PRELIMINARY REFLECTIONS ON THE SEXUAL VIOLENCE LEGISLATION ACT 2021

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This article considers the Sexual Violence Legislation Act 2021. It focuses on three key areas of reform: heightened restrictions on sexual experience and sexual disposition evidence; pre-recording of witness evidence prior to trial; and mandatory judicial intervention in unacceptable questioning. The article outlines each of the changes, and anticipates the practical effects they may have on defendants, complainants, counsel, and the wider court system. It concludes that the reforms, while incremental, may go some way to improving the courtroom experience of complainants, and that there appear to be sufficient safeguards embedded in the Act to preserve defendants' fair trial rights. There are, however, questions about the capacity of counsel, and the court system, to accommodate some of the reforms on a large scale – particularly in relation to video record evidence. The authors support an independent evaluation of the Act once in effect, to analyse the efficacy of the changes and to address resourcing concerns.

I INTRODUCTION

In December 2021, Parliament passed the Sexual Violence Legislation Act 2021 (the Act). The Act made a number of amendments to the Evidence Act 2006, the Criminal Procedure Act 2011, and the Victims' Rights Act 2002, with the aim of reducing the retraumatisation that victims of sexual violence may experience when they attend court and give evidence, while preserving the fairness of the trial process and the integrity of the criminal justice system.[1]

There has long been consensus amongst practitioners, participants and commentators alike that the criminal justice system does not adequately respond to sexual violence within Aotearoa. However, there is disaccord about what changes are appropriate to remedy those shortcomings. These reforms

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1 *Legislative Statement for the Sexual Violence Legislation Bill: Presented to the House of Representatives in accordance with Standing Order 272* (J.17, 11 February 2021) at [1]–[2].

are no exception. The Act attracted widespread criticism, ranging from concern that the incremental reforms would not affect meaningful change for complainants navigating the court process, through to suggestions that the amendments breach defendants' rights to a fair trial and may even discourage victims from coming forward.

The purpose of this article is to analyse the reforms contained in the Act and to consider whether the primary concerns expressed during the consultation process and in the media have eventuated. We focus on three key features of the Act: s 44 of the Evidence Act and the heightened restrictions on sexual experience and sexual disposition evidence; pre-recording of witness evidence prior to trial; and mandatory judicial intervention in unacceptable questioning.

II AN INCREMENTAL APPROACH

The changes brought about by the Act are not transformational. Rather, the Act strengthens and broadens a number of existing measures designed to protect complainants during the court process. The key developments can be briefly summarised as follows: (i) narrowing the circumstances in which evidence of either a complainant's sexual disposition or a complainant's sexual experience with the defendant can be adduced; (ii) enabling complainants and propensity witnesses to give the entirety of their evidence by way of pre-recorded video in advance of trial; (iii) imposing a positive duty on judges to disallow unacceptable questions; (iv) requiring judges to give jurors any directions that they consider necessary or desirable to address relevant misconceptions about sexual cases; (v) broadening the restrictions on cross-examination by parties in-person to include any witnesses (not just complainants) who have made allegations against that person; and (vi) affording greater flexibility in the presentation of victim impact statements at sentencing.

Although the Act came into force in December 2021, some of its changes do not come into effect until 21 December 2022.[2] Most notably, the new provisions for witnesses to give evidence by alternative means (including by

2 Section 2(2) of the Act provides that ss 4(1) and (3), 11–23, 31, 42, 43, 45 and 47–51 will come into force 12 months after the Royal assent, or an earlier date set by Order in Council. Schedule 1AA further provides that Part 1 applies only to proceedings commenced on or after the commence of that provision (being 12 December 2022). The amendments to s 44 discussed in part 4 of this article therefore apply to proceedings commenced after 21 December 2021 whereas the amendments to pre-recorded evidence apply to proceedings commenced after 21 December 2022.

way of pre-recorded video); and the requirement for judicial directions to be given about misconceptions arising in sexual cases.[3]

The catalyst for these reforms can be traced back to 2014,[4] when the then Minister of Justice asked the Law Commission to develop proposals for improving the court experience of complainants in sexual violence cases.[5] That culminated in *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, which was presented to the House of Representatives in December 2015.[6] The 2015 Report recommended a broad suite of changes to the prosecution of sexual offending in Aotearoa. These ranged from amendments to the existing legislative framework to improve the court experience of complainants, through to more fundamental changes in how the justice system responds to sexual violence, including the development of an alternative justice mechanism.[7] A number of the recommended changes to trial procedure were adopted but the more transformational recommendations were not, the Government preferring an incremental approach to reform over radicalism.

Subsequently, in 2019, the Law Commission presented its report on the operation of the Evidence Act: *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006*.[8] The Law Commission focussed on how the rules of evidence operated in sexual violence and family violence cases

3 Section 4(2) of the Act inserts a new definition of "sexual case" into the Evidence Act 2006 at s 4. "Sexual case" means a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for, an offence against any of ss 128 to 142A or s 144A of the Crimes Act 1961, or any other offence against a person of a sexual nature. It can also include a civil proceeding that involves issues in dispute of a sexual nature.

4 We acknowledge that many of the reforms advanced by the Act have been championed by victims, advocates and academics for decades.

5 Government Response to the Law Commission report on *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* at 2.

6 Te Aka Matua o te Ture | Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

7 See chapter 9. This proposal involved developing accredited programme providers through which victims and perpetrators could voluntarily engage in conciliatory and restorative processes wholly outside of the court and judicial oversight. It would not involve a fact-finding forum that would attribute guilt or punish a perpetrator. If a perpetrator completed the process, there would be a statutory bar against prosecution for that particular incident of sexual violence.

8 Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019). Section 202 of the Evidence Act requires the Law Commission to review the operation of that Act every five years and to report to the Minister of Justice on whether any provisions ought to be repealed and whether any amendments are necessary or desirable. The Terms of Reference for the 2019 Report required the Law Commission to specifically consider the rules of evidence as they apply to sexual violence and family violence cases.

and made 27 recommendations for change within the existing adversarial system. The Government progressed six of those recommendations through the introduction of the Sexual Violence Legislation Bill (the Bill) in late 2019.[9]

III CONCERNS WITH THE PROPOSALS

The proposed reforms attracted a significant response from the legal profession and the wider public. The Select Committee received 91 submissions in response to the Bill, and some of the amendments attracted mainstream media attention.[10] Most submitters supported the intent of the Bill – to reduce the retraumatisation of complainants – but many expressed concerns about the effectiveness of the reforms and their impact on the overall justice of criminal proceedings. Broadly, the submissions fell into two categories: those who were concerned that the Bill would derogate fair trial rights for defendants; and those who felt the Bill did not go far enough to protect complainants.

