



New Zealand Women's Law Journal
Te Aho Kawe Kaupapa Ture a ngā Wāhine

20 October 2023

Justice Committee

Submission in support of the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill

1. Thank you for the opportunity to provide a submission on the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (the **Bill**).
2. This submission is made on behalf of the New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine Trust (the **Journal**). The Journal is the only academic publication solely dedicated to publishing legal scholarship about gender justice. The primary aims of the Journal are to promote awareness about gender justice in the law; and to support women in the Aotearoa New Zealand legal profession throughout their careers. This includes contributing to wider society discourse about legal issues facing women.
3. The Bill aims to reduce the harm experienced by complainants¹ of sexual violence participating in court proceedings. Among other things, the Bill proposes to amend ss 201 and 203 of the Criminal Procedure Act 2011 (the **CPA**). Those amendments are the focus of these submissions.
4. Sections 201 and 203 provide for the automatic suppression of the name, address, or occupation of the defendant and complainant, respectively, in proceedings involving specified sexual offences under the Crimes Act 1961. The Bill proposes requiring

¹ While the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill uses “victim”, the Journal tends to adopt “complainant” throughout these submissions. Although the legal definition of victim includes a person who suffers physical injury because of an offence (see Victims' Rights Act 2002, s 4), some advocates feel that the word “victim” carries negative connotations (see Joel Best “Victimization and the Victim Industry” (1997) 3 Society 9 at 13). Some prefer to use the term “survivor” (see Sexual Assault Kit Initiative “Victim or Survivor: Terminology from Investigation Through Prosecution” (2015) <SAKI: Sexual Assault Kit Initiative <www.sakitta.org> at 1). In addition, “complainant” is the conventional term used in criminal proceedings until the defendant is convicted. The Journal has therefore chosen to use “complainant” as a neutral term and to keep consistent with ss 201 and 203 of the Criminal Procedure Act 2011.



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courts, in determining whether or not to make an order under ss 201 or 203 of the CPA, to take into account any views of the complainant.

5. The Journal supports the proposed amendments and the aim of the Bill of promoting the autonomy of complainants. However, the Journal recommends that the following issues, amongst others, are clarified to ensure the Bill effectively meets its purpose:
 - (a) the weight to be given to complainants' views;
 - (b) how publication is to be determined where there are competing interests of multiple complainants, including where some complainants are over 18 years old and others are younger than 18 years old; and
 - (c) who is reasonable for ascertaining complainants' views and the manner of obtaining these views.

The Journal supports the Bill overall

6. The Journal would first like to express its support for the Bill and its aim of strengthening the protections for complainants of sexual violence who participate in criminal proceedings. The Journal supports the goal of the Bill to promote the autonomy of these complainants.
7. In expressing its support, the Journal acknowledges that people of any gender can experience sexual violence. Legislative amendments are, generally speaking, gender neutral in this respect to ensure all those who experience sexual violence are captured by the relevant provisions. However, sexual violence remains a gendered issue that is significantly more likely to be experienced by women,² in particular wāhine Māori,³ transgender, and LBTQIA+ and gender diverse individuals.⁴

² Ministry of Justice *New Zealand Crime and Victims Survey. Key findings – Cycle 5 report. Descriptive Statistics. June 2023. Results drawn from Cycle 5 (2021/22) of the New Zealand Crime and Victims Survey (June 2023) [NZCVS]* at 4; Ministry of Justice *New Zealand Crime and Victims Survey. Cycle 4 survey findings. Descriptive statistics. June 2022. Results drawn from Cycle 4 (2020/21) of the New Zealand Crimes and Victims Survey (June 2022)* at 10, 11, and 17; Janet Fanslow, Ladan Hashemi, Zarintaj Malihi, Pauline Gulliver and Tracey McIntosh “Change in prevalence rates of physical and sexual intimate partner violence against women: data from two cross-sectional studies in New Zealand, 2003 and 2019” (2021) 11 *BMJ Open*; and Manatū Wāhine | Ministry for Women “Violence against women” (2023) <[Violence against women | Ministry for Women](#)>.

³ Nerys Udy “Conceptualising Mana Wāhine as a Legal Force” (2021) 5 *NZWLJ* 18 at 26. The full article is available [here](#).

⁴ *NZCVS*, above n 2, at 36; and Michael Johnson “Domestic Violence: It’s Not About Gender – Or Is It?” (2005) 67 *J Marriage Fam* 1126 at 1128.



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8. While the Journal generally supports the proposed amendments to the CPA, the aim of this submission is to make recommendations in respect of technical aspects of the amendments to ensure the full gendered dimensions of sexual violence are addressed.

