National Council of Women of New Zealand
Te Kaunihera Wahine o Aotearoa

GENDER EQUAL NZ
MAKING EQUALITY REALITY

Level 4, Central House
26 Brandon Street
PO Box 25 498
Wellington 6146

+ 64 4 473 7623
info@ncwnz.org.nz
www.ncwnz.org.nz

31 January 2020 S20.02

Submission to Justice Select Committee on the Sexual Violence Legislation Bill 185-1

Introduction

0.1. The National Council of Women of New Zealand, Te Kaunihera Wahine o Aotearoa (NCWNZ) is an umbrella group representing over 200 organisations affiliated at either national level or to one of our 15 branches. In addition, about 450 people are individual members. Collectively our reach is over 450,000 with many of our membership organisations representing all genders. NCWNZ's vision is a gender equal New Zealand and research shows we will be better off socially and economically if we are gender equal. Through research, discussion and action, NCWNZ in partnership with others, seeks to realise its vision of gender equality because it is a basic human right.

0.2. This submission has been prepared by the NCWNZ Social Issues Standing Committee and the Parliamentary Watch Committee after consultation with the membership of NCWNZ.

1. Summary

1.1. NCWNZ welcomes and supports this Bill as it seeks to improve sexual violence victims' experiences in court, while preserving the fairness of the trial and the integrity of the criminal justice system. However, some of the proposed amendments do not go far enough. There are areas which particularly affect women victims that need to be included. Our submission makes some observations on all of these amendments of the Bill and then addresses five key areas identified in the amendments.

2. Intent of the Bill

2.1. This Bill amends the Evidence Act 2006, Victims' Rights Act 2002, and Criminal Procedure Act 2011 to reduce the retraumatisation victims of sexual violence may experience when they attend court and give evidence.

2.2. The United Nations Committee for the Convention on the Elimination of Discrimination Against Women (CEDAW), in their concluding remarks after Aotearoa New Zealand's 8th Periodic report in 2018 expressed concern and made several recommendations to address violence against women including:
26.Taking into account its general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19,
(c) Strengthen capacity-building and awareness-raising campaigns as well as training for judges, law enforcement officials and welfare personnel on all forms of gender-based violence and abuse…[1]
(e) Adopt criteria and guidelines for the provision of victim-oriented and culturally appropriate legal, psychosocial and economic assistance,
(f) Collect and report to the Committee disaggregated data on the number of cases of violence against women that have been investigated and that have led to prosecutions, including information on the sanctions imposed on perpetrators; Women victims of violence who have been provided with legal assistance and relevant support services; Women victims of violence who have been compensated

2.3. This Bill goes some way to make things better for women and girls in the court system.

2.4. In this submission NCWNZ highlights for consideration amendments in the Bill for specific legislative clauses relating to:

3. Part 1 – Amendments to Evidence Act 2006

3.1. **Clause 8: Section 44 and 44A of the Evidence Act 2006**
Section 44 and 44A of the Evidence Act 2006 is providing a step forward to protect the complainants from unduly invasive questioning. NCWNZ membership feels that giving discretion to judge will allow fairness. But our concern is that Judges can dispense with all protective measures if they consider it is in the best interest of justice. It is very important to ensure that victims of sexual violence who choose to go to court participate in a fair trial. In order for this to happen, they should not be humiliated or embarrassed about their sexual behaviour. At the same time, the facts of the matter need to come out so that the defendant also gets a fair trial.

3.2. However, there is a huge amount of discretion for judges so training will be important and some of the conditions for granting exception e.g. to permitting evidence of sexual experience or reputation, should be restricted further.

[1] https://women.govt.nz/sites/public_files/CEDAW_C_NZL_CO_8_31061_E%20%283%29.pdf

3.3. Section 44 (4) – where defendant is charged as a party, subsection (1) does not apply. This will not only open the way for the sexual experience/disposition of the complainant to be questioned it will also discourage the victims to come forward and report. The implications of this are not clear.

3.4. Section 44A (7) – Huge amount of discretion to the judge and the factors underlying allowing the judge to dispense with the safeguarding requirements in section 44A (2-6) seem very broad, and given the potential harm to the complainant, should be restricted to section 44A (7) (c).

3.5. Section 44AA (2) – Questions regarding sexual reputation could be allowed in civil but not in criminal cases. How many sexual offence cases would be civil? There needs to be some data to back it up. Department of Justice information states, "Many civil cases are settled without a court hearing. This is possible when all parties agree on a solution – usually after negotiations by the parties' lawyers. In a civil case, the person who brings the action or 'sues' someone (the plaintiff) must prove their case to the balance of probabilities. This means they must prove that it is more likely than not that their version of events is correct." Even though this is a much simpler and informal process, it still does not justify allowing information about sexual reputation to be allowed.

