

# Regulatory Impact Statement: Strengthening legal protections for victims of **Section (9)(2)(f)(iv)** sexual violence

## Coversheet

### Purpose of Document

Decision sought:	This analysis and advice has been prepared to support final Cabinet decisions to amend legislation to strengthen the legal protections for victims of <b>Section (9)(2)(f)(iv)</b> sexual violence with a focus in three key areas.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	24 March 2023

### Problem Definition

This Regulatory Impact Statement proposes legislative amendments to address three issues:

- (1) minimising the risk of child victims of sexual violence being further traumatised when participating in court proceedings
- (2) addressing barriers to adult victims of sexual violence exercising their autonomy by applying to the court to have their automatic name suppression lifted, and

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### Executive Summary

This paper proposes three discrete shifts in regulatory settings, intended to strengthen the legal protections afforded to victims of **Section (9)(2)(f)(iv)** sexual violence. Tight timeframes mean that the proposals have not been tested with stakeholders.

#### ***Strengthening protections for child victims of sexual violence***

The Crimes Act 1961 includes age-related sexual violence offences for children and young people. Specifically, s132(1) makes it an offence to have a sexual connection with a child (defined in s132(6)(a) as a person under the age of 12 years) and carries a maximum penalty of 14 years' imprisonment. Section 132(5) also states that it is not a defence to a charge under that section that a child consented to the sexual activity.

However, Ministry of Justice data shows the rape of, or unlawful sexual connection with, a child is typically charged as a sexual violation under s128B – primarily because of the culpability associated with the offence and its (longer) maximum penalty of 20 years' imprisonment. Under this section, lack of consent and lack of reasonable belief in consent are key elements that must be proved. As a result, child victims may be asked about their willingness, agreement to, or even enjoyment of alleged sexual offending against them. This process can further traumatise young victims.

There is a divergence in stakeholder views on the extent to which this line of questioning happens in practice. However, regardless of the scale, there is evidence that when it does happen the impacts on children can be significant.

We have considered four options for amending the status quo, with the intention of better protecting children under 12 years. In our assessment, the non-regulatory option will not, on its own, provide enough incentive for prosecutors to change their charging practice. The three legislative options considered are to EITHER:

- (i) amend the Crimes Act to make it clear that children aged under 12 years cannot consent to sexual activity, in a way that directs prosecutors towards using the age-appropriate provisions; OR
- (ii) align the maximum penalties applied to s132 to the maximum 20-year imprisonment penalty applied to s128B (removing the primary reason for charging under section 128B); OR
- (iii) make both amendments described in (i) and (ii), above.

The preferred option is (iii), and this is reflected in the Cabinet paper. The option makes the policy intent explicit – protecting the interests of young victims, while ensuring that the justice system is fair and robust. There may be a marginal reduction in the rate of attrition of sexual violence cases involving children, resulting in an increase in cases reaching trial. We do not anticipate that aligning the maximum penalties will drive the average length of custodial sentences up – rather, existing sentences applied under s128B would be transferred to the age-appropriate provisions under s132. These assumptions need to be tested with stakeholders.

### ***Strengthening the autonomy of adult victims of sexual violence***

The Criminal Procedure Act 2011 provides for the automatic suppression of the identities of sexual violence complainants. Provisions also exist for adult complainants to apply to the court to have their name suppression lifted, so long as certain conditions are met – including the court being satisfied that the complainant understands the nature and effect of their decision.

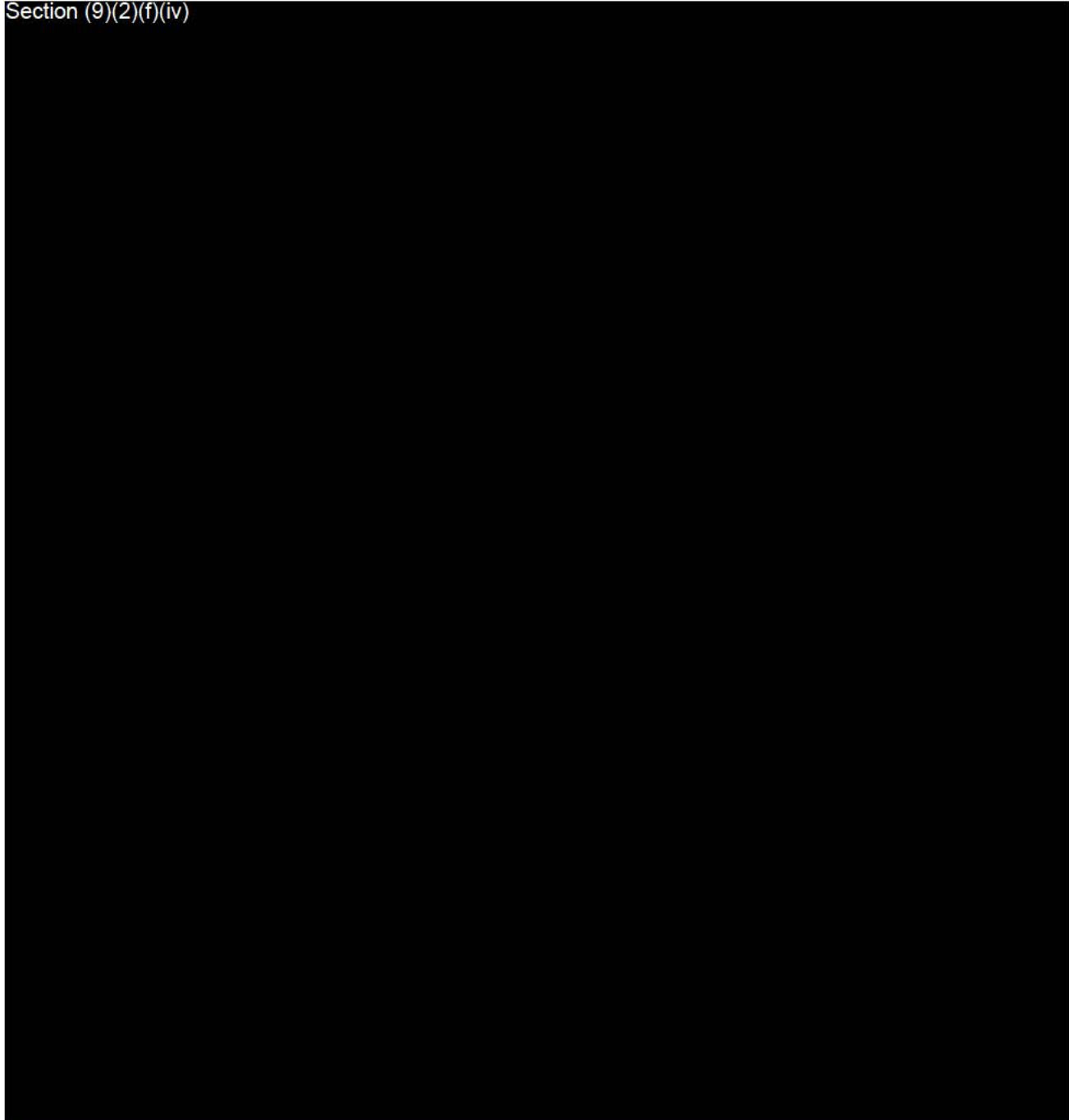
The policy intent of these provisions is to protect the complainants. However, some victims do not want or need such protection and may wish to speak publicly about their experience. In practice, victims are not consistently made aware of the option to request that their name suppression is lifted. It appears that processes for lifting automatic name suppression are not clear and can place procedural and financial burdens on victims.

