

Policy announcement: Improving the Justice response to victims of sexual violence

GENERAL QUESTIONS

1. *Why are these reforms important?*

These reforms respond to the needs of sexual violence victims, many of whom find the justice process causes further trauma. The package will deliver changes that have been recommended by the Law Commission and other experts.

Legislation is planned for introduction before the end of year, and will include:

- tightening the rules around evidence about a complainant's sexual history, to better protect against unnecessary and distressing questioning
- ensuring specialist assistance is available for witnesses who need it to understand questions and communicate in court
- giving sexual violence victims the right to choose how they give their evidence – for example by audio-visual link or pre-recorded video
- ensuring there's a recording of the evidence, so it can be replayed at any re-trial instead of having to be given again
- providing more protections for sexual violence victims giving their victim impact statements in court, and
- providing surer footing for judges to intervene in unfair or inappropriate questioning, and to address common myths and misconceptions about sexual violence.

Over time, there is potential for increased reporting of sexual violence crimes when our system is more responsive, and people have greater confidence in it.

2. *When will the reforms be enacted?*

A Bill will be introduced to the House by the end of the year. There will be adequate lead-in time before the changes come into effect, to ensure everyone is prepared for the changes.

ALTERNATIVE MODES OF EVIDENCE (INCLUDING PRE-RECORDED CROSS-EXAMINATION)

3. *What are the benefits of alternative ways of giving evidence?*

All alternative modes of evidence mean the witness doesn't have to see the defendant. If audiovisual link or CCTV is used, the witness doesn't have to be in the courtroom – so they don't have to see anyone except the judge and the lawyer asking them questions, and their support person. They can also be in a more comfortable environment.

Recording evidence on video also provides more flexibility. It can mean the witness can give evidence at a scheduled time, and breaks or inadmissible comments can be edited out before the video is played to the court.

When all the evidence, including cross-examination, is pre-recorded, it can reduce the harm caused by delays in getting to trial. In some cases it may also help to resolve issues, or even the case, before the trial.

4. *How will pre-recorded cross-examination work?*

The details are still being worked through, but the evidence will be recorded in a hearing that occurs some time before trial. The legislative and operational settings will be designed to both reduce trauma and protect the fairness of the trial. Safeguards will be tailored to our disclosure framework, and the entitlement to pre-record cross-examination will always be subject to the right to a fair trial.

5. *Aren't victims already entitled to be consulted about alternative modes of evidence?*

The judge must have regard to the witness's views before deciding what mode of evidence is used, and prosecution guidance encourages prosecutors to discuss the options with sexual violence complainants in relevant cases. A standalone entitlement to be consulted will be more visible and concrete, both for complainants themselves and for lawyers and judges who need to seek out their views.

RECORDING EVIDENCE FOR USE AT RETRIAL

6. *How will this work in practice?*

Details are still being worked through, but the intention is to allow complainants' evidence from the original trial to be used at any retrial as a normal 'alternative way of giving evidence'. This will mean that the evidence will need to be recorded at the trial, if it hasn't been pre-recorded already.

EVIDENCE OF COMPLAINANTS' SEXUAL HISTORY

7. *What will the changes mean?*

Any evidence of a complainant's sexual experience, with anyone, will only be admissible if it would be contrary to the interests of justice to exclude it. Judicial permission to lead that evidence will need to be sought prior to trial.

The one exception is around evidence of the mere fact that the complainant and defendant have a sexual history. That will be subject to normal admissibility rules.

These rules will also apply to evidence about a complainant's "sexual disposition".

8. *What is "sexual disposition"?*

Evidence of sexual disposition is about a person's tendencies or preferences, which might not be exhibited by behaviour or interaction with others. An example includes fantasies recorded in a diary.

9. *Won't evidence of sexual experience with the defendant always be relevant?*

One of the key objectives of this change is to ensure the relevance of the evidence is considered, rather than assumed. Questioning about a complainant's sexual history can be invasive and extremely sensitive. Assuming the admissibility of evidence about a complainant's sexual history is a clear example of how the justice system may unnecessarily retraumatise complainants.

