

REDACTED VERSION

**NOTE ON CA335/2011: EXTANT DISTRICT COURT ORDER
SUPPRESSING THE APPLICANT'S NAME AND THE SCHOOL AT WHICH
HE IS A TEACHER.**

**NOTE ON CA339/2011: EXTANT DISTRICT COURT ORDER
SUPPRESSING THE RESPONDENT'S NAME.**

**NOTE APPLICABLE TO BOTH APPEALS: PUBLICATION OF NAME OR
IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY
S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA335/2011
[2011] NZCA 303**

BETWEEN M (CA335/2011)
Applicant

AND THE QUEEN
Respondent

CA339/2011

AND BETWEEN THE QUEEN
Applicant

AND E (CA339/2011)
Respondent

Hearing: 30 June 2011

Court: Glazebrook, Chambers and Arnold JJ

Counsel: P L Borich and S M Cowdell for M
P J Davey and K Maxwell for E
P K Hamlin and C A Brook for the Crown

Judgment: 30 June 2011

Reasons: 9 August 2011

JUDGMENT OF THE COURT

M (CA335/2011)

- A** The application for leave to appeal is granted.
- B** The appeal is allowed.
- C** The order directing that the complainant's cross-examination is to be recorded prior to the trial and given at trial by a video record is quashed. In its place, an order is made that the cross-examination is to take place at the time of the trial. Whether the complainant should be cross-examined in an alternative way as set out in s 105(1)(a)(i) or (ii) of the Evidence Act 2006 is to be determined in the District Court.

E (CA339/2011)

- D** The application for leave to appeal is granted.
- E** The appeal is dismissed.

REASONS OF THE COURT

(Given by Chambers J)

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Cross-examining in advance of trial

[1] The Crown Solicitor at Auckland has been concerned about delays in getting sex cases, particularly child sex cases, to trial quickly. Such cases are given priority

by the District Court and the High Court, but, notwithstanding that, there can still be many months' delay before the trials begin. Having to wait a long time can cause stress to complainants. As well, child complainants in particular may forget details relating to the offending they allege.

[2] There is no problem with respect to child complainants' evidence in chief as that is now routinely the subject of an evidential video interview, undertaken as soon as possible after the alleged offending comes to light and conducted by skilled interviewers. But cross-examination of the complainant has, of course, awaited the trial itself. The Crown Solicitor formed the view that the Evidence Act 2006 now permits cross-examination to be taken in advance of trial if there are good reasons to do so. He has applied in a number of cases in the High Court and District Court for orders to this effect. Sometimes the applications have been granted, sometimes refused.

[3] We have before us two appeals, one in which an order for pre-trial cross-examination was made and one in which the Court declined to make an order. We heard the appeals together as they are effectively test cases. The defence bar is keen to establish that there is in fact no jurisdiction for orders of this kind.

Issues on the appeals

[4] Two issues arise. First, is there jurisdiction to make these pre-trial cross-examination orders (as we shall call them)?

[5] Secondly, if there is, how should the jurisdiction be exercised?

[6] Having answered those two questions, we shall then go on to apply our general reasoning to the two appeals at hand.

[7] One thing that was not in issue was our jurisdiction to hear these appeals. All counsel assumed we had jurisdiction. We think that assumption was right. Effectively the Crown, in seeking pre-trial cross-examination orders, was attempting to have ruled admissible at trial evidence that would not otherwise have been

admissible. The situation is on all fours with the position under the pre-Evidence Act law, as explained in *R v Accused (CA32/91)*.¹ In that case, a High Court Judge had ruled that an interview with the complainant recorded on videotape could be used as her evidence in chief. The accused sought to appeal, pre-trial, from the Judge's ruling. The Crown cross-appealed on the ground that the Court of Appeal had no jurisdiction to review what was simply a direction as to how the complainant's evidence in chief was to be given at the pre-trial stage. It contended that applications for pre-trial determinations and subsequent appeals under ss 344A and 379A of the Crimes Act 1961 were limited to the content of evidence, not matters of procedure such as the mode or form of evidence. This Court held there was jurisdiction to entertain the appeal, the question essentially being one as to the admissibility of the videotapes.²

Is there jurisdiction to make pre-trial cross-examination orders?

