

Sexual Violence Legislation Bill

Government Bill

As reported from the Justice Committee

Commentary

Recommendation

The Justice Committee has examined the Sexual Violence Legislation Bill. The committee is unable to agree to recommend that it be passed in its current form. The committee does recommend the amendments as detailed in this report.

Labour Party members support the bill and the amendments. National Party members have reservations about two matters, as detailed in the relevant sections of this report.

The bill as introduced

This bill aims to reduce the trauma that sexual violence complainants may experience when they attend court and give evidence. It was introduced in response to recommendations by the Law Commission in 2015 and 2019. The bill would amend the Evidence Act 2006, the Victims' Rights Act 2002, and the Criminal Procedure Act 2011.

Alternative ways of giving evidence in sexual violence cases

Clause 14 would insert new sections into the Evidence Act to allow certain witnesses in sexual violence cases to give evidence in alternative ways without having to apply to court to do so. (The ordinary way of speaking directly from the witness box would still be available.) A witness could choose to give evidence:

- by video recorded before the trial
- in the courtroom but unable to see the defendant or some other specified person
- from an appropriate place outside the courtroom.

Prosecutors would have to inform the court and the defence how the evidence will be given. The defence could ask for a direction that the evidence be given in the ordinary way or in a different alternative way.

The bill would allow cross-examination to be given by pre-recorded video made before the trial. Clause 14 provides a framework for the use of pre-recorded cross-examination. The defence could also apply to further cross-examine the witness at trial.

The alternative ways of giving evidence would apply to both sexual case complainants and propensity witnesses. A complainant is a person who is alleged to have experienced the offence(s) charged. Propensity witnesses give evidence that the defendant behaved or offended in a similar way at another time.

Limits around certain evidence

Clause 8 would amend the Evidence Act to require a judge's permission before evidence was submitted on a complainant's sexual experience or disposition, unless the evidence sought to establish the mere fact that the complainant had sexual experience with the defendant. Clause 8 would expand the current scope of section 44, which places the same restrictions on evidence about a complainant's sexual experience with people other than the defendant. It would also completely prohibit evidence of a complainant's sexual reputation. Clause 8 would apply these rules to civil cases concerning sexual allegations, with an exception to the prohibition on evidence about sexual reputation in certain circumstances.

Judicial intervention

Clause 9 relates to questions that witnesses are asked. It would require a judge to disallow questions they consider inappropriate, or to direct that the witness not answer them.

Clause 16 would require judges to direct the jury, when necessary or desirable, about misconceptions relating to sexual cases. An example is the misconception that complainants are at least partially responsible for sexual offending if they have dressed provocatively, flirted, drunk alcohol, or taken drugs.

Changes to Victims' Rights Act and Criminal Procedure Act

Clause 22 provides for victim impact statements to be presented in the courtroom in a manner other than reading them out (for example, by playing a video). Clauses 23 and 30 would allow the court to be closed to the public while a victim impact statement is presented in cases of a sexual nature. Media would still be permitted.

Under clause 24, sexual violence complainants would have to be consulted about their preferred way of giving evidence. Reasonable efforts would have to be made to ensure that appropriate facilities were available to victims when they attended court, including minimising the likelihood that they encounter the defendant outside the courtroom.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Clearer definition of “propensity witness”

Clause 4(3) would insert a definition of “sexual case complainant or propensity witness” into the Evidence Act. Propensity evidence is defined in section 40(1) of the Act. It shows a person’s tendency or propensity to act in a particular way or to have a particular state of mind. The bill would extend some protections to propensity witnesses in sexual cases.

The definition in clause 4(3)(b) could be interpreted to include witnesses such as police officers giving evidence about a defendant’s previous actions. We do not believe such witnesses should be treated as propensity witnesses for the purposes of the bill. Propensity witnesses should be limited to people giving evidence about their personal experiences, of a sexual nature, with the defendant. We recommend making this clear in paragraph (b) of the definition in clause 4(3).