We have considered three options for amending the status quo, with the intention of providing adult victims with a clear opportunity to apply to lift their name suppression. The non-regulatory option has been dismissed as not providing sufficient clarity or visibility of current provisions. The two legislative options considered are to EITHER:

- (i) shift to an ‘opt in’ approach– in which complainant name suppression is no longer automatic, rather individual complainants are asked if they would like their name suppressed on a case-by-case basis; OR
- (ii) give effect to an ‘opt out’ model by maintaining current legislative protections, but also ensuring that complainants are provided with an explicit opportunity to decide if they would like to apply to have their name suppression lifted as part of the court proceedings.

The preferred option is (ii), and this is reflected in the Cabinet paper. This option enhances the autonomy of complainants, while ensuring that current provisions remain in place for those aged under 18 years, alongside victims who would like to retain their name suppression. Final decisions would remain with the presiding Judge.

We anticipate the option will require a marginal increase in prosecutor and court time to facilitate applications and decision-making, as more complainants become aware of (and take up) the options to apply to lift their name suppression at the time of trial. These assumptions need to be tested with stakeholders.



### Limitations and Constraints on Analysis

Limitations and constraints on the analysis vary across the three issues canvassed in this document, as set out below.

#### Impact of time constraints on nature of proposals

Time constraints have been the greatest limitation in the development and analysis of these proposals, due to Ministerial direction to move quickly to address the identified issues. Broader issues with consent, name suppression, **Section (9)(2)(f)(iv)** are highly complex by nature. Time constraints have significantly reduced the scope of our analysis and the subsequent proposals under consideration.

#### *Child victims of sexual violence and name suppression*

While policy analysis on these two issues has been ongoing over several months, the timeframes for these specific proposals mean it has not been possible to examine a range of related matters

such as the definition, or age of, consent, or the broader cultural implications of automatic name suppression.

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### **Lack of consultation on specific proposals**

Consultation has not been possible on the specific proposals for which Cabinet agreement is sought. Subject to Cabinet decisions, we anticipate undertaking targeted engagement to inform the effective implementation of the proposals, consistent with the policy intent. This engagement will occur prior to final regulatory proposals being considered by the Cabinet Legislation Committee (LEG).

### **Treaty responsibilities**

Our ability to consult with iwi or Māori has also been limited. Gaps in our analysis and engagement approaches may be able to be addressed in the next phase of work, should the proposals be agreed, prior to final proposals being submitted to LEG.

### **The evidence base and data analysis**

Evidence supporting the problem definitions has been sourced from targeted discussions with some stakeholders, though the extent of this varies between the three issues. If time allowed, a wider range of legal and cultural perspectives would have been sought.

#### *Child victims of sexual violence*

We have reasonable data on the use of non-age-specific provisions to charge alleged offenders when the elements of the offence of sexual violation exist. However, the extent to which questioning of children aged under 12 years about matters of consent occurs in practice is not known – or systematically recorded. Analysis has highlighted the potential detrimental impacts on child complainants, regardless of scale.

We have undertaken targeted engagement with some stakeholders on this issue since mid-2022, including the Chief Victims' Advisor, specialist service providers, court victim advisors, and the New Zealand Police. Crown Prosecutors and the Public Defence Service have also been engaged in a much more limited way.

#### *Name suppression*

Data holdings on the use of name suppression provisions appear to be limited (and potentially do not accurately reflect the number of complainants who successfully apply to have their name suppression lifted). We do not have insights into the extent to which lifting name suppression may be desired, but not acted on. We intend to address this information gap through engagement with lawyers and advocates working closely with those impacted by automatic name suppression.

Further evidence has been sourced from past research (particularly research commissioned by the Chief Victims' Advisor) and targeted engagement with some stakeholders since mid-2022, including the Chief Victims' Advisor, specialist service-providers, academics and cross-government agencies. Crown Law has been engaged in a limited way.

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[REDACTED]

[REDACTED]

## Assumptions underpinning impact analysis

### *Child victims of sexual violence*

A key assumption underpinning our analysis is that aligning the maximum penalty applied to the s132(1) offence of 'sexual connection' with a child under 12 years to the maximum penalty applied to s128B, will not contribute to a substantive increase in the average length of custodial sentences. We intend to test this issue with Police and Crown prosecutors alongside members of the Judiciary.

### *Name suppression*

We assume that most adult sexual violence complainants will want to keep their automatic name suppression in place at the time of trial, but that in explaining the options for lifting name suppression some will want to apply at that time, while others may choose to apply in the post-trial context.

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[REDACTED]

## Level of confidence

Ministers can be reasonably confident in the problem definitions provided for the three issues. While there are differing views on the scale of each issue, the existence of potential harm to even a small group of victims warrants action to strengthen the legal framework.

We have less certainty about the potential efficacy or potential unintended consequences of the proposals recommended in the paper, because of time constraints that have limited stakeholder engagement. Subject to Cabinet agreement, engagement with key stakeholders is planned to examine the strengths and weaknesses of specific proposals, with the intent of informing the final advice on regulatory proposals to be considered by LEG.

We also consider a robust Select Committee process will provide an important opportunity to further ensure there are no unintended consequences to these proposals. It will be critical to provide victim-survivors an avenue to safely and anonymously provide feedback on the proposed changes to the law. This is true of all three issues, Section (9)(2)(f)(iv)

[REDACTED]

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<sup>1</sup> The Backbone Collective. 2017. *Out of the Frying Pan and into the Fire: Women's experiences of the New Zealand Family Court.*

**Responsible Manager(s) (completed by relevant manager)**

Sally Wheeler  
Manager  
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24/03/2023

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24/03/2023

**Quality Assurance (completed by QA panel)**

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment: The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Regulatory Impact Statement prepared by the Ministry and associated supporting material and consider that the information and analysis summarised in the Regulatory Impact Statement **does not meet** the Quality Assurance criteria. This is due to the constraints the proposals were developed under, meaning that there is insufficient evidence to meet the convincing criterion and insufficient consultation on the proposals across all the issues. However, the Panel understand that should the proposals be agreed, officials will consult with the key stakeholders to ensure the best possible implementation of the policy intent.

# Issue one: Strengthening protections for child victims of sexual violence

## Section 1: Diagnosing the policy problem

### 1.1 Context/Background

Sexual violence is a broad descriptor of all unwanted acts of a sexual nature perpetrated by one or more person(s) against another. While sexual violence occurs throughout society, some population groups are at an increased risk – Ministry of Justice data shows that women are six times more likely than men to be victims of sexual violence and Māori are overrepresented as both victims and offenders.<sup>2</sup>

In 2020, more than half of people who reported sexual violence victimisations were children and young people when the offending occurred – 41% of reported offences involved a child or young person (aged under 18 years) and a further 15% were historical childhood victimisations reported as an adult.<sup>3</sup> Notably, 22% of reported cases involved a child aged under 12 years at the time the alleged offending occurred.<sup>4</sup> Sexual violence is the primary reason for a young person participating in a trial as a complainant.<sup>5</sup>

#### Current regulatory framework

##### *Sexual violence offences*

Sexual crimes in New Zealand are dealt with in ss127 to 144 of the Crimes Act 1961. The primary offence is s128B – sexual violation, defined as rape and unlawful sexual connection. This offence comes with the highest maximum penalty (20 years imprisonment).

Sexual violation occurs when *person A rapes or has an unlawful sexual connection with person B*. Whether a rape or unlawful sexual connection occurred depends on consent – for a person to be convicted of this offence, the following two elements need to be proven:

- Person B did not consent to the sexual connection, **and**
- Person A did not reasonably believe person B consented.

This offence may be used to charge alleged offenders, regardless of the age of the victim. When the Crown lays charges under s128B, the prosecutor must prove the offending occurred, as well as the above two elements, beyond a reasonable doubt. This means the defence counsel may raise arguments that either the offending did not occur, OR any sexual activity that did occur was consensual.

