Regulatory Impact Statement

Child witnesses in the criminal courts: proposed reforms

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice. It analyses proposals that aim to improve the accuracy and completeness of children's evidence in criminal cases by reducing the time delay before children give evidence at court and addressing inappropriate questioning. A child is defined in the Evidence Act 2006 as a person under 18 years old. This paper will use the term 'child witnesses' to cover both victims/complainants and witnesses, unless there is a need to differentiate.

The proposed reforms have been informed by a targeted consultation process with key stakeholders and government agencies and international literature on the experiences of child witnesses in criminal justice systems. A working group of officials from the Ministry of Justice, Crown Law Office, Ministry of Social Development and the New Zealand Police was established to provide input into the development of proposed reforms.

The Ministry of Justice estimates that there are approximately 750 child witnesses who give evidence in criminal court cases each year. To date, the practice of documenting when a child is involved in a court case has been inconsistent, meaning the available statistics are not highly reliable. Estimates on the number of child witnesses have come from the records made of child witnesses in the Court's Case Management System.

The proposed reforms are constrained by:

- the costs of implementation;
- the need to be consistent with the New Zealand Bill of Rights Act 1990;
- the need to be consistent with current criminal justice processes; and
- the scope of the reforms – the proposals address child witnesses in the criminal justice system only.

Esther King
Acting General Manager, Social Policy and Justice
Ministry of Justice

Date: 23 June 2011

Status quo and problem definition

The criminal justice system currently acknowledges that child witnesses are particularly vulnerable and applies a number of special provisions.

Under the Evidence Act 2006, prosecutors can apply to the court to allow child witnesses to give evidence and undergo cross- and re-examination in alternative ways. The alternative ways are limited to: giving evidence from outside the courtroom (i.e. by closed circuit television [CCTV]); giving evidence in court behind a screen; or by a video record made before the hearing of the proceeding.

Most child witnesses in New Zealand are interviewed by a specialist-trained interviewer from Child, Youth and Family (CYF) or the New Zealand Police. These interviews are recorded and usually played at trial as the child's evidence-in-chief. This means most children do not need to give evidence-in-chief at trial, but will need to be cross- and re-examined at the trial.

Since the end of 2010, the Auckland Crown Solicitor has been making applications for children's evidence-in-chief and cross-examination to be pre-recorded and played back at the later trial, in reliance of s 105 of the Act. However, the jurisdictional basis for pre-recording is currently the subject of two appeals before the Court of Appeal.

Depending on the Court of Appeal decision, it is possible that holding pre-trial hearings to pre-record children's cross- and re-examination will soon be standard practice in Auckland. It is also possible that the practice will progressively extend around the country, although this will be dependent on the preferences of prosecutors and judges in each area.

Despite these and other special provisions, it is widely acknowledged that giving evidence can be traumatising for children. There is a significant body of research nationally and internationally which discusses the experiences and challenges faced by children when testifying in criminal courts. In April 2010, researchers from the Auckland University of Technology published a report on child witnesses in New Zealand's criminal justice system (the AUT Report).[1] This research and consultation undertaken by the Ministry of Justice has indicated that the two key concerns for child witnesses in the New Zealand criminal courts are the impact of: long delays before giving evidence at trial (an average of 15 months);[2] and inappropriate questioning of children (particularly during cross-examination). Long delays and inappropriate questioning both risk re-traumatising child witnesses and reduce the ability to elicit the most accurate, reliable and complete evidence from them.

Long delays extend the length of time that the child must be involved with the criminal justice system and can prevent the child from being able to "move on" from the crime. Long delays can also affect children's memory, and therefore the accuracy and quality of their evidence, as children are being asked to recount facts a significant time after the event. It is recognised that young children's memories are subject to greater deterioration than adults' memories, and children are more susceptible to suggestibility.[3]

---

[1] Hanna et al., (2010) *Child witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy*, Institute of Public Policy, Auckland University of Technology.

[2] Based on the sample of children from the AUT Report.

[3] Malloy, L., & Quas, J. (2009). Children's Suggestibility: Areas of Consensus and Controversy. In K. Kuehnle & M. Connell (Eds.), *The Evaluation of Child Sexual Abuse Allegations: A Comprehensive Guide to Assessment and Testimony*. Hoboken, N.J: Wiley & Sons, Inc.