Victim’s sexual experience, disposition, and reputation

Clause 8, new section 44(1) would allow the following evidence to be given only with a judge’s permission:

- (a) evidence about the complainant’s sexual experience with the defendant (except to establish either (i) the mere fact that the complainant has sexual experience with the defendant or (ii) an act or omission that is an element of the offence (or the cause of action if a civil case))
- (b) the complainant’s sexual experience with anyone other than the defendant
- (c) the sexual disposition of the complainant.

Under new subsection (4), subsection (1) would not apply in sexual cases where there are co-defendants. This makes sense if a complainant’s sexual experience with a co-defendant could be relevant. However, we believe subsection (4) is too wide. It should only exclude subsection (1)(b), the provision that would apply to co-defendants. We recommend amending new section 44(4) to reflect this.

New section 44AA deals with evidence of a complainant’s sexual reputation. However, subsection (5)(b) is ambiguous. It provides that evidence of a complainant’s sexual reputation could not be used to “prove the truth of its contents”. We recommend amending subsection (5)(b) to provide explicitly that evidence of a complainant’s sexual reputation could not be used to prove the accuracy or truth of that reputation.

National Party view

National Party members believe it would be inappropriate to apply the same admissibility threshold across those various categories of evidence, however, if fair trial rights are to be upheld.

More particularly, evidence about the complainant’s sexual experience with the defendant (under section 44(1)(a)) should not be subject to the same heightened threshold as will apply to the complainant’s sexual experience with any other person (under section 44(1)(b)) or the complainant’s sexual disposition (under section 44(1)(c)). The latter two categories are less likely to assist a court in determining

whether a person has committed a relevant offence, particularly as to whether the defendant has acted without the consent of the complainant.

Accordingly, National Party members recommend deleting section 44(1)(a), along with any consequential amendments.

Broader provisions on unacceptable questions

Clause 9 would strengthen section 85 of the Evidence Act, which is about unacceptable questions that are put to witnesses. Currently, section 85 gives the judge the discretion to disallow unacceptable questions. The bill would change the word “may” to “must”, placing a requirement on the judge to disallow such questions.

We believe the wording in new section 85(1) is too narrow because it could be read to contemplate only the appropriateness of questions’ subject matter, not the way they are asked. Judicial intervention should also be required when witnesses are asked questions in an unacceptable style. We recommend amending new section 85(1) to reflect this.

The drafting of new section 85(1) should also allow a witness to answer a question if they wish to. This is the case under existing section 85: a judge can either disallow an unacceptable question or direct that the witness is not obliged to answer it (meaning they can if they wish). However, the second option for the judge in new section 85(1) as introduced is simply to direct that the witness not answer the question. We recommend amending it so that the judge’s second option is to direct that the witness is not obliged to answer the question (but can if they wish).

Judges should also be able to consider an additional factor for the purposes of section 85(1), namely, the context of previous questions and any potential cumulative effect they may have on the witness. We recommend setting this out in new subclause (3) of clause 9, inserting new section 85(2)(f).

Restrictions on personal cross-examination

Section 95 of the Evidence Act prevents defendants (or parties in civil cases) from personally cross-examining witnesses in certain situations, including when the witness is a complainant in a sexual case. Instead, the defendant’s questions may be put to the witness by somebody else, such as a lawyer.

We consider that this ban should also apply to the cross-examination of witnesses who have made allegations against a defendant in, or a party to, a sexual case, or against a defendant in, or a party to, a proceeding concerning family violence or harassment (for example, propensity witnesses in sexual cases). Propensity witnesses are in a similar position to complainants giving evidence. Like complainants, they could be re-traumatised if they are cross-examined personally by a defendant.

We recommend inserting new clause 9A to amend section 95 of the Evidence Act to cover propensity witnesses in sexual cases.

Section 95 currently applies to both civil and criminal cases concerning family violence or harassment. However, it currently does not apply to civil sexual cases. We

recommend making clear that our new section 95(1) would apply to allegations of sexual violence in civil cases. We also recommend amending paragraph (b) of the definition of “sexual case” in clause 4(2) to effect this change.