[8] Mr Hamlin, for the Crown, pitched his case on the basis of Subpart 5 of Part 3³ of the Evidence Act. The starting point for his argument was s 103(1):

In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

[9] Subsections (3) and (4) provide guidance as to how the discretion under s 103(1) is to be exercised. We shall return to those subsections shortly.

[10] Section 105 then sets out the alternative ways of giving evidence:

105 Alternative ways of giving evidence

- (1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—
 - (a) the witness gives evidence—
 - (i) while in the courtroom but unable to see the defendant or some other specified person; or

¹ *R v Accused (CA32/91)* [1992] 1 NZLR 257 (CA).

² At 261, 268, 271 and 273. See also *R v M (CA590/2009)* [2009] NZCA 455 at [31], affirming that *R v Accused (CA32/91)* remains good law post-Evidence Act.

³ Referred to simply as "Subpart 5" hereafter.

- (ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
 - (iii) by a video record made before the hearing of the proceeding:
 - (b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:
 - (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:
 - (d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.
- (2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 to the manner in which cross-examination and re-examination of the witness is to be conducted.
- (3) The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103 despite a failure to observe strictly all of those terms.

[11] Mr Hamlin submitted that the phrase “the evidence of a witness” in subs (1) includes the evidence that witness gives in cross-examination or re-examination. That must be correct. For instance, for many years complainants in sex cases have given their evidence in court with a screen between them and the accused. That procedure continues to be sanctioned under the Evidence Act by s 105(1)(a)(i). Clearly, that “alternative way” of giving evidence applies not only to the witness's examination in chief but also to the time when the witness is being cross-examined or re-examined.

[12] The third alternative way sanctioned is evidence “by a video record made before the hearing of the proceeding”. Clearly that permits the continuation of evidential video interviews, as had been occurring under pre-Evidence Act law. Mr Hamlin submitted that it also permitted cross-examination to be undertaken “by a video record made before the hearing of the proceeding” in suitable circumstances.

[13] We accept that, on the plain wording of ss 103 and 105, Mr Hamlin's submission appears correct. Any evidence, including evidence given in cross-examination, may be given “in an alternative way”, which includes “by a video

record made before the hearing of the proceeding”. There is nothing surprising about that interpretation when one remembers that ss 103 and 105 can apply in any proceedings – civil or criminal – and to any witness. Suppose a prospective witness in a civil case was expected to die prior to trial or was going to be out of New Zealand at the time of trial. It would make very good sense that that witness’s evidence, examination in chief and cross-examination, could be taken by means of a video record prior to the trial.

[14] Notwithstanding the clarity of the language and the apparent sensibleness of permitting pre-trial cross-examination in some cases, Mr Borich, for the appellant M, and Mr Davey, for the respondent E, both submitted that s 105(1)(a)(iii) did not permit a witness to be cross-examined “by a video record made before the hearing of the proceeding”. They submitted that pre-trial cross-examination orders were not intended by Parliament for five reasons.

[15] First, they submitted the Law Commission, on whose draft code the Evidence Act is based, expressly considered the issue of pre-trial cross-examination and rejected it. They cite in support the following passage from the Law Commission’s report accompanying its proposed Evidence Code:⁴

459 The Law Commission’s original proposals included allowing pre-trial cross-examination in the case of child complainants or elderly witnesses. This received strong support from a wide range of community groups and some practitioners, but met with almost unanimous opposition from the defence bar. One submission stated:

[O]ne of the real problems with bringing in a regime requiring cross-examination prior to trial at an early stage is that full details of the contamination and influences are not available (if at all) until detailed enquiries have been carried out by Counsel and often only at trial. This problem is exacerbated by the tendency of the police and prosecutors only to tender the evidence of the complainant (often in a videotaped form) and one or two other witnesses (sufficient to establish a prima facie case) at a depositions hearing. Often very detailed enquiry is necessary to establish the prior discussions and events which have shaped and influenced a child or young person’s or other complainant’s evidence. It is my experience that disclosure in this area is a continuing process and it is not until close before trial (usually some months after the initial videotaped interview) that effective cross-examination is possible.

