence of veracity and propensity. The amendment is consequential on *new sections 44 to 44A* (inserted by *clause 8*).

#### *Propensity: evidence of propensity*

*Clause 7* amends section 40 (propensity rule). The amendments are consequential on *new sections 44 to 44A* (inserted by *clause 8*).

#### *Complainants in sexual cases*

##### *Introduction*

*Clause 8* replaces sections 44 (evidence of sexual experience of complainants in sexual cases) and 44A (application to offer evidence or ask question about sexual experience of complainant in sexual cases). *New sections 44 to 44A* implement R3 to R5 of (NZLC R142, 2019). Those recommendations are informed by concerns identified in

case law, including *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 (SC). *New sections 44 to 44A* apply, in line with those recommendations, in civil (as well as criminal) proceedings. A complainant, as used in those new sections, therefore has the meaning given in *new section 44(6)*. *New sections 44 and 44AA* deal with evidence about sexual experience, disposition, and reputation.

### *Experience*

*New section 44* amends section 44 to ensure that—

- evidence of the sexual *experience* of a complainant with the defendant is admissible (*new section 44(1)(a) and (2)*)—
  - only with the Judge’s permission; and
  - only if it is of such direct relevance that it would be contrary to the interests of justice to exclude it; and
- there are exceptions, however, for the following evidence (*new section 44(1)(a)(i) and (ii)*):
  - evidence of the mere fact the complainant was in a sexual relationship with the defendant—this evidence continues to be admissible subject to sections 7 and 8; and
  - evidence of an act or omission that is—
    - one of the elements of the offence for which the defendant is being tried; or
    - the cause of action in the civil proceeding in question.

### *Disposition*

*New section 44* also amends section 44 to clarify that sexual *disposition* evidence is admissible—

- only with the Judge’s permission; and
- only if it is of such direct relevance that it would be contrary to the interests of justice to exclude it.

### *Reputation*

*New section 44AA* re-enacts, but amends, section 44(2) (which provides that, in a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the *reputation* of the complainant in sexual matters). *New section 44AA* amends section 44(2) so evidence of the sexual reputation of the complainant—

- includes, without limitation, the reputation of the complainant for having a particular sexual disposition (in line with R3 of (NZLC R142, 2019)); and
- is inadmissible *unless a Judge gives permission in a specified civil proceeding (new section 44AA(1) and (2))*.

A specified civil proceeding, as defined in *new section 44AA(3)*, is a civil proceeding in which the complainant’s sexual reputation itself is directly relevant to—

- a cause of action in the civil proceeding; or
- a defence in the civil proceeding.

The Judge must not grant permission under *new section 44AA(2)* to bring the evidence or ask the question unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it: *new section 44AA(4)*.

However, *new section 44AA(5)* ensures that evidence (of the sexual reputation of the complainant) permitted to be given under *new section 44AA* cannot be used—

- to support a claim of consent, or of reasonable belief in consent, to an act of a sexual nature; or
- to prove the truth of its contents.

#### *Application to offer evidence or ask questions*

*New section 44A* adjusts section 44A to include references to the complainant’s sexual disposition and to *new section 44AA* (under which evidence of a complainant’s reputation for having a particular sexual disposition is inadmissible unless a Judge gives permission in a specified civil proceeding). An application to a Judge to offer evidence, or ask a question, about the sexual experience or sexual disposition or sexual reputation of a complainant is also required by *new section 44A(2)(c) and (3)(d)* to include the reasons it is claimed that the evidence or question meets the test in *new section 44(2) or 44AA(4)*. (Compare R6, and the new section 44A(2)(c) and (3)(d) in the Evidence Amendment Bill in Appendix 1, of (NZLC R142, 2019).) *New section 44A(5) and (6)* specifies the deadline, in a criminal proceeding or a civil proceeding, for making and copying to all other parties an application under *new section 44(1) or 44AA(2)*.

#### *Trial process: questioning of witnesses*

*Clause 9* amends section 85, which is about unacceptable questions. The amendments, in line with R16 and R17 of (NZLC R142, 2019),—

- ensure that the Judge has a duty (instead of the current discretion) to disallow a question or to direct the witness not to answer it if the Judge considers the question is unacceptable (improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand) (*new section 85(1)*); and
- add the “vulnerability of the witness” to the non-exhaustive list of permitted relevant factors the Judge may consider when deciding whether a question is unacceptable (*new section 85(2)(a)*).

*Clause 10* amends section 99 (witnesses recalled by Judge). *New section 99(3)* makes it clear that the power in section 99 to recall a witness is subject to *new section 106H* (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) inserted by *clause 14*.

#### *Trial process: alternative ways of giving evidence*

*Clause 11* replaces section 102, which is about the application of subpart 5 of Part 3. *New section 102* makes it clear that sections 103 to 106 (which provide for directions about alternative ways of giving evidence) are subject to *new sections 106C to 106J* (inserted by *clause 14*). *New sections 106C to 106J*—

- deal with the specific situation of sexual case complainants or propensity witnesses; and
- entitle those complainants and witnesses to give evidence in alternative ways unless a Judge directs otherwise.

#### *Video record evidence*

*Clause 12* amends section 106, which sets out procedural requirements for video record evidence given under sections 103 to 106. The amendments are to make clearer the nature of video record evidence given under sections 103 to 106 (which is mostly evidence in chief). Special procedural requirements will apply to a sexual case complainant's or propensity witness's cross-examination evidence (as defined in *new section 106D(7)* (inserted by *clause 14*)) given by video record made before trial under *new sections 106C to 106J* (inserted by *clause 14*). Those special procedural requirements are in *new section 106I*.

#### *Giving of evidence by family violence complainants*

*Clause 13* replaces section 106A with *new sections 106AA and 106A*, which are about giving of evidence by family violence complainants.

*New section 106AA* specifies the complainants who are subject to *new section 106A* and to section 106B.

*New section 106A* re-enacts section 106A, except for section 106A(1) (which is re-enacted in *new section 106AA*).

#### *Giving of evidence by sexual case complainants or propensity witnesses*

*Clause 14* inserts *new sections 106C to 106J*, which are about the giving of evidence by a sexual case complainant or propensity witness.

*New section 106C* indicates that *new sections 106D to 106J* apply to a sexual case complainant or propensity witness of any age (*see* the definition of that term in section 4(1) as amended by *clause 4(3)*).

