THIS IS A "COMPELLING CASE"

THE CASE FOR PRE-RECORDING THE ENTIRE TESTIMONY OF CHILD WITNESSES IN AOTEAROA NEW ZEALAND

EVA PEARSON

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To my friends – old and new, north and south – for getting me to where I am today.

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Finally, an acknowledgment and a reminder that all cases and empirical research referenced in this dissertation involve real children, most of whom have experienced or witnessed unimaginable horrors. Let that be a reminder to us of what is at stake, and an incentive to work toward a justice system that lessens, rather than worsens, the burdens on these children.

All errors and omissions remain my own.

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“If the law remains deaf to the voices and needs of the children it purports to protect from harm, it fails by any means of what constitutes justice.”

Christine Eastwood

INTRODUCTION

In 2015, the Ministry of Justice estimated that approximately 750 children give evidence in criminal trials each year.[1] This dissertation is written in response to concerns that current practice – live cross-examination at trial – does not elicit the best quality evidence from young witnesses. The stressful and confrontational nature of the adversarial trial system has proven damaging for child witnesses and has in turn reduced their ability to present the most accurate and reliable evidence possible. This has consequences that extend beyond just the individual child to impact the overall efficacy and fairness of the justice system. As s 6 of the Evidence Act 2006 recognises, promoting fairness to all participants in the justice system is essential to securing the just determination of proceedings.

This dissertation proposes pre-trial pre-recording of child witnesses' entire testimony as a readily available solution to effectively mitigate these concerns. Pre-recording has been used sparingly in Aotearoa, due largely to Court of Appeal precedent in *M v R* which held that it should be reserved for "compelling cases" only.[2] I will argue that current treatment of children in our criminal justice system supports the argument that a "compelling case" presents itself every time a child is required to give evidence.

Chapter One outlines how child witnesses currently give evidence. It traverses the barriers current practice has placed in the way of both a positive experience for young witnesses and the elicitation of the best quality evidence. Chapter One also details New Zealand's fleeting experience with pre-recording entire testimonies and the Court of Appeal decision that put a stop to it.

Chapter Two describes the pre-recording regimes utilised in two comparable jurisdictions: Western Australia and England and Wales. The purpose of Chapter Two is to illustrate that pre-recording the entire testimony of young witnesses can and does work successfully.

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[1] Cabinet Domestic Policy Committee *Child Witnesses in Criminal Courts: Proposed Reforms* (29 June 2011) DOM Min (11) 10/1 at 1.

[2] *M v R (CA335/2011); R v E (CA339/2011)* [2011] NZCA 303, [2012] 2 NZLR 485 at [41]: to be referred to as "*M v R*" throughout this dissertation.

The appropriateness of reform will depend on a balancing exercise of the advantages and disadvantages of pre-recording evidence. This is what Chapter Three endeavours to do. Chapter Three begins by addressing the broad fair trial concerns that underpin the majority of opposition to pre-recorded evidence. It then explains and rebuts the disadvantages cited in *M v R* and follows with discussion of the advantages of pre-recorded evidence.

In light of the conclusions drawn in Chapter Three, Chapter Four recommends a two-pronged approach to reform: amending the Evidence Act to include a presumption that child witnesses have their entire testimony pre-recorded; and encouraging the legal profession to pre-record on their own initiative.

For ease of reference, when this dissertation refers to pre-recording a child witness' "entire testimony", that is a child's evidence-in-chief, cross-examination and re-examination. References simply to "pre-recording" or "pre-recorded evidence" are references to pre-recording the entire testimony, at a pre-trial hearing (a "pre-recording hearing"). Any reference to pre-recording only part of a testimony will be specified. Furthermore, I use the terms "child witness" and "young witness" interchangeably. In all instances I am referring to child witnesses as defined by the Evidence Act: a witness under the age of 18.[3]

It is also my opinion that eligibility for pre-recording should be extended to adult victims of sexual and family violence. However, this is outside the scope of my dissertation. For more information, see the Law Commission's recommendations in *The Justice Response to Victims of Sexual Violence* and the *Second Review of the Evidence Act 2006*.[4]

[3] Section 4 of the Evidence Act 2006.

[4] Law Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015); and Law Commission, *Second Review of the Evidence Act 2006* (NZLC IP42, 2018).

CHAPTER ONE: CURRENT PRACTICE IN AOTEAROA

Chapter One outlines how children are currently testifying and the ways in which this impacts witness experience and quality of evidence. The most apparent barriers are delays to trial and cross-examination methods. These have the effect of eroding children's memory and subjecting them to undue stress, the consequence being diminished quality of evidence. Chapter One also addresses the extent to which pre-recorded evidence has been utilised in Aotearoa, as well as the *M v R* Court of Appeal decision, which has narrowly limited the prospects for pre-recorded evidence.

I Child Witnesses as Sexual Violence Complainants

The majority of child witnesses in criminal trials in Aotearoa appear as complainants in sexual violence cases.[5] In approximately half of reported sexual violence incidents, the victim is a young person.[6] The nature of sexual violence is such that there are rarely other witnesses with corroborating evidence.[7] Consequently, testimonies of young witnesses in these cases are generally the cornerstone of the prosecution case and thus are intensely scrutinised at trial.[8] Successful prosecution then becomes heavily dependent upon the child's comprehensive recall of detailed facts.[9] Accordingly, the problems identified in Chapter One are particularly pertinent when the child witness is a sexual violence complainant. As such, the experiences of these complainants have been used to inform the following analysis.

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[5] Emma Davies and others "Prerecording children's entire testimony" [2011] NZLJ 335 at 337; Isabel Randell and others *Young Witnesses in New Zealand's Sexual Violence Pilot Courts* (New Zealand Law Foundation, May 2020) at 7 and 12; and Kim McGregor *Child Witnesses in the New Zealand Criminal Courts: Issues, Responses, Opportunities* (Chief Victims Advisor to Government, December 2019) at 6, 20 and 22.

[6] Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (2019) at 1.

[7] Randell and others, above n 5 at 7; McGregor, above n 5 at 6; and Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.8.

[8] McGregor, above n 5 at 6; Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.8.

[9] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.8.

II Delays

As it currently stands, young people face significant delays between when an offence is allegedly committed or reported and giving evidence at trial. Presently, there is little systematic data relating specifically to cases involving young witnesses in our court system.[10] This makes it difficult to understand and tackle procedural issues that arise when children give evidence, like delay. However, small scale studies and anecdotal evidence provide valuable insight.

Dr Kirsten Hanna reviewed a sample of trials in various District and High Courts from 2008-2009 that involved a witness under the age of 18 giving evidence.[11] The study found the time between reporting alleged offending and attending trial averaged between 19-20 months. In the 2019 Chief Victims Advisor report, Dr Kim McGregor observed that there had been no studies since Hanna's to show whether delays for child witnesses had improved or worsened.[12] However, McGregor did comment that anecdotal evidence from legal practitioners suggests the situation has not improved in many parts of Aotearoa.[13]

Given most child witnesses are sexual violence complainants, it is worth commenting on delays in sexual violence trials. Sexual violence trials in the District Courts from 2014-2015 took on average 443 days from the date of filing charges until the end of the proceedings.[14] These figures do not distinguish between child and adult witnesses. The Sexual Violence Pilot Courts in Whangārei and Auckland are aimed at reducing these delays through the use of robust case management models.[15] Qualitative data from the Ministry of Justice has shown that, although the pilot courts experienced minor increases in delay at case review stages, the time from Police involvement to trial start date and case disposal reduced considerably, as compared to pre-pilot

[10] McGregor, above n 5 at 16.

[11] Kirsten Hanna "The Police and Court Processes" in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, Auckland, 2010). The study reviewed 46 out of the 69 trials in the District Courts at Auckland, Manukau, Wellington and Christchurch; and the High Courts at Auckland, Wellington and Christchurch. This research involved analysing questionnaires filled out by 71 child witnesses, who ranged from age in 6 to 17.

[12] McGregor, above n 5 at 8

[13] McGregor, above n 5 at 8

[14] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.6: on the basis of figures provided by the Ministry of Justice.

[15] These pilot courts were rolled out in December 2016 within the Whangārei and Auckland District Court precincts and have since become permanent fixtures.

sexual violence trials in Whangārei and Auckland.[16] Again, this data does not distinguish between child and adult witnesses

In May 2020, a study on young witnesses in the Sexual Violence Pilot Courts found the average time between a Police complaint and date of trial was 13.2 months.[17] Delays for sexual violence trials in non-pilot courts ranged from seven to 24 months.[18] While this study involved only a small sample size and therefore cannot be presumed representative of all child witnesses in Aotearoa, the consistency with previous studies that pre-date the pilot courts suggests long delays to trial for young witnesses are a pressing concern.[19]

As compared with the 2008-2009 study which showed child witnesses were facing 19-20-month delays – notwithstanding the focus on child witnesses generally, rather than child witnesses in sexual violence trials – these figures do represent a small improvement. Despite this, the average delay for child witnesses remains over a year, with some waiting up to two years.[20] All participants in the May 2020 study identified reduction in delay as a necessary change in court processes for young witnesses.

III How Children are Currently Giving Evidence

According to s 83 of the Evidence Act, the ordinary way of giving evidence in a criminal proceeding is orally in a courtroom.[21] However, s 105(1)(a) establishes alternative ways of giving evidence: (i) while in the courtroom but unable to see the defendant; (ii) from an appropriate place outside the courtroom; or (iii) by video record made before the hearing of the proceeding.[22] Pursuant to s 107, children are entitled to give their evidence in an alternative

[16] Sue Alison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited for the Ministry of Justice, June 2019) at 3: in Whangārei the delay was reduced by 39 percent and in Auckland the delay was reduced by 30 percent.
[17] Randell and others, above n 5 at 47.
[18] Randell and others, above n 5 at 47.
[19] See the studies referenced at 36 of Randell and others, above n 5.
[20] Randell and others, above n 5 at 55.
[21] Or by an affidavit filed in the court.
[22] Section 103 of the Evidence Act 2006 grants a judge power to permit a witness to give their evidence-in-chief and be cross-examined in alternative ways.

way.[23] The Court of Appeal has regularly stated that it is common for young complainants to give their evidence-in-chief by way of video record.[24]

The majority of young people who report alleged offending are forensically interviewed by a specially trained Police Officer or an Oranga Tamariki social worker, typically within two weeks of the complaint.[25] These interviews are routinely video recorded and referred to as an Evidential Video Interview or an EVI. EVIs are often used as evidence-in-chief at trial, as noted by the Court of Appeal.[26] Usually, the witness will watch their EVI before being cross-examined at trial. Audio-visual link, or AVL, has become the default method for cross- and re-examining young witnesses in practice.[27] This involves the witness being questioned at the trial but from a separate location, usually a room within the courthouse.[28]

Many young witnesses describe cross-examination at trial as traumatic.[29] Child witnesses often wait at court for long periods of time before giving evidence, while the jury is empaneled or last-minute legal issues are addressed. In Hanna's 2008-2009 study, the average time children spent waiting at the courthouse was two hours and 42 minutes.[30] Only 58 percent of the witnesses completed their evidence on their first day at court, with the remaining having to

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[23] Section 107A of the Evidence Act 2006 preserves the child witness' ability to apply for a direction to give their evidence in the ordinary way should they wish to.

[24] See the examples cited in Simon France (ed) *Adams on Criminal Law – Evidence* (online loose-leaf ed, Thomson Reuters) at EA103.01: *R v M (CA590/09)* [2009] NZCA 455 at [39]; *R v E (CA308/06)* [2007] NZCA 404 at [17; and *E (CA799/12) v R* [2013] NZCA 678 at [56].

[25] Ministry of Justice *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system: Issues Paper* (2010) at [15].

[26] Above n 24; Cabinet Domestic Policy Committee, above n 1 at 2; Emma Davies and Kirsten Hanna "Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases" (2013) 46(2) Aust NZ J Criminol 289; Hanna, above n 11 at 41; Kirsten Hanna, Charles Crothers and Clare Rotherham "Children's Access to Alternative Modes of Evidence" in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, Auckland, 2010) at 99-100; Law Commission *Second Review of the Evidence Act 2006*, above n 4 at 9.10; and Randell and others, above n 5 at 8.

[27] Alison and Boyer, above n 16 at 60; Hanna, Crothers and Rotherham, above n 26 at 100-101; Hanna, above n 11 at 41-42; and Randell and others, above n 5 at 8.

[28] Ministry of Justice, above n 25 at [25] – [26].

[29] Cabinet Domestic Policy Committee, above n 1 at 2; Emily Henderson "Innovative Practices in Other Jurisdictions" in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, Auckland, 2010) at 119 and 146; Alison and Boyer, above n 16 at 66; Kirsten Hanna and others "Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?" (2012) Psychiatry, Psychol Law 19:4 at 539-542; McGregor, above n 5 at 6, 9 and 14; Ministry of Justice, above n 25 at [1], [17] and [106]; and Randell and others, above n 5.

[30] Hanna, above n 11 at 49.

attend court for two to four days.[31] In some cases, the young witness did not give evidence on the day they were called, with the average wait before they could leave for the day being four and a half hours.[32]

IV Problem Definition

> *"I was pretty nervous. I was scared most of the time."*[33]
>
> *"We had to remember every single thing, every single day…"*[34]
>
> *"It should never take that long because that whole time you can't really carry on with your life, you can't really move forward…"*[35]
>
> *"I just didn't want to be here, like, I didn't want to be on earth."*[36]

These delays make up a significant proportion of a child's lifetime, during critical stages of social and cognitive development. This causes at least two fundamental problems. Firstly, a child's memory is particularly vulnerable to erosion over long periods of time,[37] especially memory of peripheral details, which are often the focus of cross-examination.[38] Secondly, waiting over a year to testify places immense stress on children and frequently leads to mental health problems and behavioural changes. Separately, these issues have the potential to

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[31] Hanna, above n 11 at 49.