The stressful nature of New Zealand's adversarial process may actually undermine the quality of evidence given by children and potentially other vulnerable witnesses. There is a considerable body of literature that shows that the strategies used in cross-examination do not obtain the most accurate and reliable evidence from children and that greater evidential safety can be achieved by specialist questioning.[4] It is also well documented that children often acquiesce to misleading questions, and rarely request clarification on questions they do not understand.[5]

The AUT Report found that there is a high level of inappropriate and unsafe questioning of child witnesses in New Zealand, particularly during cross-examination, and no evidence that lawyers adjusted their language to accommodate younger children's linguistic and cognitive competence. In addition, the AUT researchers found that nearly all of the children they sampled had not understood some questions posed by the defence lawyer.[6] If a child is confused by questioning, this is likely to affect how successfully accurate and reliable evidence can be obtained from them. The AUT Report also found that judges are not intervening as often as they could.

Appendix 1 provides further detail on the status quo for child witnesses in the criminal justice system and issues that arise in relation to each area of reform.

Objectives

The aim of the proposed reforms is to improve the quality and accuracy of children's evidence, by addressing the:

- re-traumatisation of child victims and witnesses in the criminal justice system;
- impact of long delays; and
- inappropriate questioning of children.

The proposed reforms represent the most critical legislative and operational changes, given current fiscal constraints.

The proposed reforms will improve children's experiences in the criminal justice system and allow them to exit the system faster to focus on recovering from their experiences. The reforms also preserve important defendants' rights, including the right to choose counsel, to be present, to present a defence and to examine the witness.

One of the proposed reforms – a presumption in favour of pre-recording children's evidence – may lead to an earlier resolution of cases, through either early guilty pleas or withdrawn or reduced charges, based on all parties having the opportunity to assess the credibility of important evidence early in the process. This is supported by anecdotal evidence from Western Australia, where pre-recording is common practice for child witnesses.

Pre-recording may therefore align with the Government's broader objectives relating to criminal procedure, namely:

---

[4] Hanna et al., (2010); Hoyano, L., & Keenan, C. (2007); Dr Rachel Zajac (2009).

[5] Zajac et al, *Asked and Answered: Questioning Children in the Courtroom*, University of Otago, NZ, 2003; Hanna et al., (2010).

[6] Hanna et al., (2010), p 52.

- timely justice – resolving cases as soon as possible; and
- efficiency – increasing overall cost-effectiveness by focussing more resources on a pre-trial process that may prevent a trial.

Regulatory impact analysis

Please refer to the Appendix.

Consultation

The Ministry of Justice sought feedback on reform options through targeted consultation on an issues paper: *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system*. The Ministry received 31 written submissions, from groups and individuals, on the Issues paper. Most submitters agreed that the quality of children's evidence could be improved by adopting some or all of the suggested reforms. Further detail on submitters' responses to individual proposals is incorporated within the analysis of reform options.

During the course of the consultation process, the Ministry of Justice met with: the Chief District Court Judge; representatives of Te Ohaakii A Hine – National Network Ending Sexual Violence Together (TOAH-NNEST); Youth Law; members of the Public Defence Service; academics from Auckland University and the Auckland University of Technology; Jigsaw (umbrella organisation for child protection agencies in New Zealand); the New Zealand Law Society's Criminal Law Committee and Continuing Legal Education group; representatives of the Maori and Pacific Island community; psychology and counselling organisations; the NGO alliance; the Audio-Visual Link Judicial Committee of the District Court; and other legal professionals.

The proposal relating to a new judicial direction in relation to child witnesses' evidence was not included in the Issues Paper, but was raised by some submitters as a further issue the Ministry of Justice should consider. A brief consultation on this proposal was subsequently undertaken with: the Crown Law Office; Ministry of Social Development (including Child, Youth and Family) and NZ Police; the heads of benches; New Zealand Psychological Society; and Auckland University of Technology academics.

A working group of officials from the Ministry of Justice, the Crown Law Office, Ministry of Social Development and the NZ Police was established to provide input into the development of proposed reforms.

During the development of the Cabinet paper and this regulatory impact statement the following agencies were consulted: Ministry of Social Development (including Child, Youth and Family); New Zealand Police; the Crown Law Office; Legal Services Agency; the New Zealand Law Commission; Office of the Children's Commissioner; Te Puni Kokiri; Ministry of Pacific Island Affairs; Ministry of Women's Affairs; Human Rights Commission; Families Commission; Office for Disability Issues; Office of Ethnic Affairs; and the Treasury. The Department of the Prime Minister and Cabinet was informed.

Conclusions and recommendations

Please refer to the Appendix.

Implementation

Please refer to the Appendix for further explanation of the proposals described below.

Legislation to enact these reforms could be passed by January 2013 at the earliest. The period of time during which legislative change is progressed in the House will enable service design work and procurement to be undertaken. Some of the reforms will be phased in, reducing initial costs and allowing courts to effectively implement them.

