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Sexual Violence Bill 2019

Submission from:

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We request the opportunity for two representatives of TOAH-NNEST to speak to this submission in person at the Select Committee.

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Background

Te Ōhaakii ā Hine – National Network Ending Sexual Violence Together (TOAH-NNEST) is a national network that leads and coordinates both the prevention of sexual violence and the provision of high-quality specialist services to those impacted by sexual violence. We are a Te Tiriti-based organisation and operate with a two whare model. Each whare, Ngā Kaitiaki Mauri and Tauiwi Caucus, work according to their own world views and in relationship with each other towards the common goal of ending sexual violence.

Our membership includes 48 not-for-profit community organisations that provide specialist sexual violence prevention and support services to those impacted by sexual violence (including Kaupapa Māori organisations). Our membership includes organisations that work with those who engage in sexually harmful behaviour, as well as organisations that support those who are harmed. We also have as members 92 individuals, who also work in this sector and relevant allied community organisations.

As practitioners working in the field of sexual violence on a day to day basis, we understand the impacts of sexual violence on victims/survivors, perpetrators, whānau, families and communities. We are interested in contributing to the development of a system which achieves justice and assists those impacted to achieve healing and recovery.

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TOAH-NNEST's submission will start by stating some of the current and historical issues for Māori and the reflections on the current criminal justice response. Then we will present our specific views on the proposed bill.

Throughout our submission we will refer to the complainant as victim/survivor as, in our professional practice, we work with their experience and how they choose to identify themselves.

We welcome this proposed Sexual Violence Bill. It is long overdue.

Considerations on the Current Criminal Justice Response

Te Ao Māori Definition of Sexual Violence

The current criminal justice system lacks cultural safety to meet the unique needs of Māori victims/survivors and their whānau. The current justice system is unfamiliar and difficult to navigate and is completely at odds with traditional Māori practices of dealing with sexual violence. Evidence suggests that prior to colonisation sexual violence was not tolerated or as prevalent in Māori society as it is currently. (Mikaere, 1994; Durie, 2001)

Mainstream definitions of sexual violence focus on the idea that it is a forced or coerced physical act that is experienced by a victim. However, for Māori sexual violence is understood to be not just a violation of the body but also a violation of a person's mana, creating spiritual and collective impact upon the wider whānau.

Māori view mana as a form of intrinsic strength that each individual holds within themselves. It is also derived from their ancestors and can then be passed on to subsequent generations. There is no single definition for mana and it will generally have different meanings among individuals. Because of this when sexual violence occurs, it is viewed as a collective violation of the mana of the victim/survivor, their whānau, hapū and iwi. Thus, it becomes an intergenerational pain experienced by both our ancestors and descendants. This act of intergenerational pain has been recognised in Waitangi Tribunal Claims, particularly in the case of Parihaka.

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Reasons Māori do not Report

- We know that 9 times out of 10 Māori have no desire to report to a colonial system that they view as disrespectful and dismissive of Māori worldview and tikanga. The Law Commission's findings on Māori customary law, notes that the dominance of colonial values and the lack of Māori presence, in terms of workforce and cultural practices, within the justice system contribute to the fear of increased injustice.
- Institutional and systemic racism shows no respect to the tangata whenua of the land. When we discuss institutional racism, we refer to the disproportionately high rates of convictions and victimisation for Māori, as explained in the MOJ Attrition and Progression report, 2019 (Ministry of Justice, 2019). However, not all forms of racism experienced by Māori in the courtroom can be analysed through numbers.
- The current system operates from the belief that harm is only experienced by victims. In Māoridom there is an integral belief that when sexual violence occurs, it is not just the immediate victim that experiences harm but also their whānau, hapū and iwi.
- The Westminster system focuses on punishment and fails to consider the healing process that must occur alongside punishment in order to restore mana. For many of our wāhine who come to us experiencing violence, those victimising them are often intimate partners or those known to their whānau. As a consequence, they want their abuser to seek help so that they may begin to take accountability for their actions and eventually work to repair their relationships.

