Benchmark

best practice-best evidence with vulnerable people

Pre-trial Case Management Guideline

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1. Introduction

Disclaimer: The material provided in this guideline is not legal advice and should not be treated as such. The information is intended as a guide only and should not be relied upon as the definitive authority on pre-trial case management in the New Zealand courts. No liability is accepted for any adverse consequences of reliance upon it. Further disclaimer information is provided here [link].

1.1 This guideline is intended to help lawyers and judges to prepare for jury trials involving children or vulnerable adults in the adult criminal courts, whether as complainants, witnesses or defendants.

1.2 The guideline is intended to be read in conjunction with those for specific types of vulnerability (e.g. Intellectual Disability) and those which cover specific stages or processes (Questioning Children, Communication Assistance) in more detail.

1.3 The guide is intended to assist counsel with:

- Defendants who are fit to plead; and/or
- Witnesses who are competent to give evidence.

but who may require support to participate in proceedings adequately and to give "best evidence" (i.e., evidence that is as complete and accurate as is reasonably possible for them).

NOTE: The guide does not address issues of a defendant's fitness to plead or stand trial nor a witness's competence.

Objectives of this guideline

1.4 The courts increasingly emphasise that to ensure a fair trial, all reasonable measures must be taken to adapt usual court processes to enable:

(a) vulnerable defendants to participate as fully as possible in their own trials and;

(b) vulnerable witnesses (and defendants who give evidence) to give "best evidence", as fully and completely as they are able.[1]

1.5 The measure of the fairness of a trial is not only its fairness to the defendant but also in its fairness to witnesses and to the interests of society in obtaining accurate factual decisions.[2]

1.6 Parliament has also explicitly provided for assistance for vulnerable witnesses and defendants in all criminal and civil proceedings, especially for children,[3] and has imposed particular obligations on the Youth Court and the Family Court to facilitate children's understanding of and participation in proceedings.[4]

1.7 New Zealand courts are also obligated by the United Nations Convention on the Rights of Persons with Disabilities to provide "effective access to justice for persons with disabilities … [via] procedural and age-appropriate accommodations".[5] (See UNCRPD guideline)

Barriers to vulnerable people's participation

1.8 Despite this increasing focus on accommodating vulnerable people in the court process, research reveals continuing barriers to their full participation.

1.9 Key problems include:

(a) Lack of professional contact/support and information;[6]

(b) Long delays before trial;[7]

(c) Stressful and/or difficult to understand trial processes including:

- Long waits and poor waiting facilities at court during trial;
- Lack of special measures or adaptations whilst appearing at trial.

(d) Poor communication:

- Vulnerable people often have communication difficulties which are overlooked or poorly understood by legal professionals;
- The language used by police officers, lawyers and judges when communicating with vulnerable people is often difficult to understand, overly suggestive or coercive and/or unnecessarily humiliating or stressful.

Pre-trial planning is key

1.10 Good pre-trial planning is one key to overcoming these barriers and getting the right supports in place for trial. This guideline aims to assist counsel to achieve that.

1.11 The objectives in the pre-trial phase should be:

(a) Fast-tracking the trial/streamlining the pre-trial process as much as possible;

(b) Obtaining proper accommodations or special measures for trial;

(c) Ensuring the vulnerable person is kept informed and has good support through the process;

(d) Preparing the defendant/ witness for trial.

2. What is vulnerability?

2.1 A "vulnerable" witness or defendant is one for whom conventional legal processes are likely to cause unacceptable levels of stress, impede their ability to give evidence as fully and accurately as they might otherwise be able, and/or impede their ability to participate in their own proceedings.

2.2 Vulnerability in this context does not mean incompetence because it can be managed effectively if professionals take reasonable measures.

Who is vulnerable?

2.3 Vulnerability may result from permanent features such as intellectual disability, or transient ones such as being very young or distressed as a result of a traumatic event.

2.4 Examples of those who may be vulnerable in the courts include:

- Children and teenagers;
- People with head injuries;
- People with intellectual disabilities;
- People with communication and speech impairments;
- People with hearing impairments and deafness;
- People who have autism;
- People with mental illness or distress;
- People with trauma due to the case, such as complainants in sexual offence cases.

Legal Definitions

2.5 The law defines vulnerability widely. The breadth of its acceptance of vulnerability is suggested by the following:

Alternative Modes: s 103 Evidence Act 2006

2.6 Under s 103(3), a witness (including a defendant) may be vulnerable and eligible to use a wide range of alternative modes/methods for testifying due to, inter alia:

- Their age and maturity;
- A physical, intellectual, psychological, or psychiatric impairment;
- Trauma they have suffered;
- Fear of intimidation;
- Their linguistic or cultural background or religious beliefs;

- The nature of the proceeding or evidence the witness is to give.

Children and Alternative Modes: s 107 Evidence Act

2.7 Children (under 18) are automatically deemed vulnerable witnesses by the rebuttable presumption that they will use one or more alternative modes of evidence.

Communication Assistance: s 80 and s 4 Evidence

2.8 Vulnerability as a defendant or witness is recognised in a person's entitlement to a broad range of "communication assistance" under s 80 if he or she:
"(a) does not have sufficient proficiency in the English language to (i) understand court proceedings conducted in English; or (ii) give evidence in English; or (b) has a communication disability."

Fitness to Stand Trial: s 4 Criminal Procedure (Mentally Incapacitated Persons) Act 2003

2.9 Defendants' vulnerability as participants in their own trials and as witnesses in giving evidence is recognised by the courts in the concept of fitness to stand trial only if special accommodations are provided.[8]

Case Law

2.10 The definition of "vulnerable witness" used in most NZ case law is that of the NZ Law Commission: "[C]hildren, people with disabilities, those from minority linguistic or cultural backgrounds, and complainants in sexual cases for whom giving evidence in court may be difficult or virtually impossible". These groups are "vulnerable" in that "without special assistance,[9] their evidence may never be satisfactorily heard".[10]

3. Identifying vulnerability

3.1 Identifying vulnerability can be one of the most difficult tasks for a lawyer. Some potential vulnerabilities will be obvious (a young child, a rape complainant, a defendant with an already diagnosed impairment or condition). However, others (such as a person with undiagnosed intellectual disabilities or mental distress) can be very difficult to identify. People may also actively try to conceal their difficulties, even from their own lawyers. In other situations, such as with teenage witnesses, lawyers (along with most of the population) may simply overestimate their coping skills.

See the specific disability Guidelines for further information on identification.

General Guidelines for Identification

3.2 Children and teenagers:

(a) Language development is a far more complex and a longer process than is commonly supposed – lasting well into adolescence[11] - and studies (including New Zealand studies) suggest that lawyers often overestimate young people's language abilities in questioning them.[12]

(b) Also, a child's chronological age may not be an accurate predictor of their abilities as traumatised/abused children often experience developmental delays.[13] Often such delays go undiagnosed.

3.3 Accordingly:

- Children 12 years and younger should always be presumed to be vulnerable in court. Best practice is to always have a specialist Communication Assessment Report into their needs.
  See Communication Assistance Guideline for details.
- Older children and teenagers may also be vulnerable: Always check (with parents, schools and any other professionals involved) that a teenager is actually performing at age level. If any concerns emerge, have a Communication Assessment done. A guardian's consent is required to contact schools or other professionals.

If your inquiries flag up any issues, or if the child is under 12, get a Communication Assessment [See the Communication Assistance guideline for more information on this].