A The right to a fair trial

It goes without saying that a defendant's right to a fair trial is a cornerstone of our criminal justice system. This right has long been guaranteed by the common law, and includes (but is not limited to) rights contained in the New Zealand Bill of Rights Act 1990 (NZBORA) being: the right to a fair and public hearing by an independent and impartial court,[11] the presumption of innocence,[12] the right to silence,[13] and the right to present a defence and robustly test the prosecution evidence,[14] including through the presentation and examination of witnesses.[15]

In the sexual violence context, where allegations are generally defended on the basis that they either did not take place, or were consented to, robust cross-examination of the complainant is usually necessary in order to present

9 Government Response to the Law Commission report: *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (2 September 2019) at 4.

10 See, for example, Marie Dyhrberg KC "Sex violence bill crosses the line on access to a fair trial" (18 February 2021) Stuff <www.stuff.co.nz>; Denise Piper "New Sexual violence laws will help more victims come forward, Rape Crisis says" (8 July 2020) Stuff <www.stuff.co.nz>; Elisabeth McDonald and Scott Optican "Claims that sexual violence bill will harm Māori are unfounded" (1 July 2021) Stuff <www.stuff.co.nz>; and Samira Taghavi "Sexual violence bill could see more innocent Māori face jail" (23 June 2021) Stuff <www.stuff.co.nz>.

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

12 Section 25(c).

13 Section 25(d).

14 Section 25(e).

15 Section 25(f).

the defence case and test the prosecution evidence, thereby ensuring the defendant's fair trial rights. The reality is that if a complainant says a sexual assault took place, and the defendant denies it, the defendant is entitled to suggest that the complainant is either mistaken, or lying, and the complainant in turn needs to be given an opportunity to respond to those suggestions.

Access to justice and ensuring fair and robust outcomes is critical to defendants but also for complainants and victims of crime. This is not least because New Zealand has obligations in international law,[16] but also in order for the criminal justice system to retain its institutional legitimacy.

Procedural justice and the perceived fairness of court processes are key to ensuring the ongoing legitimacy of, and participation in, the criminal justice system. This is particularly true for complainants and victims of crime, where the process by which the outcome is reached often has a greater impact than the outcome itself.[17] A perceived fairness in the process is also critical to ensure complainants report offending and participate in the trial process. These concerns are of heightened relevance in sexual violence cases, where reporting of offending is significantly lower.[18]

While a criminal trial necessitates a robust testing of the allegations, it need not be considered a zero-sum game with no regard given to participants beyond the defendant. After all, it is the State that prosecutes a defendant, not a complainant. Accordingly, measures which seek to accommodate the particular needs or difficulties of a witness (bearing in mind, allegations often take place in violent or coercive relationships, and frequently involve child complainants)[19] ought to be considered as part of a fair trial process.

16 In 1985 the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* GA Res 40/34 (1985). New Zealand is also a signatory to the Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 1 (adopted 18 December 1979, entered into force 3 September 1981).

17 See the outcome of an Australian study in Kristina Murphy and Julie Barkworth "Victim Willingness to Report Crime to Police: Does Procedural Justice or Outcome Matter Most?" (2014) 9 Victims & Offenders 178 at 194.

18 Between 2018–2021, the Ministry of Justice Crime and Victims Survey found that only eight per cent of sexual assaults were reported to Police. This is markedly lower than the 25 per cent reporting rate for crime overall. Commonly cited reasons for not reporting included feelings of shame and fearing further humiliation: see *New Zealand Crime and Victims Survey: Survey findings—Cycle 4 report* (Ministry of Justice, June 2022) at 217.

19 Approximately half of sexual violence offences reported in New Zealand involve a child complainant, with a further 15 per cent concerning historical childhood offending: Dr Isabel Randell *That's a lie – Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants* (Report of the Chief Victims Advisor to Government, August 2021) at 5.

In order for procedural reform to be effective, it ought to therefore fairly balance the defendant's rights whilst accounting for the particular needs of the given complainant.

IV EVIDENCE OF SEXUAL EXPERIENCE AND DISPOSITION

A Sexual experience with the defendant

The key change under s 44 sees the application of the higher admissibility threshold to evidence relating to the complainant's sexual experience with the defendant and sexual disposition. In order for such evidence to be admissible, the Court must be satisfied that the evidence is of such direct relevance to the facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.[20] The higher threshold is often referred to as the "heightened relevance test" and shall hereafter be referred.

The rationale behind such provisions is well-known: to adduce only relevant evidence and to safe-guard against the "twin-myths"; that a sexually active person is more likely to have consented to sex with the defendant, or is otherwise generally less credible as a witness.[21] As the Law Commission noted in its 1999 report which led to the Evidence Act 2006, doing so risks diverting the fact-finder's attention away from the behaviour of the defendant at the time of the alleged offence to the complainant's behaviour on earlier, unrelated occasions.[22]

While most submitters supported the extension of the heightened relevance test, objections to the amendment challenged its restrictive nature, with submitters asserting that a prior sexual relationship between the complainant and defendant was "almost inevitably" relevant to consent or belief in consent.[23]

The Ministry of Justice (the Ministry), in its departmental report to the Select Committee, observed that treating a complainant's sexual experience with the defendant in the same manner as their sexual experience generally was

20 Evidence Act, s 44(2).

21 Te Aka Matua o te Ture | Law Commission *Second Review of the Evidence Act 2006*, above n 8, at [3.7].

22 Te Aka Matua o te Ture | Law Commission *Evidence* (NZLC R55, vol 1, 1999) at [184].

23 Ministry of Justice *Departmental Report for the Justice Committee: Sexual Violation Legislation Bill* (March 2020) [Departmental Report] at [96] – [99].

both principled and practical.[24] In doing so, the Commission emphasised an overarching policy intent of the provisions – to actively avert preconceptions that consent can be informed by past conduct.[25]

Nevertheless, evidence of past sexual conduct may indeed be in issue and can, in some instances, have a direct and material bearing on a matter to be determined in the trial. The Act permits such evidence to be introduced in the trial, but not before any evidential link is carefully established.

