Sexual violence bill puts right to fair trial at risk

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As a young woman, I came to New Zealand 11 years ago from the Middle East to undertake my Master of Laws degree. Early on I was struck by how rights and freedoms are so frequently taken for granted by those born in this country. Because I come from a part of the world with so few protections, fair trial rights that protect people accused of crimes – of any type – are particularly important to me.

Now as a defence lawyer, I feel compelled to explain the very damaging effects to those rights that the Sexual Violence (Legislation) Bill would inflict if enacted.

So what are fair trial rights? There are several, all protected in our Bill of Rights Act, and they include the right to be presumed innocent, the right to run an effective defence, and the right to remain silent instead of having to help the prosecution prove your guilt. This bill would seriously violate each.

The first major change proposed that is of grave concern is the remarkable idea of prima facie outlawing *relevant* evidence benefiting the defendant, thereby increasing the likelihood of innocent men being convicted and imprisoned. So what actually is "legally relevant evidence"?

The answer is, "any evidence that makes a fact in issue either more or less likely to be true". An example of a 'fact in issue' could be, "did they have sex?"

The particular evidence in question that this bill seeks to presumptively declare illegal is that of the prior sexual relationship between the defendant and the complainant. The fact that the two of them had had consensual sex on previous occasions could therefore not be traversed, as of right.

The rationale seems to be that saving the complainant distress in giving evidence (albeit with name suppression in closed court) is of greater importance than the risk of imprisoning the innocent. Another championed justification is that consent must be given on every occasion – a necessary element recognised by the law for so long now that its mention is truly trite.

While contemporaneous consent is essential, a caveat must be remembered; sexual intimacy does not, in the moment, lend itself to forward-looking legalism. As a moral certainty, there will never be a contemporaneously signed document proving consent and so, instead, where the defence of consent is raised, the whole issue before the court will be the reasonable grounds upon which the defendant's understanding of consent was based.

Thus, the heart of such a defence is the previous concordats that the couple had – their routines, practices and certain ways of doing things, that demonstrate the defendant's reasonable belief in consent.

It is therefore absolutely vital that that evidence can be heard by the jury. The nonsensical "heightened relevancy test" exception postulated by the bill for only sometimes allowing the jury to hear this evidence takes away the right of the defendant to put anything of relevance into evidence.

Yet successful defences are often built out of small blocks of relevant evidence rather than any substantial "king-hit" pillar of "heightened relevance". Details may be the thing that the defendant can successfully rely upon to prove his innocence – but which would be choked off from careful examination by juries because of this bill. That context, in short, may change everything for the jury. Of course as the law at present stands, in every case heard, the judge must concur with the defendant that his evidence is indeed relevant.

So there is currently a very adequate judicial filter waiting to close down any question that is irrelevant.

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The second major proposal inconsistent with the Bill of Rights Act is the plan for pre-trial cross-examination of complainants – a substantial change in our criminal procedure that would likely mean that complainants would end up giving evidence twice (once pre-trial and then again at trial).

The high likelihood of this "double ordeal" would of course thoroughly undermine purported benefits of the bill. The danger to defendants is that it would force the defendant to abandon his pre-trial right to silence and so give the prosecution and witnesses the opportunity to then "re-mould" their case at trial.

In-depth analysis of this proposal has been undertaken by our Court of Appeal relatively recently. The failure of the bill's apologists to mention the court's decision is understandable, since it unanimously found six strong reasons not to adopt routine pre-trial cross-examination and also found there to be no counter-argument of any serious weight in its favour.

Lastly, the proposals discussed here are not only unnecessary and dangerous to innocent defendants, but would also be an assault upon the commitment and common sense of those many citizens who turn up every week for jury service.

Jurors would, by this bill, be prevented from hearing the whole story.