Cabinet Domestic Policy Committee

DOM Min (11) 10/1

Copy No: 29

Minute of Decision

Child Witnesses in the Criminal Courts: Proposed Reforms

Portfolio: Justice

On 6 July 2011, the Cabinet Domestic Policy Committee (DOM):

1 **noted** that the paper under DOM (11) 49 outlines a package of proposals that aim to address concerns about the way child witnesses are treated in the criminal justice system and ensure the most reliable and accurate evidence is elicited;

Reducing the impact of time delays

Proposal 1: A legislative presumption that children give their evidence via their evidential interview video record and CCTV

2 **agreed** to introduce a legislative presumption that child witnesses (excluding defendants) under the age of 12 give their evidence via their evidential interview video record (where one exists) and CCTV, regardless of whether a child gives evidence at a pre-trial pre-recording hearing or at trial;

Proposal 2: A legislative presumption in favour of pre-recording children's entire evidence

3 **agreed** to introduce a legislative presumption in favour of pre-recording children's entire evidence in criminal proceedings, applied to child witnesses (excluding defendants) under the age of 12;

4 **agreed** that, where either, or both, of the presumptions in paragraphs 2 and/or 3 apply, an application for how a child witness is to give evidence should not be required;

Proposal 3: A requirement to hold pre-recording hearings within a specified timeframe

5 **agreed** that pre-trial hearings to pre-record witnesses' evidence in criminal proceedings should be expedited and held within a specified timeframe (to be recommended when draft amendments to the Evidence Regulations 2007 are submitted to Cabinet following passage of the Evidence Amendment Bill);

6 **agreed** to introduce a regulation making power for time frames for pre-recording a person's entire evidence;

Proposal 4: Clarifications and improvements to legislation to support an increased use of pre-recording

7 **agreed** to clarify existing law (the Evidence Act 2006) to:

7.1 clarify that all witnesses (subject to the grounds outlined in section 103(3) of the Evidence Act) can give evidence, including cross- and re-examination at a pre-trial hearing where the visual and audio evidence is recorded and replayed at trial;

7.2 ensure that the Evidence Regulations 2007 outline any necessary requirements around the pre-recording of witnesses' entire evidence at a pre-trial hearing;

7.3 provide the ability to recall a witness for further questioning following a pre-trial pre-recording hearing, on application of counsel, but with a very high threshold (i.e. where it would be contrary to the interests of justice to reject the application);

7.4 allow video records, whether evidential interview video records or records made at a pre-trial hearing, to be used at re-trials instead of recalling the witness (unless the order for a retrial following appeal is based upon a deficiency in the way in which the evidence was elicited);

8 **noted** that, following the Court of Appeal's decision on the jurisdictional basis for pre-recording, the Ministry of Justice will review whether any further amendments to legislation are required;

Improving the questioning of child witnesses

Proposal 5: Improved guidance and training on questioning child witnesses

9 **directed** the Ministry of Justice to work with the judiciary and the New Zealand Law Society's Continuing Legal Education organisation to improve the availability of guidance and training on questioning child witnesses;

Proposal 6: Introduce intermediaries to improve the questioning of children

10 **agreed** to provide for the use of intermediaries for child complainants under the age of 18, when they give evidence at court proceedings, and where the intermediary service is available;

11 **agreed** to introduce a regulation making power for the ability to prescribe procedures relating to the use of intermediaries in court proceedings;

Other enhancements relating to child witnesses and their evidence

Proposal 7: Extend the automatic right to a support person

12 **agreed** that all child witnesses should have an automatic right to a support person while they give evidence at court proceedings;

Proposal 8: Introduce a new judicial direction relating to the demeanour of child witnesses

13 **agreed** to introduce a new mandatory judicial direction that juries should not draw any inference from the demeanour of child witnesses when they give evidence by an alternative mode;

Financial implications of Proposals 1 – 4

14 **noted** that the following justice sector agencies will absorb additional costs as a result of Proposals 1 – 4:

14.1 the Ministry of Justice will absorb estimated costs of up to $0.650 million per year within Vote: Courts, by re-prioritising the support provided to other non-urgent court hearings;

14.2 the Ministry of Justice will absorb estimated costs of up to $50,000 per year to the Legal Aid Scheme within Vote: Justice;

14.3 New Zealand Police will absorb a minimal increase in costs within Vote: Police;

15 **noted** that the Crown Law Office:

15.1 estimates that it will incur net costs in the range of $0.650 million and $0.840 million per year as a result of Proposals 1 – 4;

15.2 is currently unable to absorb these costs within baseline;

16 **noted** that:

16.1 the fiscal pressures faced by the Crown Law Office are to be addressed through the *Prosecution Review, Criminal Procedure Simplification* and, potentially, a reduction in volumes through *Policing Excellence* initiatives;

16.2 on 13 April 2011, DOM took decisions on setting the direction for the justice sector, which includes work on these three initiatives [DOM Min (11) 6/3];

17 **agreed** that the changes in paragraphs 3, 5, 6 and 7 are not introduced to Parliament until funding is available;

18 **noted** that the change in paragraph 2 (Proposal 1) can be implemented without any further funding;

19 **noted** that funding for the changes in paragraphs 3, 5, 6, and 7 is to be identified after the Attorney-General, in consultation with the Minister of Justice and the Minister of Police, has reported back to the Cabinet Domestic Policy Committee with recommendations for reform arising from the *Prosecution Review* (expected by 28 February 2012);

Financial implications of Proposal 6

20 **noted** that Proposal 6 will be funded out of the Victims' Services Appropriation in Vote: Justice, at an ongoing cost of approximately $0.5m per year;

Legislative implications

21 **agreed** that the Evidence Act 2006 be amended to implement the agreed changes in paragraphs 2, 4, 10, 11, 12 and 13;

22 **agreed** that the Evidence Act 2006 be amended to implement the agreed changes in paragraphs 3, 5, 6, and 7 once funding is available;

23 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office for all of the above amendments;

24

Publicity

25 **noted** that the Prime Minister and the Minister of Justice will announce the main features of the decisions and the government's intention to introduce implementing legislation in 2012 at an appropriate time;

26 **noted** that the paper under DOM (11) 49 will be placed on the Ministry of Justice's website.

