

Child witnesses in the NZ criminal courts: Issues, responses, opportunities

Defence: Was there a week when another relative came to look after you at the address?
Child: Pardon?
Defence: Was there— Can you hear me?
Child: Yeah I can but you're not talking – I don't, I just don't get you sometimes.
(NZ trial, 2008, 14-year-old witness)

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Report

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Prosecutor: Can you confirm for us how old you are?

Child: Thirteen.

Prosecutor: And you know about the matter before the Court?

Child: Um. Yes. (NZ trial, 2008)

Introduction

“Coping with the demands of the [legal] system is challenging for adults, but even more so for children who are still developing the necessary cognitive, communicative, and emotional abilities to cope with confusion and distress, at the same time as they are called upon to provide reliable information under formidable circumstances.” (Nathanson & Saywitz, 2015, p. 459)

This paper considers the problems facing child witnesses who testify in the NZ adult criminal courts, and responses and opportunities to address those problems. Children are defined as young people under 18, in accordance with the Evidence Act 2006 and the UN Convention on the Rights of the Child. The focus is on complainants and witnesses, although we make reference to young defendants in the adult courts where appropriate.

Most children who testify in the adult courts do so as complainants of sexual offence cases (Hanna, Davies, Henderson, Crothers, & Rotherham, 2010) for which there are rarely other witnesses or corroborating evidence. The child’s testimony is therefore often the most crucial prosecution evidence and becomes the subject of intense scrutiny during cross-examination.

In recognition of the stress of testifying in open court in the presence of the defendant and the barriers to prosecuting child sexual assault cases, NZ legislation introduced measures in the 1980s and early 1990s to improve the courts’ accommodation of child witnesses (NZ Law Commission, 1996). Under these reforms, judges could direct that child complainants in sexual assault cases testify using alternative modes of giving evidence: in the courtroom screened from the defendant; via CCTV from outside the courtroom; and using the child’s video-recorded police interview (EVI) as their evidence-in-chief (judges soon extended eligibility to other child witnesses). Judges were prohibited from issuing directions to the jury that children’s evidence be scrutinised with special care, from warning that children are prone to invention and distortion, and from warning about any lack of corroborating evidence if they would not have done so for an older complainant. The provisions also allowed for expert evidence to be called, for example, on the complainant’s intellectual competencies and maturity. Judicial powers to close the courts in sexual assault cases were expanded and complainants in such cases were permitted to testify with a support person on hand.

By the mid-1990s, the use of screens, CCTV and/or EVIs was commonplace (Pipe & Henaghan, 1996). However, other legislative provisions under the Evidence Amendment Act 1989 languished largely unused, including provision for pre-recording children’s entire evidence before trial (including cross-examination).

While the reforms improved children’s experiences with the courts, subsequent studies showed that significant issues remained. This report focuses initially on the key problems identified in studies from the 1990s onwards, principally delays and courtroom questioning. It then outlines innovations since 2010 that have attempted to address these and other issues. The final sections identify two key opportunities to reduce delays and improve questioning, and explain how they operate in other adversarial jurisdictions, before briefly discussing other proposed/possible modifications to pre-trial and trial processes.

This paper is limited to the current adversarial process and in particular the trial. As such, it does not consider options such as a shift to an inquisitorial process nor to an alternative dispute resolution process. Nor does it consider the possibility of providing separate legal representation for complainants or witnesses, nor its prerequisite (accordng complainants separate legal status within

the trial). These ideas are well outside the conventional conception of the adversarial criminal trial as a debate between the state and the accused person. Nor, due to its investigation/trial focus, does the paper consider options such as post-sentence treatment or rehabilitative courts (although the authors consider that there is good evidence to support such courts). Finally, due to space limitations, other aspects of children's involvement in criminal cases are not canvassed here, including the promotion of myths surrounding child sexual assault in defence cases and the calling of counterintuitive evidence, and changes to the competency test.

Problem definition

Involvement in the criminal justice system presents a broad range of stressors for children. However, delays and courtroom questioning emerge as the two most significant and longstanding issues.

Delays

"The 17-month delay in getting this matter through the court system I believe contributed significantly to the victim's confusion under cross-examination." (NZ Police officer, as cited in Hanna et al., 2010, p. 26)

In the mid-1990s, sexual assault cases involving complainants under 17 took on average 8 months to be processed through the NZ courts (Lash, 1995), despite judicial practice notes since 1992 ordering that such cases be expedited. These delays were considered unacceptably long by the Courts Consultative Committee's Working Party on Child Witnesses (1996). Yet by 2008-2009, average court processing delays had nearly doubled to 15 months (Hanna et al., 2010)¹ and children were waiting 19 months between their initial complaint to police and trial. No studies have been published since 2010 to show whether delays for child witness cases have improved—or worsened—in the interim;² anecdotal reports from practitioners suggest that the situation in many parts of NZ has not changed.

The impact of delays on both the trial and child witnesses can be substantial. With long delays, there can be:

- A reduction in the amount of information children can accurately recall and report; and
- An increase in errors in those reports (Pipe, Lamb, Orbach, & Esplin, 2004).

Younger children's memory deteriorates more quickly than older children's (LaRooy, Malloy, & Lamb, 2011) and memory for peripheral details may deteriorate more quickly than memory for more central, salient aspects of an event (Peterson & Whalen, 2001; Saywitz, Goodman, Nicholas, & Moan, 1991)—a particular issue in trials since lawyers often purport to test the strength of central memories by testing recall of peripheral details. Over time, children may also recall and report details that were not disclosed in earlier interviews, which can be treated with mistrust by those jurors who perceive such apparent inconsistencies as a sign of inaccuracy (LaRooy et al., 2011).

Involvement with the criminal justice system generally can be highly stressful for children and their families. Delays prolong the anxiety and are associated with poorer mental health subsequent to children's legal involvement (Quas & Goodman, 2012). In studies from NZ and other commonwealth countries, the vast majority of child witnesses said they were worried, anxious or very anxious in the

¹ This study examined child witness cases involving sexual assault and other charges heard in the Auckland, Manukau, Wellington and Christchurch courts.

² Sexual violence trials heard in the NZ District Courts in 2014-2015 took on average 443 days (roughly 14.5 months) from the date charges were laid until the conclusion of the trial (418 days in the High Court) (NZ Law Commission, 2015). The figures do not distinguish between child and adult complainant cases.

lead-up to trial (Davies, 1998; Hayes & Bunting, 2013; Plotnikoff & Woolfson, 2009). The anxiety manifested in a range of disturbing behaviours during the pre-trial period including eating problems, self-harm, bedwetting, sleep problems and nightmares, depression, introversion, aggression, and sickness (Hayes & Bunting, 2013; Plotnikoff & Woolfson, 2009). Some children's education is seriously disrupted (Cashmore & Trimboli, 2005; Plotnikoff & Woolfson, 2009; Seymour, 2016). In addition, the unpredictability of court dates can be unsettling for some young witnesses, yet trial adjournments are not uncommon in NZ: Over a third of child witness trials in a 2008-2009 sample were adjourned at some stage (Hanna et al., 2010).³

Table 1: The impact of delays on NZ child witnesses and carers (citing Randell et al., 2016)

"The negative impact of pre-trial delay was regarded by almost all participants [in Randell et al., 2016] as among the most significant of their court experience ... Many children and their families felt unable to move forward with their lives until completion of the trial ... For some, the delay period exacerbated significant mental health difficulties they were already experiencing as a result of the original abuse. Anxiety related to the constant presence of the trial in the minds of the children and parents, pressure on the children to maintain memory of details of the offending engagement, and the time associated with practicalities and logistics relating to attendance at the trial. Significant absences from school occurred as a result of court related obligations and mental health difficulties" (Seymour, 2016, p. 16).

While delays prior to trial are stressful, so too are delays on the day of trial. If children are called on the first day (which is standard practice for a complainant), the prosecutor typically requires the child to be in court before the trial starts. This means that the child must wait in the courthouse while the jury is empanelled and last-minute legal issues are dealt with. The Working Party on Child Witnesses (1996) recommended that children's testimony be scheduled to avoid such delays on the day of trial and to ensure children do not testify late in the day to reduce stress and increase their chances of producing quality evidence. However, in 2008-2009, NZ children spent on average 2¾ hours waiting in the courthouse to testify,⁴ nearly two-thirds began their testimony in the afternoon, and 42% had to come to court on more than one day. For some, this meant they came to court but did not end up testifying, waiting on average 4½ hours before being sent home to reappear on another day (Hanna et al., 2010).

One 6-year-old witness arrived at the courthouse at 10.30am but did not begin testifying until 2.40pm (Hanna et al., 2010).

"...a 12-year-old complainant arrived at court at 9.30am, was taken to the CCTV room at 12.18 where she waited until 1.00pm. The court adjourned for lunch and she returned to the CCTV room at 14.15pm where she waited until 14.29 to begin her evidence. She collapsed in the CCTV room at 4.45pm while giving evidence..." (Hanna et al., 2010, p. 53)

Courtroom questioning

The language of the courts is highly complex, technical, and often beyond the comprehension of adult witnesses, let alone children. The specific problems include:

- The expressions and sentence constructions used;
- The types of questions posed; and

³ The reasons for adjournments included illness, the unavailability of a juror, late applications, the child was distressed or refused to testify, a witness gave prejudicial evidence, lack of court space, unavailability of the defence lawyer, the trial was aborted because of defence conduct, CCTV equipment was not available, a change in defence counsel and plea.

⁴ This is the cumulative time over all days children came to court.

- Tactics of traditional cross-examination which are likely to reduce the accuracy of children’s evidence.

Expressions and sentence constructions

“[I was surprised] by the extreme difficulty the complainant had in understanding what I thought were the simplest questions.” (UK advocate as cited in Plotnikoff & Woolfson, 2007, p. 66)

Analyses of questions posed to children in NZ courtrooms demonstrate the frequent use of expressions and sentence constructions that likely exceed children’s comprehension, diminishing their ability to testify accurately (Davies & Seymour, 1998; Hanna, Davies, Crothers, & Henderson, 2012b; Zajac & Cannan, 2009; Zajac, Gross, & Hayne, 2003). The problematic language used in the courts, as exemplified in Table 1, can confuse typically developing children, let alone those with language impairments.

Table 2: Problematic expressions and sentence constructions with examples from NZ courtroom transcripts

Difficult words and expressions; non-literal expressions (e.g., idioms)	In what <u>circumstances</u> did that happen? (Prosecutor to a 9-year-old witness)
Legal terms and expressions	So what <u>I’m putting to you</u> is that you’ve discussed this <u>allegation</u> with your mother prior to making it. What do you say? (Defence to a 14-year-old witness)
Complex grammar (e.g., negatives, double negatives, passive voice, multiple subordinate clauses)	You were also asked some questions and it has been suggested to you that when you were raped you <u>didn’t</u> say <u>no</u> ? (Prosecutor to a 16-year-old witness) ⁵
Multipart questions (i.e., ones which ask more than one question)	And did Dad put on shorts and a t-shirt? (Defence to an 11-year-old witness)
Confusing structure	Well what I want to put to you is that when your mother wanted to come to NZ and that she was unhappy, this allegation was made in June [year]. What do you say? (Defence to a 14-year-old witness)

Experimental studies show that young children’s accuracy declines in the face of complex, “lawyerese” questions (Carter, Bottoms, & Levine, 1996). Adolescents’ and adults’ accuracy is similarly affected (Perry et al., 1995). Part of the problem is that young people cannot always accurately assess their own comprehension of such questions. As Perry et al. (1995) discovered, children, adolescents and adults “frequently were fooled into thinking that the lawyerese questions were easy to answer when, in fact, they were not.”⁶ As a result, they unwittingly answered questions they had not understood, with a concomitant impact on accuracy.

Children rarely request clarification even in the face of highly complex questions. This is evident from experimental studies (Carter et al., 1996; Peters & Nunez, 1999; Saywitz, Snyder, & Nathanson, 1999); transcripts of NZ child witnesses’ courtroom examinations (Hanna et al., 2010; Zajac & Cannan, 2009; Zajac et al., 2003); and child witnesses’ reports: 11 child witnesses in one NZ study said they had not understood some of the questions asked in court, but only 4 told anyone at court (Davies, 1998). In

⁵ This question contains multiple subordinate clauses, the passive voice, and a double negative.

⁶ Study participants indicated their level of comprehension, then answered the question, allowing the experimenters to assess participants’ comprehension monitoring by assessing the accuracy of the response.

the UK, only 45% of 111 children who experienced difficulty with the questions posed in court⁷ in fact told the court (Plotnikoff & Woolfson, 2009). It is highly likely that, just as in Perry et al. (1995)'s study, child witnesses are attempting to answer questions which they do not understand, thereby compromising the accuracy of their responses.

On the rare occasions when child witnesses *do* say they have not understood, the adults' responses are not always helpful (Hanna et al., 2012b; Zajac & Cannan, 2009):

Defence: You see, that argument about harbouring, especially if it was made the day before, it would seem before anything happened, doesn't really hold water, does it?

Child: Pardon?

Defence: That argument about keeping you because of a fear of being charged for harbouring, doesn't hold water if it was a concern raised a whole day earlier, does it?