##### *Specific age-related sexual offences*

There are also two age-related sexual offences set out in the Crimes Act 1961:

- Section 132 (sexual conduct with a child under 12), and
- Section 134 (sexual conduct with a young person under 16).

Overall, sexual offending against children aged under 12 years attracts greater maximum penalties than those applied to offences against young people aged under 16 years – although in both cases

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<sup>2</sup> Ministry of Justice. 2023. *Attrition and progression of reported sexual violence victimisations in the criminal justice system: Victimisations reported April 2017 – March 2022*. Wellington: Ministry of Justice.

<sup>3</sup> Ministry of Justice. 2023. p 11.

<sup>4</sup> Ministry of Justice. 2023. p.12.

<sup>5</sup> Hanna, K., Davies, E., Henderson, E., Crothers, C., & Rotherham, C. 2010. *Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy*.

the maximum penalties are lower than those available under (non-age-specific) charges of sexual violation.

The defences available under these two sections also differ:

- for sexual conduct with a child under 12 – the law states it is not a defence that a child consented to sexual activity (s132(5)), and
- for sexual conduct with a young person under 16 – there is a defence available if the defendant proves they took reasonable steps to determine, and reasonably believed, that the young person was aged 16 or older at the time of the act and that the young person consented (s134A).

The distinctions between the defences available to different age groups appear to be designed to reflect societal norms about the capacity of children and young people to provide true and informed consent to sexual activity – as distinct from adults. However, the maximum penalties currently available may not align with societal views on the relative seriousness of sexual violence against children and young people, compared to adults.

Table one summarises these offences, maximum penalties, and relevant defences set out in legislation.

**Table one: Summary sexual offences, penalties, and defences**

Section		Offence	Max. penalty (imprisonment)	Defence in legislation
S 128B	Sexual violation	Rape	20 years	None
		Unlawful sexual connection	20 years	None
S 132	Sexual conduct with a child under 12	Sexual connection	14 years	None (s132(5) specifies it is explicitly <i>not</i> a defence that a child under 12 consented)
		Attempts a sexual connection	10 years	
		Indecent act	10 years	
S 134	Sexual conduct with young person under 16	Sexual connection	10 years	S134A: Defendant must prove: 1) they took reasonable steps to determine they were over 16, 2) reasonably believed they were over 16, and 3) that the young person consented

### Sexual violence victims can experience further harm through the criminal justice system

The justice system’s response to victims of sexual violence can exacerbate the effects of the initial trauma caused by the offending and slow or undo psychological recovery. The complainant’s role as a witness during a criminal prosecution means that the trial process is likely to be a difficult experience. However, some aspects of the trial process unnecessarily contribute to poor experiences and can cause secondary victimisation, including intense psychological distress.<sup>6</sup>

Research into the justice system experiences of child and adolescent sexual violence complainants in New Zealand (2021) found that:

- sexual violence misconceptions were used to challenge the plausibility of evidence given by young people, and

<sup>6</sup> Ministry of Justice. 2018. *Improving the justice response to victims of sexual violence: victims’ experiences*. Gravitass Research and Strategy Limited.



- cross-examination was characterised by a leading style of questioning, with defence counsel controlling the content and narrative by routinely suggesting that complainants were lying.

As a result, complainants experienced heightened distress and, at times, the quality of the evidence that they were able to give was compromised.<sup>7</sup>

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

Sexual violence incidents (across all age groups) have very low rates of reporting and prosecution compared to other criminal offences. While the number of reported sexual violence victimisations is growing steadily each year, the New Zealand Crime and Victims' Survey estimated that only 8% of sexual violence offences against adults were reported to Police.<sup>8</sup> (We do not have an equivalent rate for children).

It is likely that the risk of secondary victimisation in the justice system contributes to low reporting rates, and the high rates of attrition between the police investigation stage and trial stage.<sup>9</sup> Further, as noted above, stress and trauma negatively impact the quality of witnesses' evidence in court and may also contribute to difficulty in pursuing prosecution and conviction.<sup>10</sup>

### **Ongoing justice sector activities**

The interests of victims are provided for through regulation and operational procedures. Victims' rights are established under the Victims' Rights Act 2002. The Evidence Regulations 2006 provide for witnesses (including child witnesses) to provide evidence in multiple ways, including by pre-recorded video.

The Ministry of Justice has made a range of operational changes designed to improve complainants' experiences of the justice system, and these are ongoing. Current initiatives include a focus on improving court procedures for both cases of family violence and sexual violence and contributing to actions that support *Te Aorerekura – the National Strategy for the Elimination of Family Violence and Sexual Violence in Aotearoa New Zealand*.

Recent regulatory initiatives include provisions under the Sexual Violence Legislation Act (2021), which amends legislation with the intention of reducing the trauma that sexual violence complainants can experience in court (eg by providing for the re-recording of evidence and providing judges with the ability to prevent harmful or irrelevant lines of questioning). Updated guidelines for prosecutors engaged in sexual violence cases were provided by the Solicitor-General in December 2022.

## **1.2 What is the policy problem or opportunity?**

Ministry data shows that most charges related to sexual connection with a child under 12 years are brought under s128B, regardless of the age of the complainant. Police and Crown prosecutors have told us that this is because of level of culpability associated with this offence, as reflected in the maximum (20-year) penalty available. The use of s128B makes consent a live issue and runs the risk of children being the subject of secondary victimisation through the trial process.

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7 Randell, I. 2021. *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants*.

8 Ministry of Justice. 2022. Survey findings – cycle 4 report: Descriptive statistics. Cycle-4-Core-Report-v0.20-20220628.pdf (justice.govt.nz)

9 Ministry of Justice. 2018. Gravitass Research and Strategy Limited.

10 Cashmore, J. & Shackel, R. 2018. *Evaluation of the Child Sexual Offence Evidence Pilot; Final Outcome Evaluation Report*.

## Use of s128B to charge in cases involving children under 12 years

In practice, prosecutors are likely to charge alleged offenders under s128B when the elements of the offence of sexual violation exist – regardless of the age of the victim. The culpability associated with sexual violation, demonstrated by the corresponding maximum penalty of 20 years imprisonment, recognises the egregious nature of sexual crimes against children. While there are separate age-based offences that cover sexual conduct with children and young people, these are primarily used when the defendant is alleged to have done an indecent act on a child or young person (which is a lesser offence).

In 2021/2022, there were 673 charges of s128B/sexual violation against a child under 12 years old (meaning lack of consent would be an element of the offence that the prosecution needs to prove). In the same period, there were 14 charges made under s132(1)/sexual connection with a child under 12 (where it is not a defence that a child consented and is therefore irrelevant in court).

In the same year, the conviction rate for offending charged under s128B was 49% (vs. 46% 'not proved' – where the person was found not guilty, and where the charge is withdrawn or dismissed).

Ministry data shows that, for sexual offences against children under 12 reported in 2019 and charged under s128B - after two years, 62% had a perpetrator identified, 60% had court action, 20% had been convicted, 18% had a prison sentence, and 25% were still active in court.

In the 10 years prior to 2021/22, 862 people charged under s128B were sentenced to imprisonment for sexual offences against children under 12; the average sentence was for 7 years and 7 months; and sentences ranged from 9 months to 20 years.

## Negative impacts on child victims

An unintended consequence of charging alleged offenders under s128B – sexual violation – is that children are not offered the same protection available under the age-related offence, in which consent is not a possible defence. Child complainants may therefore be vulnerable to a defence counsel's argument or line of questioning that implies the child wanted, asked for, or even enjoyed the sexual activity.