Reference: DOM (11) 49

Present:
Hon Bill English
Hon Simon Power (Chair)
Hon Tony Ryall
Hon Judith Collins
Hon Christopher Finlayson
Hon Paula Bennett
Hon Dr Jonathan Coleman (part of item)
Hon Kate Wilkinson
Hon Nathan Guy

Officials present from:
Officials for DOM Committee

Distribution:

In Confidence
Office of the Minister of Justice

Cabinet Domestic Policy Committee

Child witnesses in the criminal courts: proposed reforms

PURPOSE

1. This paper seeks Cabinet's agreement to a package of proposed reforms that address concerns about the way child witnesses are treated in the criminal justice system and ensure that the most reliable and accurate evidence is elicited.

EXECUTIVE SUMMARY

2. This Government is focused on improving the results of public services for vulnerable children, including children who appear in court as witnesses.

3. It is widely acknowledged that contact with the court system can be traumatic for child witnesses. Many special provisions are already in place, including alternative modes of giving evidence. Despite these, I am concerned that research and consultation has indicated two key problems for child witnesses:

   - the impact of long delays before giving evidence at trial; and
   - inappropriate questioning of children, particularly during cross-examination.

4. The Cabinet paper is divided into three areas, with eight proposed reforms:

   Reducing the impact of time delays

   (1) a legislative presumption that children aged under 12 give their evidence via their evidential interview video record (where one has been made by Police or Child, Youth and Family) and CCTV;

   (2) a legislative presumption in favour of pre-recording the entire evidence (including cross- and re-examination) of children aged under 12, at a hearing significantly earlier than the trial;

   (3) a requirement, in regulation, that pre-recording hearings are held within a specified timeframe;

   (4) clarifications and improvements to legislation to support an increased use of pre-recording;

   Improving the questioning of child witnesses

   (5) improving the availability of guidance and training for the judiciary and lawyers on questioning child witnesses;

   (6) introducing the option of an intermediary at court for all child complainants under the age of 18;

   Other enhancements relating to child witnesses and their evidence

   (7) extending the automatic right to a support person to all child witnesses; and

   (8) introducing a new judicial direction to juries relating to the demeanour of child witnesses who give evidence by an alternative mode.

5. Proposal 1 is already common practice. A presumption will ensure consistency and create benefits for Vote: Attorney General as it will remove the requirement for prosecutors to make mode of evidence applications to the court. Proposals 5, 7 and 8 have no financial implications. Proposal 6 can be funded out of the Victims' Services Appropriation in Vote: Justice.

6. Proposals 2 – 4 have cost implications for Vote: Courts, Vote: Justice, Vote: Police and Vote: Attorney-General. Crown Law has indicated that they are unable to meet these costs due to current fiscal pressures. I recommend that legislative changes related to proposals 2 – 4 are agreed to in principle, but not introduced to Parliament until funding is available.

7. Given the importance of these proposals, I recommend that legislation is drafted, ready for introduction in 2012, in parallel with the *Prosecution Review*. The *Prosecution Review* is considering how the public prosecution system can best be structured so that it delivers effective services in a way that is cost-effective and sustainable. Justice sector agencies will be in a better position to identify the necessary funding to implement proposals 2 – 4 following the recommendations of the *Prosecution Review*, which will be reported to Cabinet in February 2012.

BACKGROUND

8. In April 2010, researchers from the Auckland University of Technology published a report outlining concerns for child witnesses in New Zealand's criminal justice system (the AUT Report). Shortly after, I travelled to the United Kingdom and Europe to investigate inquisitorial systems of justice. On my return, I directed the Ministry of Justice (the Ministry) to undertake an investigation of alternative pre-trial and trial processes for child witnesses.

9. New Zealand and international research, along with consultation the Ministry has undertaken, indicates that the two key concerns for child witnesses are:

   - the impact of long delays before giving evidence at trial; and
   - inappropriate questioning (particularly during cross-examination).

10. Long delays and inappropriate questioning both risk traumatising child witnesses and reduce the ability to elicit the most accurate, reliable and complete evidence from them.

11. As outlined in the Prime Minister's Statement to Parliament in February 2011, this Government is particularly focused on improving the results of public services for New Zealand's vulnerable children, including children who appear in court as witnesses.

Child witnesses and existing special provisions

12. Child witnesses are defined in the Evidence Act 2006 (the Act) as under 18 years of age. A child witness in a criminal case may be the complainant or they may be a witness who is not the complainant. I will refer to both as 'child witnesses', except where there is a need to refer specifically to child complainants.

13. The available statistics on child witnesses are limited. The Ministry's best estimate is that there are approximately 750 child witnesses who give evidence in criminal court cases each year. Between 300 and 500 of these children are estimated to

be under the age of 12. The majority of child witnesses are complainants in sexual offence cases.

14. The criminal justice system currently acknowledges that child witnesses are particularly vulnerable and applies a number of special provisions. Most child witnesses are interviewed by a specialist-trained interviewer from Child, Youth and Family or the New Zealand Police (the evidential interview).[1] These interviews are video-recorded and usually played at trial as the child's evidence-in-chief. This means most children do not need to give evidence-in-chief live at trial but still need to attend to be cross- and re-examined. The cross- and re-examination is usually conducted via closed-circuit television (CCTV) or using a screen in the courtroom. It is not recorded, but is transcribed verbatim.