Child: I don't know what you mean. [16-year-old witness, NZ, 2008]

In some cases, lawyers use complex language intentionally to confuse children (Henderson, 2002). In other cases, lawyers may simply not realise how difficult their questions are. The problem lies partly with the fact that acquisition of even basic constructions in one's first language (let alone vocabulary) can continue well into adolescence (Nippold, 2007; Perera, 1984) and can remain incomplete for far longer than lawyers realise (Henderson, 2002). As a result, there can be a surprisingly wide gulf between young people's language competencies and those of the highly literate lawyers who question them. For example, seemingly simple words like *ask* and *tell* can be tricky for school-aged children to interpret (Chomsky, 1969; Kramer, Koff, & Luria, 1972); even adults can struggle to comprehend clauses in the passive voice (Dąbrowska & Street, 2006; Street & Dąbrowska, 2010, 2014); clauses beginning with *although* can confuse 15 year olds, while double *and* single negatives can trip children up (Perera, 1984); understanding of idioms continues to develop throughout adolescence (Nippold & Taylor, 2002).

Some lawyers refuse to countenance the idea that their questioning may be developmentally inappropriate, arguing that experience communicating with their own children and grandchildren provides the requisite training (Henderson, 2015c). This argument overlooks not only the realities of first language acquisition, but also that the forensic "conversations" held in the anxiety-provoking atmosphere of a trial are vastly different from conversations held in informal settings between lawyers and the children with whom they are familiar. For instance, anxiety may impede comprehension, while the potential consequences of miscommunication and error at trial are considerable.

Compounding the problem further, maltreated children typically have poorer language skills compared to non-maltreated children.⁸ Rates of language impairment among young offender populations are disproportionately high (Anderson, Hawes, & Snow, 2016)⁹ and rates of speech and language disorders in the general child population may be higher than once thought.¹⁰ Some forms of

⁷ The problems included comprehension, pace and being talked over.

⁸ Lum, Powell, Timms, and Snow (2015)'s meta-analysis showed that, compared to non-maltreated children, maltreated children between 2 and 11 demonstrated poorer receptive vocabulary, expressive language and receptive language.

⁹ See also Johnston et al. (2016) who found that, in their sample of 20 young defendants aged 12-20, 55% had a neurodisability, the language scores of 50% placed them below 10 years, and they had a poor understanding of trial processes and roles, even though most had prior experience of the courts.

¹⁰ The US National Academies of Sciences Engineering Medicine estimated the rate of speech and language disorders to be between 3%-16% of the general child population under 18 (Committee on the Evaluation of the

impairment can be masked by superficial fluency and competence in other communicative tasks. As a result, communication impairments can easily go undetected by legal professionals.¹¹ Even where disabilities are identified, compensating for them is another matter. In some cases, communication between children with disabilities and lawyers is virtually impossible without expert assistance. And this serves to render these children even more vulnerable: Children with disabilities have a higher risk of victimisation than their non-disabled peers (Jones et al., 2012) but may be less able to participate effectively in the criminal justice system without significant support.

Section 85(1) of the Evidence Act 2006, which is a codification of the pre-existing common law on cross-examination, gives judges discretion to disallow questions which are “too complicated for the witness to understand” (*inter alia*). Yet analyses of NZ courtroom transcripts from 2008 revealed that judges rarely intervened, even when questions were patently too complicated (Hanna et al., 2012b). While judges intervened somewhat more often in 2008 than in trials held under earlier legislation (Hanna et al., 2012b), the overwhelming majority of complicated questions went unchallenged.

It is likely that many judges intervene so infrequently because they cannot reliably recognise developmentally inappropriate language (Henderson, 2015a).¹² However, judicial non-intervention also likely reflects the culture of the adversarial court more generally which “...tends to equate judicial neutrality with judicial inaction and, therefore, is deeply suspicious of judges who intervene to prevent questioning” (Hanna & Henderson, In press; see also Henning, 2015; Victorian Law Reform Commission, 2016). As one NZ judge put it:

“...the difficulty is, the more you interrupt (even though you may need to), the more the jury are likely to think, ‘Oh, this judge is imposing his or her views on the evidence as a whole and interfering with our role.’” (Davies, Hanna, Henderson, & Hand, 2011, p. 26)

Legislating to set out the power of judges to control questioning has had little impact. That is, given the culture of the adversarial court and the lack of in-depth training for judges on child language development, s85 is not a sufficiently robust mechanism to prevent developmentally inappropriate questioning on its own.¹³

Question types

A substantial body of research has confirmed that the accuracy and completeness of children’s reports of past events can be dramatically affected by the types of questions used to elicit those reports. The literature has established that, when asking children to report about past events, responses to open-ended, free-recall questions (e.g., *Tell me about X*) are more likely to be accurate than responses to other question types (Lamb, Hershkowitz, Orbach, & Esplin, 2008). Closed questions (that license a *yes* or *no* response: *Did you go to the park?*) and leading questions (that indicate the expected response, including tagged questions: *He didn’t do it, did he?*) can be risky (Lamb & Fauchier, 2001; Orbach & Lamb, 2001; Walker, 1999; Waterman, Blades, & Spencer, 2001). Yet analyses of NZ courtroom transcripts reveal a preponderance of closed and leading questions in cross-examinations of children (Davies & Seymour, 1998; Hanna et al., 2012b; Zajac & Cannan, 2009; Zajac et al., 2003).

Supplemental Security Income (SSI) Disability Program for Children with Speech Disorders and Language Disorders, 2016).

¹¹ See, for example, *Jones v R* [2015] NZCA 601.

¹² This may also explain why judges’ attempts to rephrase counsels’ complex questions into simpler language are not always successful, despite best intentions (Hanna et al., 2012b; see also Cashmore & Trimboli, 2005).

¹³ This conclusion is based on analysis of the transcripts of trials held in 2008 in Hanna et al. (2012b).

Lawyers' reliance on leading questions in cross-examination is partly due to assumptions dating back to the 18th century about the nature of suggestibility, which underestimate the coercive impact of such questions (Henderson, 2016a). It is also due to a pervasive theory of cross-examination which licenses questioners to employ a degree of manipulation, provided it gets favourable results. Manuals on cross-examination recommend the use of leading questions precisely because they maximise the questioner's control of the witness.¹⁴ As one manual put it, "Children usually want to please adults ... A child will probably answer 'yes' to a question that suggests a yes answer and 'no' to one that suggests a no answer" (Salhany, 2006, p. 103). However, it may be difficult for children to resist (mis-)leading questions from adults displaying an authoritative style (Bull & Corran, 2002) and resistance to suggestion may be diminished by delays (Flin, Boon, Knox, & Bull, 1992; Lamb, Orbach, Warren, Esplin, & Hershkowitz, 2007).

Tactics of cross-examination

Leaving aside individual questions, many conventional cross-examination tactics which lawyers use to test children are not developmentally appropriate, but are attested—and common—in cross-examinations of NZ children (Davies & Seymour, 1998; Hanna et al., 2012b). Common tactics used by cross-examining lawyers include:

- Suddenly shifting from one topic to an unrelated one: This is intended to disrupt a supposed liar's attempts to maintain a constructed narrative (Henderson, 2000). However, even honest children might be put off balance by this tactic (Brennan & Brennan, 1988) and may be led to inconsistencies which could unfairly damage their credibility.
- Asking a series of questions about peripheral details (e.g., times, dates, durations): This is intended to elicit inconsistencies thereby undermining juror confidence in the reliability of children's account of the central events. Yet peripheral details tend to be remembered less well than central events (Peterson & Whalen, 2001; Saywitz et al., 1991) and inconsistencies are to be expected.
- Casting doubt on a witness' account by suggesting the witness is lying (and/or has been coached), mistaken, confused, or has a poor memory (Cashmore & Trimboli, 2005; Hanna et al., 2012b): In one NZ trial, a child was accused of lying 5 times within 11 utterances (Hanna et al., 2012b). Children generally report that being suspected of lying is highly distressing (Yamamoto et al., 1996) and they can be badly thrown by such accusations (Spencer & Glaser, 1990). If the defence case is that the child is lying, then the duty to put the case requires that counsel address this with the witness. However, it need not involve what has been described as sustained or aggressive attacks on the witness' honesty.

In short, conventional cross-examination relies heavily on questions and tactics which are developmentally inappropriate, confusing and distressing for child witnesses, and likely to decrease the quality and quantity of their evidence. Indeed, the negative impact of cross-examination-styled questions on children's accuracy has been demonstrated repeatedly in experimental studies.¹⁵ However, reforming cross-examination presents a particular challenge because conventional practice is supported, first, by widespread ignorance of children's language development and safe questioning

¹⁴ This highlights the fundamental difference between truth-seeking and traditional advocacy/persuasion: "...in pursuing the function of persuasion, the investigative aspect of [cross-examination] was distorted" (Henderson, 2015b, p. 933).

¹⁵ E.g., Irvine, Jack, and Zajac (2016); Jack and Zajac (2014); Righarts, Jack, Zajac, and Hayne (2015); Righarts, O'Neill, and Zajac (2013); Zajac and Hayne (2003, 2006).

practice and, second, by strong traditions which validate manipulative and suggestive questioning as part of proper advocacy and the right to a fair trial.

In light of the above, it is not surprising that children often cite cross-examination as one of the worst aspects of the entire legal process (Eastwood & Patton, 2002). For one NZ complainant, however, her treatment can only be described as extreme:

“The victim was ridiculed and called a liar by defence counsel despite the offender admitting to everything the victim said he did in a video interview I did with him. Defence counsel made the jury laugh when cross-examining the victim. She is a big girl. He called her stout and asked her underpants size and how frilly they were. He was rude and aggressive.” (Unedited version of Auckland Police Officer's comments, Hanna et al., 2010, p. 57)

Other issues

“As a society, our goal is to maximize the completeness and accuracy of children’s testimony while minimizing the stress placed on children in the process.” (Nathanson & Saywitz, 2015, p. 460)

Access to alternative modes of evidence

Stress at the time of testifying is likely to interfere with recall (LaRooy et al., 2011; Pipe et al., 2004). Testifying via CCTV can help address at least two potential sources of stress: giving evidence in the formal courtroom and being in the presence of the defendant. Observational and experimental studies have confirmed that testifying via CCTV and videotaped evidence “reduce the stress of testifying...that less stressed children give better quality evidence...and that CCTV may allow some children to testify who might not otherwise have been able” (Hanna, Davies, Crothers, & Henderson, 2012a).

Despite the Evidence Act 2006 extending eligibility for alternative modes to adult and child witnesses alike, in the late 2000s there was evidence of an age cap on children’s access to CCTV as well as regional variation:¹⁶ Younger children were more likely to testify via CCTV than older children and testimony via CCTV was more common in some centres than in others (Hanna et al., 2012a). Furthermore, older children and (non-complainant) witnesses were less likely than younger children and complainants to have been forensically interviewed by police, so the option of using an EVI as evidence-in-chief was not available (Hanna et al., 2010). No subsequent published studies have examined patterns of alternative mode use in the NZ criminal courts.

Legal knowledge

Limited understanding of legal processes, legal terminology, and courtroom roles is an issue experienced by both adults and children, with children’s legal knowledge typically ranging from limited to wildly inaccurate (Crawford & Bull, 2006; Freshwater & Aldridge, 1994). Some have argued that a lack of legal knowledge may increase child witnesses’ stress,¹⁷ while experimental studies have found that children with greater legal knowledge performed better on the witness stand (Nathanson & Saywitz, 2003).

NZ studies in the 1990s raised concerns about the quantity and quality of the information provided to child witnesses and their carers before and after trial. This included:

¹⁶ An age cap in terms of access to CCTV and EVIs was evident in the 1990s (Pipe, Henaghan, Bidrose, & Egerton, 1996).

¹⁷ Quas, Wallin, Horwitz, Davis, and Lyon (2009) found that, for 4- to 15-year-olds attending dependency court hearings in the USA, increased legal knowledge was associated with less distress about the hearing.

- A lack of advice to caregivers on how to discuss the alleged offences with the child(ren) without contaminating their evidence;
- Children and caregivers:
 - having little understanding of the court process and what to expect;
 - being inadequately informed of case progress; and
 - receiving little or no debriefing after trial (Davies, 1998; Working Party on Child Witnesses, 1996).

In response, the then Department for Courts rolled out the Court Education for Young Witnesses programme in 2004 for child witnesses (but not young defendants), which children typically attend within three weeks of trial. Agencies' responsibilities for information provision were clarified in the 2011 *National Guidelines for agencies working with child witnesses* and information is available on official websites and from some NGOs.

