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

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Abstract

This paper analyses the provisions of the Sexual Violence Legislation Bill 2019 that entitle witnesses in sexual cases to access pre-recorded cross examination, as an alternative method of giving evidence. The Bill is intended to improve the experience of sexual violence victims in court whilst preserving the fairness of the trial. Whilst the Bill prima facie entitles witnesses to access alternative evidence methods, judges retain discretion under s 106G to make orders preventing the use of pre-recorded cross examination. Under s 106G, the judge must do so where it considers that pre-recorded cross examination will present a real risk to the fairness of the trial. This paper evaluates how judges will navigate their discretion under s 106G, to cater to victims needs whilst preserving the fairness of the trial. I recount the contemporary notion of a fair trial through the lens of the Bill of Rights Act 1990, identifying areas of tension between defendants' fair trial rights and witness interests. I assess how the practical realities of the system render pre-recorded cross examination only workable 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, in an attempt to preserve the fairness of the trial. The Bill is unfit to achieve its purpose to expand the availability of alternative evidence for witnesses and improve the justice process for sexual violence complainants.

Key words: "Evidence in Sexual Cases"**,** "Sexual Violence", "Cross Examination", "Alternative Evidence", "Fair Trial", "Bill of Rights Act 1990"

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I Introduction

The Sexual Violence Legislation Bill 2019 (the Bill) is intended to improve access to alternative methods of giving evidence for witnesses in sexual cases. Victims in sexual cases are frequently re-traumatised by the justice process, particularly when giving evidence in court and being under cross examination as witnesses.[1] In consequence, victims face real disincentives to reporting sexual violence offences.[2] In 2019, victims reported only 6 percent of sexual assaults to the Police.[3] Of those reported assaults, less than 10 per cent reached the courtroom.[4] Almost 30 per cent of women have or will experience either intimate partner or sexual violence in their lifetime.[5] 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.[6] 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 Bill proposes to entitle 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 Bill 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 Bill, a judge can make an order preventing the use of pre-recorded cross examination if the judge considers that pre-recording would present a real risk to the fairness of the trial.

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[1] This essay refers to "complainants" and "victims" interchangeably. Some readers prefer the term "survivor", however, the use of "victim" here is not intended to denote any stigma or political preference, rather, merely to describe witnesses and complainants entering the criminal justice process.
[2] Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 78.
[3] Ministry of Justice *New Zealand Crimes and Victims Survey Cycle 2 Core Report* (2018-2019) at 88.
[4] At 88.
[5] At 70-71.
[6] Kim McGregor *Strengthening the Criminal Justice System for Victims* (Survey Report, August 2019) at 10-14; Sue Lees "Judicial Rape" (1993) 16 Women's Studies International Forum 11 at 15, 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, Wellington, 2018) at 79; Cabinet Office Circular "Improving the justice response to victims of sexual violence" (3 April 2019) CO (18) 4 at 16.

This paper 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 preserving defendants' fair trial rights.[7] Section II describes the current provisions governing the availability of alternative evidence methods. Section III outlines the provisions under the Bill 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. Section IV uses the NZBORA as the central analytical tool for assessing when a judge is likely to consider that pre-recorded cross examination would present a real risk to the fairness of the trial. I contrast the public outcry about the Bill's purported erosion of fair trial rights with the Attorney-General's report, to necessitate a closer scrutiny of the fair trial rights potentially threatened by the Bill. I explore what is required of cross examination to observe the contemporary notion of a fair trial bolstered by the NZBORA. There is an inherent tension between the interests of complainant witnesses, and the interests of defendants in receiving a fair trial which enables them to present a defence that is as robust as possible. The Bill's practical effects will largely depend on how the judiciary exercises its discretion to balance these two sets of rights and interests. Section IV includes an assessment of the ways in which this balance is likely to play out in practice.

This essay considers two main areas of potential tension. Firstly, that pre-recorded cross examination directly conflicts with defendants' rights to 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.[8] Secondly, that pre-recorded cross examination cannot be reconciled with the prosecution's burden of proof. By 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 the right to avoid self-incrimination, arguably encompassed in the common law right to silence. The adversarial nature of our justice system values a defendant's right to hear the case against him before taking any step in the trial, making

[7] Sexual Violence Legislation Bill 2019 (185-1) (explanatory note).
[8] For example, see *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], [81]-[86]; *Beazley v Police* [2016] NZHC 129.

it ill-equipped to facilitate pre-recorded cross examination. A fair-minded 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.