Pre-recording

Depending on the Court of Appeal decision on whether there is a jurisdictional basis for pre-recording, discussed earlier, it is possible that holding pre-trial hearings to pre-record children's cross- and re-examination will soon be standard practice in Auckland. It is also possible that the practice will progressively extend around the country, although this will be dependent on the preferences of prosecutors and judges in each area. The Ministry of Justice has already prepared an operational circular on pre-trial hearings for pre-recording to ensure consistent practice nationwide.

If a presumption in favour of pre-recording is supported, the Evidence Act 2006 will be amended accordingly. A requirement to hold pre-recording hearings within a specified timeframe will be included in the Evidence Regulations 2007.

Clarifications and improvements to current provisions will also be made to support an increased use of pre-recording.

Any increase in pre-recording would have financial implications for the Crown Law Office which could not currently be absorbed within baseline. Given current fiscal pressures, it is recommended that the proposals relating to pre-recording evidence are not introduced until the Attorney-General, in consultation with the Minister of Justice and Minister of Police, has reported back to the Cabinet Domestic Policy Committee with recommendations for reform arising from the Prosecution Review (expected by 28 February 2012). The purpose of the *Prosecution Review* is to consider how the public prosecution system can best be structured so that it delivers effective legal services in a way that is cost-effective and sustainable.

The proposal to have a legislative presumption that children under 12 give their evidence via their evidential interview video record (for evidence-in-chief) and CCTV, at trial, can be progressed prior to the Prosecution Review, as this presumption will not result in any increased costs. This will ensure child witnesses under 12 are consistently benefiting from the protection of these alternative modes of giving evidence. This protection will be extended once funding is available to implement the legislative changes related to pre-recording.

Intermediaries

The Evidence Act 2006 will be amended to allow for the use of an intermediary (to assist with communication in court for child complainants in courts where an intermediary service is operating. The details of how the intermediary service will operate in practice will not be specified in legislation, but will instead be developed by the Ministry of Justice in consultation with a working group of legal and judicial professionals and other key stakeholders as part of the implementation process.

The provision of intermediary schemes will be phased in throughout the country. A phased approach will provide an opportunity to review the intermediary role in practice and identify areas for improvement, prior to nationwide rollout.

Other amendments

The automatic right to a support person for all child witnesses and the judicial direction regarding the demeanour of child witnesses will come into effect on the amendment of the Evidence Act 2006.

Monitoring, evaluation and review

A pre-recording checkbox has already been added to the Court's Case Management System to ensure that accurate data regarding the numbers of pre-trial hearings to pre-record children's evidence is collected.

The reforms to the Evidence Act 2006 will be monitored by operational staff of the courts, the judiciary and legal professionals. As new provisions and practices develop, processes may need to be adjusted.

An evaluation of the intermediary system will be conducted following the first year of operation. This formative evaluation will inform the future development of the service.

The Evidence Act 2006 is subject to periodical reviews under s 202, with the first review scheduled to be concluded in 2012. Thereafter, the Evidence Act 2006 will be reviewed every five years. The proposed reforms will not be passed in time to be within the scope of the first review in 2012, but will be included in the second review in 2017 (approximately), at which point they are likely have been in operation for at least four years.

APPENDIX 1: Analysis of options

Time delays in giving evidence

Status Quo

Cases with child witnesses are currently treated as sensitive cases and are accordingly prioritised by the courts, yet large delays are still common. Children in the AUT report research sample waited an average of 15 months before giving evidence at trial.

Pre-recording a child's entire evidence (i.e. evidence-in-chief, cross-examination and re-examination) allows evidence to be recorded early and played at trial without requiring the presence of the child. Pre-recording of children's entire evidence has started to occur in Auckland, in reliance on s 105 of the Evidence Act 2006 (the Act). However, the jurisdictional basis for pre-recording is currently the subject of an appeal. The Court of Appeal is yet to release its decision.

Issues:

- Children are at a higher risk of memory deterioration than adults, and may forget details of their evidence before trial.
- Time delays can also increase the risk of evidence contamination, e.g. if a third party questions the child about their evidence before the trial.
- Ongoing delays can have an adverse psychological impact on children, prolonging any stress or anxiety relating to testifying, and delaying recovery time.

Objectives:

- Ensure a child's evidence is as fresh as possible by recording it early.
- Elicit the most accurate, reliable and complete evidence from child witnesses.
- Enable the child to conclude their involvement in the criminal justice system at the earliest opportunity.

