

# THE SEXUAL VIOLENCE LEGISLATION ACT 2021: PRE-RECORDED CROSS-EXAMINATION AND THE RIGHT TO A FAIR TRIAL

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*This article analyses the provisions of the Sexual Violence Legislation Act 2021 that offer witnesses in sexual cases access to pre-recorded cross-examination as an alternative method of giving evidence. The Act is intended to reduce the trauma of sexual violence victims in court whilst preserving the fairness of the trial. The Act prima facie entitles witnesses to access alternative evidence methods, but judges retain a discretion under s 106G to prevent the use of pre-recorded cross-examination. Under s 106G, the judge must do so where the pre-recorded cross-examination presents a real risk to the fairness of the trial. This article evaluates how judges are likely to exercise their discretion under s 106G. I recount the contemporary notion of a fair trial through the lens of the New Zealand Bill of Rights Act 1990 and identify areas of tension between defendants' fair trial rights and witnesses' interests. I assess how the realities of the system render pre-recorded cross-examination workable only at the expense of defendants' fair trial rights. Consequently, judges will almost always be compelled to make orders under s 106G preventing pre-recorded cross-examination. The Act is unfit for its purpose of expanding the availability of alternative evidence for witnesses and improving the justice process for sexual violence complainants.*

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## **I INTRODUCTION**

The Sexual Violence Legislation Act 2021 (the Act) is intended to improve access to alternative methods of giving evidence for witnesses in sexual cases.<sup>1</sup> Victims in sexual cases are frequently re-

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<sup>1</sup> For the purposes of this article, "sexual cases" refers to charges under ss 128–142A or s 144A of the Crimes Act 1961, or any other offence of a sexual nature against a person. A sexual case "complainant" or "propensity witness" is a person of any age who is a complainant and/or a witness for the prosecution giving evidence in a sexual case, including "propensity evidence" of a sexual nature about any one or more defendants.

traumatised by the justice process, particularly when giving evidence in court and being cross-examined as witnesses.<sup>2</sup> As a consequence, victims face real disincentives to report sexual violence offences.<sup>3</sup> In 2019, victims reported only six per cent of sexual assaults to the police.<sup>4</sup> Of those reported assaults, less than 10 per cent reached the courtroom.<sup>5</sup> Almost 35 per cent of women have or will experience either intimate partner or sexual violence in their lifetime.<sup>6</sup> For those women, access to justice should not be a fantasy, nor should the justice process be perceived as a threat.

Victims overwhelmingly report that they are most negatively affected by cross-examination.<sup>7</sup> Several features of cross-examination can be traumatic for complainants. These include treatment by counsel in front of the jury, presenting evidence in the accused's presence, the prospect of encountering them in and around court and delays in proceedings. The Act entitles witnesses to pre-record their cross-examination evidence, which can reduce witness trauma by easing those features of the conventional process. On the other hand, the Act has prompted public concern about the impact of the entitlement to pre-record cross-examination on an accused's fair trial under the New Zealand Bill of Rights Act 1990 (NZBORA). Yet, under s 106G of the Act, a judge can make an order preventing the use of pre-recorded cross-examination if the judge considers that the pre-recording would present a real risk to the fairness of the trial.

This article evaluates how this judicial discretion is likely to be exercised and whether the proposals are likely to substantially improve the cross-examination process for victims, while also

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"Propensity evidence" goes to the accused's propensity to act in a particular way or to have a particular state of mind. It may include evidence of acts, omissions or circumstances in which the accused is allegedly involved. Complainants and propensity witnesses will be referred to respectively as "witnesses in sexual cases". The focus is on the law and reform as it relates to adult witnesses. There are specific provisions and considerations pertaining to child witnesses: see Evidence Act 2006, ss 107–107B.

- 2 This article refers to "complainants" and "victims" interchangeably. Some commentators prefer the term "survivor". The use of "victim" here is not intended to denote any stigma or political preference; it is used merely to describe witnesses and complainants entering the criminal justice process.
- 3 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 78.
- 4 Ministry of Justice *New Zealand Crimes and Victims Survey Cycle 2 Core Report* (May 2020) at 88.
- 5 At 88.
- 6 At 70–71.
- 7 Kim McGregor *Strengthening the Criminal Justice System for Victims* (Hāpaitia te Oranga Tangata | Safe and Effective Justice, August 2019) at 10–14; Sue Lees "Judicial Rape" (1993) 16 *Women's Studies Int Forum* 11 at 15 and 26; Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Gravitas Research and Strategy Limited/Ministry of Justice, August 2018) at 79; and Cabinet Office Circular "Improving the justice response to victims of sexual violence" (3 April 2019) CO (18) 4 at 16.

preserving defendants' fair trial rights.<sup>8</sup> Part II describes the former provisions governing the availability of alternative evidence methods. Part III outlines the provisions under the Act providing an entitlement to give evidence in an alternative way, the factors a judge must consider when restricting that entitlement and the rationale underpinning the reform. Part IV uses the NZBORA as the central analytical tool for assessing when a judge is likely to consider that a pre-recorded cross-examination would present a real risk to the fairness of the trial. The public outcry about the Act's purported erosion of fair trial rights is contrasted with the Attorney-General's report to justify this article's close scrutiny of the fair trial rights potentially threatened by the Act. I explore what is required of cross-examination to observe the contemporary notion of a fair trial in the light of the NZBORA. There is an inherent tension between the interests of complainants as witnesses and the interests of defendants in a trial that enables them to present a robust defence. The Act's practical effects will largely depend on how the judiciary exercises its discretion to balance these two sets of rights and interests. Part IV includes an assessment of the ways in which this balance is likely to play out in practice.

This article considers two main areas of potential tension. Firstly, pre-recorded cross-examination directly conflicts with defendants' rights to have adequate time and facilities to prepare a defence. This is because disclosure processes are often incomplete and unpredictable, with widespread accounts of disclosure not occurring until close in time to the trial.<sup>9</sup> Secondly, pre-recorded cross-examination cannot be reconciled with the prosecution's burden of proof. By its nature, pre-recording cross-examination requires the defendant to reveal a major portion of its defence before the trial, thereby assisting the prosecution. This impacts on the right to avoid self-incrimination, which is arguably encompassed in the common law right to silence. The adversarial nature of the justice system values a defendant's right to hear the case against them before taking any step in the trial. It is therefore ill-suited to pre-recorded cross-examination. A judge, having regard to how defendants' rights would be implicated by pre-recording, would almost always be expected to make orders rebutting the entitlement under s 106G. Consequently, the legislative intention to improve the availability of alternative methods for witnesses is unlikely to succeed without either radical improvements to the system in which the legislation operates or curbing fair trial rights.

