

# Coversheet: Improving the justice response to victims of sexual violence

Advising agencies	Ministry of Justice
Decision sought	This analysis has been prepared to inform Cabinet decisions regarding improvements to the justice response to victims of sexual violence
Proposing Ministers	Parliamentary Under-Secretary to the Minister of Justice (Domestic and Sexual Violence) Jan Logie

## Summary: Problem and Proposed Approach

### Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

Fifteen per cent of New Zealanders suffer from sexual violence in their lifetime<sup>1</sup> yet very few feel confident that the justice system will resolve their complaint without compromising their recovery. Those few sexual violence victims who do report risk poor outcomes<sup>2</sup>: it has been established that some elements of the trial process unnecessarily exacerbate the already significant psychological impacts of the offending.

Many perpetrators of sexual violence are not held to account and opportunities to reduce reoffending are being missed. Many victims and their families do not gain any form of resolution. Society is losing confidence that the justice system can respond to this form of serious crime.

The suite of proposals analysed in this RIS aim to improve court processes and reduce the trauma sexual violence complainants experience in court. As a result, we expect both that complainants will be able to provide better quality evidence, and a lower attrition rate.<sup>3</sup> This will lead to an increase in court resolutions. While maintaining defendants' fair trial rights, the proposals are likely to increase the number of perpetrators held accountable for their offending and, over time, may result in more reporting of sexual offending.

### Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

The proposals outlined in this document respond to recommendations made in the Law Commission's 2015 report *The Justice Response to Victims of Sexual Violence* ('the 2015 Report'). The report recommended a number of legislative changes to improve the justice response to sexual violence victims.

Three additional recommendations from the Law Commission's recently published *Second Review of the Evidence Act 2006* ('the 2019 Report') are also considered. We have noted where our analysis relates to the 2019 Report; all other analysis relates to the 2015 Report. Other recommendations made in the 2019 report require further work and are not considered in this RIS.

As a result of our analysis, we propose legislative amendments to provide:

<sup>1</sup> [www.justice.govt.nz/justice-sector-policy/research-data/nzcass/survey-results/results-by-subject/sexual-violence/](http://www.justice.govt.nz/justice-sector-policy/research-data/nzcass/survey-results/results-by-subject/sexual-violence/).

<sup>2</sup> The term 'victim' is used in this RIS to refer generally to a person against whom an offence is committed by another person (section 4 Victims' Rights Act 2002), while 'complainant' is used to refer to complainant witnesses who give evidence at court about alleged sexual violence offending.

<sup>3</sup> By 'lower attrition rate' we mean fewer complainants dropping out of the justice system once Police have recorded an offence.

- that sexual violence complainants are consulted about the ways in which they wish to give their evidence, so they are aware of the options available to them;
- a presumption that sexual violence complainants are entitled to give all their evidence in alternative ways, including by pre-recorded cross-examination, to alleviate trauma caused by the nature of cross-examination;
- for evidence of all sexual violence complainants and propensity witnesses given in the courtroom in sexual violence trials to be recorded, to avoid evidence needing to be given again in a retrial (causing further traumatising);
- that a judge must (rather than may) intervene if he or she considers questioning of the witness to be improper, unfair or misleading (2019 Report);
- that evidence of the complainant's sexual experience with any person, including the defendant, as well as their sexual disposition, should be admissible only with a judge's prior permission and subject to meeting a heightened relevance test (2019 Report);
- explicit judicial discretion that a judge may give directions to the jury about 'counter-intuitive' evidence in sexual cases (such as a lack of physical injury), to counteract the potential impact of myths and misconceptions on jury deliberations (2019 Report);
- clarification that communication assistance is available for all witnesses where needed, to help them understand questions, communicate effectively, and give better evidence;
- for the victim to read their Victim Impact Statement in alternative ways (eg via video link, CCTV, from behind a screen, or in a pre-recorded video), and for judges, in consultation with the victim, to be able to clear the court when the victim reads their statement, where this is necessary to avoid causing the victim undue distress; and
- a right for sexual violence complainants to have access to appropriate facilities when attending court, to avoid seeing the defendant and their supporters so they are not intimidated or caused undue stress.

Amendments would be required to the Evidence Act 2006, the Criminal Procedure Act 2011 and the Victims' Rights Act 2002 as well as the Evidence Regulations 2007. We also propose two non-legislative changes; voluntary specialist sexual violence training for defence counsel and guidance on judicial directions to jurors to dispel commonly-held myths and misconceptions about sexual offences.

Together, the proposals analysed in this RIS will make important improvements to complainants' experience of the justice system. Government intervention is needed because the court system and evidence rules are largely governed by legislation. Our analysis, discussed in later sections, shows that the preferred options best achieve the objectives of positive change for complainants while maintaining the rule of law and defendants' fair trial rights. Non-regulatory initiatives, already underway within and outside the justice sector, complement these regulatory changes.

## Section B: Summary Impacts: Benefits and costs

### Who are the main expected beneficiaries and what is the nature of the expected benefit?

Sexual violence complainants are the main expected beneficiaries of these proposals. We expect a reduction in secondary victimisation as a result of improved trial processes. As well as being an important outcome in itself, the primary quantifiable benefit of this improvement would be reduced severity of mental illness, resulting in secondary benefits

for sexual violence complainants including reduced unemployment, healthcare use, suicide risk and improved quality of life.

We also expect reduced attrition in the court process as a result of decreased secondary victimisation, allowing more complainants to benefit from resolution through the court process. That may also lead to an increase in convictions. Research shows that sexual offenders are often repeat offenders,<sup>4</sup> so more convictions may also result in fewer instances of re-offending (as perpetrators will be serving custodial sentences, preventing further offending in the community whilst in prison).

The options outlined in this RIS would also bring benefits to victims and society, who would have increased confidence in the justice system's ability to respond to sexual violence. Enhanced confidence in the justice system will result in increased levels of reporting and greater compliance with the law. In turn, this improvement should have wider positive societal effects, including improved quality of life.

Over the long term, there is potential for improvements to reporting rates, as society gains confidence that the justice system can respond to this form of serious violence crime.

### **Where do the costs fall?**

The preferred options have direct cost implications for government, through Votes Justice, Courts, Crown Law - Attorney General, Police and Corrections.

For the purposes of costing, the reforms, combined with the effect of operational initiatives already underway, are estimated to result in eight to 20 extra prison sentences per year. Because sexual offenders serve an average of six years in prison, the financial impact is calculated on the mid-range figure of 14 beds per year, year on year until 2025/26 (stabilising at 84).

The proposal with the greatest costs is the presumption in favour of alternative ways of giving evidence (including pre-recorded cross-examination). It will require investment in technology and services across all courts to ensure entitlements are available in practice. Pre-recorded cross-examination will also result in additional costs for prosecutors and defence lawyers, especially while the new legislative settings bed in (see section 5.1).

Improving complainants' experience of the criminal justice system may result in reduced attrition through the justice system (more complainants willing to participate for the duration of a criminal prosecution), and a modest increase in the reporting of sexual violence cases over time. We are unable to quantify this effect or its cost impact.

We do not consider the preferred options represent a real risk to defendants' fair trial rights. We acknowledge that some stakeholders consider our analysis places greater weight on reducing trauma, at the expense of defendants' fair trial rights. While reducing complainants' trauma is the key objective and criterion for our analysis, maintaining fairness and justice includes protected minimum standards for defendants<sup>5</sup> we have not traded off.

In addition to Government costs, there may be some costs to defendants using privately funded lawyers, and those required to pay back legal aid grants.

<sup>4</sup> Lisak, D & Miller, P, 'Repeat Rape and Multiple Offending among undetected rapists' in Violence and Victims, 2002.

<sup>5</sup> For example, criminal procedural rights affirmed in the New Zealand Bill of Rights Act 1990.

### What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

#### *Recording of evidence*

- There is a risk that evidence recording technology is unavailable, inadequate or insufficient to meet demand, meaning complainants may not benefit from the proposed statutory entitlement consistently or in accordance with their legitimate expectations. This risk will be mitigated by ensuring appropriate funding and implementation management prior to legislative change and continued best practice investment in technology and court scheduling.

#### *Complainants having to give their evidence again*

- There is a chance that despite pre-recording their evidence, complainants may have to give further evidence or be cross-examined again, for example because of change in legal strategy or late disclosure. This risk will be partially mitigated through the design and drafting of legislation (which may specify when the decision to pre-record should be made, for example).

#### *Access to appropriate facilities*

- Some courts' ability to provide suitable facilities is limited by their physical footprint or status as historic buildings. Where no appropriate court facilities are available, the Ministry of Justice is exploring alternative options, including complainants giving evidence via audio visual link from another site.

### Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

The preferred options comply with the Government's 'Expectations for the design of regulatory systems'. The options seek to achieve clear objectives efficiently and flexibly. We have undertaken robust analysis of the proposed changes to identify the costs and benefits as far as practicably possible. The results of the changes will be monitored, evaluated and reviewed to ensure their effectiveness.

## Section C: Evidence certainty and quality assurance

### Agency rating of evidence certainty?

We have strong evidence about the status quo and the impacts of sexual offending on victims' mental health, which are well documented. Depression, anxiety, fear and self-blame have all been clearly associated with rape trauma.<sup>6</sup> This has subsequent impacts on individuals' wellbeing, including employment levels, absenteeism rates as well as suicide rates. Ministry of Justice research has also shown how the justice system causes secondary victimisation and additional trauma.<sup>7</sup>

The 2015 Report, and a 2018 report commissioned by the Ministry of Justice, provide qualitative evidence of the re-traumatising and re-victimising impact the justice system can have on victims of sexual violence. This supports evidence<sup>8</sup> that has demonstrated:

<sup>6</sup> Regehr, C et al, 'Interventions to Reduce Distress in Adult Victims of Sexual Violence and Rape: A Systematic Review' in Campbell Systematic Reviews 2013, pp.9-10.

<sup>7</sup> Gravitas Research and Strategy Limited, Improving the Justice Response to Victims of Sexual Violence: Victim's Experiences, 2018.

<sup>8</sup> Ministry of Women's Affairs, Responding to Sexual Violence: Pathways to Recovery, 2009, p.95.

- all sexual violence complainants surveyed who gave evidence in court described it negatively, using terms such as 'traumatic', 'degrading' and 'disgusting'; and
- of those surveyed whose cases went to court, 43 per cent felt the court experience was the hardest part of the recovery process.

We have based our assumptions and analysis about the impacts of the proposed interventions in the New Zealand context largely on anecdotal and overseas experience where relevant, drawing on subject matter expertise.