15. Since the end of 2010, the Auckland Crown Solicitor has been making applications for pre-recording for children's entire evidence (including cross- and re-examination), in reliance on s 105 of the Act. However, it has recently become apparent that the jurisdictional basis for pre-recording of cross- and re-examination is uncertain. This is currently the subject of two appeals before the Court of Appeal. Further information on the current situation is outlined in Appendix A. Any uptake in the use of pre-recording is currently dependent on the Court of Appeal decision, along with the preferences of prosecutors and judges in each area.

Child witnesses issues paper

16. In December 2010 the Ministry released an issues paper, *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system* (the issues paper), for targeted consultation. The issues paper set out a range of possible options for reform.

17. Thirty written submissions were received from lawyers; judicial groups; counsellors, psychologists and psychotherapists; academics; non-government organisations; government agencies and members of the public. The Ministry also met with a number of individuals and organisations in Auckland and Wellington,[2] including members of the Māori and Pacific communities.

National guidelines for child witnesses

18. In addition to the following proposed reforms, National guidelines have been developed by the Ministry, New Zealand Police, Child, Youth and Family and Crown Law, to help deliver greater consistency between agencies in how child witnesses are supported through the criminal justice system. The guidelines have been recently published on the Ministry's website.

19. An accompanying leaflet '*For parents, carers, family and whānau of young witnesses*' provides information on the criminal justice system and where families can get support. These leaflets are currently being distributed to agencies that come into contact with child witnesses and their families.

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[1] It is standard Police practice for all complainants of sexual assault and child witnesses under 12 to have a video recorded evidential interview. For other witnesses, it is discretionary.

[2] The February 2011 earthquake meant a large consultation meeting planned in Christchurch was cancelled and a number of Christchurch-based groups were unable to submit on the issues paper. Organisers of the meeting indicated there was wide support among these groups for the ideas raised in the issues paper.

PROPOSALS FOR REFORM

20. Despite the special provisions and processes,[3] I remain concerned that contact with the court system can be traumatic for child witnesses.

21. I am presenting a package of measures, developed following feedback on the issues paper, that will address concerns about the way child witnesses are treated in the criminal justice system and ensure the best quality evidence is elicited from these witnesses. This package of proposed reforms represents the most critical legislative and operational changes, given current fiscal constraints.

22. The proposed reforms could arguably be applied to other vulnerable (and potentially all) witnesses. I have focussed on child witnesses as a starting point, given their particular vulnerability.

23. The package of proposed reforms is divided into three areas:

- reducing the impact of time delays;
- improving the questioning of child witnesses; and
- other enhancements relating to child witnesses and their evidence.

Reducing the impact of time delays

24. The AUT Report found that children in their research sample waited 15 months on average to be processed through the courts. The length of time between reporting a crime and the case going to trial can affect witnesses' memory, and therefore the accuracy and quality of their evidence. Children are particularly susceptible to memory deterioration. The delay before a child gives evidence also prolongs the time before the child can conclude their involvement in the criminal justice process and fully recover from their experience.

25. I propose four reforms to reduce the time delay between disclosure of a crime and when a child gives evidence at trial:

(1) a legislative presumption that children give their evidence via their evidential interview video record and CCTV;

(2) a legislative presumption in favour of pre-recording children's entire evidence (including cross- and re-examination);

(3) a requirement, in regulation, that hearings to pre-record evidence are held within a specified timeframe; and

(4) clarifications and improvements to legislation to support an increased use of pre-recording of witnesses' entire evidence.

Proposal 1: A legislative presumption that children give their evidence via their evidential interview video record and CCTV

26. Most child witnesses, particularly those under the age of 12, are interviewed by a specialist-trained interviewer from Child, Youth and Family or the New Zealand Police (the evidential interview). These interviews are video-recorded and usually

[3] Which also include: the Court Education for Young Witnesses Service; automatic name suppression for child witnesses; closing the court to the public when complainants (of any age) in cases of a sexual nature are giving oral evidence; and prioritisation of cases involving child witnesses.

played at trial as the child's evidence-in-chief. It is common practice for these child witnesses to then give any supplementary evidence-in-chief, and be cross- and re-examined, at trial via CCTV. Prosecutors must apply to the court for children to give evidence via these alternative modes.

27. I propose to introduce a legislative presumption that children give their evidence via their evidential interview video record (where one exists) and CCTV. This presumption would apply to all child witnesses (excluding defendants) under the age of 12, and would apply regardless of whether a child gives evidence at trial or at a pre-recording hearing.

28. This presumption would ensure child witnesses are consistently benefiting from the protection of these alternative modes of giving evidence. It would also increase efficiency in the court process by removing the requirement that prosecutors must make a mode of evidence application to the court.

Proposal 2: A legislative presumption in favour of pre-recording children's entire evidence

29. The Criminal Procedure (Reform and Modernisation) Bill, which is currently before Select Committee, will reduce time delays in all criminal court cases. However, the Bill will not fully address concerns about court delays for child witnesses. While delays will be reduced, child witnesses will still face a wait before giving evidence at trial.

30. I propose to introduce a legislative presumption in favour of pre-recording children's entire evidence (including cross- and re-examination), in criminal proceedings. The presumption would apply to all child witnesses (excluding defendants) under the age of 12. Pre-recording children's entire evidence, which could take place on a date significantly earlier than the trial, would be the most effective way of addressing concerns about delays before children give evidence. Submitters to the issues paper were unanimous in their support for pre-recording children's entire evidence.

31. A legislative presumption in favour of pre-recording would:

- send a clear, positive message about the value of pre-recording children's entire evidence; and
- ensure there is consistent practice nationwide and remove regional disparity.