The proposed amendments to the CPA

Section 201

9. Section 201 of the CPA provides that where a person is accused or convicted of an offence under ss 130 or 131 of the Crimes Act,⁵ their identity will be automatically suppressed. Both provisions criminalise familial sexual abuse. Section 201(2) specifies that the purpose of suppression is to protect the complainant, removing the risk of harm to the victim being identified by publication of the defendant's name.⁶
10. Nevertheless, a court can permit publication in certain circumstances.⁷ It must make such an order where: (a) the complainant⁸ is aged 18 years or older and applies for the order; and (b) the court is satisfied the complainant understands the effect of their decision to apply for an order; and (c) no order has been made under s 200 of the CPA⁹ prohibiting publication of the defendant's identity.
11. The Bill proposes a new subsection to s 201:
 - (4A) The court, when determining whether to make an order under subsection (3), must take into account any views of the complainant (or, if there were 2 or more complainants, each complainant) in respect of the publication of the details of the person accused or convicted of an offence referred to in subsection (1).
12. The proposed s 201(4A) imposes a mandatory consideration on a court when considering whether to make an order permitting publication of a defendant's identity: the court *must* consider the views of the complainant.

⁵ Incest and sexual conduct with a dependent family member, respectively.

⁶ Criminal Procedure Act, s 201(2); *Adams on Criminal Law – Criminal Procedure Act 2011* (online ed, Thomson Reuters) at [CPA201.01]; and *Media Law – A to Z of New Zealand Law – Non-publication Orders* at [40.4.2.2(1)].

⁷ Criminal Procedure Act 2011, s 201(3).

⁸ Or complainants.

⁹ This provision provides that the court may suppress the identity of a defendant in certain circumstances.



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Section 203

13. Section 203 of the CPA provides that where a person is accused or convicted of an offence under ss 128 to 142A or 144A of the Crimes Act 1961, the identity of a complainant(s) will be automatically suppressed. These Crimes Act provisions concern sexual crimes. Suppression is ordered in such cases to mitigate the risk that the complainant will be identified.¹⁰
14. A court can permit publication of a complainant's identity where the factors set out in paragraph 11 above are met.¹¹
15. The Bill proposes a new subsection to s 203:
 - (4A) The court, when determining whether to make an order under subsection (3), must take into account any views of the complainant in respect of the publication of their details.
16. Similar to the proposed s 201(4A), the proposed s 203(4A) imposes a mandatory consideration on the court to consider a complainant's views when determining whether to make an order permitting publication of the complainant's identity.

The Journal's submissions on the proposed amendments

17. The Journal's views in respect of the proposed amendments apply equally to the proposed amendments to ss 201 and 203. The provisions are considered together below.

No indication of weight to be given to a complainant's views

18. Although the proposed s 201(4A) is a mandatory consideration, no indication is given as to the weight to be given to a complainant's views when determining whether to make an order permitting publication. There is also no guidance as to what stage these views are to be taken into consideration. The proposed amendment suggests a complainant's views are just one of many considerations, such as ss 201(4)(b) and 203(4)(b), that the courts are to weigh in determining whether to permit publication.
19. In light of this, the Journal submits it is not clear whether the purpose of the Bill of supporting complainants' autonomy will be achieved. There is no requirement or indication that a complainant's views will be given due weight, or at what stage the

¹⁰ Criminal Procure Act 2011, s 203(2).

¹¹ Section 203(3) and (4).



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views of the complainant are required to be taken into account. The Journal proposes that this uncertainty is clarified so as to ensure the complainant's views are appropriately taken into account and not outweighed by competing considerations.

No recognition of competing interests of multiple complainants

20. The Journal considers it is not clear how the views of multiple complainants will be balanced in relevant cases. Tension may arise where one complainant is in favour of publication, and another is not. It is difficult to see how the autonomy of multiple complainants with differing views on suppression can be promoted and respected. This is particularly so in respect of the proposed s 201(4A) as ss 130 and 131 criminalises familial sexual abuse. In those circumstances, both (or all) of the complainants will be related in some way to the defendant and easily identifiable if one or other of the complainants seeks to remove their name suppression.
21. The Journal recommends including a clarifying provision to the effect that, in the event complainants are related and disagree on whether the identity of the person charged or convicted of an offence should be published, suppression will prevail if there is a risk of harm to another complainant as a result of identifying one complainant.
22. Further, ss 201 and 203 provide that only a person over 18 years old can apply for an order permitting publication. Cases may arise where there are multiple complainants of varying ages. Care must be taken to ensure s 204 of the CPA, which automatically suppresses the identity of complainants under 18, is not breached. The Journal proposes adding further clarification: in a case involving multiple complainants, where a complainant over the age of 18 years old can apply for publication, but publication of that complainant's identity or the defendant's identity could risk identification of a complainant under 18, then publication should be refused. Clarification is particularly useful given that multiple qualifying offences for ss 201 and 203 require the complainant to be under 18 years old.¹²

Practical considerations for ascertaining complainants' views

23. It may be difficult for courts to comply with the mandatory requirement in the proposed amendments in certain situations. Complainants may:

¹² Crimes Act 1961, s 131 requires the 'dependent family member' to be under 18; s 132 creates an offence to have sexual conduct with a child under 12; and s 134 creates an offence to have sexual conduct with a young person under 16.