COMMUNICATION ASSISTANCE

10. *Why is legislative change needed to allow communication assistance?*

Currently, witnesses must have limited fluency in English or a 'communication disability' in order to qualify for communication assistance.

11. *What does the funding for communication assistance cover?*

Training and quality frameworks will be developed before the legislative changes are implemented, to help to ensure competency and build capacity in New Zealand. Funding will also cover additional demand once the legislative changes are implemented.

JUDICIAL POWERS IN SEXUAL VIOLENCE CASES

12. Which judges' powers are being changed?

The discretion for judges to intervene in improper questioning will be amended so that, if the judge considers the questioning is improper, they will be required to intervene.

- The factors the judge should consider will also include the witness's vulnerability.

Judges will also be encouraged to give judicial directions, where appropriate, to address common myths and misconceptions about sexual violence that are relevant to the trial.

- This amendment is unlikely to come into force until standard directions are developed. They'll also be kept up to date with current research and best practice.

13. Why are these changes important?

We want to make sure that judges are on sure footing when intervening in improper questioning, and we want to make sure that juries are appropriately and consistently informed so they can decide cases on the evidence. Both of these changes will better protect complainants from undue trauma and harm and will also support just and consistent decision-making in sexual violence trials.

VICTIMS' RIGHTS

14. What will the right to 'appropriate facilities' mean in practice?

The right will make sure that genuine effort is made to ensure that complainants are comfortable and safe when they have to come to court.

It is a variation on the Law Commission's 2015 recommendation, which would also have mandated separate bathroom and kitchen facilities. Physical constraints, and the costs involved in adding these types of facilities to every courthouse, mean that such a specific entitlement is not feasible at this point.

DEFENCE COUNSEL TRAINING

15. What is the proposal for defence counsel training about?

Budget 2019 includes funding to develop and implement specialist training specifically for defence counsel, on best practice in sexual violence cases.

We want the training to be useful and relevant, to recognise both defence counsel's role and duties to clients, and the need to reduce complainants' re-traumatisation.

16. Will the training be compulsory for counsel acting in sexual offence cases?

At this stage the training will not be compulsory. However, the settings and funding for training will be subject to review after three years, in particular looking at uptake.

BUDGET PACKAGE DETAILS

17. How much money will these reforms cost?

Budget 2019 will provide \$32.8m in funding, plus \$5m in capital, to support the implementation of these reforms.

Most of the funding will ensure pre-recorded cross-examination is available consistently across the country and wherever it is appropriate. These costs are expected to reduce over time, as pre-recording beds in as a standard process.

LONGER-TERM WORK

18. What is the scope of this longer-term work?

The longer-term work is about looking for further ways we can improve how our system responds to sexual violence, while maintaining the integrity of our criminal justice system as a whole: the fairness of a criminal trial will always be non-negotiable.

19. Why are you not progressing more transformative proposals now?

We want to make sure that the full range of options, and their impacts, are fully worked through before any decisions are made to progress more fundamental changes.

In the context of an alternative resolution process, for example, this is especially important in relation to risks around victim safety and coercion; but also to principles like equality of the law for defendants. Progressing this work on a longer timeframe will also allow fuller and more constructive community consultation and input.

20. Does this package deliver on all of the Law Commission's recommendations?

The Law Commission's recommendations to improve the justice response to sexual violence victims were delivered in 2015 – and those recommendations aligned with calls from experts and the sector from the last decade and beyond. We are taking the opportunity to progress them now as they are overdue.

Some similar recommendations for family violence cases have been made in the Law Commission's most recent review of the Evidence Act. There are many similarities between family and sexual violence dynamics, but we want to make sure we fully work through the implications in the particular context of family violence.

More recent recommendations from the Law Commission are still under consideration.