A Definitions

It is worthwhile to define several terms that will be used throughout this essay. Sexual cases relate to charges under ss 128-142A or 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. 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 with which the accused is allegedly involved. Complainants and propensity witnesses will hereafter be referred to respectively as "witnesses in sexual cases". I focus on the law and reform as it relates to adult witnesses.[9]

II Current Use of Alternative Evidence

The ways that witnesses can give evidence under the current law are governed by ss 103, 105 and 106 of the Evidence Act 2006. Section 103 enables either party to apply for a direction, or a judge to direct on their own accord, that a witness give evidence in the ordinary way, or in an alternative way, as provided for in s 105. An application for a direction permitting a witness to give alternative evidence can be made on various grounds listed in s 103(3). Such an application must be made to the judge as early as practicable.[10] Grounds include trauma suffered by the witness,[11] their fear of

[9] There are specific provisions and considerations pertaining to child witnesses, see Evidence Act 2006, ss 107-107B.
[10] Section 103(2).
[11] Section 103(3)(c). Trauma associated with the alleged offence, rather than the act of giving evidence, see Richard Mahoney, Elisabeth McDonald, Yvette Tinsley and Scott Optican *The Evidence Act 2006: Act & Analysis* (2nd ed, Thomson Reuters, New Zealand, 2014) at 465.

intimidation,[12] the nature of the proceeding,[13] or the evidence,[14] the witness's relationship to any party to the proceeding[15] or any other ground likely to promote the purpose of the Act.[16] In giving a direction, the judge must have regard to the need to ensure a fair trial.[17] The judge also is required to consider the witness's views, including the need to minimise stress on the witness, the need to promote the recovery of a complainant from the alleged offence in a criminal proceeding,[18] and any other factor relevant to the just determination of the proceedings.[19] The alternative ways are set out in s 105 and include giving evidence in court unable to see the defendant or a specified person, from a place outside the courtroom, or by video record made before trial.[20]

It follows that a judge already has 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.[21] My discussion on whether the Bill alters this trajectory to improve the availability of alternative evidence, develops against the background of *M v R.*

III The Sexual Violence Legislation Bill

The Bill proposes to amend the Evidence Act 2006. If enacted, cl 14 would entitle all witnesses to give evidence, including cross examination evidence, in an 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 would have to provide every other party and the court with written notice of how the witnesses intend to give evidence.[22] Under s 106F, the defence may apply to the judge for a direction ordering for the witness to give evidence in the ordinary way or in a different alternative way (s 106F

[12] Section 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)(c).
[20] Section 105(1).
[21] *M v R (CA335/2011); R v E (CA339/2011)* [2011] NZCA 303, [2012] 2 NZLR 485 at [41] [*M v R*].
[22] Section 106D(3).

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.[23] In the exercise of its 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 in s 103(3) and (4). Section 103(3) and (4) include issues such as witness trauma,[24] intimidation,[25] the nature of the proceeding or the evidence to be given,[26] the need to ensure a fair trial,[27] the views of the witness, and the need to reduce stress on the witness and promote their recovery from the alleged offence.[28] A departure from the s 106D entitlement is possible under s 106G, where a judge can make an order preventing the witness's access to its elected alternative evidence method. It is under this section that the judiciary will have to balance the interests of defendants in receiving a fair trial, and the witness interest in access to alternative evidence.

A Judicial orders preventing pre-recorded cross examination

Section 106G governs judicial orders preventing a witness from undergoing pre-recorded cross examination. The section is premised on the defence raising a s 106F party application.[29] The judge may endorse a s 106F party application and make a judicial order preventing pre-recorded cross examination, if they consider that it would present a real risk to the fairness of the trial,[30] and that risk cannot be mitigated adequately in any other way.[31]

The judge must consider the s 106G(2) mandatory considerations when deciding if a real risk to the fairness of the trial would arise. These include the likelihood of disclosure

[23] Section 106F(2).
[24] Section 103(3)(c).
[25] Section 103(3)(d).
[26] Section 103(3)(g).
[27] Section 103(4)(a).
[28] Section 103(4)(b).
[29] This is potentially problematic. Judges should be able to initiate their own motion against the use of pre-recorded cross examination, subject to a hearing between the parties, to account for situations in which the fairness of the trial is likely to be impacted by the s 106D witness entitlement. Defence counsel may, either due to incompetency or resource constraints, omit a s 106F party application, thereby, prejudging the defence; The Justice Committee *Final Report* (*Sexual Violence Legislation Bill) 185-2* (9 June 2020) at 5.
[30] Section 106G(1)(a).
[31] Section 106G(1)(b).

being completed before the recording,[32] whether the witness will likely need to give further evidence after the recording,[33] and whether the recording will occur substantially earlier than the trial.[34]

Additionally, s 106G(3) sets out several factors that cannot be presumed to prejudice the fairness of the trial:

> …it must be shown clearly in the circumstances of the case that the following consequences of pre-recording cross examination before trial *would present* a real risk to the fairness of the trial;[35]
>
> (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 complainants or witness's evidence were given at the trial.