*To be completed by quality assurers:*

#### Quality Assurance Reviewing Agency:

Ministry of Justice RIS Quality Assurance Panel

#### Quality Assurance Assessment:

The RIS meets the quality assurance criteria.

#### Reviewer Comments and Recommendations:

The RIS deals with an area in which evidence is patchy and some assumptions have to be made. The RIS clearly indicates where it is relying on anecdotal evidence and assumptions. The analytical framework is sound and applied in a balanced way. It ensures that the recommended options have the potential to bring about improvements for complainants without trading away fair trial rights.

# Impact Statement: Improving the justice response to victims of sexual violence

## Section 1: General information

### 1.1 Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. We have produced this analysis and advice for the purpose of informing key (or in-principle) policy decisions to be taken by Cabinet.

### 1.2 Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- *The evidence base*: Data can only tell parts of the story about victims' journey through the justice system. There is limited concrete evidence about the reasons why complainants withdraw during the court process. As a result, we have made assumptions about the scale of the problems identified and the effectiveness of options and expected impacts are uncertain.
- *Assumptions*: Significant assumptions underlie the expected impacts of some proposals. These assumptions are guided by available evidence, subject matter expertise, and conservative costing, but carry corresponding risk and uncertainty that cannot be fully ameliorated.
- *Time constraints*: We have had limited time to analyse and consult on options relating to recommendations from the 2019 Report. The resultant risks are partially mitigated by the Law Commission's thorough consideration of and public consultation on the issues, further departmental consultation, and the parliamentary process (which will provide the opportunity for public comment on any legislative change progressed).
- *Work already in progress*: Several operational changes already taking place seek to improve the justice response to victims. The impacts of these operational changes on the status quo and counterfactual are not yet apparent, but are expected to have a cumulative effect on the expected positive outcomes of the preferred options. These operational changes will form part of the implementation, monitoring and evaluation of the changes proposed in this RIS.

### Responsible Manager (signature and date):

25/03/19

Andrea King

General Manager, Courts and Justice Services Policy

Policy Group

Ministry of Justice

## Section 2: Problem definition and objectives

### 2.1 What is the context within which action is proposed?

Sexual violence is a broad descriptor of all unwanted acts of a sexual nature perpetrated by one or more person(s) against another. There are 23 sexual violence offences in the Crimes Act 1961. These offences range from indecent acts/assaults to sexual violation (including rape).

In its 2015 Report, the Law Commission identified a number of features of sexual violence. These features can be summarised as:

- sexual violence usually occurs in private and without witnesses besides the victim. It can also occur without evidence of physical force or harm. This means that it can be more difficult to establish the required standard of proof than in other criminal trials;
- victims may be less willing to engage with the justice system due to the intimate nature of the alleged acts, fear that their sexual history with the defendant and others will be scrutinised and challenged in a public setting, and as a result of the psychological impact of sexual violence;
- most perpetrators of sexual violence are known to their victim and many victims may also be reliant upon the perpetrator for social or economic support;
- much sexual violence involves a series of assaults over many years by one perpetrator against the same victim or victims; and
- sexual violence is frequently associated with beliefs and ideas based in moral judgements about how people (especially women) should and should not behave. Fact finders in cases involving serious charges are frequently jurors, who may be affected by such beliefs and ideas.

Sexual violence occurs throughout society, and across different genders, ethnicities, sexual orientations and socioeconomic circumstances. However, some population groups are at an increased risk of sexual violence. Ministry of Justice data<sup>9</sup> show that women are seven times more likely than men to be victims of sexual violence and Māori are overrepresented both as victims and perpetrators. For those sexual violence victims whose cases have been prosecuted, approximately 66 per cent in 2017/18 were between 0-24 years old (where age was recorded) and 31 per cent were Māori (where ethnicity was recorded). Court case data for the same year shows 44 per cent of sexual violence cases were for offences with a maximum penalty of 14 years or more.<sup>10</sup>

#### ***The Justice Response to Victims of Sexual Violence (Law Commission, 2015)***

The 2015 Report reviewed the experience of sexual violence victims in the criminal justice system and considered whether the criminal trial process should be modified to improve the system's fairness, effectiveness and efficiency for those victims. Within the scope of its inquiry, the Law Commission identified that some victims' needs are not being met by the formal justice system, and that gaps in victim support contribute to victims' lack of engagement with the justice system. It outlined a wide-ranging reform agenda to resolve these issues. The Law Commission made 82 recommendations for systemic change to both in-court and out-of-court processes, to improve victims' experience and increase the likelihood of achieving justice.

<sup>9</sup> Ministry of Justice data for 2017/18, when gender was known.

<sup>10</sup> Reflecting more serious sexual violence offences, such as sexual violation and unlawful sexual connection.



The recommendations included how giving evidence impacts upon complainants (options to give evidence in alternate ways, pre-recording evidence, recording all evidence for use in trial and retrial) and the support complainants receive whilst in court (communication assistance, clearing the court and the right to access appropriate facilities). These options are considered in this RIS. We are progressing some other recommendations operationally; these are discussed further below. Subject to Cabinet approval, other recommendations will be considered later – for example, the recommendation to establish a specialist sexual violence court will be considered once an evaluation of the judicially-led sexual violence pilot courts is available.

### ***Second Review of the Evidence Act 2006 (Law Commission, 2019)***

In line with its terms of reference, the 2019 Report makes recommendations relating to the rules of evidence in sexual violence trials, with a focus on improving complainants' experiences. The Commission's further consideration in its 2019 report of recommendations from its 2015 Report has informed our analysis. New (i.e. 2019 Report) recommendations considered in this RIS relate to the admissibility of evidence about complainants' sexual experience and disposition, and judges' powers to control inappropriate questioning and to counter common myths and misconceptions about sexual violence.

### **The current justice response to sexual violence offences**

In 2017/18, 5,972 individuals reported 7,339 victimisations to the police. Of these, 1,661 cases were prosecuted, resulting in convictions in 796 cases. However, the New Zealand Crime and Safety Survey estimates that less than 10 per cent of sexual offences experienced by adults (aged 15 years and over) are reported to the police.<sup>11</sup>

Improving the justice system's response to victims of sexual violence is a Government priority. Initiatives underway include:

- a pilot specialist sexual violence court in the Auckland and Whangārei District Courts operating since 2017. The pilot is operating under existing legislation, testing the benefits of more active judicial case management to expedite cases and improved awareness of the needs of sexual violence victims. It is due to conclude in the first half of 2019, with a final evaluation to be undertaken in June 2019;
- an online guide, launched in December 2018, to help victims and their families to better understand the criminal justice process. The guide explains how sexual offences are investigated and prosecuted and the victim's role in that process. It also provides information about the trial, and sentencing process if the defendant is found guilty;
- judicial education delivered by the Institute of Judicial Studies (with the District and Senior Courts). Subject to Budget 2019 decisions, this will continue to be rolled out;
- training for prosecutors in 2019, in advance of the new Solicitor-General's Guidelines for Prosecuting Sexual Violence (intended to take effect from 1 July 2019); and
- psycho-social support provided by the Ministry of Social Development (MSD), which has contracted the Auckland Sexual Abuse HELP Foundation Charitable Trust to provide support services to sexual violence complainants as a 12 month pilot. The Ministry of Justice and ACC also fund the National Sexual Violence Survivor Advocate service, administered by Skylight Trust.

On 5 October 2018, the Minister of Justice, the Minister for Social Development, and the Under-Secretary to the Minister of Justice (sexual and domestic violence issues),

<sup>11</sup> Table 11.2: Reporting to Police (a) by offence type, 2005, 2008 and 2013;  
[www.justice.govt.nz/assets/Documents/Publications/NZCASS-Data-Tables-2-Reporting-Crime-Second-Release.xlsx](http://www.justice.govt.nz/assets/Documents/Publications/NZCASS-Data-Tables-2-Reporting-Crime-Second-Release.xlsx).



announced a new Joint Venture approach to end family and sexual violence in New Zealand. The Joint Venture involves every part of the Government working together toward this goal in a planned and strategic way. Two key focus areas are crisis response and long-term support for victims.

## **2.2 What regulatory system, or systems, are already in place?**

### *Investigation and prosecution*

The regulatory system for dealing with sexual offending is governed by statutory rules and other guidance applying to our prosecutorial and court system. This includes primary legislation setting out offences, criminal procedure, and defendants' and victims' rights; supporting rules and regulations, and guidance for participants in investigation and trial processes. Judicial decisions within the parameters of legislation set precedent for other cases to follow. Defence lawyers in sexual offence trials are generally funded through the legal aid system, which is subject to regulations.

Police investigate allegations of sexual offending. If the police decide to file charges (which is less likely where the complainant does not want to give evidence), and the defendant pleads not guilty, there will be a trial, conducted by either Police or Crown prosecutors depending on the nature of the offending. Defendants in sexual offence cases can, and in around 80 per cent of cases do,<sup>12</sup> elect to be tried by jury. The defendant will be sentenced if the offence is proved by the prosecution. Sexual violence complainants are involved in the trial as a witness, not as a party to the case. If the offence is proved, victims have the right to present a victim impact statement to the court as part of the sentencing process.

### *Lawyers*

Lawyers are regulated under the Lawyers and Conveyancers Act 2006. They must hold practising certificates issued by the New Zealand Law Society (NZLS) and are subject to continuing professional education requirements. Lawyers determine their own continuing education needs. Sexual violence training is not a specific training requirement.

Legal aid providers must also satisfy relevant training requirements in accordance with the Legal Services (Quality Assurance) Regulations 2011 (the Regulations) before they are able to appear in certain types of cases. The Regulations set out the experience and competence requirements for lawyers appearing in criminal matters on a legal-aid basis.

### *Alternative processes*

Alternative resolution processes for sexual offending exist outside the criminal justice system. For example, restorative justice providers receive government funding to assist victims and perpetrators of sexual violence to work through incidents of sexual offending without the complainant making a formal allegation to Police. Support and guidance for victims (including those who choose not to go through the criminal justice system) and perpetrators of sexual violence is provided by government and non-government agencies.

### *Overall fitness-for-purpose*

The Law Commission's 2015 report highlighted how the current criminal justice system fails victims of sexual violence. The Government's response to the report accepted that the system could and should do better.<sup>13</sup> The proposals highlighted in this RIS address recommendations made by the Law Commission, to ensure that the justice system is improved for sexual violence victims.

<sup>12</sup> Ministry of Justice data shows around 80-82% of sexual offence trials were by jury between 2015-18.

<sup>13</sup> Accessible at [www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases](http://www.lawcom.govt.nz/our-projects/alternative-models-prosecuting-and-trying-criminal-cases).