⁴ Law Commission *Evidence* (NZLC R55, 1999) vol 1.

460 Until more is known about the experiences of other jurisdictions with pre-trial cross-examination, the Law Commission does not recommend it.

[16] We accept that Subpart 5 contains no significant changes from the equivalent part of the Evidence Code.⁵

[17] We think it is possible that the point of [459] and [460] of the Law Commission's report was to reject what had been proposed in the preliminary paper with respect to the cross-examination of child complainants and other vulnerable witnesses. What the Law Commission had recommended in the preliminary paper would have resulted in virtually routine pre-trial cross-examination of such witnesses.⁶ The rejection of routine pre-trial cross-examination of such witnesses does not mean the Commission considered pre-trial cross-examination could or should never take place. It is unlikely that was the Commission's intention, given that, as at 1999, the date of the Commission's final report, pre-trial cross-examination had long been possible in civil cases⁷ and in certain circumstances in criminal cases, both summary⁸ and indictable⁹. If pre-trial cross-examination was *always* seen as undesirable, one would have expected the Law Commission to have suggested suitable amendments to the existing legislation which permitted it.

[18] What we do accept unreservedly, however, is that the Law Commission pulled back from any tentative view that pre-trial cross-examination of child complainants or other vulnerable witnesses should become routine.

[19] In any event, of course, it is Parliament's intention, not the Law Commission's, we must ultimately strive to implement. Given the uncertainty of

⁵ As set out in Law Commission *Evidence* (NZLC R55, 1999) vol 2.

⁶ Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP 26, 1996) at [144]—[155]. See further ss 20 and 21 of the draft Code (set out at 82—85).

⁷ See, for instance, rr 369 and 376 of the old High Court Rules, enacted as the First Schedule of the Judicature Amendment Act (No 2) 1985. These were the rules in force at the time of the Law Commission's 1999 report.

⁸ Summary Proceedings Act 1957, ss 31 and 32. It was assumed in *Ministry of Fisheries v District Court at Christchurch* HC Christchurch CIV-2007-409-2390, 17 October 2007 that pre-trial evidence under these sections could include cross-examination.

⁹ *Ibid*, ss 174—176, as in force in 1999. See now ss 164—165, as inserted by s 12 of the Summary Proceedings Amendment Act (No 2) 2008. It is really the provisions as they stood in 1999 that are relevant for the purpose of the current discussion.

exactly what the Law Commission intended, we cannot assume that Parliament intended to render pre-trial cross-examination impossible.

[20] The second reason advanced by Messrs Borich and Davey referred to the Evidence Regulations 2007, made pursuant to ss 200 and 201 of the Evidence Act and coming into force on the same day as the Act. Section 106(2) of the Act provides:

106 Video record evidence

(2) A video record offered as an alternative way of giving evidence must be recorded in compliance with any regulations made under this Act.

[21] Defence counsel¹⁰ submitted that pre-trial cross-examination captured on video would not comply with the Evidence Regulations, a point Mr Hamlin concedes. But Mr Hamlin submits that is irrelevant, as the Regulations are not intended to cover pre-trial cross-examination conducted in court, before a judge, with counsel and the accused present. The Regulations were needed for evidential interviews of child complainants because at the time these interviews are routinely conducted the criminal proceeding has not begun. There is no judge, no accused, no counsel, no case. The Regulations are designed to ensure that the interviews are conducted in a satisfactory way so that they are likely to be able to be used at trial. This is made clear, Mr Hamlin submits, by reg 4, which provides:

4 Application of subpart¹¹

This subpart applies to the video recording of the evidence of a witness if—

- (a) it is intended that the video record may be offered later by the prosecution in a criminal proceeding as evidence in the proceeding; and
- (b) the informant in the proceeding is a member of the police.