## **II FORMER USE OF ALTERNATIVE EVIDENCE**

Prior to the reform, the ways in which witnesses could give evidence were governed by ss 103, 105 and 106 of the Evidence Act 2006. Section 103 enabled either party to apply for a direction, or a judge to direct of their own accord, that a witness give evidence in the ordinary way, or in an alternative way, as provided in s 105. An application for a direction permitting a witness to give

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8 Sexual Violence Legislation Bill 2019 (185-1) (explanatory note).

9 See for example *Weston v R* [2019] NZCA 541; *Bae v R* [2012] NZCA 455 at [27]–[28]; *R v Aitken* HC Rotorua CRI-2008-070-6480, 13 June 2011 at [14] and [81]–[86]; and *Beazley v Police* [2016] NZHC 129.

alternative evidence could be made on various grounds listed in s 103(3). Such an application had to be made to the judge as early as practicable.<sup>10</sup> Grounds included trauma suffered by the witness,<sup>11</sup> fear of intimidation,<sup>12</sup> the nature of the proceeding,<sup>13</sup> the nature of the evidence that the witness was expected to give,<sup>14</sup> the witness' relationship to any party to the proceeding<sup>15</sup> or any other ground likely to promote the purpose of the Act.<sup>16</sup> In giving a direction, the judge had to have regard to the need to ensure a fair trial.<sup>17</sup> The judge was also required to consider the witness' views, including the need to minimise stress,<sup>18</sup> the need to promote the recovery of a complainant from the alleged offence in a criminal proceeding<sup>19</sup> and any other factor relevant to the just determination of the proceedings.<sup>20</sup> The alternative ways were set out in s 105 and included giving evidence while in the courtroom but unable to see the defendant or a specified person, from a place outside the courtroom, or by video record made before trial.<sup>21</sup>

It follows that a judge already had the discretion to direct that a witness present evidence in an alternative way. However, this discretion was qualified in 2011 when the Court of Appeal held, in *M v R*, that pre-recorded cross-examination is only appropriate in rare circumstances.<sup>22</sup> Whether the Act improves the availability of alternative evidence is here developed against the background of *M v R*.

### **III THE SEXUAL VIOLENCE LEGISLATION ACT 2021**

The Sexual Violence Legislation Act of 7 December 2021 amended the Evidence Act 2006. Section 14 entitles all witnesses to give evidence, including cross-examination evidence, in an

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10 Section 103(2).

11 Section 103(3)(c). This means trauma associated with the alleged offence, rather than the act of giving evidence: see Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Thomson Reuters, Wellington, 2014) at 465.

12 Evidence Act, s 103(3)(d).

13 Section 103(3)(f).

14 Section 103(3)(g).

15 Section 103(3)(h).

16 Section 103(3)(j). Under s 6 that purpose includes securing the just determination of proceedings by promoting fairness to parties and witnesses, also referred to under s 103(4)(a)(i): see Mahoney and others, above n 11, at 465.

17 Section 103(4)(a).

18 Section 103(4)(b).

19 Section 103(4)(b).

20 Section 103(4)(c).

21 Section 105(1).

22 *M (CA335/2011) v R* [2011] NZCA 303, [2012] 2 NZLR 485 at [41].

alternative way (s 106D witness entitlement), rather than having to apply to the judge for a discretionary order that they may do so. Prosecutors intending to call a witness must provide every other party and the court with written notice of how the witnesses intend to give evidence.<sup>23</sup> Under s 106F, the defence may apply to the judge for a direction ordering the witness to give evidence in the ordinary way or in an alternative way (s 106F party application). This application is to be made as early as practicable before the trial or at a later time if permitted by a judge.<sup>24</sup> In the exercise of the discretion to endorse a s 106F party application, the judge must have regard to whether the interests of justice in the particular case require a departure from the s 106D witness entitlement, having regard to the matters set out in s 103(3) and (4). Such matters include issues such as witness trauma,<sup>25</sup> intimidation,<sup>26</sup> the nature of the proceeding or the evidence to be given,<sup>27</sup> the need to ensure a fair trial,<sup>28</sup> the views of the witness and the need to reduce stress on the witness and promote their recovery from the alleged offence.<sup>29</sup> Departure from the s 106D entitlement is possible under s 106G, where a judge can make an order preventing the witness' access to its elected alternative evidence method. It is under this section that the judiciary will have to balance the interests of a defendant in receiving a fair trial, and the witness' interest in access to an alternative evidence method.

### ***A Judicial Orders Preventing Pre-Recorded Cross-Examination***

Section 106G governs judicial orders preventing a witness from undergoing pre-recorded cross-examination. The judge may endorse a s 106F party application, or make a judicial order on their own initiative,<sup>30</sup> preventing pre-recorded cross-examination if they consider that it would present a real risk to the fairness of the trial,<sup>31</sup> and that risk cannot be mitigated adequately in any other way.<sup>32</sup> The judge must consider, in addition to any other matters that the judge considers relevant, whether it is likely that the witness will have to give further evidence (including cross-examination evidence) after the recording, for example due to disclosure.<sup>33</sup>

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23 Evidence Act, s 106D(3).

24 Section 106F(2).

25 Section 103(3)(c).

26 Section 103(3)(d).

27 Section 103(3)(g).

28 Section 103(4)(a).

29 Section 103(4)(b).

30 Section 106G(2)(a)–(b).

31 Section 106G(1)(a).

32 Section 106G(1)(b).

33 Section 106G(3).

Additionally, s 106G(4) sets out several factors that cannot be presumed to prejudice the fairness of the trial:<sup>34</sup>

... [it] must be shown clearly in the circumstances of the case, that the following consequences of cross-examination before trial *would present* a real risk to the fairness of the trial:

- (a) the making of a video record will require the defence to disclose all or any of its strategy earlier than if all of the evidence of the complainant or witness were given in the ordinary way or in a different alternative way;
- (b) the defence will be unable to tailor its cross-examination to a jury's reaction;
- (c) the making of a video record before the trial will involve preparation and other effort extra to that required for the trial;
- (d) complying with or using any appropriate practical and technical means for the making of a video record will involve more difficulty for all or any parties than if all of the complainant's or witness's evidence were given at the trial.

These factors are the inherent consequences of pre-recording cross-examination evidence, and are the very reasons that the Court in *M v R* considered pre-recorded cross-examination would impact on the fairness of the trial.<sup>35</sup> Section 106G(4) requires the judge to find a clear causal connection between the consequence and fairness in each case before making an order preventing the use of pre-recorded cross-examination. Therefore, it reduces the weight of some of the dominant considerations in *M v R*. Conversely, the s 106G(3) mandatory consideration of whether the witness is likely to need to provide further evidence post-recording codifies a concern raised in *M v R*, and arguably renders the s 106D witness entitlement to an alternative evidence method illusory. The legislation may merely entrench the status quo, leaving pre-recorded cross-examination inaccessible save in rare circumstances. It is against the background of *M v R* that I consider how judges are likely to exercise their discretion under s 106G and balance the tension between witnesses' interests and defendants' fair trial rights.