### 2.3 What is the policy problem or opportunity?

The problem is multi-faceted. The key purpose of the criminal trial process is to establish the guilt, or otherwise, of the defendant. It does not focus on meeting the needs of victims, who experience additional trauma and secondary victimisation as complainant witnesses in the trial. Victims' trauma from going through the criminal justice process results in under-reporting of sexual offending and the 'attrition' (or 'dropping out') of these cases through the system. This has further consequences as fewer perpetrators are brought to justice and opportunities to reduce re-offending are lost.

*Sexual violence victims often experience further harm through the criminal justice system, which also exacerbates the effect of sexual offending on their mental health*

There is a stronger incentive to strenuously defend sexual violence charges, as they carry both high penalties and social stigma. Testing the evidence with strenuous defence often involves the complainant experiencing extreme stress, invasive questioning, and feelings of being on trial themselves. The complainant's role as a witness during a criminal prosecution means that the trial process is always likely to be a difficult experience. However, some aspects of the trial process unnecessarily contribute to poor experiences and can cause secondary victimisation.

There is no research (internationally or locally) that reliably tells us the approximate rate of secondary victimisation in the court system. But local evidence<sup>14</sup> has demonstrated that:

- all sexual violence complainants surveyed who gave evidence in court described it negatively, using terms such as "traumatic", "degrading" and "disgusting"; and
- of those surveyed whose cases went to court, 43 per cent felt the court experience was the hardest part of the recovery process.

A negative impact is also documented in a 2018 report commissioned by the Ministry of Justice,<sup>15</sup> which found that the justice system often failed to respond appropriately to victims of sexual violence, and that this could lead to significant secondary victimisation and contribute to the low rates of reporting to the NZ Police.

The justice system's response to victims can exacerbate the effects of the initial trauma caused by the offending and slow or undo psychological recovery. Sexual violence victims' mental health needs are often "diametrically opposed to the requirements of legal proceedings"<sup>16</sup> and intense psychological distress occurs as a result of re-experiencing the event,<sup>17</sup> for example, when giving evidence that canvasses the events in detail. Consequently, the significant negative psychological impacts of sexual offending can be "considerably exacerbated"<sup>18</sup> by the criminal justice system – for example, by insensitive treatment, unhelpful procedures and poor understandings of victims' needs.

The incidence and severity of mental illness (such as PTSD, depression and anxiety) is related to a range of poor outcomes: victims suffering mental illness are more likely to be unemployed, have increased healthcare needs and increased suicide rates, which all have significant private, social and governmental costs.

14 Ministry of Women's Affairs Responding to Sexual Violence: Pathways to Recovery, 2009, p.95.

15 Gravitass, Improving the Justice Response to Victims of Sexual Violence: Victim's Experiences, above n 7.

16 Herman, J. L., 'Mental Health of Crime Victims: Impact of Legal Intervention' in Journal of Traumatic Stress, 16(2), 2003.

17 Chivers-Wilson, K. A., 'Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments' in McGill Journal of Medicine, 9(2), 2006, pp.111-118.

18 Doak, J., in McDonald, E. & Tinsley, Y., From 'Real Rape' to Real Justice: Prosecuting rape in New Zealand, 2001, p169.

These effects on complainants are also likely to manifest for propensity witnesses,<sup>19</sup> to a lesser or similar extent depending on the circumstances.

#### *Low rates of reporting and high rates of attrition*

Sexual violence incidents have very low rates of reporting and prosecution compared to other criminal offences.

It is likely that the risk of secondary victimisation in the justice system contributes to sexual violence having low reporting rates, and the high rates of attrition between the police investigation stage and trial stage. Many victims feel that seeking resolution through the courts is not an option, and so they do not report the incident at all. Research estimates that fewer than one in ten offences are reported to the police.<sup>20</sup> Trauma and secondary victimisation are also likely to negatively impact the quality of complainants' evidence, which may also contribute to difficulty in pursuing prosecution and conviction. Furthermore, research has shown that stress and trauma negatively impact the quality of witnesses' evidence in court.<sup>21</sup>

As a result, most offenders are not held to account and opportunities to reduce re-offending are missed (research shows that sexual offenders are often repeat offenders). Many victims and their families do not gain any form of resolution. Society is losing confidence that the justice system can respond to this form of serious crime.

#### *Government work to date*

The operational work underway to improve victims' experiences of the justice process (discussed in section 2.1 above) goes some way to stem the harm the justice system may cause sexual violence victims. However, regulatory aspects of the justice process remain detrimental to the wellbeing of sexual violence victims. These relate primarily to court and evidential processes, which are governed (and so require amendment) by legislation.

On the whole, without progressing the preferred options in this RIS, sexual violence victims will continue to suffer unacceptable levels of secondary victimisation, continued trauma and mental illness as they progress through the justice system. Prosecutions will continue to fail through attrition. Victims will continue to be put off from reporting the crime as they will not have confidence in seeing justice served, or confidence that they will be protected from further trauma and suffering. Society's confidence that the justice system can respond to this form of serious violent crime will continue to erode.

Section 4 below contains more detailed problem definitions and counterfactuals specific to each set of options.

## **2.4 Are there any constraints on the scope for decision making?**

#### *Budget 2019 funding*

Most proposals discussed in this RIS are subject to Budget 2019 funding. Some options may be targeted and/or scaled depending on Cabinet's budget decisions.

<sup>19</sup> A propensity witness is a witness who gives evidence that the defendant has behaved or offended similarly to the offence charged, but who is not a complainant in the trial.

<sup>20</sup> Ministry of Women's Affairs, Restoring Soul: Effective Interventions for adult victims/survivors of sexual violence. MWA 2009.

<sup>21</sup> Cashmore, J. & Shackel, R., Evaluation of the Child Sexual Offence Evidence Pilot; Final Outcome Evaluation Report, 2018.

## 2.5 What do stakeholders think?

We consulted relevant Government departments<sup>22</sup> throughout the development of the proposals. The Chief Victims Advisor and other stakeholders, including the Law Commission, were also consulted. Most proposals were also tested with representatives from key organisations across the sexual violence sector.

Overall the consultation feedback from agencies and stakeholders was supportive of the preferred options in this analysis. Section 4 discusses specific feedback for each proposal.

We have consulted professional legal organisations on the proposals relating to pre-recorded cross-examination and specialist sexual violence training for defence counsel. Strong concerns were expressed by the defence bar about pre-recorded cross-examination. Whilst we acknowledge these concerns and the significant change the proposal represents, we consider the structure of the proposal adequately protects fair trial rights. We also note that pre-recorded cross-examination is used in other jurisdictions, where, despite similar objections, impacts on defendants' fair trial rights have not been realised. Should the proposal progress, further and ongoing work on the design, drafting and implementation will focus on ensuring that risks are minimised.

## Section 3: Criteria Identification

### 3.1 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

We have used the following criteria to assess the options:

- **Reduces trauma:** makes participating in the justice system less traumatic for complainants, thus reducing the risk of secondary victimisation;
- **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, in particular the defendant's right to a fair trial;
- **Best use of resources:** delivers best value for money and, where relevant, ensures trial efficiency; and
- **Enhances quality of evidence:** promotes the quality of witnesses' evidence, in terms of accuracy and completeness.

For some criteria, there is a tension between the key objective of reducing trauma for complainants, and the minimum standard of ensuring fairness and justice and preserving fair trial rights for defendants. Any option that poses a substantial, unmitigable risk to fair trial rights is not preferred.

Not every criterion applies to every option analysed. This is because different criteria are more relevant to certain proposals than others. For example, the enhanced quality of evidence criterion is only relevant to the evidence-related proposals, and the efficient use of resources criterion is not applied to proposals that do not have an associated cost or resource implication.

<sup>22</sup> We have consulted Crown Law, New Zealand Police, the Department of Corrections, Accident Compensation Corporation, Ministries for Women and Pacific Peoples, Ministries of Health and Social Development, Te Puni Kōkiri, the Office for Disability Issues, Oranga Tamariki, the Treasury, and the Joint Venture Business Unit on this RIS.

## Section 4: Specific Problem Definition, Option Identification and Impact Analysis

### A. Specialist sexual violence training

#### A4.1 What is the specific problem?

Legal professionals and court staff may not be aware of strategies for interacting with sexual violence victims suffering trauma. Practitioners may also be affected by, or not well-trained in how to deal with, sexual violence myths and misconceptions.<sup>23</sup> The Law Commission noted lawyers who are not familiar or comfortable with the complexities of sex offence trials can present evidence in an inappropriate way and can be unduly aggressive or oppressive in their manner, which may trigger psychological distress in victims.<sup>24</sup>

Government-funded sexual violence training initiatives are underway for court staff, prosecutors, and judges. The Institute of Judicial Studies delivers judicial education (with the District and Senior Courts) in two- and three-day programmes on best practice when dealing with vulnerable witnesses in sexual violence cases. Subject to Budget 2019 decisions, this training will continue to be rolled out. Training will also be provided to Crown and Police prosecutors in 2019, in advance of the new Solicitor-General's Guidelines for Prosecuting Sexual Violence, intended to take effect in mid-2019. Some private training in best practice for sexual violence cases has been delivered recently.

However, the Government does not require, fund, or otherwise incentivise training for defence counsel. Instead, lawyers access and pay for privately developed training, to equip the defence bar with tools to effectively carry out their role while reducing sexual violence complainants' trauma in the court process.

This situation may also risk reducing the effectiveness of the existing government-funded training and education, as a cumulative effect across all court participants is not possible.

#### A4.2 What options are available to address the problem?

##### Option 1: Maintaining the status quo

Training initiatives for some court system participants are underway, such as best practice training for the judiciary when dealing with vulnerable witnesses in sexual violence cases. Training will also be provided to Crown and Police prosecutors in 2019. Specialist sexual violence training for defence counsel is neither government-funded nor required.

##### Option 2: Law Commission recommendation – mandatory training for legal aid lawyers

Under this option, which takes up the Law Commission's 2015 recommendations, the Legal Services (Quality Assurance) Regulations 2011 would be amended to include experience and competence requirements for defence counsel appearing in sexual violence trials on a legal-aid basis. This would mean that a lawyer representing any defendant receiving legal aid in a sexual offence case would have had to undertake specialist training. This option therefore creates a mandatory requirement.

<sup>23</sup> Common myths and misconceptions include that 'real' rape is perpetrated by strangers (when it is more common that a victim knows their attacker), or that a victim of sexual offending will always scream or fight back and will immediately report to the Police.

<sup>24</sup> Law Commission, *The Justice Response to Victims of Sexual Violence*, 2015, Chapter 5, paragraph 5.54.