There are mixed views on the extent to which this line of questioning occurs when complainants are under 12 years old (see stakeholder views, below). Regardless of the scale of the issue, victims' advocates and others working in the field have reiterated this issue is significant, and potentially traumatising, for those children involved, who are extremely vulnerable. Parents of child victims of sexual violence have reported that they felt their children were violated through the trial and cross-examination processes and commented that they would not make the same choice to report the offending had they known how traumatising it would be for them and their children.<sup>11</sup>

As noted, complainants in sexual violence trials can experience considerable psychological impacts that can exacerbate pre-existing trauma. In addition to the immediate impacts on children at the time of trial, the incidence and severity of mental illness (such as PTSD, depression and anxiety) is related to a range of poor life outcomes, including mental health, education, and employment, which all carry significant private, social and governmental costs.<sup>12</sup>

We do not have insights into the rate of secondary victimisation that occurs in the court system – and note that data collection would be very complex – the insights we have are research-based. The

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<sup>11</sup> Ministry of Justice. 2018. Gravitas Research and Strategy Limited. Note that this research defined a child as being under 18 years.

<sup>12</sup> For example, Henkhaus, L.E. 2022. The lasting consequences of childhood sexual abuse on human capital and economic wellbeing. *Health Economics*, 31(9), and Wilson, D.R. 2010. Health consequences of childhood sexual abuse. *Perspectives in Psychiatric Care*, 41(1).

negative impacts for some victims have been documented as a longstanding concern in academic literature and, more recently, raised as a concern and consideration by leaders within the justice system.<sup>13</sup>

### *Offending against young people aged under 16 years*

While similar trends exist for young people aged under 16, the scope of this work has been limited to children under 12 years. This is because of the complexities related to consent for the under 16-year age group and the limited time for consultation. Case law has repeatedly upheld that young people under 16 are capable of consenting to sexual activity. Victim advocates and some legal professionals have also noted that young people can and do engage in consensual sex and should not be criminalised for doing so.

### **Range of stakeholder perspectives**

There are differing perspectives on the extent to which children are subject to combative and/or harmful lines of questioning. Most of the New Zealand-based evidence of children being cross-examined about their (lack of) consent is based on the insights shared by advocates, the New Zealand Police, court victim advisors, and through high-profile cases reported by the media.

In contrast, the Public Defence Service does not consider that the use of s128B is causing issues in relation to children, or that the 'defence' is used inappropriately, noting that case law supports the notion that a child does not have the ability to give true consent.<sup>14</sup> However, despite this case law, research suggests that children can and do experience questioning around issues of consent.<sup>15</sup>

### **Root cause of the problem is regulatory failure (unintended consequences)**

As noted, Police and Crown prosecutors have told us that they seek to charge alleged offenders under the offence of sexual violation (set out in s128B) when possible, regardless of the age of the complainant, due to the culpability associated with this offence as demonstrated by the maximum (20-year) penalty available. We consider this reality is an unintended consequence stemming from previous reforms:

- in 1993, the maximum penalty for the offence of sexual violation (s128B) was increased from 14 years' to 20 years' imprisonment. Penalties for other sexual offences were not considered at the time, and
- in 2004, the Government made most sexual offences gender-neutral and raised the maximum penalty available for sexual conduct with a young person under 16, among other changes.

The overall objectives of the 2004 reforms included:

- ensuring that the law relating to sexual offences reflected changes in social attitudes towards sexual matters,
- improving the law's coverage of vulnerable groups (including children and young people),
- ensuring the law would be easier to understand and apply, and
- that the penalties for sexual offending were set at appropriate levels.<sup>16</sup>

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13 Chief District Court Judge Doogue, 2016; Randell et al., 2016 as cited in Randell, I. 2021. *That's a lie: Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants.*

14 For example, *R v Cox* [1996] CA213/96, where the Court of Appeal noted that because consent must be full, voluntary, free and informed, it would only be in 'exceptional if not rare' cases that an 11- or 12-year-old girl could consent to sexual intercourse. Similarly, in *R v Accused* [1998] 16CRNZ 149, the Court of Appeal stated that a judge might dismiss entirely or downplay consent, where the complainant was a mere child (distinguishing this from those aged around 14).

15 For example, Randell et al., 2016 as cited in Randell, I. 2021, although the research covers children and young people and the age distinctions are not always clear.

16 Crimes Amendment Bill (No 2) 2003 (104-1) (explanatory note) at Stage 1.

Hansard records<sup>17</sup> mention that the 2004 Bill removed any doubt as to whether children under 12 could consent, and this was praised as one of its achievements. However, it appears that, based on the objectives and record of debate on the reforms, Parliament did not anticipate the unintended consequence that children under 12 would now be subjected to harmful lines of questioning about consent.

### 1.3 What objectives are sought in relation to the policy problem?

The two primary objectives are to:

- **reduce further harm to child victims of sexual violence**, particularly those participating in sexual violence proceedings, and
- **ensure a more fair and robust justice system** that adequately protects children and young people from sexual violence harm.

## Section 2: Deciding upon an option to address the policy problem

### 2.1 What criteria will be used to compare options to the status quo?

The following criteria have been used to assess the options:

#### *Two primary criteria*

- (1) **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, in particular access to justice and a defendant's right to a fair trial, and
- (2) **Reduces trauma and other harm:** makes participating in the justice system less harmful for victims, thus reducing the risk of further trauma.

#### *Three secondary criteria*

- (3) **Compatibility with pre-existing regulatory systems:** does not represent a significant departure from the current public policy intent of the law,
- (4) **Best use of resources:** delivers best value for money and, where relevant, ensures efficient use of court and judicial time, and
- (5) **Ease of implementation:** can be implemented quickly to give effect to the desired objectives.

Options that meet the secondary criteria identified above and criteria (2) will need to be weighed, and greater consideration given to criteria (1). Preserving defendants' fundamental rights *must* take precedence where (1) and (2) may conflict. This supports the robustness of the trial and outcome, which in turn support the broader justice interests (and in turn, the interests of victims).

### 2.2 What scope will options be considered within?

While stakeholder views have informed the problem definition, time constraints and limited stakeholder engagement mean that we have necessarily focused on actions that can be taken to improve the efficacy of current regulatory provisions, consistent with the underpinning policy intent. Subsequently, we have had not been able to consider the full range of options, including the possibility of addressing issues that are more complex or far-reaching in nature.

### 2.3 What options are being considered?

#### *Option one - Status quo*

Existing provisions in the Crimes Act 1961 mean that, in cases of sexual violence against children aged under 12 years, prosecutors may charge alleged offenders under either:

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<sup>17</sup> Crimes Amendment Bill No (2) 2004 (first reading).

- s128B ‘sexual violation’ (which carries a maximum penalty of 20 years imprisonment), or
- s132 ‘sexual conduct with a child under 12’ (which carries a maximum penalty of 14 years imprisonment), or
- s134 ‘sexual conduct with a young person under 16’ (in practice, this offence is not often used when the victim is under 12 years but can be used as necessary when a case involves repeat offending that continues as a child grows older, or the exact age of the child at the time of offending cannot be determined).

When charges are laid under s128B, ‘consent’ is a live issue that may come up in questioning, as this is a critical element of the offence itself.

Maintaining the status quo does not fully deliver on the objectives of reducing further harm to child victims of sexual and a fair and robust justice system, from a victim-centred perspective.

### ***Option two – Children under 12 cannot consent to sexual activity***

This option seeks to clarify that children under 12 cannot give true and informed consent to sexual activity, ensuring that children are not questioned in court about whether they wanted, agreed to, or enjoyed sexual activity.

This could be achieved in several ways, including amending s128B to direct prosecutors away from using it as the primary offence to charge alleged offenders (and towards the age-related provisions of s132). It may also be possible to amend the definition of consent (s128A) to make it clear that a child aged under 12 years is not capable of consenting to sexual activity.