*New section 106D* ensures that a sexual case complainant or propensity witness is entitled to give evidence in 1 or more specified alternative ways (unless a Judge directs otherwise under *new section 106F*). *New section 106D* also requires a prosecutor intending to call the complainant or witness to provide every other party and the court with a written notice stating the 1 or more ways in which the complainant or

witness will give their evidence. *New section 106D* is also subject to *new sections 106E to 106I*.

*New section 106E* applies if a sexual case complainant or propensity witness who is a child indicates their wish to give evidence or any part of their evidence in the ordinary way. *New section 106E* enables the prosecutor to apply to a Judge for a direction that the complainant or witness be permitted to do so. The Judge may direct that the complainant or witness give evidence or any part of their evidence in the ordinary way, if satisfied that the complainant or witness fully appreciates the likely effect on the complainant or witness of doing so. When considering whether to give a direction under *new section 106E*, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to the matters specified in *new section 106E(4)*. Those matters include whether the interests of justice require a departure from the usual procedure under *new section 106D(3)* (that is, the complainant or witness giving evidence only in 1 or more alternative ways notified) in the particular case.

*New section 106F* applies if a prosecutor is calling a sexual case complainant or propensity witness to give evidence in 1 or more ways stated in a notice given under *new section 106D*. *New section 106F* provides for any other party to apply for a direction by a Judge that the complainant or witness give evidence in the ordinary way or in a different alternative way under *new section 106D*. When considering whether to give a direction under *new section 106F*, the Judge must have regard to the matters specified in *new section 106F(4)*.

*New section 106G* specifies requirements for a direction under *new section 106F* that a complainant's or witness's cross-examination evidence (as defined in *new section 106D(7)*) not be given by video record made before the trial. The direction may be given only if the requirement in *new section 106G(1)* is met. In deciding whether that requirement is met, the Judge must comply with *new section 106G(2) and (3)*. *New section 106G(2) and (3)* uses, and links clearly to a real risk to the fairness of the trial, factors articulated in the case of *M v R* [2012] 2 NZLR 485 (CA).

*New section 106H* applies to a sexual case complainant or propensity witness only if all of their evidence (except any further cross-examination evidence they give under *new section 106H*) has been or is to be given by video record made before the trial. *New section 106H* enables the defence to apply to a Judge for a direction that the defence be permitted to further cross-examine the complainant or propensity witness after a video record is made of their cross-examination evidence. The Judge may give the direction only in accordance with the test and mandatory relevant considerations in *new section 106H(3) and (4)*. If the Judge gives the direction, the complainant or propensity witness must give the further cross-examination evidence at trial (and so not by video record made before the trial).

*New section 106I* is about a sexual case complainant's or propensity witness's cross-examination evidence (as defined in *new section 106D(7)*) given by video record made before trial (*see new section 106D(1)(a)(i)*). *New section 106I* sets out special procedural requirements for that evidence.



*New section 106J(1)* requires a video record to be made, in accordance with any applicable regulations made under section 201, of evidence (of any kind) given at trial by a sexual case complainant or propensity witness and not given by video record made before trial. (Applicable regulations made under section 201 may, for example, specify who is required to make the video record under *new section 106J(1)*.) *New section 106J(2)* ensures that that video record may be used by the complainant or witness to give evidence (for example, in or for a retrial) under *new section 106D(1)(a)(i)*. *New section 106J(3)* ensures that *new section 106J* does not limit or affect a video record of a witness's evidence being filed as a formal statement under the Criminal Procedure Act 2011, or section 99 (oral evidence must be recorded) of that Act, or a witness giving oral evidence by way of a video record in accordance with an oral evidence order made under that Act.

#### *Giving of evidence by child witnesses*

*Clause 15* inserts *new section 107AA*, which indicates that sections 107 to 107B apply to a child witness when giving evidence in a criminal proceeding unless the witness is a defendant who is a child or a sexual case complainant or propensity witness who is a child.

#### *Trial process: judicial directions*

*Clause 16* inserts *new section 126A*, which requires the giving of judicial directions necessary or desirable to address relevant misconceptions arising in sexual cases. The amendment implements some of R21 of (NZLC R142, 2019).

#### *Transitional, savings, and related provisions*

*Clause 17* inserts *new Schedule IAA* (transitional, savings, and related provisions). See also *new section 4A* inserted by *clause 5*.

## **Part 2**

### **Amendments to Victims' Rights Act 2002**

#### *Preliminary provisions*

*Clause 18* indicates that the Part amends the Victims' Rights Act 2002.

*Clause 19* amends section 4, which contains definitions. Some amendments insert new, technology-neutral definitions of audio record and video record. Other amendments insert new definitions of sexual case and sexual case complainant. Those terms have meanings the same in substance as the corresponding terms defined, for the purposes of a criminal proceeding, in section 4(1) of the Evidence Act 2006 (as amended by *clause 4(2) and (3)*).

*Clause 20* inserts *new section 5A*, which is about *new Schedule IAA* (transitional, savings, and related provisions) inserted by *clause 26*.

### *Victim impact statements*

*Clause 21* amends section 19, on the form and verification of information ascertained for victim impact statements. The amendment replaces a reference to audiotape or videotape with a reference to new, technology-neutral terms.

*Clause 22* replaces section 22A, which is about how a victim impact statement may be presented to court in a manner other than by reading it. Section 22 enables a victim (even if not a sexual case complainant) to request the judicial officer sentencing the offender to have all or any part of a victim impact statement submitted under section 21 read to the court by—

- the victim; or
- the prosecutor; or
- a person nominated by the victim, not being an accused or offender in relation to—
  - the offence; or
  - another offence arising from the same incident or series of incidents as the offence.

*New section 22A* re-enacts section 22A, but also—

- clarifies that *new section 22A* enables all or any part of the statement to be presented to the court in any manner other than by reading it *in accordance with section 22 (emphasis added)*; and
- gives extra examples of the manner in which all or any part of the statement may be presented to the court under *new section 22A* other than by reading it in accordance with section 22.

### *Rights of victims who are sexual case complainants*

*Clause 23* inserts *new Part 2A* (provisions relating to rights of victims who are sexual case complainants). *New Part 2A* will initially contain only *new sections 28A and 28D*. (After the commencement of *clause 24*, however, *new Part 2A* will contain *new sections 28A to 28D*.)