We also wish to clarify who should choose the lawyer to conduct the questioning when a party is prohibited from personally cross-examining a witness. In all cases it should be the defendant or party who has been prohibited from personally conducting the cross-examination. We make this clear in our proposed new clause 9A(2) and (3), amending section 95(5).

Pre-recorded cross-examination

Proposed new section 106G sets out the rules and considerations for a judge in directing that cross-examination evidence not be given by pre-recorded video when a prosecutor had notified that a complainant or propensity witness would give their evidence in that way.

Under the bill as introduced, judges could only make such directions on application by the defence. However, we think that judges should be able to make these directions independently if they consider it appropriate. We recommend inserting subsection (1A) into new section 106G to allow judges to direct, on their own initiative, that pre-recorded cross-examination not occur.

New section 106G(2) sets out the matters that judges would have to consider before deciding on such directions. The matters in subsection (2)(a) and (b), about disclosure requirements and the likelihood of needing to recall the witness, are relevant to whether pre-recorded cross-examination presents a real risk to the fairness of the trial. However, the matters in subsection (2)(c) and (d)—the likelihood of the recording taking place substantially earlier than the trial, and the impact on the witness of having to give evidence again—are about the witness’s interests. They are things for prosecutors to bear in mind when discussing with witnesses which mode of evidence to choose. They are not relevant to the judge’s determination of whether pre-recorded cross-examination presents a real risk to trial fairness. We recommend removing the matters in new section 106G(2)(c) and (d). We also recommend combining the matters in subsection (2)(a) and (b) so the judge would have to take into account only one explicit factor. This is whether the witness was likely to need to give further evidence after the video record had been made, for example, due to further disclosure.

When all parties agree that a witness should be recalled, the normal rules for recalling witnesses under section 99 of the Evidence Act should apply. We recommend amending new section 106H(3) to make this clear.

The law should allow for evidence-in-chief and cross-examination to be recorded both together and separately. We recommend inserting new section 106IA, by means of clause 14, to ensure that witnesses could still give evidence by pre-recorded video if a video record of their Police interview cannot be used (is not offered or admitted) as evidence-in-chief. Similar processes and requirements would apply, with necessary modifications, as would apply for pre-trial video recording of cross-examination.

National Party view

The committee received advice that the current law already allows a witness to give evidence in “an alternative way”. Under the current section 103 of the Evidence Act 2006, a judge may direct this course of action, including allowing (among other things) that cross-examination may take place prior to a trial. A number of submitters highlighted that a Court of Appeal judgment in 2011 detailed the rare and exceptional circumstances that would make such a course of action appropriate.

The bill as introduced would make the pre-recording of cross-examination a matter of entitlement, rather than at the discretion of a judge taking into account the particular circumstances of the case and the witness in question.

We heard that the reason that pre-recording of cross-examination should remain rare and exceptional is its significant potential to deny a defendant their right to a fair trial, as protected by the New Zealand Bill of Rights Act 1990 (NZBORA). Partly this is because pre-trial recording affords no opportunity for the defendant to question a witness based on the conduct of the trial.

We had heard from some submitters that it is problematic that the bill appears to be inconsistent in this respect with NZBORA, given the right of a person “to be present at the trial and to present a defence” under section 25(e) of NZBORA. This particular right was not specifically considered in the report made regarding whether the bill is consistent with NZBORA. Clearly, however, a person’s right to “present a defence”—in conjunction with their right to “be present at the trial”—is limited by the bill seeking to allow that the cross-examination element of the person’s defence not be presented at the trial.

We also heard that there is considerable potential for an adverse unintended consequence in relation to the proposal, given that the existing right of “recall” under section 99 of the Evidence Act will remain on the statute book. In other words, it will remain possible that a witness (including a complainant) will be recalled to be cross-examined again later, at the trial, despite having already been cross-examined. This would actively work against the bill’s stated aim to reduce the extent to which a complainant may be re-traumatised by the process of cross-examination.

For these reasons, the National Party recommends the deletion of the relevant provisions within clause 14 of the bill.

