Submission on Sexual Violence Legislation Bill 2019

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Submitter: Professor Elisabeth McDonald MNZM, University of Canterbury

1 I am a law academic and legal researcher with 30 years' experience, with particular expertise in relation to the law of evidence and the prosecution of sexual offences. I was involved in a FoRST funded project (with Jan Jordan) in 1994 – 1996 (which culminated in the 1996 DSAC conference "Ten Years' On" in Wellington) and a Law Foundation funded project (with Jeremy Finn and Yvette Tinsley) in 2009 – 2011 (leading to the publication of *From "Real Rape" to Real Justice* (VUP, 2011) (cited as FRRTRJ), which included recommendations reflected in this Bill). From 1997 – 1999 I was Research and Policy Manager for the Evidence Reform Reference at the Law Commission, and have been a consultant in various capacities since then. I am the author of *Principles of Evidence in Criminal Cases* (Thomson Reuters, 2012), *Mahoney on Evidence: Act and Analysis* (with Scott Optican and others, Thomson Reuters, 2018) and *Adams on Criminal Law – Evidence* (on-line, edited by Simon France).

2 I have just completed a four year research project (funded by the Royal Society Marsden Grant, the New Zealand Law Foundation, the Borrin Foundation and the University of Canterbury), which compared 30 adult rape cases with 10 cases from the Sexual Violence Court Pilot and makes 55 recommendations for changes to, or development of, law and practice. The research will be produced as an Open Access book and available from 26 February: Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020) (cited as *Rape Myths*), with research and writing contributions from Paulette Benton-Greig, Sandra Dickson and Rachel Souness. (If of assistance, I will provide the Select Committee with a pre-launch copy of the book.) As part of the consultation process leading up to the publication, I ran two workshops in late August 2019 (one in Auckland and one in Wellington) which allowed discussion concerning the draft proposals among a range of experienced practitioners. Those contributing included representatives from: the New Zealand Police; Crown Solicitors; Crown Law; the Criminal Bar Association; the New Zealand Law Society; the Ministry of Justice; MEDSAC; the Institute of Judicial Studies; Community Law Centres; universities; the support sector and victim advocates (including the Chief Victim's Advisor's Office, Louise Nicholas, HELP, Rape Crisis, Rape Prevention Education, Korowai Tumanako, Te Puna Oranga – Kaupapa Māori). With my consent, some of the workshop attendees will be referring to the summary of the preliminary findings and draft proposals I distributed to them in August in their submissions on this Bill.

Overview

3 While I strongly support ongoing reform in this area, including the introduction of this Bill, I note that many of the proposed amendments come from recommendations that are now eight or more years' old. Further change based on research and information (and public concern) that has emerged recently is required. I also believe that in some places the Bill does not deliver, in its current form, what was intended, due to drafting inaccuracies or potential interpretation issues. My submission addresses both these matters.

Clause by clause commentary

4 **Clause 4:** I support the change to the definition of **communication assistance** (see Recommendation 8.9 FRRTRJ).

5 I support the extension of s 44 to civil proceedings, which the change to the definition of **sexual case** facilitates. I am not convinced that "issues in dispute of a sexual nature" will cover all appropriate cases (or rather, that this may be cause for argument). For example, when the case is not about sexual harassment (which would be caught), as opposed to when a person's sexual experience is sought to be introduced as being relevant to their credibility or their behaviour at a particular time (which may not be). It does not extend to other criminal cases, during which matters relating to the victim's sexual experience or disposition may be at issue – such as the murder of Grace Millane – which will fall to be governed by ss 7 and 8. It may be a difficult drafting exercise not to cast the net too wide and create uncertainty. However, an amendment to s 6 of the Act (which guides interpretation) may be of broader assistance to judges making decisions about relevance in such cases. While s 6 refers to the fair trial rights of witnesses and parties – it says nothing about the rights specifically of *victims* who, if deceased or incapacitated, will not be either. It would be unlikely that the rights of confidentiality would trump the rights under NZBORA, but a specific reference to the rights of victims is something I think worthy of exploration.

6 I am of the view that aspects of the definitions of **sexual case complainant or propensity witness** should be reconsidered. I am thinking of a situation where either of these potential witnesses will make a video recording pre-trial, but then become unavailable to be a witness at the time of the trial (death or incapacity etc.). This evidence will then become hearsay evidence and may well be admissible (as sufficiently reliable) – but should the definition be future-proofed in some way (so as to not only apply to witnesses)? Further, as currently drafted, the definition would include (for example) a police officer who may give propensity evidence about the defendant. So it does need some re-thinking – as I presume the idea is that the new provisions apply (only) to other alleged victims of the defendant (who are not complainants). I also suggest that s 95(1) is amended to use the final form of these definitions (and therefore include a bar on the personal cross-examination of a propensity witness).

7 **Clause 7(1):** If "one" is to replace "1" in this context (s 40), why include "1" in the definition of **propensity witness**? Same with regard to the proposed s 44(1)(a) and s 106D(1), for example.