3.4 Adult witnesses and defendants

- If an adult witness or defendant is already identified as having an impairment or disability, always seek a specialist Communication Assessment Report in addition to any report as to fitness to plead etc.
- If there is no prior formal diagnosis or assessment, or an assessment (e.g., a s 38 report) is inconclusive, but you are still concerned about an adult's abilities, a communication assessment is a useful step.

See the specific disability Guidelines for an overview of what characteristics may suggest a need for formal investigation.

4. Pre-trial planning: reducing delay

4.1 Pre-trial delay is a major problem for vulnerable people, causing serious stress and impacting on the person's ability to give clear accurate

testimony at trial.[14] Reducing delay therefore needs to be a primary focus of pre-trial planning.

4.2 The legislation and the case law supports fast-tracking cases involving vulnerable people.[15] Making full use of opportunities for disclosure, timetabling and special measures directions in the early pre-trial process especially the Case Review Hearing - is crucial.

4.3 Early pre-trial applications and decisions are particularly important:[16]

- Defendants and civil parties may need accommodations for pre-trial as well as trial/substantive hearing appearances;
- Knowing well in advance what directions have been made for them can help vulnerable people adjust and cope at court;
- Some measures (expert evidence/reports and Communication Assistant Reports) take time to organise.

5. Disclosure

Early disclosure is key

5.1 Prompt disclosure is essential to reducing delay. Prosecutors should prioritise disclosure as much as possible.

- Once initial disclosure is complete the court will often require a plea and election (judge alone or trial by jury) at the second appearance;[17]
- Early full disclosure is a prerequisite for pre-recorded cross-examination;
- Defence decisions (plea/third party disclosure/mode applications) are hampered by incomplete or late disclosure;
- Late production of prosecution witnesses = adjournment;[18]
- Early defence applications for third party disclosure are also important to reduce delays.[19]

Criminal Disclosure Act formal requirements

- *Initial disclosure*: The first tranche of disclosure documents is due 15 working days after proceedings commence,[20] the second "as soon as reasonably practicable" after the defence's written request.[21]
- *Full disclosure*: "as soon as is reasonably practicable after a defendant has pleaded not guilty".[22]
- *Formal written statements*: 25 working days before Trial Callover (TCO).

6. Case Review Hearing

6.1 The Case Review Hearing (CRH) and Case Management Memorandum (CMM) were intended to be used to fast -track administrative processes and get early directions for trial. Courts have the power to make early directions at the CRH beyond the statutory minimum both of their own motion or either party's application,[23] including mode directions by consent.[24]

The Case Management Memo (CMM)

6.2 The CMM must be completed jointly by both prosecution and defence counsel.[25] The defence are then responsible for filing the CMM at least 5 working days before the Case Review Hearing.[26]

6.3 The required content[27] is quite limited, but there is wide scope to request additional early directions. There is no requirement that the standard CMM form be used and considerable regional variation already exists.

6.4 Note that supporting evidence for any application to be made at the CRH must be attached to the CMM,[28] and other applications must be filed within 10 days of a not guilty plea.

CMM Content

6.5 For best effect, in addition to the usual material covered, the CMM should signal the main pre-trial applications and steps otherwise usually left to the Trial Callover Memorandum (TCM). See the approach of the Serious Sexual Violence Pilot Courts (SSVC).[29]

6.6 Standard content for a CMM

(a) Section 56 of the CPA 2011 requires notice of:

- Any intended change of plea;
- Any changes to the charges;
- Any sentence indication required;
- Any other matters on which directions are sought;
- Any transfer to the High Court.

(b) Under R.4.8 of the CPR 2012 the following are also required:

- Bail issues;
- Summary of facts disputes;
- Evidence in support of any applications;
- Explanation for any failure to conduct or complete discussions;

- Dates counsel are unavailable for future hearings;
- Any other issues on which directions are sought.

(c) Recommended additional directions:

- Fitness to plead: Seek directions for a forensic psychiatric or psychological report as early as possible.[30]
- Communication Assistance: Seek directions for a Communication Assistant to assess the witness or defendant's communication needs. See Communication Assistance Guideline.
- Disclosure: Seek directions including completion of discovery, (including from third parties, early release of Formal Written Statements (FWS)).
- EVI[31]
    - Seek the release of the EVI transcript and the EVI itself (in electronic form) at the CRH (subject to s 106(4)A & B restrictions);
    - If there is no transcript, seek a direction that one be prepared;
    - Once released, fast track discussion of transcript edits, or signal a need for a pre-trial hearing.[32]
- Defendant statement admissibility and edits;
- Alternative modes of testimony
    - Notify the court of which modes a child (under 18) will use (noting the rebuttable presumption in favour of their choice);[33]
    - Apply for any alternative modes for adult witnesses/defendants;
    - (See the wide range of possibilities below: "What You Can Apply For".)
    - Notify the Court of any known opposition to any application.
- Evidential applications:
    - E.g., admissibility; propensity; s 44 previous sexual history; non-party disclosure), or signal opposition, if any.[34]
- Expert evidence:
    - Notify the Court of any likely expert evidence (e.g.: ESR/forensic; medical/psychological; counter-intuitive);[35]
    - At the same time, notify the experts of the need for urgency.
- Support person(s): s 79 Evidence Act 2006 requires disclosure of person's or persons' name as soon as practicable.
- Other matters: If possible cover:
    - Reads[36]
    - Section 9 admissions
    - Trial length estimate.
- Timetabling: Seek timetabling directions for:
    - Pre-trial applications;
    - TCO; and

- Ground Rules Hearing[37] and;
- A tentative trial date.

Lawyers acting for vulnerable persons have a real opportunity at CMM to promote and resolve issues that may bring a trial forward.

7. What you can apply for: directions for accommodations and alternative modes

Introduction: a broad and flexible jurisdiction

Practice example

An adult defendant with an intellectual disability was allowed to give her evidence sitting outside the witness box in the back row of counsel's benches with a Communication Assistant beside her to assist.

R v Beards and Beards (2016) EW Misc B14 (CC)

7.1 Although counsel have tended to request only a limited range of assistance, the Court's have broad and flexible powers under statute, common law and the courts' inherent powers to control its own process, to make directions to facilitate defendants' trial participation and/or witnesses' evidence.

7.2 For instance, s 80 Evidence Act entitles defendants and witnesses with communication impairments to a wide range of help, including "oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication".[38]

7.3 Similarly, the "modes" section, s 105 Evidence Act, usually only associated with the use of EVI, CCTV or screens, in fact states that "any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence," provided the judge, jury, lawyers[39] and defendant[40] can hear and see a witness. The same statutory options are available to witnesses and parties in the civil courts.[41]

7.4 The common law also allows a wide range of additional measures such as non-traditional seating arrangements, support persons throughout trial, shorter or variable trial times, time limits on questioning and detailed directions restricting language use for examination and/or the whole trial (see below). Statutory and non-statutory measures can and should be used in conjunction as needed.

Possible Special Measures
Directions for witnesses

7.5 The following pre-trial directions may assist vulnerable people (witnesses and defendants) when giving evidence.

7.6 If a CA is appointed, his or her report recommendations should guide the court as to pre-trial directions specific to the person's needs.