In Māoridom, there are five factors to accountability

1. Accountability to the Creator
2. Accountability to our ancestors.
3. Accountability to your Iwi
4. Accountability to your Hapū
5. Accountability to your Whānau

Need for Significant Change

There is significant change required in order to create an equitable justice system for all but we welcome this bill as a first step towards eliminating sexual violence in Aotearoa. We draw attention to the work of the Chief Victim Advisor for the Ministry of Justice, Dr Kim McGregor,

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and support the four broad, high-level recommendations for Government to move victims to the centre of the system and to shift from a purely adversarial system to one that includes more inquisitorial, restorative, therapeutic and whānau focused processes that listen to victims' voices while also holding offenders to account for their actions.

Need for Māori Specialisation in Justice Response

It is widely accepted that there is a need for more Māori judges in order to improve the experiences of tangata whenua in the court. Having more Māori judges presiding over sexual violence court cases is something we deem necessary as 25% of reported cases of sexual violence involve Māori victims (Ministry of Justice, 2019). We believe this is important because a Te Ao Māori approach is not something that can be condensed down into a limited number of training sessions.

Te Tiriti o Waitangi model of Justice

We would like to propose the idea of a two whare model for our justice system, similar to how TOAH-NNEST is structured. It would reflect the original intent of Te Tiriti o Waitangi and involve two whare that recognise and enact all articles of Te Tiriti to meet the needs of both Māori and tauiwi as it would recognise the autonomy and agency of both. In fact, there has already been research such as the Matike Mai Aotearoa report that has investigated how this type of constitutional change could be created.

This model of justice has also been suggested previously by the Law Commission in their 2015 report to the Justice Minister. In it, they discussed the possibility of the introduction of a Māori commissioner that looks after the welfare of issues arising from sexual violence through a tikanga Māori approach. This would work to ensure substantial consultation with Māori, something which is sorely lacking from our current system. Meanwhile, the other whare would see to the needs and issues arising from sexual violence and support the diverse needs and worldviews that sit within tauiwi.

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Sexual Violence Bill

Preamble to the Bill

We support the principles of the proposed legislation as stated in the preamble of the bill:

- Reducing re-traumatisation of victims
- Improving experiences in court while seeking fairness

From our experience of working with those impacted by sexual violence, survivors have an extraordinarily high chance of developing Post Traumatic Stress Disorder (PTSD). One study reported that 94% of women experienced PTSD symptoms following a sexual assault, and that those symptoms would remain for life for 50% (Chivers-Wilson, 2006).

Trauma is experienced in different ways for different cultures, hence to reduce re-traumatisation culturally safe practices are also essential. For Māori victims/survivors trauma is heightened by historical trauma due to colonisation. The historical trauma of colonisation is further compounded by an adversarial system that favours colonial values.

We know that being involved in the criminal justice process can re-traumatise victims/survivors and delay healing from the event. The prospect of having to face the offender again and the possibility of being harmed by the process itself, means that people can metaphorically hold their breath until it is over.

Trauma can influence a person's capacity to participate in the criminal justice process. A victim/survivor is likely to display dissociative symptoms such as freezing, having flashbacks to the event, not being able to articulate what happened and not staying consciously present in the room. It can also reduce trust in other people and lead to high levels of fear, anxiety and depression.

TOAH-NNEST recommends taking into consideration cultural safety is required, alongside trauma-informed practice, to achieve the principles of the bill.

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Proposed Amendments to the Evidence Act 2006

The proposed amendments to the Evidence Act 2006 are enthusiastically welcomed by TOAH-NNEST.

Communication Assistance

We welcome the expansion of the definition of communication assistance which will support the needs of a wider range of victims/survivors. The credibility of the complainant and the reliability of their evidence are key in sexual violence cases. Communication can be compromised by a person's experience of trauma, limited English proficiency, cognitive capacity, vocabulary, and mental health issues.

We know from supporting victims/survivors that defence counsel use these communication difficulties as leverage to undermine witness credibility. Feeling used, not being heard or understood and feeling tricked all contribute to a range of feelings of distress and re-victimised.