### Option 3 – Voluntary, funded training (preferred)

Under this option, voluntary training would be provided for defence counsel. Time-limited Government funding for a period of three years would provide an incentive to undertake the training. This training could count towards the ten hours of professional development (CPD) required annually by the CPD Rules which would further encourage uptake. The training would also be available to privately funded lawyers, who would not be required to take up the training under Option 2. Uptake of the training would be reviewed after three years to determine whether it should be implemented on a mandatory basis.

## A. Impact Analysis

Key compared to doing nothing/ the status quo:			
++ much better      + better      0 about the same      - worse      -- much worse			
	Option 1: Status quo	Option 2: Law Commission recommendation (mandatory training for legal aid lawyers)	Option 3: Voluntary, funded training (preferred)
Reduces trauma	0	++ Yes, mandatory training would reduce trauma for all sexual violence complainants involved in legal aid cases. However, it would not be available to privately funded lawyers, so complainants in those cases would not receive the benefits.	+ / ++ Yes, but potentially to a lesser extent than Option 2 as training is voluntary and so fewer defence counsel would take the training. However, time-limited funding and the potential for training to become mandatory after that period would mitigate this issue to an extent, and encourage quicker uptake and therefore realised benefits. Training will also count toward CPD hours (further incentivising uptake) and be available to privately funded lawyers, unlike Option 2.
Fairness and justice maintained	0	0 / - Whilst specialist sexual violence training itself will not impact on fairness and justice, some feedback noted that mandatory training may result in senior experienced counsel electing to no longer be eligible for sexual violence legal aid grants. While it is unclear how significant this risk is, it may have an indirect effect on the defendant's right to choose their own counsel, reducing fairness and justice.	+ Voluntary training would not impact on numbers of defence counsel who are eligible for sexual violence training, maintaining fairness and justice by ensuring the defendant's right to consult and instruct a lawyer. Privately instructed lawyers would also be able to take up the training, unlike Option 2; this equal application will also support consistency in practice (maintaining the overall fairness of the system).
Best use of resources	0	+ Funding is not discussed in the Law Commission's recommendation; we have therefore assumed that training would be developed privately and funded by lawyers.	+ Will be funded by Government for a time limited period to encourage uptake. The training would be reviewed after three years to determine whether it should be made mandatory.



#### **A4.3 What other options have been ruled out of scope, or not considered, and why?**

##### Compulsory specialist training via CPD requirements

Initial consultation on the prospect of implementing compulsory specialist sexual violence training through the New Zealand Law Society's CPD requirements indicated that this would involve a substantial revision of the whole CPD system. The Law Society considered that the consequences of such changes would outweigh the predicted benefits.

#### **A4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?**

The preferred option for this proposal is **Option 3**: voluntary funded training. This accords with feedback we received from legal professional bodies. Defence counsel would be encouraged to take up the training as it would be funded by the Government for a limited time only, with the option of making it mandatory (and not necessarily funded) if uptake is low following the review after three years.

## **B. Alternative ways of giving evidence**

#### **B4.1 What is the specific problem?**

Currently, under the Evidence Act 2006 sexual violence complainants can give their evidence:

- in the 'ordinary way': in the courtroom before the judge, jury (if the defendant elects a jury trial), prosecutor, defendant and defendant's lawyer, court staff, police officer in charge and media. Members of the public are not entitled to be present unless the judge expressly permits<sup>25</sup>; or
- in an alternative way: from the witness box but from behind a screen (so the witness cannot see the defendant), from outside the courtroom via audiovisual link or CCTV, or by a video recorded prior to the trial.

Children are entitled to give their evidence in an alternative way; on application, orders allowing adult complainants to give evidence using an alternative way can be made on a number of grounds, including the witness's age, maturity, impairment, fear of intimidation or trauma suffered, or the nature of the proceeding, evidence or relationship of the witness to the defendant.

The Solicitor-General's Prosecution Guidelines currently state that prosecutors should consider applying for the use of alternative modes of evidence in sexual violence cases and that complainants should be advised of the availability of alternative ways of giving evidence. However, legislation does not require complainants to be consulted on which way of giving evidence they would prefer to use.

The Law Commission's consultation suggested there is significant regional variation in complainants giving evidence in chief in the form of a recorded video, even after the guidance in the Solicitor-General's Prosecution Guidelines was strengthened in 2013. Limited Ministry of Justice data also suggest that alternative modes of evidence are currently underutilised.

A 2011 Court of Appeal decision limited the use of pre-recorded cross-examination to rare and compelling cases, in order to:<sup>26</sup>

<sup>25</sup> Criminal Procedure Act, section 97.

<sup>26</sup> M v R [2011] NZCA 303.

- protect the defendant's right to a fair trial. The Court was concerned that pre-recording the cross-examination might force the defence to 'show their hand' prior to trial as they will reveal their questioning strategy to the prosecution during the pre-recording;
- avoid complainants having to give further evidence at the trial if new issues arise from continuing or later disclosure of further evidence to the defence;
- avoid delays in resolving trials due to the additional hearing time required;
- prevent the loss of the defence's ability to tailor cross-examination depending on the reaction of the particular jury to it; and
- allow juries to maintain benefits arising from the live cross-examination of the key witness, such as seeing the cross-examination in 'real time'.

Testifying in court is one of the main causes of anxiety for sexual violence complainants. Complainant witnesses are expected to remember and be able to recall traumatic experiences in detail and accurately a long time after the offending – usually in front of a jury and often under strong cross-examination.

Giving evidence of an intimate or sensitive nature in this setting can trigger a secondary 'crisis episode' in sexual violence complainants, for example extreme anxiety. This reaction risks reducing the quality of the evidence (particularly children's evidence). Long delays between the sexual violence incident and giving evidence at trial also can be detrimental to the complainant's recovery process.

## **B4.2 What options are available to address the problem?**

### **Option 1: Maintaining the status quo**

Under this option, the prosecution would continue to be required to apply to the court and satisfy statutory criteria before any adult complainant can give evidence in a way other than the ordinary way. It would be for the judge's discretion whether permission was granted or not, but the Court of Appeal ruling<sup>27</sup> limits the approval of pre-recording cross-examination. Following this ruling, in practice very few complainants will have their cross-examination pre-recorded (we are not aware of any sexual violence cases where it has occurred since the 2011 ruling).

### **Option 2: Law Commission's recommendations – complainants only**

This option takes up the Law Commission's recommendations that legislation specifies:

- adult complainants in a sexual violence case are entitled to give their evidence-in-chief in one or more of the alternative ways;
- complainants in sexual violence cases can pre-record their cross-examination evidence in a hearing prior to trial, unless a judge makes an order to the contrary;
- relevant reasons for that judicial order should include those that pertain to the fair trial rights of defendants, and circumstances where it would be impractical or excessively costly to undertake cross-examination in a pre-recorded hearing before trial; and
- a requirement that prosecutors consult with complainants on the way in which they prefer to give evidence.

### **Option 3: Extended Law Commission recommendations + all evidence is recorded (preferred)**

This option includes all Option 2 recommendations, and builds on and refines them by:

- extending proposals for alternative ways of giving evidence to propensity witnesses as well as complainants; and

<sup>27</sup> M v R [2011] NZCA 303.

- recording all evidence given at trial, as well as retaining pre-recorded evidence, for use in any re-trial.

#### Option 4: targeted Law Commission recommendations + all evidence is recorded

This option would target the increased availability of pre-recorded cross-examination to child witnesses (aged under 18) in sexual violence cases (legislation already entitles them to give their evidence in alternative ways). Adult complainants and propensity witnesses would be entitled to give all their evidence in alternative ways, and to be consulted on the way in which they want to give evidence but would be able to pre-record their cross-examination only in 'rare and compelling' cases in line with Court of Appeal precedent.

## B. Impact Analysis

	Option 1: Status quo	Option 2: Law Commission recommendations – complainants only	Option 3: Extended LC recs + all evidence recorded (preferred)	Option 4: targeted LC recs + all evidence recorded
Reduces trauma	0	<p>+</p> <p>Complainants can make use of all alternative modes, reducing the risk of re-traumatisation.</p> <p>Consulting complainants on how they wish to give evidence increases their autonomy and reduces stress. (The requirement to consult is not enforceable, but the Victims' Rights Act complaints procedure applies.)</p> <p>Potential increased risk of further trauma if the complainant is recalled to give more evidence at trial (e.g. if the jury has specific questions or the defence strategy changes).</p> <p>No reduction in the risk of re-traumatisation at the re-trial, where the complainant may still have to give evidence and be cross-examined.</p>	<p>++</p> <p>As for option 2, but for propensity witnesses as well.</p> <p>Reduces the risk of re-traumatisation in retrials where the issues in dispute do not affect the evidence required of the complainant or propensity witness, as the recorded evidence can be used in the re-trial rather than having to give evidence again.</p>	<p>+</p> <p>As for option 3, but benefits of pre-recorded cross-examination only available for child complainants. Children are likely to receive greater benefits than adults from pre-recorded cross-examination.</p>
Fairness and justice maintained	0	<p>+</p> <p>Some consider the requirement for the defence to 'show their hand' through pre-recorded cross-examination will erode the defendant's right to a fair trial. However, where pre-recording would create a real risk to a fair trial (beyond this general objection), the judge will be able to order that pre-recording should not be used.</p> <p>Fairness to complainants is improved, as they are better supported to give evidence.</p> <p>Cross-examination cannot be tailored to the jury's reaction, which may restrict the defence counsel's strategy.</p>	<p>+</p> <p>Same as Option 2, with wider benefits (and risks) due to increased reach.</p>	<p>0/+</p> <p>Same as Option 3, but to a lesser extent for adult complainants and witnesses (which may be seen as unfair given the distinction will be based on age). Fairness to children is improved to the same extent as option 3, as they can pre-record their cross-examination. This provides a marginal improvement over the status quo.</p>

Enhances quality of evidence	0	+	Will result in better quality evidence as trauma (which can degrade the quality of evidence) is reduced. It will also lead to complainants giving evidence earlier and more consistently, which will improve witnesses' recall and quality of evidence.	++	Same as Option 2, and for propensity witnesses (though to a lesser extent regarding the impact of delay). Also, using recorded evidence in retrials minimises the risk that the quality of evidence deteriorates because of delays in reaching the retrial.	+	Same as Option 3 but to a lesser extent for adult complainants and witnesses. Effects on children's evidence likely to be particularly positive given their vulnerability and sense of time.
	0	+	Some risk of delay from consulting with complainant (although no requirement to reach agreement). Pre-recorded cross-examination is costly and may create delays for other cases, or extend the time a case takes to resolve, especially where appeals are filed, however, efficiency is specified as a reason a judge may override the presumption for pre-recording.	0/+	As per Option 2; efficiency not a specific ground to refuse pre-recorded cross-examination, but taken into account in each case by the prosecutor when determining which mode of evidence to use. Recording of all evidence would require investment in technology and digital storage - as these recordings may be used infrequently, efficiency may not be optimal.	0/+	Same as Option 3 but on a smaller scale. The greater impact on children of pre-recorded cross-examination enhances the cost-effectiveness of the proposal (although economy of scale is reduced).
Best use of resources							

#### B4.3 What other options have been ruled out of scope, or not considered, and why?

N/a.