[22] We accept that submission. Section 106(2) requires compliance with regulations if there are any applicable regulations. There are no applicable

¹⁰ As we shall refer to Messrs Borich and Davey compendiously.

¹¹ Subpart 1 of Part 1 of the Regulations.

regulations for civil pre-trial evidence, whether evidence in chief or cross-examination, or for criminal pre-trial evidence, other than evidential interviews. There is a good reason for that. Where pre-trial evidence is to be taken in High Court civil proceedings under what is now r 9.17 of the High Court Rules,¹² the rules set out the procedure to be followed by the Judge, Registrar, or Deputy Registrar before whom the examination takes place. Similarly, the Summary Proceedings Act sets out how the pre-trial taking of evidence is to be undertaken and recorded in circumstances where that Act's provisions are relied on. Parliament has assumed that, where a judge determines that pre-trial evidence will be taken under the Evidence Act, that judge will determine how it is to be done. There is no need for a regulatory regime as the judge himself or herself can determine a regime which is tailor made for the particular witness in the particular case. It is only evidence taken under the evidential interview regime (that is, without Court supervision or party participation) that requires the regulatory framework.

[23] The third reason advanced by defence counsel was that pre-trial cross-examination orders would run counter to s 367 of the Crimes Act. Section 367 is the provision which sets out normal indictable trial procedure: an opening by counsel for the prosecution, prosecution witnesses, an opening for the accused person, defence evidence, a closing address on behalf of the prosecution, and finally a defence closing. Defence counsel submitted that a pre-trial cross-examination order would require defence counsel to show their hands prior to the Crown opening at the trial.

[24] While we accept s 367 is relevant on the question of when pre-trial cross-examination orders should be made in criminal cases, we do not accept it is relevant as to how ss 103 and 105 of the Evidence Act should be interpreted. First, those sections prescribe alternative ways of giving evidence applicable to all proceedings. A statutory provision applicable only to the trials of indictable crimes could scarcely be used to read down a general evidentiary provision. Secondly, s 367 is a broad provision. It cannot be read, for instance, as requiring all evidence to be given on oath at the trial; everyone accepts, for instance, that evidence in chief can be pre-recorded in certain circumstances. In any event, pre-recording evidence

¹² Previously r 369 of the old High Court Rules. For the equivalent regime in the District Court, see the District Court Rules 2009, rr 3.24—3.30.

(including cross-examination) does not necessarily breach s 367, as the video recording would still be introduced into evidence at the trial at the point in the trial where the party utilising the video record is calling its witnesses. The fact that the cross-examination, when conducted, pre-dated the Crown opening does not in terms mean a breach of s 367; after all, the evidence in chief in the video record also pre-dated the Crown opening, but no one asserts that is a breach of s 367.

[25] A similar rejoinder can be made to defence counsel's assertion that to permit pre-trial cross-examination orders would be contrary to ss 23(4) and s 24(d) of the New Zealand Bill of Rights Act 1990. Section 23(4) provides that any person who is arrested shall have the right to refrain from making a statement. Section 24(d) provides that everyone who is charged with an offence shall have the right to adequate time and facilities to prepare a defence. We do not accept that pre-trial cross-examination orders would necessarily infringe such rights. On the other hand, we do accept that fair trial rights guaranteed by the Bill of Rights should influence when the jurisdiction to order pre-trial cross-examination is exercised.

[26] Defence counsel's final argument rested on s 101 of the Evidence Act. Section 101 grants judges the discretion to allow jury members to put a question to a witness in the witness box. Defence counsel argued that, if a witness's evidence was to be given exclusively by pre-recorded video, jurors would be denied the right to question that witness.

