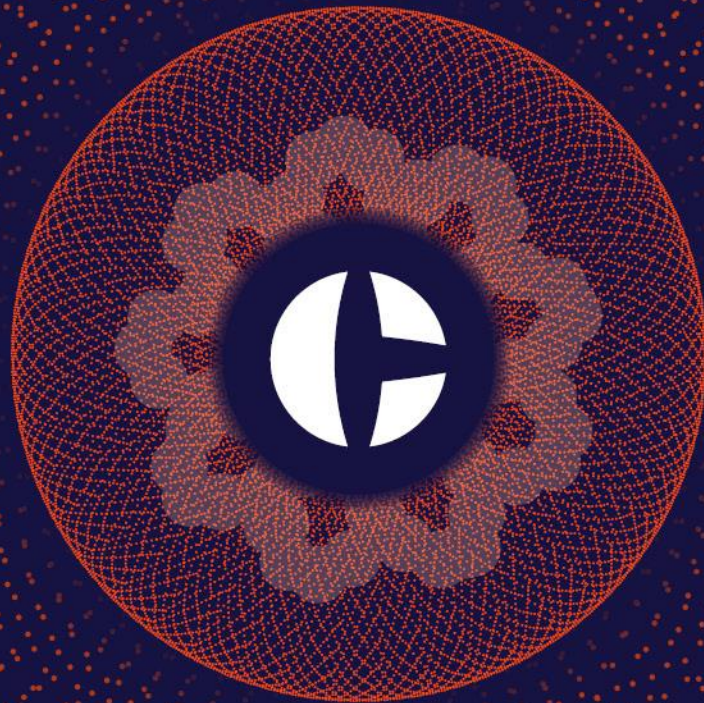


SUBMISSION

# Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill

20 OCTOBER 2023



chapman tripp

To: Justice Committee

# Submission on Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill

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## Introduction

This submission is from Chapman Tripp, Lawyers, PO Box 2206, Auckland 1140. It relates to the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill (the **Bill**).

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## About Chapman Tripp

- 1 Chapman Tripp are one of New Zealand's largest corporate law firms. We support a wide and diverse range of pro bono clients, and have provided pro bono work as part of our corporate social responsibility programme since 2004. We believe that supporting individuals and worthwhile organisations should simply be part of life at Chapman Tripp. Since we first began our pro bono programme, we have provided legal support to more than 700 individuals and organisations.
- 2 As a part of our pro bono programme, Chapman Tripp are the legal advisors to certain survivors of serious sexual offending, including in connection with name suppression matters. We provide this submission in the context of our experience with work of this nature.

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## Our approach to this submission

- 3 Chapman Tripp strongly supports the Bill. The Bill takes important steps towards reducing the harms experienced by victims of sexual violence participating in Court proceedings. Confirming this support for the Bill is the primary purpose of our submission.
- 4 Our more detailed submission is limited to certain legal mechanism matters in Part 2 of the Bill, which contains amendments to the Criminal Procedure Act 2011 (**CPA**). In particular, the Bill:
  - 4.1 clarifies the purpose of ss 201 and 203 of the CPA; and
  - 4.2 requires the Court to consider complainants' views about the publication of identifying details of a defendant under s 201 of the CPA, and their own identifying details under s 203 of the CPA.
- 5 Our submission is focused on the intersection of the amendments in the Bill with the foreshadowed "new, prescriptive process" to be set out in the Criminal Procedure Rules 2012 (**CP Rules**) by the Bill's replacement of s 203(4)(a)(ii) in the CPA (via cl 8).
- 6 We make two observations about the Bill's replacement of s 203(4)(a)(ii) in the CPA:
  - 6.1 First, the Bill's replacement of this subsection will require complainants to apply to the Court for an order allowing the publication of their own details under s 203 of the CPA in accordance with the processes in the CP Rules. The absence of the foreshadowed "new, prescriptive process" being available for review and comment in parallel with the Bill makes the effect of this replacement ambiguous at best. But it may also have the effect of making the process for complainants seeking an order under s 203 more burdensome.
  - 6.2 Second, and relatedly, the effect of the Bill's replacement of this subsection is that the process for a complainant to apply for an order for the publication of their details under s 203 appears to be different to the process for a complainant to apply for an order for the publication of the defendant's details under s 201. Assuming the reference to the CP Rules is a good development (which is unclear), then there does not appear to be any reason for this difference between ss 201 and 203 of the CPA.
- 7 We discuss these observations in further detail below.

