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SUBMISSIONS BY THE AUCKLAND DISTRICT LAW SOCIETY ON THE SEXUAL VIOLENCE LEGISLATION BILL

FEBRUARY 2020

INTRODUCTION

1. The ADLS Criminal Law Committee ("Committee") welcomes the opportunity to make written submissions on the Sexual Violence Legislation Bill ("SVLB"). The Committee is comprised of counsel from the defence bar in the Auckland region.

SUBMISSIONS ON THE GENERAL POLICY STATEMENT

2. The Explanatory Note[1] which accompanies the SVLB provides the start point from which this legislation develops and identifies the SVLB as a response to the findings of two recent Law Commission reports.[2]

3. There is particular reference to some of the findings from *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) which concern the difficulties faced by complainants in sexual cases. The concern was twofold:

   3.1 first, the complainants risked further traumatisation through the court process; and

   3.2 second, this can deter other complainants in making complaints.

4. These are problems the criminal justice system both in New Zealand and internationally face. These concerns have been around for a long time, they are not new. However, the major problem with this approach is this reverses the onus of proof. This attitude reflects a presumption of guilt and that all complainants are telling the truth when they allege sexual assaults. This has a major impact on defendants and the restrictions they face in the current jury trial process and would adversely affect fair trial process rights.

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[1] Sexual Violence Legislation Bill 2019 (185-1) (explanatory note) at 1.

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

5. The Committee would remind the legislators a defendant does not have to do anything or say anything in their defence. The burden of proof is on the prosecution to make the elements of their case to the required standard of proof beyond reasonable doubt.

6. The SVLB with its emphasis on the restriction of judicial discretion in favour of mandatory directions and duties on the court undermines the integrity of the criminal justice system by unbalancing the fairness of the trial process in favour of the complainant and by extension the prosecution. In *Crowx v R* [2013] NZCA 571, the Court of Appeal stated at [23]:

> *"Under our system defendants must have a fair trial. This is guaranteed under the New Zealand Bill of Rights Act 1990 [s 25(a)] and is also expressly recognised in the Evidence Act [s 8(2)]."*[3]

7. What is different is the social climate and the way the community deals with alleged sexual offending. There has been a greater number of complainants coming forward with alleged incidents of assaults, but this greater openness has not translated into improved reporting rates or cases proceeding to court.

8. The SVLB attempts to provide a solution to this perceived and misconceived problem by curtailing the use of judicial discretion throughout the trial process and particularly through the expansion of evidence which *cannot be offered* under s 44 without an application under s 44A to now include the defendant as well as any other witness.

9. The SVLB requires mandatory judicial consideration of matters which are based not on questions of fact or law under the new s 44AA. The SVLB requires the judicial officer must make decisions affecting the admissibility of reputation evidence. Reputation is an objective opinion. It smacks of morality. Reputation evidence is currently barred under s 44(2) except where it can also be found to be relevant and in the interests of justice to be admitted and put before the finder of fact. This should not be mandatory and should instead be a decision for the judicial officer running the trial based on the particular evidence and circumstances of each case and arguments before the court.

10. The inclusion of any moral element to mandatory judicial decision making under an imposed duty inherently undermines the fairness of the trial and the integrity of the criminal justice system. Morality is a matter for society and policy and should have no part in the criminal justice process. It should not be permitted. It may result in differing verdicts on the same or similar facts and create uncertainty.

11. Further, the SVLB is based on a leap of faith in identifying there are flaws in the criminal justice system that are the reason complainants choose not to report.[4] There are many stages before complaints of a sexual nature make the courts. Counsel respectfully submits, the attitude and investigative processes of the police on sexual complaints, combined with the use of prosecutorial discretion and the evidential burden the prosecution has to meet also have a part to play in low reporting rates and progression of reported cases to court.

[3] *Crowx v R* [2013] NZCA 571 at [23].
[4] Sexual Violence Legislation Bill 2019 (185-1) (explanatory note) at 1.

12. With respect to the key amendments identified in the SVLB in the explanatory note, the following comments are being made.

12.1 Any further restriction on the admissibility of evidence to protect complainants from perceived unduly invasive questions simply skews the fairness of the trial process in favour of the prosecution. The rationale for this is the finder of fact will not be able to separate previous consented sexual behaviour from the alleged unconsented sexual activity. There are already tight restrictions on probity and relevance of questioning in sexual cases and judicial directions to the jury about consent in respect of the alleged offending. Currently unduly invasive questioning is adequately dealt with by the use of judicial discretion, intervention and objections from Counsel and s 85. A change is unnecessary. This is a decision best left in the hands of judicial discretion and on a case by case basis.