These non-presumptive factors are the inherent consequences of pre-recording cross examination evidence, and the very reasons that the Court in *M v R* considered to impact the fairness of the trial. Section 106G(3) requires the judge to find a clear causal connection between the consequence and fairness in each case before it compels a judicial 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(2) mandatory considerations codify many of the other concerns identified in *M v R*, arguably rendering the s 106D witness entitlement to alternative evidence an illusory addition. 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 will exercise their discretion under s 106G and balance the tension between witness interests and defendants' fair trial rights.

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[32] Section 106G(2)(a); Disclosure occurs under the Criminal Disclosure Act 2008, s 13(1).
[33] Section 106G(2)(b).
[34] Section 106G(2)(c).
[35] (emphasis added).

B The rationale

The Bill primarily responds to the issues coming out of the Law Commission's 2015 report, *The Justice Response to Victims of Sexual Violence,*[36] and their *Second Review of the Evidence Act 2006.*[37] 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.[38] Victims frequently feel as if it is that they are put on trial rather than the accused.[39] Some report that the court process is worse than the rape itself.[40] Distrust and apprehension of the legal system are characteristic of vulnerable witnesses in sexual cases.

Complainants report that they are most traumatised by the cross examination stage of the trial.[41] When under cross examination, defence counsel's aim is to undermine the word, character, and veracity of witnesses, to test their evidential account of events.[42] 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."[43] Pre-recording cross examination reduces the stress of being in the presence of the defendant in and around the court,[44] being insensitively examined before the jury,[45] and the wait times surrounding

[36] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 2.
[37] Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2017). Also influential; Boyer, Allison and Creagh, above n 6.
[38] Sue Lees *Carnal Knowledge Rape on Trial* (1st ed, Penguin, London, 1996) at 31; Victim Support *Women, Rape and the Criminal Justice System* (Victim Support, London, 1996); Christine Eastwood "The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System" (2003) 250 Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice 1 at 3.
[39] Boyer, Allison and Creagh, above n 6, 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; 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 *Strengthening the Criminal Justice System for Victims*, above n 5, at 10-14; Lees, above n 5, at 15, 26; Boyer, Allison and Creagh, above n 6, at 79; Cabinet Office Circular, above n 5, 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 re-victimisation for many participants"; Boyer, Allison and Creagh, above n 6, at 79.
[43] (14 November 2019) NZPD 742 (Sexual Violence Legislation Bill - First Reading, Hon Andrew Little).
[44] Boyer, Allison and Creagh, above n 6, at 72.
[45] This issue is discussed at part IV(E)(1).

giving evidence,[46] with the potential for unexpected adjournments,[47] and delays in proceedings.[48] The technological advantages of pre-recording cross examination can also improve the evidential product later presented to juries, improving the likelihood of the just result.[49]

IV A Fair Trial and the Bill of Rights Act 1990

As previously outlined, s 106G guides judicial orders preventing 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 the judge will have to balance the 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".[50] A bundle of provisions under the NZBORA confer fair trial rights to defendants.[51] These include the right to a fair and public hearing,[52] the right to be present at trial and to present a defence,[53]

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[46] McDonald *Rape Myths as Barriers to Fair Trial Practice*, 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 UK 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, Analytical Series Evaluation, 2016) [UK Pilot] at 65, 114-115; New Zealand research confirms similar findings, see Kirsten Hanna, Emma Davies "Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases" (2013) Australian & New Zealand Journal of Criminology 46(2) 289 at 293.

[47] It is not uncommon for an overnight adjournment to interrupt cross examination, prolonging an already traumatic experience, see McDonald *Rape Myths as Barriers to Fair Trial Practice*, above n 40, at 114.

[48] This issue is discussed at part IV(F)(3).

[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 bolster 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 v R* [2012] CA799, [2013] NZCA 678 at [58], [67]; 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 *Condon v R* [2007] 1 NZLR 529 the Supreme Court held that s 25(a) affirms an absolute right to a fair trial.

[52] Section 25(a).

[53] Section 25(e).

the right to adequate time and facilities to prepare a defence,[54] and the right not to be compelled to confess guilt.[55] 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". Whilst my analysis is centered around the NZBORA, regard is also had to common law fair trial rights which arguably exist alongside or are implicit in the NZBORA. These include the right to confrontation and the right to silence.