## Replacement of s 203(4)(a)(ii) of the CPA

- 8 Part 2 of the Bill amends certain sections of the Criminal Procedure Act 2011, including s 203 on the automatic suppression of identity of complainant in specified sexual cases.<sup>1</sup>
- 9 The amendments to s 203 prioritise complainants through:
- 9.1 clarifying the purpose in s 203(2); and
  - 9.2 inserting s 203(4A), making complainants' views a mandatory consideration in the Court's assessment. This change will support and facilitate victims in the justice system.
- 10 The Bill also changes the process for complainants to apply to remove the automatic name suppression of their details under s 203:
- 10.1 The CPA currently requires the complainant to apply to the Court for an order permitting the publication of their identifying details, without any guidance on how a complainant may do that.
  - 10.2 The Bill, both by reference in the explanatory note and the replacement of s 203(4)(a)(ii) itself (via cl 8 of the Bill), refers to the CP Rules and requires a complainant to apply to the Court for an order for the publication of their identifying details "in accordance with" the CP Rules. Although we note the replacement of s 203(4)(a)(ii) is not considered in the clause-by-clause analysis of the Bill.

### Substance and effect of CP Rules reference ambiguous

- 11 As far as we are aware, the CP Rules are not currently the subject of any amendments either by this Bill or any other bill before parliament to implement any such "new, prescriptive process" for complainants seeking a Court order under s 203.
- 12 It is difficult to assess the effectiveness of this aspect of the Bill and its amendment to the CPA in the absence of the anticipated parallel mechanism in the CP Rules.
- 13 Consequently, and generally, we see three scenarios as potentially arising should the Bill be enacted with this amendment:
- 13.1 First, the Bill is enacted prior to any parallel amendments to the CP Rules being drafted. The current procedures in the CP Rules are generic and are not directed towards facilitating *complainants* understand and navigate the Court proceedings (as appears to be anticipated by the "new, prescriptive process").<sup>2</sup> While we do not expect the reference to the CP Rules in its current form will impose any additional burdens on complainants making an application, it does not make any meaningful step to resolving current issues<sup>3</sup> and may cause confusion to complainants navigating

<sup>1</sup>. Via cl 8 of the Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill.

<sup>2</sup>. The explanatory note explains victims can be disempowered by the lack of streamlined process or readily available information for how to apply to lift automatic name suppression, and that a "new, prescriptive process" will be set out in the CP Rules 2012 (presumably to address that disempowerment and deficiencies in the current legislation).

<sup>3</sup>. It does not appear to do anything to resolve current issues for complainants seeking orders under s 203. For example, if a complainant does not raise the matter of lifting their name suppression during trial, then they may still have to bear the cost of a lawyer to make the application. The issue of complainant cost may be exacerbated if the CPA refers to the CP Rules which are generic to criminal proceedings, and not intended to facilitate complainants navigate the Court process. See Nikki Pender *Research Report: name suppression processes for victims of sexual violence* (Chief Victims Advisor to Government, 5 August 2020) at [3].

this legislation where the foreshadowed process does not actually exist (and may never exist).<sup>4</sup>

13.2 Second, the Bill is enacted while any parallel amendments to the CP Rules are still being considered by Cabinet. There are no transitional provisions in the Bill to accommodate this interim period, meaning complainants would presumably need to apply to the Court for an order in accordance with the current CP Rules. Again, this may add to the confusion complainants experience.

13.3 Third, the “new, prescriptive process” in the CP Rules are drafted after the Justice Committee report and/or before the second reading of the Bill, with the intention the Bill and any amendment to the CP Rules are enacted at the same time. While this would remove the risk of an interim transitional period or an indefinite period without the “new, prescriptive process” in place, there has not been an opportunity to review and comment on that process in parallel with this Bill.

