

# House of Representatives

# Supplementary Order Paper

Tuesday, 23 February 2021

## Sexual Violence Legislation Bill

### *Proposed amendments*

Chris Penk, in Committee, to move the following amendments:

#### *Clause 10*

Delete *clause 10* (page 10, lines 32 to 36).

#### *Clause 11*

In *clause 11*, new *section 102(b)*, replace “**sections 106C to 106J**” (page 11, line 8) with “**sections 106C to 106F**”.

#### *Clause 14*

In *clause 14*, in the heading to *new section 106C*, replace “**Sections 106D to 106J**” (page 12, line 32) with “**Sections 106D to 106F**”.

In *clause 14*, *new section 106C* replace “**Sections 106D to 106J**” (page 12, line 34) with “**Sections 106D to 106F**”.

In *clause 14*, delete *new section 106D(1)(a)(i)* (page 13, line 6).

In *clause 14*, *new section 106D(2)*, after “including any further evidence in chief” (page 13, line 19) insert “or cross-examination evidence”.

In *clause 14*, replace *new section 106D(3)* (page 13, lines 20 to 28) with:

- (3) A prosecutor intending to call a sexual case complainant or propensity witness must provide every other party and the court with a written notice stating the 1 or more ways in which the complainant or witness will give their evidence (which may, unless the complainant or witness is a child, be or include the ordinary way).

In *clause 14*, replace *new section 106D(5)* (page 13, line 35 to page 14, line 3) with:

- (5) Unless a Judge permits otherwise, the notice required under **subsection (3)** must be given in every case, no later than when a case management memorandum (for a Judge-alone trial) or a trial call-over memorandum (for a jury trial) is filed under the Criminal Procedure Act 2011.

In *clause 14*, new *section 106D(7)* replace “**sections 106F to 106IA**” (page 14, line 8) with “**section 106F**”.

In *clause 14*, new *section 106D(8)* replace “**sections 106E to 106I**” (page 14, line 15) with “**sections 106E and 106F**”.

In *clause 14*, delete new *sections 106G to 106J* (page 15, line 22 to page 19, line 13).

#### *Clause 24*

In *clause 24*, new *section 28B(b)*, replace “**sections 106C to 106J**” (page 23, line 10) with “**sections 106C to 106F**”.

#### *Clause 31*

In *clause 31*, delete new *section 215(2)(bb)* (page 26, lines 16 to 19).

#### *Clause 32*

In *clause 32*, delete new *section 217(2)(ib)* (page 26, lines 27 to 30).

### Explanatory note

This Supplementary Order Paper relates to the proposal in the Bill, as introduced, to make cross-examination prior to a trial a matter of entitlement and not discretion.

The current law already allows a witness to give evidence in “an alternative way”. Under the current section 103 of the Evidence Act 2006, a judge may direct this course of action, including allowing (among other things) that cross-examination may take place prior to a trial. A number of submitters highlighted that a recent Court of Appeal judgment detailed the rare and exceptional circumstances that would make such a course of action appropriate.

The bill as introduced would make the prerecording of cross-examination a matter of entitlement, rather than at the discretion of a judge taking into account the particular circumstances of the case and the witness in question.

The reason that prerecording of cross-examination should remain rare and exceptional is its significant potential to deny a defendant their right to a fair trial, as protected by the New Zealand Bill of Rights Act 1990 (NZBORA). Partly this is because pre-trial recording affords no opportunity for the defendant to question a witness based on the conduct of the trial.

It is problematic that the Bill appears to be inconsistent in this respect with NZBORA, given the right of a person “to be present at the trial and to present a defence” under section 25(e) of NZBORA.

We also heard that there is considerable potential for an adverse unintended consequence in relation to the proposal, given that the existing right of “recall” under section 99 of the Evidence Act will remain on the statute book. In other words, it will remain possible under the Bill, as introduced, that a witness (including a complainant) be recalled to be cross-examined again later, at the trial, despite having already been cross-examined. This would actively work against the Bill’s stated aim to reduce the extent to which a complainant may be re-traumatised by the process of cross-examination.

For these reasons this amendment deletes the relevant provisions within clause 14 of the Bill.