

Impact Summary: Re-writing the Evidence Regulations 2007

Section 1: General information

Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Impact Summary, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be made by Cabinet, and stakeholders to be consulted on a government exposure draft of planned legislation.

Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- *Gaps in data:* There is limited evidence to quantify problems with the status quo, and risks of options for change. However, we consider the anecdotal evidence, which is sourced from professionals working in the courts, is relatively reliable.
- *Lack of consultation:* The Government has not publicly consulted on progressing the proposals in this document prior to Cabinet's consideration. However:
 - in 2018, the Law Commission consulted publicly on whether the Evidence Regulations 2007 needed review. Its 2019 report recommended that review, recording numerous issues raised in submissions and general agreement that the Regulations need to be updated;
 - we have consulted with stakeholders within and adjacent to Government representing the various interests at play, including prosecutors and defence lawyers, the Chief Victims' Advisor, and the Privacy Commissioner; and
 - the Ministry plans to consult on an exposure draft of the planned regulations, and make any necessary resultant changes prior to their commencement.

Responsible Manager:

Matthew Mitchell

Manager, Courts and Tribunals Policy
Ministry of Justice

March 2021

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Ministry of Justice's RIA QA panel has reviewed the RIS: Rewriting the Evidence Regulations 2007 prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIS meets the QA criteria.

Reviewer Comments and Recommendations:

The Panel considers the RIS provides a comprehensive description of the impacts of the relatively minor proposed changes to the Evidence Regulations. Quantified information on the costs and benefits of the proposals is relatively limited. The Panel is satisfied that sufficient consultation has taken place around the options and that the proposed consultation on an exposure draft of the regulations will enable any further issues to be addressed.

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Regulatory context

The Evidence Act 2006 (the Act) governs what, and how, evidence can be presented in both civil and criminal court cases. It aims to help ensure cases are decided justly, by:

- providing for facts to be established by the application of logical rules;
- providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA);
- promoting fairness to parties and witnesses;
- protecting rights of confidentiality and other important public interests;
- avoiding unjustifiable expense and delay; and
- enhancing access to the law of evidence.

The Act allows judges to direct that a witness is to give their evidence in an alternative way, for example by audio-visual link from outside the courtroom or via pre-recorded video. Alternative ways of giving evidence can help minimise the stress and trauma of giving evidence, and thereby ensure the witness's best evidence is provided to the court.

The Act and the Evidence Regulations 2007 (the Regulations) contain specific rules for the making of and access to evidential video interviews (EVIs). An EVI is a video record of a witness's interview with Police, which can be used as an alternative way of giving their evidence-in-chief¹ at the trial.

The Regulations provide strict rules governing how EVIs are to be made, stored, shared, and destroyed. The Regulations also govern the access to and use of EVIs outside the criminal proceedings for which they are made. This includes in the Family Court and other civil proceedings, by Oranga Tamariki in relation to care and protection matters, and by the Ministry of Justice in relation to applications for the prerogative of mercy.

Problem

The Regulations have not been substantially reviewed since they came into force, and mostly carry over provisions from the 1990s. The prescribed procedure and terminology reflect the use of physical copies (of VHS tapes). The Regulations have been added to in a piecemeal way over time, which has created duplication and inconsistency.

The Law Commission's 2019 review of the Evidence Act recommended reviewing the Regulations, highlighting several overarching issues:

- terminology and requirements reflect outdated practices and processes, and do not accommodate advances in video technology;
- the distinction between Part 1 (video record evidence) and Part 4 (mobile video record evidence)² is unnecessary and repetitive;
- the need for appropriate safeguards for electronically storing and accessing EVIs, so that they are protected from loss, tampering or unauthorised access;
- the application of substantially similar obligations to a range of recipients.

¹ Evidence-in-chief is usually given in court in response to questions from the prosecutor.

² Part 4 of the Regulations was added in 2017, to govern Police practice of taking evidential interviews of adult family violence complainants on their phones at the scene of the incident.

The Ministry has also identified further discrete issues with the Regulations:

- the obligations to destroy video evidence after 10 years do not reflect modern practice around appeals and retrials, which can occur significantly after that period. The destruction dates also do not recognise video evidence's potential use as propensity evidence in later cases;
- the Criminal Cases Review Commission (CCRC) does not have an explicit right to access video evidence, and we understand it has had difficulty obtaining evidence from the courts in some cases. This is inconsistent with the explicit access enjoyed by advisors on applications for the prerogative of mercy, and may hamper the CCRC's task of investigating and reviewing potential miscarriages of justice;
- the Family Court can access video evidence of children, but not adults, apparently as a result of oversight rather than policy decision. This means important contextual information may be missing in civil cases dealing with children's care and protection, and with family violence; and
- the relationship between the Regulations' restrictions on accessing video evidence, and Court Rules governing access to court records, is unclear.

Future impacts and interdependencies

We expect the use of EVIs to increase over time, as practitioners become more aware of their benefits and as case volumes continue to grow. Technological advancements and investment will mean video evidence is increasingly stored and accessed digitally rather than in hard copy. These advancements will further exacerbate difficulties with the Regulations' coherence and compliance.

For the purposes of this analysis we assume that the Sexual Violence Legislation Bill (the Bill), currently before Parliament, will be enacted. Proposed changes in the Bill will further increase the use of EVIs, and problems in the current state, by entitling complainants in sexual offence trials to use alternative ways of giving evidence (rather than having to apply to the court). The Bill will also introduce a regime for recording complainants' cross-examination prior to trial in sexual cases, and for recording all other evidence from complainants when it is given live at trial.

Irrespective of the options outlined in this document, new regulations specifically governing these new types of video evidence will be required. We therefore define the counterfactual to include those regulations. The new additions will exacerbate the regime's lack of coherence, as they will need to be drafted technology-neutrally to accommodate for current and future practice while at the same time map into the existing processes that have largely been unchanged since 1990.

Evidence and assumptions

The Law Commission conducted thorough consultation on and analysis of the problems in the Regulations. The Ministry has strong confidence in the evidence of the problems provided by the Law Commission's report, which is supported by our further consultation with practitioners within Government. That further consultation has also reinforced our understanding of other discrete issues with the Regulations, beyond those canvassed by the Law Commission.

The Ministry has planned further external consultation on an exposure draft of revised Regulations along with this Impact Summary, to confirm our understanding of the issues and our analysis and conclusions.

2.2 Who is affected and how?

Regulations governing video-recorded evidence affect:

- Witnesses, whose evidence is governed by the Regulations. This implicates their privacy interests, rights in respect of their personal information, and broader dignity and wellbeing.
- Defendants and parties in civil proceedings (including Family Court proceedings), whose access to and use of evidence is governed by the Regulations. This engages criminal procedural rights and broader rights to natural justice and freedom of information, affirmed under the New Zealand Bill of Rights Act 1990 (NZBORA).
- Prosecutors, defence counsel, and counsel acting in civil litigation, in terms of their rights and duties in advising clients and preparing for trial.
- Police, judges, and court staff, who make, store, and provide and monitor others' access to, video recorded evidence.
- Out-of-court practitioners advising on or taking action in respect of proceedings to which video recorded evidence is relevant (eg experts in complainants' behavioural responses to sexual offending; investigators in care and protection matters; advisors on potential miscarriages of justice or prerogative of mercy applications).