[32] Hanna, above n 11 at 49. Notably, the District Court in 2017 introduced generic guidelines aimed at improving the quality of young witness' evidence by reducing stress and tiredness. The guidelines recommend that young witnesses arrive at court just before they are scheduled to give evidence; that children give evidence first thing in the morning; and that children testify within normal school hours.

[33] A quote from a young witness in the Sexual Violence Pilot Court: Randell and others, above n 5 at 18.

[34] A quote from the caregiver of a young witness in the Sexual Violence Pilot Court: Randell and others, above n 5 at 19.

[35] A quote from a young witness in the Sexual Violence Pilot Court: Randell and others, above n 5 at 20.

[36] A quote from a young witness in the Sexual Violence Pilot Court: Randell and others, above n 5 at 21.

[37] See the studies cited at: Hanna and others, above n 29 at 530; Hanna, above n 11 at 26-27; Emily Henderson "Legal Argument" in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, Auckland, 2010) at 180; Laura Hoyano and Caroline Keenan "The Child Witness" in *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, New York, 2007) at 638-639; McGregor, above n 5 at 8; Ministry of Justice, above n 25 at 11; and Randell and others, above n 5 at 7.

[38] Davies and others, above n 5 at 336; Henderson, above n 37 at 180; and McGregor, above n 5 at 8.

significantly reduce the quality of evidence elicited from young witnesses. Compounded, we may begin to question the efficacy of the justice process.

A Memory Erosion

Substantial bodies of research have shown that long delay periods negatively impact a child's memory retention.[39] There are proven correlations between delay to trial and decline in a young person's ability to accurately recollect detailed information of the alleged incident, as well as increased difficulty differentiating between different episodes of abuse.[40] The total amount of information a child can accurately recall reduces substantially over time, and the passage of time is also linked to corresponding increases in erroneous recall.[41] This inevitably impacts the quality of evidence given and potentially gives rise to inconsistencies in a witness' testimony, in turn undermining their credibility.[42] Furthermore, the suggestibility of a child increases over time, creating further risk of memory contamination.[43] An inability to comprehensively recall facts is particularly problematic for young witnesses in sexual violence trials, as the prosecution relies heavily on their evidence.[44]

If young witnesses were not waiting upwards of 12 months before testifying at trial, evidence could be preserved at a time when their memory is fresh and therefore more likely to be accurate and reliable.[45] When a child is testifying from an eroded memory and their performance and the accuracy of their answers are subsequently undermined, we must necessarily see a negative impact on the adequacy of decisions made by legal fact-finders.[46]

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[39] See the studies cited at: Hanna, above n 11 at 26-27.
[40] Hanna and others, above n 29 at 541.
[41] See the studies cited at above n 37.
[42] Hanna, above n 11 at 26-27.
[43] Lindsay Malloy and Jodi Quas "Children's Suggestibility: Areas of Consensus and Controversy" in Kathryn Kuehnle and Mary Connell (eds) *The Evaluation of Child Sexual Abuse Allegations: A Comprehensive Guide to Assessment and Testimony* (Wiley, Hoboken, 2009) at 278.
[44] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.15.
[45] Elisabeth McDonald and Yvette Tinsley "Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges" (2011) 42 VUWLR 705 at 706.
[46] Randell and others, above n 5 at 8.

B Stress

Alongside eroding memory, long delays cause immense stress. It is frequently reported that the period awaiting trial adds stress over and above that caused by the original offending.[47]

Long waits to trial are detrimental to young witnesses' psychological recovery from the alleged offending.[48] This is primarily because witnesses are required to retain the details of the offending in their mind. Participants in the May 2020 study on young witnesses in the Sexual Violence Pilot Courts reported that the impending trial was constantly on their minds. Many experienced anticipatory anxiety during this period, exacerbated by their original victimisation and inability to move on with their lives.[49] It is common for this period of tremendous stress to result in behavioural changes for young witnesses. A multitude of studies have reported that pre-trial anxiety can manifest itself in distressing ways for children, including eating disorders, self-harm, bed-wetting, nightmares, depression, aggression, and sickness.[50] The period awaiting trial also often interferes with child witnesses' desire or ability to attend school.[51]

All participants in the May 2020 study reported feeling restrained in what they could disclose to friends and family about the offending. The study noted, whether self-imposed or upon the advice of others, young witnesses avoided discussing their situation with others for reasons of sensitivity, as well as a belief they were not allowed to for legal reasons.[52] This is consistent with other findings that waiting for trial impacts a witness' personal and family circumstances, particularly in cases of sexual violence where most complainants are in family relationships with the accused.[53] Hanna's 2008-2009 study found many young witnesses experienced social exclusion and disruption to their schooling and family life while awaiting trial.[54]

[47] Randell and others, above n 5 at 16-17.
[48] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.8.
[49] Randell and others, above n 5 at 19.
[50] See the studies referenced at: McGregor, above n 5 at 8.
[51] Randell and others, above n 5 at 18.
[52] Randell and others, above n 5 at 18.
[53] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.13.
[54] Hanna, above n 11 at 26.

When child witnesses are facing long periods of pre-trial delay, these additional stressors are dragged out. The result is that, at present, the justice system intensifies and adds new stress to that already experienced by some of its most vulnerable participants.

C Cross-examination

Young witnesses also face enormous stress when cross-examined live at trial. The physical design of courthouses mean that witnesses often share waiting areas and facilities with the defendant and the jurors.[55] It is commonly reported that fear of seeing the defendant or their supporters at court is a major source of anxiety, and that actually coming face-to-face with them is distressing at an already traumatic time.[56] Further, the formality of the courthouse – designed to emphasise the gravity of participation in the justice process – can be inherently intimidating for children.[57] This additional stress has potential to further diminish a young witness' memory recall.[58]

It is critical to note that any reform aimed at improving the experiences of children in our justice system would be incomplete, and therefore less effective, without reforming the way young witnesses are questioned, particularly during cross-examination. While an in-depth discussion of this issue is outside the scope of this dissertation, a large body of research indicates that current methods of cross-examination run contrary to best practice where children are involved.[59] Common and attested methods of cross-examining children use developmentally inappropriate questioning that frequently exceeds linguistic, cognitive and communicative abilities.[60] This includes using complex language, asking complicated and leading questions,

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[55] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.3.

[56] Judy Cashmore "Child Witnesses" in Geoff Monahan and Lisa Young (eds) *Children and the Law in Australia* (LexisNexis Butterworths, Sydney, 2008) at 533; McGregor, above n 5 at 16; and Christine Eastwood "The experience of child complainants of sexual abuse in the criminal justice system" (2003) Trends & issues in crime and criminal justice 250 at 3.

[57] Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.133; McGregor, above n 5 at 16; Ministry of Justice, above n 25 at [36] and [134]; and Randell and others, above n 5 at 26.

[58] Ministry of Justice, above n 25 at [36].

[59] See the studies cited at: Hanna and others, above n 29 at 530-531; John Spencer "Conclusions" in J R Spencer and Michael E. Lamb (eds) *Children and Cross-Examination: Time to Change the Rules?* (Bloomsbury Publishing, Oxford, 2012) at 178-179; McGregor, above n 5 at 10-11 and 13-15; Ministry of Justice, above n 25 [13]; and Randell and others, above n 5 at 12.

[60] Cabinet Domestic Policy Committee, above n 1 at 3; McGregor, above n 5 at 13; and Randell and others, above n 5 at 12.

suddenly shifting from one topic to another, and suggesting the witness is lying.[61] These tactics are counterproductive to adducing best evidence.[62] Furthermore, they are particularly distressing for young witnesses. In Hanna's study, 30 percent of the child witnesses were reduced to tears upon cross-examination.[63] The May 2020 study concluded that current methods of cross-examination are "detrimental to the psychological safety of young people."[64]

As it currently stands, participation in the court process has significant potential to re-traumatise and re-victimise young witnesses, creating additional harm in the short and long term. This has implications that extend beyond the individual wellbeing of child witnesses. Firstly, all participants in the May 2020 study opined that the length of delay decreased their willingness to participate in the court process.[65] This may impact the perceived accessibility of justice, as well as further decrease the number of offences reported to Police. Reporting of sexual violence, the offending which most frequently brings young people to court, is already devastatingly low. Secondly, if courts are not eliciting the most accurate and reliable evidence possible, our justice system is failing at ensuring fairness to all of its participants.

V The Current Position on Pre-recording Entire Testimony

There has been limited use of pre-recording witnesses' entire testimony in Aotearoa. In 2008, the High Court granted two separate applications for vulnerable adult witnesses to have their evidence-in-chief, cross-examination and re-examination pre-recorded. In *R v Kereopa*, the witness was in the terminal stages of cancer and unlikely to be alive at the time of trial.[66] Upon unopposed application by the Crown, the witness' entire testimony was taken by video record at a pre-trial hearing.[67] In *R v Willeman,* the adult complainant was tetraplegic and severely physically handicapped.[68] The complainant was unable to speak and could communicate only

[61] Hanna, above n 11 at 54; McGregor, above n 5 at 13-14; Ministry of Justice, above n 25 at [19] – [20]; and Randell and others, above n 5 at 61-62.
[62] See the studies cited at above n 59.
[63] Hanna, above n 11 at 54.
[64] Randell and others, above n 5 at 26.
[65] Randell and others, above n 5 at 20.
[66] *R v Kereopa* [2008] DCR 29 (HC).
[67] At [11]. The pre-trial pre-recording hearing took place at the Opotiki District Court.
[68] *R v Willeman* [2008] NZAR 664 (HC).

by moving his big toe or blinking. The complainant's entire testimony was taken from his home, with the accused observing via AVL from a different location.[69]

In 2010, the Auckland Office of the Crown Solicitor endeavoured to circumvent pre-trial delays in the Auckland District Court by applying to have the entire testimonies of child complainants pre-recorded at pre-trial hearings, relying on s 105(1)(a)(iii) of the Evidence Act.[70] The first of these applications was granted in *R v Sadlier* by Judge Wade.[71] In *R v Sadlier* the defendant was charged with a number of sexual violence offences and the application was in respect of two child complainants.[72] Judge Wade opined that there were substantial advantages to be gained from pre-recording the witnesses' entire testimony, including the fact that memories would be fresher and the complainants would sooner be able to close the "unhappy chapter" in their lives which resulted from the offending.[73] Accordingly, an order was made for the complainants' entire testimony to be pre-recorded, obviating their need to attend the trial in person.[74] Judge Wade anticipated that Aotearoa would soon develop its own pre-recording protocol, but suggested that, until then, the New Zealand Courts follow the format provided as an appendix to the judgment.[75]

In response to *R v Sadlier,* the Ministry of Justice in early 2011 released a memorandum outlining the operational processes to be followed in trials involving the pre-recording of children's entire testimony.[76] The memorandum aimed to ensure fair and nationally consistent pre-recording proceedings. It included guidelines for applications, transcriptions, hearing requirements and procedure, and procedures for editing and storing the videos.[77] Following this, the Auckland District Court undertook approximately 15 trials involving child witnesses

[69] At [5].
[70] Davies and others, above n 5; Davies and Hanna, above n 26; and Emily Henderson "Pre-recording Children's Evidence in New Zealand: *R v M; R v E*" 35(5) Crim LJ.
[71] *R v Sadlier* DC Auckland CRI-2010-044-004165, 7 December 2010.
[72] At [1].
[73] At [12] and [23].
[74] At [29] – [30].
[75] At [32]. The format was provided to the Court in a report by Mr. Peter Dean, an associate in the Auckland Crown Solicitor's Office who studied the pre-recording protocol in Western Australia with the aid of a Churchill Fellowship grant.
[76] Davies and Hanna, above n 26 at 290.
[77] Davies and others, above n 5 at 335.

who had their entire testimony pre-recorded.[78] In these proceedings, pre-trial pre-recording hearings were attended by a judge, counsel, the defendant(s) and the witness(es). The child witnesses were cross- and re-examined via AVL from a different room in the courthouse, as per normal trial protocol.[79]

In June 2011, the Court of Appeal's decision in *M v R* effectively put a stop to any further use of pre-recording.[80] In *M v R*, the Court heard two appeals together as test cases.[81] In one case an order for pre-trial cross- and re-examination had been made, and in the other the trial Court had declined to make such an order.[82] The Court in *M v R* saw the key issues to be decided as a) whether there was jurisdiction to make "pre-trial cross-examination orders";[83] and b) if there was jurisdiction, how that jurisdiction should be exercised.[84] Awaiting this decision, 17 planned pre-recording hearings in Auckland were frozen.[85]

On the first issue, the Court of Appeal found that the reference in s 105(1) of the Evidence Act to "evidence of a witness" does include cross- and re-examination.[86] They further commented that the Evidence Act cannot be interpreted as a clear intention from Parliament to render pre-trial cross-examination impossible.[87] Accordingly, the Court concluded that "courts do have jurisdiction to make pre-trial cross-examination orders under the Evidence Act."[88]

Despite this, the Court went on to comment that "a judge should be very slow to order pre-trial cross-examination…"[89] The Court's primary reason for concluding any such order would require a "compelling case"[90] was that pre-trial cross-examination would effectively force the defendant to prematurely show their hand at trial early. They were also concerned that, without

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[78] Emily Henderson "Dealing to Pre-trial Delay for Vulnerable Witnesses" (17 November 2016) Law Society Law Talk https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-901/dealing-to-pre-trial-delay-for-vulnerable-witnesses.
[79] Davies and Hanna, above n 26 at 290.
[80] Above n 2.
[81] *M v R*, above n 2 at [3].
[82] *M v R*, above n 2 at [3].
[83] *M v R*, above n 2 at [4].
[84] *M v R*, above n 2 at [6].
[85] Davies and Hanna, above n 26 at 290.
[86] *M v R*, above n 2 at [11].
[87] *M v R*, above n 2 at [19].
[88] *M v R*, above n 2 at [28].
[89] *M v R*, above n 2 at [35].
[90] *M v R*, above n 2 at [41].

clear evidence that full disclosure had taken place, defence counsel may be required to cross-examine without having had an opportunity to carefully consider all the relevant information.[91] It was thought that these would both have the effect of jeopardising the defendant's right to a fair trial, guaranteed by s 25 of the New Zealand Bill of Rights Act 1990. This dissertation will analyse more closely the advantages and disadvantages of pre-recording cited in *M v R* at Chapter Three.