*New section 28A* ensures that *new section 28D* applies only to an individual victim who is a sexual case complainant (the **victim**).

*New section 28D* says a court may, on an application made for the purpose by the prosecutor under *new section 199AA* of the Criminal Procedure Act 2011 (inserted by *clause 30*), make an order under that section that the courtroom be cleared while the victim's victim impact statement is read or otherwise presented to the court.

*Clause 24* replaces *new section 28A* (inserted by *clause 23*) with *new sections 28A to 28C*.

*New section 28A(1)* ensures that *new sections 28B and 28D* apply only to an individual victim who is a sexual case complainant (the **victim**). *New section 28A(2)*

ensures that *new section 28C* applies only to all victims who are sexual case complainants (the **victims**).

*New section 28B* is about a victim's preferences on ways of giving evidence. *New section 28B* requires the prosecutor to make all reasonable efforts to ensure that—

- the victim is informed about the ways in which the victim may give evidence (for example, evidence in chief, and evidence given in cross-examination) as a sexual case complainant; and
- any preferences the victim has on the ways of giving evidence as a sexual case complainant are ascertained and taken into account in the operation of *new sections 106C to 106J* of the Evidence Act 2006 (inserted by *clause 14*).

*New section 28C(1)* requires the Secretary for Justice to make all reasonable efforts to ensure that appropriate facilities are available to the victims when attending court, or participating in or viewing the proceeding related to the offences concerned, as sexual case complainants. *New section 28C(2)* states matters that the Secretary must take into account (in addition to any other factors that the Secretary considers relevant) in determining whether facilities for those purposes are appropriate. *New section 28C(3)* gives examples of facilities that may be appropriate.

#### *Transitional, savings, and related provisions*

*Clause 25* amends section 53 (Amendments) to reflect that the Schedule (Enactments amended) is renumbered as Schedule 1 (*see clause 27*).

*Clause 26* inserts *new Schedule IAA* (transitional, savings, and related provisions). *See also new section 5A* inserted by *clause 20*.

*Clause 27* amends the heading of the Schedule to renumber the Schedule (Enactments amended) as Schedule 1 (*see also clause 25*).

### **Part 3 Amendments to Criminal Procedure Act 2011**

#### *Preliminary provision*

*Clause 28* indicates that the Part amends the Criminal Procedure Act 2011.

#### *Public access and restrictions on reporting*

*Clause 29* amends section 196, on court proceedings being generally open to public, by inserting a reference to *new section 199AA* (inserted by *clause 30*).

#### *Power to clear court*

*Clause 30* inserts *new section 199AA* (after section 199, but before sections 199A to 199D inserted by section 29 of the Contempt of Court Act 2019). *New section 199AA* enables the court to make an order that the courtroom be cleared when a victim impact statement is read or otherwise presented to the court in cases of a sexual

nature. *New section 199AA(1)* authorises the court to make an order of that kind on an application made for the purpose by the prosecutor. The order excludes from the courtroom any person who is not a person of a kind specified in *new section 199AA(1)(a) to (i)*. *New section 199AA(2)* provides that the order may be made only if the court is satisfied that the order is necessary to avoid causing the victim (as defined in section 5) undue distress. *New section 199AA(3)* specifies considerations that the court must take into account before making the order. *New section 199AA(4)* helps make clear that the order does not affect announcement of the decision of the court, and the passing of sentence, having to take place in public. *New section 199AA(5)* contains definitions of the terms—

- case of a sexual nature, which has the meaning in section 199(3); and
- victim impact statement, which means a victim impact statement—
  - as defined in section 17AA of the Victims' Rights Act 2002; and
  - submitted under section 21 of that Act to the judicial officer sentencing the offender; and
- read or otherwise presented to the court, which, for a victim impact statement, means that all or any part of it is read or otherwise presented to the court under section 22 or *new section 22A* of that Act.

*Appeals: appeals against pre-trial decisions: first appeals*

*Clause 31* amends section 215 (right of appeal by prosecutor or defendant against certain pre-trial evidential decisions in Judge-alone case). Section 215 applies if a court makes a decision specified in section 215(2) in proceedings to be tried by Judge-alone trial procedure. *New section 215(2)(ba) and (bb)* ensures that the defendant or the prosecutor may, with the leave of the first appeal court, appeal to that court against a decision that is one of the following:

- granting or refusing to grant an application for a direction under *new section 106F* of the Evidence Act 2006 in respect of a notification under *new section 106D* of that Act that cross-examination evidence is to be given by video record made before trial;
- granting or refusing to grant an application under *new section 106H* of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial.

*Clause 32* amends section 217 (right of appeal by prosecutor or defendant against pre-trial decisions in jury trial case). Section 217 applies if a court makes a decision specified in section 217(2) in proceedings for a category 3 offence after the defendant elected a jury trial, or a category 4 offence. *New section 217(2)(ia) and (ib)* ensures that the defendant or the prosecutor may, with the leave of the first appeal court, appeal to that court against a decision that is one of the following:

- granting or refusing to grant an application for a direction under *new section 106F* of the Evidence Act 2006 in respect of a notification under *new sec-*

*tion 106D* of that Act that cross-examination evidence is to be given by video record made before trial:

- granting or refusing to grant an application under *new section 106H* of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial.

*Transitional, savings, and related provisions*

*Clause 33* inserts a *new Part 2* in Schedule 1AA (transitional, savings, and related provisions).



*Hon Andrew Little*

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Sexual Violence Legislation Act **2019**.

**2 Commencement**

(1) **Sections 4(1) and (3), 10 to 16, 24, 31, and 32** come into force on whichever is the last to occur of the following dates: 5

(a) the date immediately after the end of the 6-month period that starts on the date of Royal assent:

- (b) **1 July 2021.**
- (2) The rest of this Act comes into force on the day after Royal assent.

## Part 1 Amendments to Evidence Act 2006

### *Preliminary provisions* 5

#### 3 Amendments to Evidence Act 2006

This Part amends the Evidence Act 2006.