Cross examination is the primary evidentiary safeguard of a fair trial,[56] described passionately by evidential theorist JH Wigmore as "the greatest legal engine ever invented for the discovery of truth".[57] 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.[58] Pre-recording modifies how conventional cross examination occurs to minimise the re-traumatisation of witnesses; 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 widespread public concern for the Bill's lack of compliance with the fair trial rights under the NZBORA. The validity of this concern will be tested through the following analysis of how pre-recording cross examination exactly interacts with each of the fair trial rights aforementioned.

B The Attorney-General and public perception on NZBORA compliance

Political opposition alleges that the proposals overtly deny defendants a fair trial.[59] This claim has seen support from the defence bar regarding the Bill's practical implications.[60]

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[54] Section 24(d).
[55] Section 25(d).
[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 Wigmore and James Chadbourn (ed) *Evidence in Trials at Common Law* (Boston: Little, Brown, 1974) at [1367]; See also *R v L* [1994] 2 NZLR 57 (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 57, 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".

One politician argued, "there is not a lawyer in New Zealand", that would have properly afforded the Bill a clean Bill of Rights vetting.[61] Yet, the Attorney-General afforded it exactly that.

The Attorney-General's NZBORA compliance report advised that the provisions of the Bill are not inconsistent with the NZBORA.[62] 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 whilst the Bill ensures that complainants are prima facie entitled to alternative evidence, the position remained largely unchanged, as "the judge is ultimately responsible for ensuring a fair trial" under s 106G.[63] Whilst s 25(a) protects, generally, the defendant's right to a fair trial, the Attorney-General did not address several additional fair trial rights, ss 24(d), 25(e) and 25(f), that potentially intersect with the Bill. This is arguably an oversight. Whilst the specific rights are not ends in themselves,[64] they each contribute to ensuring the fairness of the criminal proceedings as a whole.[65]

What follows is a consideration of the bundle of fair trial rights under the NZBORA that the Attorney-General failed to specifically address in his report. I consider what it takes for cross examination to comply with these rights, noting areas of conflict with the 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 be erosive of 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

[61] (11 February 2021) NZPD 749 (Sexual Violence Legislation Bill - Second Reading, Simon Bridges).
[62] Hon David Parker *BORA Vet: Sexual Violence Legislation Bill — Consistency with the New Zealand Bill of Rights Act 1990* (8 October 2019) at [37].
[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 Otahuhu District Court* [2001] 3 NZLR 740 (CA) at [47] per Richardson P.

confrontation is an implicit fair trial right, pre-recording cross examination in the absence of the accused may impact the exercise of judicial discretion such entitlement, under s 106G.[66]

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 equally important as the presumption of innocence.[67] Lord Bingham described it as an established common law principle that the accused should be confronted by his accusers in a criminal trial.[68]

It is questionable 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. The merit in live or confrontational cross examination assumes that witnesses will more conscientiously present the truth in the defendant's presence.[69] Cooke P stated, "it is human nature to be less likely to speak ill of a person to his or her face".[70] Conversely, confrontation may inhibit fact-finding by skewing victim's recall and inducing anxiety and distress.[71] Cooke P, in the same passage, admitted that the psychological implications on the readiness of witnesses to lie under oath, whether in the witness box or outside the courtroom, are not clear cut.[72] The tactics employed by defence counsel cross-examining prosecution witnesses are necessarily contrived to curate a narrative favourable to the defence. If necessary to present 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 equally a tool for truth distortion as it is for truth exposure, thus the relationship between fact-finding and a confrontational cross examination is questionable at best.

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[66] The mandatory s 106G(2) factors are considered in addition to any other factors the judge considers relevant.
[67] Ian Denis "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) 4 Criminal Law Review 255 at 255.
[68] In the context of witness anonymity, *Davis (Iain)* [2008] UKHL 36; [2008] 3 All E.R. 461 at [5].
[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 57, at 35.
[70] *R v Accused* (T4/88) [1989] 1 NZLR 660 (CA) at 664 per Cooke P.
[71] Ellison, above n 57, at 36.
[72] *R v Accused,* above n 73, at 664 per Cooke P.

2 The witness interest in not providing evidence directly before the accused

Any potential right defendants 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.[73] 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, albeit from behind a screen.[74] Because the defendant's presence, visual or not, induced anxiety in witnesses, pre-recording would be most effective in their absence to cater to victim's needs. This may conflict with the right to cross examination under s 25(f) if construed in a confrontational sense.