12.2 Questions on sexual reputation appear to have become conflated with sexual activity or preference. The latter are both questions of fact which may have direct relevance on the allegations. The former is an opinion formed by an individual based upon that own individual's concept of good or bad behaviour. Questions of reputation should not play a part in criminal cases and are currently barred.

12.3 A complete bar to them in civil cases is even more problematic as it would provide difficulties in matters where litigation between parties takes place and one party is a sex worker.

12.4 Being a sex worker in New Zealand is not unlawful. Part of being a sex worker and the extent to which business is conducted may to some extent be based upon reputation following marketing and representation of services which may be purchased. In this scenario, any bar to reputation evidence should be discretionary and open for argument as its relevance will be dependent on the nature of the cause of action being litigated. This is a decision best left in the hands of judicial discretion and on a case by case basis.

12.5 The mandatory requirement to make it a duty for a Judge to intervene in inappropriate questioning based on the vulnerability of a witness is also steeped in moral judgments. It is not appropriate to place this duty on the court. It is adequately handled by s 85[5] as currently drafted. Further, opposing counsel will undoubtedly raise an objection to any questions considered inappropriate/unacceptable in the circumstances. As a final point, there is no information in the explanatory note to justify what that duty might be or what might be the consequences if this is not met by the court.

12.6 Pre-recorded cross-examination evidence is already available, and counsel know this. Its use remains limited as it removes the ability to examine complainants on issues which only become known following the examination in chief or cross-examination at the trial. To pre-record and then require further examination in chief or cross-examination of the complainant at the trial is doubling up on the trauma of giving evidence and at the same

[5] Evidence Act 2006, s 85, Unacceptable Questions which gives the judicial officer the discretion to disallow a question and also provides circumstances that may be taken into account

time undermining the point of the pre-recording. To disallow further cross-examination during the trial process is not in the interests of justice if new and important aspects of the case which go to the elements of the charge come to light.

12.7 Judges are the impartial arbiters of the trial and not part of the prosecution or keepers of social morality. Requiring Judges to make directions to the jury on myths and misconceptions Judges consider relevant to the case is again seeking to place the judicial officer in a moral quandary. Myths and misconceptions are not matters of fact and law. This suggestion is rejected entirely.

12.8 The Committee has no in-depth submissions to make on the ability to close the court for the purpose of presenting victim impact statement or their presentation to the court in alternative ways. The Committee recognises these statements in sexual cases are often deeply personal and may contain information put forward by the victim which may so sensitive and personal that public broadcast may result in the hurt not being brought to light.

12.9 The Committee notes there are already controls on what can and cannot be included in the content of victim impact statements and does not feel the ability to close the court for the delivery of the statement is problematic so long as the defence or prosecution has the ability to put forward arguments for or against such a judicial decision at an appropriate point in the sentencing process.

13. On a final but important point, the complete repeal of ss 44 and 44A and replacement with the proposed sections ignores the strength and depth of the of case law which has been built over time around the original s 23 and its reincarnation as s 44. Sexual cases can be so dissimilar in their facts, circumstances and parties involved in the allegations.

14. The Committee is strongly opposed to repealing and replacing ss 44 and 44A in a wholesale fashion. There is great concern amongst Committee members that should these new sections be passed into law, defence Counsel will be so hamstrung by the changes that the defence bar may not be able to meet its professional obligations and duties to its clients and fall before the standard required by s 25 of the New Zealand Bill of Rights Act 1990.

15. Section 44A as it currently stands requires the defence to provide to the prosecution not only the identity of the witness who would be asked a question in respect of the sexual experience of the complainant but also the question itself and the scope of the questioning sought to flow from the initial question. This application must be filed and served on all other parties.

16. There is already a great concern in the defence bar generally about the amount of information the defence is currently required to provide to the prosecution through the requirements for a s 44A application before a trial even commences. This is seen as undermining the doctrine of innocent until proven guilty, the right to silence and to put forward an effective defence.

17. Practical experience shows that when s44 applications are made, the prosecution then questions complainants and witnesses on material disclosed in the s44 application which is against the rules of burden of proof, the right to silence and fair trial rights.