Following this decision, none of the planned pre-recording hearings in the Auckland District Court went ahead.[92] Some which had already conducted a pre-trial pre-recording hearing before the release of *M v R* went ahead by consent.[93] Since then, there have been very few child or adult witnesses who have had their entire testimony pre-recorded. However, in recent years courts have indicated that they may be more receptive to pre-recorded cross- and re-examination.

In 2017 the High Court conducted two pre-trial pre-recording hearings. In the first case, *R v MS*, a child witness to an alleged murder had his entire testimony pre-recorded.[94] T, when aged five years and 9 months, was the only eye witness to the defendant throwing a three-month-old baby against a wall. It was agreed by all parties that T's evidence should be taken as soon as possible and a pre-recording hearing was ordered and conducted in the Tauranga High Court.[95] At trial, the defendant was convicted of murder. However, he successfully appealed his conviction in September 2019, on the grounds that the trial Judge had not adequately directed the jury on how to consider the inconsistencies between T's evidence and the evidence given by expert witnesses.[96] The inconsistencies concerned how many times the baby had been thrown against the wall. A re-trial in the High Court was ordered.

In July 2020, Gordon J granted the defence application for T to give further evidence via AVL from an appropriate location outside the courthouse.[97] This was opposed by the Crown on the

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[91] *M v R,* above n 2 at [34] – [35].
[92] Davies and Hanna, above n 26 at 290.
[93] Davies and Hanna, above n 26 at 290.
[94] *R v MS* [2017] NZHC 184 at [8].
[95] The prosecution presented reports from a psychologist and speech language therapist which recommended T's evidence be taken as soon as possible. This was not opposed by the defence and a consent memorandum was filed. At the time of the pre-recording hearing, T was aged six years and three months.
[96] *Mehrok v R* [2019] NZCA 663.
[97] *R v Mehrok* [2020] NZHC 1812. By then, T was aged nine years and 11 months.

bases that it would be unduly distressful for T and that he was particularly suggestible;[98] that he would be unlikely to remember details of the incident;[99] and it would be likely to set back T's therapeutic recovery.[100] However, Gordon J was satisfied the defendant's right to a fair trial necessitated T be further questioned as to whether he witnessed the entirety of the assault.[101] It was accepted there would be some impacts on T, but that these would be mitigated by the narrow scope of cross-examination and appointment of the same communication assistant as was present at the original pre-recording.[102]

The second case, *R v Aitchison*, involved an intellectually disabled adult complainant in a sexual violence case.[103] This complainant was cross- and re-examined in a pre-trial pre-recording hearing. Questions were put to the complainant by a communication assistant in a jury room, while the Judge, counsel and defendant observed via AVL from the courtroom. At trial, Palmer J advised the jury that the way the complainant's testimony was given was different to usual and warned against drawing any inferences from that fact.[104] The defendant was found guilty of two charges of rape, including one against the complainant who had her evidence pre-recorded. He was found not guilty of one charge of rape each against both complainants, including one against the complainant who had her evidence pre-recorded.[105] *R v Aitchison* has not been appealed.

[98] At [28].
[99] At [29].
[100] At [30].
[101] At [49].
[102] At [51] – [52].
[103] *R v Aitchison* [2017] NZHC 3222. There were two complainants. The other was cross- and re-examined live at trial.
[104] At [44] and [48].
[105] At [50].

CHAPTER TWO: COMPARABLE JURISDICTIONS

Western Australia and England and Wales, among other jurisdictions, both have legislative regimes for pre-recording child witnesses' entire testimony. It is worth exploring how pre-recording works in these legal systems as they provide practical examples from comparable jurisdictions. Western Australia adopted a pre-recording regime almost immediately after it was recommended in 1991. England and Wales were more reticent. Similarly to Aotearoa, concerns regarding cost of implementation and implications for the right to a fair trial halted introduction of a pre-recording regime. Although provisions for pre-recording were enacted in 1999, it was not until 2013 that pre-recording was piloted and not until 2015 that it was rolled out nationally.

To echo Judge Wade in *R v Sadlier*, use of pre-recording elsewhere in the world is not of itself sufficient justification for introducing more extensive pre-recording in Aotearoa.[106] However, these comparable jurisdictions demonstrate an approach to child testimony that improves the experiences of child witnesses, an approach which apparently works very well.[107]

I Western Australia

In 1992, Western Australia implemented widespread changes to existing laws and practices concerning the treatment of child and sexual violence complainants in criminal proceedings. Following reports from the Child Sexual Abuse Task Force and the Law Reform Commission of Western Australia,[108] the Evidence Act 1906 was amended to allow children to have their entire testimony pre-recorded. While originally limited to complainants of certain sexual or violent offences, subsequent amendments have extended eligibility.[109]

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[106] *R v Sadlier,* above n 71 at [28].
[107] *R v Sadlier,* above n 71 at [28].
[108] Carmen Lawrence *Child Sexual Abuse Task Force: A Report to the Government of Western Australia* (Child Sexual Abuse Task Force, 1987); and Law Reform Commission of Western Australia *Report on evidence of children and other vulnerable witnesses* (Project No 87, 1991).
[109] Evidence Act 1906 ss 106 – 106T.

Among other alternative methods of giving evidence, any child witness in proceedings involving an offence against the Western Australia Criminal Code is eligible to have their entire testimony pre-recorded.[110]

A The Process

The process is as follows –

1. Once charges have been laid, a forensic interview of the complainant is conducted by the Police or welfare unit. This interview is video-recorded and often produced as the complainant witness' evidence-in-chief.
2. At the accused's first arraignment, the prosecution will make an application to pre-record the witness' cross- and re-examination pursuant to s 106I of the Evidence Act 1906.[111] The accused has an opportunity to be heard on the application and Child Witness Service is often asked to advise the Court of the child witness' specific needs.[112]
3. Guidelines state that children's evidence should be taken within six months. Applications for pre-recording are generally not made, or granted, if the trial proper can be scheduled within that time.[113] If it cannot be scheduled within six months, the s 106I application is generally granted.[114] The Judge will set the date for the pre-recording hearing and trial proper, and make directions pursuant to s 106K of the Evidence Act 1906 as to the conduct of the pre-recording hearing.
4. Following the accused's first arraignment and before the pre-recording hearing, the prosecution and the agency investigating the offence must comply with disclosure obligations in ss 42 – 45 of the Western Australia Criminal Procedure Act 2004.
5. The child witness will watch their pre-recorded evidence-in-chief a day or so prior to the pre-recording hearing.[115]

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[110] Evidence Act 1906 ss 106A, 106I and 106K.

[111] Hal Jackson "Children's Evidence in Legal Proceedings: The Position in Western Australia" in J R Spencer and Michael E Lamb (eds) *Children and Cross-Examination: Time to Change the Rules?* (Bloomsbury Publishing, Oxford, 2012) at 79.

[112] Jackson, above n 111 at 79.

[113] Hoyano and Keenan, above n 37 at 646; and interviews with practitioners from Henderson, above n 29 at 147.

[114] Emily Henderson, Kirsten Hanna and Emma Davies "Pre-recording children's evidence: the Western Australian experience" [2012] Crim L R 3 at 7.

[115] Henderson, above n 29 at 148; and Jackson, above n 111 at 80.

6. At the pre-recording hearing, the child is cross- and re-examined via AVL from a separate room in the courthouse. No person other than a person authorised by the Judge under s 106K(1) is to be in the same room as the child when evidence is being taken.[116] The Judge, counsel and accused will be present in the courtroom. The accused must not be in the same room as the child but must be capable of observing the proceedings via AVL and is to at all times have the means of communicating with their counsel.[117]
7. Once the child witness has been examined, the recording may be edited with agreement from counsel and approval of the Judge under s 106M of the Evidence Act 1906.
8. At the trial proper, the pre-recorded evidence is admissible to the same extent as if it were given orally in the proceeding in accordance with the usual rules and practice of the court concerned.[118]
9. The child witness does not attend the trial proper.[119] There is provision for the child to be recalled to give further evidence in clarification of that which was pre-recorded.[120]

Practitioners and witnesses in Western Australia consistently report favourable experiences with pre-recorded evidence.[121] Research has shown that children who testified in Western Australian sexual violence trials via pre-recording were far more positive about their experience than children elsewhere in Australia.[122] It has also proven to ameliorate stress, by allowing the children to conclude their involvement in the process and move on earlier.[123] Practitioners and judges have reported improved quality in evidence and commented on the advantage of knowing the strength of the evidence in advance of trial, which has increased both prosecution withdrawals and guilty pleas.[124] The clearest sign of success in Western Australia

[116] Evidence Act 1906 s 106K(3)(b).
[117] Evidence Act 1906 s 106K(3)(a).
[118] Evidence Act 1906 ss 106HB(4) and 106T.
[119] Evidence Act 1906 s 106I(1).
[120] Evidence Act 1906 s 106T(3).
[121] Australia Law Reform Commission *Family Violence – A National Legal Response* (ALRC Report 114, 2010) at 26.180; Henderson, above n 29 at 150; Jackson, above n 111 at 81-82; Henderson, Hanna and Davies, above n 114 at 13; and Kevin Sleight "Managing Trials for Sexual Offences – A Western Australian Perspective (paper presented to AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration, Sydney, 7 September 2011) at 9 and 13.
[122] Henderson, Hanna and Davies, above n 114 at 8-9; Eastwood, above n 56 at 6; Jackson, above n 111 at 81; Henderson, above n 29 at 150-151; and Sleight, above n 121 at 12.
[123] Henderson, Hanna and Davies, above n 114 at 8-9; Eastwood, above n 56 at 6; Jackson, above n 111 at 81; Henderson, above n 29 at 150-151; and Sleight, above n 121 at 12.
[124] Henderson, Hanna and Davies, above n 114 at 8-9; Eastwood, above n 56 at 6; Jackson, above n 111 at 81; Henderson, above n 29 at 150-151; and Sleight, above n 121 at 12.

is the subsequent adoption of pre-recording in other Australian states.[125] Every state in Australia bar New South Wales has adopted models for pre-trial pre-recording of child witnesses' evidence-in-chief, cross- and re-examination.[126]

While the advantages and disadvantages of pre-recording will be discussed more comprehensively in Chapter Three, it is worth noting that these reforms across Australia have significantly increased the number of sexual violence cases with child complainants proceeding to trial.[127] While the reasons these cases often do not result in convictions are wide-ranging, research has shown the conduct of such proceedings are likely to have a significant influence on court outcomes, a key aspect being the way in which child witnesses are cross-examined.[128] A study comparing the experience of child sexual violence complainants in Queensland, New South Wales and Western Australia (before Queensland implemented a pre-recording regime) found that, compared to 44 percent and 33 percent respectively, 64 percent of complainants in Western Australia would report sexual abuse again following their involvement in the court process.[129] These findings appear to be indicative of more child-friendly provisions in Western Australia, with pre-recording entire testimony being a key factor.[130]

In practice, pre-recording in Western Australia has operated smoothly for nearly 30 years. Children are very rarely recalled to give further evidence, meaning the pre-recording hearing most often signals the end of their involvement in the proceedings. To require a child witness to attend court to give further evidence, the Court must be satisfied that it is necessary to clarify the pre-recorded evidence and it is in the interests of justice.[131] In making these decisions, the Court will consider the effect of giving further evidence on the child witness.[132]

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[125] Henderson, above n 29 at 152.

[126] Criminal Procedure Act 2009 (Victoria) ss 366 – 368; Evidence Act 1929 (South Australia) ss 13 and 13A; Evidence Act 1977 (Queensland) Division 4A; and Evidence (Miscellaneous Provisions) Act 1991 (Australian Capital Territory) Part 4, Divisions 4.2A and 4.2B.

[127] See the studies cited at: Annie Cossins "Cross-examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context" in J R Spencer and Michael E Lamb (eds) *Children and Cross-Examination: Time to Change the Rules?* (Bloomsbury Publishing, Oxford, 2012) at 95.

[128] Cossins, above n 127 at 97.

[129] Eastwood, above n 56 at 2.

[130] Eastwood, above n 56 at 1.

[131] See for example: *RPM v R* [2004] WASCA 174; *State of Western Australia v Cox* [2009] WADC 20; and *Tanner v R* [2001] WADC.

[132] *Tanner v R,* above n 131 at [15] and [21].