3 Confrontation implicit in our Bill of Rights?

Section 25(f) is based on art 14.3(e) of the ICCPR,[75] designed to observe the principle of equality of arms by granting defendants an equal standing to compel the attendance, examination, and cross examination of witnesses.[76] 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 against him.[77] The Law Commission argued that s 25(f) does not include face to face confrontation.[78] Further, in *R v L*, the Court of Appeal did not interpret 25(f) as representing any absolute right to confront and question the witness at the trial itself.[79]

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[73] Boyer, Allison and Creagh, above n 6, at 72; Kim *McGregor Child Witnesses in the New Zealand Criminal Courts: Issues, Responses, Opportunities* (Chief Victims Advisor to Government, December 2019) at 16.
[74] McDonald *Rape Myths as Barriers to Fair Trial Practice*, above n 40, at 114-116; though this had varying degrees of impact across witnesses. See also Boyer, Allison and Creagh, above n 6, at 77.
[75] International Covenant on Civil and Political Human Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) (ICCPR).
[76] Butler and Butler, above n 65, at 1364.
[77] *Al-Khawaja and Tahery v UK* (2011) 32 BHRC 1 (ECtHR, GC) at [119] (emphasis added).
[78] Law Commission *The Evidence of Children and Other Vulnerable Witnesses: A Discussion Paper* (NZLC PP26, 1996) at 28, 51.
[79] *R v L*, above n 58, at 61; Affirmed in *R v Petaera* [1994] 3 NZLR 763.

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".[80] In light of this and the contentious rationale underpinning the right to confrontation, we must not treat it as imperative 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 against him, confrontation, or lack thereof, would unlikely 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.[81] 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 article 14(3)(g) of the ICCPR, which represents the "right to hold one's tongue in the face of criminal allegations".[82] 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. This understanding is not universal, with professional's viewing the right as parallel to the prosecution's obligation to prove its case without assistance from the defendant.[83] 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.[84]

The New Zealand Bar Association, the New Zealand Law Society, and the Criminal Bar Association argued variously in their submissions, that the entitlement to pre-recorded

[80] 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) 1(1) VUWLR 705 at 735.
[81] Butler and Butler, above n 65, at 1178.
[82] Hon Justice Edmund Walter Thomas "The So-Called Right to Silence" (1990–91) 14 NZULR 299 at 315.
[83] Patrick Winkler and Roderrick Mulgan "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019".
[84] 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, 23.

cross examination would undermine the right to silence.[85] Similar scrutiny surrounded the Criminal Procedure (Reform and Modernisation) Bill (CPRM Bill) when it was introduced in 2010. The CPRM Bill proposed to increase the disclosure obligations of defence counsel, by requiring them to notify issues in dispute before trial.[86] The Law Commission claimed that the CPRM Bill did not impact a defendant's right to silence.[87] Yet submitters argued that it would undermine the onus of proof by assisting the prosecution,[88] thereby eroding the right to silence.[89]

Under the Sexual Violence Legislation Bill, the provision of pre-recorded cross examination, would supersede 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 Bill, as it does not entitle a defendant to wait until trial to disclose any information about the defence strategy.[90] Instead, they argue that the right to silence is better understood as the right not to be compelled to self-incriminate or to confess guilt.[91]

However, the right to refrain from self-incrimination has a broad scope, applying not only to the making of oral statements, but to producing documentary material or any other incriminating evidence.[92] It was interpreted broadly in *Burke v Superintendent of Wellington Prison* as providing evidence or information which a prosecuting authority may rely upon to establish guilt or may open a prosecutor to an incriminating line of inquiry; "…in short, the privilege is against providing evidence or information which might assist a criminal prosecution".[93]

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[85] Ministry of Justice "Departmental Report to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" at 41.
[86] Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2), cl 64.
[87] The Fifth Amendment in the United States is similarly regarded as unaffected by such disclosure obligations; See *Williams v Florida* (1970) 399 US 78 at 85.
[88] (29 September 2011) NZPD 676 (Criminal Procedure (Reform and Modernisation) Bill - In Committee, Hon John Boscawen).
[89] (27 September 2011) NZPD 676 (Criminal Procedure (Reform and Modernisation) Bill – Second Reading, Rahui Katene).
[90] Ministry of Justice, above n 85, at 44.
[91] At 28.
[92] Butler and Butler, above n 65, at 1437-1439.
[93] *Burke v Superintendent of Wellington Prison* [2003] 3 NZLR 206 at [26]-[27].

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. Defence counsel's cross examination of witnesses would, by nature, tug at weaknesses in the prosecution's case, which the Crown would then potentially have an extensive period of time before the trial to bolster. There is also a risk of implicit admissions during questioning, which could inform 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 in advance of the trial 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 Bill?

Under s 106G(3), the judge must not assume that the defence revealing their hand would present a real risk to the fairness of the trial. The legislature is indicating 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 clearly show 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 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 in 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 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.[94]

E Right to be present at trial and 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 — not to be tried in one's absence.[95] 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.[96] On the other hand, witnesses have an interest in undergoing cross examination by pre-recording in the absence of a jury.