PART 1 – AMENDMENTS TO THE EVIDENCE ACT 2006

Clause 4: Amends section 4(1) containing definitions of communication assistance, sexual case and sexual case complainant or propensity witness

18. *Communication assistance* – This term is used in ss 80 and 81 and is about assistance in court to a witness or defendant in a civil or criminal proceeding in order to aid their understanding of what is being said or produced in evidence. While the current definition is very broad the Committee is not opposed to the new provision with the additional comment that a mention of sign language might be appropriate as well**.**

19. *Sexual Case* – The Committee notes the change to this definition. The structure of the definition applicable to criminal cases has been split in two:

    19.1 (a) without change; and

    19.2 the new expansion of this definition to civil cases under (b). This makes s 44 and 44A applicable to civil 'disputes of a sexual nature' but there is no definition of what this type of civil matter might be. The Committee feels without some form of guidance of what sort of cause of action or type of litigation may be caught by ss 44 and 44A in a civil suit, the extension of these sections into the civil jurisdiction should not be mandatory.

20. *Sexual case complainant or propensity witness* – this proposes the creation of a new definition. New paragraph (a) makes no mention of whether the sexual case is criminal or civil in nature. The Committee feels that this specificity should be included. Attempting to merge all complainants from both jurisdictions into a single definition is problematic as no definition of what a sexual case in a civil proceeding might be.

21. New paragraph (b) uses the word "prosecution" and so is clearly limited to criminal matters. The Committee suggests should this definition be intended to apply to both criminal and civil matters, the same structure as that applied to *Sexual case* should be applied. A paragraph for criminal and a separate paragraph (b) for civil application.

Clause 6: Amendments to s 36(3) (Application of ss 44 and 44A to evidence of veracity and propensity)

22. The Committee notes this change is simply to include ss 44A. This alteration simply makes s 36 subject to both ss 44 and 44A. However, the Committee questions this amendment since no evidence under s 44 can be admitted without an application under s 44A being made anyway. This change in drafting would seem unnecessary.

Clause 7: Amendments to s 40 (Propensity Rule)

23. The Committee suggests the proposed change to s 40 risks overly complicating the issue of control in respect of the admissibility of propensity evidence in sexual cases.

24. Section 40(3)(b) already requires evidence on propensity in a sexual case to be admitted only in accordance with s 44. This then requires an application under s 44A.

25. The Committee questions the need for amendment as again it would appear redundant.

Clause 8: Repeal and Replacement of ss 44 and 44A – s 44

26. The Committee would refer to the comments made by the learned authors of *Mahoney on Evidence*[6] concerning the rationale behind s 44 as it currently stands. At [EV44.01](1) the learned authors reproduce a quote from the majority judgment in *B(SC 12/2013) v R* [2013] NZSC 151. What is particularly pertinent is the quote the Supreme Court used from *Bull v The Queen* [2000] HCA 24 at [53]:

> *The High Court of Australia identified two erroneous lines of reasoning that might arise in this context: because a complainant has a particular sexual reputation, disposition or experience, either (1) he or she is the kind of person who would be more likely to consent to the activity which is the subject of the charges or (2) he or she is less worthy of belief than a complainant who does not have those characteristics. Against these concerns, however, must be balanced the defendant's right to a fair trial and the right to present an effective defence in particular.*

27. The learned authors note evidence of the sexual experience of the complainant with persons other than the defendant can only be admitted after meeting a heightened relevance test and admitted only if it would be contrary to the interests of justice not to do so.

28. Section 44 has at its heart the same aims and goals underpinning the SVLB. Protection of the complainant from re-living, or re-traumatisation through cross-examination or from questioning which is unnecessarily intrusive. This of course presumes that the allegations are true so that the starting point in reality for a defendant is a presumption of guilt.

29. The question of whether s 44(1) should also cover the complainant's sexual experience **with** the defendant has been considered several times[7] but never been implemented. The reason for the continual rejection by judges, legislators and Law Commissions is evident in that in any relationship there are events that are specific to each case and go to the heart of issues such as consent, motive to fabricate, credibility and reliability. To disavow any evidence in respect of the complainant and defendant is to so unreasonably fetter any defence the defendant may legitimately have is totally unreasonable and unacceptable in an adversarial system. We submit that such a charge would adversely affect the right to a fair trial.

30. The current relevance test is very high. The judicial officers should continue to be given the freedom to admit or exclude such evidence at their discretion based upon arguments before the court and a long line of case law to find balance and justice in what are often difficult situations each of which will have its own character. The Committee submits the legislative attempt to place

[6] Elizabeth McDonald and Scott Optican "*Mahoney on Evidence: Act & Analysis"* (Thompson Reuters, Wellington, 2018).at 356.
[7] McDonald and Optican, at [EV44.01](3).

a blanket ban on such evidence must be rejected in the interests of natural justice and the right the defendant has to confront his or her accuser.