While we recognise that communication assistance may not be required for all witnesses involved in a sexual violence cases, we believe increasing access to specialist support is an important step towards reducing trauma and ensuring fairness. We recognise that workforce development for communication assistants and court support workers will be crucial.

Statutory Duty of Judges

We are pleased to see that the sexual violence sector's 2018 submission for the Review of the Evidence Act 2006 has been taken into consideration in this context. Specifically, the inclusion of the word 'must' in the following sections:

- S. 85 of the Evidence At 2006: "In any proceeding, if the Judge considers a question is improper, unfair, misleading, needlessly repetitive, or expressed in a language that is too complicated for the witness to understand, the Judge must disallow the question or direct the witness not to answer it."

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We understand this section of the Evidence Act 2006 is not new, however currently it is not widely enforced. We believe that the experience in court needs to be one of 'fact finding' as opposed to 'tripping victims up' so a case can be dismissed.

The inclusion of 'must' will support judges to intervene and stop unreasonable questioning without fear of a mistrial.

We have heard from various participants in the Sexual Violence Court Pilot that when judges frequently intervene in unreasonable questioning there is a drastic drop in questioning aimed to disorient witnesses. This has had a positive effect on the well-being of victims/survivors by preventing re-traumatisation as well as improving the quality of evidence given.

- S. 126A of the Evidence At 2006: "In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary to address any relevant misconceptions relating to sexual cases."

  Working in the specialist sexual violence sector we encounter the harmful misconceptions and myths surrounding sexual harassment, abuse and violence daily. Removing misconceptions and rape myths from the court room is a key step to ensure fairness for all involved and judicial impartiality.

  We would like, however, the list to be extended to include the following myth topics which have been identified by the 2015 Law Commission:

  - Beliefs about the prevalence of false complaints
  - Beliefs about what 'real' rapists look like and how they behave

  The false complaints myth is frequently found in public and media discourse. It suggests that false complaints are common and are made by women with ulterior motives, trying to convict innocent men.

  Countering these myths is essential to support juries evaluating evidence and to ensure fair trials. Australia and the United Kingdom have both introduced judicial directions that give juries evidence-based information on sexual violence. This has not

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caused unintentional consequences nor is there any evidence that they have led to unsupported convictions.

Our colleagues working within the Sexual Violence Court Pilot have stated that when Judges are trained to understand the dynamics of sexual violence, they set better standards of behaviour for all involved in their court. Specialist sexual violence advocates have observed significant improvements to victims' experiences in these court processes.

The Qualitative Evaluations of the sexual Violence Court Pilot report found the training supplied for judges to be effective:

"The training put together by the Chief Judge's office was really effective. [Judges] are far more conscious of the welfare of victims. (Stakeholder, Auckland)"

"The training was essential. In my view you couldn't effectively get the [Sexual Violence Court] up and running as it should be without that knowledge and reasons for why we are doing these things this way and how to do it. (Judge)" (Gravitas Research, Strategy Limited, 2019)

We support the leadership the Chief Judge's office is showing in developing specialist sexual violence courts here in New Zealand. Learnings from this pilot should be applied to a careful training roll out across the country. This training will ensure a reduction of re-traumatisation and will improve experiences in court while also seeking fairness.

Increased Choices for Victims/Survivors

We fully support the introduction of section (s) 106C, 106E, 106F, 106G, 106H, 106I and 106J however we wish to comment on section 106D.

While we do support the introduction of section 106D which allows complainants or witnesses to give evidence in one or more specific ways, we believe merely including this amendment will not be enough to incorporate āronga Māori ways. Instead, we would more fully endorse this Bill, if the entirety of the court proceedings may also be conducted elsewhere.