#### 4 Section 4 amended (Interpretation)

- (1) In section 4(1), replace the definition of **communication assistance** with:
- communication assistance** means any assistance (for example, oral or written interpretation of a language, written assistance, or technological assistance) that enables or facilitates communication with a person who for any reason (for example, insufficient proficiency in the English language, age, or a disability) requires assistance to— 10
- (a) understand court proceedings; or 15
- (b) give evidence
- (2) In section 4(1), replace the definition of **sexual case** with:
- sexual case** means—
- (a) a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,— 20
- (i) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or
- (ii) any other offence against a person of a sexual nature; and
- (b) for the purpose of **sections 44 to 44A** only, a civil proceeding that involves issues in dispute of a sexual nature 25
- (3) In section 4(1), insert in its appropriate alphabetical order:
- sexual case complainant or propensity witness** means a person of any age who is 1 or both of the following:
- (a) a complainant who is to give or is giving evidence in a sexual case:
- (b) a witness for the prosecution who is to give or is giving evidence in a sexual case that is or includes propensity evidence (as defined in section 40(1)) of a sexual nature about any 1 or more defendants 30

#### 5 New section 4A inserted (Transitional, savings, and related provisions)

After section 4, insert:

**4A Transitional, savings, and related provisions**

The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

*Veracity: application***6 Section 36 amended (Application of subpart to evidence of veracity and propensity)** 5

In section 36(3), replace “section 44” with “**sections 44 to 44A**”.

*Propensity: evidence of propensity***7 Section 40 amended (Propensity rule)**

- (1) In section 40(1)(b)(i), replace “1” with “one”. 10
- (2) In section 40(1)(b)(ii), before “proceeding in question”, insert “civil”.
- (3) Replace section 40(3)(b) with:

(b) a complainant in a sexual case in relation to the complainant’s sexual experience, sexual disposition, or sexual reputation may be offered only in accordance with **sections 44 to 44A**. 15

*Complainants in sexual cases***8 Sections 44 and 44A replaced**

Replace sections 44 and 44A with:

**44 Evidence of sexual experience or sexual disposition of complainants in sexual cases** 20

- (1) In a sexual case, unless a Judge gives permission (on an application made under this subsection and in accordance with **section 44A**), no evidence can be given and no question can be put to a witness that relates directly or indirectly to—
- (a) the sexual experience of the complainant with the defendant (except to establish 1 or both of the following: 25
- (i) the mere fact that the complainant has sexual experience with the defendant:
- (ii) an act or omission that is one of the elements of the offence for which the defendant is being tried, or that is the cause of action in the civil proceeding in question): 30
- (b) the sexual experience of the complainant with any person other than the defendant:
- (c) the sexual disposition of the complainant.

- (2) The Judge must not grant permission under **subsection (1)** to bring the evidence or ask the question unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it. 5
- (3) The permission of the Judge is not required to rebut or contradict evidence permitted to be given under this section.
- (4) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, **subsection (1)** does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person. 10
- (5) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.
- (6) In this section and **sections 44AA and 44A**, **complainant**, in a civil proceeding that involves issues in dispute of a sexual nature, means the party, or a witness for the party, who seeks to establish a cause of action or, as the case requires, a defence in the civil proceeding. 15

#### **44AA Evidence of sexual reputation of complainants in sexual cases**

- (1) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the sexual reputation of the complainant (which, in this section, means the reputation of the complainant in sexual matters, and includes, without limitation, the reputation of the complainant for having a particular sexual disposition). 20
- (2) However, in a sexual case that is a specified civil proceeding, the Judge may give permission (on an application made under this subsection and in accordance with **section 44A**) for evidence to be given or a question to be put to a witness that relates directly or indirectly to the sexual reputation of the complainant. 25
- (3) A **specified civil proceeding**, in this section, means a civil proceeding in which the complainant's sexual reputation itself is directly relevant to— 30
- (a) a cause of action in the civil proceeding; or
  - (b) a defence in the civil proceeding.
- (4) The Judge must not grant permission under **subsection (2)** to bring the evidence or ask the question unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it. 35
- (5) However, evidence (of the sexual reputation of the complainant) permitted to be given under this section cannot be used—

- (a) to support a claim of consent, or of reasonable belief in consent, to an act of a sexual nature; or
- (b) to prove the truth of its contents.
- (6) The permission of the Judge is not required to rebut or contradict evidence permitted to be given under this section. 5
- (7) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from this section.
- 44A Application to offer evidence or ask questions about sexual experience or sexual disposition or sexual reputation of complainants in sexual cases**
- (1) An application made under **section 44(1) or 44AA(2)** must comply with **subsections (2) to (6)** (as relevant) unless— 10
- (a) every other party has waived those requirements; or
- (b) the Judge dispenses with those requirements.
- (2) A party who proposes to offer evidence about the sexual experience or sexual disposition or sexual reputation of a complainant must make a written application to a Judge, which must include— 15
- (a) the name of the person who will give the evidence; and
- (b) the subject matter and scope of the evidence; and
- (c) the reasons it is claimed that the evidence meets the test in **section 44(2) or 44AA(4)**. 20
- (3) A party who proposes to ask any question about the sexual experience or sexual disposition or sexual reputation of a complainant must make a written application to a Judge, which must include—
- (a) the name of the person who will be asked the question; and
- (b) the question; and 25
- (c) the scope of the questioning sought to flow from the initial question; and
- (d) the reasons it is claimed that the evidence meets the test in **section 44(2) or 44AA(4)**.
- (4) If any document is intended to be produced as evidence of the sexual experience or sexual disposition or sexual reputation of a complainant, the application required under **subsection (2)** must be accompanied by a copy of the document. 30
- (5) In a criminal proceeding, an application must be made, and a copy of the application must be given to all other parties,—
- (a) as early as practicable before the trial so that all other parties are provided with a fair opportunity to respond to the evidence or question: 35
- (b) unless a Judge otherwise permits under **subsection (7)**, no later than when a case management memorandum (for a Judge-alone trial) or a

- trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
- (6) In a civil proceeding, an application must be made, and a copy of the application must be given to all other parties,—
- (a) as early as practicable before the evidence is to be offered or the question is to be asked so that all other parties are provided with a fair opportunity to respond to the evidence or question; and 5
- (b) unless a Judge permits otherwise under **subsection (7)**, no later than the close of pleadings date.
- (7) The Judge may dispense with any of the requirements in **subsections (2) to (6)** if,— 10
- (a) having regard to the nature of the evidence or question proposed to be offered or asked, no party is substantially prejudiced by the failure to comply with a requirement; and
- (b) compliance was not reasonably practicable in the circumstances; and 15
- (c) it is in the interests of justice to do so.