[27] Once again, we do not consider that s 101 can dictate the appropriate interpretation of two other sections in a different part of the Act. First, s 101 is applicable only to jury trials. As we have repeatedly said, ss 103 and 105 apply to all proceedings. Secondly, in any event s 101 does not confer rights on jurors. The judge may choose to put a jury's questions to a witness. Thirdly, even if all of a witness's evidence had been pre-recorded, there would be nothing to prevent the judge, on being given a question the jury wanted asked of that witness, to have the witness brought to court so that the question could be put to him or her. Pre-recording of a witness's evidence would not preclude a judge from deciding the

witness must be recalled “if the Judge considers that it is in the interests of justice to do so”.¹³

[28] None of the considerations advanced by defence counsel has persuaded us to read down the plain words in ss 103 and 105. We are satisfied that courts do have jurisdiction to make pre-trial cross-examination orders under the Evidence Act.

If there is jurisdiction, how should it be exercised?

[29] Having concluded that judges may make pre-trial cross-examination orders under s 103(1), we must now turn to consider how the power is to be exercised. There are two main provisions, both in s 103, which provide guidance on that question:

- (3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
 - (a) the age or maturity of the witness:
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
 - (c) the trauma suffered by the witness:
 - (d) the witness’s fear of intimidation:
 - (e) the linguistic or cultural background or religious beliefs of the witness:
 - (f) the nature of the proceeding:
 - (g) the nature of the evidence that the witness is expected to give:
 - (h) the relationship of the witness to any party to the proceeding:
 - (i) the absence or likely absence of the witness from New Zealand:
 - (j) any other ground likely to promote the purpose of the Act.
- (4) In giving directions under subsection (1), the Judge must have regard to—
 - (a) the need to ensure—
 - (i) the fairness of the proceeding; and

¹³ Evidence Act, s 99.

- (ii) in a criminal proceeding, that there is a fair trial; and
- (b) the views of the witness and—
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
- (c) any other factor that is relevant to the just determination of the proceeding.

[30] Section 103 is subject to s 107,¹⁴ which is a specific provision applying only to criminal proceedings in which there is a child complainant. Section 107 really adds nothing to the present discussion as s 107(4) is effectively in the same terms as s 103(4). Section 103(3) is not repeated in s 107 as it is axiomatic that child complainants in criminal proceedings are vulnerable witnesses for whom a direction of an alternative way of giving evidence will often be required. For these reasons, we can safely confine our attention to s 103.

[31] Section 103(3) needs little elaboration. It sets out the circumstances in which a s 103(1) direction may be considered. The only category we mention is the ninth, “the absence or likely absence of the witness from New Zealand”. This indicates that s 103 directions may be made in circumstances where the witness is not “vulnerable”. The only reason we mention this category is that it reinforces the interpretation we have placed on ss 103 and 105 in the previous section of these reasons. If a proposed witness who is likely to be absent from New Zealand at the time of the trial can have his or her examination in chief given “by a video record made before the hearing of the proceeding”, there seems no reason at all why, in appropriate circumstances, he or she should not also have his or her cross-examination given similarly “by a video record made before the hearing of the proceeding”.

[32] In determining how the s 103(1) power is to be exercised, we must focus on s 103(4) (and, where applicable, on s 107(4)). Obviously the judge must balance the factors there stated. The factors in para (a) pull in a different direction from the factors specified in para (b). We do not see it as appropriate to try to lay down

¹⁴ Section 102.

guidance as to how the factors in subs (4) should be weighed. In so far as the statutory words need elucidation, such assistance will have to come on a case by case basis.

[33] Having said that, however, certain considerations are obvious in the criminal context.