#### B4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

For this proposal, the preferred option is **Option 3** – the ability to give evidence in alternative ways for complainant and propensity witnesses, and all evidence to be recorded. This would reduce the secondary victimisation and trauma experienced by sexual violence complainants and help to reduce attrition rates. The judge would be able to order that pre-recording should not be used if there are good countervailing reasons, such as an impact on the defendant's right to a fair trial.

However, the cost implications attached to Option 3 are largest. If greater weight were placed on cost efficiency, Option 4 would be preferable as it targets pre-recorded cross-examination to child witnesses only. Pre-recorded cross-examination has a greater positive impact on children, so is potentially greater value for money.

Stakeholders' views on this option were mixed. Overall, government departments were supportive of this option. The defence bar had strong concerns about the workability of pre-recording cross-examination, and its impact on fair trial rights. In particular, because pre-recorded cross-examination requires the defence counsel to 'show their hand' prior to trial, the defence bar considers it will significantly erode the defendant's fair trial rights.

We do not agree that pre-recorded cross-examination constitutes a significant risk to defendants' fair trial rights. Judges will disallow pre-recorded cross-examination where it does create such a threat to fairness. Further, international evidence has shown it can occur without compromising the fairness of the trial. Workability and other risks, including those particular to the New Zealand context, can be somewhat mitigated through design and drafting – for example, specifying when pre-recorded cross-examination can occur to minimise the impacts of late disclosure of evidence. Monitoring and evaluation will closely examine how this proposal affects all parties.

## C. Judicial intervention in improper questioning

### C4.1 What is the specific problem?

Currently during cross-examination, the Evidence Act provides that a judge “may disallow, or direct that a witness is not obliged to answer any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.” The Act includes a non-exhaustive list of factors that a judge may take into account, including the nature of the proceeding and characteristics of the witness such as age and maturity.

Judicial training on best practice when dealing with vulnerable witnesses in sexual violence cases is already underway. However, there is concern that in practice, complainants and other vulnerable witnesses are currently being subjected to inappropriate or overbearing questioning. A witness's vulnerability is not explicitly included as a factor for the judge to take into account in their decision to intervene, which may make judicial intervention less likely. There is also concern that the risk of creating appeal grounds may influence judges' decisions as to whether to intervene.

### C4.2 What options are available to address the problem?

#### Option 1: Maintaining the status quo

Currently, judges *may* disallow any question if they believe the question is “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand”. This applies to all cases (not just sexual violence cases), as well as to all witnesses.

#### Option 2: Law Commission recommendation – a judge must intervene (preferred)

In the 2019 report, the Law Commission recommended amending the Evidence Act so that a judge *must* intervene if they consider questioning to be “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand”. It also recommended including ‘vulnerability’ as a matter that judges may have regard to when exercising their power to intervene. This option would also apply to all cases, and all witnesses.

## C. Impact Analysis

	Option 1: Status quo	Option 2: Law Commission recommendation – a judge must intervene (preferred)
Reduces trauma	0	+ Complainants would be better supported during cross-examination through judicial intervention, reducing stress and trauma brought about by the giving of evidence. A witness' vulnerability would also be taken into consideration, further helping to reduce potential trauma.
Fairness and justice maintained	0	0 Would allow for a more consistent and robust approach to intervention. Any risks requiring judges to intervene may 'tip the balance' away from the defence's right to robustly test evidence, or that the change may create an overly interventionist approach, are mitigated by retaining the existing judicial discretion as to what is considered 'improper'. Appeal rights remain.
Enhances quality of evidence	0	+ Complainants would be better supported and protected while they give evidence, resulting in the presentation of better quality evidence at trial.

### C4.3 What other options have been ruled out of scope, or not considered, and why?

N/a.

### C4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred option for this proposal is **Option 2**, the Law Commission's recommendation to amend the Evidence Act so that a judge *must* intervene if they consider a question is "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand" and that a witness' vulnerability is explicitly listed as a factor the judge should take into consideration when deciding to intervene. This would result in witnesses' improved ability to give better quality evidence and improve their experience in court, reducing secondary victimisation as well as attrition rates.

Consultation raised some concerns that this option risked creating an over-interventionist approach for judges, which may be detrimental to both defendants and witnesses if more appeals or retrials result. We consider such a risk is not substantial given the proposal retains an element of discretion.

## D. Evidence of a complainant's sexual experience and disposition

### D4.1 What is the specific problem?

In criminal cases, section 44 of the Evidence Act:

- disallows evidence of a complainant's sexual reputation; and
- requires a judge's pre-trial permission to admit evidence of a complainant's sexual experience with people other than the defendant, which can be granted only if the judge considers the evidence is so directly relevant that it would be contrary to the interests of justice to exclude it (the 'heightened relevance test').

'Reputation' evidence is inadmissible to avert judgements about consent or the basing of reasonable belief in consent on (irrelevant) rumour or others' general perception of the



complainant's sexual past. Restrictions on evidence about sexual 'experience' discourage reasoning based on the 'twin myths'; that a person who has consented to sexual activity in one instance is more likely to have consented in another instance with another person, and that a sexually active person is a less credible witness. These rules also protect complainants from unduly intrusive and traumatic questioning about their sexual history.

*Issue a: Evidence of complainant's sexual experience with the defendant*

The heightened admissibility threshold and prior permission requirement do not extend to evidence of a complainant's sexual history with the defendant. That evidence is admissible on the ordinary admissibility rules; the evidence must be relevant and its probative value must not be outweighed by its prejudicial effect.

This status quo arguably means the 'twin myths' are countered only in respect of sexual history with people other than the defendant. It does not fully support the idea that consent, or belief in consent, should be considered in relation to the relevant incident itself, rather than to past instances of sexual contact. In the same vein, it does not require active consideration or a decision as to the relevance of the evidence prior to complainants giving evidence or being questioned. The status quo leaves open the prospect that the likely trauma or distress those questions elicit is unnecessary or unduly extensive.

*Issue b: Evidence of complainant's sexual disposition*

Section 44 does not refer explicitly to the admissibility of evidence of a complainant's sexual disposition.<sup>28</sup>

Case law has generally treated disposition evidence as 'experience evidence', and therefore subject to the heightened admissibility and prior permission requirements in the Evidence Act.<sup>29</sup> However, judgments in the leading case of *B (SC12/2013) v R* took different views as to how disposition evidence should be treated.<sup>30</sup> The majority judgment suggested section 44 would benefit from legislative clarification, noting differing factual scenarios may cause greater interpretive difficulty.<sup>31</sup>

The Law Commission's 2019 Report noted there is still confusion about how all sexual disposition evidence should be treated. For example, fantasies written in a diary do not fit comfortably with the phrasing in section 44 of 'sexual *experience* with a *person*...'. This may lead to cases where the policy rationale of section 44 is clearly engaged, but the particular evidence either falls through a 'gap' in the section or requires a strained interpretation of the section's wording.

## **D4.2 What options are available to address the problem?**

*Issue a: Admissibility of sexual history between complainant and defendant*

**Option a1: Status Quo – evidence of sexual history with defendant subject to ordinary admissibility rules**

Evidence of sexual history between the complainant and defendant must meet only the standard test for admissibility; that is, it must be relevant to the proceeding, and its

<sup>28</sup> Evidence of 'sexual disposition' relates to the general propensity of the complainant in sexual matters. It includes, for example, fantasies recorded in a diary, or sex toys in a bedside cabinet.

<sup>29</sup> *B v R* [2013] NZSC 151 at [61]; *R v Singh* [2015] NZCA 435 at [25].

<sup>30</sup> *B v R* (above n 29): the majority judgment treated the evidence as 'experience' evidence; one minority judgment, as 'reputation' evidence and therefore inadmissible under s 44(2); and the other minority judgment, neither reputation nor experience evidence, and therefore subject to the standard admissibility threshold.

<sup>31</sup> *B v R* (above n 28) at [56] – [57].

probative value must not be outweighed by its likely prejudicial effect. A judge's prior permission is not required to elicit this evidence.

**Option a2: Any evidence of sexual history between the complainant and defendant inadmissible, unless a judge permits**

Evidence of sexual history between the complainant and defendant could be inadmissible, unless the judge gives permission. The judge's decision would be based on the 'heightened relevance' test (where the evidence must be so relevant that excluding it would be contrary to the interests of justice).

**Option a3: Law Commission recommendation – Evidence about the nature (but not the fact) of the sexual history inadmissible unless a judge permits (preferred)**

Evidence establishing the fact that the complainant and defendant have had previous sexual contact could remain admissible on the ordinary admissibility standard. Evidence about the nature of that history could be subject to the judge's permission and the 'heightened relevance' test.

**Issue b: Admissibility of sexual disposition evidence**

**Option b1: Status quo – no legislative reference to evidence of complainant's sexual disposition**

This option would leave the admissibility of 'disposition' evidence to be determined by the courts, retaining the precedent where 'disposition evidence' has largely been treated as 'experience' evidence under s44(1) (subject to the heightened admissibility test).

**Option b2: Law Commission recommendation – Evidence of sexual disposition inadmissible unless judge permits (preferred)**

The Evidence Act could specify that disposition evidence is subject to the same admissibility threshold as experience evidence. This would enshrine the effect of current precedent. However, it would treat disposition evidence as a separate category to experience evidence, rather than a subcategory. The Act would also clarify that evidence of a person's reputation for having a particular sexual disposition is inadmissible, in line with the general bar on sexual reputation evidence.

**Option b3: Evidence of sexual disposition inadmissible**

The Act could disallow evidence of sexual disposition in the same way it disallows 'reputation' evidence.