*Trial process: questioning of witnesses*

**9 Section 85 amended (Unacceptable questions)**

- (1) Replace section 85(1) with:
- (1) In any proceeding, if the Judge considers a question is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge must disallow the question or direct the witness not to answer it. 20
- (2) Replace section 85(2)(a) with:
- (a) the age, maturity, or vulnerability of the witness; and 25

**10 Section 99 amended (Witnesses recalled by Judge)**

After section 99(2), insert:

- (3) This section is subject to **section 106H** (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). 30

*Trial process: alternative ways of giving evidence*

**11 Section 102 replaced (Application)**

Replace section 102 with:

**102 General provisions are subject to provisions for specific situations**

Sections 103 to 106 (which provide for alternative ways of giving evidence) are subject to the following provisions (which deal with specific situations): 35

- (a) sections **106AA** to 106B (which relate to family violence complainants):
- (b) **sections 106C to 106J** (which relate to sexual case complainants or propensity witnesses):
- (c) sections **107AA** to 107B (which relate to child witnesses in criminal proceedings):
- (d) sections 108 and 109 (which relate to undercover Police officers):
- (e) sections 110 to 118 (which relate to anonymous witnesses).

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*Video record evidence*

**12 Section 106 amended (Video record evidence)**

- (1) In section 106(1), replace “an alternative way of giving evidence at the trial” with “an alternative way of giving evidence in chief at the trial”. 10
- (2) In section 106(2), replace “evidence” with “evidence in chief”.
- (3) In section 106(3), (4), and (6), replace “an alternative way of giving evidence” with “an alternative way of giving evidence in chief”.
- (4) In section 106(6), after “that is to be offered”, insert “by the prosecution”. 15
- (5) In section 106(9), after “which may or may not be offered”, insert “by the prosecution”.

*Giving of evidence by family violence complainants*

**13 Section 106A replaced (Giving of evidence by family violence complainants)**

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Replace section 106A with:

**106AA Sections 106A and 106B apply to family violence complainants**

**Sections 106A** and 106B apply to a complainant (a **family violence complainant**) who is not a child and who is to give or is giving evidence in a family violence case (which does not include a sexual case).

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**106A Giving of evidence by family violence complainants**

- (1) A family violence complainant is entitled to give their evidence in chief by a video record made before the hearing.
- (2) The video record must be one recorded—
  - (a) by a Police employee; and
  - (b) no later than 2 weeks after the incident in which it is alleged a family violence offence occurred.
- (3) If a video record is to be or has been used as the complainant’s evidence in chief, a Judge must give a direction under section 103 about how the complainant

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- nant will give the other parts of their evidence, including any further evidence in chief.
- (4) Section 106 applies to a video record offered as the complainant's evidence in chief under this section.
- (5) If the prosecution intends to use a video record as a complainant's evidence in chief, the prosecution must provide the defendant and the court with a written notice stating that intention to do so. 5
- (6) Unless a Judge permits otherwise, the notice must be given no later than when a case management memorandum (for a Judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011. 10

*Giving of evidence by sexual case complainants or propensity witnesses*

**14 New sections 106C to 106J and cross-heading inserted**

After section 106B, insert:

*Giving of evidence by sexual case complainants or propensity witnesses*

**106C Sections 106D to 106J apply to sexual case complainants or propensity witnesses** 15

**Sections 106D to 106J** apply to a sexual case complainant or propensity witness of any age.

**106D Giving of evidence by sexual case complainants or propensity witnesses**

- (1) A sexual case complainant or propensity witness is entitled to give evidence in 1 or more alternative ways so that— 20
- (a) the complainant or witness gives evidence in 1 or more of the following ways:
- (i) by a video record made before the trial:
- (ii) while in the courtroom but unable to see the defendant or some other specified person: 25
- (iii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere:
- (b) by use of any appropriate practical and technical means the Judge, the jury (if any), and any lawyers can see and hear the complainant or witness giving evidence, in accordance with any regulations made under section 201: 30
- (c) the defendant can see and hear the complainant or witness, unless the Judge directs otherwise.
- (2) A sexual case complainant or propensity witness who gives evidence of any kind in one way is entitled to give the other parts of their evidence, including any further evidence in chief, in 1 or more other ways. 35

- (3) A prosecutor intending to call a sexual case complainant or propensity witness must provide every other party and the court with a written notice stating—
- (a) the 1 or more ways in which the complainant or witness will give their evidence (which may, unless the complainant or witness is a child, be or include the ordinary way); and 5
  - (b) if the complainant’s or witness’s cross-examination evidence (as defined in **subsection (7)**) is to be given by a video record made before the trial, any 1 or more other alternative ways in which their evidence is to be given during the recording.
- (4) However, no notice is required under **subsection (3)** if— 10
- (a) the complainant or witness is a child who indicates their wish to give evidence or any part of their evidence in the ordinary way under section 83; and
  - (b) the prosecutor applies under **section 106E** to a Judge for a direction that the complainant or witness be permitted to do so. 15
- (5) Unless a Judge permits otherwise, the notice required under **subsection (3)** must be given,—
- (a) if the notice states that the complainant or witness will give all or any of their cross-examination evidence (as defined in **subsection (7)**) by a video record made before the trial, as early as practicable; and 20
  - (b) in every case, no later than when a case management memorandum (for a Judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.
- (6) If a prosecutor has given notice under **subsection (3)** and it is no longer possible or desirable for the complainant or witness to give evidence by the means stated in the notice, the prosecutor may file an amended notice but must do so as early as practicable. 25
- (7) In this section and **sections 106F to 106I**, **cross-examination evidence**, for a complainant or witness, includes the following evidence (if any) that they give with their evidence given in cross-examination: 30
- (a) evidence in chief given by them further to their evidence recorded and offered under section 106:
  - (b) evidence in re-examination given by them about matters arising out of their evidence given in cross-examination.
- (8) This section is subject to **sections 106E to 106I**. 35
- 106E Application by prosecutor for sexual case complainant or propensity witness who is child to give evidence in ordinary way**
- (1) If a sexual case complainant or propensity witness who is a child indicates their wish to give evidence or any part of their evidence in the ordinary way under