2.3 What are the objectives sought in relation to the identified problem?

Regulations governing video evidence should:

1. protect witnesses' privacy and the security of video evidence;
2. allow video evidence to be accessed and used by those with a legitimate purpose;
3. be future-proof: ensuring that the Regulations are resilient to future technological advancements in creating and storing video evidence; and
4. be clear and coherent: ensuring that the Regulations are clear, and consistent both internally and with the wider legislative regime.

Ordinarily when considering regulatory change relating to video evidence, we would measure options to ensure they preserve defendants' criminal procedural rights. We have not included this as an objective, as we have not identified any specific impacts of the options on defendants' rights beyond what is inherent in objectives 2 and 4.

Neither have we included specific objectives in relation to the discrete issues with the Regulations, which are obviously not common across those issues. Specific impacts of the preferred options, further to those falling under the above objectives, are identified in section 4.2 below.

Section 3: Options identification

3.1 What options have been considered?

Issue 1: approach to Regulations as a whole

Status quo 1: retain Evidence Regulations 2007

Retaining the status quo would mean the Regulations remain unchanged (see section 2.1 above) other than for provisions to support the Bill's new forms of video evidence.

Change option 1: re-write Evidence Regulations 2007 (preferred)

A full re-write would involve the Regulations prescribing modernised procedures for:

- making EVIs (substantially the same matters as currently prescribed, covering who may be present, what must be shown on the record)
- making pre-recorded cross-examination and recordings of evidence given live at trial (covering similar ground to the EVI section, but including editing processes – these are to be determined in light of operational settings, which are being set in consultation with the judiciary and IT experts)
- retrieving recordings held by the court for use in a subsequent trial as the witness's alternative mode of evidence (to be determined)

The re-write would also consolidate duties and general rules, prescribing:

- entitlements and obligations for the 'owner' of the record (Police, or the Court), including destruction, creation of transcripts, and provision of access to others;
- entitlements and obligations for specific people and bodies who are or may be allowed to access video evidence (including lawyers, experts, parties and judges in civil proceedings, specialist advisors outside the original proceedings)
- universally applicable obligations, including requirements to keep the evidence secure, to use it only for or in connection with the purposes authorised, and in accordance with the relevant obligations, and to return or relinquish access as soon as practicable after the purposes for which access was granted are complete; and
- general or miscellaneous rules, including that the regulations applying to video records apply equally to transcripts, except where specified, and that non-compliance with the regulations has no effect on admissibility

	<i>Status quo</i>	<i>Change option 1: rewrite regulations</i>
<i>Privacy & security</i>	0	+ The option would allow privacy and security obligations to be consolidated and clarified, and strengthened in line with technological developments.
<i>Legitimate access & use</i>	0	0 The option would not change entitlements to access and use video evidence.
<i>Future-proofed</i>	0	++ The option would modernise and technology-neutralise terminology and processes.
<i>Clear & consistent</i>	0	++ The option would consolidate processes and obligations that are common across those who access and use video evidence, removing duplication and inconsistency.

Issue 2: destruction of video records

Status quo 2: mandatory destruction after 7 or 10 years

The status quo requires video evidence to be destroyed 10 years after the proceedings for which it was made are finally determined or discontinued, or 7 years after it was made if the evidence was not used in proceedings. It allows the evidence to be destroyed before the 10-year date if the proceeding was discontinued due to the evidence's insufficient probative value.

Change option 2A: mandatory destruction after 20 years

Option 2b would require video evidence to be destroyed 20 years after either the proceedings for which it was made are finally determined or discontinued, or after it was made if the evidence was not used in proceedings. It would retain the ability to destroy the evidence before the mandatory destruction date if the proceeding was discontinued due to the evidence's insufficient probative value.

Change option 2B: discretionary destruction after 10 years (preferred)

Option 2b would remove the requirement to destroy video evidence. It would still require the evidence to be kept securely for a period of 10 years after proceedings in which it was used are finally determined or discontinued, unless the proceeding was discontinued due to the evidence's insufficient probative value.

This option would allow the courts and Police to set non-legislative procedures around destruction after the 10-year retention period. For Police, this is likely to involve aligning the storage, archiving, and disposal of video evidence with the rest of the case file.

	<i>Status quo</i>	<i>Change option 2A: 20 years</i>	<i>Change option 2B: discretionary</i>
<i>Privacy & security</i>	0	0 While the options would inherently increase the risk of privacy and security breaches, that increase is likely to be nominal. The obligation for secure storage, and restrictions on access, would remain.	
<i>Legitimate access & use</i>	0	+ The options would support access and use in subsequent investigations and proceedings where the evidence was relevant, and in cases where appeals and/or retrials occur more than 10 years after the (original) disposition of proceedings. This is particularly important in sexual cases, as delayed reporting by victims is more common (so the propensity evidence may remain relevant for longer).	
<i>Future-proofed</i>	0	0 The option retains the status quo's rigidity.	+ The option would allow non-legislative guidance to reflect or guide practice changes over time.
<i>Clear & consistent</i>	0	+ The option aligns the destruction requirements for all video evidence, whether or not it is used in court	++ As for option A, and it leaves the court and Police to determine the detailed processes for destruction (which can be aligned with those for other evidence). This accords with the general rule that the 'owner' of the evidence has control over its lifespan.

Issue 3: access to video evidence by Criminal Cases Review Commission

Status quo 3: no specific reference to CCRC in regulations

The CCRC investigates potential miscarriages of justice, either on application or its own initiative, and can refer criminal convictions back to an appeal court. It replaces part of the Royal prerogative of mercy, under which parties could apply to the Governor-General for that outcome.

The status quo would mean the CCRC needs to rely on evidence-gathering powers in its empowering legislation, the Criminal Cases Review Commission Act 2019. The Act allows the CCRC to require a person to produce documents or things that may be relevant to the investigation, provided it has taken reasonable steps to obtain the information by consent, and it considers the information is unlikely to be obtained through any means other than under that power.

A person so required must provide the information, subject to exceptions including where such disclosure is prevented by an enactment or a rule of law. If that exception applies, the CCRC may apply to the District Court for disclosure of the information. The CCRC can access court documents in accordance with rules of practice and procedure applying to the relevant court. As further explained in relation to issue 5 below, the relationship between the Regulations and Court Rules is unclear when it comes to accessing video evidence.

By contrast, the Regulations provide for authorised Ministry of Justice advisors to access video evidence in relation to applications for the prerogative of mercy by requesting it from the Court Registrar, who must comply. The Regulations prescribe requirements for the authorised advisor to keep the evidence in safe custody and to return it to the Registrar as soon as reasonably practicable after their use of it is complete.

Change option 3: explicit provision for CCRC access to video evidence (preferred)

Option 3 would include within Regulations the same access rights and procedure for the CCRC as those that apply for authorised advisors.

	<i>Status quo</i>	<i>Change option: provide CCRC access with access to video evidence</i>
<i>Privacy & security</i>	0	0 While the option may appear to reduce privacy protections by allowing more people to access video evidence than under the status quo, the CCRC's empowering legislation already provides it with a (less direct) mechanism to access the information. The CCRC must not disclose its information unless reasonably necessary for specified purposes. The option would also apply the secure storage requirements in the regulations on video evidence obtained by the CCRC.
<i>Legitimate access & use</i>	0	+ The option supports the CCRC to efficiently carry out its function of investigating and reviewing convictions and sentences for potential miscarriages of justice.
<i>Future-proofed</i>	0	0 The option does not affect the future-proofing of the regulations.
<i>Clear & consistent</i>	0	+ The option clarifies the CCRC's powers to access evidence, and aligns them with its empowering legislation and authorised advisors' access to video evidence in relation to applications for the prerogative of mercy.