Recording evidence at trial

Under clause 14, new section 106J, all evidence given live at trial would have to be recorded. Under subsection (2), recordings could be used as an alternative mode of evidence in any future hearing or case. We recommend amending subsection (2) to clarify that the use of a recording in later proceedings would be subject to the relevant provisions governing the use of alternative modes of evidence. Our new paragraph (b) would make it clear that recordings from a previous trial could be used as an alternative mode of evidence in any kind of case, as long as they met the relevant criteria in Part 3, subpart 5 of the Evidence Act.

In our view, the bill should also make clear how new section 106J would interact with section 106 of the Act, which provides the ordinary rules for recorded evidence-in-chief. We recommend inserting subsection (2A) into new section 106J to ensure that provisions of section 106 would apply with necessary modifications. This would ensure that the procedural settings and requirements for evidence recorded at a previous trial are clear and workable.

Directing the jury on misconceptions arising in sexual cases

Clause 16 would insert new section 126A into the Evidence Act to require judges to give the jury any direction they consider necessary or desirable to address any relevant misconception about sexual cases. We understand that the Law Commission's parallel measure, for the judiciary to develop and maintain sample directions for judges to use with juries, is to be progressed in time for the expected commencement of the bill.

Proposed new section 126A(2) contains a (non-exhaustive) list of misconceptions relating to sexual cases. We found merit in submissions about other common misconceptions arising in sexual cases. We recommend reframing and expanding the list in new section 126A(2) to include the following:

- misconceptions about the prevalence or features of false complaints (our new paragraph (aa))
- misconceptions about stereotypical characteristics of offenders and victims (our new paragraph (ab))
- that a complainant is less credible or more likely to have consented, or that a defendant's belief in consent is reasonable, based solely on the fact that a complainant:
 - was in a relationship with the defendant (this misconception would be particularly important to mention when evidence was submitted under clause 8, new section 44(1)) (our new paragraph (d)(ii))
 - maintained contact with the defendant or showed a lack of visible distress, after the incident (our new paragraph (d)(iii)).

Paragraph (a) in the bill as introduced would become paragraph (d)(i). This would ensure that judicial directions addressing misconceptions about a complainant's actions or dress are more explicitly tied to matters that the jury considers.

Proposed new section 126A(3) provides that no direction would be necessary or desirable if the misconception was already addressed adequately by evidence (for example, evidence admitted by the agreement of all parties under section 9 of the Evidence Act). We agree with the submission that this could create confusion. We also agree that directions are different in nature to evidence: in some cases, a judicial direction is appropriate even if such evidence was presented. We recommend removing this content from new section 126A(3).

Victim to be consulted on how to present victim impact statement

The Victims' Rights Act provides for victim impact statements to be presented in court at sentencing. Section 22A of the Act allows them to be presented to the court in a manner other than reading them.

Clause 22 of the bill would insert new section 22A(2) to give examples of alternative ways of giving victim impact statements. This would make it clear that victims' options are similar to those that could be used when giving evidence in the alternative ways under clause 14, new section 106D of the Evidence Act.

We believe that sexual violence victims should be made aware of their options for delivering victim impact statements. We recommend inserting new section 28BA into clauses 23 and 24.¹ New section 28BA would require prosecutors to make all reasonable efforts to ensure that:

- sexual violence victims are informed about the ways in which victim impact statements can be presented
- victims' preferences are ascertained and taken into account in the operation of section 22A.

Clearing the court during presentation of victim impact statement

Clause 30 would insert new section 199AA into the Criminal Procedure Act, allowing the court to be cleared while the victim impact statement was presented in cases of a sexual nature. New subsection (4) would require the verdict and sentence to be announced publicly even if the court was cleared during the presentation of a victim impact statement.

However, victim impact statements are not relevant to verdicts. Impact statements are presented after the verdict, usually during a different sitting of the court. Referring to verdicts in new section 199AA is unnecessary and could cause confusion. We recommend removing the reference to verdicts in the new section.