On its own, this option would reduce the further harm to child victims of sexual violence compared to the status quo. However, it would not fully achieve the objective of ensuring a fair and robust justice system, as the anomaly in maximum penalties available under s132 would remain. This would become a problem when, for example, there is a violent or otherwise egregious case that would normally result in a high penalty following conviction.

### ***Option three – Align maximum penalties***

Under this option, the maximum penalty associated with sexual connection with a child under 12 years (s132(1)) would be adjusted from 14 years to 20 years, to align the with maximum penalty available for the offence of sexual violation (s128B).

This option is intended to encourage the use of s132(1) of the Crimes Act – sexual connection with a child under 12 – as the primary offence for the rape of a child.

We do not anticipate that aligning the maximum penalties will drive the average length of custodial sentences up, rather it would serve to transfer existing sentences from s128B, to the age-appropriate provisions under s132. This option does not include increasing the penalties to other offences under this section – attempt to have sexual connection or indecent act (132(2) and 132(3), respectively).

Compared to the status quo, this option would assist to reduce the further harm to child victims of sexual violence and ensure a fair and robust justice system. While the ‘incentive’ of a higher penalty would be removed, the possibility of children being questioned about ‘consenting’ to sexual activity remains as a low but prevailing risk.

### ***Option four – Combination of options two and three (preferred)***

This option would amend the Crimes Act to both: (1) make it clear that children under 12 years old are not able to consent to sexual activity; and (2) align the maximum penalty for sexual connection with a child under 12 with that of sexual violation (20 years imprisonment).

This option would make it absolutely clear that s132 must be used as the primary offence for sexual connection with a child under 12, protecting vulnerable child witnesses and contributing to a fair and robust justice system.

#### **Option five – education and training (non-regulatory)**

This is a non-regulatory option, focused on improving the guidance and education provided to prosecutors, defence lawyers and the judiciary to encourage the use of the age-appropriate s132 offence and to reduce the likelihood of harmful lines of questioning. It may be possible to add to existing guidance, such as *The Solicitor-General's Guidelines for Prosecuting Sexual Violence* (2022).

This option has the potential to enhance the status quo through training awareness of the provisions available and how they can be used to better protect child victims from further trauma and contribute to a fair and robust justice system.

#### **Distributional population impacts of options**

The distributional impacts of all options reflect the demographic profiles of victims and perpetrators of sexual violence against children:

- 86% of people who reported sexual violence victimisation in 2020 were female,
- Māori are overrepresented as child victims of sexual violence (25% in 2020)<sup>18</sup>,
- Māori are also overrepresented amongst those imprisoned for sexual offences against children under 12 (33% in 2021/22), and
- in 2020, 26% of identified perpetrators of sexual violence were family members (43% were known to each other but non-family members).<sup>19</sup>

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18 There are significant limitations with data on the ethnicity of victims – as 37% are recorded as 'unknown'.

19 Ministry of Justice. 2023. *Attrition and progression of reported sexual violence victimisations in the criminal justice system: Victimisations reported April 2017 – March 2022*. Wellington: Ministry of Justice.

## 2.4 How do the options compare to the status quo/counterfactual?

	<i>Option 1 – Status Quo</i>	<i>Option 2 – children cannot consent</i>	<i>Option 3 – align penalties</i>	<i>Option 4 – combine options 2 and 3 (preferred)</i>	<i>Option 5 – education and training</i>
<i>Fairness and justice</i>	0	+	++	++	+
<i>Reduces trauma and harm</i>	0	++	+	++	+
<i>Compatibility</i>	N/A	+	+	++	0 N/A
<i>Use of resources</i>	N/A	0	0	0	0
<i>Ease to implement</i>	N/A	0	0	0	0
<i>Overall assessment</i>	N/A	+1 1/2	+1 1/2	+2	+1

**2.5 What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

**Option four is the Ministry’s preferred approach** – amending legislation to (i) make it clear that children under 12 years are not able to consent to sexual activity; and (ii) align the maximum penalty available for sexual connection with a child under 12 years with that of sexual violation (20 years imprisonment). The approach makes the policy intent explicit – leaving no room for doubt – and balances the interests of young victims with a fair and robust justice system. There may be a marginal fall in the attrition of cases because of better use of the protections offered to children. As noted, we do not anticipate that aligning the maximum penalties would drive the average length of custodial sentences up, rather it would serve to transfer existing sentences from s128B, to the age-appropriate provisions under s132. However, these assumptions need to be tested with key stakeholders.

Option two, which would make it clear that a child under 12 could not consent to sexual activity alone, would not adequately address the issue of prosecutors seeking to utilise s128B as a means of accessing the longer maximum penalties. Option three, which focuses solely on aligning maximum penalties across s128B and s132 is more likely to change prosecutor behaviour but does not signal (to the defence) that children should not be questioned about ‘consent’. Non-regulatory approaches (option five) are not likely to adequately incentivise the change in practice sought.

**What are the marginal costs and benefits of the option?**

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
<i>Police/Crown prosecutors</i>	<p>May result in ongoing additional costs as more cases come to trial (reduction in current attrition rates), requiring additional prosecutor time.</p> <p>Our assumption is that the increase in caseloads will be marginal.</p> <p>No immediate risks identified.</p> <p>Low certainty due to lack of consultation.</p>	Monetisable (unquantified)	Low
<i>Court system</i>	<p>Potential increase in cases going to trial will increase demands on court time with ongoing cost and timeliness implications.</p> <p>As above, our assumption is that the increase in caseloads will be marginal.</p> <p>No immediate risks identified.</p> <p>Low certainty due to assumptions about caseloads.</p>	Monetisable (unquantified)	Low
<i>Ministry of Justice</i>	<p>One-off implementation costs in the form of costs of preparing and delivering information on changes for prosecutors, defendants and court staff and the judiciary.</p> <p>Assumption that prosecutors will have a high-level of compliance with new provisions.</p> <p>No immediate risks identified.</p> <p>Medium certainty based on internal engagement.</p>	Monetisable (unquantified)	Medium
<b>Total monetised costs</b>		N/A	
<b>Non-monetised costs</b>		N/A	



Additional benefits of the preferred option compared to taking no action			
<i>Child complainants/ victims</i>	Reduced personal costs resulting from secondary victimisation in the justice system, including potential adverse longer-term health, education, employment and justice outcomes.  Medium certainty due to documented evidence base on potential harms.	Monetisable (unquantified)  Non-monetisable (medium/high)	Medium
<i>Justice system</i>	Potential marginal benefits via reduced court and judicial time, resulting from shorter court proceedings, where examination of 'consent' issues not permitted.  Reduced secondary victimisation may improve society's trust and confidence in the justice response to sexual violence.  Low certainty due to limited implementation planning.	Monetisable (unquantified)  Non-monetisable (unquantifiable)	Low  Medium
<i>Wider society</i>	Over time, more sexual offenders may be held to account for their crimes and there may be fewer repeat offenders.  Society as a whole will benefit from a reduction in the cumulative costs associated with the poor life outcomes experienced by victims who have been further traumatised.  Certainty limited by understanding of medium to long term impacts.	Non-monetisable (unquantifiable)	Low/Medium
<b>Total monetised benefits</b>		N/A	
<b>Non-monetised benefits</b>		Medium/High	

## Section 3: Delivering an option

### 3.1 How will the new arrangements be implemented?

We intend to introduce a bill this parliamentary term to strengthen the legal protections available to victims of **Section (9)(2)(f)(iv)** sexual violence. Transitional arrangements will provide that the new provisions apply only to proceedings for which charges have been filed after commencement.

This proposal aims to change the charging practice of prosecutors away from s128B and toward s132(1) when the victim is under 12 years old, meaning children in sexual violence trials would not be subject to harmful lines of questioning about consent. The judiciary would be responsible for the active enforcement of the new arrangements, for which guidelines will need to be developed.