- section 83, the prosecutor may apply to a Judge for a direction that the complainant or witness be permitted to do so.
- (2) Unless a Judge permits otherwise, an application under **subsection (1)** must be made no later than when a case management memorandum (for a Judge-alone trial) or a trial callover memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011. 5
- (3) The Judge—
- (a) may direct that the complainant or witness give evidence or any part of their evidence in the ordinary way, if satisfied that the complainant or witness fully appreciates the likely effect on the complainant or witness of doing so; and 10
- (b) before giving a direction, may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the complainant or witness of giving evidence in the ordinary way or any alternative way. 15
- (4) When considering whether to give a direction under this section, the Judge must have regard to—
- (a) whether the interests of justice require a departure from the usual procedure under **section 106D(3)** in the particular case; and
- (b) the matters in section 103(3) and (4). 20
- 106F Application by any other party for sexual case complainant or propensity witness to give evidence in ordinary way or different alternative way**
- (1) Despite **section 106D**, if a notice given under **section 106D(3)** states that a sexual case complainant or propensity witness is to give all or any part of their evidence in an alternative way, any other party may apply to a Judge for a direction that the complainant or witness give evidence or that part of their evidence in the ordinary way under section 83, or in a different alternative way under **section 106D**. 25
- (2) An application for a direction under **subsection (1)** must be made as early as practicable before the trial, or at a later time permitted by a Judge. 30
- (3) Before giving a direction under this section, the Judge—
- (a) must give each party an opportunity to be heard in chambers; and
- (b) may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the complainant or witness of giving evidence in the ordinary way or any alternative way. 35
- (4) When considering whether to give a direction under this section, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to—
- (a) whether the interests of justice require a departure from the usual procedure under **section 106D(3)** in the particular case; and 40

- (b) the matters in section 103(3) and (4).

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

- (1) Despite **section 106F(4)**, the Judge may give a direction under **section 106F** that all or any of the complainant’s or witness’s cross-examination evidence (as defined in **section 106D(7)**) not be given by a video record made before the trial only if the Judge considers that—
- (a) the giving of that evidence in that way would present a real risk to the fairness of the trial; and
- (b) that risk cannot be mitigated adequately in any other way.
- (2) For the purposes of **subsection (1)**, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to—
- (a) whether full disclosure by the prosecutor under section 13(1) of the Criminal Disclosure Act 2008 will be, or is likely to be, completed before the making of the video record:
- (b) whether the witness is likely to need to give further evidence after the making of a video record:
- (c) whether the making of a video record is unlikely to occur substantially earlier than the trial:
- (d) if the application for the direction under **section 106F** is made after the making of a video record of all or any of the complainant’s or witness’s cross-examination evidence, the impact on the complainant or witness of having to give again that evidence.
- (3) For the purposes of **subsection (1)**, 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:
- (a) the making of a video record will require the defence to disclose all or any of its strategy earlier than if all of the evidence of the complainant or witness were given in the ordinary way or in a different alternative way:
- (b) the defence will be unable to tailor its cross-examination to a jury’s reaction:
- (c) the making of a video record before the trial will involve preparation and other effort extra to that required for the trial:
- (d) complying with or using any appropriate practical and technical means for the making of a video record will involve more difficulty for all or any parties than if all of the complainant’s or witness’s evidence were given at the trial.

**106H 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**

- (1) This section applies to a sexual case complainant or propensity witness only if all of their evidence (except any further cross-examination evidence they give under this section) has been or is to be given by video record made before the trial. 5
- (2) The defence may apply to a Judge for a direction that the defence be permitted to further cross-examine the complainant or propensity witness after a video record is made of their cross-examination evidence. 10
- (3) The Judge may give the direction (despite section 99 of this Act) only if the Judge considers it would be contrary to the interests of justice not to do so.
- (4) For the purposes of **subsection (3)**, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to—
  - (a) whether further evidence, or an additional matter, has been disclosed, or has otherwise come to light, that is directly relevant to the determination of the case: 15
  - (b) whether that further evidence, or that additional matter, can be adequately addressed without requiring the complainant to be further cross-examined. 20
- (5) If the Judge gives the direction, the complainant or propensity witness must give the further cross-examination evidence at trial (and so not by video record made before the trial).

**106I Video record evidence: sexual case complainant's or propensity witness's cross-examination evidence given by video record made before trial**

- (1) A sexual case complainant's or propensity witness's cross-examination evidence given by video record made before trial must comply with all applicable enactments in or made under this Act and any other relevant Act (and those enactments apply with all necessary modifications) as if that evidence were being given at trial. 25
- (2) A video record made before trial of the complainant's or propensity witness's cross-examination evidence must be recorded and dealt with in compliance with any regulations made under this Act. 30
- (3) All parties must be given secure access to the recording, including a version edited under **subsection (5)**, unless a Judge directs otherwise. 35
- (4) All parties must be given the opportunity to make submissions about the admissibility of all or any part of the complainant's or propensity witness's cross-examination evidence that is given by a video record made before the trial.

- (5) The Judge may, on an application for the purpose made by any party or on the Judge's own initiative, order to be excised from a video record made before the trial of the complainant's or propensity witness's cross-examination evidence all or any of the following material:
- (a) any material that, if the evidence were given in the ordinary way, would or could be excluded in accordance with this Act: 5
  - (b) procedural content that is irrelevant to the determination of the proceeding (for example, witness breaks):
  - (c) any other material that the parties agree is not to form part of the evidence. 10
- (6) After edits to a video record are ordered under **subsection (5)**, further edits to the video record may be made (on an application for the purpose made by any party or on the Judge's own initiative) only if any new relevant issues have arisen and the interests of justice require the edited version to be revisited.
- (7) The Judge may admit a video record made before the trial of evidence, and that is recorded and dealt with substantially in accordance with the terms of any direction under this subpart and the terms of regulations referred to in **subsection (2)**, despite a failure to observe strictly all of those terms. 15
- 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** 20
- (1) A video record must be made, in accordance with any applicable regulations made under section 201, of evidence (of any kind)—
- (a) given at trial by a sexual case complainant or propensity witness; and
  - (b) not given by video record made before trial. 25
- (2) That video record may be used by the complainant or witness to give evidence (for example, in or for a retrial) under **section 106D(1)(a)(i)**.
- (3) This section does not limit or affect a video record of a witness's evidence being filed as a formal statement under the Criminal Procedure Act 2011, or section 99 (Oral evidence must be recorded) of that Act, or a witness giving oral evidence by way of a video record in accordance with an oral evidence order made under that Act. 30

*Giving of evidence by child witnesses*

- 15 New section 107AA inserted (Sections 107 to 107B apply to child witnesses)** 35
- Before section 107, insert:

**107AA Sections 107 to 107B apply to child witnesses**

Sections 107 to 107B apply to a child witness when giving evidence in a criminal proceeding unless the witness is a defendant who is a child or a sexual case complainant or propensity witness who is a child.