Despite these provisions, the indications are that information remains a problem:

- In 2010, only two-thirds of child witnesses in one sample attended the Court Education for Young Witnesses programme (Hanna et al., 2010).
- The NZ Law Commission (2015, p. 83) noted that sexual assault complainants find it “confusing having to communicate with so many different people simply to stay informed about the progress of the case,” although the report does not indicate whether this was the perception of adult or child complainants, or both.
- Preliminary findings from a recent (unpublished) study suggest that some children and caregivers still feel they are left in the dark until just before trial, with young people’s misconceptions about the court process (sometimes gleaned from US television programmes) adding to their worry (Seymour, 2016). Some respondents reported being totally unprepared for the aggressive questioning and accusations of lying during cross-examination:

“They talked about how they would have been less likely to ‘take it personally’ if they had understood better the role of the defence lawyer and been forewarned of their style of questioning and confrontation. This preparation would have enabled them to be less surprised and upset and then to give better answers.” (Seymour, 2016, p. 17)¹⁸

Courthouse facilities

Coming face-to-face with the defendant and/or their supporters in the courthouse can be intimidating and distressing for children—at a time when most are already highly anxious. Yet 40% ($n=6$) of child witnesses in one NZ study had contact with the defendant while waiting to testify and 73% ($n=11$) had contact with the defendant’s supporters (Davies, 1998). The situation has not improved since the 1990s: The Victims Information website and online pamphlets warn young witnesses that they may see the defendant “in and around the court” (see, for example, Ministry of Justice, 2015, p. 3) and the NZ Law Commission (2015) noted that sexual assault complainants must still often share waiting areas and facilities with the defendant and his/her supporters.

Other concerns about courthouse facilities include:

- Children having to wait in public areas before testifying or in small, crowded rooms;
- Not having easy access to toilets;

¹⁸ We do not know whether these participants attended the Court Education for Young Witnesses service.

- Having no access to food and drink facilities or to appropriate distractions or activities (Davies, 1998; Davies et al., 2003; Pipe et al., 1996; Working Party on Child Witnesses, 1996).

Victims Advisers and lawyers recently highlighted other problems including that, from one courtroom, they could hear a child weeping in another courtroom and that CCTV rooms were “tiny, noisy and horrible” or “poky little room[s]” (Davies & Hanna, 2013, p. 299). These conditions in all likelihood add to children’s stress and may hinder their ability to effectively interact in court.

Systematic data

A key issue plaguing research and planning is the lack of reliable, systematic data on cases involving child witnesses. For example, in the late 2000s, it was not possible to extract such data from the Ministry of Justice or NZ Police databases, despite provision in the former to identify child witness cases (Hanna et al., 2010). Anecdotal evidence suggests that reliable data is still not readily available, making it difficult to track progress on tackling problems such as delays and to plan for future modifications to pre-trial and trial processes.¹⁹

Responses in the Aotearoa/NZ courts

This section reports on innovations in the courts that have taken place since the last major, wide-ranging published report on children’s interactions with the NZ criminal courts (namely, Hanna et al., 2010). The focus is on innovations reported in the public domain or known to the authors through experience within the court system.²⁰

2011 proposed reforms (and Evidence Amendment Act 2016)

In 2011, Cabinet approved a set of reforms to improve the courts’ accommodation of child witnesses. These reforms included:

- A presumption in favour of all under-12s giving evidence via EVI and CCTV (thereby addressing prosecutorial reluctance to use those options in some regions);
- A presumption in favour of pre-recording under-12s’ entire evidence before trial (including cross-examination) and that pre-recording hearings be completed within a specified timeframe to address delays;
- The introduction of intermediaries trained in children’s cognitive and language development to improve the questioning of under-18s; and
- Extending the automatic right to have a support person to all child witnesses (complainant and non-complainant).

In addition, the Ministry of Justice would help provide lawyers and judges with guidance and training on questioning children and required that there be a judicial direction that juries not draw inferences from a child’s demeanour if they testify via alternative modes. The introduction of this package would have made NZ the first adversarial jurisdiction to not only pass legislation allowing both pre-recorded cross-examination and intermediaries, but the first to actually bring both into use.

¹⁹ We have been advised that concurrent research into the collection of victims data has been undertaken by the Chief Victims Advisor, which may provide further detail on this.

²⁰ Other non-publicised innovations may be occurring in individual courts or other agencies. A survey to identify such innovations is beyond the scope of this report.

Current position

In 2013, it was announced that the reforms would be restricted to a presumption in favour of alternative modes generally and extending eligibility to support persons; the intention to support judicial/counsel training was also retained (Hon Judith Collins, 2013). The presumption and the extension of eligibility to support persons are now enshrined in the Evidence Act 2006 (ss 107 and 79(1)(A) respectively) and send a strong signal of Parliament's intentions that children are enabled to access these provisions. However, if there is still regional variation and an age cap on children's access to CCTV, it is not clear whether this measure will be interpreted in such a way so as to remedy this.

Addressing delays

Pre-recording cross-examination

In the early 2010s, Auckland prosecutors and judges began a short-lived initiative to reduce pre-trial delays by pre-recording children's cross-examination before trial using ss103 and 105 of the Evidence Act. While s105 of the Evidence Act is usually only seen as allowing pre-recorded evidence-in-chief (via EVIs), the section in fact allows pre-recording of the witness' "evidence" generally.²¹

This initiative began before the Cabinet decision of 2011 (see page 15), sparked instead by an awareness of Western Australia's (WA) success in reducing long delays by pre-recording children's cross-examinations. WA had instituted pre-recording in the early 1990s after their then 18-month delays proved intractable. By this means they manage to get children out of the system in only a few months. The process in WA is as follows:

- Police record the child's evidence-in-chief in the normal way.
- Following an expedited discovery process, a pre-trial hearing is convened with the witness, defendant, counsel and judge, but no jury.
- The child's EVI is played and then cross-examination takes place as per usual, via CCTV.
- The cross-examination and any re-examination is recorded, edited as necessary (for example, breaks and any inadmissible evidence are edited out), and replayed to the jury whenever the trial is convened (without need for prioritisation). The recording is also available for any re-hearing or appeal.

Auckland held 13 pre-recording hearings over 2010-11, using a Ministry of Justice protocol memorandum, based on WA practices. The average delay between charging and the pre-recording hearing reduced to around seven months in the eight cases for which this information was available (Davies & Hanna, 2013).

Current position

The initiative came to an abrupt halt in late 2011 after the Court of Appeal ruled on two appeals in its decision, *M v R*. The Court, while confirming that s105 allows the practice, foresaw serious dangers to the defendant's fair trial rights and warned that it should be restricted to extreme situations. Unfortunately, the Court of Appeal chose to ignore the academic literature showing the success of the model in WA, where, in over 20 years, none of the dangers the Court anticipated have eventuated. All pre-recording hearings stopped (although there are anecdotal reports of an application granted recently in the High Court). As noted above, in 2013 plans to amend the Evidence Act were also halted.

²¹ Previously, there had been a few such applications, but only for adults and only exceptionally: *R v Kereopa* ([2008] DCR 29 (HC), involving a terminally ill adult complainant unlikely to live to trial and *R v Willeman* [2008] NZAR 664 (HC), involving a tetraplegic complainant (NZ Law Commission, 2015)

In 2015, however, the NZ Law Commission, noting successful evaluations of the Australian and NZ cases, reversed its previously negative position on pre-recording and recommended introducing a rebuttable presumption for all sexual offence complainants (NZ Law Commission, 2015). This has encouraged some in the District Court, as will be seen below, to consider allowing pre-recorded cross-examination again.

Addressing examination and cross-examination

Communication assistants

Section 80 of the Evidence Act 2006 allows for communication assistants (CAs) to facilitate defendants' and witnesses' communication with the courts.²² In 2013, the NZ Court of Appeal endorsed the appointment of a speech language therapist as a CA for an adolescent complainant with Down Syndrome, rejecting complaints that the CA's interventions during trial had prevented defence from putting its case:

"The Judge was right to recognise that a fair trial requires fairness towards both the defendant and the complainant, and this requires the complainant to be able to communicate in a way which best presents his or her evidence to the jury." (*R v Hetherington* [2015] NZCA 248, at para 22)

"[The CA's] interruptions during the complainant's evidence made in accordance with the amended directions were, in our view, necessary to ensure the complainant was able to present her evidence in a way which was commensurate with her intellectual disabilities." (Para 25)

Anecdotally, since *Hetherington*, CAs have been appointed for over 50 vulnerable witnesses and defendants.²³ In *Hetherington* the court adopted the England/Wales "Registered Intermediary" model for communication assistance (see page 25), and this is the model which has been used in subsequent cases. There are now six regular CAs, all experienced speech language therapists, working mostly within the adult and youth courts, but more recently also in the Family Court. CA appointments tend to be clustered in a few centres (Whangarei, Auckland, Tauranga), most likely because the prosecutors and resident judges have a particular interest in addressing these types of cases.

Current position

Although there is a Youth Court working party developing protocols for that Court and a NZ Law Foundation/IHC project working on guidelines for the adult criminal courts, there are currently no formal guidelines for CAs' work in the courts except those borrowed from the England/Wales model. Nor is there local training or accreditation to ensure only suitably qualified individuals are appointed. This is an issue as CA services are increasingly being sought and it is probable that demand will soon outstrip the supply of CAs who understand the process. Some current CAs provide informal supervision for others; one has undertaken further training in England; some are discussing setting up an accreditation course themselves.

Funding is also an issue. Generally, CAs appointed by the Court under s80 are paid out of the same Ministry budget as are language-to-language interpreters. However, a few judges have questioned this and some counsel have acquired funding from Legal Aid. Meanwhile, police are beginning to instruct speech language therapists to assess communication-impaired witnesses (including children)

²² Specifically, it provides for "oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication" for those whose English proficiency is such that they cannot understand court proceedings or give evidence in English or who have a communication disability.

²³ Personal communication, Michelle Bonetti (communication assistant), 2 March 2017.

prior to EVIs, with a view to applying for them to be appointed as CAs at trial, as happens in England/Wales. Police are paying for that service inhouse.

Judicial and counsel training

Current judicial and practitioner training on questioning child witnesses is ad hoc and irregular. The last few years has seen some increase, with several one-off, one-to-two hour training seminars and in January this year a three-day judicial training course for the Sexual Violence Court Pilot (which the Institute of Judicial Studies has now taken over and intends running annually).

While these seminars may raise awareness and provide some rules of thumb for counsel and judges, they are unlikely to solve the problem of questioning practices on their own. Acquiring the skills to reliably and consistently produce developmentally appropriate questions (and to recognise questions that are not) requires intensive, ongoing training and/or guidance from child language specialists. There are major practical difficulties in requiring legal professionals (particularly defence counsel in private practice) to undertake that level of training. Nevertheless, recent judge-led initiatives here and overseas show that shorter, more achievable training sessions (e.g., over two to three days) can still raise awareness enough to motivate practitioners to use all available measures, be more innovative, and seek expert assistance more often.

Specialist courts: Case management initiatives

In 2014 and 2017, the District Court initiated two separate pilot courts, both of which are likely to have a major impact on child witnesses who participate in them. One is specifically aimed at child witnesses and the other at sexual offence complainants, but as most children appear as complainants in sexual assault trials, it is also highly relevant to this paper.

In the Whangarei Child Witness Protocol Pilot (“WCWP”) judges employ a special protocol in any trial involving child witnesses. The second, the more ambitious Sexual Violence Court Pilot (“SVCP”), draws on the first pilot’s trial protocols but also introduces robust pre-trial management practices to reduce delay, and to encourage good questioning practices and full use of the available legislative options for witness support. Both pilots remain strictly within the confines of current law.

The WCWP applies to children who appear as witnesses to any offence but is limited to trial process only. The SVCP is limited to sexual assault cases but that enables it to address pre-trial management because all such cases can easily be identified and funnelled through its specialist pre-trial list.

Whangarei Child Witness Pilot

The WCWP began in early 2014, initiated by the three sitting criminal judges in the Whangarei District Court and a judge in the Auckland District Court.²⁴ It introduced a “protocol” setting out a series of responses to problems identified in the research literature, most of which responses were based on recent English trial reforms (discussed below). The aim was to improve evidence quality by reducing children’s stress and tiredness and increasing their confidence to request breaks or clarify questions. The protocol evolved with the pilot, but the first set of directions were as follows:

- Children watch their EVIs a day or so before trial, rather than with the jury at trial.
- Children come to court just before giving evidence rather than waiting around at court.

²⁴ The NZ District Court has a history of initiating specialist courts (Finn, McDonald, & Tinsley, 2011; NZ Law Commission, 2015) and other practice reforms: In 2010, the Dunedin District Court issued guidelines for questioning children, although it seems its impact was never assessed. Other courts, such as the Hastings Family Court, developed their own pre-trial checklists etc.

- Before giving evidence, children meet the judge and counsel for a low-key introduction and familiarisation visit.
- Children appear first thing in the morning, which usually means they give evidence on the second day of trial.
- The afternoon of the first day of trial is occupied by expert witnesses (who like a set time slot) and the EVI.
- Children testify during school hours and stop by mid-afternoon.

These provisions are presumptive rather than binding, depending on the needs of the particular witness.²⁵

In addition, the bland, unfriendly CCTV room was redecorated and stocked (largely by court staff donations) with a kettle, snacks and games so that Victim Advisers can occupy children during the inevitable adjournments.

The protocol was circulated to the Bar and meetings held to address their concerns, which were few. When the measures proved successful, the Court expanded them, announcing that it would henceforth be proactive in policing inappropriate questioning, giving examples of inappropriate question types and referencing guidelines developed for the English Bar. Anecdotally, this expansion caused some disquiet but it also dissipated quite quickly.²⁶ Meanwhile from early on anecdotal reports from police, Victim Advisers and lawyers suggested that the changes were significantly improving children’s courtroom experience and willingness to participate.²⁷

As awareness grew, protocol practices spilled into cases involving vulnerable adult witnesses and vulnerable defendants. Other district courts also adopted “protocol” measures and began innovating themselves (for example, Tauranga Victim Advisers introduced a witness support dog). Conversely, High Court Justices sitting in Whangarei were not always prepared to use the protocol.