31. The Committee is also concerned that a complete explanation (as required under s 44A) of the reason why the evidence should be admitted under s 44 further degrades the ability of the defence to put the defendant's case to the complainant. It provides not just a signpost but a complete route map to the prosecution of the defence case and permits the prosecution to react and improve the presentation of their case to the finder of fact before the trial commences and adversely affects the right to a fair trial.

32. Some examples of reasons why evidence of the complainant's previous sexual experience might be admitted are included for illustrative purposes:

    32.1 other recent sexual activity in respect to forensic evidence;

    32.2 attempts to explain complainants' distress following allegations of rape from an earlier encounter and concern a partner may discover that earlier activity rather than the allegations against the defendant; and

    32.3 attempts to admit evidence about a complainant's historic violent sexual encounter offered by a defendant was dismissed as it bore no relevance to the current allegation.

33. In *B v (SC12/2013)* at [122(c)] William Young J noted that: "Generally and most importantly, the complainant's supposed interest in having sex on [another] occasion cannot logically provide any support for the theory that she consented to have sex with the appellant on the night in question." Case law is clear on this point. Previous consent is not automatically supportive of a submission to a jury that previous consent means consent on the relevant occasion. If however it is relevant to a defence then it ought to be admissible but not as a pre-trial which provides the Crown with information prior to trial they should not have.

34. The Committee submits the restriction in the proposed draft of s 44 to restrict all evidence in respect of the sexual experience or disposition of the complainant in a sexual case irrespective of who it is with is overly restrictive and does not permit the court to exercise its proper discretion concerning submissions of history between the complainant and the defendant and adversely affects the right to a fair trial.

35. The new requirement for an application to be made under either ss 44A or 44AA is confusing and should not be pursued. The grounds and limits of such an application should remain under a single section and not under two different but related sections.

36. The Committee also feels the proposed replacement of s 44 is poorly drafted and confusing which will lead to problems of interpretation. The law should be clear and understandable. The proposed replacement s 44 is anything but.

37. The Committee also notes the explicit inclusion of civil proceedings in the single new section. This is problematic as civil proceedings have a different burden of proof and standard of proof.

38. The Committee does not agree with the notion that the same concerns apply in respect of evidence of a complainant's sexual reputation, experience and disposition irrespective of whether it is a civil matter or criminal matter. Civil matters are brought by private parties, not the state. The litigation process is fundamentally different, and it would be extremely rare for these matters to make it into a courtroom at all, let alone before a jury. Most civil litigation is conducted on the papers. Confidentiality and privacy in respect of any litigation material is already strict.

39. The Committee suggests some explanation based on evidence of how often the current s 44 and s 44A are actually engaged in civil litigation may provide guidance on whether this explicit reference to civil matters is actually required at all.

40. The Committee agrees the sexual disposition of the complainant and evidence on what sort of sexual activity the complainant takes part in should remain subject to the current high test of relevance and probative value before being admitted.

Clause 8: New s 44AA – Evidence of Sexual Reputation

41. The Committee notes one definition of reputation is "the overall quality or character as seen or judged by people in general within a community" or "recognition by other people of some characteristic or ability."[8] This type of evidence has almost no place in respect of a criminal trial. It is not based on the facts of the allegation, but on the opinions of another people, which can be widely varied and skewed by their own personal views.

42. The Committee is concerned the court is now being asked to decide what is sexual reputation evidence based on objective judgment of a third party. The court should not be asked to make such judgments. A court is a place of law, not opinion. What people do and how they do it sexually, is very different from how their actions may be thought of by others. This proposal adversely affects the right to a fair trial. The Committee rejects this new addition in the strongest possible terms in respect of criminal matters.

43. For civil matters, as alluded to above this may impinge on the ability of one party engaged in sex work to bring a cause of action for breach of contract, privacy, defamation or nuisance as the reputation of the plaintiff may be an integral part of their cause of action. This new section would require the plaintiff to make an application to the court to get such evidence admitted to support their own case.

44. The Committee notes this section also conflates the notion of plaintiff and complainant in the drafting of s 44AA(3). They are not the same thing.

45. The Committee is strongly opposed to the inclusion of the new s 44AA which adversely affects the right to a fair trial. The original Evidence Act permitted reputation evidence to be offered as admitted by the Judge, the ability to do this was then removed with the explicit prohibition under the current s 44(2).