3.6. **Clause 12 – 14: Section 106 C – 106J of the Evidence Act – 2006**
Section 106C – 106J required judges to intervene as it seems necessary. This is probably the most that judges can do given that no matter what is prepared the judge does not know everything in advance that will be asked. The judge should be ready to step in to prevent any badgering of or unacceptable comments to the victim. Our membership suggests that judges will need training e.g. Victim Psychology.

3.7. 106D (1) of the Evidence Act 2006 will provide more safeguards to the victims if we delete "see".

3.8. Section 106G seems fraught with re-victimisation particularly as it reads as if there is the opportunity for the defendant or their lawyer to ask the victim further questions at the trial. This is in spite of having the interview videoed already where all questions should have been put to the victim. We may have misinterpreted this section about evidence by video but it seems the defence gets two opportunities to put the same questions.

3.9. Section 106G (3) gives reasons for disallowing pre-recorded video evidence. Apart from reason (a) (b), the other reasons seem inconsequential compared with victim rights.

3.10. Section 106F allows judges to force a victim to give evidence in court. Examples would have been helpful to show under what circumstances victims' right to give evidence as they wish, are comfortable with, should be overruled.

3.11. NCWNZ absolutely agree that judges should intervene in appropriate questioning of witness and include a witness's vulnerability as one of the factors a judge may consider in determining whether the questioning is unacceptable. If the questioning is extreme, may be a mistrial is appropriate.

3.12. **Clause 16: Section 126 A of the Evidence Act – 2006**
Section 126A of the Evidence Act 2006, required judges to consider it necessary or desirable to direct such information, myth or misconception to the jury. Unconscious bias can sway the way a person

hears statements and the way they perceive a person. Informing the Jury about misconceptions and myths will support the victim as it will support jury members to have a more informed view of the case. It will help to counter some unconscious bias.

3.13. NCW membership thinks that this will help as myths such as “she has done it with me before” may cloud the truth that this time complainant refused consent. It is very vital that when judges direct the jury about any myth or misconception, presumably when the victim is in attendance, it should be seen as fairer and open.

3.14. Judges will require to be trained in this area.

4. Part 2- Victims’ Rights Act 2002

4.1. **Clause 23: Section 28A to section 28C of the Victims’ Rights Act 2002**
These sections have most situations covered. There needs to include a reference to ensure that not only the victim, but his/her whanau has access to the support agencies and facilities like – Victim support, SASH and Women refuge.

4.2. There may be some prior understanding of numbers attending which should be in the policies of the Secretary, as there may be a large support group for the victim and there may not be room for all to attend.

4.3. Section 28B, allows the victim to present a statement in whichever form they choose. NCW membership feels that in the case of video statements, there needs to be some regulation relating to the length of time the video can be held by the court of the lawyers or whoever, after which it must be destroyed. Video statements could be readily misused on a social media by someone with ill will towards the victim, no matter how long after the current case.

4.4. There should also be strong procedure to keeping the video secure during the length of the trial.

5. Further Comment

5.1. As many victims of sexual violence are women, they are the ones who are affected most by any provisions around evidence given about victims of sexual violence. The legislation is a huge step forward, but real change will come when attitudes change. Stereotypes and myths about women’s sexuality and the reasons for rape and other sexual offences are still deep rooted, reflected in juries, the police, legal profession and some judges. Immediate education on these issues and how they are reflected in the legislation and over time development of case law will hopefully bring real change.

5.2. The key message is that all victims should have the best protection when attending court as complainants.

5.3. Delay in the trial by the defence lawyers can affect women victims, which is not included in this legislation. Defence lawyers will attempt to delay the trial so that the victim either withdraws their

complaint, or the quality of the victim's evidence is not as good because their memory of the event is not as good.

5.4. Finally, the training of the judges to cover these trials to make them understand the complexities of sexual assaults. Training will also help the judge presiding to have sufficient interest in the area of sexual abuse to support the women victims during their questioning.

6. Conclusion

6.1. NCW welcomes the draft bill as a major step forward. This bill has the potential to dramatically change the experience and outcomes for victims of sexual violence and, hopefully, increase the numbers willing to make complaints and participate in court proceedings.

Pip Jamieson
NCWNZ Board

Venus S Guy
Convenor NCWNZ Social Issues Standing Committee