The "mere fact" of sexual experience between the complainant and defendant remains subject to ss 7 and 8 of the Evidence Act.[26] The exception to mere fact evidence reflects a "workable compromise" between the Act's purpose and its practical application.[27] The Ministry recognised that that in many cases, a previous sexual relationship would likely be relevant to establishing a coherent narrative, but would not always meet the heightened relevance test.[28] The Ministry further determined that mere fact evidence was unlikely to represent a significant intrusion to the complainant's past conduct or sexual experiences, as compared to wider sexual history. It recommended adopting an exception accordingly, to avoid unnecessary pre-trial applications, where it is clear that the evidence should be admitted.[29]

Professor Elisabeth McDonald queried the exception, arguing that introduction of a prior sexual relationship, without wider context or indeed, a clear evidential link to an issue, may lead to impermissible jury reasoning.[30] Notably, this carve-out is not present in legislation in Australia, the United Kingdom or Canada.[31]

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24 At [103].

25 At [105].

26 Evidence Act, s 44(1)(a)(i) excludes this from the heightened relevance test.

27 Departmental Report, above n 23, at [109].

28 At [109].

29 At [106].

30 Elisabeth McDonald "Submission on Sexual Violence Legislation Bill 2019" at [8].

31 The general prohibition on evidence about sexual history is codified in the states of Victoria (Criminal Procedure Act 2009, s 342 (Vic)); Western Australia (Evidence Act 1906, s 36BC (WA)); and Tasmania (Evidence Act 2001, s 194M (Tas)). Similarly, in the United Kingdom, s 41 of the Youth Justice and Criminal Evidence Act 1999 (UK) prohibits evidence about any sexual behaviour of the complainant without leave of the court. In Canada, in accordance with s 276, Criminal Code RSC 1985 C-46. a judge must only grant leave to adduce evidence about sexual history if satisfied that the evidence is not being adduced for the purpose of supporting either of the "twin-myths", is relevant to an issue at trial, and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

B Sexual disposition evidence

A complainant's sexual disposition is now also subject to the heightened relevance test. This amendment responds to the Supreme Court decision of *B (SC12/2013) v R,* in which the majority called for legislative clarification on how sexual disposition evidence should be treated.[32] Sexual disposition remains undefined, reflecting an intentional policy decision to leave the scope of what may constitute sexual disposition with the courts.[33]

Because evidence of sexual disposition can veer into matters relating to the sexual reputation of the complainant, application of the heightened relevance test may assist in identifying where evidence of sexual disposition is admitted for its probative value (for example, sexual orientation, where that is sufficiently relevant) as opposed to an illegitimate purpose.

C Sexual reputation evidence

Evidence that purely relates to the sexual reputation of the complainant remains inadmissible in criminal proceedings.[34] A new definition of sexual reputation has been inserted into s 4(1) of the Evidence Act. The sexual reputation of a complainant means:

> (a) the way in which the complainant is regarded, by others, in sexual matters (including, without limitation, as having a particular sexual disposition or experience); but
>
> (b) excludes any witness's evidence that is derived from the witness's personal sexual experience with, or personal knowledge of the sexual disposition of, the complainant.

D Application of s 44 to civil cases

The protections in ss 44 and 44AA now apply to witnesses in civil proceedings that involve issues in dispute of a sexual nature.[35] The nature and type of civil proceedings that may fall within the definition is undefined, recognising the greater flexibility that may be required in the civil jurisdiction.[36]

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32 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [57].

33 Departmental Report, above n 23, at [115]. The Ministry of Justice suggested that "judges are well placed to adjudicate any disagreement as to the breadth of the restriction".

34 Evidence Act, s 44AA.

35 By reference to s 4(2)(b) of the Act, which extends the definition of a "sexual case" in the Evidence Act to such civil proceedings.

36 Departmental Report, above n 23, at [63].

However, unlike the blanket prohibition on sexual reputation evidence in criminal cases, s 44AA(2) permits evidence or questioning relating directly or indirectly to a complainant's reputation in specified civil proceedings where it is directly relevant to a cause of action or defence.[37] The evidence must still meet the heightened relevance test before any questions are asked or evidence admitted.[38] For the avoidance of doubt, evidence relating to sexual reputation is not admissible to support a claim of consent or reasonable belief in consent, or to prove the accuracy or truth of that reputation.[39]

The s 44AA(2) exception endeavours to balance litigants' rights where civil disputes necessarily turn on sexual reputation, while avoiding the unnecessary retraumatisation of witnesses in court. It is difficult to hypothesise the types of cases that may meet the statutory requirements, in particular where sexual reputation evidence would be adduced for a purpose other than to form a reasonable belief in consent or to prove the truth of that reputation (the latter, we presume, would exclude admissibility of reputation evidence in a defamation proceeding, where the truth of a statement is relied upon). That may be due to the nature of sexual reputation evidence itself, as distinct from sexual experience or sexual disposition. For example, evidence of sexual orientation/preference may be of direct relevance in supporting a defence to a harassment case where it may inform a witnesses' credibility. But it is difficult to see how reputation evidence would meet the heightened relevance test for the purpose of legitimately assessing a witness's credibility.

We tend to agree, therefore, with the Ministry's comments in its Departmental Report that the cases in which a complainant's sexual reputation is in issue would likely be limited and consider that there is not an appreciable risk of the civil exception "creating space for extra harassment of complainants".[40]

V PRE-RECORDING OF WITNESS EVIDENCE

The most controversial amendments in the Act are those relating to modes of evidence, in particular, the introduction of pre-recorded cross-examination

37 Specified civil proceeding is defined in s 44AA(3).
38 Section 44AA(4).
39 Section 44AA(5).
40 Departmental Report, above n 23, at [132].

of a complainant.[41] From 21 December 2022, sexual case complainants and propensity witnesses will be entitled to give the entirety of their evidence (examination-in-chief, cross-examination and re-examination) in one or more alternative ways:[42] by a video record made before the trial; in the courtroom behind a screen; or from outside the courtroom by CCTV link.[43]

A Pre-recorded evidence: notice and application for witness to give evidence in the ordinary way

Section 16 of the Act imports the new mode of evidence provisions (ss 106C to 106J of the Evidence Act). The prosecutor must give written notice of the particular mode sought for the complainant or propensity witness, including if evidence is to be given in the ordinary way.[44] If evidence is to be given by a video record made before the trial, the prosecutor is required to give notice as early as practicable. In all other all cases, notice must be given no later than the filing of the case management memorandum (for a Judge-alone trial) or trial callover memorandum (for a jury trial), unless permitted by the Judge.[45]

These provisions remove the notice requirements for child witnesses and complainants to give their evidence by alternative means.[46] To the contrary, a prosecutor must apply for a child witness or complainant to give evidence in the ordinary way.[47]

Once notice of pre-recorded video is given, the onus is on the defendant to apply, as early as practicable, for the witness to give their evidence in the ordinary way, or in a different alternative way.[48] The Judge must give each party

41 Whilst most submitters were supportive of the amendments, there were strong concerns raised by all professional legal organisations and the criminal defence bar: see Departmental Report, above n 23, at [222].

