

## Privacy Commissioner's Submission to the Justice Select Committee on the Sexual Violence Legislation Bill (185-1)

### Introduction

1. I am pleased to provide a submission on the Sexual Violence Legislation Bill (the Bill). The Bill contains a number of important provisions that will protect the privacy of complainants in sexual violence cases.
2. The Bill amends the Evidence Act 2006, Victims' Rights Act 2002 and the Criminal Procedure Act 2011. The Bill intends to reduce the trauma that sexual violence complainants experience in court by:
  - tightening rules of admissibility of sexual disposition and sexual experience evidence
  - entitling complainants in sexual cases to give their evidence in alternative ways, including recording their evidence-in-chief and cross examination before trial
  - placing a duty on a Judge to disallow a question or direct the witness not to answer it in certain circumstances, and
  - extending the availability of communication assistance to any witness who needs it to understand questions or give evidence.
3. The Privacy Act 1993 is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy. While the application of the Privacy Act does not extend to the judicial functions of a court or tribunal, one of my functions under the Privacy Act is to examine legislation before Parliament and to consider any matters affecting individuals' privacy.
4. I support the proposed Bill and consider that several of the amendments will enhance the privacy rights of sexual violence complainants. My comments on the Bill relate to clauses 8, 14 and 23. I **recommend** that the Committee consider whether the higher admissibility threshold of section 44 of the Evidence Act should also apply to deceased individuals in order to protect their privacy and dignity in the same manner afforded to survivors of sexual violence.

### Clause 8: Sexual experience and sexual disposition evidence

#### *The proposal to extend the application of section 44 of the Evidence Act*

5. The court process requires a complainant to share highly sensitive and personal information with the court. In addition, the adversarial nature of the court means that complainants are cross-examined to try to expose unreliable or dishonest witnesses. Examination and cross-examination about highly private matters can be extremely traumatising for those who have experienced sexual violence.

6. Section 6(d) of the Evidence Act recognises that there are important public interests that may qualify or limit the requirement for otherwise relevant evidence to be admitted. One example of this is the right of privacy for complainants in sexual cases.
7. Section 44 of the Evidence Act recognises this right to privacy, as evidence of a complainant's sexual history with any person other than the defendant can only be admitted following an application to the Judge. The Judge can allow the offering of evidence where the evidence is of such direct relevance to facts in issue in the proceeding or the issue of appropriate sentence that it would be contrary to the interests of justice to exclude it.
8. The Bill extends the application of section 44 to include the complainant's sexual history with the defendant, with the exceptions of:
  - the mere fact that the complainant has sexual experience with the defendant, or
  - to establish an act or omission that is one of the elements of the offence or the cause of action.
9. I consider it appropriate that sexual experience and sexual disposition evidence is only admitted when the higher threshold of section 44 is met, regardless of whether the sexual experience is with the defendant or another individual.

*Protecting the privacy and dignity of deceased individuals who experience sexual violence*

10. I understand the purpose of this Bill is to reduce the re-traumatisation of victims attending court and giving evidence. This re-traumatisation is caused by the exposure of extremely private information in front of the court and intrusive questioning of an individual at the expense of their privacy and dignity.
11. On my reading, both the current and proposed amendment to section 44 of the Evidence Act fail to protect the privacy and dignity of deceased individuals who have experienced sexual violence. Those who die before they can complain of sexual violence are not and will not be covered by the higher threshold of admissibility of section 44.
12. New Zealand has seen cases where defence counsel have sought to introduce irrelevant evidence of homicide victims' sexual experience. This is highly traumatising for family and friends of the victim and severely impacts the privacy and dignity of the deceased.
13. It is anomalous in law that a complainant who has experienced sexual violence will have their dignity and privacy protected by these measures but will not be afforded the same protections if they are killed in that same assault because they are not a 'complainant' for the purposes of the Evidence Act.
14. I consider this provision could play an important role in protecting the privacy and dignity of individuals generally, including if they are deceased. I **recommend** the Committee consider whether additional protections of section 44 of the Evidence Act should also apply to deceased individuals.

**Clause 14: Alternative ways of giving evidence**

15. The Bill will allow a sexual case complainant or propensity witness to give evidence in one or more specified alternative ways, unless a judge directs otherwise. These changes will provide complainants with greater autonomy over the way they communicate evidence which may be distressing, while appropriately balancing the needs of defendants and their rights to a fair trial.

**Clause 23: Clearing the court for victim impact statements**

16. The Bill also introduces the ability for the court to make an order that the courtroom be cleared while a victim impact statement is read or otherwise presented to the court.
17. Allowing the court to make such an order to avoid causing the victim undue distress is privacy protective. It can mitigate unnecessary exposure of highly sensitive information can cause additional distress.

**Conclusion**

18. I trust my comments are of use to the Committee in its consideration of the Bill. I am happy to appear before the Committee if that would be of assistance.

A handwritten signature in blue ink, appearing to read 'John Edwards', with a stylized, cursive script.

John Edwards  
**Privacy Commissioner**

31 January 2020