## ***B The Rationale***

The Act primarily responds to the issues raised in the Law Commission's 2015 report, *The Justice Response to Victims of Sexual Violence*,<sup>36</sup> and its *Second Review of the Evidence Act 2006*.<sup>37</sup> The narrative is not novel. Studies conducted on the experiences of sexual violence victims in court have repeatedly found that complainants felt humiliated and re-traumatised by the legal process.<sup>38</sup> Victims

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34 Section 106G(4) (emphasis added).

35 *M v R*, above n 22, at [34]–[40].

36 Law Commission, above n 3.

37 Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2018). Also influential: Boyer, Allison and Creagh, above n 7.

38 Sue Lees *Carnal Knowledge Rape on Trial* (1st ed, Penguin, London, 1996) at 31; Victim Support *Women, Rape and the Criminal Justice System* (London, 1996); and Christine Eastwood "The Experience of Child

frequently feel as if they are put on trial rather than the accused.<sup>39</sup> Some report that the court process is worse than the sexual abuse itself.<sup>40</sup> Distrust and apprehension of the legal system are characteristic of the feelings of vulnerable witnesses in sexual cases.

Complainants report that they are most traumatised by the cross-examination stage of the trial.<sup>41</sup> When cross-examining, the aim of defence counsel is to undermine the word, character and veracity of witnesses, and to test their evidential account of events.<sup>42</sup> Increasing access to alternative evidence methods, such as pre-recorded cross-examination, is said to have the capacity to "re-empower complainants by expanding the options for how they participate in some of the most daunting aspects of a trial".<sup>43</sup> Pre-recording cross-examination reduces the stress of being in the presence of the defendant in and around the court,<sup>44</sup> being insensitively examined before the jury,<sup>45</sup> and the wait times surrounding giving evidence,<sup>46</sup> with the potential for unexpected adjournments<sup>47</sup> and delays in

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Complainants of Sexual Abuse in the Criminal Justice System" (2003) 250 Trends & Issues in Crime and Criminal Justice 1 at 3.

39 Boyer, Allison and Creagh, above n 7, at 119.

40 Elisabeth McDonald and Yvette Tinsley *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 33; and Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Practice: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 2.

41 McGregor, above n 7, at 10–14; Lees, above n 7, at 15 and 26; Boyer, Allison and Creagh, above n 7, at 79; and Cabinet Office Circular, above n 7, at 16.

42 "Being cross-examined by defence lawyers was almost unanimously described as one of the most difficult aspects of the justice process, with many saying that they were completely unprepared for how traumatic this process was. This aspect ... appeared to be a key point of revictimisation for many participants": Boyer, Allison and Creagh, above n 7, at 79.

43 (14 November 2019) 742 NZPD (Sexual Violence Legislation Bill – First Reading, Andrew Little).

44 Boyer, Allison and Creagh, above n 7, at 72.

45 This issue is discussed at Part IV(E)(1) of this article.

46 McDonald, above n 40, at 114. McDonald's comparative study found that the unpredictability of wait times induced witness anxiety. Some complainants' evidence was called within one to three hours of arriving at court, and others between four and six hours. A United Kingdom pilot found that those undergoing pre-recorded cross-examination spent considerably less time waiting in court, there was better compliance with pre-recorded hearings, and practitioners regarded the process as shorter and easier to manage: John Baverstock *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (UK Ministry of Justice, 2016) at 65 and 114–115. New Zealand research shows similar findings: see Kirsten Hanna and Emma Davies "Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases" (2013) 46 Australian & New Zealand Journal of Criminology 289 at 293.

47 It is not uncommon for an overnight adjournment to interrupt cross-examination, prolonging an already traumatic experience: see McDonald, above n 40, at 114.

proceedings.<sup>48</sup> The technological advantages of pre-recording cross-examination can also improve the evidential product later presented to juries and increase the likelihood of a just result.<sup>49</sup>

#### ***IV A FAIR TRIAL AND THE NEW ZEALAND BILL OF RIGHTS ACT 1990***

As previously outlined, s 106G guides judicial orders in relation to the use of pre-recorded cross-examination. I use the NZBORA as the central analytical tool for assessing when a judge is likely to consider that pre-recording would present a real risk to the fairness of the trial. The NZBORA protects defendants' fair trial rights, against which a judge will have to balance a witness' interest in accessing pre-recorded cross-examination.

##### ***A Cross-Examination and the Fair Trial***

The right to a fair trial is a fundamental right in a democratic society. The Court of Appeal has stated that "no right is more inviolate than the right to a fair trial".<sup>50</sup> Several provisions of the NZBORA confer fair trial rights on defendants.<sup>51</sup> These include the right to a fair and public hearing,<sup>52</sup> the right to be present at trial and to present a defence,<sup>53</sup> the right to adequate time and facilities to prepare a defence<sup>54</sup> and the right not to be compelled to confess guilt.<sup>55</sup> Further, s 25(f) guarantees cross-examination, providing "the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution". My analysis is centred on the NZBORA, but regard is also had to common law fair trial rights, which exist alongside or are implicit in the NZBORA. These include the right to confrontation and the right to silence.

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48 This issue is discussed at Part IV(F)(3) of this article.

49 Pre-recorded content can be edited under the supervision of a judge to remove inappropriate or misleading questions before the recording is heard at trial. Increased control over juries' evidence consumption can eliminate juror perceptions of judicial bias toward one party and facilitate a just result. Breaks are more easily taken in a pre-recorded session which, along with judicial interventions, can be removed from the recording. Further, judges can enable juries to replay the recording as an aid in their deliberations: see *E (CA799/2012) v R* [2013] NZCA 678 at [58] and [67]; and *Hanna and Davies*, above n 46, at 293.

50 *R v Burns* [2002] 1 NZLR 387 (CA) at [10] per Thomas J.

51 Whilst the NZBORA does not explicitly frame any right as the right to a fair trial, in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 the Supreme Court held that s 25(a) affirms an absolute right to a fair trial.

52 New Zealand Bill of Rights Act 1990, s 25(a).

53 Section 25(e).

54 Section 24(d).

55 Section 25(d).

Cross-examination is the primary evidentiary safeguard of a fair trial,<sup>56</sup> described passionately by evidential theorist JH Wigmore as "the greatest legal engine ever invented for the discovery of truth".<sup>57</sup> It is the most effective device for defendants to test the integrity of witnesses, find inconsistencies or inaccuracies in oral evidence and challenge the case against them.<sup>58</sup> Pre-recording modifies how conventional cross-examination occurs in order to minimise the re-traumatisation of witnesses; it occurs in the absence of defendants and juries, in an efficient, focused, non-provoking manner, and in advance of trial, close in time to the alleged offence. These modifications have sparked public concern for the Act's lack of compliance with fair trial rights. The validity of this concern will be tested in the following analysis of how pre-recording cross-examination interacts with each of the above fair trial rights.