(a) Alternative modes of testifying*:*

7.7 Lawyers often limit their s 105 mode applications to the "standard package" of:

- Using the EVI as evidence in chief,[42]
- Cross-examination from behind a screen[43] or, more usually, via CCTV,[44]
- Having a support person present while testifying.[45]

However, there are a wide range of additional options, including:

- Remote participation for witnesses or defendants via audio visual link (AVL);[46]
- Pre-recording cross-examination in a pre-trial hearing;[47]
- Communication assistance (see below);[48]
- "Any other appropriate means".[49]

7.8 It is presumed children under 18 will use one or more alternative modes,[50] and they are also available to vulnerable adult witnesses[51] and to defendants.[52] There is no presumption in favour of the ordinary way of testifying for anyone.[53]

Section 107: children and alternative modes

Section 107 sets out a rebuttable presumption that any child witness (under 18) is "entitled" to use one or more of the s 105 alternate modes. Prosecutors need not apply but instead must notify the court and defence as to what mode(s) are selected (in the CMM in a judge-alone trial and the TCO in a jury trial). Any changes must be notified as soon as possible. The presumption is rebuttable if the child or the defence objects.

Note that the new legislative presumption embraces all the alternative modes, including pre-recorded cross-examination. (See appendix below).

CCTV: Flexible Practice

7.9 We tend to assume CCTV always happens the same way but courts can tailor its use to the needs of the witness. Examples include:[54]

- Lawyers and judges moving to the CCTV room to question the witness (when a witness had difficulty using the technology but needed the privacy);[55]
- Turning off the "picture in a picture" of the witness in the witness's screen (when it proved a distraction);
- Blocking the defendant's and the public's view of the witness over CCTV, just as if s/he was in court using a screen.

Caution with CCTV

7.10 While many vulnerable people will find CCTV helpful, some vulnerable witnesses may find it more difficult.

- Some people, such as those with autism, may find communicating over CCTV more difficult, but to enable them to make a decision (and meet counsel's responsibility to ascertain the witness's views for the Court), it will not be enough merely to explain the idea. They need to actually try the equipment out.
- People with mental distress may also find the use of technology increases their distress and paranoia: Cameras may need explanation and discussion.

Arrange a visit to the CCTV room so the person can make an informed decision.

(b) Communication Assistant

7.11 One form of the wide range of communication assistance available for witnesses and defendants under s 80 of the Evidence Act is to appoint a specialist to assist counsel and the court. A Communication Assistant (or "CA") is an independent communication specialist (not an expert witness) appointed by the court to:

- Assess a person's needs,
- Help design suitable support measures
- Monitor/assist with witness examination and a defendant's ability to follow the trial/hearing.

7.12 A CA can be crucial to ensuring vulnerable people can give evidence fully and can participate properly in their own trials. See the Communication Assistance Guideline.

(c) Language directions and restrictions

7.13 Pre-trial Language Directions, utilising the Court's wide-ranging powers and duty to ensure appropriate questioning under s 85 Evidence Act, can be a powerful tool to prevent miscommunication. See "Language Directions" below.
Where a CA has been appointed, his or her report will guide the language directions.

(d) Visual aids:

7.14 Some vulnerable people are better at understanding visual information and communicating through visual medium (i.e., drawings and in writing).[56]

7.15 Permission could be sought for a range of visual aids including:

- Aids for counsel to use to present information during questioning,[57] such as pictures of key places or people,[58] visual timelines of events, body outline diagrams[59] or vocabulary charts for key concepts or points;[60]
- Aids to support the witness to answer, including "yes/no/unsure" answer cards,[61] or permission and/or assistance to write or type answers to all or certain questions (i.e.: those on distressing topics);
- Task-orientated aids for witnesses and defendants such as visual "rules of court" reminders and traffic-light cards to indicate stress levels/need for a break;
- Aids to help a defendant follow proceedings (e.g.: visual/written explanations of the evidence,[62] or a simple running translation/account of questions/procedure, oral or written);[63]
- Reading assistance: A CA may also help a witness or defendant to read,[64] including by preparing "easy read" versions of documents or simple written translations.[65]

7.16 When using visual aids at trial, ask for the CA or support person or a Registrar to alert the court to the person's use of a card and to read aloud any typed/written answers, or to have a CCTV camera positioned appropriately. Otherwise their use of aids may not be visible. Lawyers should discuss and agree this approach before the evidence is given.

7.17 Be aware that some people, such as those with FASD, may resist using any aids perceived as childish, although they may need to use them. In such cases, it may be preferable to have a CA alongside them to prompt the use of aids.

(e) Assistance with exhibits:

7.18 People with intellectual disabilities or FASD are more likely to lose their way in exhibit books very easily and to struggle to remember where they are up to. While courts often direct a Registrar (or CA) to assist the witness to find exhibits in photo books, it can be useful to seek a direction.[66]

(f) Restrictions on co-defendants' cross-examination:

7.19 Where counsel for co-defendants will examine a witness, they can be directed to agree which counsel cross-examines on shared areas of concern, avoiding repetition and longer questioning times.[67]

(g) Support Persons:

7.20 Section 79 of the Evidence Act entitles witnesses to one or more[68] support people with them whilst testifying – including someone well-known to them.[69] The persons' preference has great weight[70] and any objections must have a substantive basis.[71]

7.21 Defendants can also have support people (including whanau and caregivers)[72] with them throughout the hearing or trial under the Court's inherent powers.

7.22 Forensic nurses or psychologists or CAs can also be directed to monitor the defendant's coping and comprehension during trial, although they are not support persons per se.[73]

7.23 Usually supporters are told to remain out of the witness's eyeshot and be completely passive, but this reduces the comfort the witness can derive from their presence. The Court can relax or vary usual practice if needed.[74]

7.24 Consider seeking a direction that the support person can, for instance, offer physical comfort if the witness becomes distressed while giving evidence, as CAs are sometimes allowed to do.[75]

(h) Timing the EVI viewing:

7.25 Vulnerable witnesses can benefit from permission to watch the EVI a day or so before trial rather than at trial, to avoid tiring and/or distressing them directly before examination.[76]

(i) Comfort objects:

7.26 Courts can direct a witness or defendant be allowed calming activities and/or comfort objects available in court as an important stress reduction measure. These could be:

- A personally meaningful item;
- Generic fidget toys[77] or activities such as colouring books and pencils;[78]
- Something to reduce sensory overload, such as a hat to reduce glare from fluorescent lighting;[79]
- Support animals are also a possibility, including the person's own pet.[80]

"An adult witness with Autism was permitted to gove evidence wearing a lion's tail, something which was his 'comfort object' in daily life."

Lexicon Autism Toolkit para 2.10

Too much of a good thing?

Some people with an intellectual disability or with FASD may find toys or animals too distracting.

Seek advice beforehand (and monitor during testimony), to ensure that a comfort object is not becoming counter-productive.

(j) Court Scheduling:

7.27 The Court should be asked to direct the Registrar that:

(a) **A priority fixture**: Long delays before trial can be very stressful for vulnerable people and erode memory.[81]

Prioritisation Practice Note

22 January 1992 per Eichelbaum CJ & Cartwright CDCJ

The Courts are directed to prioritise trials of sexual offences, especially those with child witnesses, and to scrutinise any applications to adjourn closely.

(b) **Reserve trials and back-up fixtures**: Reserve trials/back-ups can reduce delay but some vulnerable people find the uncertainty and any rescheduling very distressing and destabilising. This includes some people with autism and complainants in trials regarding traumatic events such as rape.
Consider seeking directions that:

- The case is not suitable as a back-up fixture and should be a priority firm fixture;
- Rescheduling needs to be avoided;[82]
- Seeking definite allocation of a courtroom or CCTV room as soon as possible: Some witnesses, particularly those with autism, need to familiarise themselves with the room and check for sensory distractions.