1 Witness interests 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 witness interests.[97] This factor is significant for reducing witness trauma, as witnesses are primarily affected by how defence counsel treat them.[98] Studies have also found that cross examination without a jury improves the quality of the evidence produced,[99] and reduces the length of cross examination, alleviating the emotional burden

[94] *M v R*, above n 21, at [34].
[95] Butler and Butler, above n 65, at 1360.
[96] For example, see Criminal Bar Association, above n 61, at 11; New Zealand Bar Association "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019" at 10; Elizabeth Hall "Submission to the Justice and Electoral Select Committee on the Sexual Violence Legislation Bill 2019" at 11, 15.
[97] UK Pilot, above n 46, at 66-67.
[98] Boyer, Allison and Creagh, above n 6, at 81, 119.
[99] Boyer, Allison and Creagh, above n 6, at 66; See also UK Pilot, above n 46, at 38, 67-68.

on witnesses.[100] Defence counsel are otherwise inclined to construe persuasive narratives tailored to jury reactions in the notion that "juries prefer theatre to film".[101] Direct questioning — notwithstanding the potential loss of courtroom "theatre" — in favour of achieving quality evidence and protecting witnesses from unnecessary trauma should be a welcomed shift if fairness is the objective.

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 National party argued that 25(e) is "limited by the Bill seeking to allow that the cross examination element of the person's defence not be presented at the trial."[102] 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,[103] the right to be present, as protected under s 117 of the Criminal Procedure Act 2011, is subject to "necessary modifications" to accommodate alternative evidence under the Evidence Act.[104] In *R v Accused*, McMullin J articulated the right to be present in the sense of hearing the case against him and having the opportunity to answer it.[105] The presence of defence counsel and adequate communication with defendants throughout any pre-trial proceedings would observe that right.

Further, the legislature has indicated under s 106(G)(3) 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".[106] This non-presumptive factor furthers the purpose

[100] The experience in the UK 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; UK Pilot, above n 46, at 53.
[101] Baroness Vivian Stern *The Stern Review: Independent Review Into How Rape Complaints Are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office, 2010) at 16.
[102] The Justice Committee *Final report* (*Sexual Violence Legislation Bill)*, above n 29, at 6.
[103] Such interpretation was endorsed in *R v de Montalk* CA66/98, 25 June 1998, affirmed by the Court of Appeal in *R v Smail* [2008] 2 NZLR 448 (CA) at [62].
[104] Section 98.
[105] *R v Accused*, above n 73, at 670.
[106] *M v R*, above n 21, at [38].

of cross examination. Whilst 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".[107] 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 judicial directions under s 106G. In this sense, the Bill favours witness interests to no detriment of defendants' fair trial rights.

The right to present a defence ensures defendant participation in the conduct of their trial.[108] 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, which necessitates closer analysis.

F Right to adequate time and facilities to prepare a defence

The observation 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.[109] In *Allen v Police,* Judge Giles 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".[110] This right recognises defendants' contribution and participation in their case as an integral part of the resulting determination.[111] Adequate facilities does not mean 'equality of arms' in the sense of equipping the defence with equal resources as are available to the prosecution.[112] However, the defence is entitled to sufficient time and

[107] Diane Birch "The Criminal Justice Act 1988 Documentary Evidence" (1989) 2 Criminal Law Review 15 at 17.
[108] Butler and Butler, above n 65, at 1362.
[109] In *Neinkemper v Police* HC Auckland AP120/94, 21 June 1994 one week was considered was 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* (1984) at [10.1.30]; See also *R v Shaw* [1992] 1 NZLR 652 (CA) at 653 per Cooke P.
[110] *Allen v Police* [1999] 1 NZLR 356 at 363.
[111] Butler and Butler, above n 65, at 1251.
[112] Michael Karnavas "The Position of the Defence and Adequate Facilities" (2019) 19(2) 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) 7 HRNZ 100 (HC), [2003] 3 NZLR 335; at [64] per Glazebrook J, criticising a "tit for tat" analysis.

resources to appreciate the breadth and contents of the evidence relevant to proving or weakening the prosecution's case.[113]

1 Conflict with the reality of pre-recording cross examination

Whether full disclosure has taken place, is a mandatory consideration for judges deciding whether to make an order preventing the use of pre-recorded cross examination.[114] 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.[115] Although disclosure is "haphazard and often tardy", defence counsel ought to have an opportunity to carefully consider the relevant information in the prosecutor's hands before cross-examining a complainant.[116]