### ***B The Attorney-General and Public Perception of NZBORA Compliance***

Political opposition to the Sexual Violence Legislation Bill 2019 (the Bill) alleged that it would overtly deny defendants a fair trial.<sup>59</sup> This claim has seen support from the defence bar in regard to its practical implications.<sup>60</sup> One politician argued, "there is not a lawyer in New Zealand" that would have properly afforded the Bill a clean NZBORA vetting.<sup>61</sup> The Attorney-General afforded it exactly that.

The Attorney-General's NZBORA compliance report advised that the provisions of the Bill were not inconsistent with the NZBORA.<sup>62</sup> The Attorney-General focused on whether the provisions providing for alternative ways of giving cross-examination evidence would conflict with a defendant's right to a fair trial protected under s 25(a) of the NZBORA. The report stated that, while the Bill ensures that complainants are prima facie entitled to alternative evidence, the position remains that

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56 Louise Ellison "The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch comparison" (1999) 3 Int J Law and Proof 29 at 34.

57 John Henry Wigmore and James H Chadbourn *Evidence in Trials at Common Law* (Little, Brown and Company, Boston, 1974) at [1367]. See also *R v L* [1994] 2 NZLR 54 (CA) at 61 per Richardson J, describing cross-examination as "the greatest legal engine ever invented for the discovery of truth where credibility is in issue".

58 Ellison, above n 56, at 35.

59 Collette Devlin "National Party say Sexual Violence Bill could hurt right to fair trial" *Stuff* (online ed, New Zealand, 12 June 2020).

60 See for example Criminal Bar Association "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019".

61 (11 February 2021) 749 NZPD (Sexual Violence Legislation Bill – Second Reading, Simon Bridges).

62 David Parker *BORA Vet: Sexual Violence Legislation Bill – Consistency with the New Zealand Bill of Rights Act 1990* (8 October 2019) at [37].

"the judge is ultimately responsible for ensuring a fair trial" under s 106G.<sup>63</sup> While s 25(a) protects, generally, the defendant's right to a fair trial, the Attorney-General did not address several additional fair trial rights (namely, ss 24(d), 25(e) and 25(f)) that potentially intersected with the Bill. This was arguably an oversight. The specific rights are not ends in themselves,<sup>64</sup> but they each contribute to ensuring the fairness of the criminal proceedings as a whole.<sup>65</sup>

What follows is a consideration of the bundle of fair trial rights under the NZBORA that the Attorney-General failed specifically to address in his report. I consider what it takes for cross-examination to comply with these rights, noting areas of conflict with a witness' interest in pre-recorded cross-examination. These tensions inform whether a balance may or may not be practicable under s 106G.

### ***C A Right to Confrontation?***

Pre-recorded cross-examination could potentially erode the right to confrontation. Under s 106G, judges are not explicitly required to consider a lack of confrontation as potentially presenting a real risk to the fairness of the trial. Furthermore, witnesses have an interest in not providing evidence directly before the accused. However, if confrontation is an implicit fair trial right, pre-recording cross-examination in the absence of the accused may impact on the exercise of judicial discretion, such as the discretion to grant entitlement under s 106G.<sup>66</sup>

#### *1 The rationale underpinning a right to confrontation*

The right of confrontation, in the sense of all parties being present in the courtroom, has been recognised under common law as equal in importance to the presumption of innocence.<sup>67</sup> Lord Bingham described it as an established common law principle that the accused should be confronted by the accusers in a criminal trial.<sup>68</sup>

Whether confrontation is necessary to test the evidence and reach a fair verdict or whether its value is merely symbolic of a defendant's participation in the trial may be questioned. The merit in live or confrontational cross-examination assumes that witnesses will more conscientiously present

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63 At [22].

64 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1252.

65 *Attorney-General v Otauhu District Court* [2001] 3 NZLR 740 (CA) at [47] per Richardson P.

66 Though under s 106G(3) the court may consider any factors it considers relevant.

67 Ian Dennis "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) 4 Crim LR 255 at 255.

68 In the context of witness anonymity, *Regina v Davis* [2008] UKHL 36, [2008] 1 AC 1128 at [5].

the truth in the defendant's presence.<sup>69</sup> Cooke P stated, "it is human nature to be less likely to speak ill of a person to his or her face".<sup>70</sup> Conversely, confrontation may inhibit fact-finding by skewing a victim's recall and inducing anxiety and distress.<sup>71</sup> Cooke P, in the same passage, admitted that the psychological implications on the readiness of a witness to lie under oath, whether in the witness box or outside the courtroom, are not clear-cut.<sup>72</sup> The tactics employed by defence counsel cross-examining prosecution witnesses are necessarily contrived to present a narrative favourable to the defence. If it is necessary for the best defence, counsel will conceal segments of truth by framing questions in a way that limits the possible responses from witnesses. Cross-examination is as much a tool for truth distortion as it is for truth exposure;<sup>73</sup> thus, the relationship between fact-finding and a confrontational cross-examination is questionable at best.

## 2 *Witnesses' interest in not providing evidence directly before the accused*

Any potential right that a defendant may have to confrontation would conflict with the witness' interest in not providing evidence directly before the accused. A particular stressor for complainants is the possibility of encountering the accused in and around court and having to give evidence in their presence.<sup>74</sup> In her recent study of 40 rape trials held from 2010 to 2018, Elizabeth McDonald found that many witnesses were distressed by the prospect of giving evidence in the same room as defendants, even if from behind a screen.<sup>75</sup> Because a defendant's presence, visual or not, induces anxiety in witnesses, pre-recording would be most effective in their absence to cater to victims' needs. This may conflict with the right to cross-examination under s 25(f) if construed as a matter of confrontation.

## 3 *Confrontation implicit in the NZBORA?*

Section 25(f) is based on art 14.3(e) of the International Covenant on Civil and Political Rights (ICCPR),<sup>76</sup> which was designed to observe the principle of equality of arms by granting defendants

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69 Vivian Berger "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom" (1977) 77 *Columbia Law Review* 1 at 89. See also Ellison, above n 56, at 35.

70 *R v Accused (T 4/88)* [1989] 1 NZLR 660 (CA) at 664 per Cooke P.

71 Ellison, above n 56, at 36.

72 *R v Accused*, above n 70, at 664 per Cooke P.

73 Wigmore and Chadbourn, above n 57, at [1367].

74 Boyer, Allison and Creagh, above n 7, at 72; and Kim McGregor, Kirsten Hanna and Emily Henderson *Child witnesses in the NZ criminal courts: Issues, responses, opportunities* (Chief Victims Advisor to Government, 2017) at 16.

75 McDonald, above n 40, at 114–116, though this had varying degrees of impact across witnesses. See also Boyer, Allison and Creagh, above n 7, at 77.