The Ministry of Justice will be responsible for the education, and communication of this change by updating bench books, prosecutors, defence lawyers, the judiciary, Court Victim Advisors/Sexual Violence Victim Advisors, and the New Zealand Police. The Solicitor-General Guidelines for Prosecuting Sexual Violence may also be updated.

The Ministry of Justice will update the Court Management System with any potential amended penalties. While we will work closely with cross-agency colleagues on any integration issues/system changes, it is highly unlikely this will occur.

### 3.2 How will the new arrangements be monitored, evaluated, and reviewed?

Business-as-usual data collection and assessment processes (utilising the Case Management System) will support implementation monitoring. A monitoring plan will be developed as part of implementation planning.

We anticipate monitoring will include analysis of sentencing outcomes under the amended legislation compared to the current arrangements, alongside monitoring of the number of cases charged and attrition rates.

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## Issue two: Strengthening the autonomy of adult victims of sexual violence

### Section 1: Diagnosing the policy problem

#### 1.1 Context/Background

As noted in the context of the first issue, the justice system's response to victims of sexual violence can exacerbate the effects of the initial trauma caused by the offending, and slow or undo psychological recovery. The relatively low rates of reporting and prosecution of sexual violence incidents reflects, at least in part, victims' unwillingness to take part in the justice system – particularly if they perceive that they have little to gain from it.

#### Current regulatory framework

Sexual violence complainants' identities (and defendants' identities in certain sexual cases where publication would risk identifying the complainant) are automatically suppressed under sections 201 and 203 of the Criminal Procedure Act 2011. The policy intent is to protect the complainant (s203(5)).

The court may permit publication of the complainant's identity (by court order s203(3)) so long as:

- a complainant aged 18 years or older applies to the court for such an order, and
- the court is satisfied that the complainant understands the nature and effect of his or her decision to apply to the court for the order, and
- where publication of the complainant's identity may lead to the defendant being identified, the defendant's identity is not suppressed (s203(4)).

The impact of automatic name suppression is that no person can publish the name or any identifying details of the complainant, meaning that even if a victim wants to speak out about their experience, they are unable to do so.

The impact of lifting automatic name suppression is enhanced autonomy for the complainant, but there are complexities and potential risks that may arise in some cases, for example, if there are multiple victims in a case and not all want their suppression lifted, or if lifting suppression reveals the defendant's identity and causes them undue hardship.

#### *Link to suppression of defendant's identity*

The general suppression provisions also provide that one of the grounds for suppressing a defendant's identity is that publication would be likely to lead to the identification of another person whose name is suppressed by order or by law (s200(2)(f)). In sexual violence cases, a defendant's identity will sometimes be suppressed because identifying the defendant will lead to the complainant being identified in breach of s203.

A defendant's identity is also automatically suppressed in cases of incest or sexual conduct with a dependent family member – which is intended to protect the complainant (s201(2)).

Section 203(5) provides that where the court has permitted publication of the complainant's identity, that order will cease to have effect if it leads to the identification of the defendant and the defendant successfully applies to the court for a suppression order.

### *Victims' rights*

Complainants have a right to receive information related to the case, under s12 of the Victims' Right Act 2002. In particular, s12(ca) specifies that victims should be provided with information about 'the possibility (if any) of the court making an order prohibiting the publication of identifying information about the victim, and the steps that the victim may take in relation to the making of that order'. However, the provision does not delegate whose responsibility this is, nor does it explicitly refer to automatic suppression in sexual violence proceedings (noting that it would be difficult for the legislation to list all possible scenarios in which information should be provided to victims).

### **Supporting guidance**

*The Solicitor-General's Guidelines for Prosecuting Sexual Violence*<sup>20</sup> state that adult complainants should be advised of their ability to have automatic suppression of their own name lifted (paragraph 6.11). The Guidelines also recommend that responsibility for providing advice to the complainant may best sit with the prosecutor, or officer in charge, on the prosecutor's behalf (paragraph.6.2) – and should assume 'presumptive responsibility'.

Court victim advisors are available to complainants in sexual violence proceedings to provide support and information on the court process. However, this is an optional resource that some complainants may not use.

### **Ongoing Justice Sector activities**

The Ministry of Justice, and wider Justice Sector, has a programme of work underway to improve the experience of victims in the justice system. This includes operational work to improve victims' experiences with court procedures in cases of family violence and sexual violence, contributions to *Te Aorerekura* and the wider implementation of *Te Ao Marama*, and giving effect to the new regulatory provisions introduced under the Sexual Violence Legislation Act (2021).

## **1.2 What is the policy problem or opportunity?**

### **Automatic name suppression is not wanted by all victims**

The policy intent behind automatic name suppression in sexual violence proceedings is to protect the complainant. However, some victims do not want or need such protection and may wish to speak publicly about their experience.

While it may be broadly accepted that privacy for sexual violence complainants is a valid exception to the principle of open justice, tensions do exist. High (2022) notes that there has been a gradual evolution towards recognising the rights of victims generally, and towards protection of both privacy and autonomy interests of sexual violence complainants specifically.<sup>21</sup>

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20 Crown Law. 2022. *Solicitor-General's Guidelines for prosecuting sexual violence*. Solicitor-Generals-Guidelines-for-Prosecuting-Sexual-Violence-Offences-2022.PDF (crownlaw.govt.nz)

21 High, A. 2022. Constraints on sexual offence complainants. *New Zealand Law Journal*: 144.

The 2019 report of the Chief Victims Advisor to Government, *Te Tangi o te Manawanui Recommendations for Reform*, notes that “some victims believe some offenders use the excuse of ‘protecting’ the victims to keep the offender’s name suppressed. These examples are particularly highlighted when the victim and offender have a close relationship”.<sup>22</sup>

This sentiment has been reflected in other evidence, which highlights that the automatic nature of name suppression can leave victims feeling they have no power.<sup>23</sup> Victim advocates have noted that barriers to victims being able to exercise choice about name suppression can amplify the trauma they have already experienced, and the ability to lift name suppression is seen by some as an important part of a victim’s healing process.

Media commentary<sup>24</sup> calling for regulatory reform reflects views that name suppression should be a choice and should be available to victims at no cost.

We do not have clear insights into the relative proportion of adult sexual complainants who may wish to lift their name suppression in the New Zealand context. However, Canadian research indicates that while almost all sexual assault complainants favour anonymity at the onset of criminal proceedings, as many as 30% ultimately feel constrained by, and want to be free of, anonymity orders.<sup>25</sup>

### **Victims are not consistently made aware of options to request lifting of name suppression**

Victims can have difficulty lifting name suppression at the time of trial and after proceedings have concluded. It is apparent that processes are not clear and place a procedural burden on complainants that can be difficult to navigate and costly.

In 2019, the Chief Victims’ Advisor recommended that the Government review the name suppression process – to make it easier for victims to opt out of name suppression, and at no cost. It was also recommended that victims be provided with legal advice on their rights and the long-term implications of name suppression.<sup>26</sup>

#### *Barriers to lifting name suppression while the trial is in process*

Victims can request that their name suppression be lifted at the time of the trial. In this scenario, the prosecutor can take the necessary steps on behalf of the complainant – minimising the administrative burden on the victim (and at no cost).

However, it is not clear how consistently complainants are advised of their right to request that their automatic name suppression be lifted during the trial process. Discussions with those

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22 Chief Victim’s Advisor to Government. 2019. *Te Tangi o te Manawanui: Recommendations for reform*. <https://chiefvictimsadvisor.justice.govt.nz/assets/Uploads/Te-Tangi-.pdf>.