42 Typically, sexual violence case complainants will give their evidence in chief by way of pre-recorded video interview. The provisions enable this practice to continue, with cross-examination and re-examination being given by a different, alternative means.

43 Sexual Violence Legislation Act 2021, s 16 (Evidence Act, ss 106C—106J).

44 Evidence Act, s 106D(3).

45 Section 106D(5).

46 Section 106D(3)(a).

47 Section 106E. A Judge may direct that the child complainant or witness give evidence, or any part of their evidence, in the ordinary way if satisfied that they fully appreciate the likely effect of doing so (section 106E(3)(a)). The Judge may call for a report on the effect on the complainant or witness of giving evidence in the ordinary way or any alternative way before making a direction (section 106E(3)(b)).

48 Section 106F(1)–(2).

an opportunity to be heard on the application in chambers,[49] and may call for and receive a report from any person considered to be qualified to advise on the effect on the complainant or witness of giving evidence in the ordinary or alternative way.[50] We anticipate these reports will generally be prepared by police officers, medical, psychiatric or psychological experts, but the provision is sufficiently broad to encompass other types of qualifications, such as persons with specific cultural expertise.

A direction that a witness give evidence in the ordinary way or a different alternative way can only be given if the Court is satisfied that the giving of pre-recorded evidence would present a real risk to the fairness of the trial and that the risk could not be mitigated adequately in any other way (i.e. by an adjournment or further time to prepare).[51]

Section 106G(4) also sets out various circumstances that will not presumptively present a real risk to the fairness of the trial. They are where:

(i) the making of a video record would require the defence to disclose all or any of its strategy prior to the trial commencing;

(ii) the defence will be unable to tailor its cross-examination to a jury's reaction;

(iii) the making of a video record will involve preparation and other effort extra to that required for the trial; and

(iv) compliance with the administrative arrangements of a pre-record would involve more difficulties for any party.

If a defendant wishes to rely on any of the above circumstances as a basis for a complainant or propensity witness being required to give their evidence other than by video record, the defendant must present evidence showing the risk clearly arises in the circumstances of the particular case. It remains to be seen how the appellate courts will interpret these provisions. We anticipate fairly robust judgment will be required in order to defeat Parliament's clear intention

49 In closed court, and potentially without the application being fully disclosed to the prosecutor, if that is necessary in the interests of justice. This may arise where a defendant is seeking for evidence to be given other than by video record, on the basis that disclosing defence strategy before trial would present a real risk to trial fairness. At [248] of the Departmental Report, above n 23, the Ministry noted that the Criminal Procedure Rules 2012 allow for the court to deal with applications otherwise than in accordance with usual procedure to secure the just determination of proceedings.

50 Evidence Act, s 106F(3).

51 Section 106G(1).

that the use of pre-recorded evidence is appropriately cured by further time, rather than an alternative mode.

The court, on its own initiative, may direct that a witness's evidence not be given by a video record made before the trial, irrespective of whether the defendant has made an application.[52] The same fair trial considerations outlined above apply.

In determining the defendant's application, the judge must consider whether the witness is likely to need to give further evidence after the making of the video record for example, due to further disclosure.[53] Such a caveat reinforces the importance of timely disclosure in criminal cases and where pre-recorded evidence is used. Given the notice requirements, it is anticipated that the prosecution and defence counsel will be required to engage at an earlier stage to resolve outstanding disclosure issues and that the prosecution will proactively manage the disclosure process.

B Disclosure, editing and use of video record evidence at trial[54]

All parties must be given secure access to the video record evidence, subject to any directions imposed by the Judge.[55] The evidence must comply with existing rules on admissibility and relevance, and parties must be given an opportunity to make submissions about any admissibility issues arising.[56] The Judge may, on the application of any party or his or her own initiative, excise any material from the video record evidence which infringes any provisions in the Evidence Act.[57] Section 106IA permits the making of a fresh video record, where the recording is of a poor quality or contains inadmissible material.

A defendant may apply to further cross-examine a witness after their video record evidence has been completed.[58] Section 106H(3) provides a pathway by consent, or in the alternative, if a judge considers that it would be contrary to the interests of justice not to do so. Section 106H(4) contemplates circumstances where the "interests of justice" threshold may be met, including the disclosure

52 Section 106G(2)(b).
53 Section 106G(3).
54 At the time of publishing, the proposed amendments to the Evidence Regulations 2007 have not been published. We anticipate further Parliamentary direction will be given with respect to how pre-recorded evidence will be effected following enactment.
55 Section 105I(3).
56 Section 106I(4).
57 Section 106I(5).
58 Section 106H(2).

of further evidence which cannot be adequately addressed without the complainant. In such cases, further cross-examination must be completed at trial,[59] unless the Judge is satisfied that there are exceptional circumstances making it impossible or impracticable for further cross-examination at trial that warrant further cross-examination by video record.[60] The rationale for this provision appears to be to minimise the risk of further recall at the trial.[61]

Section 106J mandates the recording of evidence given at trial by a complainant or propensity witness in a sexual case, which can then be used in the future (for example, at a re-trial). In the circumstances of a re-trial, the prosecutor may apply for the earlier evidence to be admitted as video record made before the trial.[62]

C Assessment against policy objectives

There are clear advantages in pre-recording cross-examination, for the prosecution and the defendant. One key advantage of pre-recorded evidence is that it can be edited before being viewed by the jury. Removing inadmissible content in advance lowers the risk of an aborted trial, or otherwise having to rely on a judicial direction.

The use of video record evidence should also improve the court experience for many sexual case complainants and propensity witnesses. We anticipate that giving evidence without a jury present may reduce some of the stress that witnesses experience, and judges will have greater leeway to accommodate more frequent breaks. Importantly, video record evidence can be produced at any future re-trials,[63] thereby minimising the number of times a witness is required to come to court to give the same evidence and therefore reduce possible instances of retraumatisation of witnesses.