76 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

an equal standing to compel the attendance, examination and cross-examination of witnesses.<sup>77</sup> The European Court of Human Rights has noted that exceptions will arise and will not violate the defendant's absolute right to have an *adequate and proper* opportunity to challenge and question witnesses.<sup>78</sup> The Law Commission has argued that s 25(f) does not include face-to-face confrontation.<sup>79</sup> Further, in *R v L*, the Court of Appeal did not interpret s 25(f) as representing an absolute right to confront and question the witness at the trial itself.<sup>80</sup>

It is arguable that pre-recorded cross-examination indirectly ensures confrontation through defence counsel, regardless of whether the defendant is present. McDonald and Tinsley suggest that pre-recording "allows confrontation by way of direct questions from counsel".<sup>81</sup> In light of this and the contested rationale underpinning the right to confrontation, it must not be treated as essential to s 25(f). Requiring witnesses to present evidence directly before the accused would unnecessarily traumatise victims for the sake of a common law norm, rather than preserving the fairness of the trial. Where defendants nevertheless have an adequate and proper opportunity to challenge and question the witnesses, confrontation, or a lack thereof, is unlikely to be a relevant fairness consideration under s 106G.

### ***D Right to Silence and the Right against Self-Incrimination***

The right to silence is embodied in ss 23(4) and 25(d) of the NZBORA.<sup>82</sup> Section 23(4) entitles anyone arrested or detained to refrain from making any statement, and s 25(d) confers the right not to be compelled to be a witness or to confess guilt. These provisions reflect art 14(3)(g) of the ICCPR, which represents the "right to hold one's tongue in the face of criminal allegations".<sup>83</sup> The Ministry of Justice suggests that the right to silence is tied to the right not to self-incriminate, rather than entitling defendants not to show their hand before trial.<sup>84</sup> This understanding is not universal, with others viewing the right as the corollary of the prosecution's obligation to prove its case without

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77 Butler and Butler, above n 64, at 1364.

78 *Al-Khawaja and Tahery v The United Kingdom* [2011] 6 ECHR 191 (Grand Chamber) at [118] (emphasis added).

79 Law Commission *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper* (NZLC PP26, 1996) at 28 and 51.

80 *R v L*, above n 57, at 61, affirmed in *R v Petaera* [1994] 3 NZLR 763 (HC).

81 McDonald and Tinsley, above n 40, at 282. See also Yvette Tinsley and Elisabeth McDonald "Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges" (2011) 42 VUWLR 705 at 735.

82 Butler and Butler, above n 64, at 1178.

83 E W Thomas "The So-Called Right to Silence" (1991) 14 NZULR 299 at 315.

84 Ministry of Justice "Departmental Report to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" at 28.

assistance from the defendant.<sup>85</sup> In principle, the accused ought not to be compelled to disclose their defence strategy, the aspects of the prosecution's case it intends to challenge, or the evidence it intends to lead before trial.<sup>86</sup>

The New Zealand Bar Association, the New Zealand Law Society, and the Criminal Bar Association argued variously in their submissions on the Bill that the entitlement to pre-recorded cross-examination would undermine the right to silence.<sup>87</sup> Similar commentary surrounded the Criminal Procedure (Reform and Modernisation) Bill 2010 (CPRM Bill) when it was introduced. The CPRM Bill proposed to increase the disclosure obligations of defence counsel by requiring them to notify issues in dispute before trial.<sup>88</sup> The Law Commission claimed that the CPRM Bill did not impact on a defendant's right to silence.<sup>89</sup> However, submitters argued that it would undermine the onus of proof by assisting the prosecution,<sup>90</sup> and would thereby erode the right to silence.<sup>91</sup>

Under the Sexual Violence Legislation Act, the provision of pre-recorded cross-examination supersedes identifying issues in dispute by bringing a significant portion of the defence strategy to light before the trial. Successive Attorneys-General have nevertheless argued that the right to silence is not engaged by either the Sexual Violence Legislation Act or the CPRM Bill, as the right does not entitle a defendant to wait until trial to disclose any information about the defence strategy.<sup>92</sup> Instead, they have argued that the right to silence is better understood as the right not to be compelled to self-incriminate or to confess guilt.<sup>93</sup>

However, the right to refrain from self-incrimination has a broad scope, applying not only to the making of oral statements, but also to producing documentary material or any other incriminating evidence.<sup>94</sup> It was interpreted broadly in *Burke v Superintendent of Wellington Prison* as providing

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85 Patrick Winkler and Roderick Mulgan "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019".

86 Exceptions under the Criminal Disclosure Act 2008 require defendants to disclose supporting evidence when a defendant intends to call an expert witness or run an alibi defence: ss 22 and 23.

87 Ministry of Justice, above n 84, at 41.

88 Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2), cl 64.

89 The Fifth Amendment in the United States is similarly regarded as unaffected by such disclosure obligations: see *Williams v Florida* 399 US 78 (1970) at 85.

90 (29 September 2011) 676 NZPD (Criminal Procedure (Reform and Modernisation) Bill – In Committee, John Boscawen).

91 (27 September 2011) 676 NZPD (Criminal Procedure (Reform and Modernisation) Bill – Second Reading, Rahui Katene).

92 Ministry of Justice, above n 84, at 44.

93 At 28.

94 Butler and Butler, above n 64, at 1437–1439.

evidence or information upon which a prosecuting authority might rely to establish guilt, or which allows a prosecutor to open an incriminating line of inquiry: "in short, the privilege is against providing evidence or information which might assist a criminal prosecution".<sup>95</sup>

### *1 Conflict with the practical reality of pre-recorded cross-examination*

Pre-recorded cross-examination inherently results in assistance to the prosecution, potentially exposing incriminating lines of inquiry or evidence which may later be relied upon to establish guilt. The defence counsel's cross-examination of witnesses would, by its nature, expose weaknesses in the prosecution's case, which the Crown would then potentially have an extensive period of time before the trial to address. There is also a risk of implicit admissions during questioning, which could lead to the satisfaction of certain elements of the offence. Consequently, cross-examination is likely to be conducted with caution. The fear of conceding one's strategy may deter defence counsel from openly testing the evidence. It will be difficult for defence counsel to conduct an effective cross-examination whilst minimising any incidental assistance to the prosecution. The provision of pre-recorded cross-examination will, by implication, conflict with a defendant's right to refrain from self-incrimination on the interpretation of *Burke*, and thereby the right to silence as successive Attorneys-General have framed it.

### *2 How is this addressed by the Act?*

Under s 106G(4), the judge must not assume that the defence's revealing its hand would present a real risk to the fairness of the trial. The Act indicates that defendants' disclosing some of their strategy will not always unfairly prejudice the trial. The right to silence, as inclusive of the right against self-incrimination, will not have priority for the sake of the common law norm; rather, it must be clear to the judge that such rights affect the fairness of the proceedings in the particular case.