(k) Closed Court

7.28 Even when they are not automatically entitled to a closed court by reason of age or offence-type, vulnerable witnesses and defendants may need the court closed or entry restricted when giving evidence to reduce distraction and distress.[83]

(l) Trial timetabling

7.29 Directions can also be sought for the trial itself to reduce waiting times for witnesses at court, and to ensure they give evidence when they are most able to concentrate.

7.30 The Court could be asked for:

- A "Clean Start" or definite start time for the person's evidence, without delaying for housekeeping etc.;[84]
- Shorter or variable sitting times: Ask for the person to be called at the time of day they are most able to concentrate (check this with the person and/or whanau or caregivers);[85]
- A limit to total questioning time per day.[86]

(m) Breaks during appearances:

7.31 Vulnerable witnesses will generally need more breaks than others. Consider seeking directions for:

- More frequent breaks,[87] either pre-scheduled or whenever witness became distressed/disorganised[88] or as requested by the CA.[89] Get expert advice as to frequency (e.g.: children with autism may only be able to concentrate for 10-15 minutes, or less if very anxious);

Breaks for Children

" as a general rule, a young child will lose concentration after about 15 minutes, whether or not this becomes obvious. In most cases a child's cross-examination should take no more than an hour and usually considerably less."

England and Wales Equal Treatment Benchbook at 2-16 (56)

- Setting the length of breaks: Longer breaks[90] or short in-court "mini" breaks can be very effective;[91]
- Scheduled breaks should be automatic: Do not rely on the witness to ask, as they may be too embarrassed or scared, simply want it over with or not realise they are flagging;

If a vulnerable witness asks for a break it will often be when they are at their limit. Any delay ("I only have a few more questions") may result in breakdown. Seek a direction that:

- Any additional break requested (by the witness or by a CA) can be given without delay.

Good practice examples:

- Cross-examination of a 16 year old girl with intellectual disabilities was conducted for two periods of 20 minutes each in the morning, over a period of five days. *Lexicon Learning Disabled Toolkit* para 3.7.
- Cross-examination of a tetraplegic witness was conducted one hour a day over several days. *R v Willeman* (2008) NZAR 644 (5)

Creativity with Break-time

7.32 Courts can be flexible in allowing a vulnerable person to take a break in the way that will best calm them.

- Witnesses have taken breaks under blanket "tents", in corners of the CCTV room visible only to the judge and support person or outside the CCTV room;[92]
- Younger and autistic witnesses have calmed themselves with rhythmic physical activity during breaks, such as jumping on a mini-tramp in the CCTV room, or by vacuuming court corridors.[93]

(n) Reduced formality:

- Minimise stimuli and distraction by removing gowns,[94] dropping formal titles etc.
- Permit unusual behaviours (e.g., repetitive gestures such as flapping or tapping, or a fixed attention on one object, can be important stress-management techniques for Autistic witnesses and defendants. Others may need permission to get up from their seat and move around);
- Permission to avoid eye contact, especially for autistic witnesses, and answer with their back to the cross-examiner[95] or pull up a hoodie;[96]
- Permission to whisper answers to a CA;[97]

A 10 year old autistic witness was allowed to testify via CCTV while wearing a visor to reduce glare and distraction from the lighting. She was also allowed to have her pet dog with her to reduce stress.

R v BL (2016) ACTSC 209

(o) Directions to Avoid Confrontation

7.33 Directions to ensure anxious vulnerable people do not meet defendants or their supporters or opposing parties can include:

In and around Court:

- Directions that witnesses use a separate entrance, and/or staggering witness/defendant arrival times;[99]
- Directions that witnesses use separate waiting facilities or wait somewhere close to but outside the courthouse;[100]

If using screens: Directions that the witness to be seated in court before the defendant/opposing party or any public enter the courtroom;[101]

If using CCTV: Directions blocking the defendant's and/or public's view of the witness on screen.[102]

(p) Meeting judge and counsel

7.34 If the witness wants to do so, meetings to introduce the judge and counsel before being examined[103] can decrease the vulnerable person's stress and are also a good opportunity for judge and counsel to find out more about their communication style.

Meeting people with autism:

When meeting a witness with autism Judge and counsel need to be aware that:

- Small talk is difficult for people with autism;
- Touch is inappropriate, unless the person offers it;
- Follow the person's cues on eye-contact;
- Language needs to be simple, non-figurative and concrete.[104]

8. Directions for Defendants

In addition to the above directions for witnesses, defendants may need directions for:

(a) Preparation:

- A courtroom orientation visit such as usually given to witnesses[105] (ensuring if possible that the courtroom and CCTV room shown are the ones to be used at trial) and including any CA in the visit;
- Extra preparation sessions with counsel and any CA (relevant for Legal Aid).[106]

(b) Communication assistance throughout the trial not just during the defendant's evidence;[107]

(c) Remote participation via audio visual link (AVL) including pre-trials and the whole trial;[108]

(d) Language directions covering the whole trial and all the defendant's court appearances not just their examination;[109] including checks to monitor comprehension.[110]

(e) Scheduling:

- Shorter sitting times throughout trial or sitting only at times of the day when the person is most able to concentrate;[111]
- Pre-trials and trials may need to be in smaller or closed courts or ask for pre-trial hearings to be scheduled at quieter times of day or listed alone.[112]

(f) Slower pace of proceedings throughout trial/hearing.[113]

(g) Breaks: In addition to taking more breaks while giving evidence (see above), vulnerable defendants are likely to need more breaks during the hearing/trial for legal advice and explanation as to what is happening, and to give instructions[114] as well as for rest and emotional regulation.[115]

Note: If a defendant has become overwhelmed it may be possible to get permission to remain out of court after a break/attend only part of hearings (counsel remaining to represent them).[116]

(h) Stress/coping monitoring: Periodic reports by psychologist,[117] Court Liaison Nurse[118] or CA. A Ground Rules Hearing can be convened in chambers during trial to reassess measures needed by the defendant as necessary (see "Ground Rules Hearings" below).

(i) Support at Court: In addition to a support person(s) whilst giving evidence, defendants can have one or more support people with them throughout the trial, whether whanau or caregivers[119] or professionals such as a CA or CLN.[120]

(j) Seating arrangements: directions can be sought over:

- Where and with whom defendant sits during trial (e.g.: at a table in easy reach of counsel;[121] beside counsel or beside counsel and a caregiver or whanau during trial/substantive hearings[122] or with whanau/caregiver in the public gallery for short appearances)[123] and while giving evidence (e.g. beside counsel[124] or using an alternative mode);[125]
- Separating a vulnerable defendant from co-defendants where there is a risk of peer-pressure.[126]

(k) Judge-alone trial:

- A judge-alone trial may be fairer for some defendants, particularly defendants with autism or those with intellectual disabilities. Judge-alone trials can:
    - Reduce distractions;
    - Be fairer to defendants whose demeanour (e.g. lack of emotional response, facial expression etc., or outbursts during questioning) may be perceived negatively by a jury;
    - A judge sitting alone may cope better with the necessity for multiple adjournments than a jury.[127]

Myths about CCTV

Some lawyers prefer witnesses not to use CCTV or even EVIs, believing they have less impact on juries than evidence given in the courtroom. In fact, as a recent paper for the Scottish government put it:

"Some – but by no means all – studies suggest a preference on the part of jurors for evidence that is presented live in court, but in simulations with a group deliberative component, mimicking actual jury decision-making, the broad consensus of researchers to date has been that this preference **does not impact significantly upon verdict outcomes**."[128]

In order words, while some studies demonstrate an initial negative impact,[129] this does not appear to affect post-deliberation verdicts.[130]

9. Language directions

"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. Advocates must adapt to the witness, not the other way around."