Discussion of options	Conclusions and Recommendations
Prioritise trials involving children through legislation Prioritising trials involving child witnesses, possibly through legislation, was suggested as an option for addressing time delays. Submitters agreed that it would be beneficial for cases involving child witnesses to be progressed more quickly. However, lawyers and members of the judiciary questioned whether these cases could be prioritised more than they currently are. Although pre-recording adds an additional heading into the court process, the Ministry of Justice considered it more effective to prioritise taking the child's evidence earlier, rather than moving whole trials forward by a significant amount. One justification to rebut a presumption in favour of pre-recording could be that the trial itself can be held at a sufficiently early time, that the benefit of addressing time delays would not be gained by holding a pre-trial pre-recording hearing.	Bringing every trial involving a child witness forward is unlikely to be a workable solution. Any number of factors could create delays. This system would be difficult to enforce. **Recommended option** No recommendation. However, if a trial can be held sufficiently early, this is likely to justify rebutting the presumption in favour of pre-recording.
Clarify existing legislative provisions relating to pre-recording The jurisdictional basis for pre-recording is currently the subject of an appeal. Regardless of the Court of Appeal's decision (yet to be released), there is scope to clarify and improve the law Sections 103-107 of the Act could be amended to clarify that all witnesses (subject to the grounds outlined in s 103(3) of the Act) can give evidence, including cross- and re-examination, at a pre-trial hearing where the visual and audio evidence is recorded and replayed at trial.	**Recommended option** Clarify ss 103-107 of the Evidence Act to ensure there is no uncertainty about pre-recording. Make other minor amendments to the Evidence Act and Evidence Regulations 2007 to support

Discussion of options	Conclusions and Recommendations
• Further amendments could also be made to the Act to amend the Evidence Regulations 2007 to outline any necessary requirements around the pre-recording of witnesses' evidence at a pre-trial hearing; • provide the ability to recall a witness for further questioning following a pre-recording hearing (subject to a very high threshold); and • allow video records to be used at re-trials instead of recalling the witness .	provisions relating to pre-recording. Given the fiscal implications on an increased use of pre-recording, the Ministry of Justice recommends these amendments are not introduced until the Attorney-General, in consultation with the Minister of Justice and Minister of Police, has reported back to the Cabinet Domestic Policy Committee with recommendations for reform arising from the Prosecution Review (expected by 28 February 2012).
Increasing the use of pre-recording a child witness' entire evidence Introducing a presumption in favour of pre-recording children's entire evidence at a pre-trial hearing will ensure more children benefit from the process. This contributes to evidence quality by reducing the length of time that children have to wait before giving evidence, ensuring evidence is fresh and the child is able to remember more. Where evidence is pre-recorded, the child will not need to return to give evidence in the event of a mistrial or retrial. If the child discloses information that is inadmissible, it can be edited from the video record (instead of during a trial, where it could lead to a mistrial). The pre-recorded video is played in court during the trial. Evidence from Western Australia, where pre-recording is allowed for certain children, shows that children who pre-record are more likely to say they would report an offence again and less likely to say they would refuse to give evidence again.[7] Anecdotal evidence suggests that pre-recording also leads to earlier resolution of cases, through an increase in withdrawn or reduced charges and early guilty pleas prior to trial. *Maintain status quo* Since the end of 2010, the Auckland Crown Solicitor has been making applications for children's evidence-in-chief and cross-examination to be pre-recorded and played back at the later trial, in reliance on section 105 of the Act. Depending on the Court of Appeal decision on the jurisdiction for pre-recording (discussed earlier), it is possible that holding pre-trial hearings to pre-record children's cross- and re-examination will soon be standard practice in Auckland. It is also possible that the practice will progressively extend around the country, although this will be dependent on the preferences of prosecutors and judges in each area.	Pre-recording hearings can be scheduled earlier more easily than a full trial. They also offer additional benefits beyond the reduced time for children in giving evidence. **Recommended option** To minimise fiscal impact, the Ministry of Justice proposes a targeted presumption in favour of pre-recording applying to all child witnesses under the age of 12. As with the proposal to clarify existing provisions relating to pre-recording, the Ministry of Justice recommends this proposal is not introduced until the Attorney-General, in consultation with the Minister of Justice and Minister of Police, has reported back to the Cabinet Domestic Policy Committee with recommendations for

[7] AUT report, p 150.