However, in order to show clearly why or how revealing one's hand would present a real risk to the fairness of the trial, the defence would likely have to disclose the defence strategy in issue. This is self-defeating; either way, the defendant will end up showing their hand. Careful redrafting, however, could enable defendants to demonstrate how or why pre-recorded cross-examination would expose elements of their defence and erode their right to silence, thereby impacting on the fairness of the overall proceedings. Conceivably, this could occur in a private session with the judge without full disclosure to the prosecution.

If the Attorneys-General and the Ministry are correct that the right to silence is enshrined in the right against self-incrimination under s 25(d) on the interpretation of *Burke*, it is difficult to imagine a case in which pre-recording would not engage these rights, and therefore present a real risk to the fairness of the trial. The practical consequences spelt out in *Burke* would likely be evident in any s 106F party application for the judge to make an order preventing the use of pre-recorded cross-

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<sup>95</sup> *Burke v Superintendent of Wellington Prison* [2003] 3 NZLR 206 (HC) at [26]–[27].

examination. In addition, *M v R* may continue to compel judges not to "lightly countermand" the "general rule" that the accused is not required to show their hand or take any step in the trial before hearing the prosecution's case.<sup>96</sup>

### ***E Right to Be Present at Trial and to Present a Defence***

Section 25(e) guarantees defendants the right to be present at trial and to present a defence. The right to be present at trial denotes the right of attendance—that is, the right not to be tried in one's absence.<sup>97</sup> Several commentators argue that pre-recorded cross-examination unfairly disadvantages defendants, undermining s 25(e) by precluding the defence from tailoring its cross-examination to the jury at trial.<sup>98</sup> On the other hand, witnesses have an interest in undergoing cross-examination by pre-recording in the absence of a jury.

#### *1 Witnesses' interest in the absence of a jury*

Overseas experience indicates that when cross-examination occurs out of court or in the absence of a jury, defence counsel are more likely to focus their questioning and be attentive to a witness' interests.<sup>99</sup> This factor is significant for reducing witness trauma, as witnesses are primarily affected by how defence counsel treat them.<sup>100</sup> Studies have also found that cross-examination without a jury improves the quality of the evidence produced<sup>101</sup> and reduces the length of cross-examination, alleviating the emotional burden on witnesses.<sup>102</sup> Defence counsel are otherwise inclined to construct persuasive narratives, tailored to jury reactions, in accordance with the notion that "juries prefer theatre to film".<sup>103</sup> Direct questioning in favour of achieving quality evidence and protecting witnesses from unnecessary trauma should be a welcome shift if fairness is the objective.

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96 *M v R*, above n 22, at [34].

97 Butler and Butler, above n 64, at 1360.

98 See for example Criminal Bar Association, above n 60, at 11; New Zealand Bar Association "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019" at 10; and Elizabeth Hall "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019" at 11 and 15.

99 Baverstock, above n 46, at 66–67.

100 Boyer, Allison and Creagh, above n 7, at 81 and 119.

101 At 66. See also Baverstock, above n 46, at 38 and 67–68.

102 The experience in the United Kingdom pilot was that pre-recording witnesses' entire evidence took between 20 and 45 minutes, whereas cross-examination at trial took between 45 minutes and three hours. Shorter cross-examinations were positive for witnesses' experiences: Baverstock, above n 46, at 53.

103 Baroness Vivian Stern *The Stern Review: Independent Review Into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Government Equalities Office/Home Office, 2010) at 16.

## 2 *In conflict with the right to be present at trial and to present a defence?*

The provision of pre-recorded cross-examination does not implicate the right of attendance at one's trial. In its scrutiny of the Bill, the New Zealand National Party argued that s 25(e) is limited by the Bill's "seeking to allow that the cross-examination element of the person's defence not be presented at the trial".<sup>104</sup> Arguably, this interpretation of s 25(e) is misguided—the court would play any pre-recorded evidence for the jury in the natural order of the proceedings at the trial. In any case, taking the broad interpretation of "trial" as inclusive of pre-trial hearings,<sup>105</sup> the right to be present, as protected under s 117 of the Criminal Procedure Act 2011, is subject to "necessary modifications" to accommodate evidence taken by alternative methods under the Evidence Act.<sup>106</sup> In *R v Accused*, McMullin J articulated defendants' right to be present as a right to hear the case against them and to have the opportunity to answer it.<sup>107</sup> The presence of defence counsel and adequate communication with defendants throughout any pre-trial proceedings would satisfy that right.

Furthermore, Parliament has indicated under s 106G(4) that being unable to tailor the cross-examination to jury reactions is not to be presumed to prejudice the fairness of the trial. It challenges the Court's assertion in *M v R* that jury presence for cross-examination is a "very relevant fair trial factor".<sup>108</sup> This non-presumptive factor furthers the purpose of cross-examination. While defence counsel ought to put forward the most effective defence, a fact-finding exercise should not become one that enables defence counsel to "make an honest witness appear at best confused, and at worst a liar".<sup>109</sup> Although utilising cross-examination to tug at the heartstrings of a particular jury may be advantageous, such a lost opportunity would not compromise the fairness of the trial. Without a clear connection between the jury's absence for cross-examination and the fairness of the trial, it must not impact on judicial directions under s 106G. In this sense, the Act favours witnesses' interests without detriment to defendants' fair trial rights.

The right to present a defence ensures defendants' participation in the conduct of their trial.<sup>110</sup> The right to present a defence is not precluded by pre-recorded cross-examination but presupposes the provision of adequate time and facilities to prepare a defence.

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104 Sexual Violence Legislation Bill 2019 (185-2) (select committee report) at 6.

105 This interpretation was endorsed in *R v de Montalk* CA66/98, 25 June 1998, affirmed by the Court of Appeal in *R v Smail* [2008] NZCA 6, [2008] 2 NZLR 448 at [62].

106 Criminal Procedure Act 2011, s 98.

107 *R v Accused*, above n 70, at 670.

108 *M v R*, above n 22, at [38].

109 Diane J Birch "The Criminal Justice Act 1988 – Documentary Evidence (Pt 2)" [1989] Crim LR 15 at 17.

110 Butler and Butler, above n 64, at 1362.

## ***F Right to Adequate Time and Facilities to Prepare a Defence***

The provision of adequate time and facilities to prepare a defence may depend on the complexity and volume of the evidence, and the familiarity of counsel with the case.<sup>111</sup> In *Allen v Police*, Giles J held that s 24(d) entitled defendants to access the relevant documents in advance of the trial "so as to form a view as to whether an issue of reliability arose".<sup>112</sup> This right recognises defendants' contribution and participation in their case as an integral part of the resulting determination.<sup>113</sup> The provision of adequate facilities does not mean "equality of arms" in the sense of equipping the defence with equal resources to those available to the prosecution.<sup>114</sup> However, the defence is entitled to sufficient time and resources to appreciate the breadth and contents of the evidence relevant to proving or weakening the prosecution's case.<sup>115</sup>

### ***1 Conflict with the reality of pre-recording cross-examination***

Under the Bill as introduced, whether full disclosure had taken place before pre-recorded cross-examination was a mandatory consideration for judges deciding whether to make an order under s 106G. However, the Act omits this mandatory consideration. The Court of Appeal in *M v R* considered that a judge should be "very slow" to order pre-recorded cross-examination where full disclosure has not taken place.<sup>116</sup> Although disclosure is "haphazard and often tardy", defence counsel ought to have an opportunity to consider carefully the relevant information in the prosecutor's hands before cross-examining a complainant.<sup>117</sup>

The right to adequate time and facilities to prepare a defence was of primary concern to commentators opposing the Bill.<sup>118</sup> The right cannot be recognised without full disclosure early on,

111 In *Neinkemper v Police* HC Auckland AP120/94, 21 June 1994, one week was considered sufficient time for experienced counsel to prepare a defence and not in breach of s 24(d). A fact-specific analysis was envisioned in Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* (Wellington, 1985) at [10.1.30]. See also *R v Shaw* [1992] 1 NZLR 652 (CA) at 653 per Cooke P.