R v Lubemba (2014) EWCA 2064 (68) per Hallet LJ

9.1 The most important way to facilitate best evidence is for counsel's questions to be comprehensible and non-coercive. NZ courts are beginning to follow the English practice[131] of making specific language directions to ensure vulnerable people are examined appropriately.[132]

9.2 Language directions can be equally important for vulnerable defendants as for witnesses,[133] and can be given to cover the whole trial rather than just their examination.[134]

9.3 Examples include directions to:[135]

- Use short, one-topic questions,[136] not composite or roll-up questions;[137]
- Avoid leading questions,[138] especially tagged questions;[139]
- Conversely, permission may be given for leading questions in direct examination where the witness needs to be directed to topic;[140]
- Use simple,[141] developmentally-appropriate, comprehensible questions;[142]
- Avoid figurative speech, metaphors and idiom;[143]
- Slow down questioning and allow more processing time between questions;[144]

- Allow vulnerable defendants to narrate evidence with few interruptions;[145]
- Actively check witnesses' understanding of questions (i.e.; ask them to repeat it back in their own words).[146]
- Restricting co-defendants from cross-examining on the same topics;[147]
- Restrictions on putting the case in overly suggestive terms (see "Putting the Case" below).

9.4 While the Court of Appeal has discouraged generic "blanket bans" on certain question types without evidence specific to the witness,[148] where there is evidence of what the individual finds coercive or incomprehensible, counsel should apply for directions.[149]

9.5 **Process for determining directions:**

- Courts will probably require expert evidence or a CA Assessment Report specific to the person before making more than common-sense directions.[150]
- The detail of language directions should be discussed and finalised at a Ground Rules Hearing shortly before trial. See "Ground Rules Hearing" below.

10. Putting the Case

"When the witness is young or otherwise vulnerable, the court may dispense with the normal practice and impose restrictions on the advocate 'putting his case' where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions." [151]

10.1 It is now possible to seek pre-trial directions setting out the extent to which counsel must put the case in order to reduce unnecessary and overly distressing questioning.

10.2 When the case is put to a vulnerable witness, research shows it is often done at a level of detail or in a way that is inappropriate and not reasonably answerable. In particular:

- *Peripheral details*: Lawyers often cross-examine younger children on their recall of peripheral detail, when research suggests that they cannot reasonably be expected to retain such memories (unlike memories for core events which are generally longer-lasting).[152] Thus the absence of peripheral details is not an accurate test of core memory;

- *Allegations of lying*: Children, adult sexual assault complainants and witnesses with conditions such as autism can find challenges that they are lying or mistaken distressing to the point that they may lose concentration, be unable to continue, or become erroneously compliant and suggestible;[153]
- *Sensitive records*: Questioning some witnesses about the sensitive content of their medical or counselling records can also cause overwhelming distress, whereas such questions could be as readily or better answered by a third party (e.g.: the GP or counsellor).[154]

Lawyers may feel obliged to put such questions but in fact, the law does not require it.

10.3 Section 92(1) Evidence Act 2006 states that "[i]n any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters."

10.4 This implies that counsel has no obligation to put any question to which the witness cannot be reasonably expected to give a relevant answer.

10.5 Judges in England and Australia[155] and in New Zealand,[156] especially in the pilot Sexual Offence Courts are increasingly issuing pre-trial directions defining what aspects of the case need be put to the witness and what compensatory measures counsel may access instead.

10.6 Courts have ruled it is not necessary for witnesses to be asked or to answer questions putting the case where the risk of becoming overwhelmed and/or erroneously compliant is too great and have also said that answers to such questions may legitimately be disregarded as unreliable.[157] The English Court of Appeal has also emphasised that the modern tendency to put the case via questions which are really only comment is improper as well as unnecessary.[158]

10.7 Instead, the Court allows counsel to tell the jury what they would otherwise have asked and to address the topics with other witnesses and in closing.[159]

10.8 However, a witness' communication difficulties cannot be used as an excuse to avoid cross-examining where the witness can in fact cope: Where questions can be worded appropriately, counsel have a responsibility to give the witness a chance to respond.[160]

11. Expert advice and evidence

11.1 Input from experts can be crucial in cases with vulnerable people:

(a) Communication Advice: A specialist's advice is important to planning communication strategies and appropriate accommodations for court appearances, not just for mode of evidence but also as to how to communicate effectively. See Communication Assistance Guideline.

(b) Expert Evidence:

- Expert evidence is vital to any application regarding fitness to plead or stand trial (see above);[161]
- At trial, expert evidence can be important to assist the fact finders to interpret the witness and/or defendant's behaviours appropriately and give the person's evidence and/or case proper consideration;
- At sentence, expert evidence may be very important to determining mitigating factors and to deciding the appropriate sanction.[162]

(c) Expert evidence is typically provided by a psychologist or psychiatrist with specialist knowledge of the particular issues. Speech Language Therapists typically provide communication advice.

(d) Forward planning is important both to find an appropriate, available expert and obtain legal aid/Crown law funding.

12. Trial Callover

Trial Callover Memorandum (TCM)

12.1 A TCM must be filed by each party: the prosecution files 15 working days before the Trial Callover (TCO); the defence files 5 working days beforehand.[163] As noted earlier, nothing stops a party from seeking an early TCO.

12.2 With a vulnerable witness or defendant, many of the usual matters for a TCO should already have been declared, and some resolved, by the CMM or at the CRH.

Formal requirements of TCM

12.3 The requirements are set out in s 88(2) CPA 2011 and R.4.18 CPR 2012.

12.4 *Both sides must disclose:*

- Any pre-trial applications they have made[164] or will make;[165]
- Whether those applications require a separate hearing or can be resolved at callover;[166]
- Any evidence in support of any application to be determined at callover;[167]
- The number of witnesses;[168]
- The estimated length of their case;[169]
- Details of any expert witness;[170]
- Details of any young or vulnerable witness;[171]
- Any proposed special trial arrangements (e.g., interpreters, screens, closed-circuit television, facilities for playing video recorded interviews, and AVL), whether they are agreed or opposed and, if opposed, why;[172]
- Challenges to the admissibility of any proposed evidence;[173]
- Dates on which counsel are available for trial;[174]
- Anything else they want addressed at TCO.[175]

12.5 *Prosecution must also disclose:*

- Any evidence in formal statements on which it does not intend to rely;[176]
- A summary of facts.[177]

12.6 *Defence counsel must also disclose:*

- Any expert witness's brief/report/summary of evidence *10 days before trial*.[178] However, the High Court Rules oblige experts to consult and if possible produce a joint brief, so early disclosure is important.[179]
- Any s 9 admissions.[180]

12.7 *The defence may also disclose:*

- Any fact (other than a s.9 admission) that the defendant will/will not dispute;
- Any issue that the defendant will/will not dispute at the trial or on which the defendant intends to rely.