Issue 4: access to video evidence of adults by the Family Court

Status quo 4: Family Court access only to video evidence of children

The Regulations currently allow the Family Court to require Police to provide it with access to video evidence of children, to:

- allow parties to a care and protection case under the Care of Children Act 2004 or the Oranga Tamariki Act 1989, or their lawyer, to view the video record:
- assist a person preparing a medical, psychiatric, or psychological report on the child under s 133 of the Care of Children Act or s 178 of the Oranga Tamariki Act:
- allow parties to a case under the Family Violence Act 2018 or the lawyer for those parties to view the video record.

The Family Court must keep the video evidence in safe custody, must return it to Police on request, and may only use it for the purposes above if:

- in the case of Care of Children Act or care or protection proceedings under the Oranga Tamariki Act, a Family Court Judge is satisfied that showing it is in the best interests of the child who is the subject of the proceeding; and
- the viewing is authorised in writing by a judge, takes place on Family Court premises, and is supervised by a registrar or by any person nominated by a registrar; and
- satisfied that showing it is not likely to jeopardise any pending criminal proceeding.

It appears that Family Court access to video evidence is confined to children's evidence simply because, when the relevant regulations were first developed, children were the only witnesses who were able to video record their evidence.

Change option 4: Family Court access to video evidence of adults too (preferred)

Option 4 would expand the Family Court's access to video evidence of adults, in respect of the same proceedings as for children. Settings would recognise the adult's autonomy (for instance, the adult's views would need to be taken into account, rather than just the child's best interests), and some different purposes would be specified (for instance, in relation to medical, psychiatric, or psychological reports about the adult, rather than about the child). These settings would be consulted on publicly and with the judiciary before being finalised.

	<i>Status quo</i>	<i>Change option 4: provide Family Court access to adults' video evidence</i>
<i>Privacy & security</i>	0	- The option allows a wider range of people to access adults' video evidence, subject to the court's discretion and supervision. However, it would retain the strict access regime imposed in respect of children's evidence, with necessary modifications (e.g. requiring consideration of the witness's views before release).
<i>Legitimate access & use</i>	0	+ The option allows the Family Court's determination of both child care and protection matters and family violence matters to benefit from video evidence of adult witnesses where relevant and appropriate.
<i>Future-proofed</i>	0	0 The option does not affect the future-proofing of the regulations.
<i>Clear & consistent</i>	0	+ The option removes a now-arbitrary distinction between video evidence of adult and child witnesses.

Issue 5: relationship between Evidence Regulations and Court Rules

Status quo 5: remain silent on relationship between regulations and rules

The Rules provide a process for applying to access court documents in the control and custody of the court, including “video recordings, records in electronic form, films, photographs, and images in electronic form”. The rules also provide that they are subject to any enactment,³ court order, or direction limiting or prohibiting access or publication. The Regulations do not reference access to video records under the Rules, and prescribe an offence for failing to comply with their requirements or restrictions on the use of, supply of, or access to video records.

Nevertheless, the status quo leaves open the question of whether the court could grant access to a video record in its custody and control via the Rules, to someone not authorised to access it under the Regulations. In fact, the Law Commission considered the Rules would apply in that way.

Change option 5: clarify relationship between regulations and rules (preferred)

Option 5 would clarify in the Regulations that:

- the court can grant access to video recorded evidence or transcripts under the Rules, but
- the Regulations will prevail where there is a conflict between the Regulations and the Rules (e.g., Rule 9(3) allows parties to criminal proceedings to inspect any document relating to the proceeding unless the judge directs otherwise, while Regulation 32(5) allows defendants to view video evidence only in the presence of a lawyer), and
- any person to whom access is granted under the Rules must use the record or transcript only for the purposes for which access was granted, and must comply with the applicable obligations and duties under the Regulations.

	<i>Status quo</i>	<i>Change option 5: clarify relationship between Regulations and Rules</i>
<i>Privacy & security</i>	0	0 While the option may appear to allow a wider range of people to access the video evidence than under the status quo, on the Law Commission’s view the Rules would be interpreted to apply anyway; the option simply makes this explicit. Any increased risk to privacy and security of video evidence may be offset by the regulations’ protections on any evidence that is released under the Rules.
<i>Legitimate access & use</i>	0	0 While the option may appear to allow a wider range of people to access the video evidence than under the status quo, on the Law Commission’s view the Rules would be interpreted to apply anyway; the option simply makes this explicit.
<i>Future-proofed</i>	0	0 The option does not affect the future-proofing of the regulations.
<i>Clear & consistent</i>	0	+ The option will clarify, and help people to navigate, prescribed processes for accessing video evidence across different legislation.

³ ‘Enactment’ is not defined in the Rules, but in the Interpretation Act 1999 it is defined to include regulations.

3.2 Which of these options is the proposed approach?

For each issue, change is preferred to the status quo. These options would support the regulations' coherence and overall fitness-for-purpose, individually and as a package:

1. modernising and consolidating the regulations via a full re-write;
- 2B. removing the requirement to destroy video evidence after 10 years;
3. explicitly providing for CCRC access to video evidence;
4. providing for Family Court access to video evidence of all witnesses; and
5. clarifying the relationship between Evidence Regulations and Court Rules governing access to court documents.

None of the proposals loosen the requirements for video evidence's secure storage and access, and modernising the regulations regime as a whole provides the opportunity to ensure that storage and access can benefit from technological security advances. We therefore consider any increase in risk to witnesses' privacy interests is minimal. However, removing mandatory destruction and providing explicitly for wider access may still be *perceived* as a more significant privacy risk than our analysis suggests.

As well as improving on the status quo in respect of the regulatory system objectives sought, the preferred options also broadly support the aims of the Evidence Act and the interests of justice. They ensure a potential source of relevant information is available to decision-makers in matters that are significant to people's lives (noting none of the changes affect the admissibility or actual use of video evidence outside the original proceedings). Further specific impacts are outlined in section 4.2 below.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties	Comment	Impact
Additional costs of proposed approach, compared to taking no action		
Courts	Additional costs of storing video evidence for longer, if mandatory destruction dates are removed (cost cannot be determined before operational practice is determined, but will not be felt until 10 years after implementation)	Monetisable but currently unquantifiable
Police		
Witnesses	Perception of increased risk of privacy breach, based on provision for wider access to video evidence	Low (non-monetised)
Total monetised cost		Unquantified
Non-monetised cost		Low
Expected benefits of proposed approach, compared to taking no action		
Courts, Police, Lawyers, CCRC	Improved efficiency, due to clarity of regulatory regime	Low-medium (monetisable but unquantified)
Parties to cases, complainants	Evidence that is retained for longer may support just outcomes in appeals, retrials, or subsequent cases occurring more than 10 years after evidence was obtained	Low-medium (non-monetised)
Total monetised benefit		Low-medium
Non-monetised benefits		Low-medium

4.2 What other impacts is this approach likely to have?

By improving the clarity and workability of the regulations, the proposals for change will support the Bill's implementation. This is particularly important given the significance and controversy of the Bill's key changes around pre-recorded cross-examination.