[8] Mirriam-webster legal dictionary (online, Marriam-Webster, 2020) < https://www.merriam-webster.com/dictionary/reputation#legalDictionary>.

46. These difficulties were discussed by the Supreme Court[9] who noted at [57]:

> *"A further difficulty arising out of s44 is that, although analytically distinct, the concepts of experience, reputation and disposition may overlap in practice, which may result in problems of application"*.

47. In the same case at [115]-[117], William Young J discussed the problem of reputation evidence further and agreeing with the majority concluded:

> *"admissibility of evidence about the underlying behaviour of the complainant can [then] be addressed by s 44(1) and (3). I would therefore construe the section as proceeding on the basis that evidence about behaviour may be admissible, but evidence confined to reputation is not."*

48. In *Wallace v R* [2018] NZCA 2 at [12] the Court of Appeal noted s 44 was intended to "protect complainants from unnecessary humiliation by controlling the admission of evidence concerning their sexual history were to do so serves no real probative purpose but merely panders to illegitimate rape myth reasoning." The Committee submits it can see no advantage to be gained in changing s 44 at this time and this position negates the need for s 44AA at all. This is legislation attempting to address an evidential problem that does not exist in order to provide a solution to a problem that evidential tinkering cannot solve and adversely affects the right to a fair trial.

Clause 8: Repeal and Replacement of ss 44 and 44A – s 44A

49. The major difference between the current s 44 and its proposed replacement is two-fold:

    49.1 First, the new draft now references reputation: As discussed above the Committee strongly opposes s 44AA and favours retaining the controls on reputation evidence currently found under s 44 and s 85 combined with the high bar set in respect of relevance and that such reputation must also be demonstrated as probative.

    49.2 Second, the position of defence counsel in respect of the legislative requirement to disclose questions as well as the scope of the questioning to the prosecution prior to trial is already problematic. This mandatory requirement clearly favours the prosecution at the pre-trial stage.

50. The additional element of reputation inserted into this achieves nothing except to add further confusion into an already difficult piece of evidential law. The Committee can see no advantages to be gained by taking this step which adversely affects the right to a fair trial. Admission of reputational evidence has many gates to travel through before being admitted into a criminal trial. The current protections are adequate and there is no need for change. Again change here will not solve the problem of low reporting rates for allegations of sexual offending.

51. The above concerns also apply to the proposed explicit addition to civil litigation matters.

[9] *B (SC12/13) v R* [2013] NZSC 151.

52. The Committee submits no alteration to the current s 44A is required at this time.

Clause 9: Amendment to s 85 – Unacceptable Questions

53. The current section gives the judicial officer discretion on disallowing a question or directing a witness not to answer. The proposed amendment makes this a judicial duty. This hardening of the need for a judge to intervene removes the discretion which makes it possible for a question acceptable for one witness to be deemed unacceptable for another. The principal aim of s 85 is "to enable the judge to ensure that no party or witness is unfairly disadvantaged by the way he or she is questioned"[10]. That should remain as currently legislated.

54. It is unreasonable to turn this discretion into a duty which could adversely affect the right to a fair trial. Further, there is no real reason provided in the Explanatory Note why a duty over a discretion is now preferred.

55. Finally, there appears no consideration or guidance on what would occur if a judge was found to have breached this duty.

56. The second part of this amendment is the addition of the phrase "vulnerability of the witness" to a non-exhaustive list of permitted relevant factors. The Committee points out the current list is non-exhaustive and so if the witness is considered by the judicial officer as vulnerable this can be included now.

57. No definition of what vulnerable means for the Evidence Act is provided.

58. The word vulnerable is frequently used but not often understood. Vulnerable has been defined as "capable of being physically or emotionally wounded" or "open to attack or damage".

59. A combination of factors from the current non-exclusive list could equate to any witness being found vulnerable by the court. The Committee submits this new proposed inclusion is simply not required as it is already covered in the factors explicitly contained in the current s 85 and the list of factors itself being explicitly non-exhaustive. The Committee submits this is an unnecessary addition.

Clause 10: Amendment of s 99 – Witnesses recalled by Judge

60. Whether this amendment is accepted is dependent upon whether the new s 106H finds favour with the Committee.

Clause 12: Section 106 – Video record evidence

61. The current Evidence Act under s 105(1)(a)(iii) allows pre-recording of video of cross-examination and examination in chief. We are of the view the current legislation already provides adequately for the protection of vulnerable witnesses including family violence and sexual violence complainants. One simply has to go through the formal procedural steps to

[10] Law Commission *Evidence Code* at [C322].

apply for it, and it can also be on the Judge's own initiative. No change is necessary or appropriate.