## D. Impact Analysis

	Option a1: Status quo	Option a2: Higher threshold for all sexual experience with defendant	Option a3: Law Commission recommendation - higher threshold for <i>nature</i> of sexual experience with defendant (preferred)
Reduces trauma	0	+ Potentially traumatic questioning or evidence relating to complainant's sexual history can be disallowed or excluded more easily; there is a tighter check on complainants being unnecessarily subjected to invasive questioning about their sexual experience. Application requirements ensure complainant can be prepared for questioning prior to trial.	+ As for option a2, but targeted to detailed (and therefore more traumatic) questioning or evidence relating to the complainant's sexual history. Questions about the <i>fact</i> of a relationship (not subject to heightened relevance test) are unlikely to cause significant trauma.

Maintains fairness and justice	0	0	0
		The defendant's fair trial rights would be a primary consideration in the judges' assessment of whether the interests of justice require the questioning or evidence to be allowed.	As for option a2.
Maintains quality of evidence	0	0	+
		Risks creating 'holes' in evidence if the context of the previous relationship is all ruled inadmissible, which could confuse or misguide jurors. This risk is small, as judges could rule some of the evidence admissible to avoid that consequence, in the interests of justice. Active decisions as to admissibility help to ensure relevance of admitted evidence through scrutiny prior to trial; quality of complainant's evidence may improve if questions are less invasive.	Risk that 'holes' in narrative will confuse or misguide jurors is minimal (because fact of relationship can be automatically admitted, and the case contextualised). As for option a2, active decisions as to admissibility help to ensure relevance of admitted evidence through scrutiny prior to trial; quality of complainant's evidence may improve if counsel's questions are less invasive.
Best use of resources	0	-	0/-
		May introduce complexity and delay through pre-trial admissibility applications or argument, and pre-trial appeals, in relation to applications that would likely be granted in any case (to ensure the quality of evidence and/or fair trial rights).	As for option a2, but risk of unnecessary delay or complexity (through applications to introduce evidence that would likely be granted in any case) is minimised by targeting the heightened admissibility threshold to more detailed evidence.

	Option b1: status quo	Option b2: Law Commission recommendation – higher threshold for sexual disposition evidence (preferred)	Option b3: Sexual disposition evidence inadmissible
Reduces trauma	0	+	++
		Ensures that all sexual disposition evidence is subject to the higher admissibility threshold (even if the circumstances of the case are distinguished from precedent). Maintains/ enhances protection from bar on reputation evidence.	Complainants could not be questioned about their sexual disposition (and no evidence could be led of it), reducing invasive questioning and complainants' feelings of being put on trial.
Maintains fairness and justice	0	+	-
		Codifying the effect of current precedent, and clarifying the position for all disposition evidence, will enhance the certainty of the law (supporting the rule of law), and preserve the judge's discretion to admit the evidence in the interests of justice. Clarifying that the bar on reputation evidence applies in respect of sexual disposition will help to ensure reasoning is well-founded.	Codifying the position in relation to disposition evidence would support certainty of the law. However, in some cases disposition evidence may be salient to a defence of consent – this option risks defendants' fair trial rights as there would be no discretion for the judge to preserve the interests of justice by admitting the evidence.

Maintains quality of evidence	0	+	Quality of complainant's evidence may improve in cases where the admissibility of disposition evidence would be unclear under the status quo (complainant more likely to be protected from invasive questioning, and can be prepared with more certainty for giving evidence).	-	Quality of complainant's (remaining) evidence may improve if questions are less invasive, but this option would disallow evidence that may have provided helpful context (undermining the quality of evidence as a whole).
Best use of resources	0	+	The same process (pre-trial applications and argument) would apply; but may be quicker as the law will be clearer.	+	Would reduce (but unlikely to eliminate) the incidence of pre-trial argument as to admissibility – for example there may still be argument as to whether the evidence is disposition, experience, or reputation evidence (which have different rules or carve-outs).

#### D4.3 What other options have been ruled out of scope, or not considered, and why?

In relation to evidence about the complainant's sexual history with the defendant, we discarded two further options:

##### Heightened relevance test only

Evidence of sexual history with the defendant would be subject to the 'heightened relevance test, but prior judicial permission would not be required to lead the evidence.

This option would not necessarily reduce complainants' trauma, as the admissibility of the evidence can only be contested after questioning has elicited it. It also retains the risk to the quality of evidence, if excising evidence creates 'holes' in the narrative.

##### Complete prohibition, subject to certain exceptions

Evidence of sexual history between the complainant and defendant would be inadmissible. This option could potentially apply only in respect of certain uses (e.g., as evidence relating to whether the complainant consented), as occurs in the United Kingdom.

This option would reduce complainants' trauma, but places fairness and justice at significant risk as there would be no discretion for the judge to preserve the interests of justice (including defendant's fair trial rights) by admitting the evidence in situations falling outside the prescribed exceptions. The UK experience indicates this type of rule would also introduce undue complexity.

#### D4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred options are the Law Commission's recommendations (options Da3 and Db2). These options will:

- reduce complainants' trauma by extending the protection of section 44;
- codify and clarify the position in relation to disposition evidence, and remove the potential for complainants falling through any 'gap' within the current protections;
- encourage issues of consent and the relevance of evidence to be actively considered on an individualised basis (improving the quality of evidence and over time, further improving complainants' experiences of court processes);
- preserve the defendant's rights to present an effective defence and to a fair trial;
- ensure evidence can be presented coherently;

#### **D4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?**

- not unduly compromise the efficiency of trial processes; and
- ensure the intent of section 44 is clear and fully articulated in statute.

Most Government agencies consulted strongly supported this proposal. There were some concerns expressed that the changes would create unnecessary compliance costs, on the view that the status quo works adequately. Other concerns noted the erosion of the defence's right not to show their hand prior to trial (as more evidence would be subject to pre-trial applications before it could be admitted).

### **E. Judicial directions on counter-intuitive evidence**

#### **E4.1 What is the specific problem?**

Judicial directions are instructions provided by a judge to a jury about points of law. The jury must apply them to the evidence and to lawyers' arguments to reach a verdict. Judicial directions may be particularly important to counteract myths or misconceptions about sexual violence which individual jurors may bring with them into trial – for example, a juror might believe that a complainant consented to a sexual act because they did not fight off the defendant or suffer physical injuries. The Law Commission noted that judicial directions risk confusing the jury or creating unintended consequences if they are not worded clearly and in accordance with science about changing attitudes (for example, over-emphasising the myth may inadvertently reinforce it).

Judges may give directions to the jury at any time, at their discretion or as required by case law. Legislation may also permit or require judicial directions to be given in certain circumstances. Currently, the only judicial direction in the Evidence Act 2006 that pertains specifically to misconceptions in sex offence cases concerns the victim's delay or failure to make a complaint in respect of the offence.

Directions to address other common myths and misconceptions pertinent to sexual violence cases are not specified in the Act. Judges may be directing juries on these matters according to case law. However, the absence of an explicit reference or trigger in legislation may be a missed opportunity to provide a consistent approach to correcting juries' assumptions or misunderstandings about sexual violence.

#### **E4.2 What options are available to address the problem?**

##### **Option 1: Maintaining the status quo**

Under this option, no additional directions would be developed (although the judiciary could choose to initiate the development of directions for judges to use).

##### **Option 2: Law Commission's recommendation – development of judicial directions (preferred)**

Under this option, specific judicial directions addressing juror assumptions in sexual violence cases would be developed by the judiciary and contained in the Jury Trials Bench Book. This could include a list of topics on which judicial directions may be appropriate, as well as example directions. The directions would be made publicly available and be kept up-to-date with new research and developments. The Evidence Act would explicitly include a

## E4.2 What options are available to address the problem?

judicial discretion to give directions addressing myths and misconceptions that may arise in sexual violence cases.

### Option 3: Regulations amendment

Under this option, Evidence Regulations would be amended to contain judicial directions on the matters listed above. A legislative trigger in the Evidence Act would refer to the directions in the regulations.

### Option 4: Evidence Act amendment

In this option, the Evidence Act itself would be amended to include the directions referred to above within the Act itself.

## E. Impact Analysis

	Option 1: status quo	Option 2: Law Commission recommendation – development of judicial directions (preferred)	Option 3: Regulations amendment	Option 4: Evidence Act amendment
Reduces trauma	0	<p>+</p> <p>Sexual violence complainants and their evidence may be more accepted and understood by juries. This may reduce the trauma of feeling disbelieved or judged, and the effects of damaging stereotypes and myths would be mitigated.</p>	<p>+</p> <p>As for Option 2. Prescribing directions in regulations may provide greater certainty and visibility particularly for complainants, further reducing trauma.</p>	<p>+</p> <p>As for Option 3. The visibility and certainty of primary legislation is greater.</p>
Fairness and justice maintained	0	<p>++</p> <p>Retaining judicial discretion, and ensuring directions are thoroughly researched and accessible, will ensure fairness and help to mitigate any perceived risk of directions lending undue weight to the complainant's evidence.</p> <p>This option also preserves judicial independence to decide what directions, and what content, are appropriate and retains judicial responsibility for managing the conduct of trials.</p>	<p>+</p> <p>Fairness of the content and effect of the discretion ensured as per Option 2. There is a risk that the executive prescribing judicial directions is seen as constitutionally inappropriate.</p>	<p>+</p> <p>As per Option 3, but the risk of this option being seen as constitutionally inappropriate may be less than Option 3 because Parliament is supreme.</p>
Best use of resources	0	<p>+</p> <p>May avoid the need for expert counter-intuitive evidence to be called or reduce the number of topics to be covered by expert evidence.</p> <p>The guidelines themselves can be kept up to date in line with new research and emerging needs more easily and quickly than regulations or primary legislation.</p> <p>The judiciary is best placed to determine and keep up-to-date the content of the directions.</p>	<p>0</p> <p>As per option 2, may reduce the amount of required expert evidence. Keeping regulations up to date with research would be more difficult than Option 2, given changes to regulations require Government approval.</p> <p>The judiciary has less control over the development of directions.</p>	<p>-</p> <p>As per Option 3, but to a greater extent, because of the process of amending primary legislation.</p>



#### **E4.3 What other options have been ruled out of scope, or not considered, and why?**

We have not analysed the options discussed below further as they either risk unintended or uncontrollable outcomes, or there are no appropriate levers to encourage the greater use of existing mechanisms.

##### *Pre-trial education for jurors*

One option to help dispel myths and misconceptions is to include juror education prior to trial. This could be in the form of sending information packs to those empanelled, covering the difficult features that sometimes arise in sexual violence cases.

The main risks for such an option are that a 'one size fits all' approach would not be appropriate. A pack covering all myths, given without context before the trial, may unduly reinforce false information or bias jurors against the defendant before the trial has begun. Conversely tailoring packs to the specific circumstances of the case may add financial and time burdens to the case. There is also a risk that such an option lacks gravitas (unlike judicial directions), and therefore may not be taken seriously enough.