Of note is that the need for pre-recording in Western Australia has been reduced due to expedited timetabling of trials involving child witnesses. Changes to trial allocation implemented in 2008 have meant the trial can often take place as quickly as a pre-recording hearing.[133] In these cases, child witnesses generally give evidence live at trial, unless they are very young or intellectually disabled.[134]

II England and Wales

In 1988, the Home Secretary established an Advisory Group on Video-Recorded Evidence to consider whether video recordings of children's evidence should be readily admissible in criminal trials. The Advisory Group made several recommendations in what came to be known as the "Pigot Report" in 1989, including a recommendation that the entire testimony of young witnesses be pre-recorded, removing the need for them to attend trial in person.[135] Following these recommendations, measures known as the "half-Pigot" were introduced, which slightly increased the admissibility of live-link evidence and pre-recorded evidence-in-chief for some child witnesses, but still required cross- and re-examination to be conducted live at trial.[136]

The Youth Justice and Criminal Evidence Act 1999 (YCJEA) codified a variety of these recommended special measures for vulnerable and intimidated witnesses, including the use of screens and live-link at trial and admitting pre-recorded interviews as evidence-in-chief.[137] Section 28 allowed eligible witnesses to have their cross- and re-examination pre-recorded. It was the last of the special measures in the YCJEA to be implemented. Discussion at a Ministry of Justice seminar in 2011 indicated that the principal impediment to the implementation of s 28 was the cost of technical equipment.[138]

Changing attitudes towards the evidence of children and calls for improving the experiences of child witnesses brought about the introduction of a s 28 pilot.[139]

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[133] Henderson, above n 29 at 248.
[134] Henderson, above n 29 at 248.
[135] Great Britain Home Office *Report of the Advisory Group on Video Evidence* (1988) at 2.25 – 2.38.
[136] Henderson, above n 29 at 125.
[137] From ss 16 – 33.
[138] Spencer, above n 59 at 173.
[139] The England and Wales Court of Appeal decision *R v Barker* [2010] EWCA Crim 4 was instrumental in this shift. The Court of Appeal at [35] – [36] reaffirmed that old misconceptions that young children are incapable of

A The Pilot

The YCJEA special measures are available to all vulnerable or intimidated witnesses. Pursuant to s 16, any witness under the age of 18 at the time of trial is considered vulnerable and therefore eligible for special measures.[140] These witnesses are automatically entitled to special measures upon application to the Court, unless it would not be in the interests of justice or would not maximise the quality of evidence.[141] Section 21 gives rise to a presumption that child witnesses will give their evidence-in-chief by way of a pre-recorded video, a prerequisite to having cross- and re-examination pre-recorded under s 28.[142]

From December 2013 – October 2014, s 28 was piloted in Crown Courts in Leeds, Liverpool and Kingston-upon-Thames. The witnesses involved were either under the age of 16 or significantly mentally impaired.[143] All witnesses had received a s 27 direction to have a pre-recorded interview admitted as their evidence-in-chief.[144] The pilot involved 194 s 28 cases and 196 s 27-only cases.[145] The majority were sexual violence trials.[146]

Following the pilot, the Ministry of Justice commissioned a process evaluation to determine whether s 28 worked as intended and to inform a decision as to whether and how best to implement s 28 on a national scale. The process evaluation sought to obtain the views of practitioners and witnesses on the practicalities of s 28 and whether it achieved the aim of reducing pre-trial delays.[147] The outcome was generally favourable. Section 28 cases nearly always kept to their expedited timeframes and the trials were on average significantly shorter

producing reliable evidence no longer apply in England and Wales. As Emily Henderson comments in "Root or Branch? Reforming the Cross-Examination of Children" (2010) Camb Law J 69(3), the *Barker* decision signaled a new rigour in the policing of cross-examining children.

[140] Section 98(2) of the Coroners and Justice Act 2009 changed this from 17 to 18.

[141] Youth Justice and Criminal Evidence Act 1999 ss 16(1)(b) and 19(2).

[142] Youth Justice and Criminal Evidence Act 1999 s 28(1).

[143] John Baverstock *Process evaluation of pre-recorded cross-examination pilot (Section 28)* (Ministry of Justice (UK), 2016) at 12.

[144] Baverstock, above n 143 at 2.

[145] Baverstock, above n 143 at 2.

[146] Baverstock, above n 143 at 2.

[147] Baverstock, above n 143 at 19. The evaluation involved interviews with 40 practitioners, including members of the judiciary, prosecutors, defence advocates and court staff, as well as 16 participant witnesses from 11 separate cases.

than the s 27-only cases.[148] While half of the witnesses interviewed reported technical difficulties, all reported positive experiences with pre-recording.[149] No s 28 witnesses were recalled at trial. The process evaluation found, because pre-recorded cross- and re-examination still took place months after initial reporting to Police, witnesses' memory remained patchy.[150] As such, it could not conclude that s 28 improved the recall of vulnerable witnesses. However, all s 28 witnesses appreciated giving their evidence earlier and most practitioners felt the quality of evidence was higher.[151]

Following the outcome of the process evaluation, the use of s 28 continued in Leeds, Liverpool and Kingston-upon-Thames. Wave one of national implementation began in June 2019 in Crown Courts in Bradford, Carlisle, Chester, Durham, Mold and Sheffield.

B The Process

Protocol in England and Wales is for Police to be made aware of the availability of pre-recorded cross- and re-examination and identify witnesses who may benefit from the special measure as early as possible in the investigation.[152] From there, the Police explain the available special measures to the witness and obtain their informed views.[153] These are passed on to the Crown Prosecution Service to assist with any special measures application.[154]

From there, the Criminal Practice Directions establish the required process:[155]

1. If the defendant pleads not guilty at the first hearing in the Magistrates' Court, the prosecutor must inform the Court and the defence that the prosecution is seeking a s 28

[148] Baverstock, above n 143 at 65.
[149] Baverstock, above n 143 at 67.
[150] Baverstock, above n 143 at 66.
[151] Baverstock, above n 143 at 68.
[152] Emma Barnett and Andrew Penhale *A National Protocol between the Police and Crown Prosecution Service in the Investigation and Prosecution of Offences in Relation to which the Cross-examination of a Witness will be Pre-recorded* (National Police Chiefs' Council and the Crown Prosecution Service, 2019) at 5.1.
[153] Barnett and Penhale, above n 152 at 6.7.
[154] Barnett and Penhale, above n 152 at 6.7.
[155] Criminal Practice Directions 2015 [2015] EWCA Crim 1567.

direction. This is then listed for a Plea and Trial Preparation Hearing in the Crown Court within 28 days of sending from the Magistrates' Court.[156]

2. At the Plea and Trial Preparation Hearing, the Judge may hear submissions from advocates and will rule on the s 28 application. If granted, the Judge makes orders for the preparation of the pre-recording hearing and trial. Orders that may be made include for initial prosecution disclosure and service of prosecution evidence within 50 days; fixing a date for the Ground Rules Hearing; and scheduling both the pre-recording hearing and trial.[157]
3. At the Ground Rules Hearing, the defence advocate and the Judge must be the same as those to appear at the pre-recording hearing. Topics for discussion at the Ground Rules Hearing depend on the individual needs of the witness, but will always cover the length of cross-examination and the type of questions to be asked. The Judge decides how the witness will view exhibits.[158] The parties should also discuss how and when any limitations on questioning in cross-examination will be explained to the jury.
4. At the pre-recording hearing, the witness will be cross- and re-examined, usually via live-link from a separate room in the courthouse, with the Judge, advocates, and defendant in the courtroom. At the conclusion of cross- and re-examination, the Judge may issue further orders, including for editing of the recording or that the recording not be admitted into evidence.[159]
5. In preparation for trial, further cross- and re-examination must not take place unless the criteria in s 28(6) are satisfied and the Judge makes a further order under s 28(5). Any such application must be made at least 28 days before trial and will only be granted if a party ascertains information not available at the time of the original pre-recording hearing, or if for any reason it would be in the interests of justice.[160]
6. At trial, the pre-recorded evidence will be played at appropriate times.[161]

Since the continuation of the s 28 pilot and beginning of the national roll-out, the England and Wales Court of Appeal have commented approvingly on pre-recording child witnesses' entire testimony. *R v PMH* concerned an appeal against conviction where the appellant had been

[156] At 18E.9 – 18E.12.
[157] At 18E.19 – 18E.21.
[158] At 18E.34 – 18E.37.
[159] At 18E.38 – 18E.42.
[160] At 18E.51 – 18E.53.
[161] At 18E.55.

convicted of several offences of sexual assault against a child under the age of 13, on the basis of that child's pre-recorded testimony.[162] The Court characterised the appellant's submissions as a "thinly disguised attack on the use of pre-recorded cross-examination."[163] The Court went on to comment that it was a procedure provided for by Parliament which reportedly operates successfully.[164] The Court made it clear that pre-recording a child witness' entire testimony does not undermine the defendant's right to a fair trial but has necessarily led to a "sea of change in advocacy techniques" that require advocates to adapt to the needs of witnesses.[165]

R v YGM was also an appeal against conviction of two counts of rape of a child under 13 years on the basis of the complainant's pre-recorded testimony.[166] The Court of Appeal again commented that s 28 does not conflict with the right to a fair trial and that any limitations on pre-recorded cross-examination are as to style, rather than content.[167] In both decisions the Court of Appeal issued best practice guidance.[168] In *YGM,* the Court opined that failure to adopt best practice in every respect does not inevitably lead to the conclusion that a resulting conviction is unsafe.[169]

[162] *R v PMH* [2018] EWCA Crim 2452.
[163] At [16].
[164] At [16].
[165] At [19].
[166] *R v YGM* [2018] EWCA Crim 2458.
[167] At [24].
[168] *R v PMH* above n 162 at [21] and *R v YGM* above n 166 at [21].
[169] At [22].

CHAPTER THREE: ADVANTAGES AND DISADVANTAGES

The Court of Appeal decision in *M v R* provides a useful framework for discussing perceived disadvantages of pre-recording a witness' entire testimony. In coming to its decision that it will require a "compelling case" for any court to order pre-trial cross-examination,[170] the Court of Appeal identified six distinct pitfalls to pre-recording entire testimonies. The Court thought these "considerable disadvantages" outweighed what they saw as the "sole advantage" of pre-recording: avoiding delay.[171]

Underpinning all of the specific concerns identified by the Court of Appeal is the interest in a fair trial generally. The Court recognises, and it is accepted, that it is critical the defendant's right to a fair trial is vigorously protected by ensuring evidence is robustly put to proof. Some of the perceived disadvantages of pre-recording imply that this right might be compromised. As such, it may be helpful to recount recent legal and jurisprudential comment on the purpose of cross-examination and its intersection with the right to a fair trial.

R v Barker is a landmark case in this respect. In this decision, the English Court of Appeal recognised that the tactics involved in cross-examining child witnesses had become unacceptably distressing and were accordingly having serious implications for the quality of evidence. These tactics were briefly discussed in Chapter One.[172] *Barker* signaled a new determination to move cross-examination "away from illegitimate theatrics and obfuscation and back towards its essential purpose of testing the evidence."[173]

The *Barker* decision is indicative of a shift from once defendant-centric conceptions of a fair trial towards conceptions that are also inclusive of the rights of both the victims and the wider community.[174] This shift is reflected in s 6 of our own Evidence Act, with fairness to witnesses and the protection of public interests codified as essential to the just determination of

[170] *M v R,* above n 2 at [41].
[171] *M v R,* above n 2 at [36] and [41].
[172] See IV C: Cross-examination.
[173] Henderson, above n 139 at 462.
[174] Terese Henning "Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?" (2013) 37 Crim LJ 155 at 172.

proceedings.[175] Further, international human rights jurisprudence obligates states and domestic courts to uphold victims' rights in legal proceedings.[176] These developments reflect the idea that what is "fair" is not fixed or immutable.[177] Rather, the concept of fairness, and therefore what constitutes a fair trial, adapts to community expectations and prevailing societal values.[178]

Cross-examination that produces misleading or distorted testimony by confusing or upsetting a child witness does not account for the interests of the accused, the witness, or the community in the right to a fair trial. No party can have a legitimate interest in testimony of that kind.[179] Rather, the right to a fair trial generates a legitimate interest in accurate fact-finding. Limitations on cross-examination conducive to that end must therefore be consistent with the right to a fair trial.[180]

Cross-examination is often revered within the adversarial system as the most effective way of testing evidence and therefore achieving safe verdicts.[181] However, its current form is regarded by many child advocates and academics as "unnecessarily traumatic and a threat to the safety of the evidence."[182] Indeed, it is difficult to reconcile the notion of cross-examination as the most effective method of fact-finding when the questions that currently typify it are associated with the increased risk of factually incorrect recall.[183] Strategies currently employed in the cross-examination of children, like the use of theatrics and tailoring questioning to appear convincing to a jury, are not guaranteed by the right to a fair trial. Rather, they are incidental benefits of the way cross-examination within the adversarial trial has developed and been

[175] Section 6(c) and (d).
[176] See the cases cited in Henning, above n 174 at 172 – 174: *SN v Sweden* (2004) 39 EHRR 13 at [52]; and *X & Y v Netherlands* (1985) 8 EHRR 235 at [27]. Note also that the New Zealand Human Rights Commission has identified that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("the Declaration") mandates that victims be treated with compassion and respect for their dignity. The United Nations Office on Drugs and Crime Handbook on Justice for Victims on the use and application of the Declaration recommends consideration of the use of videotaped depositions for the protection of particularly vulnerable victims.
[177] Cossins, above n 127 at 101.
[178] Cossins, above n 127 at 101.
[179] Henning, above n 174 at 172; and Spencer, above n 59 at 183.
[180] Henning, above n 174 at 172; and Spencer, above n 59 at 183.
[181] Cossins, above n 127 at 101; Henderson, above n 139 at 463; McDonald and Tinsley, above n 45 at 710; and McGregor, above n 5 at 34.
[182] Henderson, above n 139 at 463.
[183] Hanna and others, above n 29 at 535.

perceived. This means the defence have less to lose from the use of pre-recording than it may originally seem.