The proposed amendments are likely to have specific positive impacts on:

- complainants, parties, and outcomes in historical abuse cases, or appeals and retrials more than 10 years after a case was last active, which may benefit from the additional context of video evidence (over transcripts);
- efficiency in the Criminal Cases Review Commission, which will have clearer rights of access to video evidence; and
- children, parties, and outcomes in Family Court cases. Video evidence of or about adults can help to provide additional context in determining child care and protection matters, and may also support informed decision-making in Family Violence Act proceedings involving adults.

Any perceived expansion of access may create a risk that witnesses are disinclined to give their evidence via video, because they are aware of the number of people who might see it after the trial. This could, arguably, effectively remove the option and benefits of pre-recording evidence from the witness.

However, we consider this outcome unlikely in the vast majority of cases. Witnesses will generally understand that their video evidence will be viewed by many people in the course of proceedings. Should the current settings be amended as planned, it would be unusual for a witness to consider (or be informed of) the fact that more people outside of the proceeding are now entitled, in certain rare cases, to see the video evidence.

Modernising the Regulations may heighten the need to update other procedural legislation, including the Criminal Disclosure Act 2008 and Criminal Procedure Act 2011. Officials are reviewing related requirements across the statute book.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Public consultation for the Law Commission's 2019 report garnered submissions from prosecuting agencies, professional legal organisations, an individual practice, and victim advocacy groups. These submissions confirmed the existence of several issues with the Regulations, and indicated general support for a review.

Stakeholders within Government who work directly with the Regulations, including Police, Crown Law, the Public Defence Service, and Oranga Tamariki, agree with our analysis of the status quo and are comfortable with the proposals for change. The CCRC was supportive of the proposal to clarify its ability to access video evidence. The Government Chief Victims Advisor and the Privacy Commissioner did not express any concern with the proposals for change.

We are proposing to consult on an exposure draft of regulations progressing the changes in this impact summary. Consultation will help to ensure we have not missed or mischaracterised any impacts of the proposals, particularly for Family Court lawyers and for witnesses, defendants, and parties to proceedings in which video evidence is used.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

Subject to feedback via the exposure draft, the proposed changes would be progressed via Order in Council and Gazettal. They would come into force at the same time as the Bill's video evidence changes (the latter of 1 December 2021 or 6 months after Royal assent).

The proposed changes do not create any novel requirements, or involve any new actors. Courts and agencies involved in video evidence are experienced at managing their creation, use, storage, and destruction.

The removal of mandatory destruction dates will have the most significant operational impacts. Transitional arrangements are likely to apply that change to video evidence in existence at the time of commencement. As video evidence is already stored by both Police and the Courts, there will not be a significant immediate impact. However, work is already underway to plan for increased storage, and on non-legislative protocols for review and deletion of video evidence beyond the mandatory retention period.

The more permissive settings for destruction of video evidence mean that any implementation risks that become apparent between now and commencement can be managed through those non-legislative protocols. Any more significant risks, requiring regulatory adjustment, can be mitigated through changes to the proposed settings – there is time to make those changes prior to finalising the new regulations, which will need to be completed by mid-September 2021.

Funding has already been secured for the courts' storage of new video evidence under the Bill, based on current settings requiring storage for 10 years. Should implementation monitoring indicate further funding is required to manage storage beyond 10 years, those additional funds can be sought prior to the impacts occurring.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The key method of monitoring the impacts of the new arrangements will be direct feedback from implementing agencies and the courts. Many of the impacts will be closely linked to those of the Bill's provisions around video evidence, which are subject to careful, cross-Ministry and cross-Government implementation planning. Data on the creation and storage of video records will be gathered and monitored by both Police and the Ministry.

Video evidence is already accessed outside the criminal proceedings for which it was made, though very rarely. Business as usual data collection does not capture these processes, so monitoring will continue to be manual.

7.2 When and how will the new arrangements be reviewed?

There are no plans for a formal review of the new arrangements beyond business as usual regulatory stewardship monitoring, given the changes to the current regime are relatively slight. Feedback as to any unintended or more significant impacts, from implementing agencies and the courts or from other stakeholders such as Family Court lawyers or parties to civil proceedings, would trigger a review.

Annex to Impact Summary: Re-writing the Evidence Regulations 2007

Coversheet

Purpose of Annex	
Decision sought:	<p>This analysis has been prepared for the purpose of supporting Cabinet approvals of updated Evidence Regulations.</p> <p>This is an Annex to the Impact Summary: <i>Re-writing the Evidence Regulations 2007 (attached)</i>, and the two documents should be read together. The Impact Summary supported Cabinet policy decisions in November 2021 to update the Evidence Regulations 2007.</p>
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	23 May 2023
Limitations and constraints on analysis	
<p><i>Significant issues arose during early consultation that have required us to revisit our approach to the Regulations</i></p> <p>Consultation with the judiciary identified that the draft Regulations encroached on judicial responsibilities for, and control of, court information. We agree with these concerns, which required us to pause further consultation on the draft Regulations and consider a new approach. Reconsidering the approach to the Regulations, and re-drafting them to exclude coverage of court information, has had knock-on impacts for the time available for consultation and to analyse issues that have arisen during drafting.</p> <p><i>Tight timeframes have limited consultation and analysis</i></p> <p>We have been directed to prepare the Regulations so that they enter into force as soon as possible after the commencement in December 2022 of amendments made by the Sexual Violence Legislation Act 2021 (SVL Act). Due to time constraints, we have not undertaken full public consultation on the re-written Regulations as envisaged by Cabinet in November 2021.</p> <p>We have, however, undertaken two rounds of targeted consultation with the judiciary and key groups representing the legal profession and the Victims Advocacy sector. A fuller public consultation would enable us to be more confident that we have not missed or mischaracterised the impacts of the updated Regulations or introduced any ambiguity.</p> <p>To ensure they are operating as intended, the Ministry of Justice will commence a review of how the Regulations are operating two years after they fully enter into force.</p>	
Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Justice

Panel Assessment & Comment:

The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the Annex to Impact Summary prepared by the Ministry of Justice. The Panel has concluded that the Annex **meets** the Quality Assurance criteria. While the Annex was prepared under tight time constraints which precluded wide consultation, two rounds of targeted consultation were undertaken, which clearly influenced the policy development. The Panel notes that the proposed review of the regulations 2 years after commencement provides an early opportunity to revisit the regulations.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

The Evidence Regulations 2007 set out rules relating to video recorded evidence. They are currently framed around evidential video interviews (EVIs), which are recordings of Police interviews with a witness and can be later used in court as a witness's evidence-in-chief (in place of questioning by the prosecutor). The Regulations provide strict rules on how these videos are to be made, stored, shared and destroyed.

The current Regulations have not been substantially reviewed since they came into force. They prescribe procedure and terminology that reflects the use of physical video records (VHS tapes) and have been added to in a piecemeal way over time, creating duplication and inconsistency. A fuller description of the problems is set out in section 2.1 of the Impact Summary.

In November 2021 Cabinet agreed to update the Regulations and to bring them into force alongside the commencement in December 2022 of the parts of the SVL Act which enable greater use in court of video evidence in sexual violence cases. This includes a regime for recording complainants' cross-examination prior to trial in sexual cases, and for recording all other evidence from complainants when it is given live at trial (court-recorded video evidence).