32. The presumption would apply unless there was a good justification why a child should not give evidence this way. One such justification may be that the trial itself can be held at a sufficiently early time that there would be no additional reduction in time delay as a result of a pre-trial hearing.

33. In addition to addressing the impact of time delays, pre-recording children's entire evidence has a number of other advantages, including:

- potential earlier resolution of cases, either through an increase in guilty pleas if the defendant sees that the evidence is compelling or an increase in withdrawn prosecutions (which may provide significant cost benefits);[4]

[4] Anecdotal evidence from Western Australia is that there was an increase in early guilty pleas and withdrawn prosecutions following the introduction of pre-recording.

- witnesses do not need to spend time waiting at court to be called to give evidence and there will be greater opportunity at pre-trial pre-recording hearings to give witnesses breaks when they get tired or stressed; and
- the audio-visual recording can be used for any retrial so the witness does not need to be recalled.

34. Introducing this legislative presumption, along Proposal 1, would mean that it would be assumed a child witness under the age of 12 would:

- give their evidence-in-chief by way of their evidential interview video record, where such a video record has been made and where it is the wish of the prosecutor for it to be used at trial; and
- give their remaining evidence, including cross- and re-examination, at a pre-trial hearing, conducted via CCTV, where the visual and audio evidence is recorded and replayed at trial.

35. I have considered the potential risk that the impact of a child's evidence may be lost when the jury only views their evidence by way of a video record, which may risk a reduction in the number of convictions. However, there is very little research on the relative impact of live testimony and CCTV or pre-recorded video evidence, and the available research is varied and inconclusive. I believe that the benefits of pre-recording outweigh any potential risk.

36. Consideration has also been given to fast tracking trials involving child witnesses, therefore bringing the whole trial forward rather than pre-recording the entire evidence of child witnesses. Trials involving child witnesses are already prioritised by the courts, and I do not believe they can be fast tracked any further than they are currently.[5]

Proposal 3: A requirement to hold pre-recording hearings within a specified timeframe

37. I also propose to introduce a requirement to expedite pre-trial hearings to pre-record witnesses' evidence in criminal proceedings, and that they be held within a specified timeframe (to be included in the Evidence Regulations 2007). This would require an amendment to the regulation making powers in the Act.

38. I propose that a timeframe is set that will significantly reduce the average time children wait to give evidence at court, potentially to less than six months. This would ensure the central purpose of pre-recording all evidence – reducing the time children wait before giving evidence at court – is achieved. The timeframe will also apply to other vulnerable witnesses who, on rare occasions, have their evidence pre-recorded.

39. While meeting a specified timeframe will be dependent on available court time, it will create a clear expectation on court staff, the judiciary and the legal profession. The timeframe will need to allow for disclosure to have been completed, sufficient

[5] Currently, cases involving child witnesses are identified and monitored by court staff, and prioritised where possible. A Practice Note was issued by the Chief Justice and the Chief District Court Judge in 1992, detailing expectations that cases involving sexual offending and child witnesses are disposed of promptly. Judges and Criminal Caseflow Managers provide case management, such as setting timeframes for each event and set time-tabling orders if necessary.

time for counsel to prepare for cross-examination, and for the Judge to extend the timeframe if the situation necessitates it.

40. I recommend that the Ministry undertake further work to determine the exact timeframe and parameters, in tandem with the development of the new Criminal Procedure Rules arising from the Criminal Procedure (Reform and Modernisation) Bill.

Proposal 4: Clarifications and improvements to legislation to support an increased use of pre-recording

41. As noted earlier, the Auckland Crown Solicitor has been making applications for pre-recording for children's entire evidence (including cross- and re-examination), in reliance on s 105 of the Act. This section outlines the alternative ways any witness may give evidence, subject to certain grounds.[6] The current provisions relating to pre-recording are ambiguous, and the jurisdictional basis for pre-recording is currently the subject of two appeals before the Court of Appeal.

42. To clarify the law which can apply to all witnesses, and to support an increased use of pre-recording children's entire evidence, I propose a number of clarifications of existing provisions and other improvements related to pre-recording. Regardless of what the Court of Appeal decides, I suggest there is scope to clarify and improve the law.

43. I propose to clarify the law relating to all witnesses by:

- amending ss 103-107 of the Act to clarify that all witnesses (subject to the grounds outlined in s 103(3) of the Act) can give evidence, including cross- and re-examination, at a pre-trial hearing where the visual and audio evidence is recorded and replayed at trial;
- amending the Evidence Regulations 2007 to outline any necessary requirements around the pre-recording of witnesses' entire evidence at a pre-trial hearing;
- explicitly providing the ability to recall a witness for further questioning, on application of counsel, but with a very high threshold (ie, where it would be contrary to the interests of justice to reject the application); and
- allowing video records, whether evidential interview video records or records made at a pre-trial hearing, to be used at re-trials instead of recalling the witness (unless the order for a retrial following appeal is based upon a deficiency in the way in which the evidence was elicited).

44. Following the Court of Appeal's decision, the Ministry of Justice, in consultation with Crown Law, will review whether any further amendments to legislation are required.

45. I am also aware of concerns about s 106(4) of the Act. This section provides for the lawyer for each party to receive a copy of any video record evidence before it is offered in evidence, unless the Judge directs otherwise. There are concerns that the lawyer's copy of the video record may be used for improper purposes,

[6] These include grounds such as the trauma suffered by the witness, the witness' linguistic or cultural background, and the absence or likely absence of the witness from New Zealand.

exposing victims and witnesses to harm. Work is currently progressing on an amendment to be included in the Evidence Amendment Bill proposed in this paper, to reduce the level of risk for all witnesses who give evidence by video record. As this work is yet to be completed and has implications beyond child witnesses it will be the subject of a separate Cabinet Paper.

Costs and implementation of proposals 1 – 4

46. The current fiscal pressures on the criminal justice system mean that will be necessary to carefully manage the implementation of these important proposals.