Discussion of options	Conclusions and Recommendations
Introduce a presumption in favour of pre-recording Amending the Evidence Act 2006 to create a presumption in favour of pre-recording a child's entire evidence received unanimous support from submitters. Pre-recording evidence has cost implications due to the additional pre-trial hearing and the costs of recording equipment. To minimise fiscal impact, we recommend that a presumption in favour of pre-recording apply to all children under 12 years. Applications for older children to have their evidence pre-recorded can still be made. Under this proposal, the Ministry of Justice will face an estimated cost of up to $0.650m per year. The Ministry can absorb these costs within Vote: Courts. New Zealand Police will face minimal costs, which they can absorb within current funding or by re-prioritising existing funding. The Legal Aid Scheme will also face increased costs, which are expected to be minimal. The anticipated extra cost on the legal aid budget can be absorbed within Vote: Justice. Crown Law estimates that it would incur costs in the range of $0.650m and $0.840 per year as a result of the pre-recording proposals. Crown Law has no funding for any increase in the use of pre-recording witnesses' evidence and is currently unable to absorb these costs within baseline. Until funding is found, the pre-recording proposals (including clarifying existing provisions) cannot be implemented. *Introduce mandatory pre-recording for all child witnesses* Mandatory pre-recording would ensure that all children, regardless of age, would benefit from pre-recording. This approach though would restrict children who want to testify in court and may not be necessary in every case. It would also be the most costly. *Presumption in favour of alternative modes of evidence* Most children under 12 already give evidence by an evidential interview video record and CCTV. Introducing a presumption in favour of these modes of evidence for children, regardless of whether a child gives evidence at a pre-recording hearing or at trial, would increase efficiency by removing the need for prosecution to apply to the court. This would also reduce costs for Crown Law and the Ministry of Justice and ensure that national practice is consistent.	reform arising from the Prosecution Review (expected by 28 February 2012). The Ministry of Justice recommends that a presumption in favour of children under 12 giving evidence by way of an evidential interview video record and CCTV be introduced, regardless of whether a child gives evidence at a pre-recording hearing or at trial.
Timeframe for pre-recording Pre-recording children's evidence could take place at any time prior to trial. However, given the objective is to reduce the time delay before a child gives evidence, a timeframe could be specified in regulations within which a pre-recording hearing should take place. Introducing pre-recording will mean that the defence will need to be prepared to cross-examine the child witness much earlier than usual. Submitters suggested a range of timeframes for pre-recording, but most noted it was important to strike a balance between taking evidence as soon as possible and allowing the defence sufficient time to prepare. The Ministry of Justice considered a range of timeframes between two to six months, following completion of disclosure. The timeframe will need to allow for disclosure to have been completed, sufficient time for counsel to prepare for cross-examination, and the provision will allow for the Judge to extend the timeframe if the situation necessitates it.	**Recommendation** The Ministry of Justice will undertake further work to determine a timeframe for pre-recording hearings, in tandem with the development of the new Criminal Procedure Rules arising from the Criminal Procedure (Reform and Modernisation) Bill. A specified timeframe will be recommended when draft amendments to the Evidence Regulations 2007 are submitted to Cabinet following passage of the Evidence Amendment Bill.

Improving questioning of children

Status quo

Child witnesses will usually undergo an evidential interview by a specialist interviewer for Police or Child, Youth and Family to discuss their story in detail. The interview is filmed, and the video will often become their evidence-in-chief, and be played at trial. Children are then cross- and re-examined at trial.

Analysis of questioning methods shows that lawyers are often questioning children in a manner that may not always elicit accurate, complete or reliable evidence. Examples of unsafe questioning are: leading questions; confusing questions or used overly-complicated vocabulary; or aggressive or confrontational language or tones. Judges are able to intervene in inappropriate questioning, but research suggests this is not happening as often as it could.

Issues

- Research shows children are frequently unable to understand questions by lawyers.
- Questioning techniques used during cross-examination may affect how successfully accurate and reliable evidence is obtained from children.
- Judges are not intervening as often as they could during inappropriate questioning.

Objectives

- Ensure that questioning of children is undertaken in a way that is forensically safe, i.e. promotes accuracy and reliability in evidence.
- Avoid re-traumatising children.
- Preserve the defence's right to vigorously examine evidence, but in a way that is not re-traumatising for children.