In theory,[64] the use of video record evidence should enable complainants and propensity witnesses to give their evidence earlier, as the recording should take place in advance of trial. This has obvious advantages. Put simply, the earlier a complainant or propensity witness can give their evidence, the less

59 Section 106H(5).
60 Section 106H(6).
61 Departmental Report, above n 23, at [196].
62 Evidence Act, s 106J(2)(a).
63 Assuming that the earlier convictions were quashed for reasons unrelated to the complainant's evidence.
64 However, the authors have reservations about whether the use of video record evidence will in fact lead to completion of a complainant's full evidence earlier. See subsection J below on practical implications.

likely it is that they will suffer delay-related memory difficulties while awaiting the trial date.

Completion of a complainant's full evidence at an earlier stage may also lead to more efficient resolution of some sexual violence cases. The Ministry cited data from a pilot carried out in the United Kingdom in 2016, in which defendants pleaded guilty in 48 per cent of all concluded cases where pre-recorded cross-examination was to be used, compared with nine per cent guilty pleas in those cases using only pre-recorded evidence-in-chief.[65] The national plea rate was 33 per cent in sexual offence cases in the same period.[66]

In the New Zealand context, many family violence complainants have the option of making a digitally recorded Family Harm Video Statement (FHVS) within two weeks of the date of the alleged incident.[67] A study which followed 4,715 family harm cases in Counties-Manukau found that use of FHVS increased the rates of an early guilty plea by 95 per cent, compared to those who made a written statement instead.[68] The authors of the study opined that a key reason for the increased frequency of early guilty pleas is that digitally-recorded contemporaneous evidence is harder to contest than written statements, which lend themselves more easily to reinterpretation.[69]

These findings may suggest that the use of video record evidence could increase the frequency of early guilty pleas in sexual cases. While such results appear promising, any direct comparison between family harm cases and sexual cases which the Act will address remains difficult. Most sexual offences carry significant penalties, increasing the likelihood that a charge will be defended.[70] The nature of the evidence captured by FHVS is also distinct, such that it is difficult to draw direct comparisons with other types of recorded evidence. This is because many FHVS' are recorded by police in the immediate minutes or hours following the alleged offending, often at the scene. The raw, contemporaneous nature of this evidence can be particularly compelling. By comparison, video record evidence will be taken in a formal court environment, likely months or possibly years after the allegations are said to have taken place.

65 Departmental Report, above n 23, at [451.1].
66 At [451.3].
67 Evidence Act, s 106A.
68 Darren Walton, Ross Ellwood and Samara Martin "The Likelihood of Early Guilty Pleas Following Digitally Recorded Victim Statements for Family Violence" (2021) Journal of Interpersonal Violence 1 at 12.
69 At 14.
70 At 14.

Monitoring should be undertaken to determine whether video record evidence does increase the frequency of early guilty pleas. In due course, the courts will also need to consider how to treat a defendant's guilty plea that follows video record evidence, but comes before trial, noting that much of the efficiency gains and trauma-reduction usually associated with early guilty pleas will be reduced.

D Fair trial implications

Opponents to the use of video record evidence cite a defendant's fair trial rights as being infringed by its use. Central to this position is the fundamental principle that defendants are not required to disclose their hand before trial, and more broadly, defendants' right to silence under the NZBORA. Many submitters opposing the Bill referred to the 2011 Court of Appeal decision, *M (CA335/2011) v R.*[71] In that case, the Court of Appeal held that video record evidence would only be available in "compelling" cases. The Court canvassed several reasons for its view including a defendant's fair trial rights and increased pressure on court resources.[72] Accordingly, prior to this legislative amendment, video record evidence was rarely used.

Some submitters also suggested that it was "inevitable" that complainants may need to be recalled at trial, in the event that there is a change of trial counsel (and a resulting change in trial strategy under new counsel) or prosecution disclosure obligations are not met in a timely manner. Some defence counsel envisaged the inquiries required prior to cross-examination may not be completed until the eve of the trial. Submitters further raised the issue of no longer being able to tailor their cross-examination to a jury.[73]

In considering the submissions both for and against the amendments, the Ministry observed that pre-recorded evidence has been used in overseas jurisdictions for many years, and there was no evidence of increased unsupported rape convictions.[74] The Ministry also observed that evidence

71 *M v R (CA335/2011)* [2011] NZCA 303, [2012] 2 NZLR 485.
72 At [34]–[41].
73 Departmental Report, above n 23, at [226]–[228].
74 At [220], citing the submission of Paulette Benton-Grieg, a legal academic at the University of Waikato.

from the Australian use of pre-recorded evidence for child witnesses observed that witnesses were rarely ever recalled.[75]

Indeed, the amendments seem to be sufficiently flexible to avoid the fair trial infringements feared. As the Court of Appeal recognised in *M (CA335/2011) v R,* a defendant's right to silence under s 23(4) of the NZBORA relates to self-incrimination, not trial strategy.[76] If the making of a video record would require the defence to disclose all or any of its trial strategy, and that disclosure would present a real risk to the fairness of the trial, there is scope for the Court (either on the application of the defendant, or by its own volition) to direct ordinary or another, alternative mode of evidence.[77] Further, a defendant is able to articulate its opposition to the Judge in chambers (in closed court, and if necessary, without the prosecution being present), providing a procedural safeguard to ensure fair trial rights are preserved.[78]

The Ministry further noted in its report to the Select Committee that video record evidence will not be appropriate in every case, and that prosecutors would be expected to exercise judgement around when the mode would be sought.[79] It may be helpful for Crown Law to update its Prosecution Guidelines to ensure that there is consistency about when video record evidence may or may not be appropriate, to reduce the likelihood of different approaches being taken by different Crown offices.