47. As noted above, I recommend targeting both legislative presumptions (Proposals 1 and 2) to child witnesses (excluding defendants) under the age of 12. This will reduce the fiscal impact of these proposals. Targeting these presumptions will not prevent applications or directions for pre-recording and alternative modes of giving evidence being made for children aged 12 and over or other vulnerable witnesses.

48. Proposals 1 – 4 have financial implications for Crown Law which mean that further work is required before legislative changes can be introduced to Parliament. Proposal 1 will create savings for Crown Law by removing the need to make court applications. However, this is not sufficient to cover the increased costs for Vote: Attorney-General that will arise from an increase in pre-recording. These costs cannot currently be absorbed within existing baselines.

49. The fiscal pressures faced by Crown Law are to be addressed through the *Prosecution Review, Criminal Procedure Simplification* and, potentially, a reduction in volumes through *Policing Excellence* initiatives (refer *Setting the direction for the justice sector,* DOM (11) 27 on 11 April 2011). The purpose of the *Prosecution Review* is to consider how the public prosecution system can best be structured so that it delivers effective services in a way that is cost-effective and sustainable.

50. I propose that legislative changes related to pre-recording (Proposals 2 – 4) are agreed to in principle, but are not introduced to Parliament until funding becomes available. Given the importance of these proposals, I recommend that legislation is drafted, ready for introduction in 2012, in parallel with the *Prosecution Review.*[7]

51. Justice sector agencies will be in a better position to identify the necessary funding following the *Prosecution Review.* There is a risk that the *Prosecution Review* may not result in sufficient efficiencies to fund the implementation of the pre-recording proposals. In this case, other options for funding the costs of pre-recording will need to be considered.

52. Detailed costs and benefits are outlined in the financial implications section of this paper.

[7] The Attorney-General, in consultation with the Minister of Justice and Minister of Police, is expected to report back to the Cabinet Domestic Policy Committee with recommendations arising from the *Prosecution Review* by 28 February 2012.

Improving the questioning of child witnesses

53. New Zealand's adversarial criminal trial process can result in witnesses' evidence being tested in a confrontational manner. There is a considerable body of literature that shows that the strategies used in cross-examination do not obtain the most accurate and reliable evidence from children and that greater evidential safety can be achieved by specialist questioning. It is also well documented that children often acquiesce to misleading questions and rarely request clarification of questions they do not understand.

54. The AUT Report found that there is a high level of inappropriate and unsafe questioning of child witnesses in New Zealand, particularly during cross-examination. If a child is confused by questioning, this is likely to affect how successfully accurate and reliable evidence can be obtained from them. The AUT Report also found that judges are not intervening as often as they could.

55. I propose two reforms to improve the questioning of child witnesses:

    (5) improving the availability of guidance and training on questioning child witnesses for judicial and legal professionals; and

    (6) introducing the use of intermediaries to improve the questioning of children at court.

Proposal 5: Improved guidance and training on questioning child witnesses

56. I propose that the Ministry of Justice work with the judiciary and the New Zealand Law Society to improve the availability of guidance, education and training for the judiciary and lawyers on how best to question and cross-examine child witnesses, particularly as proposed changes to legislation and practices relating to child witnesses are implemented. This could include providing information on the range of behaviours of children who are victims of crime. This proposal has no financial implications.

Proposal 6: Introduce intermediaries to improve the questioning of children at court

57. I believe that the introduction of specialist trained intermediaries is the best way to improve the questioning of children at court. Benefits of intermediaries include that:

    - the impact of inappropriate questioning of witnesses by counsel is likely to be mitigated if questions are managed by intermediaries trained in the cognitive development and language comprehension of children;
    - if witnesses are less stressed, and understand all the questions asked, it is more likely that accurate and reliable evidence will be elicited; and
    - intermediaries, if from a range of cultural backgrounds or appropriately trained, could take into account cultural considerations in children's communication. In particular, intermediaries with relevant expertise in addressing the needs of Māori children, who are substantively overrepresented as victims of crime, are more likely to take into account and recognise nuances in Māori children's communication.

58. Introducing intermediaries would place New Zealand among the world's leaders in reforming criminal justice processes for vulnerable witnesses. Over 80% of submitters to the issues paper indicated support for the use of intermediaries, including the New Zealand Law Society.

59. I propose amending the Act to allow a party to elect (with the consent of the Judge), or a judge direct, that a child complainant use an intermediary service to give evidence at a court proceeding, where an intermediary service is available. This provision will be available for all child complainants under the age of 18.

60. There are a range of potential intermediary models, based on practices in other jurisdictions.[8] I recommend that intermediaries are used during criminal court proceedings to undertake the questioning of child witnesses,[9] as this would be the most cost-effective approach. I propose that the exact nature of the model, along with the necessary qualifications and training, is developed by the Ministry in consultation with a working group of legal and judicial professionals and other key stakeholders as part of the implementation process.

61. Some members of the legal profession may be concerned that intermediaries could interfere with the defence's ability to challenge a witness' evidence and test their credibility, which is at the heart of cross-examination. With the development of clear rules, I am confident any risk that defendants' rights might be affected will be minimised, and that any other practical concerns can be resolved during the implementation process.

62. I propose that the Ministry phase in the intermediary service over two years, including an evaluation of the service to ensure it is meeting the needs of child victims and any issues are resolved prior to full implementation. I also propose an amendment to the Act to enable regulations to be made on the use of intermediaries in court proceedings.

Other enhancements relating to child witnesses and their evidence

63. I also propose two further reforms:

(7) extending the automatic right to a support person to all child witnesses; and

(8) introducing a new judicial direction relating to the demeanour of child witnesses.