8 **Clause 8:** I support the extension of the admissibility rule in (proposed) s 44(2) to the complainant's sexual experience with the defendant (see Recommendation 8.11 FRRTRJ). However, I strongly disagree with the exclusion from the rule proposed in s 44(1)(a)(i). Such evidence (the "mere fact" evidence) will then only be subject to ss 7 and 8. My research suggests that the combination of these provisions do not sufficiently control the admission of evidence of the complainant's sexual experience with the defendant (*Rape Myths* pp 186 – 196), so subjecting all information to the heightened relevance test is highly desirable. If, however, the "mere fact" evidence need only be sufficiently relevant to be admitted – what is the purpose of its admission? If it is to establish that the complainant and the defendant previously had a sexual relationship in the context of a rape allegation then the evidence must be relevant to something of consequence to the determination of the proceeding – so penetration or consent (including belief in consent) and perhaps (more on this later), credibility. The jury will need to be advised what the evidence is relevant to. If the "mere fact" evidence is offered as being relevant to consent then it is just the type of evidence that should be subject to proposed s 44(2), not just ss 7 and 8. It would be unusual for "mere fact" evidence to be relevant to the issue of whether penetration occurred, but the risk is that the jury may make more of this evidence than appropriate unless a limited use warning is given. Finally, I am of the view (consistent with the purpose of s 44) that "mere fact" evidence should never be relevant to credibility – and even if, in unusual circumstances, it is, then the jury should again be directed as to limited use, which is a difficult proposition. Therefore, in my view, it makes no sense to single out "mere fact" evidence as being outside the rule. While there may be examples where the fact of a previous relationship explains why the complainant and defendant are in the same place, there is no reason not to subject even that information to a heightened relevance test in order to avoid the risk of illegitimate reasoning which the reform is supposed to address. Such an exception does not exist in any other jurisdiction of which I am aware.

9 I also agree with extending the scope of a 44(1) to capture matters like the absence of sexual experience, recording sexual fantasies in a diary, possession of sex toys and the like. However, I am concerned that the addition of the phrase "the sexual disposition of the complainant" will not result in the intended outcome, and may give rise to much litigation. The term "disposition" is not defined in the Act and is only used in s 37(5) as part of the definition of veracity. Given that s 44 is referred to in s 40, and that the definition of propensity has received significant appellate attention, I suggest that the phrase should be something like: "the propensity of the complainant in sexual matters". Whatever phrase or term is used should, in my view, be defined in s 4 or s 44 and be wide enough to capture evidence of (see *Rape Myths* p 148):

1. the complainant's sexual orientation;
2. the complainant being in an intimate relationship with someone else at the time of the alleged offending;
3. the number of pregnancies or children the complainant has had;
4. the complainant's use of or choices about contraception;
5. the complainant's possession or use of sex toys;
6. the complainant's propensity in sexual matters (or "sexual behaviour") offered as relevant to the complainant's credibility;

7. the complainant's sexualised comments or photographs (for example, on social media);
8. the complainant's sexual behaviour with another person or the defendant (including flirting, kissing or close dancing) even when proximate in time to the alleged offending;
9. the complainant's having never previously behaved in a (relevant) sexual way; and,
10. the complainant's sexual behaviour with the defendant (including the fact that they were in an intimate relationship at the time of the alleged offending), except that which is part of the events in issue.

10 Aside from issues around the drafting of s 44, I also recommend that admissibility decisions made pursuant to s 44 are always recorded/transcribed; and that directions as to the use of evidence admitted under s 44 are drafted and contained in a publicly available Bench Book. I also remain of the view (see Recommendation 8.11 FRRTRJ) that more guidance for determining relevance under proposed s 44(2) should be provided. This is included in s 44AA(5)(a) to an extent – could s 44 not be amended to make it clear that evidence of a complainant's propensity in sexual matters/sexual experience is irrelevant to consent, reasonable belief in consent or the complainant's credibility?

11 With regard to proposed s 44AA, I consider that "reputation of the complainant in sexual matters" is broad enough to capture reputation about the complainant's propensity in sexual matters (see above at [9]), unless this is seen as desirable for clarity. I am struggling to make sense of proposed s 44AA(5)(b) – the contents of what? What does "its" refer to? That they do really have that particular reputation? That would seem to run counter to s 44AA(3).

12 I agree with the amendment to s 44A. I do have concerns about the enforcement of the notice requirement and the impact on Crown preparation and appeal rights: see *Rape Myths* p 161. I suggest the removal of s 44A(7)(a) and (c) – the only exception should be that compliance was not possible.

13 **Clause 9:** I agree with the message behind the change to the wording, but am unsure it will make a difference in practice. Appellate case law indicates the current section is viewed as codifying a duty. My research suggests that the implementation of the provision is not used effectively to prevent/control humiliating and belittling questions (content as opposed to form), so some more work on legislative guidance as to scope would be helpful: see *Rape Myths* pp 358 – 368.

14 **Clause 13:** I disagree with the approach in the Bill of treating complainants in family violence cases differently from those in sexual cases.