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- (a) be particularly vulnerable, suffering from mental health and/or intellectual impairments, and require the input and advocacy of therapeutic or protective services to assist in obtaining their views;
 - (b) require assistance from support services, interpreters or legal counsel in deciding whether or not to provide their views and in a manner which reduces potential harm;
 - (c) have experienced family violence and/or familial sexual abuse and be reluctant to provide their views for fear of further reprisals from their abuser;
 - (d) be themselves incarcerated; and/or
 - (e) have moved locations since the events in question.
24. In addition, there is no protection for complainants who are at risk of being retraumatised by the statutory process. The process for ascertaining a complainant's views should be streamlined to avoid such risk. It may be difficult for the effect of a publication order to be discussed with the complainant, for a complainant to articulate their views around the defendant's name suppression, and to contextualise the consequences of a publication order for a complainant. Care must be taken to ensure complainants' views are gathered in a supportive manner that promotes their autonomy.
25. The Journal submits that these difficulties highlight the need for the proposed amendments to make provision for the form, method of and timeframes for obtaining a complainant's views, and address necessary or reasonable exceptions for courts that cannot meet the mandatory requirement outlined.
26. The Journal recommends it also be clarified *who* is responsible for ascertaining the complainant's views. As recognised by the Victims' Rights Act 2002, complainants have a right to receive information. Section 12(1)(ca) of that Act states that complainants should be provided with information about the possibility of the court making an order prohibiting the publication of identifying information about the victim; and the steps the victim may take in relation to that order. Such information is to be provided by investigating authorities, court staff, or the prosecutor.¹³
27. The proposed amendments are silent as to who bears the responsibility of ascertaining the complainant's views. Without clear guidance as to responsibility, it is possible the mandatory consideration to ascertain the complainant's views may not always be able to be complied with, particularly considering that most victims do not have their own

¹³ Victims' Rights Act 2002, s 12(1).



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counsel in criminal proceedings.¹⁴ When allocating responsibility, the Journal considers it is important for legislators to bear in mind the demands of various actors in the criminal justice system.

28. The Journal considers a court-appointed victim advocate or court victim advisor would be the appropriate person to allocate responsibility to gather a complainant's views. The Journal notes this role would be in addition to the role already on Crown prosecutors and police to liaise with complainants. Court victim advisors provide information to complainants throughout the court process and keep complainants up to date about the progress of their case.¹⁵ As a complainant is likely to be familiar with their court victim advisor, it is logical and appropriate to extend the court victim advisors' responsibilities to include ascertaining the complainant's views on publication of the defendant's name. The Journal notes, however, that this will place an additional burden on court victim advocates and victim advisors that will need to be met with additional training, resourcing, and support from the Ministry of Justice.
29. Finally, the Journal considers the proposed amendments assume complainants are homogenous in their legal and practical abilities, and have access to resources. In reality, complainants are likely to have varying needs and capacity to express their views. This is a further reason the Journal considers it important that the Bill addresses the method and form that complainants' views are to be ascertained and communicated to the court.
30. The Journal considers the use of formal guidance by way of a Practice Note (or similar) would be beneficial in ensuring the proposed amendments are properly given effect to. Official guidance aimed at addressing the practical concerns identified above would ensure the processes around gathering complainants' views and ensuring their needs are met and streamlined. It will be a step closer to achieving the purpose of the Bill of empowering complainants.¹⁶

¹⁴ Counsel to assist the victims have only been appointed in a couple of criminal cases in Aotearoa, including for the victims of the Christchurch Mosque attacks and the victims in the *Ellis v R* appeal before the Supreme Court. This mechanism is rare and not provided for within criminal legislation.

¹⁵ Victims Information "Going to court" Victims Information | For people affected by crime <<https://victimsinfo.govt.nz/en/home/going-to-court/#step-2>>.

¹⁶ Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (274-1) (explanatory note).



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Conclusion

31. The Journal commends Hon Ginny Anderson for introducing the Bill. It is a necessary step in promoting the autonomy of complainants of sexual violence in legal proceedings.
32. Thank you for the opportunity to submit on the Bill. The Journal looks forward to seeing how it progresses. Members of the Journal are available to discuss this submission if necessary.

Ngā mihi nui,

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