Proposal 7: Extend the automatic right to a support person

64. Currently, s 79 of the Act allows complainants (of any age) to have, as of right, a support person near them while giving evidence. However, witnesses who are not complainants are only entitled to a support person with the leave of the Judge. I propose to extend s 79 of the Act so that all child witnesses have an automatic right to a support person while they give evidence. Giving evidence can be a stressful experience for children, even if they are not the complainant. Of those submitters who commented, 91% were in support of extending the automatic right to a support person. This proposal has no financial implications.

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[8] Such as a questioner model, an interpreter model, and a model where an intermediary makes recommendations to the court based on a communication assessment of the child.

[9] In New Zealand, we already have a well-developed and skilled forensic interviewing service within CYF and New Zealand Police. For this reason, intermediaries would only be required for court proceedings.

Proposal 8: Introduce a new judicial direction relating to the demeanour of child witnesses

65. I propose amending the Act to introduce a new judicial direction relating to the demeanour of child witnesses when giving evidence by an alternative mode.[10]

66. Research has found that some jurors may believe that if children are not visibly distressed when giving evidence, then they have not been victimised as alleged. This issue applies to all witnesses but may be especially true in the case of children, as jurors may expect that they will be less able to control their emotions. Research clearly indicates that the truth or accuracy of a witness' evidence is not related to their demeanour.

67. Alternative modes of evidence are designed to reduce stress for children when giving evidence. However, as a result of the reduction in stress, children may appear more calm or dispassionate when giving evidence. This may lead jurors to think that the child is less credible. Given I am proposing to increase the use of alternative modes of evidence, in particular pre-recording of children's entire evidence, it is timely to introduce a direction that juries should not draw any inference from the demeanour of child witnesses when giving evidence by an alternative mode.

68. I also propose that this judicial direction be mandatory. Research has shown that judges do not regularly use discretionary directions, even where they are relevant. I believe a mandatory direction will lower the risk of perceived bias, and by using the direction regardless of whether a child is calm or distressed, it will reinforce that demeanour is not an accurate way of assessing truth. Distress is no more indicative of truthfulness than an absence of distress is indicative of untruthfulness.

69. The Law Commission and Crown Law have raised some concerns with this proposal, including that jurors may be confused by the direction. Research undertaken by the Law Commission shows that jurors do not always know that judicial directions are standard, or do not see them in that light, and think that the judge is providing them with some clue as to his or her view of the case.

70. It is a fundamental responsibility of the judge to provide clear instructions to the jury. I believe that judges have the ability to articulate judicial directions in ways that will prevent any confusion of jurors. The training highlighted at proposal 5 will help ensure judges have sufficient information available regarding the research evidence in this area to explain their directions to the jury.

71. This proposal has no financial implications.

CONSULTATION

72. The following agencies were consulted on this paper and the Regulatory Impact Statement: Ministry of Social Development (including Child, Youth and Family); New Zealand Police; Crown Law Office; Legal Services Agency; the New Zealand Law Commission; Office of the Children's Commissioner; Te Puni Kokiri; Ministry of Pacific Island Affairs; Ministry of Women's Affairs; Human Rights Commission;

[10] Alternative modes include in the court from behind a screen, via CCTV, and by a pre-recorded video.

Families Commission; Office for Disability Issues; Office of Ethnic Affairs; and the Treasury. The Department of the Prime Minister and Cabinet was informed.

Treasury comment

73. While Treasury is supportive of the proposals set out in this paper, it is cautious about agreeing to proposals 2 – 4 without the certainty of funding from Crown Law. Treasury considers that the decision to agree to proposals 2 – 4 should be delayed until the *Prosecution Review* reports back to Cabinet in February 2012, when Crown Law is able to determine how it can fund these proposals.

FINANCIAL IMPLICATIONS

74. This package of proposals represents the most critical legislative and operational changes, given current fiscal constraints. The Regulatory Impact Statement provides more detail regarding the range of options that were considered.

75. The limited data on child witnesses has made accurately costing the proposed reforms difficult. The following paragraphs outline the financial implications for agencies for those proposals with financial implications: the proposals related to pre-recording and reducing time delays (Proposals 1 - 4) and the introduction of intermediaries (Proposal 6). Proposals 5, 7 and 8 have no financial implications.

Pre-recording proposals (Proposals 1 - 4)

76. The pre-recording proposals will remove the need to make applications to the court for pre-recording and mode of evidence, and are likely to have benefits of more accurate and reliable evidence, earlier resolution of cases and a potential reduction in appeals. However, the proposals will have an additional cost to Vote: Courts, Vote: Justice, Vote: Police and Vote: Attorney-General, and could increase court delays. In estimating the costs, agencies have taken into account whether any efficiencies can be obtained at trial.

77. There are no additional costs associated with Proposal 3, but prioritising pre-recording hearings could create delays in other proceedings.

Vote: Courts / Justice

78. The costs to Vote: Courts arise from (i) the costs of hiring the equipment necessary to record the proceedings; and (ii) the costs of the court and judicial time of holding pre-trial hearings to pre-record evidence. Estimated benefits result from (i) an expected small time saving at trial as a result of the efficiency of playing an audio visual record rather than having live testimony; and (ii) an expected increase in earlier resolution of cases, prior to trial.

79. The Ministry will face an estimated cost of up to $0.650m per year, based on an estimated range of 300 to 500 children witnesses under the age of 12. The Ministry will absorb the additional costs within Vote: Courts by re-prioritising the support provided to other non urgent court hearings across the criminal, civil and family jurisdictions. The consequence of this may be an increase in waiting times, or queue length, for cases in the District Court of between 6 days and 7.5 days (this equates to a 7% to 9% increase). The Ministry will ensure that adequate processes are in place to improve rostering and scheduling of cases to mitigate the risks of any urgent cases being unduly delayed as a consequence.