Significant progress has been made to improve the experiences of child witnesses and avoid damaging cross-examination strategies. This indicates that what is considered to constitute a fair trial can change and be subject to limitations in the interests of justice.[184] Pre-recording is a viable next step that cannot convincingly be said to unjustifiably limit fair trial rights. It may well limit the latitude currently enjoyed by parties in cross-examination. However, limitations should not go further than what is necessary to enable children to testify honestly, reliably and with credibility. If no more than this is done, the accused's right to a fair trial will not be imperiled.[185] It is counterintuitive to claim that a fair trial is compromised when cross-examination is modified to enable children to give the best evidence of which they are capable.[186]

The implementation and widespread use of pre-recording in Western Australia and England and Wales, as well as its limited use in Aotearoa, demonstrates that pre-recording does not inherently impinge the right to a fair trial.[187] Even in *M v R*, the Court of Appeal conceded this point.[188] This has also been confirmed by New Zealand's Chief Justice. In a submission on behalf of the judiciary, Chief Justice Winkelmann addressed the provisions in the Sexual Violence Legislation Bill 2019 that would allow witnesses in sexual violence trials to have their entire testimony pre-recorded.[189] She considered these provisions in light of their effect on the operation of the courts and the administration of justice.[190] The Chief Justice did not oppose the pre-recording provisions, but recommended that judges retain the opportunity to consider the fair trial implications on a case-by-case basis.[191] This shows the New Zealand judiciary is alert to their obligation to ensure a fair trial in every criminal proceeding, but accept

[184] Cossins, above n 127 at 112.
[185] Henning, above n 174 at 172.
[186] Henning, above n 174 at 174; and *R v Barker,* above n 139 at [42].
[187] The use of pre-recording in the 2010-2011 trials in Auckland District Court, and in the High Court in 2017 shows that lawyers and judges in New Zealand have not perceived pre-recording to be detrimental to the accused's right to a fair trial.
[188] *M v R,* above n 2 at [25].
[189] Helen Winkelmann "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (11 February 2020) at 1.
[190] Winkelmann, above n 189 at 1.
[191] Winkelmann, above n 189 at 2.

that pre-recording with appropriate safeguards will not in and of itself compromise that right. In a submission on the same aspects of the same Bill, the New Zealand Human Rights Commission welcomed the pre-recording provisions as consistent with aforementioned international human rights jurisprudence.[192]

I Disadvantages

In this section, I consider and critique each of the six purported disadvantages as identified by the Court of Appeal. This analysis is done with reference to broader academic commentary and research, as well as relevant submissions to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019.

1 The Accused is Required to "Show their Hand" Before Trial

The Court of Appeal commented that "the general rule … is that the accused is not required to show his or her hand before the start of the trial" and maintained that "the general rule is not lightly to be countermanded."[193] The rationale behind this rule is accepted to be that a defendant is generally entitled to hear the prosecution's opening before taking any steps at trial.[194] Pre-recorded cross- and re-examination arguably gives the Crown an unfair advantage, as it may enable the tailoring of the Crown case to the evidence already given.[195] There appears to be widespread concern that this particular consequence of pre-recording would imperil the defendant's right to a fair trial.[196]

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[192] Human Rights Commission "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (31 January 2020) at 3 and 5.
[193] Human Rights Commission, above n 192 at [34].
[194] *M v R,* above n 2 at [34].
[195] Criminal Bar Association of New Zealand "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (20 February 2020) at 4.6(b).
[196] New Zealand Bar Association "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (14 February 2020) at [50]; Henderson, above n 37 at 184; Alison and Boyer, above n 16 at 41; and New Zealand Law Society "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (17 February 2020) at 8(c)(i) and 64(b).

There is also concern that witnesses who have their entire testimony pre-recorded will "de-brief" with other witnesses who are to give evidence at the trial proper, in an effort to ensure the evidence given at trial "fits in" with that given at the pre-recording stage.[197]

There already exist exceptions to the general rule that the accused is not required to disclose details of their case before the trial.[198] Sections 22 and 23 of the Criminal Disclosure Act 2008 respectively require the defence to disclose to the prosecution details of its alibi and expert witness evidence.[199] When exceptions to the rule already exist, there must be scope to add another if there are good reasons to do so. As discussed further in this Chapter, there are many advantages, for both defence and prosecution, that come with pre-recording child testimony. Legislators in Western Australia and England and Wales clearly saw this as a justifiable exception to the general rule of non-disclosure. Significantly, early disclosure of the defence case has not given rise to any successful fair trial arguments in either jurisdiction.

It is questionable how much of the defence case early cross-examination would reveal. In responding directly to this concern, Judge Wade in *R v Sadlier* observed that the defence case can be put to the complainant without necessarily revealing which lines of questioning would go on to be supported by evidence or identifying witnesses who might give such evidence.[200] It is also relevant that child witnesses are most commonly testifying as sexual violence complainants. Almost invariably, defences to these accusations are restricted to a few well-known arguments.[201] These arguments include either that the complainant is lying and sexual contact never occurred, or that the complainant is mistaken about the identity of the perpetrator.[202] When the defences are relatively predictable, the case theory can be developed

[197] Auckland District Law Society "Submission to the Justice and Electoral Committee on the Sexual Violence Legislation Bill 2019" (20 February 2020) at 64.1; New Zealand Bar Association, above n 196 at [53]; and New Zealand Law Society, above n 196 at 64(f).
[198] The Court of Appeal in *M v R,* above n 2, did recognise these at [34].
[199] The rationale behind s 22 is to enable the prosecution to make inquiries to confirm or refute the ability. The rationale behind s 23 is to enable the prosecution to call their own expert witness in response.
[200] *R v Sadlier,* above n 71 at [26].
[201] Henderson, above n 70.
[202] Emma Davies, Emily Henderson and Fred Seymour "In the Interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings" (1997) Psychiatry, Psychol Law 217 at 226; John Spencer "Children's Evidence: The *Barker* Case, and the Case for Pigot" [2010] 3 Archbold News 5 at 7-8; and Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.93.

and put to the child earlier.[203] This significantly limits the scope of any claimed disadvantage that may arise from pre-recorded cross-examination.

R v Sadlier went on to comment that, even if early cross-examination disclosed information that may spark further prosecution inquiry, the law already enables the prosecution to call further evidence after closure of the case for a variety of reasons, including when the need arises from the conduct of the defence.[204] As such, it does not appear that pre-recording a child witness' entire testimony represents a significant increase in the risk to a fair trial from the present state of the law. Moreover, calling additional evidence as a result of things said at the pre-recording stage would be subject to judicial discretion and would most likely be the exception rather than the rule.[205]

Additionally, the concern that witnesses may de-brief and collude to give corresponding testimony does not add much to the argument against pre-recording, given the risk can be no greater than the ever-present risk that witnesses may agree to corroborate their stories and give consistent evidence at the trial proper.

2 Disclosure

The Court of Appeal in *M v R* commented that "a judge should be very slow to order pre-trial cross-examination in the absence of clear evidence that full disclosure … has taken place."[206] The Court accepted counsel's submission that disclosure under the Criminal Disclosure Act 2008 was, in 2011, "haphazard and often tardy."[207] On this basis, the Court remarked that cross-examination should never have to take place without the defence having had an opportunity to carefully consider all the information that should be disclosed before trial.[208] The issue of

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[203] Henderson, Hanna and Davies, above n 114 at 12.

[204] *R v Sadlier,* above n 71 at [26]. Section 98(3) of the Evidence Act 2006 enables the Judge to grant permission to the prosecution to offer further evidence after closing their case, if –

a) The further evidence relates to a purely formal matter; or
b) The further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen; or
c) The further evidence was not available or admissible before the prosecution's case was closed; or
d) For any other reason the interests of justice require the further evidence to be admitted.

[205] *R v Sadlier,* above n 71 at [27].

[206] *M v R,* above n 2 at [35].

[207] *M v R,* above n 2 at [35].

[208] *M v R,* above n 2 at [35].

prompt disclosure is likely to be particularly pertinent in cases requiring multi-agency third party disclosure.[209]

Practitioners have reported that disclosure is currently no less tardy than it was in 2011.[210] Indeed, disclosure may be more onerous, given the general increase in the amount of disclosable material as a result of the proliferation of social media and smartphone use. It has been argued that, until the Criminal Disclosure Act is amended to account for the realities of digital information, it is unsafe to assume either counsel will have all the information necessary to cross-examine well in advance of trial.[211] If cross-examinations were to proceed in the absence of full disclosure, it is likely courts would see more applications for further cross-examination, or even appeals of convictions based on pre-recorded testimony.[212] This risks increasing demand on judicial resources, as well as adding to child witnesses' stress by requiring them to testify again.

It is a valid concern that full disclosure may not occur promptly enough to enable comprehensive cross-examination. Indeed, this concern transpired in two of the 2010-2011 pre-recording cases in Auckland. Both floundered because of delayed disclosure from third parties.[213] However, following these two cases, senior practitioners, child protection agencies and the Auckland Crown Solicitor's Office contemplated how to streamline the disclosure process for pre-recording hearings. This resulted in the Auckland regional protocol, designed to hasten full disclosure under the Criminal Disclosure Act.[214]

This is indicative of the fact that concerns about tardy disclosure amount to practical, rather than principled, objections. Where practical problems arise, practical solutions can be found.

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[209] Emily Henderson, Jonathan Temm and Phillip Hamlin "Pre-trial Case Management" (2018) Benchmark https://www.benchmark.org.nz/guideline-summaries/pre-trial-case-management/.
[210] Criminal Bar Association of New Zealand, above n 195 at 4.7(c); Auckland District Law Society, above n 197 at 64.2; and New Zealand Bar Association, above n 196 at [58].
[211] Criminal Bar Association of New Zealand, above n 195 at 4.7(e).
[212] Criminal Bar Association of New Zealand, above n 195 at 4.7(f) – (g).
[213] Davies and Hanna, above n 26 at 294-295. In one case the defence had requested the material too late and in the other a government Ministry did not comply in time.
[214] Davies and Hanna, above n 26 at 302.

All jurisdictions that routinely pre-record have achieved regimes for expedited disclosure.[215] There is no reason to assume the same cannot be done in Aotearoa.

3 Cost and Delay

The Court of Appeal was concerned that requiring a judge, court staff and a room for the pre-recording hearing, and then replaying the pre-recorded evidence at trial, would increase overall court time.[216] This would have the potential to exaggerate the current pressure on judicial resources. Practitioners across New Zealand have expressed concern as to whether an already overstretched system could cope.[217] The Court also foresaw an increase in legal fees due to counsel effectively having to prepare for trial twice and attend court more frequently.[218] Costs might also be exacerbated if the advocate who conducted the cross-examination had to be replaced for the trial proper. This would impact Crown and legal aid expenditure, as well as amplify the burden on defendants funding their own defence.[219]

The Court of Appeal also expressed concern that avoiding delay for child witnesses would result in greater delays in resolution for defendants.[220] If children's testimony was entirely pre-recorded, the rationale for prioritising trials involving child witnesses would dissipate, meaning defendants in these cases would be waiting longer for trial.[221] Additionally, all defendants may face longer delays if resources are routinely diverted to enable the pre-trial taking of evidence.[222] This may have the unintended consequence of increasing the prison population and time spent in custody, given approximately one third of prisoners are on remand waiting for trial.[223]

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[215] Henderson, above n 37 at 183; Henderson, Hanna and Davies, above n 114 at 11; Henning, above n 174 at 174; and McGregor, above n 5 at 25.
[216] *M v R*, above n 2 at [36](a).
[217] New Zealand Bar Association, above n 196 at [64]; Auckland District Law Society, above n 197 at 64.5; and New Zealand Law Society, above n 196 at B5(d).
[218] *M v R*, above n 2 at [36](b).
[219] Criminal Bar Association of New Zealand, above n 195 at 4.8(a)(iii).
[220] *M v R*, above n 2 at [36](c).
[221] *M v R*, above n 2 at [36](c).
[222] *M v R*, above n 2 at [36](c).
[223] Department of Corrections "Prison facts and statistics" (June 2020) https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_june_2020.

Fiscal considerations cannot be ignored in the consideration of legal reform. There are likely to be costs associated with implementing a pre-recording regime. However, the forthcoming discussion of the advantages of pre-recording will show that reform may also come with savings. The two may well balance each other out. Regardless, even if costs materialise, the substantial advantages that would be realised suggest it would be a worthy investment.

It is not a convincing objection to pre-recording that defendants in cases with young witnesses would wait longer for trial because the case would no longer be prioritised. These defendants do not merit prioritisation over other defendants. Priority was never afforded to them, but to the children.[224] It cannot be unfair to lose something a person never had. In fact, de-prioritising cases with child witnesses after their testimony has been pre-recorded would make trial allocation fairer for all defendants in the justice system.[225]

4 Absence of the Jury

The Court considered it a "very relevant fair trial factor" that the jury would not be present for cross-examination, as it means defence counsel lose the ability to tailor questioning to a jury's reaction.[226] It has become the reality of criminal trials that counsel must carefully craft their cross-examination to come across persuasive to the particular jury.[227] The theatrics employed to do so would be futile in a pre-recording hearing. Arguably then, pre-recording requires counsel to cross-examine in a vacuum and compromises the right to present an effective defence.

Further, the jury loses the ability to watch the cross-examination live and any benefits that may arise from that, such as observing the witness' demeanour or the accused's reaction to the evidence at the time it is given.[228] There are also concerns pre-recorded evidence will lose its impact, as jurors only see it via a TV screen.[229] Accordingly, it may have a blunting effect,

[224] Henderson, above n 70.
[225] Henderson, above n 70
[226] *M v R,* above n 2 at [39].
[227] New Zealand Bar Association, above n 196 at [51].
[228] *M v R,* above n 2 at [39].
[229] Henderson, Hanna and Davies, above n 114 at 12; Davies and Hanna, above n 26 at 301; Henderson, above n 37 at 181; Auckland District Law Society, above n 197 at 68; and New Zealand Bar Association, above n 196 at [6].

whereby the use of a video to present the child's evidence changes the emotional impact it has on the jury.[230]

The fear that defence advocates may not be able to tailor their cross-examination to a particular jury is addressed by the aforementioned analysis of general fair trial concerns.