##### *Greater use of expert opinion witnesses*

Expert opinion witnesses can help correct erroneous beliefs that juries hold intuitively and help restore a complainant's credibility due to juror misapprehension. However, the use of expert witnesses can be impacted by the availability of experts who are willing to give such evidence. There is also a risk that the evidence given may not have the same gravitas or perception of impartiality that a judge can convey. Furthermore, expert witnesses are already available to either counsel; it is difficult to use regulatory levers to increase the use of this kind of evidence in an appropriate way.

##### *Section 9 statements*

Section 9 statements enable parties to agree to the admission of evidence in any way or form, which could remove the need for evidence to be given by an expert during the trial itself as a witness. Section 9 statements may be used currently in sexual violence cases. We do not consider legislation is an appropriate vehicle to encourage their greater use.<sup>32</sup>

#### **E4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?**

The preferred option is **Option 2**, the Law Commission's recommendation for judicial directions to be specified in judicial guidance, with a discretionary legislative trigger. The judiciary would be invited to develop the content of the directions and keep them up-to-date. The directions will help to mitigate the risks to sound decision-making of any jurors' intuitively-held but erroneous beliefs and assumptions, which would also improve the complainant's overall experience in court and reduce the risk of stress and trauma.

Government agencies were broadly supportive of this option. Some concern was expressed that judicial directions, combined with existing mechanisms (such as expert opinion counter-intuitive evidence), would risk overemphasis at the defendant's expense. We consider this risk can be managed through the judge's discretion to determine whether the judicial direction is needed, considering the evidence given in the trial.

<sup>32</sup> The Law Commission's 2015 report endorsed the admittance of expert evidence under section 9 but did not recommend regulatory change to encourage its greater use.

## F. Communication assistance

### F4.1 What is the specific problem?

Currently, communication assistance is available for witnesses and defendants when giving evidence if they have a 'communication disability'. Communication assistance means oral or written interpretation of a language, written assistance, technological assistance and any other assistance that enables or facilitates communication. Using a communication assistant (usually a speech therapist) in these situations can reduce confusion and help the witness to give better quality evidence.

This is particularly so for people with disabilities who, according to the Office for Disability Issues, have difficulties accessing the support they need and are often hindered in their interactions with the criminal justice system by a lack of recognition of their disability.

There may be situations where a person needs assistance to understand questions, or communicate their answers, but the circumstances do not constitute a 'communication disability' under the Evidence Act 2006 (for example, children may have trouble understanding questions in court, or those with Foetal Alcohol Spectrum Disorder). This can lead to increased stress and trauma for complainants who do not understand what is happening in court, as well as risking poorer quality evidence.

### F4.2 What options are available to address the problem?

#### Option 1: Maintaining the status quo

Under this option, the status quo, communication assistance is available for witnesses and defendants when giving evidence if they have a 'communication disability', or if they have insufficient proficiency in the English language.

#### Option 2: Law Commission's recommendation – expand the accessibility of communication assistance (preferred)

The Law Commission recommended amending the Evidence Act 2006 to clarify that communication assistance is available, when needed, to help witnesses understand questions and communicate effectively, whether or not they have a 'communication disability' (for example, a young child).

## F. Impact Analysis

	Option 1: Status quo	Option 2: Law Commission recommendations – expand the accessibility of communication assistance (preferred)
Reduces trauma	0	+ Entitlement to communication assistance for those who need it is clear and accessible. More witnesses, including sexual violence complainants and propensity witnesses, are likely to receive assistance, which may help alleviate some of the stress of demanding, confusing or unclear questioning.
Fairness and justice maintained	0	+ Will help ensure all witnesses can competently give evidence and be cross-examined. Good quality evidence, enabled by the provision of communication assistance, supports fair and just outcomes.  No increased risk to defendants' rights to cross-examine as communication assistance providers cannot insist on question retraction or rephrasing, so defence can still control the way they ask questions.

Best use of resources	0	<p><b>0/+</b></p> <p>Likely to increase demand for communication assistance services, requiring additional funding and potentially lengthening proceedings.</p> <p>However, it would reduce the giving of poor quality evidence and improve the experience of all witnesses (including sexual violence complainants) in the courts.</p>
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#### F4.3 What other options have been ruled out of scope, or not considered, and why?

##### Use of an intermediary

Intermediaries, who specialise in communication with vulnerable or young witnesses, could be employed. Several formulations could be possible, including the intermediary relaying the questions from counsel to the witness and changing the language where appropriate. The use of an intermediary was not considered by the Law Commission in its 2015 report. We did not consider this proposal further, noting it was discarded by Cabinet in 2013 due to the lack of a professional market to perform the role of intermediary, and its perceived departure from New Zealand's adversarial model.

#### F4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred option for this proposal is **Option 2**, the Law Commission's recommendation to expand the accessibility of communication assistance. This would result in witnesses' improved ability to give better quality evidence and improve their experience in court, thereby reducing secondary victimisation as well as attrition rates, compared to the status quo where some witnesses would continue to struggle with the court processes and experience unnecessary additional stress and trauma.

Stakeholders were supportive of this option.

## G. Clearing the court

#### G4.1 What is the specific problem?

Generally, court proceedings are open to the public. The threshold for clearing the court is high and exceptions are made only to the extent necessary, in the interests of open justice.

A judge may clear the court to avoid specified outcomes, for example undue disruption of the proceedings, or danger to the safety of an individual. The impact of proceedings on the victim, however, is not one of the specified factors judges can take into account.

Under the Criminal Procedure Act 2011 the court is automatically cleared in sexual violence cases when the complainant is giving evidence at trial, to avoid inflicting additional trauma on the complainant. However, the complainant may also find open court traumatic at other times throughout the process, for example during a sentencing hearing, when a complainant can choose to read a victim impact statement (VIS). The reading of the VIS is a right and can assist a victim's recovery. Conversely, describing in open court the impact that the sexual offending has had on them, which may include sensitive information, also risks causing victims additional trauma.

The Victims' Rights Act 2002 specifies that a VIS can be given "in any manner other than by reading it (for example, if the information ascertained from a victim is recorded on an audiotape, by playing that audiotape)". However, anecdotally we are aware the ability to give a victim impact statement in alternative ways, such as via audio-visual link, is unclear.

## G4.2 What options are available to address the problem?

### Option 1: Maintaining the status quo

Under the status quo, the judge is required to clear the court when a sexual violence complainant is giving evidence at trial. Judges do not currently have the power to clear the court at other times when a witness may be suffering additional stress.

### Option 2: Law Commission's recommendation – clearing the court at any time

Under this option, the judge would be authorised to clear the court at any point in a proceeding involving sexual violence, where the judge is of the view that the order is necessary to avoid causing undue emotional distress to a complainant witness. An order under that provision could be subject to an exception for members of the media.

### Option 3: Amended recommendation – clearing the court for the VIS

A third option is to allow for judges, in consultation with the complainant, to be able to clear the court when the complainant is reading their VIS at the sentencing hearing (but not at any point during the trial), where necessary to avoid causing undue distress. This is the only other time the complainant directly addresses the court.

### Option 4: Amended recommendation – clearing the court for the VIS and additional ways to give VIS (preferred)

This option would add to Option 3, to provide for a judge to allow the complainant to read their Impact Statement via audiovisual link, CCTV, from behind a screen or from a pre-recording (that is, in the same alternative ways that a witness can give evidence).

## G. Impact Analysis

	Option 1: Status quo	Option 2: Law Commission rec – clearing the court at any time	Option 3: Amended Law Commission rec – clearing the court for the VIS	Option 4: Amended LC rec - clearing the court for the VIS + additional ways to give VIS (preferred)
Reduces trauma	0	++ Yes, at any time the complainant is present in situations where the court currently lacks the power to clear the court.	+ Yes, but to a lesser extent than for Option 2 as the court could only be cleared in one other circumstance beyond the status quo (the reading of the VIS).	++ As per Option 3, but to a greater extent as other options will also become available for the reading of the VIS.
Fairness and justice maintained	0	- May be fairer to complainants. However, this option limits the fundamental principle of open justice on a subjective and potentially inconsistent basis, risking the maintenance (and perception) of fairness and justice.	0 Limits the principle of open justice compared to the status quo, but to a lesser extent than Option 2 (and not to the extent of undermining fairness and justice). Better balances open justice and fairness to complainants by targeting the discretion to close the court to situations where complainants are at greatest risk of harm (when directly addressing the court).	+ As for Option 3, but this option provides more ways to retain open justice by allowing the VIS to be given in a variety of methods (which may remove the impetus for closing the court). This option also improves fairness for victims, as they are more empowered to deliver the VIS and show the impact the offending has had on them.

Best use of resources	0	0 Clearing the court would have no resourcing impact.	0 As for option 2.	0/+ As for option 2. Would require technological resource, but unlikely to have a significant financial impact due to planned investment (resulting in better use of resources).
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#### G4.3 What other options have been ruled out of scope, or not considered, and why?

N/a.

#### G4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

**Option 4** is the preferred option for this proposal – providing for a judge to allow complainants to read their VIS via audiovisual link, CCTV, from behind a screen or from a pre-recording, as well as allowing the court to be cleared when the victim is reading the VIS. This would improve victims' experiences of court, reducing the trauma and secondary victimisation they face but would not significantly limit the principle of open justice. This would better support victims than under the status quo, but better balances the interest in open justice than Option 2. It also provide more options for victims than Option 3.

Stakeholders were broadly supportive of this option. The Joint Venture Business Unit preferred Option 2, as it afforded the most support for victims. However, we believe this option impinges too far on the principle of open justice.

## H. Appropriate court facilities

#### H4.1 What is the specific problem?

Complainants giving intimate evidence of a sexual nature may have to share waiting rooms with defendants and jurors. When giving evidence in court, the feeling that they are the ones 'on trial' may be exacerbated by their physical isolation in the courtroom (for example in the witness box).

Research has shown that one of the main causes of anxiety around attending court for complainants is the possibility of encountering the defendant and their supporters in or around the courthouse.<sup>33</sup> This research indicates that when defendants are encountered, it has a high negative impact on the complainant. Further anecdotal reports suggest that some complainants have experienced harassment and intimidation from perpetrators and their supporters when attending court.

The Ministry has made significant efforts to better accommodate complainants in both existing and newly constructed court buildings. This is partially in response to a 2015 Report recommendation that the Ministry of Justice should consider funding the development of separate entrances, waiting rooms and refreshment facilities in those District Courts where this would be particularly beneficial for complainants and their supporters. The Ministry of Justice applies Courthouse Design Standards when court buildings are refurbished or built. This includes dedicated facilities for complainants but the standards can only be applied to existing courts gradually and at significant cost.