80. The Legal Aid Scheme will face costs of up to $50,000 per year. The anticipated extra cost on the legal aid budget will be absorbed within Vote: Justice.

Vote: Police

81. In cases where the Police Prosecution Service is the prosecuting agency, there will be additional costs for Vote: Police arising from prosecutors preparing for, and attending, pre-recording hearings. New Zealand Police expect these costs to be minimal, and will either absorb the costs or re-prioritise existing funding.

Vote: Attorney-General

82. Crown Law estimates that it will incur net costs in the range of $0.650m and $0.840m per year as a result of the pre-recording proposals. These costs arise from the preparation for, and attendance at, pre-recording hearings for children under 12. There are also estimated benefits of $0.115m per year included, as a result of Proposal 1, as a presumption for children under 12 will remove the need to make applications to court for mode of evidence for those witnesses and to attend the associated hearings in instances where those applications are opposed.

83. Crown Law also expects that, as a result of the pre-recording proposals, half the child witnesses aged 12 and over will also have their evidence pre-recorded (where the presumption would not apply and an application to the court would be required). The costs of this (between $0.590m and $0.695m) form the majority of Crown Law's estimated net costs.

84. The 2011/12 Appropriation for Supervision and Conduct of Crown Prosecutions in Vote: Attorney-General is $48.196m. Crown Law has no funding for any increase in the use of pre-recording witnesses' entire evidence and is currently unable to absorb these costs within baseline given existing fiscal pressures. Until funding is available, the pre-recording proposals will not be implemented.

Proposal 6: Introduce intermediaries to improve the questioning of children at court

Vote: Justice

85. The cost of training and contracting intermediaries can be funded out of the Victims' Services Appropriation in Vote: Justice, at an ongoing cost of approximately $0.5m per year. The Victims' Services Appropriation holds the revenue collected from the Offender Levy and the scope of the appropriation is the provision of funding for entitlements and services for victims of crime. Proposal 6 falls within this scope, as the proposal has been limited to child complainants (ie, victims). The funding for the intermediaries service will be monitored and accounted for separately from other justice sector funding.

LEGISLATIVE IMPLICATIONS

86. The proposals will be implemented through an Evidence Amendment Bill.

REGULATORY IMPACT ANALYSIS

Regulatory Impact Analysis requirements

87. The Regulatory Impact Analysis requirements apply to the proposals in this Cabinet paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

88. The Internal Ministry of Justice Quality Assurance Panel has reviewed the RIS prepared by the Ministry of Justice and associated material, and considers that the information and analysis in the RIS meets the quality assurance criteria.

Consistency with Government Statement on Regulation

89. I have considered the analysis and advice of my officials, as summarised in the attached RIS and I am satisfied that, aside from the risks, uncertainties and caveats already noted in this Cabinet paper, the regulatory proposals recommended in this paper:

    a are required in the public interest;

    b will deliver the highest net benefits of the practical options available; and

    c are consistent with the commitments in the Government Statement on Regulation.

HUMAN RIGHTS IMPLICATIONS

90. The need for improvements in the way that child witnesses are treated in New Zealand has recently been reinforced by the United Nations Committee on the Rights of the Child (UNCROC) in its most recent report (UNCROC, 56th session, *Concluding Observations: New Zealand*, 4 February 2011).

91. The proposals in this Cabinet paper are consistent with UNCROC and the *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.*

92. Crown Law will review the legislative proposals in this paper for consistency with the New Zealand Bill of Rights Act 1990 before a draft Bill is presented to Cabinet.

GENDER IMPLICATIONS

93. The proposals in the attached papers will amend the Evidence Act 2006, and will be expressed and implemented in a gender neutral manner. However, many of the children targeted by these proposals are victims of sexual violence. While child sexual abuse affects both males and females, the majority of victims are females. Many of the proposals will enhance female child victims' experience of the criminal justice system.

DISABILITY PERSPECTIVE

94. The proposals in this Cabinet paper are consistent with the United Nations Convention on the Rights of Persons with Disabilities, and the New Zealand Disability Strategy.

PUBLICITY

95. I will issue a press release on the proposed reforms when Cabinet has made its decision. In doing so, I will make it clear that implementation of the pre-recording proposals (Proposals 2 – 4) will be subject to funding being secured.

96. I also propose to make this Cabinet paper available to the public on the Ministry of Justice's website.

RECOMMENDATIONS

97. The Minister of Justice recommends that the Committee:

1. **note** that this paper outlines a package of proposals that aim to address concerns about the way child witnesses are treated in the criminal justice system and ensure the most reliable and accurate evidence is elicited;

Reducing the impact of time delays

Proposal 1: A legislative presumption that children give their evidence via their evidential interview video record and CCTV

2. **agree** to introduce a legislative presumption that child witnesses (excluding defendants) under the age of 12 give their evidence via their evidential interview video record (where one exists) and CCTV, regardless of whether a child gives evidence at a pre-trial pre-recording hearing or at trial;

Proposal 2: A legislative presumption in favour of pre-recording children's entire evidence

3. **agree** to introduce a legislative presumption in favour of pre-recording children's entire evidence in criminal proceedings, applied to child witnesses (excluding defendants) under the age of 12;

4. **agree** that, where either, or both, of the presumptions in recommendations 2 and 3 apply, an application for how a child witness is to give evidence should not be required;

Proposal 3: A requirement to hold pre-recording hearings within a specified timeframe

5. **agree** that pre-trial hearings to pre-record witnesses' evidence in criminal proceedings should be expedited and held within a specified timeframe (to be recommended when draft amendments to the Evidence Regulations 2007 are submitted to Cabinet following passage of the Evidence Amendment Bill);

6. **agree** to introduce a regulation making power for time frames for pre-recording a person's entire evidence;