Apprehension about the blunting effect of pre-recording may be overstated. Studies on the impact of watching evidence on a screen, rather than in person, have produced mixed results.[231] Some have found that jurors perceive televised testimony less positively, whereas others found it makes no difference.[232] There is at least no conclusive evidence that viewing evidence on a screen, as opposed to in person, impacts jury verdicts: case studies have found no difference in conviction rates.[233]

Extensive psychological research has demonstrated how the average person tends to overestimate their ability to assess truthfulness on the basis of a person's demeanour.[234] Accordingly, judges routinely warn juries against doing so.[235] Warnings like this, tailored specifically to pre-recorded evidence, would work to mitigate concerns about the blunting effect. Hanna, Crothers and Rotherham have suggested reminding the jury that behaviours commonly associated with credibility, such as emotional distress, are exactly the behaviours processes like pre-recording are designed to prevent.[236] They suggest the jury be told that one of the aims of pre-recording is for the child to be as unstressed as possible, meaning they may appear calmer than expected.[237]

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[230] Henderson, Hanna and Davies, above n 114 at 12.
[231] Hanna, Crothers and Rotherham, above n 26 at 110.
[232] See the studies cited at: Davies and Hanna, above n 26 at 303; and Hanna, Crothers and Rotherham, above n 26 at 109-110.
[233] See the studies cited at: Hanna, Crothers and Rotherham, above n 26 at 112; Henderson, Hanna and Davies, above n 114 at 13; and McDonald and Tinsley, above n 45 at 739.
[234] See the studies cited at: McDonald and Tinsley, above n 45, at 735-739.
[235] Under s 123 of the Evidence Act 2006, judges in jury trials where evidence is given in an alternative must direct the jury not to draw adverse inferences against the defendant because of that manner of giving evidence or questioning.
[236] Hanna, Crothers and Rotherham, above n 26 at 114.
[237] Hanna, Crothers and Rotherham, above n 26 at 114.

Courts have been reticent to accept arguments on grounds that the emotional impact of testimony is altered by virtue of its presentation on a screen.[238] In *R (D) v Camberwell Green Youth Court*, the House of Lords held there was nothing intrinsically unfair in video-recorded evidence, so long as the accused has the opportunity to see, hear and challenge the evidence.[239] Lady Hale in *Re W* opined that fairness to the accused depends on the reliability and thoroughness of the method used to test a witness' evidence, not on the method of testifying.[240] The English Court of Appeal in *R v PMH* rejected submissions that pre-recorded cross-examination jeopardised the accused's right to a fair trial on the basis that the jury could not assess the child witness' demeanour.[241]

Unless and until it can be verified that not observing the witness live in person impacts the fairness of a trial, this cannot be a persuasive objection to pre-recorded evidence. These concerns also overlook the current ubiquity of pre-recorded evidence-in-chief, which our Parliament and courts have accepted do not impact the assessments made by juries at trial.[242]

5 Jury Questions

Section 101 of the Evidence Act provides for jurors to ask questions of witnesses in criminal proceedings.[243] The Court of Appeal opined that, while s 101 does not confer a *right* on jurors to ask questions, their ability to do so may be subjugated when a witness' entire testimony is pre-recorded.[244] While the witness could be recalled to answer any questions from the jury, one of the key aims of pre-recording – obviating the need for children to attend trial – would be defeated.

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[238] See the cases cited at: McDonald and Tinsley, above n 45 at 712-713.
[239] *R (on the application of D) v Camberwell Green Youth Court; R (on the application of the Director of Public Prosecutions) v Camberwell Green Youth Court* [2005] UKHL 4 at [49].
[240] *Re W* [2010] UKSC 12 at [28].
[241] *R v PMH,* above n 162 at [19]-[20].
[242] Henderson, above n 70.
[243] Section 101 of the Evidence Act 2006 was introduced after the Law Commission concluded that the opportunity to ask about matters of concern was fundamental to jury understanding and deliberation: Law Commission *Juries in criminal trials* (NZLC R69, 2001) at [360] – [370].
[244] *M v R,* above n 2 at [37] and [39].

There is no evidence to suggest this concern has been substantiated in jurisdictions that routinely pre-record.[245] The response to this objection can also mirror the response to concerns that the accused is required to prematurely "show their hand": if there are only a limited number of defences likely to be argued in cases with child complainants, the number of possible questions will similarly be limited. Additionally, the desire to ask a question of the witness may be mitigated if the jury can re-watch parts of the evidence for clarification. In any event, even if some cases require the witness to be recalled to answer questions, this is likely to be the exception rather than the rule. In the majority of cases, no questions will arise and the child can reap the benefits of pre-recording.

6 Giving Evidence Twice

The Court of Appeal opined that it is "almost inevitable" new information would come to light shortly before trial, requiring witnesses who pre-recorded their testimony to return and give live evidence.[246] Should more disclosure emerge, or new information be acquired between pre-trial pre-recording and the trial proper, it would be imperative to ensure a fair trial that cross-examination be re-opened.[247] The Criminal Bar Association have reported it is commonplace for more information to materialise as late as the day of trial.[248] As the Court in *M v R* observed, it is likely judges would err on the side of caution and order further examination in these cases.[249] If recall of young witnesses for further cross-examination at trial became the norm, any reform to increase the use of pre-recording would be self-defeating; or in the words of the Criminal Bar Association, "a pointless and expensive waste of time and resources."[250]

It is agreed cross-examination would need to be re-opened should there be further disclosure or the unearthing of new information. However, international experience indicates that this does not render the entire exercise "a pointless and expensive waste of time and resources." Over a period of nearly 30 years in Western Australia, child witnesses have rarely been

[245] See the discussion below on giving evidence twice: witnesses are hardly ever recalled to answer questions or give further evidence.
[246] *M v R*, above n 2 at [40].
[247] *M v R*, above n 2 at [40].
[248] Criminal Bar Association of New Zealand, above n 195 at 4.11(a).
[249] *M v R*, above n 2 at [40].
[250] Criminal Bar Association of New Zealand, above n 195 at 4.11(b).

recalled.[251] None were recalled in the English pre-recording pilot,[252] or in any of the trials that took place in the Auckland District Court from 2010-2011.[253] The majority of New Zealand practitioners interviewed for an academic evaluation of those 2010-2011 pre-recording trials agreed that it would be uncommon to recall a witness and that any recall would need to be for a legitimate reason with agreement between the Crown and the defence.[254] Such a case arose earlier this year, in *R v Mehrok*, as discussed in Chapter One.[255] Those who object to pre-recording can take comfort in *Mehrok*, as it demonstrates that the judiciary are alive to the fair trial considerations at play.

If practitioners can achieve prompt disclosure and comprehensive preparation, international experience tells us it is unlikely child witnesses will routinely be required to give evidence twice. Regardless, the ability to recall the witness is sufficient to mitigate the concern that witnesses may not be cross-examined on important matters.

II Advantages

By citing the sole advantage of pre-recording as reducing delay to enable the complainant to move on, the Court of Appeal in *M v R* arguably overlooked nearly 20 years of considerable evidence from Western Australia – now confirmed by the regime in England and Wales – that pre-recording a child witness' entire testimony can be practical and successful.[256] The Court of Appeal was right that reducing delay is the most significant advantage of pre-recording. However, the decision failed to unpack the numerous advantages that flow from reducing delay. Empirical experience and extensive academic literature demonstrate that pre-recording young witnesses' entire testimonies can deliver a plethora of advantages.

[251] Cossins, above n 127 at 99; and Davies and others, above n 5 at 337.
[252] Baverstock, above n 143 at 37.
[253] Davies and Hanna, above n 26 at 300.
[254] Davies and Hanna, above n 26 at 300.
[255] *R v Mehrok,* above n 97.
[256] Henderson, above n 70; and Henderson, Temm and Hamlin, above n 209 at 16.5.

A Better Quality Evidence

Perhaps the most glaring omission from the Court of Appeal's skeletal catalogue of advantages is the facilitation of better quality evidence as a result of reduced delays between the incident, or the reporting of it, and cross-examination. Reducing delay ameliorates the stressors currently associated with delay to trial, which have been detailed in Chapter One. It is the corollary of Chapter One that earlier capture of a child's evidence will improve its quality, as it is less likely to be contaminated by memory erosion and suggestibility. If a child's memory is fresher closer to the time of the alleged incident, it follows that evidence given closer to that time is more likely to be accurate. In *R v Sadlier*, the defence advocate argued it would be inconsequential to the child witness' memory if cross- and re-examination took place seven months after the incident (at a pre-recording hearing), as opposed to 12 months after the incident (at trial).[257] In response, Judge Wade said, "that seems to me to fly in the face of reality that memories fade over time."[258]

This is supported by anecdotal evidence from practitioners. When the Ministry of Justice sought feedback on an Issues Paper recommending child witnesses have their entire testimony pre-recorded, the large majority of written submissions agreed that this would likely improve the quality of children's evidence.[259] Practitioners in Western Australia have reported the quality of the evidence is better when it is taken earlier.[260] In the s 28 YCJEA pilot in England and Wales, witnesses who had their entire testimony pre-recorded had delay times halved.[261] While the data did not allow for a conclusive finding that s 28 led to superior memory recall, there was broad agreement across counsel and judges that earlier cross- and re-examination improved the quality of the evidence.[262] Section 28 witnesses also reported it was easier to remember details of the alleged offending.[263] Practitioners involved in the Auckland District

[257] *R v Sadlier,* above n 71 at [17].
[258] *R v Sadlier,* above n 71 at [24].
[259] Cabinet Domestic Policy Committee, above n 1 at 4.
[260] Cossins, above n 127 at 98 and 111; Davies and others, above n 5 at 336 and 338; Henderson, above n 78; Henderson, Hanna and Davies, above n 114 at 8-10; Henning, above n 174 at 168; Jackson, above n 111 at 81; and Sleight, above n 121 at 5 and 9.
[261] On average, s 28 witnesses waited 94 days to be cross- and re-examined, whereas s 27-only witnesses waited 182 days on average: Baverstock, above n 143 at 8.
[262] Baverstock, above n 143 at 35, 38, 40, 56 and 68.
[263] Baverstock, above n 143 at 56.

Court pre-recording trials reported that the earlier capture of evidence appeared to produce more reliable testimony.[264]

Pre-recording cross- and re-examination offers the best hope of reducing delays before children testify and can therefore be considered a viable method for eliciting the most accurate, reliable and complete evidence from these witnesses.

B Witness Experience

One of the clear advantages of pre-recording is the improved experience of child witnesses within the justice system. Accordingly, pre-recording would be consistent with current legislative ambition to ensure witnesses in criminal proceedings have positive experiences.[265]

(a) Reduced stress on the day

It has been reported that pre-trial pre-recording hearings are generally less stressful for chilren than giving evidence live at trial. Although pre-recording hearings tend to still take place in the formal courthouse setting, the main advantages for the witness are the reduction of delay on the day, the reduced likelihood of seeing the defendant or their supporters, and the absence of a jury and public spectators.[266]

As discussed in Chapter One, child witnesses often wait at court for long periods of time before giving evidence. It is not uncommon for children to be sent home without giving evidence and required to return the next day. In Western Australia, pre-recording hearings are given fixed dates which are altered infrequently.[267] Child witnesses can begin giving their evidence shortly after they arrive at the courthouse and do not have to return on a different day if the trial proper is delayed for any reason.[268] Seeing the defendant and their supporters at court on the day of

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[264] Davies and Hanna, above n 26 at 292.
[265] Section 6(c) of the Evidence Act 2006 includes promoting fairness to witnesses as one of the purposes of the Act. Section 103(4)(b) requires a Judge, when making a direction for a witness to give evidence in an alternative way, to consider the views of the witness; the need to minimise the stress on the witness; and in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offending.
[266] See the studies cited at: Henderson, above n 37 at 179; and Hoyano and Keenan, above n 37 at 641.
[267] Jackson, above n 111 at 81.
[268] Jackson, above n 111 at 81; and Sleight, above n 121 at 10.

trial is also a major source of stress for child witnesses. With pre-recording, the court should be closed to the public and the child will not be waiting around before giving evidence, reducing the risk of intimidation from defendants and their supporters in public waiting areas.[269]

There has been concern that special measures designed to soften the experience of witnesses at trial, like pre-recording, may detract from the witness' appreciation of the seriousness of the task.[270] However, it is more likely the gravity of a jury trial in open court would overwhelm a child witness than induce an ingenuous and confident state of mind.[271] Indeed, research suggests that the more people present, the more difficult it is for witnesses to fully disclose their experiences.[272]

One of the most significant benefits of having no jury present is the increased likelihood that the needs of the witness will be accommodated. For example, a judge may be more likely to initiate breaks in the child's testimony,[273] or more stringently control the questioning in cross-examination, if they are not concerned with accommodating the jury or appearing to "descend into the arena."[274] Further, counsel are more likely to adapt their questioning to the needs of the witness when they are not concerned with appearing powerful to the jury.[275] Defence advocates in the s 28 YJCEA pilot in England and Wales reported that their questioning improved in the pre-recording hearings, being more focused and relevant than questions posed in the ordinary process.[276] The majority of participants in the process evaluation of the pilot thought that pre-recorded cross-examinations were more witness-friendly and less combative.[277]

Questioning style is recognised as a key barrier to children having positive experiences within the criminal justice system.[278] Pre-recording can play a part in remedying this, partially because of the absence of the jury, but also because of more robust pre-trial controlling of the questions. In England and Wales, the Ground Rules Hearing provides an opportunity for proposed

[269] Henderson, Temm and Hamlin, above n 209 at 16.11.
[270] Henderson, above n 37 at 182.
[271] Henderson, above n 37 at 182; and Ministry of Justice, above n 25 at [36] – [37] and [134].
[272] Cashmore, above n 56 at 533; New Zealand Law Society, above 196 at 40(a); and Sleight, above n 121 at 15.
[273] Ministry of Justice, above n 25 at [72]; and *R v Sadlier*, above n 71 at [12](d).
[274] Ministry of Justice, above n 25 at [72]; and Sleight, above n 121 at 15.
[275] Davies and Hanna, above n 26 at 296.
[276] Baverstock, above n 143 at 35.
[277] Baverstock, above n 143 at 35.
[278] See discussion in Chapter I.

examination to be scrutinised by all parties, including the judge. In practice, all parties generally reach agreement as to the questions that will be asked of the child witness.[279] By enabling tighter judicial control of questioning, pre-recording has the ability to reduce the illegitimate cross-examination tactics that are antithetical to the right to a fair trial.