Regarding the risk of witnesses being recalled, there will be implications for the prosecution in terms of ensuring disclosure obligations are complied with, in a timely manner. However, timetabling orders for disclosure are already provided for in s 32 of the Criminal Disclosure Act 2008 and can be

75 In the 2018 evaluation of the New South Wales' pre-recorded cross-examination pilot, a witness was recalled in one identified instance, out of the 26 pre-recorded hearings: see J Cashmore and R Shackle *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report* (Social Policy Research Centre, Australia, August 2018) at 65, as referred to in the Departmental Report, above n 23, at [250.1] n 6. In 2011, Judge Kevin Slight, speaking of the Western Australian experience stated that the power to recall was rarely used and that "the Western Australian experience does not confirm the majority of concerns raised by the Court of Appeal in New Zealand": Kevin Sleight "Managing trials for sexual offences – a Western Australian Perspective" (paper presented to AIJA Criminal Justice in Australia and New Zealand - Issues and Challenges for Judicial Administration, Sydney, 7 September 2011), as referred in the Departmental Report, above n 23, at [250.3] n 8.

76 *M v R (CA335/2011),* above n 71, at [25]. In its Departmental Report, the Ministry noted that in any event, the need to "disclose" aspects of the defence trial strategy is not a novel development. For example, where a defendant wishes to rely on alibi evidence: Departmental Report, above n 23, at [138].

77 Evidence Act, s 106G.

78 Section 106F.

79 Departmental Report, above n 23, at [245].

factored into the scheduling of pre-trial evidence. There is a statutory safeguard which permits the re-calling of a complainant or propensity witness where it would be contrary to the interests of justice not to recall them (for example, in the event of late disclosure).[80] The Ministry should monitor trials with pre-recorded evidence to assess whether these concerns eventuate.

E Practical implications

Against the apparent benefits of pre-recorded evidence, there remain concerns about whether the courts, and the profession, can accommodate the increased workload that video record evidence presents. In practice, we anticipate the taking of video record evidence will amount to a mini-trial, with the presence of a judge, court staff, counsel and the defendant.[81] Scheduling and hearing pre-recorded evidence will therefore require additional court resourcing and specialist equipment, in a significantly backlogged system.[82]

In response to these types of concerns, the Ministry signalled that $37.8 million in additional funding was allocated in the 2019 Budget to support the implementation of the Act, including the development of new processes and court equipment, and to cover additional costs for both prosecutors and defence counsel acting for legally aided defendants.[83] It remains to be seen how these funds will be allocated. We foresee particular costs arising with the fit-outs required of court rooms and storage of video evidence, particularly of all trial evidence in accordance with s 106J. If the Government fails to invest sufficient resources, there is a real risk that the use of video record evidence will lead to even greater delays for jury trials.

Capacity of counsel is also a concern. Our experience is that senior defence counsel and Crown lawyers across the country are already under considerable strain. We anticipate that many lawyers will find it difficult to accommodate the additional hearing time required for video record evidence. Video record evidence will also require both defence counsel and the Crown to fast-track

80 Evidence Act, subss 106H(3) and (4).

81 Section 106I(2) of the Evidence Act envisages that regulations will be made, which will stipulate the requirements for video record evidence. At the time of writing, those regulations are not yet available.

82 As at 18 May 2022, the Ministry of Justice recorded 142,000 appearances (sentencings, bail hearings, Family Court proceedings and trials) had been rescheduled due to Covid-19 since March 2020: see Jimmy Ellingham "Pandemic delays held up 150,000 court appearances" (18 May 2022) Radio New Zealand <www.rnz.co.nz>.

83 Departmental Report, above n 23, at [260] and [452]. *Wellbeing Budget 2019: Family Violence and Sexual Violence Package, breaking the cycle of family and sexual violence* (New Zealand Government, 2019) at 13.

trial preparation that they would normally undertake over the course of several months before the scheduled trial date. This raises questions concerning the need for additional funding, particularly to the legal aid grant scheme, to facilitate this increased workload.

While these practical constraints are, to a degree, anticipated by the Act[84] and the associated budgetary allocation, the realistic capacity of the courts and counsel to effectively implement the reforms is yet unknown. Video record evidence hearings will utilise the same finite pool of court resources and counsel availability as trials (both sexual cases and otherwise). The widespread use of video record evidence may in fact lead to greater delays to trials, both for sexual cases (where counsel and the court will need to accommodate two hearing dates, rather than the trial date alone) and for trials for other types of offences. We also anticipate delays in the short-term, as defendants are likely to appeal pre-trial decisions permitting the use of pre-recorded evidence.

It is also possible that lower priority will be allocated to proceedings that have utilised pre-recorded evidence. This has obvious implications for both the complainant and defendant in the finality of proceedings. Complainants may be required to wait several months for a verdict despite having completed their evidence.

Because of these practical concerns, we anticipate that video record evidence will only be utilised in a limited pool of cases – likely matters where trial dates have previously been adjourned, re-trials, and trials involving young or particularly vulnerable complainants.

All told, the use of video record evidence has the potential to have real value in cases where it is appropriately used, provided sufficient resource is invested in the court system. While these changes may require counsel to engage with a file earlier, the anticipated efficiency gains and reduced stress on complainants and propensity witnesses are welcome developments.

VI JUDICIAL INTERVENTION FOR UNACCEPTABLE QUESTIONS

A Overview of amendments to s 85

Section 85 of the Evidence Act now imposes a positive duty on judges

84 Section 106G(4)(d) provides that the fact the making of a video record will involve more difficulty for any or all parties will not, without sufficient evidence, be sufficient grounds to challenge the use of video record evidence.

to intervene where witnesses are asked unacceptable questions. If a judge considers a question, or the way in which it is asked, to be unacceptable, they must either disallow the question or direct that the witness is not obliged to answer it. Prior to the Act, judges were permitted to intervene in these ways, but it was not mandatory to do so.

The first iteration of the Bill required a judge to disallow the question "or to direct the witness not to answer it".[85] Following objections at the Select Committee stage, this was amended to retain the option for a direction that the witness may choose whether they wish to respond. As the New Zealand Law Society explained, a jury may or may not draw an inference that a witness is being evasive by declining to answer a question, which may be important where credibility is at issue.[86]

The meaning of "unacceptable questions" remains unchanged. They are questions that a judge considers "improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand".[87] But s 85 has been broadened to expressly encompass not only questions that are unacceptable because of their contents, but questions that are unacceptable because of the way in which they are asked. Relatedly, s 85(2)(f) now provides that judges may take into account the "cumulative impact" of questioning on a witness when assessing whether a question is unacceptable.[88]

"Vulnerability" has also been added to the (non-exhaustive) list of factors a judge may take into account when determining whether a question is unacceptable.[89]

B From discretion to duty

The imposition of a positive duty to intervene responds to two related concerns: that cross-examination of complainants in sexual cases routinely oversteps into inappropriate lines or styles of questioning; and a perceived inconsistency in when and how judges intervene when unacceptable questioning does occur.