*Trial process: judicial directions*

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**16 New section 126A inserted (Judicial directions about misconceptions arising in sexual cases)**

After section 126, insert:

**126A Judicial directions about misconceptions arising in sexual cases**

- (1) In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases. 10
- (2) Misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to,—
- (a) a complainant is at least partially responsible for sexual offending if they dress provocatively, act flirtatiously, drink alcohol, or take some other drug: 15
- (b) sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance: 20
- (c) sexual offending always involves force or the infliction of physical injuries.
- (3) No direction is necessary or desirable if the misconception has already been addressed adequately by evidence (for example, evidence admitted by agreement under section 9(1)), and this section does not limit or affect— 25
- (a) section 127 (delayed complaints or failure to complain in sexual cases):
- (b) any regulations made under section 201(m) (warning or informing jury about very young children's evidence).

Compare: 1961 No 43 s 128A; SR 2007/204 r 49

*Transitional, savings, and related provisions*

30

**17 New Schedule 1AA inserted**

Insert the **Schedule 1AA** set out in **Part 1** of the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act.

## Part 2 Amendments to Victims' Rights Act 2002

### *Preliminary provisions*

- 18 Amendments to Victims' Rights Act 2002** 5  
This Part amends the Victims' Rights Act 2002.
- 19 Section 4 amended (Interpretation)**  
In section 4, insert in their appropriate alphabetical order:
- audio record** means a recording on any medium from which a sound track may be produced by any means
- sexual case** means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,— 10
- (a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or
- (b) any other offence against the person of a sexual nature
- sexual case complainant** means a complainant who is to give or is giving evidence in a sexual case 15
- video record** means a recording on any medium from which a moving image may be produced by any means; and includes an accompanying sound track
- Transitional, savings, and related provisions*
- 20 New section 5A inserted (Transitional, savings, and related provisions)** 20  
After section 5, insert:
- 5A Transitional, savings, and related provisions**  
The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.
- Victim impact statements* 25
- 21 Section 19 amended (Form and verification of information ascertained)**  
In section 19(1), replace “on audiotape or videotape” with “as an audio record or video record”.
- 22 Section 22A replaced (Victim impact statement may be presented to court in some other manner)** 30  
Replace section 22A with:



**22A Victim impact statement may be presented to court in some other manner**

- (1) The judicial officer sentencing the offender may, at the request of the prosecutor, agree that all or any part of a victim impact statement submitted under section 21 be presented to the court in any manner other than by reading it in accordance with section 22. 5
- (2) For example, the manner in which all or any part of the statement may be presented to the court under this section may be any of the following:
- (a) it can be read to the court by the victim while in the courtroom but unable to see the defendant or some other specified person:
  - (b) it can be read to the court by the victim from an appropriate place outside the courtroom, either in New Zealand or elsewhere: 10
  - (c) if it is an audio record, it can be presented by playing that record:
  - (d) if it is a video record, it can be presented by playing that record.

*Rights of victims who are sexual case complainants***23 New Part 2A inserted** 15

After Part 2, insert:

**Part 2A**  
**Provisions relating to rights of victims who are  
sexual case complainants**

**28A Section 28D applies only to individual victims who are sexual case complainants** 20

**Section 28D** applies only to an individual victim who is a sexual case complainant (the **victim**).

**28D Court may be cleared when victim impact statement read or otherwise presented to court** 25

A court may, on an application made for the purpose by the prosecutor under **section 199AA** of the Criminal Procedure Act 2011, make an order under that section that the courtroom be cleared while the victim's victim impact statement is read or otherwise presented to the court.

**24 New sections 28A to 28C inserted** 30

Replace **section 28A** (inserted by **section 23** of this Act) with:

**28A Sections 28B to 28D apply only to individual victims, or all victims, who are sexual case complainants**

- (1) **Sections 28B and 28D** apply only to an individual victim who is a sexual case complainant (the **victim**). 35

- (2) **Section 28C** applies only to all victims who are sexual case complainants (the victims).
- 28B Victim’s preferences on ways of giving evidence**  
 The prosecutor must make all reasonable efforts to ensure that—
- (a) the victim is informed about the ways in which the victim may give evidence (whether in chief or under cross-examination or on re-examination) as a sexual case complainant; and 5
  - (b) any preferences the victim has on the ways of giving evidence as a sexual case complainant are ascertained and taken into account in the operation of **sections 106C to 106J** of the Evidence Act 2006. 10
- 28C Availability of appropriate facilities when attending court**
- (1) The Secretary must make all reasonable efforts to ensure that appropriate facilities are available to the victims when attending court, or participating in or viewing the proceeding related to the offences concerned, as sexual case complainants. 15
  - (2) In determining whether facilities for those purposes are appropriate, the Secretary must, in addition to any other factors that the Secretary considers relevant, take into account—
    - (a) the victims’ physical and emotional comfort and safety;
    - (b) any physical constraints posed by the courtroom or courthouse. 20
  - (3) Examples of appropriate facilities may include—
    - (a) alternative waiting areas away from the general public;
    - (b) alternative bathroom facilities;
    - (c) other measures to minimise the likelihood that the victims encounter the defendants or the defendants’ supporters. 25

*Transitional, savings, and related provisions*

- 25 Section 53 amended (Amendments)**  
 In section 53, replace “the Schedule” with “**Schedule 1**”.
- 26 New Schedule 1AA inserted**  
 Insert the **Schedule 1AA** set out in **Part 2** of the **Schedule** of this Act as the first schedule to appear after the last section of the principal Act. 30
- 27 Schedule heading amended**  
 Replace the Schedule heading with:

## Schedule 1 Enactments amended

s 53

### Part 3 Amendments to Criminal Procedure Act 2011 5

#### *Preliminary provision*

#### **28 Amendments to Criminal Procedure Act 2011**

This Part amends the Criminal Procedure Act 2011.