In 2016, an academic evaluation concluded that almost all local lawyers supported the changes and that they markedly improved children’s experiences of trial (Randell, Seymour, Henderson, & Blackwell, 2016).²⁸

However, in mid-2016, the new language restrictions led to appeal. In *Metu*, the trial judge indicated he would stop any “tagged questions”,²⁹ a type research says is so suggestive that they are effectively banned from children’s cross-examination in England/Wales. In *Metu* the Court of Appeal dismissed the appeal but refused to rule on the protocol, and expressed disapproval of “blanket bans” on questions without expert evidence relating the ban to the particular witness.

²⁵ I.e., early on, Victims Advisers identified that meeting the judge in court intimidated some children. When the judges were told of this, they switched to meeting in the CCTV room. Some defence counsel find that if they meet children before trial, they develop a sympathy for the child which makes cross-examining emotionally difficult for the lawyer. In those cases judges meet the children with a Registrar only. Good communication between stakeholders as issues arise has been essential to the pilot.

²⁶ Personal communications between local lawyers and the second author.

²⁷ In one early case, a re-trial, the police had feared that two children would not cope with testifying again, and credited the protocol with increasing the children’s confidence sufficient for them to go ahead. Another defence counsel was surprised and touched when a complainant’s Victim Impact Statement included a thank you to her for her respectfulness and for making the questioning easy to understand.

²⁸ Further papers examining the Whangarei initiatives are to be submitted for publication shortly.

²⁹ E.g., Statements with an interrogative tag, such as *you went to the park, didn’t you?* or *you didn’t go to the park, did you?*

Current position

In early 2017 the Whangarei “protocol” was replaced by the senior District Court judiciary with more generic “guidelines” which do not reference specific question types. However, the original protocol was so embedded in local legal practice that it remains the status quo.³⁰

The WCWP has achieved considerable improvements for children through a well-educated, highly motivated judiciary with good ties to the local Bar, police and Victims Advisers. However, because it applies at trials only, and not at the pre-trial stages, judges cannot control pre-trial delay and they cannot engage counsel in pre-trial discussion about questioning (and thus avoid poor questioning at trial). The SVCP addresses some of those gaps.

Sexual Violence Court Pilot

The SVCP was established by the Chief District Court Judge in response to the Law Commission’s proposal that her Court pilot a specialist sexual offences court to address persistent problems with cross-examination, lack of support and delays. This pilot is directly relevant to this paper because not only are these similar issues to those all child witnesses face, but most children appear in sexual offence trials.

The pilot runs out of ordinary courts but operates a specialist pre-trial list (like the Family Violence court list) run by a dedicated registrar and a cohort of accredited judges, along with a trial protocol similar to that of the WCWP.

The two-year pilot began in March 2017. Its main objectives are reducing pre-trial delays and secondary trauma (Chief District Court Judge Doogue, 2016). Like the WCWP, whose trial reforms it adopts, it operates within existing legal frameworks and without significant additional investment (although each court has some additional judicial and support staff time).

The pilot judges attended a three-day course (similar to the English judicial accreditation course) presented by, *inter alia*, psychologists, linguists and speech language therapists. While such a short course cannot equip judges to correct all poor questioning, it aims to sensitise them to the problems, introduce key concepts and some simple techniques (e.g., ways of intervening), and to raise awareness of additional resources such as CAs.

While it still has to work within existing statutory pre-trial timeframes, the Court tackles pre-trial delay using a robust case management model which makes better use of existing hearings:

- The agenda of the first major appearance, the Case Review Hearing (or CRH), has expanded to cover issues usually covered at Trial Call-over up to 8 weeks (40 working days) later (e.g., notice of mode of evidence applications, disclosure applications);
- Unopposed applications at the CRH are made immediately (i.e., mode of evidence or EVI release);
- All future appearances (Trial Call-overs, a generic pre-trial hearing in case it is later needed) are scheduled at the CRH, including pencilling in a trial date.³¹
- Later appearances are freed up for use as directions hearings for the conduct of trial.
- The court is also working informally with the Crown, Police and ESR to encourage swift discovery.³²

³⁰ Personal communication between the second author and Whangarei lawyers, judges, Victims Advisers and police.

³¹ Personal communications between the second author and pilot judges. Anecdotally confidence is high that this is working very well.

³² Personal communications with the second author.

Current prospects

Reducing delay by pre-trial management needs a cohesive, determined judiciary and a cooperative Bar and Police. Neither pilot has what commentators often suggest are necessary parts of the puzzle: specialist counsel (especially prosecutors), increased witness support and preparation services (Parkinson, 2016), and statutory support for its tighter pre-trial timeframes. However, with good communication between stakeholders, coupled with the new listing process where lawyers effectively cannot escape the pilot judges' demands, it is hopeful that efficiencies will be achieved and all available special measures will be identified. The new process also encourages robust pre-trial directions and strong trial management, which should improve trial practice and questioning.

Its greatest limitation is that, given backlogs, limited additional resourcing and the continuing volume of new cases, pre-trial delay is unlikely to reduce sufficiently for children. One alternative would be to embrace pre-recorded cross-examination, which some SVCP judges appear open to doing. This option is discussed in detail below.

Opportunities

Of all the reform options developed within the adversarial world, by far the most impressive are pre-recording to reduce delays and intermediaries/CAs to improve questioning. Research shows that each delivers real improvements without diminishing the defendant's right to a fair trial. Crucially, our local courts have already proven both measures can work here.

This section outlines how these measures operate in their home countries, before considering how they might be adapted to, and adopted more fully in, NZ. It then explores specialist courts in more detail before considering other possible pre-trial and trial modifications to improve children's interactions with the courts.

Addressing delays: Pre-recording children's entire evidence before trial

"I don't see that there is any drama in connection with [pre-recording children's cross-examination]. It's just another step to ensure that best evidence is put before the court." (NZ prosecutor, as cited in Davies & Hanna, 2013, p. 304)

Short of major investment in new court buildings and so forth, pre-recorded cross-examination offers the best hope of reducing the time children wait to testify. The Evidence Act already allows pre-recording, but practitioners remain wary following 2011's negative appeal decision. This section explores new evidence demonstrating pre-recording's value and ways to encourage its use, including:

- A legislative presumption in favour of pre-recorded cross-examination for all children;
- An overall statutory limit on the length of time a child may spend in the system before giving evidence, to encourage the use of all available mechanisms for expediting children's evidence; and
- A faster legislative pre-trial timetable for sexual offence trials (since most children appear in sexual assault cases), thus supporting the SVCP's expedited case management process.

Pre-recorded cross-examination

Although pre-recorded cross-examination has been an option since the 1989 Evidence Amendment Act and despite the courts' brief experiment in 2010-2011, our Court of Appeal, some of our leading academics (McDonald & Tinsley, 2011) and (prior to 2015) the NZ Law Commission have expressed misgivings. However, overseas it is a highly regarded and unusually well-tested means of reducing pre-trial delay.

Evaluations of Australian pre-recorded cross-examination

Western Australia in particular has had 25 years of successful pre-recording of children's cross-examination. After the success of the WA model (for a review of the evaluations, see Hanna et al., 2010), all other states in Australia barring NSW have since followed suit (Henning, 2015). However, pressure is building also in NSW, including from their Parliamentary select committee on sentencing child sexual assault offenders who argued that pre-recording is worth considering (Parliament of New South Wales, 2014).

Table 3: Benefits and anticipated risks of pre-recording in Australia

Research on Australian practice has shown clear benefits of pre-recording children's entire evidence (Davies & Hanna, 2013; Eastwood & Patton, 2002; Hanna et al., 2010; Jackson, 2003, 2012; Sleight, 2011). Benefits include:

- Earlier capture of the evidence improves its quality.
- Children can get on with their lives quicker and undertake therapy without concern about contaminating their evidence.
- Courts can be more accommodating of the child's needs (e.g., for breaks or short sitting times) because the jury does not have to be accommodated.
- There is less danger of the child encountering the defendant's supporters or witnesses at court than at the trial.
- The tape can be edited of prejudicial or otherwise inadmissible material which might otherwise cause the trial to abort.
- Editing makes the time the jury spend listening to the child shorter.
- Certainty about the strength of a child complainant's evidence enables earlier and better pre-trial decision-making and cost savings accordingly:
 - (a) Prosecutors can withdraw or amend charges to reflect the evidence, avoiding more aborted trials;
 - (b) Defence counsel can advise early guilty pleas.

Australian research reporting higher disposal rates was not based on hard data but on anecdotal reports from practitioners. However, in the 2016 evaluation of the English pre-recording pilot, this was borne out in far higher rates of guilty pleas (see below).

Meanwhile, the risks which were initially feared have not transpired, including:

- Defence counsel do not believe pre-recording impacts on the defendant's fair trial rights, although they must "reveal their hands" early.
- Where new defence counsel have been appointed between pre-trial and trial, it has not proven problematic.
- A different trial judge than sat at pre-trial has likewise been unproblematic.
- Disadvantage to the prosecution by the so-called "TV effect", where some prosecutors fear evidence via recording is less impactful, has not been proven by research (Victorian Law Reform Commission, 2016). WA prosecutors regard any disadvantage of this sort as outweighed by pre-recording's many advantages.
- Early disclosure has proven to be unproblematic: After initial "growing pains" the system settled quickly (Jackson 2003, 2012).

- The fear that children would be recalled at trial for additional questioning because of late-breaking/undisclosed evidence has not been realised (an experienced WA judge once told the second author that in 20 years he had had two applications to recall a child and had granted one).
- Technology failures are a problem, but they are problematic for child witness cases anyway because of the need to replay the EVIs.
- WA defence counsel were, however, unhappy about the lack of Legal Aid cover for payment for preparation of the pre-trial hearing and then refreshing that preparation before trial, but this does not seem to have impeded the system (Hanna et al., 2010).

The English pre-recording pilot

Following on from the Australian successes, the English piloted (and evaluated) pre-recorded cross-examination between December 2013 and October 2014, covering under-16s and vulnerable or impaired adults. Whereas Australian evaluations concentrated on stakeholder reactions, the English evaluation was more wide-ranging, providing data that for the first time proves the Australians' anecdotal reports of savings in time and money.

So successful was the pilot (see Baverstock, 2016) that the government has announced they are adopting it nationally (Coleman, 15 September, 2016).

Importantly, this pilot was preceded and informed by the “*Barker reforms*” of vulnerable witness trials (see below), so that their judges (like our SCVP judges) are trained in the issues facing children and vulnerable adults and, like our pilot judges, take a robust managerial stance. This may explain some of their results.

English evaluation findings: Time and cost savings

The evaluation of the pilot compared 194 pre-recording cases with a control group of 196 non-pre-recorded cases. Sexual assault cases made up the vast majority of each groups' cases. The pilot resulted in significant savings in time and cost:

- Reduction in delays: Pre-trial delays reduced by 50%. The time to the actual trial stayed static at 182 days, but pre-recording hearings occurred within 94 days.
- A substantial increase in pre-trial guilty pleas: 48% of defendants in pre-recorded cases pleaded before trial as opposed to only 9% in the control group.
- Far fewer aborted trials: Of those that went to trial, far fewer collapsed part-heard. Only 8% of pre-recorded trials aborted, compared to 28% of the control group.
- Trials themselves were slightly shorter; and
- There were fewer re-scheduled trials.

Thus, while pre-recording does require an additional pre-trial hearing, and counsel must re-prepare /reacquaint themselves with the case when the actual trial arrives, they had a major reduction in numbers of actual trials, and those that did proceed were far less likely to require retrial. Much of this is because pre-recording a complainant's evidence takes the guesswork out of trials as the strength of their evidence is known beforehand. But the judges also believed that the early preparation required of counsel (i.e., for the pre-recording hearing) forced them to come to terms with the strength of the case earlier, prompting earlier decisions about plea or withdrawal.

Evaluation findings: Quality of evidence and questioning

There were also gains in the quality of the evidence and questioning:

- Witnesses were perceived to have better recall (Baverstock, 2016);

- Witnesses still found the experience unpleasant but they were more positive than their counterparts in the control group;
- Judges and counsel reported that defence counsel were more respectful in their questioning and that questioning was more focused and relevant;
- Cross-examination was significantly shorter (25-45 minutes as opposed to 45 minutes to 3 hours for the control group), which would also tend to reduce witness stress; and
- Lawyers and judges were reported to be more accommodating of witnesses' needs and more accepting of innovative procedures and more frequent breaks (Baverstock, 2016; Plotnikoff & Woolfson, 2016).

Lawyers in the pilot put these extra improvements down to the tighter judicial management but also to greater pre-trial scrutiny: All pilot cases had an extensive pre-trial directions or "ground rules" hearing, with defence counsel for the first time required to submit their cross-examination questions in writing to the judge for discussion before trial.