(b) Earlier recovery

Ideally, if a child has their entire testimony pre-recorded, there is no need for them to attend trial. Accordingly, as the Court of Appeal rightly identified, pre-recording provides an opportunity for child witnesses to conclude their involvement in the justice system as early as possible. Reducing delays and allowing children to move on with their lives at an earlier stage has the benefit of reducing the secondary victimisation and re-traumatisation that child witnesses experience throughout the court process. It also aligns with statutory guidance for judges to regard the need to reduce witness stress and promote recovery.[280] Furthermore, if the recordings of the witness' testimony could be used at a re-trial, the child may not have to give further evidence if the case is re-tried.

Research has shown that improving witness experience is likely to mean they are more prepared to give evidence and more likely to report any further offending in the future.[281] Anecdotal evidence from Australia suggests pre-recording has allowed many cases to be brought to court that otherwise would not have been reported.[282] Child witnesses in the England and Wales pre-recording pilot reported that the special measure enabled them to give evidence they would not otherwise have been willing to give.[283] This suggests that as well as ameliorating stress for already traumatised and vulnerable children, pre-recording increases the likelihood of their participation in the court process.

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[279] Crown Prosecution Services "Special Measures" (2020) https://www.cps.gov.uk/legal-guidance/special-measures.
[280] Evidence Act 2006 s 103(4)(b).
[281] McDonald and Tinsley, above n 45 at 725; McGregor, above n 5 at 14; and New Zealand Law Society, above n 196 at 40(b).
[282] Cossins, above n 127 at 95; Eastwood, above n 56 at 2; and Hal Jackson "Child Witnesses in the Australian Criminal Courts" (paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1-2 May 2003) at 15.
[283] Baverstock, above n 143 at 15.

C Better Pre-trial Decisions

Pre-recording benefits both prosecuting and defence counsel by enabling better pre-trial decisions. When counsel have the opportunity to consider the credibility and likely impact of important evidence early in the process, they can conduct a more objective assessment of the likelihood of conviction or acquittal.[284] Earlier resolutions may therefore be reached. For the Crown, charges may be amended or withdrawn. For the defence, guilty pleas may be entered. If trial does go ahead, both parties have the advantage of preparing the case knowing the details of the child's evidence. This can aid with decisions regarding whether to prepare certain evidence or call certain witnesses. While there are concerns that pre-recording will involve preparing for trial twice, knowing the strength of a witness' evidence in advance means trial preparation can be more focused.[285]

Section 28 cases in the England and Wales pre-recording pilot saw fewer cracked trials and more pre-trial guilty pleas, as compared with the s 27-only cases.[286] At trial, there was little difference in conviction rates between the two tracks.[287] Practitioners in Western Australia enjoy more streamlined trial preparation, as well as increased pre-trial guilty pleas and charge withdrawals.[288] Evaluation of the pre-recording trials in the Auckland District Court found counsel were able to prepare more effectively by clarifying core issues sooner, which encouraged either early resolution or more efficient trials.[289]

D Editing out Inadmissible Material

Pre-recorded evidence can be edited to excise adjournments in the testimony, as well as any unduly prejudicial or inadmissible material that may otherwise lead to a mistrial. It also enables counsel to cross-examine on issues they might else have avoided due to the risk of eliciting said inadmissible evidence.[290] An incidental benefit from being able to edit out breaks in the

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[284] *R v Sadlier*, above n 71 at [12](g).
[285] Sleight, above n 121 at 13.
[286] Baverstock, above n 143 at 58.
[287] Baverstock, above n 143 at 60.
[288] Davies and others, above n 5 at 336; Henderson, above n 37 at 181; Henderson, above n 29 at 147; and Henderson, Hanna and Davies, above n 114 at 10.
[289] Davies and Hanna, above n 26 at 294.
[290] Henderson, above n 70.

testimony is that the evidence becomes more comprehensible to a jury because it is shorter and without interruption.[291]

E Cost Savings

Most of the aforementioned benefits come with associated cost savings. Improved evidence quality and increased ability to make better pre-trial decisions save both time and money for the justice system as they allow weak accusations to be weeded out. Inducing earlier resolutions saves court resources and legal aid expenditure. Moreover, efficient trial preparation and the possibility of using pre-recorded testimony at re-trials should significantly reduce legal costs.

Even if it materialises that costs associated with pre-recording are just front-loaded to the pre-trial stage, there are real savings to be made at the trial proper which should not be discounted. When pre-recorded testimony is excised of inadmissible evidence and adjournments, the presentation of that testimony at trial is significantly less time-consuming. The pre-recording pilot in England and Wales found that trials were shorter and easier to manage because the main witness was generally not present and earlier disclosure simplified the trial process.[292] Court officials, witnesses, and the jury will all benefit from the associated time savings.

The process evaluation of the England and Wales pilot provided data substantiating anecdotal reports of savings in time and money from Western Australia.[293] Pre-trial delays were reduced by 50 percent.[294] There was a substantial increase in pre-trial resolutions.[295] There were fewer aborted and re-scheduled trials.[296] While the pilot did see elements of double preparation, the number of actual trials reduced considerably and those that did proceed were less likely to require a re-trial.[297]

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[291] Henderson, above n 70.
[292] Baverstock, above n 143 at 33.
[293] McGregor, above n 5 at 25.
[294] Baverstock, above n 143 at 8.
[295] Baverstock, above n 143 at 9.
[296] Baverstock, above n 143 at 8.
[297] McGregor, above n 5 at 26.

III Balancing Advantages and Disadvantages

It is the contention of this dissertation that the aforementioned advantages contradict and negate the Court of Appeal's assertion that one "sole advantage" of pre-recording is outweighed by "significant disadvantages."[298] It is accepted that the cost of reform must not outweigh the benefits. However, to once again echo Judge Wade, when proper preparation is undertaken by both defence and prosecuting counsel, the disadvantages of pre-recording "pale into insignificance" in comparison with the substantial advantages.[299]

[298] *M v R*, above n 2 at [36] and [41].
[299] *R v Sadlier*, above n 71 at [29] and [33].

CHAPTER FOUR: OPTIONS FOR REFORM

As outlined in Chapter Three, there are practical objections to increasing the use of pre-recorded evidence in Aotearoa. However, the weight of the analysis leads to the conclusion that pre-recording is not only the best option for improving experiences of child witnesses, but also for ensuring fairer and more effective proceedings overall. While the practicalities of pre-recording may necessitate *incremental* reform, reform is nonetheless necessitated. If, as Chapter Three would suggest, pre-recording is the best way of giving effect to the purposes of our justice system and of the Evidence Act, the practical hurdles must simply be overcome. This chapter considers options for reform, in light of those underlying purposes and practical considerations.

I Options for Reform

This dissertation identifies two options for reform:[300]

A. Encouraging the use of current provisions in the Evidence Act by increasing awareness of the benefits of pre-recording and developing processes to ensure nationwide consistency in the use of pre-recording.
B. Amending the Evidence Act to include a presumption in favour of child witnesses having their entire testimony pre-recorded.

A Maintain the Current Evidence Act Provisions

Legislative reform may not be required to increase the use of pre-recording. As the Court of Appeal confirmed in *M v R*, courts have jurisdiction to make pre-trial cross-examination orders under the Evidence Act.[301] Pursuant to s 107(1) of the Evidence Act, child witnesses are entitled to give evidence in one or more alternative ways, including by video record made before trial.[302] The Ministry of Justice has confirmed that s 107 permits the pre-recording of pre-trial cross-

[300] Adapted from the recommendations made in the Ministry of Justice *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system* Issues Paper: above n 25.
[301] *M v R*, above n 2 at [19].
[302] The Evidence Amendment Act 2016 introduced this entitlement.

and re-examination.[303] The Act provides no guidance as to which alternative method is preferred. Rather, it is left to prosecutors' discretion.[304] If defence counsel wants the witness to give evidence in the ordinary way under s 83, they must apply under s 107B. Before giving a direction on the s 107B application, the Judge must give both parties the opportunity to be heard in chambers and may call for a report on the impact the method of giving evidence will have on the child.[305]

Accordingly, prosecutors are not legally barred from initiating pre-recording hearings. It remains open to practitioners, as they did in Auckland from 2010-2011, to unofficially implement pre-recording reform. As Chapter Three identifies, practical concerns are unlikely to impose insurmountable obstacles and the right to a fair trial is unlikely to be compromised. Courts then are capable of interpreting and applying the existing statutory provisions in a way that allows pre-recorded cross- and re-examination.

There already exists precedent for informal reform, as courts have used their inherent jurisdiction to develop procedural initiatives aimed at improving the experiences of young witnesses.[306] Henning has observed that courts in Aotearoa have recognised they have the jurisdiction, and possibly even a duty, to ensure effective participation in fair trials by enabling witnesses to give their evidence in alternative ways, even without legislative mandate.[307] Before screens were introduced as an alternative method of giving evidence,[308] the High Court used its inherent jurisdiction to acquiesce to the requests of prosecutors that defendants be hidden from child witnesses in court.[309] In 1997, child complainants in a neglect case were permitted to have their EVIs admitted as evidence-in-chief, despite the Evidence Act 1908 limiting eligibility to child complainants of sexual offences.[310] The Court of Appeal confirmed that these

[303] Richard Mahoney and others *Mahoney on Evidence: Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2008) at 713, citing Ministry of Justice *Evidence Amendment Bill: Departmental Report for the Justice and Electoral Committee* (October 2015) at [126] and at footnote 12.
[304] Mahoney and others, above n 303 at 713.
[305] France, above n 24: commentary on s 107 of the Evidence Act 2006.
[306] Henderson, above n 70.
[307] Henning, above n 174 at 170.
[308] By the Evidence Amendment Act 1989.
[309] Henderson, above n 70, referencing *R v Rihari* T4/88 Whangārei High Court, Hillyer J, June 1988 and *R v Vloet (No 2)* T34/88, Auckland High Court, Hillyer J, June 1988.
[310] *R v Moke* T46/97, HC Wellington, Neazor J, 19 August 1997.

were both appropriate uses of the Court's inherent jurisdiction on the basis that justice, in the form of protecting child witnesses, required a departure from the ordinary rules.[311]

Trial advocates and judges could be encouraged to make and grant pre-recording applications through widespread and nationally consistent education that emphasises the benefits of pre-recording. Additional funding from the Ministry of Justice for pre-recording facilities would make non-legislative reform a slightly less burdensome task. However, if evidence-in-chief can be pre-recorded in the form of an EVI, as is already standard practice, the practical infrastructure for pre-recording already exists.

For this type of reform to be successful, it is vital to have a cohesive and determined judiciary, as well as a cooperative Bar. The objections outlined in Chapter Three indicate that a cultural and attitude change within the legal profession is necessary to turn pre-recording hopes into a reality. To quote Lady Justice Hallett DBE in *R v Lubemba* –

> It is now 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.[312]

Perhaps instead of waiting for outside intervention, it is time for the legal profession to take stock of the tools at hand and use them to change the existing procedural conventions that have operated to re-victimise and re-traumatise one of the most vulnerable groups within our justice system. If the law is a piece of machinery, and the legal profession are the operators, we have a responsibility and a duty to ensure that the machine is running as effectively as possible. Perhaps all that is necessary is the will and the courage to do so.[313]

B Introduce a Legislative Presumption

A second option for reform is to amend the Evidence Act to include a presumption in favour of child witnesses having their entire testimony pre-recorded.

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[311] *R v Rihari* [1989] 1 NZLR 660 at 667-668; and *R v Moke and Lawrence* [1996] 1 NZLR 263 at 393.
[312] *R v Lubemba* [2015] 1 WLR 1579 at [45].
[313] This paragraph is paraphrased from Dr Emily Henderson's lecture in LAWS414 (Law of Evidence) at the University of Otago on 2 May 2018; as well as from conversation between Dr Emily Henderson and the author.

For example, the following provision could replace the existing s 107[314]:

Giving of evidence by child witnesses

107 Child witnesses entitled to pre-record whole evidence

(1) Any child witness, when giving evidence in a criminal proceeding, is entitled to have his or her whole evidence (including cross-examination and re-examination) -

a) Recorded by means of a video record made from an appropriate location before the hearing of the proceeding; and

b) Presented, in the form of a video record, as the whole or part of the child's evidence at the hearing of the proceeding; and

c) The defendant must be able to see and hear the witness giving evidence, except where the Judge directs otherwise.

(2) If the child's whole evidence is presented at the hearing of the proceeding as a video record in accordance with subsection (1), the child need not be present at the hearing of the proceeding.

(3) Despite subsection (1), the Judge may order, on application from either party or on his or her own initiative, that the whole or part of the child's evidence (including cross-examination and re-examination) be given –

a) In the ordinary way in accordance with section 83; or

b) In a different alternative way in accordance with section 105(1)(a)(i) or 105(1)(a)(ii).

(4) Despite subsection (2), the Judge may require the witness to give further evidence after the video record is made in accordance with section 99, in the ordinary way or in a different alternative way in accordance with section 105(1)(a)(i) or 105(1)(a)(ii).