[34] First, the general rule under our criminal law as it currently stands is that the accused is not required to show his or her hand before the start of the trial. There are some exceptions to that general principle. For instance, a defendant who intends to adduce evidence in support of an alibi must give written notice to the prosecutor of the particulars of the alibi prior to trial.¹⁵ A defendant who proposes to call a person as an expert witness must, prior to trial, disclose to the prosecutor any brief of evidence to be given by that witness.¹⁶ The general rule is not lightly to be countermanded. A defendant is generally entitled to hear the prosecution's opening before taking any step in the trial. To that extent, as we said previously, we consider s 367 of the Crimes Act does bear upon the exercise of the power, as part of "the need to ensure ... that there is a fair trial".

[35] Secondly, a judge should be very slow to order pre-trial cross-examination in the absence of clear evidence that full disclosure under the Criminal Disclosure Act 2008 has taken place. We were told that disclosure under the Act continues to be haphazard and often tardy. Defence counsel should not have to cross-examine a complainant when the defence has not had an opportunity to consider carefully all the relevant information in the prosecutor's hands.

[36] Thirdly, the sole advantage of the Crown Solicitor's stratagem is the avoidance of delay in completing the complainant's evidence, thereby reducing stress on him or her and thereby, it is said, allowing recovery of the complainant to begin more quickly. We say that is the sole advantage because Mr Hamlin proposes that the cross-examination will be undertaken in circumstances exactly like those pertaining at trial. That is to say, the complainant will be required to come to court

¹⁵ Criminal Disclosure Act 2008, s 22.

¹⁶ Ibid, s 23.

and to appear before a judge. Lawyers will be present. The accused will be present, although, of course, the complainant may not be able to see the accused, because other alternative ways of giving evidence - for example, the use of screens or the use of closed circuit television (CCTV) - will be necessary. Cross-examination will take place exactly as it would at trial. The only advantage to the complainant is, therefore, that the ordeal of giving evidence may be over sooner. That sole advantage is to be weighed, however, against the considerable disadvantages. Quite apart from the matters previously considered, the following factors come to mind:

- (a) The overall use of court resources is increased. A judge and court staff and a courtroom have to be provided for the taking of the evidence. Then at trial the cross-examination, which may have taken a day or more, has to be replayed. The overall court time will inevitably be longer.
- (b) Counsel on both sides end up having to prepare for trial twice. Overall legal fees will therefore be higher. Such increased costs will be exacerbated if the defence have to retain new counsel for trial, counsel who conducted the pre-trial cross-examination having become or being unavailable for the trial itself.
- (c) The avoidance of delay for complainants will mean greater delay in resolution for the accused. At present, trials involving child complainants get priority. Mr Hamlin conceded that, if the complainant's evidence were taken in advance, the rationale for priority would go. The end result would be that these accused would have to wait longer for their trials to take place. Indeed, all defendants would have to wait longer if pre-trial cross-examination orders became routine, as the stratagem envisaged, as resources otherwise available for trials will have to be diverted to the taking of evidence pre-trial. Trial delay will also potentially disadvantage complainants because, although the ordeal of giving evidence for them may be over sooner if their cross-examination takes place before trial, they will still be aware in many cases that the trial itself, which may well involve a family

member or friend as the accused, sits unresolved, with all the tensions within families that can cause.

[37] In short, therefore, the Crown Solicitor's stratagem seems a poor solution to the problem of delay in child sex cases.¹⁷

[38] Fourthly, a very relevant "fair trial" factor is that the jury would not be present for the cross-examination. Defence counsel would lose the ability to tailor his or her cross-examination depending upon the reaction of the particular jury to it. The jury would also lose the significant benefits arising from a live cross-examination of the key witness. At best they would get to view a split screen, with the witness on one side, the cross-examiner on the other. They would not be able to choose where they looked. They would not be able to assess the accused's reaction to the evidence as it was being given. We appreciate the accused would be in court as the videoed cross-examination was played, but by then the accused's reaction might well be staged, not spontaneous.

[39] Fifthly, a judge would need to bear in mind the increased difficulty of a jury asking questions. We accept it could still be done by recalling the witness. But that would mean, of course, that the witness ended up making two appearances in court rather than just one.