Limitations of English pilot

Problems included:

- Technology failures (a constant issue everywhere) and an insufficient supply of equipment and available CCTV rooms to cope with the demand (Baverstock, 2016), a bottleneck which may resolve when the backlog clears;
- Counsel and police disliked the frontloaded workload, but, as discussed, judges believed it was advantageous overall (Baverstock, 2016);³³
- Practitioners and witnesses suggested that in future witnesses be able to use remote facilities rather than testifying at the courthouse; and
- Practitioners asked for the extension of the measure to older children.

Pre-recording for a Kiwi audience?

There appears to be some judicial appetite for pre-recorded cross-examination in NZ. In 2015 the NZ Law Commission reported that a submission from 20 NZ District Court judges stated that "consideration should be given to greater use of pre-recorded evidence" (NZ Law Commission, 2015, p. 75).

Furthermore, as discussed, anecdotally some SVCP judges may be willing to consider pre-recording applications again, and have been discussing expedited discovery with the Crown, police and ESR, alongside a willingness to consider children appearing from remote locations where appropriate. Some practitioners are even suggesting that they might conclude pre-recording hearings within three months of first appearance, in line with timeframes achieved in England's pilot (Baverstock, 2016). However, the Court of Appeal's reaction to renewed interest in pre-recording cannot be predicted, and this will deter many judges in inferior courts from accepting applications.

Three measures might encourage uptake:

1. **A rebuttable presumption of pre-recorded cross-examination for children:** Reviving the government's 2011 plan to amend the Evidence Act to create a rebuttable presumption would send an unmistakable signal to the courts. Making the presumption rebuttable would

³³ As in WA, when expedited discovery was first introduced for pre-recording cross-examination (Hanna et al., 2010; Jackson, 2003), it is likely that there will be some initial teething problems as counsel and police adjust to the new expectations. However, similar issues in WA did not last long (Jackson, 2003, 2012).

accommodate children who want to appear at trial and particularly complex cases where discovery cannot be expedited.³⁴

2. **Statutory time limits:** Introducing a statutory time limit on disposition, not of the trial, but of the child's participation in it, would encourage speed generally but pre-recording specifically (as a way to meet the deadline). There would need to be provision, however, for a child to be recalled later (e.g., in the event of relevant, previously undisclosed evidence). As the NZ Law Commission (2015, pp. 66-69) notes, time limits can serve a rhetorical function as a statement about the government's objectives. While unrealistic time limits risk being ignored, as in a recent experiment in Victoria (NZ Law Commission, 2015), some pilot practitioners consider it possible to complete a child's evidence in as little as three months. Conversely, it is unlikely practitioners would support time limits on trials, because too many factors contribute to delays.³⁵ Pre-recording a child's evidence would also remove the need to prioritise the trial generally, making way for other serious criminal cases with more need for a priority trial date (i.e. trials involving impaired defendants or the family of a murder victim).
3. **Shorter legislative pre-trial timetables for sex offence cases:** Amending the Criminal Procedure and Criminal Disclosure Acts to follow the English pilot's and the NZ SVCP's shorter pre-trial timeframes would assist courts to reduce delays in the category of cases children are most likely to appear.³⁶ The brunt of such changes would fall on the Crown (earlier disclosure obligations and deadlines for pre-trial applications for mode of evidence, and so on), rather than the defence, and would thus generally be in the defence's favour.

These three steps would have a marked impact upon pre-trial delays for cases involving child witnesses.

Addressing questioning: Intermediaries (CAs) in England/Wales

"[Intermediaries have] improved the administration of justice ... without a diminution in the entitlement of the defendant to a fair trial." (Lord Chief Justice of England and Wales, 2011, p. 16)

Since 2004, court-appointed, expert communication assistants ("registered intermediaries") have been operating in the England/Wales courts as a "special measure" under the Youth Justice and Criminal Evidence Act 1999.³⁷ The intermediary role is to "enable complete, coherent and accurate communication to take place between a witness who requires special measures and the court" (Ministry of Justice (England/Wales), 2015, p. 8). Intermediaries are available to assist in cases

³⁴ Discovery would probably be incomplete when the judge ruled on the application, but this would allow for unusual cases where there was a particular issue obtaining discovery (i.e., multiple defendants or involvement with state agencies). Otherwise, exceptionally, there could be an application to reschedule the pre-recording hearing were disclosure still incomplete.

³⁵ For example, late inquiries over the defendant's competence, other witnesses' unavailability, counsel unavailability (much more important for the trial than the examination of one witness), pre-trial hearings of unrelated issues (propensity, defendant's interview, another witness's behaviour) or plea discussions.

³⁶ Reduced statutory pre-trial frameworks seem to work in NZ: In addition to the new 2011 timeframes in the Criminal Procedure and Disclosure Acts, the Family Court has different pre-trial timeframes for different applications. There does not appear to be any research on the Family Court rules but, although the current criminal court timeframes are too slow for current purposes, research does suggest that they have had some impact on delay (Ministry of Justice, 2014; NZ Law Commission, 2015). Similarly, after a rocky start, Victoria's ambitious statutory time limits (12 months for all trials and 3 months for sexual assault trials) have also, in tandem with strong judicial case management, proven effective (Victorian Law Reform Commission, 2016) (NZ Law Commission, 2015).

³⁷ The Registered Intermediary system was piloted in 2004-2005. National roll-out was completed in 2008 (Ministry of Justice (England/Wales), 2015).

involving children (i.e., on the grounds of age alone) or any witness whose testimony could be compromised, whether through mental disorder, “significant impairment of intelligence and social functioning” or physical disability/disorder (Ministry of Justice (England/Wales), 2015, p. 18). Currently, defendants are excluded from accessing special measures. However, so valued are intermediaries that judges regularly use their inherent jurisdiction to appoint them for vulnerable defendants.

Most registered intermediaries are experienced speech language therapists (Plotnikoff & Woolfson, 2015). All are self-employed and undergo training and accreditation.

A crucial part of their success is that intermediaries are neutral and independent of either party, owing their paramount duty to the judge, and are available to advise all counsel. They are not expert witnesses, nor witness supporters nor interpreters. Nor do they advise on the reliability of the witness’ evidence.

The process

The basic process is as follows:

- The intermediary assesses a vulnerable witnesses’ communicative competencies (e.g., vocabulary, receptive and expressive language, understanding of question forms, ability to resist inaccurate suggestions, concentrate and manage stress).
- The intermediary produces a report of the assessment with recommendations on how the witness should be questioned and any modifications to trial process.³⁸
- The report is discussed at a pre-trial “ground rules hearing”, at which the judge sets rules for questioning the witness and other accommodations.
- Counsel can discuss their proposed questions and concerns privately with the intermediary.
- At trial, the intermediary monitors the questions posed, alerting the judge when questions are problematic, and monitors the witness’ need for breaks (see Appendix for a full description of the process).

Legal participants’ perceptions of the registered intermediary scheme

“Advocates must adapt to the witness, not the other way round.” (*R v Lubemba, R v JP* [2014] EWCA Crim 2064)

In the studies which have sought legal professionals’ views on intermediaries,³⁹ the vast majority of respondents were highly positive, including judges, counsel and police (Henderson, 2015c; Plotnikoff & Woolfson, 2007, 2015). The benefits of the scheme include:

- **Increasing access to justice:** Intermediaries enable witnesses to testify who might not otherwise have been able to (Henderson, 2015c; Plotnikoff & Woolfson, 2007).

An intermediary facilitated the evidence of a young woman whom police had previously declined to interview due to her extremely unclear speech. The witness eventually testified at court and the defendant was convicted (Plotnikoff & Woolfson, 2015).

An intermediary-assisted witness was able to indicate that the person in custody was *not* the assailant (Plotnikoff & Woolfson, 2007).

³⁸ This might include the use of communication aids, careful scheduling of breaks, allowing witnesses to hold comfort toys, and so forth.

³⁹ Note that all such studies have explored participants’ perceptions of intermediaries’ work with child *and* adult witnesses.

- **Potential cost savings:** Intermediaries have helped identify cases early in the process where interviewing the witness is *not* possible, saving police and prosecution time. Intermediaries are perceived to also save court time by helping witnesses focus on their testimony so examinations are completed in a timely fashion (Plotnikoff & Woolfson, 2007). They may also help precipitate guilty pleas, saving court time, in addition to contributing to the smooth running of trials.

An intermediary helped police interview a paralysed, mute woman; the defendant pleaded guilty upon seeing her interview. “According to his counsel, the defendant realised that the mute woman he had raped, because she wouldn’t be able to tell, could in fact tell her story in great detail” (Plotnikoff & Woolfson, 2015, p. 89).

Prosecutors initially decided not to call a child as a witness, but then decided to appoint an intermediary to facilitate the child’s participation. The defendant pleaded guilty soon after the ground rules hearing (Henderson, 2015c).

One defendant intermediary helped prevent a volatile 15-year-old with Asperger syndrome from absconding from court (Plotnikoff & Woolfson, 2015).

- **Increasing satisfaction with the criminal justice system:** Interviewees perceive that intermediaries improve witness satisfaction with, and public confidence in, the criminal justice system (Plotnikoff & Woolfson, 2007). Carers interviewed during the pilot evaluation were unanimously enthusiastic.

The parent of an 11-year-old with cerebral palsy commented that, “The intermediary was brilliant—a diamond. I would recommend this to anyone. Without her he wouldn’t have coped. He cracked up when he got to court—I was surprised he didn’t cry during his evidence. He said there were some questions that he couldn’t understand but he turned to her and she helped” (Plotnikoff & Woolfson, 2015, p. 15).

- **Improving trial processes:** Intermediaries have facilitated appropriate questioning, reduced witness stress, and ensured witnesses understand instructions (Plotnikoff & Woolfson, 2007). They have been credited with “rewrit[ing] the ‘rules’ of cross-examination” (Plotnikoff & Woolfson, 2015, p. 303) and of facilitating a remarkable degree of collaboration and agreement between opposing counsel on how to adapt their questions.

“The first time I saw an intermediary intervene in cross-examination, I thought it was wondrous. But the miracle is what goes on if they don’t have to intervene at all” (Judge, as cited in Plotnikoff & Woolfson, 2007, p. 303).

- **Improving investigative interview processes:** Intermediaries have identified witnesses who were more impaired than the CPS/police had realised and ensured best evidence from the beginning of the investigative process. They have also ensured the efficient planning of witness interviews and helped with identification processes (Plotnikoff & Woolfson, 2007).

The evaluation of Northern Ireland’s pilot intermediary scheme, which is modelled on the England/Wales scheme, reported very similar benefits to those found in England/Wales (Department of Justice, 2015).⁴⁰

⁴⁰ See Appendix for details of the NI scheme and its evaluation.

Concerns raised

Many of the concerns raised during the pilot evaluation (Plotnikoff & Woolfson, 2007) related to process and information issues.⁴¹ There were also concerns about the exclusion of vulnerable defendants from the scheme. Other criticisms of the system included:

- **Interventions:** Some police, counsel, and judges felt intermediaries intervened at trial either too little or too much (Henderson, 2015c; Plotnikoff & Woolfson, 2015).
- **Referrals:** A third of judges and counsel in Henderson (2015c)'s study felt that intermediaries should be appointed more often and earlier in the process; a quarter felt they were appointed too often.⁴²
- **Quality of intermediaries:** Some reported variability in the standard of service provided by intermediaries (Plotnikoff & Woolfson, 2015). One barrister noted that some intermediaries “forget that they are in fact independent” (Plotnikoff & Woolfson, 2015, p. 285).
- **Resistance to intermediaries:** Some judges and advocates continue to reject intermediaries' recommendations or are unable to follow them, although one intermediary reported that, “Counsel flouting directions is less frequent now” (Henderson, 2015c, p. 160). Some judges still will not allow intermediaries in their court in the first place (Henderson, 2015c; Plotnikoff & Woolfson, 2015). Negativity towards intermediaries generally came from practitioners who were less aware of the problems vulnerable witnesses face in court (Henderson, 2015c).

Potential challenges to extending the use of CAs in NZ

CAs are already operating in NZ courts, although they are few and unregulated. There is both a need and an opportunity to regulate practices and extend their services to all vulnerable witnesses and defendants who will struggle to communicate effectively with the courts.

There may be opposition to the greater use of CAs from some judges and defence counsel. Emphasising that vulnerable defendants can access communication assistance would likely help quell defence anxieties. That the system has been successful in England/Wales for over a decade, and is being adopted in other comparable jurisdictions, provides reassurance that it does not undermine trial fairness or prevent counsel from fulfilling their duties to their clients, as the NZ Court of Appeal agreed in *R v Hetherington*.

There will also be concerns about costs. However, the Northern Ireland review suggested that the costs per trial were not excessive (see Department of Justice, 2015, pp. 11-14). Costs also need to be balanced against potential savings to court and prosecution time as highlighted above.

The NZ Law Commission reported in 2012 that the NZ Law Society and Criminal Bar Association did not support introducing intermediaries, and that legal stakeholders believed them to be “unnecessary because there are already adequate protections for witnesses such as CCTV, screens, and judicial powers to intervene in questioning” (NZ Law Commission, 2012, p. 82).⁴³ Interestingly, the NZ Law Society's view of intermediaries in 2011 was more favourable:

⁴¹ E.g., Legal professionals' failure to identify eligible witnesses or taking a too narrow interpretation of eligibility criteria; confusion around the intermediary's role, including vis-à-vis the judge's role in terms of controlling inappropriate questions; engaging intermediaries too late in the legal process.