112 *Allen v Police* [1999] 1 NZLR 356 (HC) at 363.

113 Butler and Butler, above n 64, at 1251.

114 Michael Karnavas "The Position of the Defence and Adequate Facilities" (2019) 19 *International Criminal Law Review* 234 at 270. The greater resourcing of the prosecution dwarfs that available to defendants. It is said that the differing burden of proof justifies increased resourcing to overcome the obstacles inherent in identifying the existence of an offence and proving the culprit. See *Brown v Attorney-General* [2003] 3 NZLR 335 (HC) at [64] per Glazebrook J, criticising a "tit for tat" analysis.

115 Criminal Disclosure Act 2008, s 13(3).

116 *M v R*, above n 22, at [35].

117 At [35].

118 See for example Criminal Bar Association, above n 60; New Zealand Bar Association, above n 98; Hall, above n 98; and Sam Hurley "Lawyers say Sexual Violence Bill is 'flawed', fear changes may compromise right to a fair trial" *NZ Herald* (online ed, New Zealand, 23 June 2020).

and this has been described as "unworkable" in the current system.<sup>119</sup> The practical difficulties of disclosure have not improved since *M v R*. In its submission on the Bill, the Criminal Bar Association argued that disclosure delays are "no better than they were in 2011".<sup>120</sup> It stated that the volume of material subject to disclosure has "increased dramatically" due to digital media, and that it would be "unsafe" to assume that the defence will have all the relevant information at the time of pre-recording.<sup>121</sup> Similarly, those disapproving of the CPRM Bill argued that the proposed requirement that defendants identify issues in dispute was impracticable until the prosecution had fully presented its case at trial.<sup>122</sup> Pre-recorded cross-examination may face the same difficulties by potentially taking place up to a year in advance of trial, when the issues have not yet emerged.

## 2 *Balancing these issues under the Act*

The Act does not require a judge to consider whether full disclosure will have taken place before pre-recording cross-examination evidence. The removal of this mandatory consideration may reflect the difficulties judges would face in predicting the completeness of disclosure in order to take it into consideration under s 106G. Late disclosure is often a consequence of unexpected discoveries or lines of enquiry that do not become apparent until close in time to the trial. In a recent case, forensic testing results were made available only at the time of trial, after the prosecution's opening and evidence.<sup>123</sup> In that case, counsel's failure to recall the witness justified a retrial.<sup>124</sup> Defence lawyers argued in their submissions that this was not uncommon,<sup>125</sup> and that inquiries relevant to cross-examination are often incomplete until the eve of trial.<sup>126</sup> Neither the rationale nor the practice has substantially changed since 2011. *M v R* would have likely always compelled judges to exercise their discretion under s 106G to prevent the use of pre-recorded cross-examination without full disclosure. The potential erosion of defendants' rights to adequate time and facilities, therefore, was unlikely to eventuate at trial. However, its omission from the Act implies that full disclosure is not a strict prerequisite, possibly representing a legislative nudge towards leniency in favour of pre-recorded

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119 Marie Dyhrberg "Sex violence Bill crosses the line on access to a fair trial" *Stuff* (online ed, New Zealand, 18 February 2021).

120 Criminal Bar Association, above n 60, at 9.

121 At 9.

122 Ministry of Justice, above n 84, at 46.

123 *Weston v R*, above n 9, at [58].

124 At [62].

125 This is evident in the case law: see *R v Aitken*, above n 9; *Beazley v Police*, above n 9; and *Bae v R*, above n 9.

126 Ministry of Justice, above n 84, at 42. See also Elizabeth Hall and Nick Chisnall "An Attack on Fair Trial Rights: The Disclosure Crisis in New Zealand" (presentation to the Criminal Bar Association Annual Conference, 2 August 2018).

cross-examination at the expense of defendants' rights under s 24(d). However, a judge is unlikely to stand by while defence counsel cross-examine witnesses on evidence yet to be heard.

A consequence of disclosure being incomplete before pre-recorded cross-examination is that a witness may need to give evidence after the initial pre-recording. This is a mandatory consideration under s 106G(3) of the Act and will support judicial orders against pre-recording. The Court in *M v R* flagged this as destructive of the rationale behind pre-recorded cross-examination by perpetuating the trauma associated with providing evidence and enabling a "second bite at the cherry".<sup>127</sup> Professor McDonald submitted that pre-recorded cross-examination should occur close in time to the trial to minimise the need to recall witnesses.<sup>128</sup> This would equally ensure that adequate time and facilities are provided, given the reality that the parties rarely meet disclosure obligations in a timely manner. However, this resolution undercuts a significant benefit of pre-recording for witnesses—namely, the reduction of delay between the time of the incident and giving evidence.

### 3 *Witnesses' interest in reduced delays*

In the Law Commission's reporting of sexual violence trials in 2015, the average time between filing charges and the end of the trial was 443 days in the District Court and 418 days in the High Court.<sup>129</sup> Delays negatively impact on the complainant and their evidence. Successful prosecution will usually turn on complainants' ability to retain a detailed account of the act in question.<sup>130</sup> The nature of questioning under cross-examination will probe the existence of consent and the circumstances leading up to the point of sexual contact.<sup>131</sup> The longer complainants have to remember the intimate details, the less clear and accurate the evidential product is. Beyond the trial, delays continue to affect complainants' long-term recovery, as the event and its trauma become etched in their memory.<sup>132</sup> Complainants become not only victims of the offence, but victims of the court process.

Judges need not consider whether the recording is unlikely to be made substantially in advance of the trial.<sup>133</sup> Commentators frequently regard delay as the principal justification for alternative

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127 *M v R*, above n 22, at [40].

128 Ministry of Justice, above n 84, at 42–43.

129 Law Commission, above n 3, at 63.

130 In sexual cases, there is usually only one witness, the complainant. Their memory is, therefore, essential evidence to proving the offence beyond reasonable doubt.