Clause 13: Section 106A – Giving of evidence by family violence complainants

62. We have concerns about the use of Police video records of family violence complainants as evidence in chief in court because:

    62.1 The videos are mainly recorded for investigative purposes by Police often very close in time to the alleged incident, they are not concerned with evidentiary rules. They can be largely 'emotional' and frequently do not offer a clear factual account of events. There have been instances when complainants later do not wish these types of "on the scene videos" to be relied upon and played at court, however the Police have sought to play them against the wishes of the complainant.

    62.2 The quality of such videos is varied - they regularly contain irrelevant or inadmissible material. Heavily editing them for admissibility purposes can mean the complainants still need to give viva voce evidence which somewhat defeats the argument for recording the statement in the first place.

    62.3 There are on-going concerns with how the video is stored. The Police store it in a cloud based platform operated by a third party who are located outside New Zealand. Lawyers must to agree to the terms and conditions of this company in New Zealand before being able to access this evidence. Access to this is by a link sent to the lawyer by the Police, which 'expires' at regular intervals. This adversely affects the right to a fair trial.

    62.4 There are issues with accessing the video for those defendants in custody given internet access is needed to view the videos.

Clause 14: News sections 106C to 106J - Giving of evidence by sexual case complainants or propensity witnesses

63. The Court of Appeal in *M v R* [2011] NZCA 303 considered pre-recording of evidence, and discussed the pre-recording of cross-examination. The Court found that fair trial issues were raised.

64. We have strong objections to the pre-recording of cross-examination for these below reasons:

    64.1 Pre-recording cross-examination means the defence are in effect required to disclose their defence in advance of the actual trial. There are concerns if in-roads were made into the Crown case at this stage, that the Crown would attempt to resolve this with further investigations occurring after the pre-recording of the evidence;

    64.2 There are currently issues with late disclosure, up to and including during the week of the trial. If pre-recording of cross-examination was to occur, there is a risk further disclosure could be made after the recording, and the witness would need to be recalled

again either at trial or for addition pre-recording to occur (which would defeat any time savings envisaged by the new provisions). Alternatively, consideration could be given to prohibiting Crown/Police relying on further evidence if that was not available prior to the pre-recording of the cross-examination.

64.3 The complainant or witness may also need to be recalled if unexpected evidence is given by other witnesses during the trial.

64.4 Giving evidence of a personal nature such as the usual evidence involved in a sexual case or a family violence matter is upsetting and intrusive. It is questioned how much the pre-recording of evidence will minimise that for complainants if it is to be pre-recorded in a 'trial' type setting solely in the absence of the jury. The amendments suggest this will occur prior to trial, but it is not clear when e.g.: a month before trial, a week etc. The complainant is still likely to have a lengthy wait before the cross-examination is pre-recorded (especially if full disclosure is required in advance, which it must be to ensure a fair trial process for the accused).

64.5 It can be questioned whether there will be any savings in both time and cost. Pre-recording will require a courtroom, a judge, court staff; recording equipment, escort staff, all lawyers involved in the proceeding etc. Essentially all the resources for trial (save the jury) are required twice - for the pre-recording and for the trial itself. There is also the risk that that the complainant/witness could need to be recalled to give further evidence, which may actually lengthen the time required.

64.6 When the evidence is pre-recorded, the jury cannot ask questions of the witness. They also lose the opportunity to "see" the witness/complainant in person which may impact how much weight they place upon the evidence.

64.7 The lawyers for both Crown and defence cannot gauge the jury reaction to the evidence as it is given. This means the effect and impact of evidence may be lost, as questions cannot be amended/altered depending upon how the jury receives evidence.

64.8 There could be a change in defence counsel between the pre-recording and the trial. If the new counsel had a different trial strategy, the earlier pre-recorded evidence may need to be reviewed and discarded. A change in Prosecutor may also give rise to issues around how the trial is conducted.

64.9 There are issues about reliability and accuracy when:

(a) This occurs well after the incident which is the subject of the complainant; and

(b) This is not tested or not properly tested at trial.

Clause 14: New section 106G – Direction that sexual case complainant's or propensity witness's cross-examination evidence not be given by video record made before trial

65. We are concerned that s106G requires there to be a '*real risk to the fairness of the trial*' and that the risk cannot be mitigated in '*any way*' before a Judge can consider whether cross-examination should not be pre-recorded. The phrase 'real risk' is not defined, and it can be

anticipated this will be the subject of significant litigation until case law is established around this terminology.