⁴² The latter tended to be oblivious to the problems, including believing that intermediaries are not needed with typically developing young children; that intermediaries underestimate children's competencies; that ordinary experiences of talking with children as parents or grandparents qualified lawyers for questioning children appropriately.

⁴³ Other concerns raised were that intermediaries were costly and likely to prolong proceedings.

“Most [overseas evidence] suggests that the use of intermediaries does not unduly interfere with legitimate trial approach of counsel. There is some chance that legitimate lines of examination and cross-examination might be hindered by intermediaries, but it is more likely that the use of intermediaries will lead to the giving of clear evidence, with less stress on child witnesses and complainants.” (New Zealand Law Society, 2011, p. 3)

Gaining acceptance that there is a problem may be a critical first step in gaining acceptance for an expanded CA system. However, the authors’ experience is that, when directly informed of the research findings, judges and counsel are often quick to accept that the communication difficulties are more common and profound than they had realised, and rapidly become open to accepting CA assistance.⁴⁴

The future of CA services in NZ

Demand for CA services in NZ is increasing and will soon outstrip existing capacity,⁴⁵ raising concerns that less able and less professionally qualified CAs might be appointed. There is an urgent need to develop the appropriate infrastructure (protocols, guidelines, checks and balances) to ensure that:

- CAs are appointed for all witnesses who need communication assistance, whether by virtue of age, language impairment or other disability;
- Only individuals with the requisite personal characteristics and professional skills are engaged;
- New CAs are trained, accredited and receive guidance;
- All CAs are subject to oversight, including a code of practice and code of ethics; and
- Protocols are developed to ensure the courts take a consistent approach, including clear delineation of roles (e.g., that the judge retains ultimate responsibility for controlling questioning).

The England/Wales and Northern Ireland systems provide a guide for infrastructure and protocols, which could be informed by those NZ professionals (including Victim’s Advisers), witnesses and their families who have experience of CAs here.

In summary, the value of a CA/intermediary system lies in its focus on best evidence: No legal professional can argue that facilitating best evidence is contrary to the principles of the criminal justice system or unfair to either party. Importantly, their involvement with prosecution witnesses is seen as improving trial fairness, without diminishing the defendant’s rights (Lord Chief Justice of England and Wales, 2011).

The system also has clear benefits over training lawyers and judges, since we cannot expect to do more than give those groups generalised guidance on how to question children and other vulnerable witnesses. Conversely CAs provide *individualised* guidance for questioning a particular witness. Importantly, the introduction of intermediaries into the England/Wales courts seems to have helped

⁴⁴ Similarly, in England/Wales, judges and lawyers who expressed initial opposition—even hostility—to the idea of a third party intervening in courtroom questioning quickly changed their minds once they fully understood both the limits of the intermediary role (they do not prevent counsel from fulfilling their duties to their client) and the limits of their own expertise in questioning young and vulnerable people.

⁴⁵ This rapid up-take of CA services (including for young children as well as vulnerable adults) suggests it is unnecessary to consider the NZ Law Commission’s recommendation to expand s4’s definition of “communication disability” to explicitly reference children (NZ Law Commission, 2015). The definition is already proving wide enough.

to create a significant shift in courtroom questioning practices, making judges far less tolerant of old-style cross-examination.

Supporting cultural change: Helping the Courts to help themselves

The NZ Law Commission suggests that one of the best ways forward for child witnesses is through specialist courts. The Sexual Violence Court Pilot (integrating the WCWP trial model) provides a promising blueprint for such a court. As most children give evidence in sexual offence trials, a specialist sexual offences court would provide an integrated and improved approach for most children, whilst also providing a model for the general criminal court to draw upon when children appear in other types of cases. However, there are two provisos:

- It is more achievable to establish a set of specialist procedures that can operate within existing systems than to set up a completely separate court;
- To achieve any such change requires a change in the legal culture, and that change needs supporting.

Set up a good toolbox, don't build a whole workshop

Physically separate specialist courts are unlikely to succeed. Unless one can be established in every district, such courts become bottlenecks, reducing rather than increasing access to justice (Cashmore & Trimboli, 2005). As Lord Chief Justice Judge said when the UK Home Affairs Select Committee called for specialist sexual violence courts:

"Restricting the available venues to a few specialist centres is likely to lead to far greater waiting times because of the limited number of courtrooms, judges and staff . . . [and] are likely to prove expensive to set up and run." ("Complex sex abuse cases to be heard by select judges," 7 August, 2013)

Instead, the English trained and accredited a large cohort of judges to try sexual offences, aided by a flying squad of specialist judges with additional training for particularly complex trials. This might be called the "toolbox" over the "workshop" model, in that the former consists of a set of processes which can be carried into any court, rather than a fixed "workshop". Given our small, widely-distributed population and current fiscal constraints, as desirable as purpose-built courthouses undoubtedly are, a "toolbox" approach seems more achievable.

A toolbox approach is also more effective if the court encounters a child witness in another type of offence. As in the WCWP, specialist judges and counsel are unlikely to have any difficulty carrying their skills into a new arena. The possibility is that, as in England, practice with vulnerable people will improve across the whole criminal court.

Support cultural change

"Merely because there is put in place a new legislative framework and an implementation programme, the change that the framework envisages does not simply come about. . . . the real need [is] not yet more initiatives and reforms, but the cultural change that is necessary to make the new framework a reality." (Lord Justice Thomas P, as cited in Plotnikoff & Woolfson, 2009, pp. i-ii)

Long, repeated and expensive experience across jurisdictions shows that the only reliable way to change courtroom practice is for the courts themselves to take ownership of the issue; reform imposed on the Courts from outside is likely to fail (Darbyshire, 2014; Henderson, 2016b). Criminal lawyers and judges are, rightly, highly protective of the justice system and wary of any change that

might impact adversely on defendants' rights. With child witnesses, sabotage is easy: Most behaviours reformers seek to change are subtle and take place behind closed (courtroom) doors. Thus, despite decades of trenchant public criticism, cross-examination has continued relatively unchanged (Hanna et al., 2012b).

However, events in England/Wales over the last seven years show that, led by other lawyers, lawyers can change their behaviour quickly and comprehensively. In fact, so significant are the changes there that Lord Chief Justice Judge called them a "revolution" (The Rt Hon The Lord Judge, 2013, p. 1). Accordingly, there is great value in supporting the NZ District Court's own reform initiatives: the two current pilots.

The *Barker* cross-examination reforms (England/Wales)

"[These cases] effected a major change in the way in which cross-examination should be undertaken . . . underlin[ing] the simple proposition that the objective of cross-examination is to investigate the truth by questions which must be clearly understood by the witness." (The Rt Hon The Lord Judge, 2013, p. 8)

Starting in 2010 with *Barker*⁴⁶ the English Court of Appeal issued a series of decisions⁴⁷ methodically reviewing and rejecting a string of conventional cross-examination practices which the research identifies as forensically unsafe including developmentally inappropriate language and overly suggestive questions. The Court had no legislative assistance: All changes were made using the standard common law rules applicable in NZ and codified in our s85.

This new line of thought was then picked up and supported by the Judicial College in its sexual offences training course. Consequently, it now appears "generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary" (*R v Lubemba* [45]).

English judges have become far more willing to control inappropriate questioning, and judges and lawyers are increasingly flexible and innovative in adapting trial practice to vulnerable people, developments also supported by the example of intermediaries (Henderson, 2015b).

The English courts have proven that it is possible to achieve from inside what has eluded governments and academics for decades: real systemic reform of trial practice for children. That being so, judge-led initiatives such as the SVCP and WCWP can be seen as the beginning of similar changes here – all the more so because they were undertaken in the full knowledge of the English reforms. The next section considers how such judge-led changes might be supported.

Supporting judge-led reform

Many things auger well for the existing pilots. Both are conscientious in ensuring their practices have a base in the academic research, draw heavily upon established models in England and Australia, and have similar judicial education and accreditation programmes.

However, comparison with similar courts in England, Australia and South Africa suggests:

⁴⁶ *R v Barker* [2010] EWCA Crim 4.

⁴⁷ The first important decisions were *R v Edwards* [2011] EWCA Crim 3028; *R v W & M* [2010] EWCA Crim. 1926; *R v Wills* [2011] EWCA Crim. 1938; *R v Watts* [2010] EWCA 1824; *R v Farooqi* [2013] EWCA Crim. 1649. See also more recently the essential *R v Lubemba* [2014] EWCA 2064; and also *R v Boxer* [2015] EWCA 1684; *R v RL* [2015] EWCA 1215; *R v FA* [2015] EWCA 209. See also the case law section of *The Advocate's Gateway* (<https://www.theadvocatesgateway.org/cases>).

- The SVCP's efforts to fast-track trials through case management could be supported by reduced statutory pre-trial frameworks; and
- The courts would be assisted by specialist counsel, especially prosecutors, and specialist support services (see below for a discussion on accreditation and specialist legal services).

There is another, more significant challenge, however.

Can "trickle-up" succeed?

The Law Commission suggested that a District Court pilot could be a model for the High Court also: Reform could effectively "trickle up" the court hierarchy. It may not be so simple. Courts are intensely hierarchical. The English reforms were led by the most senior judges. A major factor in English trial judges' acceptance of the changes was their confidence that the appeal courts would support intervention and criticise inaction (Henderson, 2015b, 2016b).

Conversely in NZ things inadvertently began a little back to front. It would have been easier had the higher courts initiated these reforms. Instead, a major and positive shift is underway in the District Court, but the appellate courts could stymie it and their attitude is unknown.

While some recent appellate cases support vulnerable people's use of special measures⁴⁸ (as in *Hetherington*, the decision approving the use of a CA on the English model (see page 17), in *Metu*), the Appeal Court was critical of a WCWP judge's cross-examination direction.

One issue may be that while the pilot judges are all criminal specialists, many High and Court of Appeal judges, even those who sit on criminal appeals, are not. They may have little awareness of vulnerable witnesses' problems and thus take a conservative line. There is a real risk that, caught by surprise, an upper court could react so negatively to a District Court's innovation that they will squash the lower courts' confidence, as occurred after the Court of Appeal's 2011 pre-recording decision.

Setting up infrastructure to support CAs and introducing legislative reforms such as those proposed above to reduce delays, especially encouraging pre-recorded cross-examination, would send a strong signal to the upper courts that society supports trial reform.

Other proposed/possible modifications to pre-trial and trial processes

This final section reviews other possibilities for improving the courts' treatment of children, including pre-trial preparation for the children, and training for counsel and the judiciary; addressing inadequate courthouse facilities; amending the Evidence Act s85; judge-alone trials; and evaluation and data collection.

Pre-trial preparation

"An understanding of the [court] system provides a frame of reference from which to make sense of the experience and expectations of adults." (Saywitz & Snyder, 1993, p. 121)

If children are to testify effectively in criminal trials, they need *inter alia* to:

- Have a good understanding of court processes and the roles of courtroom participants (including their own role as a witness);
- Know what to expect of direct and cross-examination (including understanding the defence lawyer's role and why they ask the questions they do);

⁴⁸ See for example *R v Crozier* [2016] NZHC 1530 [14-16]; *R v Miller* [2016] NZCA 183 [29]; *Wealleans* [31]; *R v Stewart* [2015] NZHC 2471 [12].

- Manage their stress and anxiety;
- Monitor their comprehension and ask for clarification when necessary;
- Say, “I don’t know” and “I don’t remember” when, and only when, it is appropriate to do so; and
- Maintain accuracy in the face of misleading or suggestive questioning.

Pre-trial preparation programmes have been developed in NZ and overseas to increase children’s competencies in one or more of these areas (e.g., NZ’s Court Education for Young Witnesses). They are also identified as an important part of specialist courts in South Africa (Parkinson, 2016).

An American pre-trial preparation programme teaches witnesses aged 4 to 18 about court processes and the witness role; provides opportunities for children to practise response options (e.g., “I don’t know,” “I don’t remember”, “I don’t understand”); teaches stress-reduction techniques; and prepares children for testifying via a mock trial. The programme takes place over two one-hour sessions. An evaluation reported a significant decrease in children’s self-reported anticipatory anxiety after attending the programme (Nathanson & Saywitz, 2015).⁴⁹ The impact on the children’s actual performance at court was not assessed.

Pre-trial preparation is a bottom-up approach focusing on changing children’s knowledge base and their behaviours in response to courtroom questioning. This approach alone cannot eliminate the mismatch between many children’s competencies/knowledge and the demands of the court process (Saywitz & Snyder, 1993), however, it can help narrow that gap. In addition, it is worth investigating whether evidence-based components of pre-trial preparation programmes might be formally incorporated into CA practice. For example, intermediaries in England/Wales already teach and model the “rules” in an interview, such as when to say “I don’t know,” along with stress-management techniques (Plotnikoff & Woolfson, 2015). In this way, preparation can be tailored to the individual child (including when and where this preparation takes place) to complement the more general Court Education for Young Witnesses programme.