Cabinet agreed to:

- modernise and consolidate the regulations to ensure the framework around video evidence is consistent, future-proofed, and accessible
- add new regulations managing the new forms of video evidence in the SVL Act (evidence recorded in court before, and at trial); and
- three discrete changes to:
 - allow the Family Court and the Criminal Cases Review Commission to access video evidence outside the criminal proceedings for which it was made
 - remove the mandatory destruction dates for video evidence; and
 - clarify that where there is a conflict between the Regulations and Court Rules for accessing court documents, the Regulations will prevail, and that any person granted access under the Court Rules must comply with all applicable obligations prescribed by the Regulations.

Cabinet agreed to release an exposure draft of the re-written Regulations and authorised the Minister of Justice to report back with finalised Regulations for approval in 2022 [LEG- 21-Min-0194].

Consultation post-Cabinet decisions changed our understanding of the context

The Ministry of Justice developed draft Regulations in line with the policy approvals described above. Before targeted consultation with stakeholders, the Ministry undertook targeted consultation on the draft Regulations with the judiciary, Police, Crown Law Office, the Public Defence Service and other agencies.

The judiciary raised strong concerns about the proposed inclusion in the regulations of content that directs the courts how to make, use and manage “court information”. This includes videos of evidence recorded by the courts as part of a trial (either before or during the trial) and Police-recorded videos after they have been produced in evidence to the court. These videos are court information and come under the supervision and control of the judiciary in terms of use, access, and storage. They questioned the appropriateness, from a constitutional perspective, of the Executive making Regulations that prescribe how the courts must record and deal with these videos.

Judicial responsibility for the custody and control of court information is an element of the constitutional principles of separation of powers and judicial independence. The judiciary consider that the Regulations, as initially drafted, encroached on the court’s powers and cannot properly restrict the courts’ ability to supervise and control access to court information. The statutory information framework established under the Senior Courts Act 2016 and the District Court Act 2016 recognises that the management and use of court information is a judicial responsibility.

In response to the judiciary’s concerns, the exposure draft Regulations released for targeted consultation with stakeholders excluded coverage of court information. This RIS analyses the revised approach to the Regulations, excluding court information (see issues 1 and 3).

What is the policy problem or opportunity?

The feedback from the judiciary does not change the problem identified in the Ministry’s original Impact Summary (see section 2.1) relating to the need for new Regulations that future-proof and improve the accessibility of the current Regulations.

However, the approach to the update needs to consider the degree to which the new Regulations would encroach on the wider statutory and constitutional framework relating to court information. We agree with the concerns raised by the judiciary.

The current statutory regime for court information is spread across a number of Acts including the Evidence Act 2006, the District Court Act 2016 and the Senior Courts Act 2016. The District Court Act and the Senior Courts Act, in particular, establish the principle that court information is under the custody and control of the courts. Video evidence recorded in court before and at trial is ‘court information’ in the ‘custody and control’ of the court from the moment it is made. Police-recorded evidence can also become court information once it is used in court.

The Ministry considers that alternative approaches need to be explored for the following three issues identified in the original Impact Summary:

- Approach to Regulations as a whole (issue one in this annex)
- Access to video evidence of adults by the Family Court (issue two in this annex)

- Relationship between Evidence Regulations and Court Rules (issue three in this annex)

What objectives are sought in relation to the policy problem?

The objectives of the original Impact Summary remain relevant. Regulations governing video evidence should:

- a) protect witnesses' privacy and the security of video evidence;
- b) allow video evidence to be accessed and used by those with a legitimate purpose;
- c) be future-proof: ensuring that the Regulations are resilient to future technological advancements in creating and storing video evidence; and
- d) be clear and coherent: ensuring that the Regulations are clear, and consistent both internally and with the wider legislative regime.

As noted in the Impact Summary, ordinarily when considering regulatory change relating to video evidence, we would measure options to ensure they preserve defendants' criminal procedural rights. We have not included this as a standalone objective as we have not identified any specific impacts of the options on defendants' rights beyond what is inherent in objectives (b) and (d). Consistency with defendants' criminal procedural rights has been considered as part of objective (d).

All the objectives are weighted equally.

Section 2: Options identification

We have analysed options against a status quo of the current Evidence Regulations 2007. For each of the issues we have, where relevant, re-assessed the proposed current approach to the re-write, taking into account stakeholder feedback and our additional analysis.

What options are being considered?

Issue 1 – approach to Regulations as a whole¹

This issue deals with the general approach to re-writing the Evidence Regulations. The problems with current Regulations are described in the problem definition above.

Option one – continue with the current approach to the re-write (the new Regulations would cover both Police and court)

The current approach to the update of the Regulations contemplates a full re-write prescribing modernised procedures for:

1. making Police EVIs (Police-recorded information: substantially the same matters as prescribed in the current Regulations for Police covering who may be present, what must be shown on the record)
2. making pre-recorded cross-examination and recordings of evidence given live at trial (court-recorded information)
3. retrieving recordings held by the court for use in a subsequent trial as the witness's alternative mode of evidence (court-recorded information).

¹ See Impact Summary Issue 1, p5.

Continuing with the current approach would mean that the new Regulations cut across the statutory court information regime which recognises the judiciary's independence in the supervision and management of court information.

The Ministry did not recognise the impact of encroaching on the courts' responsibilities in the original Impact Summary. The impact of this option is therefore analysed again in Table one below.

Option two – exclude court-recorded video evidence from the updated Regulations (approach recommended in LEG paper)

Under this approach, the updated Regulations will focus solely on Police evidential interviews and will not cover video evidence recorded in court. Their primary purpose will be to set out an updated regime for managing Police-recorded video evidence, including both EVIs and mobile video records.²

The updated Regulations will not provide rules for managing Police-recorded evidence that has been used in court, as the court has control of the court information.

The updated Regulations will not address the new forms of video evidence introduced by the SVL Act (evidence recorded in court before, and at, trial).

Under this option the Ministry would work separately with the judiciary on whether court rules are required to manage court-recorded evidence, and Police-recorded evidence that has been used in court. In the absence of Regulations (or court rules) dealing with court-recorded video evidence, individual judges can make decisions on how to manage court-recorded evidence. Due to the range of events that must take place before a case is ready for trial, we do not expect recordings of pre-recorded evidence to take place at scale until November 2023 at the earliest.

Option three: draft updated Regulations alongside consideration of whether court rules are required to support court-recorded video evidence (preferred approach)

This option would take the same approach to the Regulations as in option two above, but on a slower track. While the Regulations are being developed, the Ministry of Justice would work with the judiciary to identify whether court rules are required to support the management of court-recorded video information and court-held Police video evidence, and if so the content of any court rules.

If the judiciary consider court rules are required, this approach would enable them to be developed alongside the Regulations and decisions made about the extent to which alignment is necessary or desirable.

How do the options compare to the status quo?

All options are compared to the status quo in the Evidence Regulations 2007. The analysis in the Impact Summary for the current approach as agreed by Cabinet has been updated to reflect stakeholder feedback.

² EVIs are video recordings made by police of complainant or witness interviews that may be offered later as evidence by the prosecution in a criminal proceeding. A mobile video record is a particular type of EVI – a video of an adult complainant made by Police on a mobile phone at the scene of alleged family violence with the intention that it be offered later as evidence in a criminal proceeding.