Additional Options

12.8 Consider seeking:[181]

- *Early EVI viewing*: Seek directions for any vulnerable witnesses to view their EVIs before trial so that they do not have to watch them with the jury[182] (cutting the time they have to concentrate on the day and giving recovery time for a witness who may be embarrassed by their EVI);

- *A Ground Rules Hearing*: One useful step the Sexual Violence Court Pilot is adopting is to hold a final callover to finalise the detail of language directions and any other practical directions. This English innovation, known as a "Ground Rules Hearing" should be held a week or two before trial, not the morning or first day of trial. See "Ground Rules Hearing" below;
- *Teleconference*: To reduce delay, consider asking to hold the TCO by teleconference or Skype (such as occurs in the Serious Sexual Violence Pilot Courts in Auckland).

Trial Callover

12.9 The TCO must be held not later than 40 working days after the CRH.[183]
Get it in writing: Ensure any specific practical directions beyond mere permission to use CCTV etc., (e.g., directions on language or putting the case) are in writing, to save later argument and confusion.

13. Ground Rules Hearings: Final Trial Call-over

13.1 A Ground Rules Hearing or (GRH) is an optional final call-over confirming arrangements for trial, such as:[184]

- New directions on late-arising matters (e.g.: A CA appointed earlier has now given their recommendations);
- The practical implementation of earlier directions (e.g.: if a CA has been directed, how he or she intervenes at trial); or
- Detailed directions best discussed by trial judge and counsel (such as the detail of language directions and how to put the case).

13.2 GRH are strongly recommended, especially for cases using Communication Assistants.[185] GRHs are best held two to three weeks before trial when counsel are beginning their preparations, so they have time to assimilate directions.

13.3 GRH are not housekeeping discussions. Some courts already routinely schedule GRH. Others prefer to deal with issues on the day of trial as "housekeeping". However, this disadvantages counsel, who may not have enough time to absorb and adjust to directions, especially on questioning, and makes some valuable options (e.g. pre-trial court visits; letting witness view EVIs several days ahead, introductory visits between witness, judge and counsel) impossible.

13.4 GRHs can be reconvened multiple times as necessary, including during trial.[186] Ground Rules Hearings may equally be appropriate before civil hearings as before criminal trials.[187]

Ground Rules in Aotearoa

The judge and counsel had several GRH with the CA to work out how best to question an adult complainant with intellectual disabilities and a fear of men (counsel and the judge all being men). After consultation, the judge issued extensive directions by agreement, including that the woman CA would ask the defense's questions in the CCTV room, using visual aids she prepared. Any additional questions would be formulated between defence counsel and the CA in discussion breaks.

R v Aitchison (2017) NZHC 3222

Agenda

13.5 Agenda: Counsel should file a written memorandum beforehand, whether jointly or separately.[188]
If a CA has been directed, their report should form the basis of the discussion.

13.6 Get it in writing: It is essential to get any Ground Rules directions in writing in detail to save later argument and confusion.

13.7 Communication Assistant involvement: If a CA is appointed, it is vital that they are present at the GRH to take part in discussions.[189] See Communication Assistance Guideline "Ground Rules Hearings".

Pre-trial Support

13.8 Vulnerable witnesses and defendants do better with counsel who are proactive in managing clients' and witnesses' stress, providing more than usual information and support.

Contact and information

13.9 Although prosecutors in particular must maintain objectivity, greater contact to build rapport and ensure good information are key ways to increase vulnerable people's confidence in the process and reduce their stress.

13.10 Good briefing practice is the other main way in which lawyers can improve vulnerable people's confidence and trial performance (see "Briefing" below).

13.11 It is good practice to inform other counsel of the increased briefing and need to build rapport with a vulnerable witness.

Information obligations

13.12 The following references prosecutorial obligations under statute and the Crown Law Guidelines but is intended for anyone calling a vulnerable witness.

13.13 Prosecutors must consult complainants and put their views before the court on:

- Bail applications;[190]
- Modes applications;[191] and
- Defendant applications for name suppression;[192]
- Prosecutors must keep complainants and witnesses informed of all major pre-trial decisions,[193] including:
- Progress of the investigation;[194]
- Bail applications;[195]
- Plea discussions;[196]
- Decisions on charging and all changes thereto;[197]
- Changes of plea;[198]
- Defendant applications for permanent name suppression;[199]
- Name suppression for sexual offence complainants and child witnesses;[200]
- Mode applications;[201]
- Dates and places of all pre-trial appearances, the trial and any appeal;[202]
- Any pre-trial disposition of the case including withdrawal of charges, guilty plea or finding that the defendant is unfit to stand trial;[203]
- Prosecutors must ensure proper briefing for vulnerable witnesses.[204]

13.14 Other matters on which information should be given include:

- Change of venue applications;[205]
- Special measures applications (such as for CAs or remote participation);
- Relevant substantive evidence applications (i.e. s 44 or others regarding the witness's character, health, medical or psychological treatment);
- Outcomes of any relevant pre-trial applications;
- Any listing of the trial for backup should be explained;
- Available support, including early referral to Victims' Advisors and advice regarding resources, counselling and financial assistance available.[206]

13.15 Contact should be with the lead counsel, but, if necessary, information can be provided via an intermediary (e.g. the Officer in Charge or a Victim's Advisor) and can be provided to the nominated

support person.[207] Maintaining continuity in the professionals handling the case is important to vulnerable witnesses' confidence in the process.

13.16 Counsel should meet with vulnerable witnesses or complainants often. As a rule of thumb, counsel should meet a vulnerable witness *at least twice* before the trial (not including on the day they give evidence). Prosecutors should take the Police O/C with them to such meetings.

13.17 Support people: Suggest the client/witness bring a support person along to meetings. It is worth (with the person's permission) having ongoing contact with their support network to monitor their coping. If the person has limited support, or is coping poorly, consider referring to counselling, whilst recognising some counsel will make an issue of therapy prior to trial.

14. Pre-trial preparation

Counsel's cross-examination preparation

14.1 An important way to ensure a fair trial for vulnerable witnesses and defendants who testify – to ensure witnesses can give their evidence as accurately and completely as possible and defendants can participate properly in their own trials - is for counsel to ensure their questions are comprehensible and not coercive. See the specific guidelines on different disabilities or vulnerabilities as a basis for planning your questions.

14.2 It is strongly recommended that both counsel consult any CA privately when planning questions. See Communication Assistance Guideline.

14.3 When in doubt about consultation, raise the issue with the court at a GRH (see "Ground Rules Hearings").

Witness briefing and courtroom education

14.4 Counsel must ensure their witnesses are properly prepared for Court. This includes both ensuring that they have attended courtroom education before trial and briefing them properly.

Briefing Vulnerable Witnesses and Defendants

Witness briefing and courtroom education

14.5 There are concerns that many lawyers do not brief vulnerable witnesses sufficiently.[208] Research shows that well-briefed witnesses cope

better with suggestive and complex language.[209] Better briefing may also reduce their stress.

14.6 Many lawyers, especially prosecutors, have reservations about briefing witnesses at length, fearing they will slip into impermissible coaching. However, there is good recent authority on briefing showing that more is allowed than may have been thought.[210]

14.7 Before briefing:

- Allow extra time for briefing. More than one session may be needed and it should be at least a few days before the trial or hearing;
- Find out about their communication style and needs. Get expert advice (e.g., from a communication assistant or, with the person's consent, a caregiver or friend). If possible have any CA present at the briefing to assist you. For further information check the "How to Question" sections of any relevant disability guideline.
- Ask the person if they would like a support person present;
- Ask if they want to bring any comfort object.