66. Under section 106G(3) it appears all four criteria must be met which is a high threshold. It is suggested that these criteria should be stand alone, and that meeting any one of the criteria should be sufficient to displace pre-recording and instead require 'live' via voce evidence to occur before the jury. Having to meet all four will raise significant fairness issues for an accused. We have concerns that fair trial rights for the defendant will not be preserved under this subsection as it is currently drafted.

67. We are also concerned that to show a 'real risk' to fairness, that the defence will have to disclose their defence/trial strategy under s 106G(3)(a). For the Judge to determine whether there is a real risk to a fair trial, the defence will have to say what the risk to the defence is, thereby in effect having to outline the defence.

68. Further, increased use of video evidence may dehumanise the complainant and/or witnesses, as juries will feel detached from them. It is just an image on a screen instead of a person in front of them.

Clause 14: New section 106I – Video record evidence: sexual case complainant's or propensity witness's cross-examination evidence given by video record made before trial

69. We have previously outlined concerns with the storage of police video records. Similar comments apply to this section, more so given this will be "evidence". It is not clear what type of storage is envisaged, and we would have concerns if this type of evidence was to be held in a similar system to evidence.com as currently used by the Police, which allows the Police to track who views the video and when (and allows them solely to have control over editing). An unchanged original of the recording should be stored unchanged and available to the defence to ensure a fair trial.

Clause 14: Section 106J – Making of video record of sexual case complainant's or propensity witness's evidence given at trial and not given by video record made before trial

70. This section makes it mandatory to make a video record of all evidence given by a complainant or a propensity witness at the trial, if that evidence that was not given by video record made before trial. This is an extra layer of cost for the court system and we question why videoing these parts of the trial is necessary. The main rationale appears to be to allow such evidence to be used in any retrial however there are many reasons why that may not be practical or in the interests of justice e.g.: subsequent law changes, re-trials that are a result of counsel competency appeals, fresh evidence leading to a re-trial etc.

Key findings from the UK Process Evaluation of Pre-recorded Cross-examination Pilot 2016

71. The Committee would also like to draw the Justice Committee's attention to some of the key findings from the *UK Process Evaluation of Pre-recorded Cross-examination Pilot* dated 2016 (copy attached to these submissions).

72. Timeliness

72.1 Practitioners reported that overall the listing of pre-recorded cases was largely successful, but some witnesses interviewed said their cross-examination dates had been re-advised at short notice.

72.2 Benefitted from pre-set listing times of cross-examinations. Less time waiting in court for witnesses.

72.3 On average shorter trials and easier to manage. Possibility of increases to guilty pleas as a result of pre-recorded cross-examinations, i.e. potential to save court time.

73. Cross-examination process, procedure and experience

73.1 Witnesses interviewed reported that the experience of cross-examination was mostly affected by how the defence advocate treated them.

73.2 Practitioners felt that the questioning style in these cases were better as questions were more focused and relevant than questions posed to vulnerable witnesses in the ordinary process. Trauma could have been reduced as a result of this.

73.3 Main problem for witnesses was treatment by defence, particularly relating to communication problems and being called a liar.

73.4 Style of questioning had an impact on witness ability to recall.

73.5 The main factor of traumatisation of giving evidence and being cross-examined in these types of cases are still present. Making it an automatic right to give evidence in a pre-recorded manner doesn't really resolve these concerns. If anything, the possibility of the complainant and/or witnesses having to give evidence and/or be cross-examined again will add to the traumatisation.

74. Technology

74.1 Reported problems with the technology used during the pilot, by both practitioners and witnesses.

75. Recall and quality of evidence

75.1 Overall no difference for witness ability to recall. Both groups considered memories to be patchy.

75.2 Some defence counsels felt the conditions mean they were not able to effectively question the witness e.g. not able to follow-up on body language or answer given during cross-examination.

76. The use of a complainant's pre-recorded cross-examination is also further discussed in a useful UK Law Gazette article *Cross-examination in Sexual Offences* dated 4 June 2019 (copy attached to these submissions).