Key:	
++	much better than the status quo
+	better than the status quo
0	about the same as the status quo
-	worse than the status quo
--	much worse than the status quo

Table one

	Option one – continue with the current approach to the re-write	Option two – exclude court-recorded video evidence	Option three: draft updated Regulations alongside consideration of possible court rules
Privacy & security	<p>+</p> <p>Would allow privacy and security obligations to be consolidated, clarified and strengthened as a package in line with technological developments.</p>	<p>+</p> <p>Would allow privacy and security obligations around Police EVIs to be consolidated, clarified and strengthened in line with technological developments.</p>	<p>+</p> <p>Would allow privacy and security obligations to be consolidated, clarified and strengthened as a package in line with technological developments. Consideration would be given to whether similar rules are required for court-recorded video evidence.</p>
Legitimate access & use	<p>0</p> <p>Choice about form and process for making Regulations or Rules does not impact on entitlements to access and use video evidence.</p>	<p>0</p> <p>Choice about form and process for making Regulations or Rules does not impact on entitlements to access and use video evidence.</p>	<p>0</p> <p>Choice about form and process for making Regulations or Rules does not impact on entitlements to access and use video evidence.</p>
Future-proofed	<p>++</p> <p>Would modernise and technology-neutralise terminology and processes.</p>	<p>++</p> <p>Would modernise and technology-neutralise terminology and processes relating to Police-recorded video evidence.</p>	<p>++</p> <p>Would modernise and technology-neutralise terminology and processes relating to Police-recorded video evidence. Consideration would be given to whether rules are required for court-recorded video evidence.</p>
Clear & consistent	<p>-</p> <p>Would consolidate processes and obligations that are common across those who access and use video evidence, removing duplication and inconsistency.</p>	<p>0</p> <p>Would consolidate processes and obligations that are common across those who access and use Police-recorded video evidence. Court-recorded evidence will</p>	<p>++</p> <p>Would consolidate processes and obligations that are common across those who access and use video evidence, removing duplication and inconsistency.</p>

	Option one – continue with the current approach to the re-write	Option two – exclude court-recorded video evidence	Option three: draft updated Regulations alongside consideration of possible court rules
	Not consistent with wider statutory framework for managing court information.	remain the preserve of the judiciary. Would not remove duplication and inconsistency for users of both Police and court recorded video evidence. However, would be consistent with the wider statutory framework for managing court information.	Provides an opportunity to consider whether court rules are required. If court rules are required, content of those rules can be considered alongside and choices can be made about degree of desired alignment.

Which option best addresses the problem?

The analysis in Table one shows that option three (draft updated Regulations alongside consideration of possible court rules) is preferred. This would enable consideration of the consistency of Regulations, and if the judiciary consider rules are required, court rules. The LEG paper recommends the approach in option two, where the Regulations will be made ahead of consideration of the need for court rules.

There is a small risk with option three, and a slightly bigger risk with option two, that the rules for managing court information may not align with the rules in the updated Regulations. To mitigate this risk the updated Regulations have been drafted in a way that is mindful of the judiciary’s responsibility for managing court information. For either of these options the Ministry will work with the judiciary to assess whether specific court rules are required and if so whether alignment is necessary or desirable.

Issue 2: access to video evidence of adults by the Family Court³

Status quo under the Evidence Regulations 2007

The existing regulations⁴ enable the Family Court to require Police to provide it with the video evidence of children to allow parties and their lawyers, in proceedings under the Care of Children Act 2004 (COCA), the Oranga Tamariki Act 1989 (the OT Act), and the Family Violence Act 2018 to view the record. The Family Court can also require the record to be provided to assist persons preparing a medical, psychiatric or psychological report under COCA and the OT Act.

Before ordering a person can view this video evidence, the Court must be satisfied that the order is in the best interests of the child who is the subject of the proceeding and be satisfied that showing the video will not jeopardise any pending criminal proceeding. Any viewing of this video evidence must take place within Family Court premises and be supervised by a Family Court Registrar or their nominee.

Cabinet previously agreed to expand the Family Court's access to adult's video record evidence

This part of the draft Regulations enables the Family Court to require Police to provide it with access to video evidence of adults so that the court can consider whether it should be disclosed to parties to proceedings under the Care of Children Act 2004 and the Family Violence Act 2018.

Two concerns arose during consultation on and analysis of the draft regulations:

(a) Concerns about causing further harm to complainants

During targeted consultation on the draft Regulations, some stakeholders indicated support for enabling the Family Court to access Police-recorded video evidence. They considered access to adults' video evidence could support the court in keeping children safe where there have been reports of violence in the household. However, they were also concerned about the potential for the video evidence to be used against victims to perpetuate further abuse within the context of Family Court proceedings.

Our analysis of the draft Regulations also identified that the matters a Judge is required to consider before disclosing video record evidence in the Family Court are more limited, and less protective of complainants, than the matters a Judge is required to consider before disclosing video record evidence in other civil proceedings.⁵

(b) Concerns that rules for viewing video records and transcripts are too restrictive

The current Regulations require children's video evidence to be viewed within Family Court premises. However, requiring all video evidence to be viewed at the Family Court may be unnecessarily restrictive for lawyers and parties. These restrictions may create access to justice barriers for parties who cannot travel to view video evidence at the court during business hours. Not having access to video records or transcripts may also impede a

³ See Impact Summary Issue 4, p8

⁴ Regulation 22, Evidence Regulations 2007.

⁵ These matters are set out in section 119B of the Evidence Act. They include matters such as the extent to which the video record is relevant to the proceedings before them, the likely extent of harm to the witness whose video evidence is contained in the video record from disclosure of that record and the availability of other means of obtaining the evidence.

lawyers' ability to prepare the case. Requiring supervision by a registrar in all cases may also impact a lawyers' ability to provide legal advice to the client during the viewing of a video record.

Enabling the Family Court to order disclosure and viewing of adult video evidence will significantly increase the volume of video evidence that can be disclosed in this way. Requiring all video evidence to be viewed in the Family Court and supervised by a registrar will increase demand for limited room space and registrar capacity in the Family Court.

On the other hand, there are also concerns about potential misuse of video evidence in Family Court proceedings and potential risk of perpetuating further harm.

Options to address concerns about causing further harm to complainants

Option one – continue with current approach (expand access to adult video evidence with adjusted settings to recognise adult autonomy)

The current approach as previously agreed by Cabinet, discussed in the Impact Summary Issue 4, contemplates expanding the Family Court's access to video evidence of adults in respect of the same proceedings as for children. Settings were intended to recognise the adult's autonomy (for instance, the adult's views would need to be taken into account, rather than just the child's best interests), and some different purposes would be specified (for instance, in relation to medical, psychiatric, or psychological reports about the adult, rather than the child).

During drafting, some modifications were made to this approach to recognise how adults participate in the relevant proceedings. For example, medical, psychiatric and psychological reports are only ordered for children, not adults.

For adult video evidence, the approach previously agreed by Cabinet would require the Judge to consider the following matters before ordering disclosure of a video record:

- after taking reasonable steps to ascertain the view of the complainant, consider their view
- be satisfied that disclosing the video record or transcript is not likely to jeopardise any pending criminal proceeding.

These criteria would not require the Judge to consider the relevance of the evidence to the proceedings or potential harm to the complainant as a result of the disclosure. As noted above, some stakeholders expressed concern that the settings as currently drafted may create risk to complainants whose video record evidence disclosed family or sexual violence.

Option two – modify current approach by adding additional matters a Judge must consider before disclosing a video record, for both adult and children's video record evidence (preferred)

This approach would add additional matters for a Judge to consider before the Judge could order disclosure of a video record in the specified Family Court proceedings. These additional matters respond to the concern about potential harm that could be inadvertently caused by disclosure, and include:

- the extent to which the video record is relevant to the proceedings before them
- the likely extent of harm to the witness whose evidence is contained in the video record from disclosure of that record
- the public interest in protecting the privacy of complainants
- any other matter that the Judge or judicial officer considers relevant, and

- if the complainant is a child, the disclosure order is in the welfare and best interests of the child.