It may also be opportune to review the components, timing and delivery of the Court Education for Young Witnesses programme to consider whether changes are warranted and, further, to ascertain whether the information needs of young defendants testifying in the criminal courts are being met.

Table 4: Experimental studies investigating the effects of pre-trial preparation components

Comprehension monitoring: Experimental studies show that training, practice and feedback can help children aged 5 to 8 to better monitor their comprehension of legalese questions and to indicate when they do not understand a question (Peters & Nunez, 1999; Saywitz et al., 1999).⁵⁰ Children who received this training asked for clarification more often than children in other experimental conditions, resulting in greater accuracy. However, the trained children still attempted to answer some of the difficult questions. Furthermore, the approach relies on adult questioners having the skills to rephrase complex questions into simpler language when asked to do so—something which lawyers and judges are not consistently able to do (Hanna et al., 2012b).

Resistance to misleading questions: A series of NZ studies has explored the effects of an intervention which gives school-aged children aged under 12 practice and feedback on responding accurately to credibility challenging questions, a question type which is common in cross-examinations (Irvine et al.,

⁴⁹ Most of the participants were involved in abuse or neglect cases dependency court where children are examined by both counsel about the allegations.

⁵⁰ To our knowledge, there are no studies testing the impact of comprehension monitoring training of legalese with adolescents.

2016; O'Neill & Zajac, 2013; Righarts et al., 2013).⁵¹ In each study, children underwent the equivalent of direct examination followed by cross-examination in which credibility challenging questions were posed. Cross-examination reduced children's accuracy irrespective of preparation. However, children who received the intervention a week or less before cross-examination were more accurate under cross-examination than children who did not. While further research is still required to fully understand the effect of this intervention on children's testimony, the results are very promising.

Training and/or accreditation for judges

The English experience shows that judicial training and accreditation are powerful mechanisms for achieving reform (Henderson, 2016b; McDonald & Tinsley, 2011; Quirk, 2006). English judges nowadays are often sent on a course soon after appointment and must attend the course again at least every three years.

The continuation of the SVCP's commitment to select and train its judges is important, and even better would be if the Institute of Judicial Studies would eventually commit to cycling all of its judges through the course. Numerous accredited judges would alleviate problems with workload and possible burnout, and, as children appear across the courts, raise standards of practice across all courts.

Training and/or accreditation for counsel

There are already widespread calls for training and accreditation for counsel dealing with vulnerable witnesses and sexual assault cases (Henderson, 2016b; NZ Law Commission, 2015), including from the Bar itself (NZ Law Commission, 2015).

The English CPS has a long-standing requirement that its staff have specialist training on vulnerable witnesses, and the defence Bar has recently introduced training as a prerequisite for Legal Aid appointments in sexual offence cases (Henderson, 2015a).⁵²

NZ already accredits Lawyer for Child appointees in the Family Court and the Youth Court, and maintains a specialist SFO prosecution unit, but the Bar is likely to resist defence counsel accreditation on the basis that defendants should have a choice of counsel (NZ Law Commission, 2015). Legal Aid's graduated certification process, however, already operates as a form of accreditation, and could be expanded, as in England, to restrict appointment to trained counsel. Legal Aid restrictions cannot capture privately-retained counsel, but would capture the bulk of the Bar (NZ Law Commission, 2015).

Both Crown Law and the Public Defence Service could also make training mandatory for lawyers undertaking any sexual offence or vulnerable witness cases (NZ Law Commission, 2015), and make training a prerequisite for advancement.

Addressing inadequate courthouse facilities: Remote links and courthouse design

Under the Courts (Remote Participation) Act 2010, trial participants can—and do—testify from locations outside the courthouse. Allowing children to testify from suitable remote sites eliminates the risk of contact with the defendant and his/her supporters in the courthouse and lets children wait and testify in more comfortable and appropriate surroundings. It also has the potential to reduce the inconvenience and costs of travelling to a courthouse (including accommodation costs for witnesses

⁵¹ E.g., when a child says they did not get their photo taken, that response was challenged thus: "I think maybe you just forgot about getting your photo taken. That's what happened, isn't it?" If the child did not acquiesce, the next question was, "That might be what happened though, don't you think?" (Righarts et al., 2013, p. 364).

⁵² Personal communication with England/Wales practitioners and academics.

travelling from out of town). This measure could be adopted within the context of pre-recording children's entire evidence and the use of CAs.

Suitable remote link sites in Auckland include the multi-agency centres in Central Auckland (Puawaitahi) and Manukau. Judge David Harvey, director of the University of Auckland's NZ Centre for ICT Law, has further suggested that Skype is sufficiently encrypted for use in trials,⁵³ potentially widening the range of remote sites.

There are practical issues to consider (e.g., careful pre-planning for dealing with exhibits), but these can be overcome.⁵⁴ Furthermore, the quality of the remote site and the technology adopted are important considerations: The Australian Gateways to Justice project concluded that "a successful videolinked court encounter requires careful consideration of the technology, environments, personnel, protocols and legislation that enable their use" (Rowden, Wallance, Tait, Hanson, & Jones, 2013, p. 45).

In the longer term, improving courthouse facilities for child witnesses could be achieved by ensuring the design of new courthouses takes children's interests into account; retrofitting existing courts has been suggested by the NZ Law Commission (2015).

The District Courthouse in Perth comprises two parts joined by an atrium: a main court complex and a section housing the witness support service. Witnesses enter and exit the courthouse via the witness support service section and testify from there via CCTV. There is therefore no risk of coming into contact with the defendant and supporters within the courthouse (Sleight, 2011).

Increasing judicial intervention: Section 85 Evidence Act

Some commentators advocate for increasing judicial intervention in, or control of, inappropriate cross-examination by creating stronger or more detailed legislation as to what is inappropriate (for example, by amending s85 of the Evidence Act to state that judges may disallow questions which "intimidate" (McDonald and Tinsley (2011)).⁵⁵ However, the broad language of the existing s85 already gives judges wide scope for intervention and the common law has long prohibited intimidating (or "oppressive" or "browbeating") questions (Henderson, 2016a).

Another change to s85 that might encourage judges to intervene (and appellate courts to support them doing so) would be to replace the current discretion to disallow unacceptable questions with a duty to do so. A similar duty to disallow improper questions to vulnerable witnesses in the Victorian Evidence Act 2008 seems to have met with approval from the judiciary, Bar and other stakeholders, judging from the positive reaction to their Law Reform Commission's proposal to extend it to all complainants (Victorian Law Reform Commission, 2016).

Amending our s85 to impose an obligation to disallow unacceptable questions is unlikely in itself to "fix" cross-examination, but as a signal of Parliament's intentions it may encourage the District Court in its reforms and encourage the appellate courts to support them also.

⁵³ Presentation to the Legal Research Foundation's Evidence Act Seminar, 23 September, 2016.

⁵⁴ Counsel in one recent trial described sending the Registrar at the remote location a sealed envelope of defence exhibits. The Registrar then handed them out as counsel called for them, very much as she would normally (personal communication between second author and defence counsel).

⁵⁵ The NZ Law Commission has reserved judgement on this point (see sections 4.101-105, NZ Law Commission, 2015).

Judge-alone trials

The arguments for increasing judge-alone sexual offence trials are well made by McDonald and Tinsley (2011). In brief, trained and accredited judges may be less affected by the myths and prejudices which infect some jurors, and not need as much counter-intuitive expert evidence. Trials by judge alone are also much quicker to resolve (NZ Law Commission, 2015), although this may partly reflect the characteristics of cases taken to judge-alone trial and the faster pre-trial legislative schedule.

Although judge-alone trials confer some benefits, they do not obviate the need for stress-reduction measures (e.g., CCTV, EVIs), for controls on inappropriate questioning, or better pre-trial education, *inter alia*. Further, increasing judge-alone trials in serious and sensitive criminal matters will probably cause significant apprehension in the public and lawyers alike (including many judges).

Evaluation and data

Without good data, it is impossible to monitor child witness trials or evaluate the effectiveness of reform initiatives. The evaluation of the WCWP, for example, was of great use in the design of the SVCP. The SVCP in turn provides an important opportunity to gather information to discover whether it is achieving its aims, thus providing evidence for (or against) any future national roll-out. However, presently the Ministry of Justice only intends collecting very limited data, mainly on delay reduction, and not on the other key aim of the pilot: the reduction of re-traumatisation.

Recommendations

This section lists the key recommendations that emerge from our findings on how best to address the issues facing child witnesses.

Recommendations for addressing delays: Pre-recording children's entire evidence

1. **Pre-recording:** That the Evidence Act is amended to create a presumption in favour of pre-recording children's entire evidence before trial.
2. **Tighter statutory timeframes:** That the Criminal Procedure and Criminal Disclosure Acts be amended to introduce shorter pre-trial timeframes for sexual offences and a time limit on the disposition of children's evidence (that is, their participation in the process).
3. **Ground rules hearing:** That a mandatory ground rules hearing be convened between the judge and both counsel prior to the pre-recording hearing to determine processes and questioning practices.
4. **Evaluation:** That there be an evaluation of the impact of pre-recording on reducing delays and improving other aspects of witnesses' experience with the courts.

Recommendations for addressing courtroom language

5. **Communication assistants:** That infrastructure to support and extend current CA capacity be developed, drawing on the experience of (a) NZ practitioners with experience of this process; and (b) the England/Wales and Northern Ireland schemes. This should include, but not be limited to:
 - a. Ensuring eligibility criteria for engaging a CA are clear and justifiable on evidence-based, clinical grounds (e.g., age, language impairment or other disability). Consideration should be given to imposing a requirement that some groups of children are assessed by a CA, again, guided by evidence-based, clinical expertise.

- b. Ensuring only individuals with the requisite personal characteristics and professional skills are engaged to undertake CA work.
 - c. Developing a training, accreditation, and mentoring process for CAs.
 - d. Developing guidelines for CA practice including a code of practice and code of ethics.⁵⁶
 - e. Developing protocols to ensure the courts take a consistent approach, including clear delineation of roles.
 - f. Clarifying which budget will cover CA costs.
 - g. Developing a managed register of accredited CAs as a first port of call for police or legal professionals requesting their services.
 - h. Creating a statutory requirement that a pre-trial ground rules hearing be convened before the child testifies to allow the judge to determine processes to be followed.
2. **Training:** That a programme of judicial and counsel training on best practice in questioning children and vulnerable witnesses, and adapting trials to accommodate such people, be developed and provided on a regular basis.
 3. **Section 85 Evidence Act:** That consideration be given to imposing a duty to disallow unacceptable questions.
 4. **Evaluation:** That any expanded CA scheme be formally evaluated to provide feedback loops to inform future practice and development. This should include capturing witnesses' and legal professionals' perceptions via interviews.

Recommendations for addressing other issues

5. **Accreditation:** (a) That consideration be given to accrediting judges, prosecutors and Public Defence Service lawyers to take cases involving children and other vulnerable witnesses; (b) that consideration be given to consulting with the private defence bar on how accreditation of defence counsel might be achieved; (c) that a prerequisite for accreditation (and for maintaining such accreditation) be attending regular training on best practice in questioning children and vulnerable witnesses, and adapting trials to accommodate them.
6. **Access to CCTV:** That the Evidence Act 2006 be amended to include a presumption in favour of EVIs as evidence-in-chief and CCTV as the modes by which children testify (whether at trial or at a pre-trial hearing).
7. **Remote access:** That the use of remote sites for children's testimony be investigated to identify appropriate sites that facilitate best practice in terms of processes adopted.
8. **Courthouse facilities:** That consideration of vulnerable witnesses' interests be formally included in future plans for renovating or building courthouses. This should include consideration of the appropriateness of existing CCTV rooms, witness waiting areas, and access to facilities.
9. **Courtroom education / legal knowledge:** That the existing Court Education for Young Witnesses programme be reviewed to identify any gaps in provision and whether changes are warranted to components, timing, and delivery.
10. **Data:** That systematic and reliable data is collected on children's interactions with the courts. If this cannot be drawn from the existing CMS database, it could be collected prospectively until reliable information can be extracted from CMS (e.g., by having appropriate court staff, such as the Registrar at trial, collect relevant data manually on a short-form questionnaire every time a child testifies).

⁵⁶ For an example, see Ministry of Justice (England/Wales) (2015).