23 A submission on Section 194K of Tasmanian Evidence Act 2001 by End Rape on Campus Australia & Marque Lawyers includes accounts from 14 survivors describing experiences, either in not being able to tell their story publicly, or in being able to speak out about the abuse they experienced.

24 Articles that call for reform include, but are not limited to:

- <https://www.stuff.co.nz/national/crime/106211394/advocate-sex-abuse-victims-shouldnt-have-to-pay-to-get-name-suppression-lifted>
- [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11390990](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11390990)
- <https://www.stuff.co.nz/national/crime/7329352/Incest-name-suppression-battle>
- <https://www.newstalkzb.co.nz/news/crime/high-court-lifts-name-suppression-on-sexual-slavery-victim/>
- <https://sst.org.nz/christchurch-sex-offender-protected-by-name-suppression-madness/>

25 Taylor, L. How the criminal code ‘protects’ sexual assault complainants from themselves and constrains their participation in the news media. In Taylor, L. & O’Hagan, C. 2017. *The unfulfilled promise of press freedom in Canada*. Toronto University of Toronto Press.

26 Chief Victim’s Advisor to Government. 2019, p 42.

closely involved with court processes suggest that approaches to lifting automatic name suppression are (at best) ad hoc and inconsistent in nature. For example, we heard of name suppression being lifted following a verbal request to a judge (and the judge confirming with the victim that was what they wanted). In other instances, victims have written letters, or memoranda have been prepared on their behalf, setting out why they want to lift their name suppression and confirming that they understand the impact. We also heard that requests to lift name suppression are typically initiated by individual complainants – rather than in response to advice that applying to lift name suppression is an option.

The Ministry of Justice’s data holdings reflect that during the 2013/14 to 2021/22 period, the number of court directions to permit the publication of a victims’ name and/or particulars while the trial is in process ranged between nil and four each year.<sup>27</sup> It is not clear how accurate these figures are, and the low numbers may reflect inconsistent processes and subsequent recording practices. Further, we do not have insights into the number of complainants who would have applied, had they known the option was available to them.

### *Barriers to lifting name suppression following a trial*

Complainants may also apply to have their name suppression lifted post-trial – and there is no time constraint on this. We have heard that victims can find the process difficult and, at times, costly.<sup>28</sup> This may reflect the fact that there is no publicly documented process that advises potential applicants of the steps that should be followed. As a result, we have heard some victims seek legal advice alongside assistance to apply for a court order (legal aid is not available for this purpose). Concerns have also been raised that the process of requiring victims to return to court to obtain a s203 order may not be appropriate, particularly if they have been traumatised by the court trial.<sup>29</sup>

Ministry data holdings on lifting name suppression post-trial capture five instances of court directions for the publication of a victim’s name and or particulars in the 2004/05 to 2021/22 period. It is not clear how accurate the data is, and it is otherwise difficult to gauge the scale.

If a victim wants to apply to lift their name suppression months or years after trial has concluded, the prosecutor, defence counsel, and judge familiar with the case are no longer guaranteed to be available for consideration of the application. This heightens complexities related to cases with multiple victims, defendant’s rights, and cultural considerations (such as Te Ao Māori processes, and how automatic suppression may limit tino rangatiratanga). These complexities will require wider public consultation to consider appropriately, likely requiring shifts in funding settings and potentially unveiling additional options. While this is not possible in the constrained timeframe available, we do consider there are options that will both address barriers to lifting suppression at the time of court proceedings and mitigate some of the pain points associated with lifting suppression after trial has concluded.

### **Range of stakeholder perspectives**

We have had ongoing conversations with specialist service providers, victim advocates, Te Puna Aonui, the New Zealand Police, Ministry of Social Development, Oranga Tamariki, Accident Compensation Corporation, and Crown Law about issues with automatic name suppression in sexual violence proceedings. Enhancing autonomy for adult victims in this area

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27 Higher rates were recorded for the 2004/05 to 2012/13 period – ranging from a low of four, through to high of 22 in 2006/07 – although these reflect several cases involving multiple victims.

28 For example, engagement undertaken by the Chief Victim’s Advisor to inform the 2019 report, *Te Tangi o te Manawanui: Recommendations for reform*, found that “some victims have spent many thousands of dollars attempting to have their name suppression lifted so that the public can know who harmed them”, p 17.

29 High, A. 2022.

is largely supported across these stakeholders. However, we are aware that there are mixed views on the cultural implications arising from automatic name suppression – and options to lift it. These will need to be further examined and consulted on through the Bill process, as discussions to date have been limited in scope.

**Root cause of the problem is a lack of awareness/information**

The root cause of the problem is a lack of information provided to adult complainants about their option to apply to lift name suppression. While the Criminal Procedure Act 2011 makes provision for name suppression to be lifted, this option is not routinely explained to complainants at the time of the trial (despite the supporting provisions in the Victims’ Rights Act 2002). The Solicitor-General’s guidance (both the latest 2022 version and the 2019 version) states that adult complainants should be advised of their ability to apply to have their name suppression lifted – but this does not appear to routinely happen. Further consultation is required to understand why this is the case.

There is also little information available for those who have a suppression order already in place and have decided they would now like to be able to speak out. This can prompt victims to seek legal advice and support in applying to lift name suppression, at their own cost.

**1.3 What objectives are sought in relation to the policy problem?**

The three primary objectives are to:

- **give effect to the law**, by providing adult victims of sexual violence with a clear opportunity to apply to lift their name suppression,
- **reduce trauma experienced by adult victims of sexual violence**, by supporting victims to navigate the court process to exercise their choice to request to lift their name suppression, and
- **ensure a more fair and robust justice system** that maintains adequate protections for victims of sexual violence.

**Section 2: Deciding upon an option to address the policy problem**

**2.1 What criteria will be used to compare options to the status quo?**

The following criteria have been used to assess the options:

**Two primary criteria**

- (1) **Ensures fairness and justice:** upholds the rule of law and ensures fair and just processes and outcomes for all parties, in particular access to justice and a defendant’s right to a fair trial, and
- (2) **Reduces trauma and other harm:** makes participating in the justice system less harmful for victims, thus reducing the risk of further trauma.

**Three secondary criteria**

- (3) **Compatibility with pre-existing regulatory systems:** does not represent a significant departure from the current public policy intent of the law,
- (4) **Best use of resources:** delivers best value for money and, where relevant, ensures efficient use of court and judicial time, and
- (5) **Ease of implementation:** can be implemented quickly to give effect to the desired objectives.

Options that meet the secondary criteria and criteria (2) need to be weighed against, and greater consideration given to, criteria (1). Preserving defendants’ fundamental rights *must*

take precedence where (1) and (2) conflict. This supports the robustness of the trial and outcome, which in turn support the broader justice interests (and in turn, the interests of victims).

## **2.2 What scope will options be considered within?**

While stakeholder views have informed the problem definition, time constraints and limited stakeholder engagement mean that we have necessarily focused on actions that can be taken to improve the efficacy of current regulatory provisions, consistent with the underpinning policy intent. Subsequently, we have not been able to consider the full range of options, including the possibility of addressing issues that are more complex or far-reaching in nature.

## **2.3 What options are being considered?**

### ***Option one - Status quo***

Under existing legislative provisions sexual violence complainants' identities are automatically suppressed (s201 and s203 of the Criminal Procedure Act 2011). Provision is made for adult complainants to apply to have their name suppression lifted via court order, subject to criteria being met (ss203(3) and 203(4)).

This option helps to meet the objective of a fair and robust justice system by maintaining adequate protections for victims of sexual violence, but has limited ability to support victims to exercise their choice to request that their name suppression be lifted.