Except for the 'best interests of the child complainant' test, the additional matters are drawn from s119B of the Evidence Act 2006, which sets out the matters a Judge must consider before ordering disclosure of video evidence in other civil proceedings. We have not included the s119B requirement to consider the availability of other means of obtaining the evidence as in these cases the form (video record) is important.

We have added the best interests test for the child complainant as the existing test for disclosure of a child complainant's video record only considers the best interests of the child who is the subject of the proceedings. There may be circumstances where a child complainant's video is being considered for disclosure, but the child is not the subject of the proceedings (for example under the Family Violence Act).

For consistency, we consider that these matters should also be considered by a Judge considering the disclosure of children's video evidence.

Following targeted consultation, we discussed this option with the Principal Family Court Judge and the New Zealand Law Society, who both indicated support for building in these additional matters for consideration. The Chief Victims' Advisor supports this option, but considered it should be further tested with victim advocates. A second round of consultation, extended to include family violence victim advocates, did not elicit any specific feedback on this change.

How do the options compare to the status quo?

All options are compared to the status quo in the Evidence Regulations 2007. The analysis in the Impact Summary for the current approach as agreed by Cabinet has been updated to reflect stakeholder feedback.

Table two

	Option one – continue with current approach	Option two – add additional matters a Judge must consider
Privacy & security	- Increased risks to complainant's privacy. Some risks to security from increasing access to adult evidence but these are mitigated by strict access regime and duties imposed on users in other parts of the Regulations.	+ Greater protection of complainant's privacy. Some risks to security from increasing access to adult evidence but these are mitigated by strict access regime and duties imposed on users in other parts of the Regulations.
Legitimate access & use	- Increased risk the video record could be used to perpetuate further harm to complainant	+ Reduced risk of harm from disclosure as judge required to consider wider range of risks
Future-proofed	0 No impact on the future-proofing of the regulations	0 No impact on the future-proofing of the regulations
Clear & consistent	- Inconsistent with the treatment of the same evidence in civil	+ More consistent with the treatment of the same evidence

	proceedings outside the Family Court.	in civil proceedings outside the Family Court.
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Option to address concern that rules for viewing video records and transcripts are too restrictive

This is a new issue that was not analysed in the Impact Summary.

We have identified two options for addressing concerns that only being able to view video records and transcripts within Family Court premises is unnecessarily restrictive and may impede access to justice. Both options complement our preferred approach to the matters a Judge must consider when ordering disclosure. We would not recommend this option progressing together with the previously agreed approach to disclosure in the Family Court as there are fewer safeguards in the option one decision-making process.

We conducted a second round of targeted engagement with stakeholders, including family violence victim advocates, to test option one (enabling the Judge to authorise viewing outside of the Family Court).

The Principal Family Court Judge supported providing more flexibility for viewing this evidence, noting that the Judge should be able to make appropriate directions and that in some cases viewing within the Family Court precinct would still be necessary. She also emphasised that lawyers can be given access to Police video record evidence in the criminal jurisdiction already. The New Zealand Law Society and the New Zealand Bar Association also supported this approach. All three pointed out current pressures on the courts and the risk of further delays should all viewings be required to take place at the Family Court.

The Chief Victims’ Advisor supports enabling a party’s lawyer to supervise viewing of the video evidence but only within Family Court premises. She does not support enabling lawyers to supervise a party’s viewing of video evidence outside Family Court premises. Victim advocates did not provide specific feedback on this change, although they expressed general concerns about the risks to complainants if video record evidence is leaked or circulated inappropriately.

Option one – enable lawyers to supervise viewing of adult and children’s video evidence and the Judge to authorise viewing outside of Family Court premises (preferred)

This option would retain the default position that video records must be viewed within the premises of the Family Court, but a party’s lawyer would also be able to supervise viewing of the video evidence of a child or adult complainant. This would be in place of supervision by a registrar.

The Judge, when considering whether to order disclosure of a video record or transcript, would also have discretion to authorise the viewing of the video record or transcript outside of Family Court premises. This enables Judges to make decisions about viewing outside of Family Court premises to be made on a case-by-case basis.

The Regulations would enable the Judge to impose conditions on the viewing of the video record evidence.

The Judge would not have discretion to order viewing outside the Family Court for the most sensitive video evidence (children’s evidence and sexual violence or violence cases), as the

Evidence Act imposes additional precautions around the viewing of this evidence in criminal proceedings.⁶

Option two – enable lawyers to supervise viewing of adult and children’s video evidence outside of Family Court premises, unless a Judge directs otherwise

This option would, as the default position, enable a party’s lawyer to view and supervise the party’s viewing of adult and children’s video records and transcripts, outside of Family Court premises. A Judge could however direct a more precautionary approach, for example requiring videos to be viewed within Family Court premises, when making an order for disclosure.

How do the options compare to the status quo?

Table three

	Option one – enable lawyers to supervise, judicial discretion regarding viewing outside Family Court	Option two – enable lawyers to supervise viewing outside Family Court unless judge directs otherwise
Privacy & security	- Some privacy risks but these are mitigated by judicial discretion and strict duties on users of video records and lawyers’ professional obligations	-- Some privacy risks, mitigated by strict duties on users of video records and lawyers’ professional obligations
Legitimate access & use	+ Requiring judges to specifically authorise viewing outside Family Court provides assurance that use is legitimate.	- Making viewing outside Family Court the default position increases risk that use perpetuates harm.
Future-proofed	0 No impact on the future-proofing of the regulations	0 No impact on the future-proofing of the regulations
Clear & consistent	+ Consistent with broader legislative regime and access to justice principles	+ Consistent with broader legislative regime and access to justice principles

Which option best addresses the problem?

The analysis in Table two shows that option two (requiring the Judge to consider additional matters when deciding whether to order disclosure) best achieves the objectives. In particular, this option provides greater protection of a complainant’s privacy and reduces the risk of causing the complainant further harm.

⁶ Section 106(4A) – (4C) Evidence Act 2006.

The analysis in Table three shows that option one (enabling lawyers to supervise viewing within Family Court premises and judicial discretion to authorise lawyer-supervised viewing outside the Family Court) best achieves the objectives. It enables greater access to justice by parties in the relevant Family Court proceedings with specific safeguards through judicial decision-making to provide assurance that viewing records in these circumstances is appropriate and legitimate.

Issue three –relationship between updated Evidence Regulations and Court Rules⁷

This issue relates to the relationship between the Evidence Regulations and Court Rules governing access to court information. The issue arises because the same video evidence record is:

- Police information where it is in the custody and control of the Police
- Court information once it has been used in court proceedings.

There is potential for an inconsistent approach to some types of video evidence between the Regulations and Court Rules. For example, Rule 9(3) allows parties to criminal proceedings to inspect any document relating to the proceeding unless the judge directs otherwise, while Regulation 32(5) allows defendants to view video evidence only in the presence of a lawyer.

The Rules are predicated on a judicial discretion to provide access while taking into account the type of information and context. They allow for Judges to grant access with any conditions attached as appropriate. This means that the court could grant access to a video record in its custody and control via the Rules, to someone not authorised to access it under the Regulations. The Law Commission considered the Rules would apply in that way.