(5) When making an order under subsection (3) or (4), the Judge must have regard to –

a) The views of the witness and –

i. The need to minimise stress on the witness; and

ii. In a criminal proceeding, the need to promote the recovery of the complainant from the alleged offence; and

[314] This draft provision is based loosely off the pre-recording provisions in the Western Australian Evidence Act 1906 and the English Youth Justice and Criminal Evidence Act 1999, as well as existing provisions in New Zealand's Evidence Act 2006. It is also informed by the pre-recording provisions in the Sexual Violence Legislation Bill 2019 and the public submissions on that Bill.

b) The need to ensure the fairness of the proceeding and that, in a criminal proceeding, there is a fair trial; and the impact the method of giving evidence will have on this; and
c) The most appropriate method to maximise the quality of the evidence; and
d) The need to avoid unnecessary expense or delay; and
e) Whether the interests of justice require departure from usual procedure under subsection (1) in the particular case.

(6) Any video recording made under subsection (1) must comply with section 106.

To support this new s 107, minor amendments to surrounding provisions will need to be made.[315] Section 106 deals explicitly with video recorded evidence. Amendments to s 106 should be made to provide for the following:

⇒ To ensure all copies of pre-recorded evidence are provided to defence counsel.[316]
⇒ To explicitly state that procedural content irrelevant to the determination of the proceedings (for example, witness breaks) and any other material the parties agree is not to form part of the evidence may be excised from the video record.[317]
⇒ To include provision that, after original edits are ordered under s 106(7), further edits only be made if new relevant issues have arisen and the interests of justice require the video record to be edited.

The effect of a rebuttable presumption in s 107 is that, for a child to give evidence in the ordinary way, or in a different alternative way,[318] application would have to be made by either counsel, or the Judge would have to give an independent direction to that effect. This allows the presumption to be rebutted in appropriate cases, such as where the child witness wants to

[315] For example, ss 107A and 107B – which provide for the prosecution and the defence to apply for the witness to give evidence in the ordinary way or a different alternative way under s 105(1)(a)(i) or (ii) – may become redundant in light of the proposed s 107(4) and (5).
[316] Currently, under s 106(4A) of the Evidence Act 2006, copies of pre-recorded evidence are not given to the defendant's lawyer when the evidence is of a child complainant or any witness in a sexual or violent case (although it must be offered for viewing). Under s 106(4B), the Judge may order, on application, that a copy be given contrary to s 106(4A). If pre-recording a child witness' entire testimony becomes the norm, the defendant's right to present an effective defence may necessitate amendment to s 106.
[317] The current s 106(7) only provides for material to be excised if, were it evidence given in the ordinary way, it would or could be excluded in accordance with the Evidence Act 2006.
[318] A different alternative way under s 105(1)(a)(i) or (ii).

appear at trial to have their "day at court", or in complex trials where discovery and full preparation cannot be expedited.

Western Australia and England and Wales have found similar legislative presumptions an effective way to guarantee the consistent implementation of pre-recording state and nationwide. The most obvious benefit of a legislative presumption is that it will improve children's access to pre-recording. Another key benefit is that it sends an unequivocal message from Parliament to courts and practitioners that there is value in pre-recording. It is also likely to reduce time spent on applications for evidence to be given in alternative ways. Furthermore, if pre-recording children's entire evidence becomes the norm, the risk that jurors will draw adverse inferences against the defendant on the basis of the method of giving evidence will be mitigated over time.[319]

Given the likely resistance to pre-recording from a significant portion of the Criminal Bar, legislative reform must be unambiguous to ensure its intent is not circumvented in practice.

II Recommended Option for Reform

The most effective reform would be a combination of both options: amending the Evidence Act to introduce a presumption that child witnesses have their evidence pre-recorded, as well as encouraging pre-recording by increasing awareness of the benefits and developing nationwide pre-recording procedures. A mixture of bottom up and top down action will have the best chance at realising the advantages of pre-recording.

Despite there being jurisdiction under the Evidence Act to pre-record, and a history of prosecutorial and judicial activism in the interests of young witnesses, the *M v R* decision has erected a formidable barrier to non-legislative reform. It is likely counsel would foresee the reticence of lower courts to allow pre-recording in an effort to avoid an appealed decision and will accordingly be discouraged from advancing the application. As such, more than a passive sea change from the ground up will be necessary to make meaningful changes to the experiences of child witnesses.

[319] Ministry of Justice, above n 25 at [54].

Current legislation and recent case law suggest some parts of the profession are willing and able to expand the use of pre-recording.[320] However, opposition to pre-recording provisions in the Sexual Violence Legislation Bill 2019 illustrates that there would remain considerable resistance to any such cultural shift. Introducing a legislative presumption would send an unambiguous message from Parliament that this resistance must be overcome. Legislative mandate would also help to guarantee nationally consistent pre-recording procedures, to ensure that all child witnesses have access to the same levels of protection. In the meantime, those practitioners with an appetite for change should continue pushing the boundaries of the Evidence Act and the Court of Appeal precedent.

Should legislative reform be implemented, a concomitant shift in culture and traditional views of trial will still be necessary to give it any effect. For statutory reform to equate to meaningful change in courtroom practice, officers of the court must take ownership of the procedures themselves.[321] The experiences in Western Australia and England and Wales indicate statutory pre-recording regimes operate most effectively when they are accepted into the legal landscape and embraced by practitioners.[322] On implementing pre-recording regimes, former Western Australian Chief District Court Judge, Hal Jackson, opines it works best when there is an appropriate legislative base, enthusiastic practitioners, a supportive judiciary, and sufficient resourcing to maintain the necessary infrastructure.[323] Encouraging a cultural shift, through educating the legal profession as to the benefits of pre-recording, as well as a nudge from Parliament through legislative reform, would work to create these conditions. That is why a synthesis of reform options A and B offers the best chance for the successful implementation of a pre-recording regime in Aotearoa.

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[320] For example, the 2017 use of pre-recording in the High Court. See *R v Aitchison,* above n 103; and *R v MS,* above n 94. See also Law Commission *The Justice Response to Victims of Sexual Violence*, above n 4 at 4.73: 20 District Court Judges in New Zealand submitted that consideration should be given to the greater use of pre-recorded evidence. The 2019 report on child witnesses in criminal courts from the Chief Victims Advisor reported that some judges in the Sexual Violence Pilot Courts were willing to consider pre-recording applications again: McGregor, above n 5 at 27.

[321] McGregor, above n 5 at 34.

[322] Henning, above n 174 at 168.

[323] Jackson, above n 111 at 86.

III What Pre-recording would look like in Aotearoa

To maximise the advantages of pre-recording, any such regime should endeavour to establish robust pre-trial and trial management in each case. Additionally, consideration should be given to pre-recording from remote locations.

A Pre-trial Ground Rules

International experience indicates that opportunities to control cross-examination offered in the pre-trial context should be exploited.[324] Looking to Western Australia and England and Wales, the best option in this regard is to hold pre-trial directions hearings to set ground rules for the conduct of cross-examination. Best practice guidelines in both jurisdictions indicate that determining the witness' level of understanding and setting ground rules for the questioning of the child is crucial to restraining improper questioning.[325]

In Aotearoa, the Benchmark initiative has produced guidelines to assist practitioners in facilitating the best evidence from vulnerable witnesses. Henderson, Temm and Hamlin have already drafted preliminary guidelines for the conduct of pre-recording hearings in New Zealand.[326] Should the use of pre-recording increase, these guidelines should be utilised and new ones developed for pre-trial directions hearings.[327] It would also be prudent to develop a systematic auditing system, to monitor challenges and patterns over time and to create a database for the collection of quantitative data on how children are giving evidence.[328] This would make it easier to ensure best practice is kept up to date, to monitor compliance and to evaluate success.

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[324] Henning, above n 174 at 161.

[325] For Western Australia see the District Court of Western Australia *Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability* Circular to Practitioners No CRIM 2010/1 (8 September 2010). For England and Wales see the Judicial College "Bench Checklist: Young Witness Cases" (18 January 2012) Courts and Tribunals Judiciary https://www.judiciary.uk/publications/jc-bench-checklist-young-wit-cases/.

[326] Henderson, Temm and Hamlin, above n 209.

[327] Again, the High Court is already taking the initiative in this area. In *R v Mehrok* (above n 97 at [51] - [52]), Cooper J ordered that the communication assistant submit a Ground Rules Checklist to allow the court to make any necessary orders, and that the defence counsel submit proposed cross-examination questions to the communication assistant for her feedback and assistance in formulating appropriately worded questions.

[328] Emma Davies, Kirsten Hanna and Emily Henderson "Implications for Future Legislation and Practice" in *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, Auckland, 2010) at 170.

B Pre-recording from Remote Locations

An important concern identified in Chapter Three was that one of the key stressors associated with children giving evidence – the intimidating nature of the courtroom environment – is not ameliorated by pre-recording. As discussed, the nature of a formal courtroom may reduce counsel's ability to elicit good quality evidence from children and induce a reluctance on behalf of the witness to talk.[329] This concern appears to be overlooked in the Western Australian pre-recording regime, given that pre-recording is foregone if the trial proper can be scheduled within six months of the charges being laid.

Possibly then, consideration should be given to pre-recording from more familiar environments, such as the child witness' home or school. This might enable the child to feel more comfortable answering questions about the alleged incident. It would also reduce the risk of the witness seeing the accused and their supporters before giving evidence and has the potential to reduce the cost and inconvenience of travel.[330]

However, there is a risk that traumatised complainants giving evidence in familiar environments would begin to associate that environment with the harm they have experienced.[331] Further, it is possible this would be perceived as giving too many concessions to the witness, which may unduly influence the jury to infer guilt.[332] In light of these concerns, another option may be for young witnesses to give evidence from remote but neutral locations, such as multi-agency centres like Puawaitahi in Auckland.[333]

There is already precedent within the law to conduct parts of a trial from remote locations. The Courts (Remote Participation) Act 2010 allows trial participants to testify via AVL from remote locations.[334] In *R v Willeman*, the entire testimony of a severely physically handicapped

[329] Ministry of Justice, above n 25 at [134].
[330] McGregor, above n 5 at 38.
[331] Ministry of Justice, above n 25 at [140].
[332] Ministry of Justice, above n 25 at [139].
[333] Puawaitahi is a child protection multi-agency centre. Formal evidential video interviews conducted by Police and Oranga Tamariki interviewers take place in Puawaitahi's Evidential Video Unit.
[334] In making any such order, the Judge is mandated by ss 5 and 6 to consider, inter alia, the impact of the technology on the ability to assess the credibility and reliability of the witness, as well as the impact on the defendant's right to a fair trial.

adult complainant was pre-recorded from his home.[335] Some cases in the Sexual Violence Pilot Courts involve complainants appearing via AVL from locations outside of the courthouse, reportedly without negatively impacting the proceedings.[336] Furthermore, initiatives like the Rangatahi and Pasifika Courts enable entire hearings to be conducted outside of the courthouse. These all demonstrate that there is wide scope for our existing court processes to adapt to the needs of its participants in an effort to achieve the most just outcomes possible.

Given there already exists opposition from the Bar to the idea of pre-recording cross- and re-examination at all, doing so from a location outside the courthouse may be considered too far of a jump. However, conducting a pre-trial pre-recording hearing in a more child-friendly environment would maximise the benefits of pre-recording. Any such development would likely be incremental, giving practitioners the opportunity to adjust to the cultural shift that will ideally accompany the introduction of pre-recording reform. Further, the decision as to where pre-recording takes places should be one for counsel and the Judge, with consideration of witness preference and fair trial implications, on a case-by-case basis. It will also be important that juries receive appropriate directions to guard against undue inferences of guilt.

IV Conclusions on Potential Reforms

While the Bar may have difficulties adjusting to a new pre-recording regime, incremental implementation should alleviate the practical concerns. The introduction of pre-recording will be a significant change to the current landscape of criminal proceedings. However, as a reform with the ability to soften the experience of the court system's most vulnerable participants, as well as enhance overall justice, it should be welcomed by the legal profession.

To facilitate the smooth implementation of pre-recording reform and ensure its purposes are not circumvented in practice, it will be necessary to have clarity in the Evidence Act, as well as the supporting infrastructure. This would include comprehensive training for practitioners, judicial education, detailed guidelines for pre-recording procedure, and the necessary financial investment.

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[335] *R v Willeman,* above n 68. The Judge, registrar and counsel were present, with the accused viewing the proceedings via AVL from a different location.
[336] Randell and others, above n 5 at 92.

The widespread use of pre-recorded evidence will inevitably come with associated costs. However, experience in other jurisdictions demonstrates that the cost is not infinite. It can be quantified, and the benefits to procedural fairness and improvements to the experiences of vulnerable court users indicate that the investment will be a worthy one. Additionally, Chapter Three illustrates that pre-recording is likely to deliver savings that offset some of the associated costs through increased plea bargaining and the more efficient conduct of proceedings. Fiscally, there are marks on both sides of the ledger.

While any new system takes some getting used to, practitioners in Aotearoa should take comfort in the experiences of Western Australia and England and Wales. Our closest legal counterparts have demonstrated the viability of pre-recording child witnesses' entire testimony.

CONCLUSION

The crux of this dissertation is as follows: the current methods children use to give evidence are stressful. Less stressed children give better quality evidence. Pre-recording a child's entire testimony is a readily available and practical option for reducing the stress involved in giving evidence.

This dissertation has endeavoured to illustrate that the current experiences of child witnesses, and the consequences this has on the evidence that is produced, leads to the conclusion that every case with a child witness is a compelling case for pre-recorded evidence. Academic research and international experience show that the advantages outweigh the risks and that those advantages extend to all participants in the criminal justice system. Increasing the use of pre-recorded testimony offers real improvements for the overall efficacy of the court system and does not inherently impinge on the accused's right to a fair trial.

Reform of this kind may appear radical to those in the legal profession who are highly protective of legal procedures that have developed within the adversarial system over the years, particularly where cross-examination is involved. However, where radical problems manifest, radical reform is required. The current treatment of child witnesses, which produces inaccurate testimony and discourages participation in the justice system, meets this threshold.[337]

[337] Cossins, above n 127 at 108.

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