33 Gravitas, Improving the Justice Response to Victims of Sexual Violence: Victim's Experiences, above n 7.

Services and facilities vary widely in suitability and quality. In some courts, dedicated facilities for complainants are lacking. In those locations, the Ministry of Justice is exploring alternative options to accommodate complainants' needs.

#### H4.2 What options are available to address the problem?

##### Option 1: Maintaining the status quo

Under this option, the Ministry of Justice would continue to refurbish existing facilities for complainants in its courthouses nationally, using existing funding, to make the courthouse environment as comfortable as possible for complainants.

##### Option 2: Law Commission recommendations – rights to specific facilities

This option would progress the Law Commission recommendations that legislation should:

- give complainants in sexual violence cases the right to a separate entrance, waiting room, toilet and refreshment facilities whenever possible; and
- provide that a judge in a sexual violence case may, either on the application of a party or on his or her own initiative, reconfigure the courtroom where the case is to be heard to avoid causing unnecessary harm to a complainant witness.

##### Option 3: Amended recommendation – right to appropriate facilities (preferred)

The third option would amend the Victims' Rights Act to entitle victims to have access to appropriate facilities, having regard to their needs and any constraints imposed by the physical setting of the courthouse. Unlike Option 2, Option 3 would not include explicit reference to reconfiguring courtrooms, which can be done under current settings.

#### H. Impact Analysis

	Option 1: Status quo	Option 2: Law Commission recommendation – rights to specific facilities	Option 3: Amended recommendation – right to appropriate facilities (preferred)
Reduces trauma	0	++ Yes, where unwanted contact is avoided because of the separate services and facilities.	+ Yes, but to a lesser extent than Option 2.
Best use of resources	0	- Giving effect to the new right would have significant financial implications given the wide-ranging changes required for all court buildings, which may not deliver equivalent benefits to complainants. Reduces the ability to consider other priorities when making decisions to upgrade buildings.	+ Would encourage more consistent provision of services and facilities across all courts, while allowing capital expenditure on buildings to be considered with other priorities. Would have some financial implications.

#### H4.3 What other options have been ruled out of scope, or not considered, and why?

We have not considered other options. However, we note a link to the analysis of alternative ways of giving evidence (above at B: Alternative ways of giving evidence), which includes analysis of options that may support the complainant not needing to come to court to give evidence.



#### H4.4 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

**Option 3** is the preferred option for this proposal – entitling complainants to have access to appropriate facilities, having regard to their needs and any constraints imposed by the physical setting of the courthouse. Legislation would not specify particular facilities, but existing operational work based on the Law Commission’s recommendations will continue and inform how this right is given effect. This is financially more practical than Option 2 but would still reduce the trauma and secondary victimisation complainants face.

Stakeholders were supportive of this option.

## Section 5: Conclusions

### 5.1 Summary table of costs and benefits of the preferred approach

Affected parties	Comment	Impact	Evidence certainty
<b>Additional costs of proposed approach, compared to taking no action</b>			
Government	Cost of the reforms, including justice pipeline impacts, for the Ministry of Justice, New Zealand Police, Department of Corrections, and Crown Law Office. <i>The majority of this cost (around \$44m) will support the proposal for pre-recorded cross-examination and other alternative modes of evidence.</i>	Around \$56m over 4 years. Ongoing per year cost of around \$16m.	Medium-high
Court users/ court system	Additional hearing time required for pre-recorded cross-examination may result in additional delays in hearing or resolving other cases. This would result in a time/ opportunity cost to court users and the court system.	Monetisable and non-monetisable costs – unquantifiable.	Medium-high
Defendants	Defendants who engage private lawyers (few in sexual violence cases, exact numbers unknown) are likely to pay more if pre-recorded cross-examination is used.	Monetisable, but unquantified.	High
<b>Expected benefits of proposed approach, compared to taking no action</b>			
Complainants	Cumulatively, and combined with the impacts of initiatives already underway, the preferred options will reduce the secondary victimisation and trauma that sexual violence complainants experience in the justice system. They will also support victims to feel supported, heard and recognised through the justice system process. Greater use of pre-recorded cross-examination may enable victims to begin or progress their recovery more quickly.	Significant primary benefits to complainants’ wellbeing (non-monetisable, unquantifiable).	Medium-high
Complainants and health system	Reducing complainants’ secondary victimisation and trauma will help reduce the incidence and severity of mental illness including PTSD, depression and anxiety, which will have flow-on impacts of increased employment and reduced absenteeism, and lower healthcare utilisation and suicide rates.	Moderate secondary benefits (monetisable but unquantified).	Medium

Wider society	Over time, the cumulative effect of the preferred options will result in holding to account more sexual offenders for their crimes, and fewer repeat sexual offences.	Moderate benefits (non-monetisable, unquantifiable).	Low-medium
	----- This, and the reduced re-traumatisation of victims, will improve society's trust and confidence in the justice response to sexual violence will improve.	Moderate benefits (non-monetisable, unquantifiable).	Medium

## 5.2 What other impacts is this approach likely to have?

### *Risks of cost estimates*

Most cost estimates are based on assumptions, including about demand for and uptake of new processes and services. Key assumptions about phasing and implementation are that non-legislative proposals will be rolled out in the first year following policy and funding approval, while costs stemming from legislative change are based on implementation following enactment in 2020/21.

Changes to rules of evidence require investment in technology that cannot be fully determined before the new services are designed. The operating costs of these changes will be driven in part by how often prosecutors nominate the use of pre-recorded cross-examination, and how often that will be challenged by defence lawyers. Costs therefore rest on some untestable nominal figures and assumptions that cannot be fully tested.

### *Risks of pre-recorded cross-examination*

The legal profession, particularly the defence bar, has expressed strong concerns about the proposal to increase the availability of pre-recorded cross-examination. Their view reflects the earlier concerns of the Court of Appeal that pre-recording of cross-examination should continue to be available only in rare circumstances and on a case-by-case basis (rather than as a matter of statutory presumption).

Key issues raised during consultation centred on:

- the potential risk to defendants' fair trial rights, as they will have to 'show their hand' prior to trial;
- continuing or late disclosure of further evidence to the defence (after the pre-recorded cross-examination) which may require complainants to give further evidence at the trial if new issues arise; and
- without additional judicial resource, pre-recording of cross-examination may slow down resolution of sexual (and other) trials because of the additional hearing time required.

Greater use of pre-recorded cross-examination would be a significant change from the way criminal trials are currently managed, and the proposal will limit the defence right not to 'show their hand' before trial. However, as discussed in section B4.4, we consider there is not a significant risk posed by the proposal to defendants' fair trial rights, and the concerns identified through consultation can be mitigated to some extent through the design and drafting of legislation.

### *Risks related to proposals around evidence of complainant's sexual experience*

The preferred option to amend the process and standard for admitting evidence about the complainant's sexual experience with the defendant is likely to be opposed by some stakeholders, including the defence bar. We have conducted consultation only within government on this proposal. The risks of this limited consultation are mitigated to an extent by the Law Commission's consultation process in formulating its recommendation.

### 5.3 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

Yes. The reforms seek to achieve clear objectives while remaining flexible and efficient. The reforms will help update and modernise New Zealand's criminal justice system and will deliver significant benefits for sexual violence victims.

## Section 6: Implementation and operation

### 6.1 How will the new arrangements work in practice?

The proposals require amending the Evidence Act 2006, the Criminal Procedure Act 2011 and the Victims' Rights Act 2002 in a Sexual Violence Bill, as well as supporting regulations. The timeframe for enactment is subject to parliamentary priorities.

The Ministry of Justice would be responsible for the ongoing operation and enforcement of the new arrangements, working closely with the Courts, Police, Crown Law and Department of Corrections. No concerns have been raised with any party's ability to implement the work in a manner consistent with the Government's 'Expectations for regulatory stewardship by government agencies'. Subject to Cabinet and Treasury decisions, funding will be directly allocated to the appropriate Vote. Enactment and commencement dates would allow for sufficient preparation before the necessary arrangements come into effect.

Governance and project management structures will be established, building on the project management of related initiatives already underway. These structures will support the proposed legislative changes and ensure they are implemented efficiently and coherently. Other stakeholders with an interest in the implementation and operation will be included through these structures.

### 6.2 What are the implementation risks?

Stakeholders raised concerns that the implementation of the proposals may delay trials. This will be addressed through regular review and monitoring of their impact.

Key risks (including underlying assumptions) and the strategies for managing them are:

- a lack of coordination and alignment between multiple parts of the Ministry of Justice and other agencies required to implement the proposals. The proposals will be subject to pre-existing project/implementation management which will mitigate this risk;
- a lack of capacity in the market to meet new demand for communication assistance. There is a risk that we cannot meet the demand brought about by the increase in availability of communication assistance. To mitigate this risk we have sought additional funding to support workforce development and training prior to implementation. However there remains a risk that this investment may not fully mitigate these risks prior to legislation; and
- Australian and UK research shows that the quality of IT and facilities for pre-recording evidence is critical to ensure evidence quality is not undermined. We have factored this risk into costings to ensure the service is fit for purpose, and project management will monitor this part of the package closely.

## Section 7: Monitoring, evaluation and review

### 7.1 How will the impact of the new arrangements be monitored?

As these initiatives will affect court processes, business as usual data collection and assessment will support implementation monitoring. A monitoring plan will be developed as part of implementation planning. The detail of these arrangements will be determined once the shape and scope of the reform package is clearer.

Existing data collection, for example from case management systems, will inform the monitoring of the proposals. This will include data on time taken for the completion of the court case, numbers of victims coming forward to report their crime, attrition rate as well as numbers of offenders sentenced and prosecuted.

The monitoring and evaluation of the operational initiatives already underway will help inform, and be considered together with, the monitoring and evaluation of the changes in this package. We have already set up governance mechanisms to monitor those operational initiatives, including cross-Ministry representation to ensure a joined-up approach, which will be further strengthened by the Joint Venture. These or similar structures will be used as necessary for this initiative.

### 7.2 When and how will the new arrangements be reviewed?

Subject to Budget decisions, the package of reforms progressed will be evaluated two to three years after implementation. The evaluation will include interviews with criminal justice system participants.

Issues such as implementation delays, or the occurrence of significant unintended consequences, will be monitored by the project management team and may prompt changes to the project management plan. Stakeholder views will be incorporated into monitoring and evaluation.

Best practice recurrent legislative and regulatory review, including regular reviews of the Evidence Act 2006 by the Law Commission will ensure these changes are regularly monitored and evaluated.