Other Acts should not restrict alternative modes of evidence

Section 102A of the Evidence Act provides that the Act's general provisions for alternative modes of evidence override certain restrictions on the use of audio-visual links in the Courts (Remote Participation) Act 2010. We consider that those restrictions should also not apply to the rules for alternative modes of evidence in particular cases, including under proposed new sections 106C to 106J. To provide for this, we recommend inserting new clause 11A, replacing section 102A of the Evidence Act.

¹ Under clause 2, new section 28BA in clause 24 would replace new section 28BA in clause 23 within 6 months of the bill coming into force. This is to manage differing commencement dates for other new sections. The two new sections 28BA are identical, so there is no change in their effect.

For similar reasons, we also recommend inserting new clause 28A to amend section 98 of the Criminal Procedure Act. This would ensure that the entitlement to give evidence in alternative ways would apply when an oral evidence order was made under the Criminal Procedure Act.

Appendix

Committee process

The Sexual Violence Legislation Bill was referred to the committee on 14 November 2019. The closing date for submissions was 31 January 2020. We received and considered 81 submissions from interested groups and individuals. We heard oral evidence from 38 submitters.

We received advice from the Ministry of Justice.

Committee membership

Hon Meka Whaitiri (Chairperson)

Ginny Andersen

Simeon Brown (from 27 May 2020)

Hon Clare Curran

Hon Tim Macindoe (until 27 May 2020)

Hon Mark Mitchell

Greg O'Connor

Chris Penk

Hon Dr Nick Smith

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Andrew Little

Sexual Violence Legislation Bill

Government Bill

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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, 28A, 31, and 32** come into force on 5
whichever is the last to occur of the following dates:
- (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. 10

Part 1

Amendments to Evidence Act 2006

Preliminary provisions

3 Amendments to Evidence Act 2006

This Part amends the Evidence Act 2006. 15

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— 20
- (a) understand court proceedings; or
 - (b) give evidence
- (2) In section 4(1), replace the definition of **sexual case** with: 25

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,—
 - (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 40(3)(b), 44 to 44A, and 95(1)** only, a civil proceeding that involves issues in dispute of a sexual nature

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- (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:

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- (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)) related to their personal experience of a sexual nature ~~about~~ with any 1 or more defendants

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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.

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Veracity: application

6 **Section 36 amended (Application of subpart to evidence of veracity and propensity)**

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

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Propensity: evidence of propensity

7 **Section 40 amended (Propensity rule)**

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

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- (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**.

*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** 5
- (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: 10
- (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): 15
- (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. 20
- (3) The permission of the Judge is not required to rebut or contradict evidence permitted to be given under this section. 25
- (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)(b)** 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. 30
- (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 40(3)(b), 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. 35

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). 5
- (2) However, in a sexual case that is a specified civil proceeding (as defined in **subsection (3)**), 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. 10
- (3) A **specified civil proceeding**, in ~~this section~~ **subsection (2)**, means a civil proceeding in which the complainant's sexual reputation itself is directly relevant to—
 - (a) a cause of action in the civil proceeding; or 15
 - (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. 20
- (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 accuracy or truth of its contents ~~that reputation~~. 25
- (6) The permission of the Judge is not required to rebut or contradict evidence permitted to be given under this section.
- (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 30

- (1) An application made under **section 44(1) or 44AA(2)** must comply with **subsections (2) to (6)** (as relevant) unless—
 - (a) every other party has waived those requirements; or
 - (b) the Judge dispenses with those requirements. 35
- (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—
 - (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)**.
- (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
 - (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.
- (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:
 - (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
 - (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,—
 - (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
 - (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, or the way in which it is asked, 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 that the witness is not obliged to answer it. 5
- (2) Replace section 85(2)(a) with:
- (a) the age, maturity, or vulnerability of the witness; and
- (3) After section 85(2)(e), insert: 10
- (f) the nature of previous questions and any cumulative impact the questioning may have on the witness.