Discussion of options	**Conclusions and Recommendations**
Judicial examination In inquisitorial jurisdictions judges undertake all questioning of witnesses. One option is to allow judges to undertake all questioning of child witnesses. The majority of submissions did not support this proposal. Opposition to this proposal centred on two themes: scepticism that the judiciary would be capable of questioning children any better than lawyers; and concerns about the inquisitorial nature of the proposed change. Communicating with children is recognised as a highly specialised area requiring a specific skill set. It would be difficult to comprehensively train all judges in child communication and development. Many submitters were reluctant to extend the judge's role beyond its current parameters in the adversarial system. It was recognised that in inquisitorial jurisdictions judges are subject to different training and have a range of checks and balances that would be absent in New Zealand. It is risky to import one particular inquisitorial process into our adversarial system where the same framework to support it is not in place. The Law Commission is currently undertaking a project inquiring into whether the present adversarial trial process should be modified or replaced with an alternative model, with particular reference to cases involving sexual violence. This proposal may be more appropriately considered within the Law Commission's work.	A move towards inquisitorial processes, e.g. judicial examination, could present too much of an imposition on defendants' rights. Any reforms should be consistent with the adversarial nature of our criminal justice system. **Recommendation** No change at this time. Could be considered by Law Commission.
Intermediaries Intermediaries are independent professionals used in some jurisdictions to assist with questioning of children or other vulnerable witnesses. Submitters were asked to discuss the benefits of intermediaries and their preferred	The use of intermediaries could be beneficial for all child witnesses. At this stage intermediaries

Discussion of options	Conclusions and Recommendations
conception of the role. The majority supported intermediaries and many noted it was important intermediaries were neutral – both in practice and perception. A wide range of views were provided on appropriate candidates and their possible functions. We considered two general types of intermediary – an interpreter style, rephrasing questions as necessary, and a questioner style, undertaking all cross- and re-examination of the child using guidance from lawyers. *Questioner* A questioner style approach operates in Norway (an inquisitorial jurisdiction). Approximately one third of submitters supported this style of intermediary. Under this approach, an intermediary would receive guidance from lawyers on areas of evidence to test, then undertake all questioning of the child. Lawyers would have opportunities to consult with the intermediary to follow up on issues raised or areas of evidence not fully explored. It arguably offers the greatest benefits for children by ensuring all questioning is undertaken by a professional in children's communication. This approach also supports narrative styles of evidence and could allow the child to communicate their story in a style that suited them. As with judicial examination, there is a degree of reluctance to adopt processes of an inquisitorial nature into the New Zealand criminal justice system. The questioner style of intermediary was perceived by many to be too much of an imposition on the defence, as it removes the ability to develop a line of questioning and test evidence in the manner they choose. Additionally, we expect this system could be prohibitively expensive. Intermediaries would require extensive training in rules of evidence and would likely need to spend more time with each child witness before the trial to understand their communication needs, and will require more preparation by all parties. *Interpreter* Under the interpreter style approach the intermediary will act as an interpreter between the lawyers and the child. They will receive questions and pass these on to the child, rephrasing as necessary. The child will only hear questions from the intermediary, which will mitigate the impact of confusing vocabulary and aggressive language. An interpreter style intermediary is less of an imposition on defence counsel. Defence lawyers will still be able to develop and lead a line of questioning. Intermediaries will reword questions only as necessary to ensure the child understands the meaning. Lawyers are also able to respond to new issues or new lines of questioning in real time, rather than needing to wait for time with the intermediary. This approach is likely to be less expensive than a questioner style approach, as less preparation will be required. *United Kingdom model* In the United Kingdom, the intermediary undertakes an assessment of the witness' communication needs and prepares a report for the court on how the witness should be communicated with. The intermediary attends the trial and can intervene where their recommendations are not followed to suggest alternative wording for questions. *Targeting* The Ministry considered whether particular groups of children would benefit from access to intermediaries. Targeting options based on age, offence	must be targeted due to fiscal constraints. The Ministry considers targeting all child complainants would Further work will be necessary to determine which mix of intermediary functions best suits the New Zealand criminal justice system. **Recommendation** Introduce intermediaries to assist with questioning at court proceedings of child complainants (under 18 years), on the election of the prosecutor (with the judge's consent) or direction of the judge. The Ministry of Justice will create a working group of legal and judicial professionals and other stakeholders to contribute to the development of the intermediary service, including the exact nature of the model.