Clause 16: New s 126A – Requires the giving of judicial directions necessary or desirable to address relevant misconceptions arising in sexual cases

77. The need for a specific section in the Evidence Act 2006 (**EA**) addressing misconceptions in sexual cases must be prefaced on proof that misconceptions regarding sexual offending continue to have an effect on jury deliberations in New Zealand. In this respect it is observed that there is current research in the UK suggesting that most jurors do not believe in the "obvious" myths, such as that all rape allegations will be reported immediately.[11] There is no point, and indeed it may be counter-productive, to require judges to direct juries on misconceptions that they do not or are unlikely to believe. It should only be misconceptions that current and uncontentious research can show are believed by jurors that should attract mandatory judicial directions.

78. The Committee considers that on balance, guidance on misconceptions in sexual cases is better addressed by expert witnesses than judges. There are several reasons for this view:

    78.1 Experts will keep abreast of developments and changes in opinion;

    78.2 Experts will understand the research basis for concluding that certain beliefs are misconceived and can be expected to be able to explain the same – this cannot be expected of judges; and

    78.3 The circumstances of the trial may dictate that directions on a particular misconception require truncation or amendment – again experts are better equipped to safely do so than the trial judge.

79. In terms of the specific directions proposed, the Committee comments as follows:

    79.1 Section 126A(2)(a): strictly speaking, any directions should be focused on the relevant legal elements of an offence. In sexual violence offending the concept of "responsibility" is vague and is likely to be confusing for juries as they will not hear counsel or the trial judge making reference to that term. A complainant's dress, conduct or intoxication level may be directly relevant, for example, to the issue of consent or reasonable belief. If such points are in issue then a jury might rightly be directed that, for example, features such as a complainant's dress and conduct alone cannot provide the foundation for a reasonable belief in consent. By contrast, it is submitted that it is not helpful to draw a jury's attention to whether or not they might consider a complainant partly responsible for the alleged offending.

[11] https://theconversation.com/how-tackling-rape-myths-among-jurors-could-help-increase-convictions-at-trial-123797

79.2 Section 126A(2)(b): in a similar vein, the reference in this proposed direction to the seriousness of an offence is not obviously connected to the usual elements of sexual offences. Generally speaking, seriousness of the offending is a factor for sentencing, not for juries. Drawing a jury's attention to the level of seriousness of alleged offending is, it is submitted, more likely to confuse than clarify.

79.3 Unhelpful directions may result in mistrials or unsafe verdicts and re-trials which is what the changes seek to avoid.

80. It is also difficult to understand why a jury should in effect be directed that sexual offending can and is committed by people known to a complainant. Presumably such a direction would only be relevant where the complainant's allegation is that sexual offending has been committed by somebody they know. The fact of such an allegation in itself should be more than sufficient to address any misconceptions jury members might have about familiar sexual offending. If, in addition, the trial judge then directs the jury that sexual offending is not only committed by strangers, then this could have the effect of unfairly bolstering the complainant's credibility. It is submitted that such a direction as this would only be justified in the highly unlikely event that defence counsel submits that the alleged offending could not have occurred because the complainant and defendant were known to each other.

81. If specific reference to judicial directions about misconceptions arising in sexual cases are to be included in the Evidence Act then the Committee supports the recommendation of the Law Commission in *The Second Review of the Evidence Act 2006* (and for the reasons cited by the Commission) that the Evidence Act should not contain a list of particular directions or topics for directions, and that such content is better incorporated into a "jury trial bench book" or similar.[12] The proposed legislation appears to represent a rejection of the Law Commission's recommendation in this respect.

[12] Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at 12.104.

PART 2 – AMENDMENTS TO THE VICTIMS RIGHTS ACT 2002 (VRA)

82. The Committee does not have submissions to make on the clauses in Part 2.

PART 3 – AMENDMENTS TO THE CRIMINAL PROCEDURE ACT 2011 (CPA)

Clause 30: Power to clear court – Victim Impact Statements

83. There are two submissions the Committee wishes to make in relation to the draft of the new s 199AA:

    83.1 In s 199AA(1) the application is to be made by the prosecutor, however, there appears no ability for the defence to challenge or to have any input into this application. The Committee submits this should be rectified to permit the defence at least some right of reply. To deny this is to deny one of the basic principles of natural justice.

    83.2 In s 199AA(3) the list of factors the judge must take into account should include (d) any other factors the court considers relevant. Further, it is submitted subparagraphs (a) to (c) should terminate with **and** ensure they are read together. This would simplify the drafting of s 199AA(3) greatly.

84. Overall, the Committee has no objection to the court being cleared for this purpose but would remind the legislature that 'undue distress' as a test in a new section has not yet been considered by the Courts. The Committee notes that undue is generally a lower test than extreme. As this is a new test, it is all the more important for the defence to be allowed a right of reply to such applications.