9A Section 95 amended (Restrictions on cross-examination by parties in person)

- (1) Replace section 95(1) with: 15
- (1) A defendant in or a party to a sexual case, or a defendant in or a party to a criminal or civil proceeding concerning family violence or harassment, is not entitled to personally cross-examine—
- (a) a complainant; or
- (b) any other witness (for example, a propensity witness) who has made an allegation against that defendant or party (as applicable),— 20
- (i) in a criminal proceeding, of an offence of a sexual nature, or of an offence of family violence or harassment; or
- (ii) in a civil proceeding, of a sexual nature, or of family violence or harassment; or 25
- (c) a child who is a witness of a kind not described in **paragraph (a) or (b)**, unless the Judge gives permission.
- (2) In section 95(5),—
- (a) after “A defendant”, insert “in”; and
- (b) replace “his or her” with “that defendant’s or party’s”. 30
- (3) In section 95(5)(a) and (b), after “the defendant”, insert “or the party”.

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). 35

*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): 5

- (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): 10
- (d) sections 108 and 109 (which relate to undercover Police officers):
- (e) sections 110 to 118 (which relate to anonymous witnesses).

11A Section 102A replaced (Relationship of Courts (Remote Participation) Act 2010 to sections 103 to 106)

15

Replace section 102A with:

102A Relationship of Courts (Remote Participation) Act 2010 to this subpart

Nothing in the Courts (Remote Participation) Act 2010 affects or limits the ability of—

- (a) a witness to give evidence, or a party to apply for evidence to be given, under a provision of this subpart; or 20
- (b) a Judge to make directions under a provision of this subpart.

*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”. 25
- (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”. 30
- (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)**

Replace section 106A with:

| | |
|---|----|
| 106AA Sections 106A and 106B apply to family violence complainants | 5 |
| 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). | |
| 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. | 10 |
| (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. | 15 |
| (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 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. | 20 |
| (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. | |
| (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. | 25 |

*Giving of evidence by sexual case complainants or propensity witnesses***14 New sections 106C to 106J and cross-heading inserted**

After section 106B, insert:

| | |
|---|----|
| <i>Giving of evidence by sexual case complainants or propensity witnesses</i> | 30 |
| 106C Sections 106D to 106J apply to sexual case complainants or propensity witnesses | |
| Sections 106D to 106J apply to a sexual case complainant or propensity witness of any age. | 35 |

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—
 - (a) the complainant or witness gives evidence in 1 or more of the following ways:
 - (i) by a video record made before the trial: 5
 - (ii) while in the courtroom but unable to see the defendant or some other specified person: 10
 - (iii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere: 10
 - (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: 15
 - (c) the defendant can see and hear the complainant or witness, unless the Judge directs otherwise. 15
- (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.
- (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— 20
 - (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
 - (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. 25
- (4) However, no notice is required under **subsection (3)** if—
 - (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 30
 - (b) the prosecutor applies under **section 106E** to a Judge for a direction that the complainant or witness be permitted to do so.
- (5) Unless a Judge permits otherwise, the notice required under **subsection (3)** must be given,— 35
 - (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

- (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. 5
- (7) In this section and **sections 106F to 106IA**, **cross-examination evidence**, for a complainant or witness, includes the following evidence (if any) that they give with their evidence given in cross-examination: 10
- (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**. 15
- 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. 20
- (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. 25
- (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 30
- (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.
- (4) When considering whether to give a direction under this section, the Judge must have regard to— 35
- (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).

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**. 5
- (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. 10
- (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. 15
- (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 20
 - (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— 25
 - (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. 30
- (1A) A direction referred to in **subsection (1)** may be made—
 - (a) on an application made under **section 106F**; or
 - (b) on the Judge's own initiative.
- (2) For the purposes of **subsection (1)**, the Judge must, in addition to any other matter that the Judge considers relevant, have regard to— whether the witness is likely to need to give further evidence (including cross-examination evidence) after the making of a video record (for example, due to further disclosure). 35

- (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:~~ 5
- (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.~~ 10
- (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: 15
- (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: 20
- (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. 25
- 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. 30
- (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. 35
- (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.~~
- (3) The Judge may give the direction,—