"(iii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere"

We want to make a push for sexual violence court cases to be able to occur on marae. We have already seen in Aotearoa the benefits of the Rangatahi and Pasifika courts as

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alternatives to the youth courts and as such believe that there is real benefit to creating a similar process for sexual violence court cases. Our reasoning for Māori focused sexual violence court cases to be held on marae as follows:

- It shows to Māori that the justice system respects and understands the impact that the marginalisation of Māori practices has had upon them as a people. We want to see real commitment from the Crown working towards honouring Te Tiriti o Waitangi.
- Having sexual violence court cases being heard on marae tells whānau that the justice system recognises how integral and vital their support is to the victim/survivor throughout the process.
- Māori are overrepresented both as victims of sexual violence and perpetrators with 29.1% of Māori experiencing sexual violence compared to 16% of Pākehā people. (Fanslow & Robinson, 2004; World Health Organisation, 2005)

For this proposed legislation to achieve reduced re-traumatisation as well as fairness we need to ensure judges and prosecutors have adequate trainings. Making provision for all victims to have access to independent sexual violence support workers (Kaupapa Māori and mainstream) is essential. (Law Commission, 2015)

Walking alongside victims we know that the anticipation and subjection to cross-examination is invariably a stressful experience. This is almost always conducted during the hearing, even in cases with child victims. Allowing pre-recording of cross-examination will improve accuracy of testimony and increase fairness of trial. Pre-recording of cross-examination evidence was first raised by the Law Commission in 1996 (Law Commission, 1996). In 2011, it was found to be effective in cases with child complainants and child witnesses, and a subsequent evaluation reported it as a positive contribution to the justice system. In addition, the Law Commission's 2015 report highlighted the collated submissions of 20 District Judges, that suggested a greater role for pre-recorded evidence. Similarly, the New Zealand Law Society has suggested that pre-recording cross-examination should be the usual, but not mandatory, method for children (Henderson, 2016). We propose that, at a minimum, this may be appropriate for other vulnerable complainants also.

Reducing time delay between incident and cross-examination benefits all involved. It ensures a more accurate memory recall, prevents people's lives being put on hold while waiting for a

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court date and increases predictability of the scheduling and structure of the process. This is especially important given many sexual violence trials rely on the evidence of a single witness.

Less time in court is better for all those involved in the process. Reducing delays and increasing predictability of the process have been linked to reducing re-traumatisation for victims/survivors.

As we stated in our 2018 submission to the Review of the Evidence Act 2006:

We would also like to see New Zealand evidence, specifically that of Hanna and associates in their 2010 report, amended in legislation and implemented in court practices. Specifically, “Child witnesses in the NZ criminal courts: A review of practice and implications for policy”, research has shown us how to get the best evidence from children, but this “profoundly contradicts the general principles of cross-examination”. To not be using this research to direct what we do, makes it a matter of politics. (Hanna, Davies, Henderson, Crothers, & Rotherham, 2010)

TOAH-NNEST believes the government has a moral duty to listen to research that indicates this change is vital for the well-being of child victims.

Propensity Witnesses

We support courtroom protections for propensity witnesses in sexual cases. They are required to have the same level of recall of a horrific experience, and can experience the same level of questioning and challenges to credibility and consent and they have the same level of risk of re-traumatisation.

Specialist sexual violence support workers and other court staff have been advocating for this change for a number of years so it is great to see the need has been recognised and addressed.

We would like to see it considered for other witnesses that might find the process distressing, like parents of child victims.

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Sexual History, Disposition and Reputation

Sexual experience, disposition and reputation are irrelevant to whether consent is given, in any given sexual encounter according to s. 128A of the Crimes Act 1961. We welcome the extension of the rule against using a victim/survivor's sexual history as evidence.

The current adversarial process (and jury system) places undue pressure on victims/survivors who, unlike defendants, do not have enforceable trial rights enshrined within legislation. It is common for a victim/survivor to experience themselves being put on trial for their credibility, rather than the actions of the accused.

When victims/survivors are subjected to invasive questioning on highly personal matters, and individuals determining the outcome of the trial believe in rape myths and misunderstandings of consent, the process is imbalanced and based on myth acceptance rather than facts.