14.8 At the briefing:

- Minimise distractions: Some people are easily overloaded by unfamiliar sounds or lights or even textures. Ask the person if there is anything in the room that needs changing;
- Take frequent, regular breaks;
- Use simple, everyday language, avoid jargon and metaphor. See the "How to Question" sections of the relevant disability guideline;
- Go at a slow pace;
- Explain the trial/hearing process in simple everyday language, including stages of the proceedings, who will be involved, what will happen and the supports that will be provided;
- Explain their own role as a defendant and/or witness, including the oath/affirmation, concepts which can confuse some people;
- Explain examination in chief, and re-examination, and that you have to ask open questions and cannot be specific about what information you are asking for;
- Explain cross-examination carefully, especially that the lawyer may try to suggest answers to them, that it is likely to be challenging and that the lawyer may suggest they are lying or mistaken, that the lawyer may get facts wrong and that they should say if something said to them is incorrect;
- Many lay people find such challenges surprising and distressing. It can be helpful to explain it is not personal but just part of the lawyer's job;

- *Challenge*: People also need (and are allowed) notice of what topics they are likely to be challenged on, and especially if they are likely to be accused of lying;
- *Sensitive questions*: Also give notice or reminders if they will questioned about sensitive issues such as past sexual history, psychiatric or counselling records or diary entries;
- *Practice (without coaching)*: People need opportunities to practice answering both examination in chief and cross-examination-type questions. It is never acceptable to have witnesses practice answering questions on substantive matters, but it is appropriate to give witnesses opportunities to practise on neutral topics.[211] This includes practising:
    - Taking their time to answer and not allowing themselves to be rushed;
    - Asking for clarification or saying they do not understand;
    - Not guessing: Saying when they do not remember or do not know;
    - Disagreeing/correcting misinformation;
    - Asking for breaks.
- Research suggests that such training can improve all witnesses' ability to seek clarification and resist suggestion.[212]
- *Equipment practice:* Witnesses need opportunities to practice using any equipment, including CCTV but also any visual aids such as answer cards or stress scales.

Sensory Overload

"Depending on the individual, problems … could include: lights that are too bright, buzz or flicker; noise or vibration from a lift or escalator; announcements over a loudspeaker; electronic feedback over the live link; echoes in the courtroom; smells (even something as 'minor' as flavoured crisps); or colours, fabrics or materials (e.g. a different kind of chair might be needed) … (or) crowds."

Lexicon Autism Toolkit para 2.11

- *Special measures*: Witnesses need to know what special measures will be available (i.e., additional breaks, mini-breaks, meeting with judge and defence counsel, CCTV).

Courtroom education:

Witness briefing and courtroom education

14.9 The Court Education for Young Witnesses programme, delivered by Victim Advisors, is designed to reduce witness stress by familiarising them with court facilities and processes;[213]

- The programme is available to all children, but similar visits may help vulnerable adults as well. Defendants can also get permission for orientation visits (led by counsel);[214]
- Best practice is for counsel to attend courtroom education as part of briefing.[215] Any CA should also attend to ensure the witness or defendant understands the visit;
- If possible, show the person the room they will use during trial;
- Use the courtroom visit to check for unexpected stresses, such as the lighting or noises in the CCTV room or lift that could contribute to sensory overload.

Arrange logistical support:

14.10 Vulnerable adults may need practical support during the court day, including:

- Help getting to and from court (including getting back from breaks) and navigating at court;
- Calming activities and food during the day. Consider measures such as calming phone applications, mindfulness, and grounding techniques;[216]
- A supporter with the person throughout the day.

14.11 Plan so that the witness is not left sitting in court for long periods (e.g., more than 20 minutes) before giving evidence: Negotiate a set time for their appearance with the Court and if there is any doubt about timing, arrange with the support person that they wait for a text in a more congenial location (a local café, a park).

A Pragmatic Approach

An autistic witness was left to take the bus to court alone and arrived hours late because he was fixated on mending fences and got off the bus every time he saw a broken one.

A car was arranged for him and he arrived on time for the next date.

Plotnikoff & Woolfson Registered Intermediaries in the Criminal Justice System

EVI Viewing

14.12 It may be better for a vulnerable person to watch the EVI a day or so before giving evidence, just as other witnesses refresh their memories with their statements before trial.[217]

- Watching the EVI with the jury can be tiring and distressing, reducing concentration span for subsequent questioning;[218]
- Watching at an earlier time allows people to proceed at their own pace with appropriate breaks;[219]
- Some child and adult vulnerable witnesses find watching their EVIs distressing and may do better if allowed to recover before being examined.

14.13 If a witness watches their EVI before trial, the prosecutor must arrange a viewing time with the OC, Court and Victims' Advisor. The OC or another officer must be present.

15. Supporting a vulnerable person at court

Explanations and advice

- Make extra time for explanations and legal advice during the appearance;
- Seek adjournments or pauses in proceedings as necessary;
- Explain what is happening and signpost any coming changes in process (adjournments, objections), so the person knows where they will be taken, why and what to expect when they get there;
- You may have to remind the person of earlier advice and what they learned during the court familiarisation visit as they may not have remembered everything.

16. Pre-recorded Cross-examination Appendix

16.1 A potentially valuable alternative means of testimony under s 105 Evidence Act is to pre-record not only the witness's evidence in chief but to pre-record their cross-examination too in a separate, judge-alone hearing well in advance of trial.

16.2 While rarely used in New Zealand, pre-recording cross-examination has been found to be a very successful measure in Western Australia over the last 25 years, to the point most other Australian states have adopted it, and in 2015 the English government announced it will be rolling it out nationally following a successful pilot.

16.3 The main objective of pre-recording cross-examination is to reduce lengthy pre-trial delays. Pre-trial delay is a major barrier to obtaining reliable, detailed evidence. Memories erode with time, particular those memories concerning peripheral details of an event. Delay can also cause unacceptable levels of stress and prevent witnesses moving on with their lives successfully.

The process

16.4 Following expedited, full disclosure, a special pre-trial hearing is convened with the judge, counsel and defendant, but not jury. Cross-examination takes place as per usual with CCTV and/or other special measures, and is recorded on DVD. The recording is edited of inadmissible material and breaks. Both the EVI and cross-examination DVDs are then played at trial. A joint Ministry and Courts protocol sets out the hearing procedure.[220]

16.5 There is considerable evidence from Australia and England that pre-recording cross-examination can be practical and successful.[221] Evaluation of the Auckland pre-recording hearings over 2010-11 supports this.[222] (See "Benefits and Risks" below).

Jurisdiction

16.6 Section 105(1)(a)(iii) of the Evidence Act allows cross-examination to be pre-recorded. The measure was used in several cases[223] and the Ministry and courts have a protocol for its use.[224] The Court of Appeal confirmed its legitimacy in 2011, although it said it should be restricted to "rare" and "compelling" cases.[225] As a result, Crown Law have a policy against prosecutors initiating pre-recording.

16.7 However, the courts are becoming more receptive:

(a) The High Court is pre-recording vulnerable witnesses' evidence, (including a five-year-old, and an intellectually disabled adult);[226]

(b) Parliament's recent inclusion of pre-recorded cross-examination in the alternative modes which it is presumed children will use suggests an intention it be used more;[227]

(c) The Court of Appeal has also suggested allowing pre-recorded cross-examination for a vulnerable defendant;[228]

(d) Pre-recorded cross-examination accords with the Act's objectives of:

- A just and fair trial includes fairness to witnesses and the avoidance of delay:[229]

- The mandatory requirement that courts consider the "need to ensure" a "fair trial"[230] and also "have regard to" the "need" to "minimise" witnesses' stress and "promote" recovery.[231]

(e) Given the standard delays of 12+ months in our courts, experts are likely to support pre-recording for children or vulnerable adults.