Discussion of options	Conclusions and Recommendations
type and role in the trial were considered. Psychologists advised during consultation on the Issues Paper that it would be difficult to draw a clear line in terms of a child's age and ensure that all vulnerable children would be covered. As a general rule, younger children would most likely benefit most from communication assistance. However, older children with particular vulnerabilities could also benefit. Targeting complainants only would mean that some vulnerable witnesses would be excluded from the service. Complainants as a group may be more vulnerable, as the offending has affected them personally.	
Training for legal professionals Training for the judiciary and legal professionals on appropriate techniques for questioning children could improve the standard of questioning and therefore the quality of evidence. Many submitters supported training yet doubted it would result in significant improvements in how children were questioned. Some practitioners and members of the judiciary also expressed doubt that training would have any impact on their own ability to undertake or monitor questioning of children, noting it is a highly specialised area and it would be difficult to provide meaningful, skills based training. The Ministry of Justice recognises that awareness of issues relating to child witnesses is increasing and is likely to become widespread as the practice of pre-recording in Auckland develops and these reforms are progressed. It was agreed the Ministry of Justice will work with both the judiciary and the New Zealand Law Society's Continuing Legal Education organisation (NZLS) to improve the availability of guidance, education and training for judicial and legal professionals on how best to question and cross-examine child witnesses. In particular, the Ministry of Justice will work alongside the judiciary and the NZLS as any changes to legislation and practices relating to child witnesses are implemented.	Training for lawyers and judges is unlikely to significantly improve the questioning of children in court. **Recommendation** Ministry of Justice officials will work alongside the NZLS and the judiciary to improve the availability of guidance, education and training on the questioning of child witnesses.
Specialisation of courts, judges or legal professionals The Ministry of Justice considered the following options for specialisation: a specialist jurisdiction; specialist judges; and specialist lawyers, both prosecution and defence. Only half of submitters commented on this proposal. There was limited support for a specialist jurisdiction for child witnesses. Establishing a specialist jurisdiction would involve significant costs and submitters noted other specialist courts experienced great delays in cases reaching trial and did not address the needs of witnesses as well as intended. Some reservations about the efficacy of other specialist courts were raised. There was a greater degree of support for specialist defence lawyers and judges. Some submitters supported the introduction of a training and accreditation system for defence lawyers which would be necessary before they could act in cases involving child witnesses. A system like this though would restrict the defendant's right to choose counsel. Training only some practitioners may not sufficiently address the underlying problem. A concern with all areas of specialist practitioners was availability. If there was limited uptake of specialist accreditation training it could create further delays due to unavailability of practitioners. We expect that as awareness of child witness issues grows, specialist judges and prosecutors may evolve informally, as already happens in some main centres.	It is more efficient and likely to be more beneficial to introduce further specialist procedures in the criminal justice system for child witnesses, rather than specialist lawyers and judges. Accordingly, we have focused on intermediaries to address inappropriate questioning. No recommendation.

Other enhancements

Status quo

Currently, s 79 of the Evidence Act 2006 allows complainants (of any age) to have, as of right, a support person near them while giving evidence. However, witnesses who are not complainants are only entitled to a support person with leave of the Judge.

Some jurors may believe that if children are not visibly distressed when giving evidence, then they have not been victimised as alleged.[8] This issue applies to all witnesses but may be especially true in the case of children, as jurors may expect that they will be less able to control their emotions. Research clearly indicates that the truth or accuracy of a witness' evidence is not related to their demeanour.[9] If jury decisions are influenced by witness demeanour then there is a risk that they will be less likely to make the best judgement from the evidence presented.

Issue

- Some areas of the criminal justice system treat child victims and child witnesses differently.
- Providing additional support to child witnesses in practical ways could improve their experience in giving evidence.
- If jury decisions are influenced by witness demeanour then there is a risk that they will be less likely to make the best judgement from the evidence presented.

Objective

- Increase consistency between treatment of child witnesses.
- Provide additional support to child witnesses.

Discussion of options	Conclusions and Recommendations
Judicial direction relating to child witnesses Research suggests that some members of the public believe common misconceptions and myths about the ability of child witnesses to recall events and give reliable evidence. An image of stereotypical behaviour and demeanour by children held by jurors can be misleading and capable of leading to injustice, particularly in cases of alleged sexual offences. Myths such as a belief that victims will appear traumatised when describing the abuse suffered, that a genuine victim will provide a consistent account of what happened, or that a genuine victim of sexual abuse would completely cut off any connections to an abusive caregiver, can be perpetuated during jury trials, affecting the jurors' perception of the witness and the case. Submitters suggested an additional option to provide for a mandatory judicial direction relating to the range of misconceptions of child witnesses, particularly regarding child sexual abuse. Such directions would ensure jurors were better informed before deliberating on evidence. The Ministry considered the following broad judicial directions: • The demeanour of witnesses when giving evidence – noting that alternative modes of giving evidence are designed to reduce witness stress, and children may therefore not appear to be traumatised while testifying; • Witness behaviour after the offence (sexual abuse cases only) – children may behave in a way that seems illogical to observers	If legislation is amended to increase the use of alternative modes of evidence, in particular pre-recording, it is timely to introduce a direction that juries should not draw any inference from the demeanour of child witnesses when giving evidence by an alternative mode. The Ministry considers that the need to counter any undesired consequences of an increased use of alternative modes of evidence outweigh concerns regarding the possibility of influencing the jury, and that

[8] Blackwell, Suzanne (2007), 'Child sexual abuse on trial', Doctoral thesis, University of Auckland.