- (a) if all parties agree that a recall of the complainant or propensity witness is necessary or desirable, under section 99 of this Act; and
- (b) in any other case, only if the Judge considers it would be contrary to the interests of justice not to do so (despite section 99 of this Act).
- (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:
- (b) whether that further evidence, or that additional matter, can be adequately addressed without requiring the complainant to be further cross-examined.
- (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.
- (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.
- (3) All parties must be given secure access to the recording, including a version edited under **subsection (5)**, unless a Judge directs otherwise.
- (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:
- (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. | |
| (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. | 5 |
| (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. | 10 |
| 106IA Procedure if video record evidence under section 106 not offered, or not admitted, as evidence in chief | | |
| (1) | This section applies if,— | |
| (a) | a prosecutor gives a notice under section 106D(3) stating that a sexual case complainant or propensity witness is to give all of their evidence by a video record made before trial; and | 15 |
| (b) | for any reason, video record evidence under section 106 is not offered as an alternative way of the complainant or witness giving, or is not admitted as, evidence in chief (for example, because the record is of poor quality, or it contains inadmissible, or other non-complying, material). | 20 |
| (2) | The complainant or witness may give both their evidence in chief and their cross-examination evidence by a video record made before the trial. | |
| (3) | The making and use of that video record must comply with— | |
| (a) | the process, and requirements, specified in sections 106D to 106I for a sexual case complainant's or propensity witness's cross-examination evidence given by video record made before trial (and that process, and those requirements, apply with any necessary modifications); and | 25 |
| (b) | the process, and requirements, specified in regulations made under this Act that apply to a video record made under this section. | |
| (4) | However, if no regulations of that kind are in force, the making and use of that video record must comply with the process, and requirements, specified in regulations made under this Act for a video record made before the trial of the complainant's or witness's cross-examination evidence (and, in that case, those regulations apply with any necessary modifications). | 30 |
| 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 | | |
| (1) | A video record must be made, in accordance with any applicable regulations made under section 201, of evidence (of any kind)— | 35 |
| (a) | given at trial by a sexual case complainant or propensity witness; and | 40 |

- (b) not given by video record made before trial.
- (2) That video record may be used by the complainant or witness to give evidence in an alternative way under this Act (for example, in or for a retrial) ~~under **section 106D(1)(a)(i)**~~.—
- (a) in a sexual case, and under **section 106D(1)(a)(i)**; or 5
- (b) in any other proceeding, and under any other provisions of this subpart.
- (2A) Section 106 (except section 106(4A) to (4C)) applies, with any necessary modifications, to the video record.
- (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. 10

Giving of evidence by child witnesses

- 15 New section 107AA inserted (Sections 107 to 107B apply to child witnesses)** 15

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. 20

Trial process: judicial directions

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

After section 126, insert: 25

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.
- (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, misconceptions— 30
- (aa) about the prevalence or features of false complaints in sexual cases:
- (ab) that a victim or an offender in a sexual case has, or does not have, particular stereotypical characteristics:

| | | |
|--|--|----|
| (a) | a complainant is at least partially responsible for sexual offending if they dress provocatively, act flirtatiously, drink alcohol, or take some other drug: | |
| (b) | that 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: | 5 |
| (c) | that sexual offending always involves force or the infliction of physical injuries: | |
| (d) | that, in a sexual case, a complainant is less credible or more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant— | 10 |
| | (i) dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs: | |
| | (ii) being in a relationship with a defendant, including a sexual relationship: | 15 |
| | (iii) maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending. | |
| (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 This section does not limit or affect— | 20 |
| | (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 25

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 30

Preliminary provisions

18 Amendments to Victims' Rights Act 2002

This Part amends the Victims' Rights Act 2002.

19 Section 4 amended (Interpretation)

In section 4, insert in their appropriate alphabetical order: 35

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,—

- (a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or 5
- (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

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 10

Transitional, savings, and related provisions

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

After section 5, insert:

- 5A Transitional, savings, and related provisions** 15
- The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.