131 The defence posed is usually the defence of consent, or the defence that sexual contact did not occur: Law Commission, above n 3, at 79.

132 Law Commission *Alternative Pre-Trial and Trial Processes: Summary of Submissions to Consultation* (December 2012) at [95]. See also Isabel Randell and others *Young Witnesses in New Zealand's Sexual Violence Pilot Courts* (New Zealand Law Foundation, May 2020) at 16–20.

133 By contrast, the Bill as introduced included the likelihood of delay as a mandatory consideration.

evidence,<sup>134</sup> but it is arguable that delay should only carry such weight where it is the sole advantage of pre-recording. Delay will be a compelling consideration where pre-recorded cross-examination is set to occur in identical conditions to those at trial, in the presence of the accused in the courtroom, but just at an earlier date. This led the Court in *M v R* to consider that the disadvantages of pre-recorded cross-examination trumped the benefits of giving evidence earlier.<sup>135</sup> The legislative exclusion of delay as a mandatory consideration minimises the suggestion that delay is the primary justification of pre-recording cross-examination. Pre-recording, regardless of timing, can eliminate the aggravating aspects of the courtroom environment, such as presenting evidence before the defendant, encountering them in and around court and facing jury-centric tactics by defence counsel when being cross-examined.

#### *4 Addressing competing interests under the Act*

Under s 106G, judges have to weigh the benefit to witnesses, when considering the likelihood of reduced delay or recalling witnesses, with the detriment to defendants, when considering whether full disclosure will be completed before cross-examination, to observe defendants' right to adequate time and facilities. These considerations, in theory, assist a judge's determination of whether pre-recording will pose a real risk to the fairness of the trial. In reality, fairness to the accused and fairness to witnesses are not easily reconciled.

Pre-recording cross-examination is often impracticable due to the difficulties in achieving full disclosure in advance of trial. This can lead to the defence recalling witnesses after pre-recording to be cross-examined again on the new evidence. To mitigate this, the judge could order pre-recording close in time to trial. However, this undermines the benefit of reducing delays for witnesses, which is a fundamental justification for using an alternative evidence method. Nevertheless, pre-recording closer to trial to eliminate those aspects of the trial, other than delay, that distress witnesses may still be justified. This demonstrates a compromise achievable under the Act. More broadly, it reflects the complexity of the tensions between the respective interests of witnesses and defendants. Even under a compromise, the preservation of defendants' rights to adequate time and facilities comes at a cost to witnesses' interests in reduced delay. Similarly, the system of pre-recorded cross-examination operates at the expense of defendants' right to silence and to avoid self-incrimination before the prosecution's case has been heard at trial.

### ***V CONCLUSIONS***

#### ***A Welcome Changes for Victims***

The Act does achieve some, albeit minor, victories in the interests of witnesses when guiding judicial discretion under s 106G. The non-presumptive factors prevent a judge from assuming fair

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<sup>134</sup> McDonald and Tinsley, above n 40, at 295.

<sup>135</sup> *M v R*, above n 22.

trial prejudice based on some of the consequences that the Court of Appeal in *M v R* considered to be relevant. For example, the inability to tailor cross-examination to a jury is not sufficient grounds for denying the use of pre-recorded cross-examination for the sake of a traditional adversarial norm. Similarly, the requirement of extra effort and preparation, or practical and technical difficulties, cannot be presumed to prejudice the fairness of the trial. This represents a shift from *M v R*, where the Court diminished the rationale of pre-recording by emphasising the consequence of increased court resources and counsel preparation. While accurate and compelling, these practical consequences should not bear on whether the trial is fair. These changes are a welcome legislative push for the system to evolve to accommodate justice for victims.

### ***B The Shortfalls***

Whilst the Act ensures that witnesses are entitled to give evidence in an alternative way as a starting point, their entitlement is subject to the judicial discretion under s 106G to direct otherwise. Driving this judicial discretion are almost identical factors to those identified by the Court of Appeal in *M v R*, when it reasoned that courts should only permit pre-recorded cross-examination in rare circumstances. Under the Act, judges are tasked with weighing up the witness' entitlement and the benefits of pre-recording, with the practical consideration of whether the witness may need to be cross-examined again (for example, due to further disclosure). Equally compelling will be the fair trial rights engaged when those practical realities come into play. One can only speculate as to the weight that judges will attribute to s 106G(3). However, without a system materially different from that which was before the Court of Appeal in *M v R*, it seems that these amendments will not materially impact on when and how often witnesses can access pre-recorded cross-examination.

### ***C Addressing the Public Concern***

The widespread opposition from barristers and judges is somewhat misguided. Even if the judiciary takes the legislative intervention at face value to require pre-recording, the NZBORA rights will intervene. While these rights are not absolute and are subject to reasonable limits demonstrably justified in a free and democratic society,<sup>136</sup> when it is possible to interpret an enactment in a way that is consistent with the NZBORA, that interpretation is to be preferred.<sup>137</sup>

This article considers that pre-recording in the context of the system's disclosure realities would run contrary to a defendant's right to adequate time and facilities. Secondly, by its nature, pre-recording erodes a defendant's right to silence (in the sense of assisting in the prosecution's case), and thereby undermines the right to non-self-incrimination. When these fair trial rights are implicated, the interpretation consistent with the NZBORA would be to exercise judicial discretion against the use of pre-recorded cross-examination.

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136 New Zealand Bill of Rights Act, s 5.

137 Section 6.

Consequently, the Attorney-General's compliance report was warranted because the legislation lends itself to an interpretation that is compliant with the NZBORA. The legislature avoided the political scrutiny of explicitly eroding defendants' fair trial rights by passing the baton to the judiciary. The judiciary will have to navigate the legislation with regard to the purpose of the Act, whilst being constrained to interpret it in a way that is consistent with the NZBORA.

#### ***D What Has the Act Achieved?***

The overarching issue is that witness re-traumatisation is caused by conducting a "fair trial" for defendants. The respective interests of witnesses and defendants, while equally compelling, are not reconcilable in the current system because delays are inevitable, disclosure is inefficient, and because the notion of fairness is equated with the rigid adversarial system that values defendants' rights to hear the prosecution's case before taking any step in the trial. Where characteristics of the adversarial system have been softened (for example, regarding the role of a jury in cross-examination, or confrontation between witnesses and the accused), the legislation reflects that.

If anything, the Act signals a call for changes that favour a more efficient process, so that pre-recording can occur in practice. However, judges need more than a legislative mandate to facilitate pre-recording cross-examination. The system itself needs resourcing and improvements before it can accommodate victims' needs without impacting on defendants' fair trial rights. Until then, the entitlement to pre-record will be more symbolic than practical. The Law Commission's observation in 2015 still rings true:<sup>138</sup>

... incremental change, which has been struggling forward over the last three decades, will not bring about the desired result of bringing these complainants within the formal justice system or satisfying their legitimate needs.

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<sup>138</sup> Law Commission, above n 3, at IV.