15 **Clause 14:** I consider that there are some real difficulties in practice with getting a pre-trial recording process working effectively, despite being supportive of this option when it is preferred by the complainant. I suggest a model is first developed as part of the Pilot court in Auckland or Whāngārei. Rolling out these provisions before best practice (and appropriate facilities) are available will, I believe, result in unnecessary delays and poor use of court time – both counter to the intention of the reform. As currently drafted, I am

of the view that proposed s 106G(2)(c) will be the deciding inquiry. See further the discussion in *Rape Myths*, Recommendation 10.

16 Section 106I(3) is at odds with s 106(4A). Both provisions cannot operate to control disclosure of the same video record.

17 I support the introduction of s 106J (which based on the reform announcements made in July 2019 explicitly implements recording evidence at trial for use at a retrial; see also Recommendations 8.6 and 8.7 of FRRTRJ) but am concerned that a clearer statement of legislative intent is not flagged in the Explanatory Note to reflect the mandatory nature of s 106J(1). Just a query as to whether the regime in s 106I will cover such recordings, given the reference to "before trial" – wide enough?

18 **Clause 16:** I support the drafting and use of counter-intuitive directions in sexual cases (especially those concerning adult complainants – see also Recommendation 8.17 of FRRTRJ) but wonder about the drafting of the proposed provision which requires the judge to give a direction when considered necessary or desirable to address any relevant misconception. This presumes that the judge will recognise that a misconception is being relied on or reinforced (and is not adequately addressed) and that it should be responded to by way of a direction. To be effective the implementation of the provision will need to be accompanied by training and development programmes to assist the judges' ability to do this. Should it also be extended to self-directions in a judge-alone trial? I also consider that the words before "this section does not limit…" in s 126A (3) should be removed. A direction from a judge is different in nature from evidence offered by the parties, and this wording seems to encourage arguments about whether the misconception has been "addressed adequately" by evidence and trial tactics about how to ensure a direction is given (or not). Further, s 127 is not so limited. In my view if a direction is required, it should be given as the judge's imprimatur regardless of any evidence offered by the parties.

19 My research indicates that the list could be added to – and note that in none of the 40 cases was counter-intuitive evidence offered (except for directions under s 127). Suggested additions are:

1. the extent to which people who are sexually assaulted are unable to, or do not, physically resist the attack, due to the physiological and psychological impacts of the event (fight, freeze or (be)friend);
2. the extent to which victims of sexual offending may (or may not) appear distressed after the alleged offending or when giving evidence, and that distress may manifest in varying ways, including in the form of anger or hostility;
3. the fact that in the majority of cases no genital injuries occur;
4. the fact that what victims were wearing at the time of the offending is not a contributor to sexual violence;
5. the fact that time of reporting and alleged rape, choice of whom to report to, or incremental reporting, are not indicators of a lack of truthfulness or reliability;
6. the forensic significance of post-event behaviour, such as contact with the defendant; and
7. the prevalence and nature of false reports of particular forms of sexual violence.

20 I also recommend the repeal of s 127, with the work it has done in the past to form part of the proposed directions to counter misconceptions. In brief, this is due to the limited scope of s 127 and the fact that it is not responsive to all of the challenges regarding time, content and recipient of complaint that occur at trial: *Rape Myths* at 219 and 405 ff.

21 I also recommend the addition of other directions of significance in sexual cases, such as those related to inconsistencies, trauma and memory, as are employed in other jurisdictions: *Rape Myths* at 329 ff.

22 The proposed s 127A directions should be given to the jury in writing, at the time they are given (as with a s 9 statement): *Rape Myths* Recommendation 37.

23 **Clause 24**: I support the introduction of s 28B (see Recommendation 6.1 FRRTRJ) – should it also include reference to provision of communication assistance and support persons?

24 I support the introduction of s 28C (see Recommendation 7.5 FRRTRJ) but ask the Select Committee to consider a specific reference to the provision of voice amplification for complainants. Our research indicates that many struggle to talk at the required volume (due to venue and content) and are often admonished for this: *Rape Myths* at 117.

25 **Clause 30:** I support the proposed amendment but suggest additional direction, in both this provision and in s 199(1)(i), to the effect that the Judge should only permit a person to be present after ascertaining the views of the complainant: *Rape Myths* at 116.

26 **Clauses 31 and 32:** I support the proposed amendment to ss 215 and 217 but query why other provisions in the Act of a procedural nature are not also included. For example, ss 95, 103, 106A, 107 etc.

Other related legislative recommendations

27 I suggest s 88 is amended to control a larger range of evidence to protect a complainant's privacy (see *Rape Myths* at 204ff):

1. the occupation the complainant had at the time of the alleged offence and/or at the time of the trial;
2. whether the complainant has (or had) no occupation or is (or was) unemployed or is (or was) a student, and in what course of study;
3. whether the complainant is (or was) fully occupied caring for children or family members;
4. the complainant's school or tertiary qualifications.

28 The recommendations in *Rape Myths* include reform and clarification of ss 128 and 128A of the Crimes Act 1961, which I note is on the Government's longer-term work plan.