Proposal 4: Clarifications and improvements to legislation to support an increased use of pre-recording

7. **agree** to clarify existing law to:

    7.1. clarify that all witnesses (subject to the grounds outlined in section 103(3) of the Act) can give evidence, including cross- and re-examination at a pre-trial hearing where the visual and audio evidence is recorded and replayed at trial;

    7.2. ensure that the Evidence Regulations 2007 outline any necessary requirements around the pre-recording of witnesses' entire evidence at a pre-trial hearing;

    7.3. provide the ability to recall a witness for further questioning following a pre-trial pre-recording hearing, on application of counsel, but with a very high threshold (ie, where it would be contrary to the interests of justice to reject the application);

    7.4. allow video records, whether evidential interview video records or records made at a pre-trial hearing, to be used at re-trials instead of recalling the witness (unless the order for a retrial following appeal is based upon a deficiency in the way in which the evidence was elicited);

8. **note** that, following the Court of Appeal's decision on the jurisdictional basis for pre-recording, the Ministry of Justice will review whether any further amendments to legislation are required;

<u>Improving the questioning of child witnesses</u>

Proposal 5: Improved guidance and training on questioning child witnesses

9. **direct** the Ministry of Justice to work with the judiciary and the New Zealand Law Society's Continuing Legal Education organisation to improve the availability of guidance and training on questioning child witnesses;

Proposal 6: Introduce intermediaries to improve the questioning of children

10. **agree** to provide for the use of intermediaries for child complainants under the age of 18, when they give evidence at court proceedings, and where the intermediary service is available;

11. **agree** to introduce a regulation making power for the ability to prescribe procedures relating to the use of intermediaries in court proceedings;

<u>Other enhancements relating to child witnesses and their evidence</u>

Proposal 7: Extend the automatic right to a support person

12. **agree** that all child witnesses should have an automatic right to a support person while they give evidence at court proceedings;

Proposal 8: Introduce a new judicial direction relating to the demeanour of child witnesses

13. **agree** to introduce a new mandatory judicial direction that juries should not draw any inference from the demeanour of child witnesses when they give evidence by an alternative mode;

Financial implications of Proposals 1 – 4

14. **note** that the following justice sector agencies will absorb additional costs as a result of Proposals 1 – 4:

    14.1. the Ministry of Justice will absorb estimated costs of up to $0.650m per year within Vote: Courts, by re-prioritising the support provided to other non urgent court hearings;

    14.2. the Ministry of Justice will absorb estimated costs of up to $50,000 per year to the Legal Aid Scheme within Vote: Justice;

    14.3. New Zealand Police will absorb a minimal increase in costs within Vote: Police;

15. **note** that Crown Law estimates that it will incur net costs in the range of $0.650m and $0.840m per year as a result of Proposals 1 – 4, and that Crown Law is currently unable to absorb these costs within baseline;

16. **note** that the fiscal pressures faced by Crown Law are to be addressed through the *Prosecution Review, Criminal Procedure Simplification* and, potentially, a reduction in volumes through *Policing Excellence* initiatives (refer *Setting the direction for the justice sector,* DOM (11) 27 on 11 April 2011);

17. **agree** that the changes in recommendations 3, 5, 6 and 7 are not introduced to Parliament until funding is available;

18. **note** that the change in recommendation 2 (Proposal 1) can be implemented without any further funding;

19. **note** that funding for the changes in recommendations 3, 5, 6, and 7 is to be identified after the Attorney-General, in consultation with the Minister of Justice and Minister of Police, has reported back to the Cabinet Domestic Policy Committee with recommendations for reform arising from the *Prosecution Review* (expected by 28 February 2012);

Financial implications of Proposal 6

20. **note** that Proposal 6 will be funded out of the Victims' Services Appropriation in Vote: Justice, at an ongoing cost of approximately $0.5m per year;

Legislative implications

21. **agree** that the Evidence Act 2006 be amended to implement the agreed changes in recommendations 2, 4, 10, 11, 12 and 13;

22. **agree** that the Evidence Act 2006 be amended to implement the agreed changes in recommendations 3, 5, 6, and 7 once funding is available;

23. **invite** the Minister of Justice to issue drafting instructions for all of these amendments;

24. [redacted]

Publicity

25. **agree** that the Minister of Justice announce the main features of the agreed proposals and the Government's intention to introduce implementing legislation in 2012; and

26. **agree** that this Cabinet paper should be placed on the Ministry of Justice's website.

Hon Simon Power
Minister of Justice

Date signed: 29/6/11

APPENDIX A – CURRENT SITUATION FOR PRE-RECORDING IN AUCKLAND

1. Since the end of 2010, the Auckland Crown Solicitor has been making applications for children's evidence-in-chief and cross-examination to be pre-recorded and played back at the later trial. Applications for this purpose have been made in reliance on s 105 of the Act. To date 13 pre-trial hearings have been held in the Auckland District Court to pre-record cross- and re-examination of a child witness and a further 14 cases have pre-recording dates set.

2. These pre-trial hearings typically operate using CCTV, with the child witness and support person in a secure witness room linked to a courtroom where the Judge, prosecutor, defence counsel and defendant are present. The cross- and re-examination takes place via CCTV and the child's evidence is recorded (with audio and video) on to DVD.

3. Recently, there has been an appeal on the jurisdictional basis for pre-recording. Two appeals, on pre-trial decisions in relation to pre-recording, were heard together in the Court of Appeal on 30 June 2011. The first appeal challenged an order for pre-recording, on a jurisdictional basis, and the second appeal was by the Solicitor-General against a refusal to order pre-recording. The Court has yet to release its decision.

4. The judges in the Auckland District Court have decided that, pending the Court of Appeal decision, no opposed pre-recording applications will be heard and no trials where pre-recordings are to be played will occur until after the decision is known.

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