[40] Finally, the judge would need to bear in mind that taking cross-examination pre-trial would often mean, we fear, that complainants would end up giving evidence twice. It is almost inevitable that new matters come to light shortly before trial. Defence counsel will claim that, following the pre-trial cross-examination, more disclosure emerged or more information has come to light from third parties. It is imperative, they will argue, that cross-examination be reopened. A fair trial, they will say, will not otherwise be possible. Frequently, we suspect, judges would feel they had to err on the side of caution and permit a reopening of the cross-examination on "fair trial" grounds. It would be entirely self-defeating, of

¹⁷ Elisabeth McDonald and Yvette Tinsley say in their forthcoming VUWLR article, "Use of alternative ways of giving evidence by vulnerable witnesses: Current proposals, issues and challenges" (at 29), "many of the benefits of pre-recording of evidence could be achieved by fast-tracking applicable cases rather than pre-recording evidence". We wish to acknowledge the considerable benefit we derived from this article.

course, to have permitted pre-trial cross-examination only then to have to order the witness be recalled for further cross-examination at trial. That would bring with it additional problems. The live cross-examination may carry more weight with the jury than the pre-trial cross-examination. Almost inevitably, when a court finds itself forced into permitting a second round of cross-examination, the cross-examination will spill over to matters already covered and will amount to a second bite at the cherry.

[41] It will require a compelling case, we suggest, for the views of the witness or complainant to overcome the considerations we have mentioned. We are not to be taken as unsympathetic to the needs and views of complainants, especially child complainants. Much could and should be done to improve their lot. Taking their cross-examination in advance is not in itself the answer to the problems. We accept it may be part of an answer in rare circumstances, but they will be rare. We suspect the Law Commission recognised this too, which is why it pulled back from its original idea of routine pre-trial cross-examination in the case of child complainants and elderly witnesses.

Was the jurisdiction correctly exercised in M's case?

[Paragraphs [42]—[58] omitted.]

[59] We are satisfied that, if all the relevant factors are taken into account in this case, this is not a case in which a pre-trial cross-examination order was appropriate. There was really no advantage in attempting to have A's cross-examination taken in advance in the circumstances of this case. Whatever advantage there was was clearly outweighed by the fair trial considerations, which dictated cross-examination should take place at the time of the trial as is normal.

[60] The formal result in M's case is therefore as follows. We grant the application for leave to appeal and allow the appeal. We quash the order directing that the complainant's cross-examination is to be recorded prior to the trial and given at trial by a video record. In its place, we make an order that the cross-examination is to take place at the time of the trial. Whether the complainant should be

cross-examined in an alternative way as set out in s 105(1)(a)(i) or (ii) of the Evidence Act is to be determined in the District Court. M has already indicated that he would not oppose cross-examination being conducted via CCTV.

Was the jurisdiction correctly exercised in E's case?

[Paragraphs [61]—[72] omitted.]

[73] In particular, we note that the application was brought on 30 March, just after the trial date for early April had been vacated. The trial has now been rescheduled for August. Once again, as with the M case, bringing forward the cross-examination would bring little advantage to either complainant. Whatever advantage there was is easily outweighed by the detrimental effects on fair trial process.

[74] While we grant the Solicitor-General leave to appeal, we dismiss the appeal.

[75] E has already indicated that he would not oppose the complainants giving their evidence from behind a screen.¹⁸

Postscript

[76] Readers will note the banner on the front of this judgment, referring to two extant District Court orders granting name suppression. Mr Hamlin informed us these orders are in place. We have not been able to find them on the relevant District Court files. We were told they are not recorded in written form anywhere. That is unsatisfactory. When Courts make suppression orders, they must ensure that those orders are clear in their terms and recorded in writing and kept on the relevant court files.

Solicitors:
Rice Craig, Papakura for M
Crown Law Office, Wellington for Crown in both appeals

¹⁸ At [1] and [19].