The right to adequate time and facilities to prepare a defence is of primary concern to commentators opposing the Bill.[117] It cannot be recognised without full disclosure early on, which is described as "unworkable" in the current system.[118] The practical difficulties of disclosure have not improved since *M v R.* The Criminal Bar Association argued that disclosure delays are "no better than they were in 2011".[119] It urged that the volume of material subject to disclosure had "increased dramatically" due to digital media, and it would be "unsafe" to assume that the defence will have all the relevant information at the time of pre-recording.[120] Similarly, those disapproving of the CPRM Bill argued that the proposed requirement of defendants to identify issues in dispute was impracticable until the prosecution fully elicited its case at trial.[121] Pre-recorded cross examination would face the same difficulty, by potentially taking place up to a year in advance of trial when the issues have not yet emerged.

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[113] Criminal Disclosure Act 2008, s 13(3).
[114] Section 106G(2)(a).
[115] *M v R*, above n 21, at [35].
[116] At [35].
[117] For example, see Criminal Bar Association, above n 61; New Zealand Bar Association, above n 94; Elizabeth Hall, above n 101; 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).
[118] Marie Dyhrberg "Sex violence Bill crosses the line on access to a fair trial" *Stuff* (online ed, New Zealand, 18 February 2021).
[119] Criminal Bar Association, above n 61, at 9.
[120] At 9.
[121] Ministry of Justice *Departmental Report to the Justice and Electoral Committee on the Criminal Procedure (Reform and Modernisation) Bill* at 46.

2 Balancing these issues under the Bill

Because the Bill only requires a judge to consider whether full disclosure will have taken place before pre-recording cross examination evidence, full disclosure is potentially not a strict prerequisite. This section possibly represents a legislative nudge towards leniency in favour of pre-recorded cross examination at the expense of defendants' rights under s 24(d). However, a fair-minded judge would unlikely stand by whilst defence counsel cross-examine witnesses on evidence yet to be heard.

Also of concern is the expectation that judges can predict the likelihood of the completeness of disclosure obligations in order to take that into consideration under s 106G(2)(a). Late disclosure is often a consequence of unexpected discoveries or lines of enquiry not showing face until close in time to the trial. In a recent case, ESR testing results were made available only at the time of trial, after the prosecution's opening and evidence.[122] In that case, counsel's failure to recall the witness justified a retrial.[123] Defence lawyers argued in their submissions that this was not uncommon,[124] and inquiries relevant to cross examination are often incomplete until the eve of trial.[125] The rationale nor the practice has substantially changed since 2011. *M v R* would likely always compel judges to exercise discretion under s 106G(2) preventing the use of pre-recorded cross examination without full disclosure. The potential erosion of defendants' rights to adequate time and facilities, therefore, is unlikely to eventuate at the bench.

A consequence of full 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(2)(b) and will further 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".[126] Professor

[122] *Weston v R*, above n 8, at [58].
[123] At [62].
[124] This is evident in the case law; see *R v Aitken*, *Beazley v Police* and *Bae v R*, above n 8.
[125] Ministry of Justice, above n 85, at 42. See also, Elizabeth Hall and Nick Chisnal "An Attack on Fair Trial Rights: The Disclosure Crisis in New Zealand" (presentation to the Criminal Bar Association Annual Conference, 2 August 2018).
[126] *M v R*, above n 21, at [40].

McDonald submitted that pre-recorded cross examination should occur close in time to the trial to minimise the risk of needing to recall witnesses.[127] This would equally ensure adequate time and facilities, 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: reducing the delay between the time of the incident and giving evidence.

3 The witness 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.[128] Delays negatively impact the complainant and their evidence. Successful prosecution will usually turn on complainants' ability to retain a detailed account of the act in question.[129] The nature of questioning under cross examination will probe the existence of consent and the circumstances leading up to the point of sexual contact.[130] The longer that complainants have to remember the intimate details, the less clear and accurate the evidential product is. Beyond the trial, delays continue to impact complainants' long-term recovery, as the event and its trauma become engrained in their memory.[131] Complainants become not only victims of the offence but victims of the court process.