Option one - continue with the current approach (clarify the relationship between the Evidence Regulations and Court Rules)

Under this option the Regulations would prescribe that the Regulations will prevail where there is a conflict between the Regulations and Court Rules.⁸ This would mean that the Court could grant access to video recorded evidence or transcripts under the Court Rules, but the Regulations would prevail where there is a conflict (this would require, for example, a defendant to view the video evidence only in the presence of a lawyer).

Targeted engagement with the judiciary expressed concern about the appropriateness of Regulations managing judicial controlled court information and expressly overriding the Court Rules. As noted earlier in this Annex, judicial responsibility for the custody and control of court records is an element of the constitutional principles of separation of powers and judicial independence.

Option two – work with the judiciary to identify if court rules are required and if so, assess where conflict may arise between court rules and Regulations (preferred)

This approach would mostly maintain the status quo for the Regulations, though as part of re-writing the Regulations existing sources of confusion or inconsistency would be addressed. The Ministry would work with the judiciary to identify whether court rules are required to manage Police video-evidence held by the courts or court-recorded video evidence (court information). If the judiciary consider court rules are required, this would provide an opportunity to assess any necessary or desirable alignment between the Regulations and court rules.

⁷ See Impact Summary Issue 5, p9.

⁸ Relevant Court Rules include the District Court (Access to Court Documents) Rules 2017 and Senior Courts (Access to Court Documents) Rules 2017. The wide definition of 'document' in the Rules includes a document in an electronic form including "information recorded or stored by means of a tape recorder, computer or other device."

This approach would enable a judicial-led approach to be taken to the court’s management of information that is also held by Police, which is more constitutionally appropriate. However, there would be a risk that different rules continue to apply to the same information, depending on whether a request is made to the Police or to the court.

How do the options compare to the status quo?

All options are compared to the status quo in the Evidence Regulations 2007. The analysis in the Impact Summary for the current approach as agreed by Cabinet has been updated to reflect stakeholder feedback.

Table four

	Option one – continue current approach (clarify relationship between Regulations and Rules)	Option two – status quo for Regulations but work with judiciary to identify if court rules are required and assess where conflict may arise
Privacy & security	0 While the option may appear to allow a wider range of people to access the video evidence than under the status quo, on the Law Commission’s view the Rules would be interpreted to apply anyway; the option simply makes this explicit. Any increased risk to privacy and security of video evidence may be offset by the regulations’ protections on any evidence that is released under the Rules.	0 At this stage no change to status quo.
Legitimate access & use	0 While the option may appear to allow a wider range of people to access the video evidence than under the status quo, on the Law Commission’s view the Rules would be interpreted to apply anyway; the option simply makes this explicit.	0 At this stage no change to status quo.
Future-proofed	0 No impact on the future-proofing of the regulations	0 No impact on the future-proofing of the regulations
Clear & consistent	- The option will clarify, and help people to navigate, prescribed processes for accessing video evidence across different legislation. However, it would not be appropriate, from a constitutional perspective, for the Executive to override the judiciary through Regulations.	+ Consistent with broader legislative regime and access to justice principles. Any existing sources of confusion or inconsistency with the principle that the judiciary manage court information will be addressed.

Which option best addresses the problem?

The analysis in Table four shows that option two (status quo for Regulations but work with judiciary to identify where court rules are required) best meets the objectives. This approach enables the Regulations to be drafted with the respective executive and judicial responsibilities in mind.

Section 3: Impact analysis (preferred approach)

This table updates the table in the Impact Summary to reflect the additional analysis in this Supplementary Annex.

Affected groups	Comment	Impact
Additional costs of the preferred option compared to taking no action		
Courts	Additional costs of enabling access to adult video records at the Family Court: <ul style="list-style-type: none"> Up to 1400 additional requests for videos p/a Up to 4200 additional viewings at Family Court premises p/a (could be lower if judges enable lawyers to access offsite) Up to seven additional FTEs to support supervised viewing (could be lower if judges enable lawyers to supervise viewing) Additional laptops and DVD playback capability Costs will be absorbed within Ministry of Justice baselines	Monetisable but not currently quantified
Courts and Police	Additional costs of storing video evidence for longer, if mandatory destruction dates are removed (cost cannot be determined before operational practice is determined, but will not be felt until 10 years after implementation)	Monetisable but currently unquantifiable
Witnesses	Perception of increased risk of privacy breach, based on provision for wider access to video evidence	Low (non-monetised)
Total monetised costs		Unquantified
Non-monetised costs		Low
Expected benefits of the preferred approach compared to taking no action		
Courts, Police, Lawyers, CCRC	Improved efficiency, due to clarity of regulatory regime	Low-medium (monetisable but unquantified)
Parties to cases, complainants	Evidence that is retained for longer may support just outcomes in appeals, retrials or subsequent cases occurring more than 10 years after evidence was obtained	Low-medium (non-monetised)
Total monetised benefits		Low-medium
Non-monetised benefits		Low-medium

Section 4: Stakeholder views

What do stakeholders think about the problem and proposed solution?

The Ministry has tested the revised approach to the Regulations with the judiciary, the Law Commission, the Chief Victims Advisor, representatives of the legal profession and a handful of key bodies representing the Victims Advocacy Sector. The Ministry undertook a second

round of targeted engagement to test its proposed approach to concerns expressed during the first round of engagement.

The judiciary were supportive of the change in approach to the update of the Regulations to exclude court-recorded evidence and video evidence held by the court.

Stakeholder feedback on specific issues is summarised above in the discussion of those issues. Stakeholders were generally supportive. Most stakeholders provided feedback on technical drafting of the Regulations, which we have considered as part of the drafting process. In response to stakeholder feedback, we have revised the Family Court access provisions.

The Chief Victims' Advisor does not support introducing judicial discretion to allow video records to be accessed outside the Family Court. Victim advocates did not provide specific feedback on this change, although they expressed general concerns about the risks to complainants if video record evidence is leaked or circulated inappropriately.

Some stakeholders commented on how long video records should be retained before they may be destroyed. They suggested a period longer than 10 years should be mandated for certain types of video record evidence – for example, in sexual violence cases (issue 2 in the Impact Summary). There was insufficient time to consider alternative time periods or the range of cases in which a longer retention period may be justified. We note that the Regulations do not prevent Police from retaining such evidence for a longer period.

Section 5: Implementation and operation

How will the new arrangements be given effect?

The Minister of Justice will seek Cabinet approval in June 2023 to the revised approach to the Regulations. The proposed changes would be progressed via Order in Council and Gazettal. The updated Regulations would come into force on 6 July 2023.

Appropriate technology and qualified staff will be required to enable the Family Court to consider and enable supervised viewing of adults' video evidence in Family Court proceedings. The Ministry is identifying these requirements and will have them in place when this aspect of the Regulations enters into force on 6 January 2024.

The Ministry will prepare guidance which sets out the expectations on family lawyers when viewing and managing Police video evidence, whether in or outside the Family Court. The Ministry will engage with victims' groups when preparing this guidance.

We will work with the judiciary to determine if new court rules for these videos should be developed. The development of such rules is subject to agreement by the judiciary, formal judicial concurrence and Cabinet agreement.

Section 6: Monitoring, evaluation and review

The Ministry of Justice intends to commence a review of how the Regulations are operating two years after the Regulations entering into force in their entirety. This will include considering how the provisions relating to the Family Court are operating. The Ministry's intention to review is noted in the explanatory note to the Regulations.