This process is frequently re-traumatising, unjust and a major deterrent for survivors to engage with the criminal justice system particularly for Māori.

Without sexual violence specialist training and support for all involved in the trying of sexual violence cases, we cannot be confident that rape myths will not be presented and believed.

Protection of Survivors' Confidential Records

For s. 69 of the Evidence Act 2006 TOAH-NNEST recommends that the Bill includes a restriction on defence counsel access to sexual violence complainants' confidential counselling and therapeutic records (or what has been termed a "sexual assault communications privilege").

For a victim/survivor, knowing that their highly sensitive records could be released to a defence lawyer seeking to attack their credibility during the criminal process, is a significant deterrent to survivors' full participation in therapeutic processes. Conversely, where the survivor is already engaged with support services, or has previously seen health practitioners regarding mental health matters, the knowledge that their counselling and other sensitive records could be disclosed in criminal proceedings is a barrier to reporting and participation in the criminal process. Unfortunately, there can be a real risk of disclosure of their confidential records.

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Amendments to the Victim's Rights Act 2002

Changes need to be made to court practices and spaces to prioritise the needs of the victim/survivor to have choices and an environment that facilitates their feelings of safety.

Section 22A supports victims/survivors to deliver their victim impact statement via alternative means. The explanation of those options, as stated within the Victims' Rights Act, is a useful addition.

We especially appreciate the option of pre-recording. Sentencing can be extremely stressful for all involved. Allowing a victim/survivor to pre-record statements would be incredibly useful for some survivor's healing processes. This is also the case for some perpetrators as hearing statements from victims themselves can help individuals gain a greater sense of accountability.

If we enable Māori to use culturally relevant places outside of court, as suggested in our submission, it would mean that the justice system is working towards being representative of both tangata whenua and tauiwi.

We see section 28A as a positive addition in giving a duty of care of prosecutor toward the victim. The rollout of independent specialist sexual violence support workers (Kaupapa Māori and mainstream) is the best way to ensure victim/survivors can have a safe clinical/cultural space to explore what option will meet their needs.

Our frontline workers, in their nationwide experiences of court, know that s. 28C, availability of appropriate facilities, is essential and will resolve long standing difficulties that have been identified for many years. This is a practical and important step to reducing anxiety and distress for victims/survivors.

Further steps should be made to ensure the criminal justice process is trauma informed and culturally safe. All involved in the court system need to understand trauma, how it can affect behaviour and what language is appropriate to use with a survivor of sexual violence.

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Amendments to the Criminal Procedure Act 2011

We support judges being able to clear the court during victim impact statement. However, we also recognise that victim/survivor is not the only individual in need of healing.

A perpetrator, their whānau or community are likely to be in need of their own form of trauma healing. We understand that, for a perpetrator's family or support network, court may be the first time they hear details of the events and what their loved one is accused of. Above all, we favour increasing choices for victims and as such welcome this amendment.

Key Recommendations

- Pass this Sexual Violence Legislation Bill.
- Honour the Crown's responsibilities under Te Tiriti o Waitangi by establishing a two whare model of justice.
- Allow sexual violence court cases to be able to occur on marae.
- Address systemic and institutional racism within the justice system.
- Extend s. 126A of the Evidence Act 2006 to include beliefs about false complaints and what 'real' perpetrators are like.
- Include to s. 69 of the Evidence Act 2006 TOAH-NNEST recommends that the Bill includes a restriction on defence counsel access to sexual violence complainants' confidential counselling and therapeutic records
- Consider the growing body of evidence on how to reduce re-traumatisation for survivors.
- Collaborate and consult with the victim/survivor representatives, Kaupapa Māori and Tauiwi specialist sexual violence sector and other key community stakeholders.

TOAH-NNEST supports this bill and acknowledge there will be significant work during implementation. It is clear the impacts of these legislative changes greatly rely on the training involved and the work of the Ministry of Justice. We are optimistic that with careful planning, specialist sexual violence training for all and a commitment to Te Tiriti o Waitangi, the changes will make a positive difference for survivors' experiences of court.

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