14 In any event, it is difficult to assess the true impact of the replacement of s 203(4)(a)(ii) now without a clear indication of when this process will be available for review and implemented (should it be drafted at all).

15 We understand these concerns have been raised previously.<sup>5</sup>

**Complainant applications under ss 201 and 203 of the CPA governed by different procedures**

16 A corollary of the replacement of s 203(4)(a)(ii) is that the procedure for a complainant to apply for a Court order under s 203 would appear to be different to the procedure for a complainant to apply for a Court order under s 201.

17 For example, compare:

Current s 201(4)(a)(ii) of the CPA (not amended by the Bill)	Replacement of s 203(4)(a)(ii) of the CPA (amended via cl 8 of the Bill)
<p>...</p> <p>(4) The court must make an order referred to in subsection (3) if—</p> <p style="padding-left: 40px;">(a) the complainant (or, if there were 2 or more complainants, each complainant)—</p> <p style="padding-left: 80px;">...</p> <p style="padding-left: 40px;">(ii) applies to the court for such an order; and</p> <p>...</p>	<p>...</p> <p>(4) The court must make an order referred to in subsection (3)(b) if—</p> <p style="padding-left: 40px;">(a) the complainant—</p> <p style="padding-left: 80px;">...</p> <p style="padding-left: 40px;">(ii) applies to the court for such an order <b>in accordance with the Criminal Procedure Rules 2012</b>; and</p> <p>...</p> <p>(emphasis added)</p>

18 The Bill does not amend s 201(4)(a)(ii) of the CPA.

4. Noting that the amendments to the CPA in the Bill acknowledge (and presumably seek to take steps to resolve) victims’ disempowerment by the lack of streamlined process or readily available information for how to apply to lift their automatic name suppression: see explanatory note – general policy statement of Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill.

5. Crown Law pointed out that “presumably” the new process will make it easier for complainants to apply to the Court, but the change in process is difficult to assess. It is not clear what the procedure in the

6. CP Rules will be and how it will change the status quo: see Crown Law letter to the Attorney-General re Victims of Sexual Violence (Strengthening Legal Protections) Legislation Bill PCO 24501/1.5 - Consistency with the New Zealand Bill of Rights Act 1990 dated 21 July 2023 at [4].



- 19 The effect of the Bill’s amendment (or lack of amendment) is that, while a complainant is entitled to apply to the Court for an order under both sections, presumably:
- 19.1 A complainant applying for an order under s 201 must do so according to the status quo.
- 19.2 A complainant applying for an order under s 203 must do so according to the CP Rules (either in their current form, or some future amended form containing the “new, prescriptive process”).
- 20 There is no obvious reason why s 201 would not be amended in the same way as s 203, and at the same time, particularly if there are steps underway to implement the foreshadowed “new, prescriptive process” in the CP Rules.

**Next steps**

- 21 We anticipate that the best way forward is either:
- 21.1 To treat the Bill’s replacement of s 203(4)(a)(ii) as premature in the absence of the “new, prescriptive process” in the CP Rules – we do not see the issue of the Bill’s replacement of s 203(4)(a)(ii) as preventing the Bill’s other amendments to ss 201 and 203 from being carried forward.
- 21.2 In light of the objective to better help victims understand and navigate the Court processes, the intention behind the Bill’s replacement of s 203(4)(a)(ii) is implemented properly by:
- (a) Drafting an amendment for the “new, prescriptive process” in the CP Rules that is available after the Justice Committee report and/or before the second reading of the Bill, with that process available for public review and comment.
  - (b) Should the effect of that “new, prescriptive process” be for the benefit of complainant, implementing a similar amendment in relation to s 201(4)(a)(ii) of the CPA. We propose the wording mirror the s 203(4)(a)(ii) drafting and that the Bill replaces section 201(4)(a)(ii) with:

*(ii) applies to the court for such an order in accordance with the Criminal Procedure Rules 2012; and*



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