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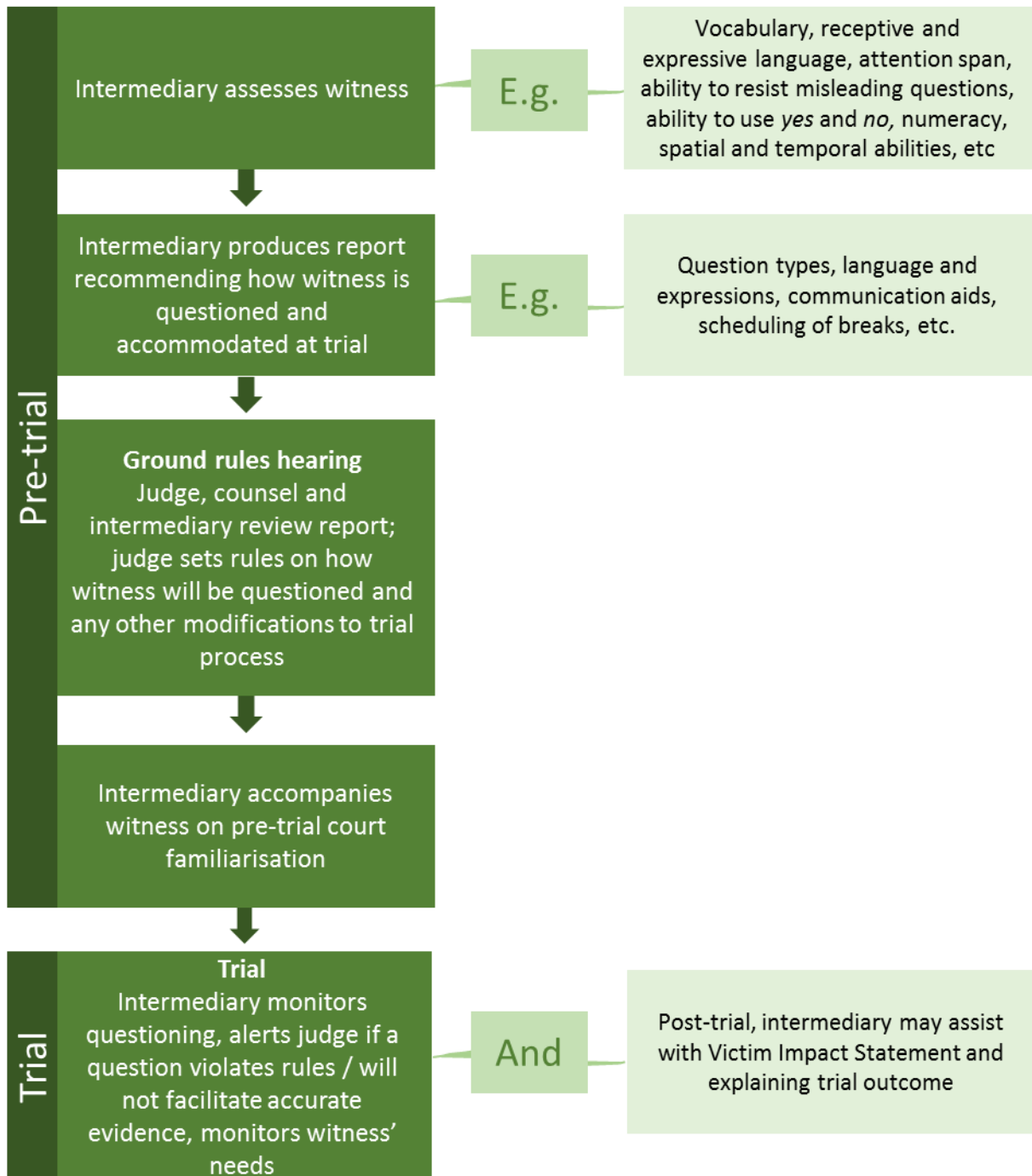
Child witnesses in the NZ criminal courts:

Issues, responses, opportunities

APPENDICES

2017

Registered intermediaries in England/Wales & Northern Ireland for child and other vulnerable witnesses



Registered intermediaries in England/Wales

Registered intermediaries are independent officers of the court whose role is to facilitate accurate communication between witnesses and the courts. Most are experienced speech language therapists (Plotnikoff & Woolfson, 2015). They are available in cases involving child witnesses or any other witness whose testimony is likely to be compromised as a result of mental disorder, significant impairment in intelligence or social functioning, or physical disability/disorder (Ministry of Justice (England/Wales), 2015, p. 18).⁵⁷

The process

The following outline of the process assumes that an intermediary is requested by the Crown Prosecution Service (CPS). In practice, they can be requested by police, solicitors, counsel or judges. Most requests for intermediaries in fact come from police to assist with EVIs although the intermediary then may go on to assist at court. In the following sections, “intermediary” refers to a “registered intermediary” unless otherwise indicated.

When the CPS identifies a witness as eligible for intermediary assistance, a request is made to the National Crime Agency’s Witness Intermediary Scheme Matching Service for an intermediary whose skill-set matches the witness’ specific needs. The intermediary selected liaises with the officer in charge to meet the witness and conduct an assessment(s) of the witness’ communicative competencies. The following illustrates the scope of the assessments one intermediary conducts with children:

“The [assessment] activities are designed to quickly assess the witness’ communication, vocabulary and attention; her ability to understand language and question forms and to use language to describe and clarify; whether she is aware that others have knowledge that she does not have; and her ability to refute inaccurate suggestions. I also assess her ability to concentrate, attend and to manage her arousal [anxiety] levels; I try out approaches for keeping her calm and engaged and introduce ‘talking rules’, such as ‘don’t guess’.” (Plotnikoff & Woolfson, 2015, p. 40)

Intermediaries also assess, *inter alia*, witnesses’ spatial and temporal abilities (e.g., *before v. after*, *under v. over*, time, distance and so on), numeracy, understanding of non-literal language, short-term memory, and whether they can reliably use *yes* and *no* (Plotnikoff & Woolfson, 2015).

If the police have already interviewed the witness, the intermediary will view the EVI or read the statement after making the initial assessment; they may then adjust their original assessment if required. Based on this assessment and any other information available with the witness’ consent (e.g., from other professionals familiar with the witness), the intermediary prepares a report outlining how best to facilitate two-way communication between the witness and the court.

This report is appended to an application to the court for special measures and is also sent to defence. If the judge grants the application, a pre-trial directions or “ground rules” hearing is obligatorily held between (minimally) the intermediary, both counsel and the judge. The purpose of this meeting is to discuss the intermediary’s report and agree on how the witness will be questioned, any modifications to court processes required (e.g., how often breaks should be taken, communication aids required), and how the intermediary will alert the court to any communication issues at trial. It is also an opportunity for the intermediary to clearly explain his/her role in the proceedings. The judge may also direct that the intermediary examines counsels’ proposed questions before trial “to advise on their

⁵⁷ The role has expanded over time. Intermediaries are now being used in the Family Court, various tribunals, in suspect identification processes, and extradition processes (Plotnikoff & Woolfson, 2015).

suitability in terms of the witness' communication needs" (Ministry of Justice (England/Wales), 2015, p. 24).

The intermediary accompanies the witness on their pre-trial court familiarisation visit organised by the Witness Service. The intermediary may inform the Witness Service in advance of "any relevant matters regarding the witness's care and well-being that might impact on the quality of the witness's evidence" (Ministry of Justice (England/Wales), 2015, p. 24). This might involve helping Witness Service personnel adjust their language to match the witness' competencies or alerting them to specific issues, such as the requirements of a witness who might experience incontinence or planning the visit to accommodate an autistic witness' fear of using lifts (Plotnikoff & Woolfson, 2015). During the court visit, the witness may practise answering questions via CCTV ("live link"). The questions posed must be unrelated to the case and approved by the CPS beforehand. The intermediary also sits with the witness when they review their EVI before trial.

At trial, the intermediary sits with the witness either in the CCTV room or by the witness box and monitors the questions posed, as well as monitoring the witness' needs (e.g., signs that the witness needs a break). When a question violates the agreed ground rules or is otherwise unlikely to facilitate best evidence, the intermediary intervenes as per the agreed-upon method of doing so. If the judge allows the intervention, the judge then typically invites counsel to rephrase the question. If they are unable to do so, the intermediary may be invited to rephrase the question for them. Where a witness' communication needs are acute, the intermediary may have to take a more active role, such as relaying the witness' answers to the court. At the conclusion of the trial, the intermediary may also assist the witness with their Victim Impact Statement and explain the trial outcome.

Table 5: Example of intermediary involvement

"Melissa acted as intermediary for G, a girl who had just turned four at the time of the trial, 21 months after the alleged offence. ... The judge convened a three-hour ground rules hearing in advance of the trial and required everyone involved to attend, including the usher, clerk and Witness Service. Every aspect of how G would be dealt with was discussed. Melissa then met both barristers to explain her use of communication aids to support their questions; these included miniature figures, furniture and cardboard shapes to represent the house where the offence was alleged to have taken place. The police obtained child-sized furniture for the [CCTV] room from a local nursery and camera angles were adjusted. Melissa accompanied G on three familiarisation visits to the court, on one of which she met the judge and barristers. ... G also practised on [CCTV], answering non-evidential questions from the usher, who had already met G twice. G's cross-examination, conducted in 10-minute sessions, went smoothly and she was able to show and tell what happened to her. When G had finished, the judge came to the witness room to thank her. (The defendant was found guilty and received a long custodial sentence)." (Plotnikoff & Woolfson, 2015, pp. 144-145)

Perceptions of the intermediary scheme

Evaluations have demonstrated that intermediaries enjoy the widespread and strong support of legal professionals, including judges, counsel and police. Central to this enthusiasm for intermediaries is their neutrality, their professionalism, and the fact that they have brought into the courts a new and valuable set of language and other skills. They have opened up other professionals' eyes to the difficulties young and vulnerable witnesses can have in communicating with the courts:

"There is now a much greater awareness of the needs of a vulnerable witness and this has led to simpler, swifter and more effective cross-examination." (Judge, as cited in Plotnikoff & Woolfson, 2015, p. 283)

Police officers, judges, and counsel all report that their own practices have changed as a result of working with intermediaries (Henderson, 2015c; Plotnikoff & Woolfson, 2015). Some believe that intermediary reports empower judges to modify processes to facilitate best evidence (Henderson, 2015c). Certainly, through these reports, judges have a great deal more information about the witness to guide them in controlling questioning than would ordinarily be the case (Cooper & Wurtzel, 2014). It is fairly standard for advocates to work through their questions *before* trial with the intermediary—an idea initially met with hostility by some advocates, who subsequently decided it was not a big deal after all (Henderson, 2015c). Intermediaries have helped focus judicial attention on the forensic dangers of traditional tactics of cross-examination and may have prompted the (effective) ban on the use of tagged questions when the witness is a child.⁵⁸ Judges are routinely accepting intermediaries' recommendations that leading questions be avoided with witnesses where there is a high likelihood that such questions would elicit unreliable responses (including where this means finding other ways to meet the duty to put the case).

For a short video on how intermediaries work in England/Wales and questioning vulnerable people at trial, see *A Question of Practice*, at <http://www.theadvocatesgateway.org/a-question-of-practice>.

Supporting infrastructure

The England/Wales Ministry of Justice's Intermediaries Registration Board has responsibility for the governance of the Witness Intermediary Scheme (WIS). Quality assurance, regulation and monitoring falls to the WIS's Quality Assurance Board (Ministry of Justice (England/Wales), 2015).

Intermediaries are recruited on the basis of personal qualities and professional skills. They must complete an approved training, assessment and accreditation process before becoming registered; training is conducted by barristers and registered intermediaries (Plotnikoff & Woolfson, 2015). The Ministry of Justice has developed an intermediary code of practice and code of ethics, as contained in the *Registered Intermediary Procedural Guidance Manual* (see Ministry of Justice (England/Wales), 2015). There is now a mentoring process in place for new recruits.

The National Crime Agency maintains the intermediary register and manages requests for their services. When such a request is made, the Agency matches the witness in question with an intermediary who has the appropriate skills and expertise to meet that particular witness' communication needs.

The Northern Ireland Registered Intermediary Scheme

An RI scheme was piloted in Northern Ireland from May 2013 to November 2014. Unlike the England/Wales scheme, the Northern Ireland scheme allows defendants to access RI services, but only for the defendant's oral evidence, and ground rules hearings are not mandatory. Otherwise, the two schemes are very similar (Cooper & Wurtzel, 2014).

The pilot review provides only brief details about the evaluation; in only four cases did an intermediary assist at trial, limiting the ability of judges to comment and limiting assessment of RIs' contributions to the trial process. Nonetheless, feedback on intermediaries received from the judiciary, solicitors, police, the Public Prosecution Service and others, was "overwhelmingly positive" (Department of Justice, 2015, p. 27).

⁵⁸ See *R v Edwards* [2011] EWCA Crim 3028; *R v W & M* [2010] EWCA 1926.

The findings reported are similar to those found for the England/Wales scheme and include the following benefits:

- **Increased access to justice** for vulnerable people, including young children.⁵⁹
- **Increased confidence in the criminal justice system** on the part of vulnerable witnesses' families and carers.
- **Potential cost savings** due to defendants pleading guilty when they realise the complainant is ready and able to testify at court.
- **Improving investigative processes:** Police officers' perception that their communication skills had improved through observation of RI practice.
- **Added benefits:** RIs helped explain court processes to witnesses and advised police officers on how to explain the caution to suspects.

The concerns raised by the review included:

- That **cost** implications might limit the ability of legal professionals to engage RIs.
- That **defendants** need RI assistance throughout the entire trial, not just when testifying.
- That **ground rules hearings** were *not* mandatory in the pilot—respondents felt they should be obligatory, as the ground rules hearings were highly regarded.
- That **awareness** of the RI scheme and the RI role be increased.

⁵⁹ Although intermediary involvement in police interviews could increase the time spent planning for and conducting them (e.g., some interviews had to take place over three or more sessions), the benefits of achieving full disclosure were perceived to outweigh the costs (Department of Justice, 2015, see p. 18).