[9] Vrij, A., Akehurst, L., Brown, L., & Mann, S. (2006). Detecting lies in young children, adolescents and adults. *Applied Cognitive Psychology, 20* 1225-1237.

Discussion of options	Conclusions and Recommendations
following sexual abuse, but it does not follow that the abuse did not occur. • Child development, memory and recall – information for jurors on the ability of children to recall things that have happened to them and describe them. There was some concern during consultation that judicial directions on child behaviour and development could be confusing for a jury or potentially suggestive. It would also be difficult to reach an academic consensus on the content, as research on child development has produced a range of opinions. Currently, it is mandatory under the Evidence Act s 123 for the judge to warn the jury not to draw an adverse inference against the defendant if a witness testifies via an alternative mode. However, this section does not include a warning to jurors that they should avoid drawing any inference from the demeanour of the child witness. Introducing a judicial direction that juries should not draw any inference from the demeanour of child witnesses when giving evidence by an alternative mode would reinforce that demeanour is not an accurate indicator of whether the witness is telling the truth and encourage juries to focus on the quality of the evidence when deciding. The Ministry considered whether a direction should be mandatory or discretionary. A mandatory direction would help normalise the direction and reduce the risk of perceived bias against the defendant. Some research shows that judges do not regularly use discretionary directions, even when they are relevant.	judges have the ability to word judicial directions in ways that will reduce any confusion of jurors. The direction should be mandatory to normalise the content and reduce the risk of perceived bias against the defendant. **Recommendation** Introduce a mandatory judicial direction that juries should not draw any inference from the demeanour of child witnesses when giving evidence by an alternative mode.
Automatic right to a support person Giving evidence can be stressful for children, regardless of whether they are the complainant or not. Currently, s 79 of the Evidence Act 2006 allows complainants (of any age) to have, as of right, a support person near them while giving evidence. Extending the automatic right to a support person to all children is a no-cost proposal that could help children to feel safer when giving evidence.	**Recommendation** Extend the automatic right to a support person under s 79 to all child witnesses.
Supportive environment for giving evidence Children can find the courtroom an intimidating and frightening place. This can be exacerbated by long times in waiting areas and the possibility of seeing the defendant and their supporters. One option to address this is allowing the child to give evidence in a designated child-friendly room in court, or outside the courtroom. Consideration was given to allowing children to give evidence from a familiar location, for example their home or school. There was concern though that allowing children to give evidence in a familiar location could lead to them associating the environment with the harm they have experienced. It is also important, while addressing intimidating environments, that the formality and importance of giving evidence is maintained.	It is likely to be too resource intensive for courts to develop new, child-friendly spaces. Some larger centres in New Zealand are developing multi-agency centres with age-appropriate facilities which could be used in future. This may develop in practice. No recommendation.
Narrative style evidence An option to help improve child witnesses' experience in court was to allow narrative style testimony. Generally this would only apply to children who had not been forensically interviewing before trial. Testifying in a narrative style allows the child to retain control over the delivery of their story, which can be empowering for children. Narrative style testimony does carry risks though, for example it is more likely that, without guided questioning, children may disclose information that is inadmissible or leads to a mistrial. Overall, this proposal would only be relevant to a small number of children	Allowing greater use of narrative style testimony is risky, as it appears to increase the risk of inadmissible evidence being disclosed, where the witness is not guided by a lawyer's

Discussion of options	Conclusions and Recommendations
and there was limited interest from submitters. When children do give their evidence-in-chief live at trial, many prosecutors formulate questions based on the child's witness statement. This allows the child to step through their story with minimal guidance or structured questioning.	questions. No recommendation.
Remove the defendant from the courtroom Although screens can be used in courts to prevent the witness seeing the defendant, anecdotal evidence suggests that the awareness of the defendant's presence or sounds (e.g. coughing) can be just as traumatic even without eye contact. This can be exacerbated by the witness experiencing anxiety relating to lack of knowledge about what the defendant is doing. Removing the defendant from the courtroom would prevent a child victim from having to see or hear him/her when giving evidence. This could reduce trauma associated with testifying. Although defendants could still watch trial proceedings via CCTV, removal may be too great an imposition on defendants' rights. Removing the defendant would not address other concerns about the courtroom setting that apply to child witnesses, e.g. the formality of the setting. Most submitters believed it would be more beneficial to remove the child from the courtroom rather than the defendant.	Removing the defendant from court is a controversial proposal and received very little support from submitters. On balance, we agree it is more appropriate to advance proposals that remove the child from the courtroom and its formalities, rather than the defendant. No recommendation.