The suggestion that defence counsel are able to, and do, ask inappropriate questions of sexual case complainants, without judicial intervention, prompted strong objections from some submitters. Prominent defence lawyer

85 Sexual Violence Legislation Bill 2019 (185-1), cl 9(1).

86 New Zealand Law Society "Submission on the Sexual Violence Legislation Bill" at [32(c)].

87 Evidence Act, s 85(1).

88 The previous wording of s 85 would have enabled a judge to take into account the cumulative impact of questioning, as the matters they could have regard to were non-exhaustive.

89 Sexual Violence Legislation Act 2021, s 10(2); contained in the Evidence Act, s 85(2)(a).

Elizabeth Hall characterised this as an offensive "rape trial myth".[90] Hall noted that inappropriate questioning was already impermissible under the earlier, discretionary, iteration of s 85.[91] She suggested that imposing a positive duty on judges would only perpetuate the false perception that bullying, unnecessarily repetitive and demeaning questioning is commonplace in sexual cases, and may in fact disincentivise complainants from proceeding to trial.[92]

As discussed above, fair trial rights routinely demand robust cross-examination of sexual case complainants. Defence counsel are not only entitled, but required, to test the prosecution case and to put their client's defence to the complainant. Where a defendant denies that the allegations took place or defends the charge on the basis of consent, cross-examination will almost invariably involve challenging the credibility and honesty of a complainant's recollection. The fact that those lines of questioning may be upsetting or even re-traumatising for complainants does not mean they are inappropriate. That is an unfortunate side effect of the existing adversarial system.

However, inappropriate questioning does take place, and judges do not always intervene, despite their longstanding ability to do so under s 85. This reality is clearly demonstrated by Elisabeth McDonald's recent research into the experience of complainants in adult rape trials—*Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Pilot Court*.[93] McDonald analysed 30 rape trials which occurred between 1 January 2010 and 30 September 2015 in nine courts across New Zealand, and 10 rape trials held between November 2017 and November 2018 that took place in the Sexual Violence Pilot Court in the Auckland and Whangārei District Courts.[94] A key feature of the Pilot Court was its encouragement of

90 Elizabeth Hall "Submission on the Sexual Violence Legislation Bill" at [11]. A similar point was raised by defence lawyer Emma Priest in her article in the New Zealand Herald. Priest suggested the "implication that lawyers harass rape complainants is a modern rape-trial myth": see Emma Priest "Emma Priest: Is victim-centric approach to rape trials eroding rights of defendants?" *NZ Herald* (online ed, Auckland, 16 April 2022).

91 Hall, above n 90, at [11].

92 At [10] and [12].

93 Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Pilot Court* (Canterbury University Press, Christchurch, 2020).

94 At 16. McDonald's study focused on rape trials involving one adult male defendant and one adult female complainant. This was a deliberate decision, "given the gendered and heteronormative nature of rape myths and characterisations of 'real' victims": at 18–19.

greater active judicial engagement at trial, including through the use of s 85.[95] A distinctive feature of McDonald's research is that she was able to listen to audio recordings of each trial, including the complainants' evidence.[96] Her findings offer a unique insight into the experience of complainants across New Zealand, before different judges, and with different lawyers.

McDonald identified numerous examples of cross-examination that were inappropriate, and which seemed to go beyond defence counsel's obligations to their clients, but that went unchecked by the Court, both in the Pilot Court and outside of it. One such example involved counsel repeatedly traversing distressing lines of questioning, even when a complainant had already given a clear response, such as denying the proposition being put to them or saying they had no recollection (for example, because they were intoxicated at the time).[97] There are of course legitimate uses for repetition in cross-examination, particularly when a witness has provided unclear or inconsistent evidence, but persistent questioning in the face of a clear answer, for effect, would seem to trigger the "needlessly repetitive" threshold.

A more disturbing example identified in McDonald's research was questions that suggested the complainant carries some responsibility for the alleged rape. For example, one complainant was asked:[98]

> … do you feel any sense of responsibility whatsoever for allowing yourself to get drunk where you say you don't know what you were doing or what you were saying, do you feel any sense of personal responsibility for allowing yourself to get into that situation?

While the fact of a complainant's intoxication may be relevant at trial – for instance, to issues of consent or recollection – it is difficult to see any evidential value in questions concerning "personal responsibility", or how that might meet the s 7 relevance threshold.

McDonald did find that there was an increased use of s 85 interventions in the Pilot Court, compared against the 30 District Court and High Court

95 At 22. A key focus of the Pilot Court was encouraging more active judicial engagement at trial, supported by specialist training. The Pilot Guidelines required judges to be alert to and interventionist with unacceptable lines of questioning, in accordance with their existing powers under ss 44 and 85 of the Evidence Act.

96 At 26.

97 At 355

98 At 352.

trials she assessed.[99] This likely reflects the emphasis that the Pilot Guidelines placed on judges being alert to, and interventionist with, unacceptable lines of questioning, and the specialist training judges received. However, McDonald found that the type of interventions in both datasets focused on the form of questions, rather than improper substance – for instance, asking counsel to simplify the question, use clearer language, refrain from starting or ending questions with "do you remember" or "do you recall", let the witness answer the question and avoid repetition.[100] These findings suggest that if the Government wishes to more closely regulate unacceptable questioning of sexual case complainants under cross-examination, imposing a duty on judges to intervene is unlikely to suffice.

There is good reason for judges to be reluctant to regulate the content of questioning under cross-examination. Appeals against conviction on the basis that a judge inappropriately intervened during questioning are relatively common. As the Court of Appeal recently recognised in *Haumate v R,* "[t]he New Zealand authorities have long held that trial judges have a duty of neutrality and it is no part of their function to act as an advocate".[101]

One concern arising from this amendment is that the heightened s 85 duty may lead to an increase in appeals against conviction by defendants. Of course, this will only occur if the new s 85 leads to increased intervention by judges during cross-examination. McDonald's research suggests this is dubious. The types of interventions McDonald observed more of in the Pilot Court – which largely went to form rather than substance – do not lend themselves as clearly to perceptions of a lack of neutrality by the presiding judge.[102] The likelihood of appeals arising from judicial intervention during cross-examination can be minimised by clear jury directions. In its submission to the Select Committee, the New Zealand Law Society suggested that jury directions may be necessary in some cases to counteract the perception that a judge has formed a view on the case and is shielding the complainant.[103] We agree that such directions may be prudent, particularly in cases where a judge has intervened frequently.