The judge must have regard to whether the recording is unlikely to be made substantially in advance of the trial under s 106G(2)(c). While commentators frequently regard delay as the principal justification for alternative evidence,[132] it is arguable that delay should only be a relevant mandatory consideration where it is the only advantage of pre-recording. Delay is a compelling consideration where cross examination will commence

[127] Ministry of Justice, above n 85, at 42-43.
[128] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 2, at 63.
[129] In sexual cases, there is usually only one witness, the complainant. Their memory is, therefore, essential evidence to proving the offence beyond reasonable doubt.
[130] The defence posed is usually the defence of consent, or the defence that sexual contact did not occur; Law Commission *The Justice Response to Victims of Sexual Violence*, above n 2, at 79.
[131] Law Commission *Alternative Pre-Trial and Trial Processes: Summary of Submissions to Consultation* (2012) at [95]. See also Isabel Randell, Fred Seymour, Clare McCann, Tamara Anderson, Suzanne Blackwell *Young Witnesses in New Zealand's Sexual Violence Pilot Courts* (University of Auckland and the New Zealand Law Foundation, May 2020) at 16-20.
[132] McDonald and Tinsley, above n 40, at 295.

in identical conditions to those at trial, in the presence of the accused in the courtroom, just at an earlier date. This was the case in *M v R*, which led the Court to consider that the disadvantages of pre-recorded cross examination trumped the benefit of giving evidence earlier.[133] The legislative inclusion of s 106G(2)(c) omits this context, which is imperative to understanding the weight attributed to delay in *M v R*. This implies that delay is the primary justification of pre-recorded cross examination glossing over the broader rationale. Pre-recording in other circumstances, 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 Bill

Under s 106G, judges are essentially tasked with weighing the benefit to witnesses, when considering whether there will be a reduction in delay and whether witnesses will be likely to be recalled, with the detriment to defendants, when considering whether full disclosure will be completed before cross examination to observe their right to adequate time and facilities. These considerations, in theory, are listed to 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-recorded cross examination is 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. This undermines the benefit of reducing delays for witnesses, a fundamental justification for alternative evidence. Nevertheless, the broader rationale may justify pre-recording closer to trial to eliminate those aspects of the trial, other than delay, that distress witnesses. 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 come at a cost to witnesses' interests in reduced delay. Similarly, the system of pre-recorded cross

[133] *M v R*, above n 21.

examination arrives at the expense of the defendants right to silence, and to refrain from self-incrimination or assisting the prosecution's case, before it has the opportunity to hear it at the trial.

V Conclusions

A The welcomed changes for victims

The Bill 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 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 ordering against 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 welcomed legislative push for the system to evolve to accommodate justice for victims.

B The shortfalls

Whilst the Bill 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 the courts should only permit pre-recorded cross examination in rare circumstances. Under the Bill, Judges are tasked with weighing up the witness entitlement and the benefits of pre-recording, with the practical considerations of whether full disclosure will have occurred, whether the witness will likely need to be cross-examined again, and whether it is unlikely to happen in advance of trial. Equally compelling will be the fair trial rights engaged when those practical realities come into play. One can only speculate the weight that judges will attribute to each mandatory consideration under s 106G(2). However, without a system materially different from that which the Court of Appeal observed in *M v R*, it seems that

these amendments will not materially impact when and how often witnesses can access pre-recorded cross examination.

C Addressing the public concern

The widespread opposition from barristers, QCs, and judges is somewhat misguided. Even if the judiciary takes the legislative intervention at face value to mandate pre-recording, the Bill of Rights will intervene. Whilst these rights are not absolute and are subject to reasonable limits demonstrably justified in a free and democratic society,[134] when it is possible to interpret an enactment in a way that is consistent with the NZBORA, that interpretation shall be preferred.[135]

This paper considers that pre-recording in the context of the system's disclosure realities would run contrary to the defendants right to adequate time and facilities. Secondly, by nature, pre-recording erodes the defendants' right to silence in the sense of assisting in the prosecution's case, thereby undermining the right to refrain from 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.

Consequently, the Attorney-General's compliance report is warranted because the legislation lends itself to a NZBORA compliant interpretation. The legislature avoids the political scrutiny of explicitly eroding defendants fair trial rights by handing over the baton to the judiciary to, somehow, navigate the legislation with regard to the purpose of the Bill, whilst being constrained to interpret it in a way succumbing to the Bill of Rights.

D Where does that leave us

The overarching issue is that witness re-traumatisation is caused by conducting a "fair trial" for defendants. The respective interests of witnesses and defendants, whilst equally compelling, are not reconcilable in the current system, because delays are inevitable, disclosure is inefficient, and because we have equated the notion of fairness 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 softened,

[134] NZBORA, s 5.
[135] Section 6.

for example, regarding the role of a jury in cross examination, or confrontation between witnesses and the accused, the legislation reflects that.

If anything at all, the Bill signals a legislative call for changes favouring a more efficient process, so pre-recording can practically occur. 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 defendants' fair trial rights. Until then, the entitlement to pre-record will be more symbolic than practically groundbreaking. The Law Commission's observation in 2015 still rings true; "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."[136]

[136] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 2, at IV.

Word Count

The text of this paper (excluding table of contents, abstract, non-substantive footnotes, and bibliography) comprises approximately **7987** words.

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