Victim impact statements

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”. 20

22 Section 22A replaced (Victim impact statement may be presented to court in some other manner)

Replace section 22A with:

- 22A Victim impact statement may be presented to court in some other manner** 25
- (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.
- (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: 30
 - (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: 35

- (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

After Part 2, insert:

5

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

28A Sections ~~28BA and 28D~~ applies-apply only to individual victims who are sexual case complainants

10

Sections ~~28BA and 28D~~ applies-apply only to an individual victim who is a sexual case complainant (the **victim).**

28BA Victim's preferences on presenting victim impact statement

If a victim impact statement of the victim as a sexual case complainant is to be, or has been, submitted under section 21(1), the prosecutor must make all reasonable efforts to ensure that—

15

- (a) the victim is informed about the ways in which the victim impact statement may, with the agreement of the judicial officer sentencing the offender, be read to the court, or presented to the court in some other manner, under sections 22 and ~~22A~~; and

20

- (b) any preferences the victim has on that matter are ascertained and taken into account in the operation of those sections.

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

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.

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24 ~~New sections 28A to 28C inserted~~ Sections 28A and 28BA replaced

Replace **sections ~~28A and 28BA~~** (inserted by **section 23** of this Act) with:

30

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

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

- (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

28BA Victim's preferences on presenting victim impact statement

If a victim impact statement of the victim as a sexual case complainant is to be, or has been, submitted under section 21(1), the prosecutor must make all reasonable efforts to ensure that—

- (a) the victim is informed about the ways in which the victim impact statement may, with the agreement of the judicial officer sentencing the offender, be read to the court, or presented to the court in some other manner, under sections 22 and **22A**; and 15
- (b) any preferences the victim has on that matter are ascertained and taken into account in the operation of those sections. 20

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. 25
- (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. 30
- (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. 35

*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. 5

27 Schedule heading amended

Replace the Schedule heading with:

Schedule 1
Enactments amended

10

s 53

Part 3**Amendments to Criminal Procedure Act 2011***Preliminary provision***28 Amendments to Criminal Procedure Act 2011**

15

This Part amends the Criminal Procedure Act 2011.

*Procedure for taking oral evidence***28A Section 98 amended (Application of sections 103 to 105 of Evidence Act 2006)**

(1) In the heading to section 98, replace “sections 103 to 105” with “subpart 5 of Part 3”. 20

(2) In section 98, replace “sections 103 to 105 of the Evidence Act 2006 apply” with “subpart 5 (alternative ways of giving evidence) of Part 3 (trial process) of the Evidence Act 2006 applies”.

Public access and restrictions on reporting

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

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)**

30

After section 199, insert:

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:
 - (a) the Judge:
 - (b) the prosecutor:
 - (c) the defendant and any person who is for the time being acting as custodian of the defendant:
 - (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:
 - (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:
 - (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.
- (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.~~
- (5) In this section,—
case of a sexual nature has the meaning in section 199(3)

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
- (b) submitted under section 21 of that Act to the judicial officer sentencing the offender.

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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)

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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:
- (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:

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

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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:
- (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:

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30

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.

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

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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.

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

Schedule 1AA
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

- (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.

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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** (~~sections 28BA and 28D~~ applies ~~apply~~ 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 to the application of **sections 28BA and 28D**: 10
 - (ca) **section 28BA** (victim's preferences on presenting victim impact statement) (as inserted by **section 23 or 24** of that Act):
 - (d) **section 28D** (~~Court~~ court may be cleared when victim impact statement read or otherwise presented to court). 15

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** 20
- (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.
 - (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. 25
 - (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)**:
 - (a) section 196(3) (~~Court~~ court proceedings generally open to public): 30
 - (b) **section 199AA** (~~Court~~ court may be cleared when victim impact statement read or otherwise presented to court in cases of sexual nature).

Sexual Violence Legislation Bill

Legislative history

11 November 2019

Introduction (Bill 185–1)

14 November 2019

First reading and referral to Justice Committee