#### *Public access and restrictions on reporting*

#### **29 Section 196 amended (Court proceedings generally open to public) 10**

In section 196(3), replace “and 199” with “199, and **199AA**”.

#### *Power to clear court*

#### **30 New section 199AA inserted (Court may be cleared when victim impact statement read or otherwise presented to court in cases of sexual nature)**

After section 199, insert: 15

#### **199AA Court may be cleared when victim impact statement read or otherwise presented to court in cases of sexual nature**

- (1) In any case of a sexual nature, a court may, on an application made for the purpose by the prosecutor, make an order that no person may be present in the courtroom while the victim’s victim impact statement is read or otherwise presented to the court, except for the following: 20
- (a) the Judge:
  - (b) the prosecutor:
  - (c) the defendant and any person who is for the time being acting as custodian of the defendant: 25
  - (d) any lawyer engaged in the proceedings:
  - (e) any officer of the court:
  - (f) the Police employee in charge of the case:
  - (g) any member of the media (as defined in section 198(2)):
  - (h) any person whose presence is requested by the victim: 30
  - (i) any person expressly permitted by the Judge to be present.
- (2) The order may be made only if the court is satisfied that the order is necessary to avoid causing the victim undue distress.

- (3) In deciding an application made under this section, the court must take into account, in addition to any other factors the court considers relevant, the following considerations:
- (a) the interests of the victim, and any preferences the victim has on how the victim's victim impact statement is read or otherwise presented to the court: 5
  - (b) whether those interests and preferences could be served and met by the statement being read or otherwise presented to the court in an alternative way:
  - (c) whether the statement is to be read to the court by the victim, or by a person nominated by the victim, under section 22(1)(a) or (c) of the Victims' Rights Act 2002. 10
- (4) Even if an order is made 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 considerations that it has taken into account in reaching its decision or verdict, or in determining the sentence. 15
- (5) In this section,—
- case of a sexual nature** has the meaning in section 199(3) 20
- read or otherwise presented to the court**, for a victim impact statement, means that all or any part of it is read or otherwise presented to the court under section 22 or **22A** of the Victims' Rights Act 2002
- victim impact statement** means a victim impact statement—
- (a) as defined in section 17AA of the Victims' Rights Act 2002; and 25
  - (b) submitted under section 21 of that Act to the judicial officer sentencing the offender.

*Appeals: appeals against pre-trial decisions: first appeals*

**31 Section 215 amended (Right of appeal by prosecutor or defendant against certain pre-trial evidential decisions in Judge-alone case)** 30

After section 215(2)(b), insert:

- (ba) granting or refusing to grant an application for a direction under **section 106F** of the Evidence Act 2006 in respect of a notification under **section 106D** of that Act that cross-examination evidence is to be given by video record made before trial: 35
- (bb) granting or refusing to grant an application under **section 106H** of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial:

**32 Section 217 amended (Right of appeal by prosecutor or defendant against pre-trial decisions in jury trial case)**

After section 217(2)(i), insert:

- (ia) granting or refusing to grant an application for a direction under **section 106F** of the Evidence Act 2006 in respect of a notification under **section 106D** of that Act that cross-examination evidence is to be given by video record made before trial: 5
- (ib) granting or refusing to grant an application under **section 106H** of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial: 10

*Transitional, savings, and related provisions*

**33 Schedule 1AA amended**

In Schedule 1AA, after clause 3, insert the **Part 2** set out in **Part 3** of the **Schedule** of this Act. 15

**Schedule**  
**Transitional, savings, and related provisions**

**ss 17, 26, 33**

**Part 1**  
**New Schedule 1AA of Evidence Act 2006** 5

**Schedule 1AA**  
**Transitional, savings, and related provisions**

**s 4A**

**Part 1**  
**Provision relating to Part 1 of Sexual Violence Legislation Act 2019** 10

**1 Proceedings affected by Part**

- (1) Amendments made by a provision of **Part 1 of the Sexual Violence Legislation Act 2019** (except for this clause) apply only to proceedings commenced on or after the commencement of that provision.
- (2) Proceedings commenced before that commencement, and not finally determined (including any rehearing, retrial, or appeal) before that commencement, continue as if those amendments had not been enacted. 15

**Part 2**  
**New Schedule 1AA of Victims' Rights Act 2002**

**Schedule 1AA** 20  
**Transitional, savings, and related provisions**

**s 5A**

**Part 1**  
**Provision relating to Part 2 of Sexual Violence Legislation Act 2019**

**1 Proceedings affected by Part** 25

- (1) Amendments made by a provision of **Part 2 of the Sexual Violence Legislation Act 2019** (except for this clause) apply only to proceedings commenced on or after the commencement of that provision.
- (2) Proceedings commenced before that commencement, and not finally determined (including any rehearing, retrial, or appeal) before that commencement, continue as if those amendments had not been enacted. 30

- (3) However, the following provisions apply, after they come into force, to proceedings specified in **subclause (2)**:
- (a) **section 22A** (victim impact statement may be presented to court in some other manner):
  - (b) **section 28A (section 28D)** applies only to individual victims who are sexual case complainants) (as inserted by **section 23** of that Act): 5
  - (c) **section 28A (sections 28B to 28D)** apply only to individual victims, or all victims, who are sexual case complainants) (as inserted by **section 24** of that Act), but only to the extent that it relates the application of **section 28D**: 10
  - (d) **section 28D** (Court may be cleared when victim impact statement read or otherwise presented to court).

### Part 3

#### New Part 2 of Schedule 1AA of Criminal Procedure Act 2011

### Part 2

#### Provision relating to Part 3 of Sexual Violence Legislation Act 2019

- 4 Proceedings affected by Part** 15
- (1) Amendments made by a provision of **Part 3 of the Sexual Violence Legislation Act 2019** (except for this clause) apply only to proceedings commenced on or after the commencement of that provision. 20
  - (2) Proceedings commenced before that commencement, and not finally determined (including any rehearing, retrial, or appeal) before that commencement, continue as if those amendments had not been enacted.
  - (3) However, the following provisions apply, after they (or, as the case requires, after the amendments made to them by that Part) come into force, to proceedings specified in **subclause (2)**: 25
    - (a) section 196(3) (Court proceedings generally open to public):
    - (b) **section 199AA** (Court may be cleared when victim impact statement read or otherwise presented to court in cases of sexual nature).