99 At 361.

100 At 361.

101 *Haumate v R* [2021] NZCA 400 at [48], citing *E H Cochrane v Ministry of Transport* [1987] 1 NZLR 146 (CA) and, as examples, *R v Fotu* [1995] 3 NZLR 129 (CA) at 137–138 and 142; *R v Loumoli* [1995] 2 NZLR 656 (CA) at 667–670; *M (CA508/2014) v R* [2015] NZCA 183 at [25]; and *R v H* (CA421/01) (2002) 19 CRNZ 518 (CA) at [33]–[34] and [45]–[49].

102 McDonald, above n 93, at 361.

103 New Zealand Law Society, above n 86, at [32(c)].

There are also concerns that the Crown might appeal on the basis that a judge failed to exercise their duty under s 85. The avenues by which the prosecution may challenge a jury trial acquittal are extremely limited.[104] The prosecution or the defendant may, with the leave of the first appeal court, appeal on a question of law against a ruling by the trial court.[105] Further, while the Act does impose a mandatory duty, judges retain their discretion to determine whether a question is in fact inappropriate, or in other words, whether s 85 is in fact engaged. The prosecution could, conceivably, appeal against a ruling by a trial judge that the questioning in issue was not unacceptable, and therefore did not engage s 85. Given the scarcity of prosecution appeals to date, it is difficult to envisage the Crown appealing in relation to a ruling declining to apply s 85 unless the questioning in issue was so egregious that it had an undeniable impact on the outcome of the trial. In such cases, we would expect the prosecutor to object to such questions at trial vigorously, and it is difficult to imagine that such questions would not attract a response from the presiding judge.

C Regulating style, manner and tone of questioning

The Act now expressly requires judges to intervene when questions are unacceptable because of the manner in which they are asked.[106] This amendment followed feedback from some submitters at Select Committee that the style, manner, and tone of questioning was not being adequately regulated, and a suggestion that these features should be explicitly subject to the judicial duty to intervene.[107] While earlier iterations of s 85 would have allowed for judicial intervention on the basis of questioning style, codifying the position is helpful to ensure consistency across courts. As the Ministry noted, nothing in s 85 would prevent counsel from reframing a question to address the impropriety.[108]

We note that interventions for stylistic impropriety may be more complex

104 Section 26(2) of the NZBORA provides that "[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again".

105 Criminal Procedure Act 2011, s 296. Section 313 also provides a mechanism by which the Solicitor-General may, with the leave of the Court of Appeal, refer a question of law that arose in or in relation to the trial of a person in the District Court or the High Court for a criminal offence. References do not disturb the verdict, but they may be appropriate where they raise a point of practical importance which is likely to be relevant to subsequent cases: see *Solicitor-General's Prosecution Guidelines* (Crown Law, 1 July 2013) at [27].

106 Evidence Act, s 85(1).

107 Departmental Report, above n 23, at [162] and [165].

108 At [168].

to deal with on appeal, as these are generally done by reference to the written transcript. An appeal based on inappropriate exercise of s 85 regarding style, manner or tone would inevitably require listening to the recording, as these types of issues may not translate clearly into writing.

D Vulnerability

Finally, s 85(2)(a) now includes "vulnerability" as one of the factors a judge may consider for the purpose of assessing whether a question is unacceptable. The other (unchanged) factors a judge may take into account include: the witnesses' age and maturity; any physical, intellectual, psychological or psychiatric impairment they may have; their linguistic or cultural background and religious beliefs; the nature of the proceeding; and in the case of a hypothetical question being put to the witness, whether the hypothesis has been or will be proved by other evidence in the proceeding.

The factors contained in s 85(2) are non-exhaustive, so there was nothing to stop judges from taking a witnesses' vulnerability into account prior to these amendments. The authors' experience is that vulnerability is a factor that most judges were alive to in exercising their discretion under s 85 prior to the Act coming into force. Indeed, a number of submitters suggested the inclusion of vulnerability was unnecessary for this reason.[109]

In our view, the specific reference to vulnerability is a positive development, and there do not appear to be any fair trial trade-offs for defendants brought by this change. As previous commentators have recognised, this amendment will encourage judges to turn their minds to the particular circumstances of witnesses, particularly those who may be vulnerable for reasons other than those already contained in s 85(2).[110] The amendment simply codifies a factor judges were already entitled to take into account.

VII CONCLUSION

The Sexual Violence Legislation Act appears likely to achieve its stated purpose of improving the courtroom experience of sexual case complainants, while

109 For instance, see New Zealand Law Society, above n 86. The Auckland District Law Society went further in its opposition, making the point that vulnerability is not defined in the Evidence Act, and opined that the term is "frequently used but not often understood": Auckland District Law Society "Submissions by the Auckland District Law Society on the Sexual Violence Legislation Bill" at [57]–[58].

110 Luke Elborough and Cheyenne Conroy-Mosdell "A Snapshot of the Law Commission's Second Review of the Evidence Act 2006: Fine lines to draw in sexual violence cases" (2019) 3 NZWLJ 60 at 71.

preserving the fairness of the trial process and the integrity of the criminal justice system.

The Act imports a range of measures which are designed to reduce the re-traumatisation that many sexual case complainants (and propensity witnesses) experience. Crucially, the reforms analysed in this article do not appear to erode defendants' fair trial rights in the way that was feared by some submitters. There are sufficient safeguards embedded in the Act to ensure the paramountcy of those rights, including, for instance, judicial discretion to disallow the use of video record evidence where it would present a real risk to the fairness of the trial, and to admit evidence of a complainant's sexual experience with the defendant where it is directly relevant to the issues at trial.

The efficacy of the reforms in practice remains to be seen, and there are lingering questions about the capacity of counsel, and the court system, to accommodate some of these changes on a large scale — particularly in relation to video record evidence. We are encouraged by the Government's commitment in the 2019 Budget to fund an independent evaluation of the reforms, and their impact on both complainants and defendants.[111]

However, while the reforms may go some way to improving the experience of complainants in sexual cases, more meaningful change is unlikely to be achieved within the existing framework. If real change is to be achieved, the Government may need to look beyond incrementalism and consider more radical reform, such as the alternative justice mechanism proposed in the Law Commission's 2015 Report.

111 (14 December 2021) 756 NZPD 7054.