### ***Option two – An 'opt-in' approach to name suppression***

This option represents a fundamental shift in the approach to complainant name suppression – rather than being automatic, individual complainants would be asked if they would like their name suppressed on a case-by-case basis (c.f. the Canadian approach).

The approach places an emphasis on complainants' ability to exercise free choice, over and above the objective related to a fair and robust justice system that maintains adequate protections for victims of sexual violence. It would not offer complainants' the same level of protection afforded under the status quo, nor would it guarantee the rights and interests of defendants are appropriately considered.

### ***Option three – An 'opt out' model with an explicit process for decision-making (preferred)***

Under this option, the Criminal Procedure Act would be amended to ensure that complainants are provided with an explicit opportunity to indicate if they would like to apply to have their name suppression lifted as part of the court proceedings. The final decision would remain with the presiding judge.

This approach would enhance the autonomy of complainants, while ensuring that current provisions remain in place for those aged under 18 years, alongside other victims who would like to retain their name suppression – ensuring adequate protections are in place. It would strengthen and 'codify' the status quo through the introduction of clear processes with legislative backing.

### ***Option four – enhanced information, training and education (non-regulatory)***

Under this option, a range of operational actions would be implemented to improve adult complainants' awareness of their ability to apply to have their name suppression lifted. It may include initiatives to raise prosecutors' awareness of existing legal provisions and guidance, together with improvements to information available to complainants (eg on government administered victims' information websites).

This approach would go some way to enhancing the status quo through raising the awareness of key players.

### **Distributional population impacts of options**

The distributional impacts of all options reflect the demographic profile of victims and offenders of sexual violence against adults, Ministry of Justice data provides:

- 86% of people who reported sexual violence victimisations in 2020 were female,
- Māori are overrepresented as victims of sexual violence - 22% in 2020 (although ethnicity data is not always collected from victims and 31% were recorded as 'unknown' in this period), and
- 26% of identified offenders of sexual violence were family members (43% were known to each other but non-family members).



## 2.4 How do the options compare to the status quo/counterfactual?

	Option 1 – Status Quo	Option 2 – ‘opt-in’ model	Option 3 – ‘opt-out’ model (preferred)	Option 4 – training and education
Fairness and justice	0	+	++	0
Reduces trauma and harm	0	--	++	+
Compatibility	N/A	--	++	0 N/A
Use of resources	N/A	--	-	0 No significant impact.
Implementation ease	N/A	0	0	0 Would require appropriate resourcing to support education and training.
Overall assessment	N/A	-2	+1 1/2	+1/2

## 2.5 What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

**Option three is the Ministry’s preferred approach** – strengthening current provisions by amending the Criminal Procedure Act to ensure that adult complainants are provided with an explicit opportunity to apply to have their name suppression lifted as a part of the court proceedings. The approach retains the current safeguards in place for all victims of sexual violence, recognising that for the majority, name suppression is likely to provide welcome privacy at the time of trial. Defendants’ rights and interests would remain a consideration for all presiding judges.

Option two, which would require a proactive decision by a complainant to apply for name suppression, represents a significant shift away from the current policy intent and carries related risks of some complainants ‘missing out’ on the protections currently offered. Non-regulatory approaches (option four) are, on their own, unlikely to achieve the consistency in approach sought.

### What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
<i>Police and Crown prosecutors</i>	<p>Marginal ongoing additional costs related to prosecutors taking the time to explain option to complainant and act on direction given (where lifting of suppression requested).</p> <p>Assumption that there will be a high compliance rate (supported by education and information).</p> <p>Low risk of high uptake, resulting in significant additional costs.</p> <p>Low certainty due to lack of consultation with prosecutors.</p>	Monetisable (unquantified)	Low
<i>Court system</i>	<p>Potential marginal ongoing increase in court time for judges to respond to request to lift name suppression – also potential for request to be challenged by defendant, resulting in delays in proceedings and additional court time.</p> <p>Assumption that there will be a high compliance rate (supported by education and information).</p> <p>Risk of significant number of defendants challenging applications.</p> <p>Low certainty due to lack of consultation with judiciary.</p>	Monetisable (unquantified)	Low
<i>Ministry of Justice</i>	<p>One-off implementation costs in the form of costs of preparing and delivering information on changes for prosecutors, defendants and court staff, the judiciary and the media. Information for victims would also be updated (eg sexualviolence.victiminfo.govt.nz).</p> <p>Assumption that existing information and communication platforms can be used.</p> <p>Medium certainty based on internal engagement.</p>	Monetisable (unquantified)	Medium
<b>Total monetised costs</b>		N/A	
<b>Non-monetised costs</b>		N/A	

Additional benefits of the preferred option compared to taking no action			
<i>Adult complainants/victims</i>	<p>Ability to give effect to personal choice and 'reclaim power' in a timely way and potential reduction in severity of trauma experienced and long-term impacts.</p> <p>Victims may feel better supported and heard in the justice system.</p> <p>Risk that some victims may be overwhelmed by the need to make a decision.</p> <p>Medium certainty due to documented evidence base.</p>	Non-monetisable (high)	Medium
<i>Justice system</i>	<p>Potential marginal ongoing benefits via reduced court and judicial time, resulting from clear in-trial processes.</p> <p>Assumption that in-court processes can be streamlined and will be relatively straightforward.</p> <p>Risk that this will be offset by longer proceedings resulting from challenges by defendants.</p> <p>Low certainty due to limited implementation planning.</p>	Monetisable (unquantified)	Low
<i>Wider society</i>	<p>Over time, more sexual offenders may be held to account for their crimes and there may be fewer repeat offenders.</p> <p>Society as a whole will benefit in an ongoing way from a reduction in the cumulative costs associated with the poor life outcomes experienced by victims who have been retraumatised.</p> <p>Certainty limited by understanding of medium-longer term impacts.</p>	Non-monetisable (unquantifiable)	Low/Medium
<b>Total monetised benefits</b>		N/A	
<b>Non-monetised benefits</b>		High	

## Section 3: Delivering an option

### 3.1 How will the new arrangements be implemented?

We intend to introduce a Bill this parliamentary term to strengthen the legal protections available to victims of **Section (9)(2)(f)(iv)** sexual violence. Transitional arrangements will provide that the new provisions apply only to proceedings for which charges have been filed after commencement.

The proposal related to name suppression codifies existing operational practice, meaning there will be little to no change to current responsibilities for the Crown prosecutor and court registry staff. Subject to consultation with the judiciary, a new step may be added to the process, which could have the judge presiding over the case ensure the complainant has been advised of their options relating to the lifting of suppression orders and confirm their decision.

The Ministry of Justice will be responsible for communicating the codified process by updating court staff guidance, media guidelines, bench books, the Victims Information website, [sexualviolence.victiminfo.govt.nz](http://sexualviolence.victiminfo.govt.nz), and NGOs and specialist service-providers. This will likely be covered by baseline funding, but additional funds may be required to ensure public-facing information is available in te reo Māori and accessible formats.

The net result of this change may result in more complainants seeking to lift their name suppression both before and at the time of trial. There is a risk this could elongate disposal rates, as applications made pre-trial will require additional court proceedings, and applications could be appealed, meaning a conference in chambers is required. This extent of this potential impact on disposal rates is unknown, as is the potential impact on the number of post-trial applications. However, if increased awareness does result in more complainants seeking to lift

suppression before or during trial, this could lessen the number of people who pursue post-trial applications.

### 3.2 How will the new arrangements be monitored, evaluated, and reviewed?

A monitoring plan will be developed as part of implementation planning. We anticipate that the introduction of a 'codified' process for asking victims if they would like to apply to have their name suppression lifted will support improved data collection (utilising the courts' Case Management System). Business as usual data collation and assessment processes will support implementation monitoring.

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Section (9)(2)(f)(iv)



**Section (9)(2)(f)(iv)**