(f) There is also support from analogous Court of Appeal rulings in favour of EVIs because of the benefit of early recording to preservation of the evidence[232] and supporting other accommodations facilitating best evidence from vulnerable witnesses.[233]

Who is pre-recording suited for?

16.8 Consider pre-recording for:

- All children, especially those under 12 years of age;
- Vulnerable adults who are susceptible to delay whether due to memory issues or heightened sensitivity to stress;

16.9 The courts have allowed pre-recording for dying witnesses,[234] tetraplegic witnesses,[235] young children[236] and impaired adult witnesses.[237] The Court of Appeal has suggested it for impaired adult defendants.[238]

Timing of application

16.10 The main value of pre-recorded cross-examination is that it happens early. To get an early hearing, applications must be made by the Case Review Hearing, and disclosure (including of the EVI) must be expedited.

Benefits and Risks:[239]

16.11 Benefits of pre-recording include:

- Evidence is of better quality because it is captured early before the witness's memory erodes;
- The shorter waiting period is less stressful for witnesses and aids recovery.[240]
- It is easier to include additional accommodations (e.g., more frequent breaks or a remote location),[241] and easier for judges to stop inappropriate questioning,[242] as the jury are absent and the recording can be edited of breaks etc.;
- There is less risk of witness intimidation by defendant supporters at the courthouse as supporters tend to come to the trial only;

- Aborted/cracked trials are reduced, as inadmissible/prejudicial answers can be edited from recordings;
- AS the strength and content of key witnesses' evidence is known ahead of trial:

    - More cases can be disposed of pre-trial through early guilty pleas or withdrawal of charges;
    - Trials acan be shorter due to revised or reduced charges and shorter playing time of recordings compared to live evidence.

16.12 Disadvantages of pre-recording include:[243]

- Disclosure must be completed early (so not necessarily suitable for cases requiring multi-agency third party disclosure);
- Counsel must be fully prepared for cross-examination earlier than trial (although this can greatly assist pre-trial decision-making);
- Possible lack of continuity of judge and counsel between hearing and trial (but overseas this has not been an issue);
- Additional effort required getting Legal Aid to pay for the extra hearing time;
- Recall of the witness at trial if new evidence emerges, although experience in Western Australia over 25 years is this is very rare. Both prosecution and defence counsel express a high degree of confidence in the system.[244]

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18. References

[1] *R v Hetherington* [2015] NZCA 248 at [22], [12]; *R v Moeke* [2017] NZHC 1314 at [12], [30]; *R v BL* [2016] ACTSC 209 at [28] [60-63], [67-68] [94]. See also *R v Barker* [2010] EWCA Crim 1 at [42]; *R v Lubemba* [2014] EWCA Crim 2064 at [38-40] [44].

[2] *Wealleans v R* [2015] NZCA 353 at [29-31]; *R v Driver* [2016] NZHC 186 at [22-25], [28]; *R v Chase* [2016] NZHC 1509 at [23].

[3] The Evidence Act 2006, s 103(3)(a) and s 107.

[4] Oranga Tamariki Act 1989, s 5, s 10, s 11(2) and s 208(h).

[5] UNCRPD Art 13.1 requires state parties ensure "effective access to justice for persons with disabilities on an equal basis with others…[through] the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages." See also Outcome 4 of the NZ Disability Strategy https://www.odi.govt.nz/nz-disability-strategy/outcome-4-rights-protection-and-justice/

[6] Elisabeth MacDonald and Yvette Tinsley (eds) From "Real Rape" to Real Justice: Prosecuting Rape in NZ (Victoria University Press, Wellington, 2011) at 173-187 (recommendations 6.3-6.4.).

[7] What is a long delay will vary. With a vulnerable child, aim for them to exit the system within 6 months. For a vulnerable adult, the window for best evidence will vary. Seek expert advice.

[8] Section 4 of the Criminal Procedure (Mentally Incapacitated Persons) Act 2003 states that a defendant is unfit to stand trial if that person is "unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; . . . include[ing] a defendant who, due to mental impairment, is unable . . . (i) to plead, (ii) to adequately understand the nature or purpose or possible consequences of the proceedings; (iii)to communicate adequately with counsel for the purposes of conducting a defence."

[9] While the terms "special measures" or "special assistance" continue to be used in the legal context, the United Nations Convention on the Rights of Persons with Disabilities uses the term "reasonable accommodations" to denote support required by disabled people to participate in all areas of public life on an equal basis to their peers.

[10] Law commission The Evidence of children and other vulnerable witnesses (NZLC PP26, 1996); cited in, e.g.: *R v M* [1997] NZFLR 920; *Taylor v R* [2010] NZCA 69; *M v R* [2012] 2 NZLR 485; *Wealleans v R*, above n 2 ; *R v GJ* [2014] NZHC 2276.

[11] Marilyn A Nippold Later language development: School-age children, adolescents, and young adults (3rd ed, PRO-ED Inc, Austin, TX, 2007).

[12] E Davies and FW Seymour "Questioning child complainants of sexual abuse: Analysis of criminal court transcripts in New Zealand" 5(1) (1998) Psychiatry, Psychology and Law; K Hanna, E Davies, C Crothers et al "Questioning child witnesses in New Zealand's criminal justice system: Is cross-examination fair?" 19(4) (2012) Psychiatry, Psychology & Law at 530-546; R Zajac and P Cannan "Cross-examination of sexual

assault complainants: A developmental comparison" 16 (2009) Psychiatry, Psychology and Law at S36-S54; R Zajac, J Gross and H Hayne "Asked and answered: Questioning children in the courtroom" 10(1) (2003) Psychiatry, Psychology and Law at 199-209.

[13] Sara McLean "The effect of trauma on the brain development of children" (June 2016) Child Family Community Australia <https://aifs.gov.au/cfca/publications/effect-trauma-brain-development-children>.

[14] *NZ Police v VT* [2015] NZYC 819 at [26(b)], [30]: A case against a young impaired defendant was dismissed due to delays which, bad in themselves, impacted more greatly on the defendant's memory because of his cognitive difficulties. See also cases accepting EVIs as evidence in chief to ameliorate delays: *R v E* [2008] 3 NZLR 145 at [17]; *R v Salt* CA353/004 4 May 2005 at [17]; *R v L* [1993] 4 SCR 419 at [78]. See also Judicial College (UK) "Equal Treatment Benchbook" (February 2018) <https://www.judiciary.uk/wp-content/uploads/2018/02/equal-treatment-bench-book-february2018-v5-02mar18.pdf> at 2.13 [40], 2.14-15 [46-48].

[15] **Section 6 Evidence Act 2006** aims at "avoiding unjustifiable expense and delay"; **S 55(1)(a) Criminal Procedure Act 2011 (CPA)** emphasizes "fair and expeditious resolution"; **S 364 of the CPA 2011:** Costs orders against counsel for "significant" "procedural failure" without "reasonable excuse"; **Rule 1.3 Criminal Procedure Rules (CPR) 2012:** Aims at "just and timely determination"; **Practice Note 22 January 1992** per Eichelbaum CJ & Cartwright CDCJ: Prioritise sexual offence trials, especially those involving children, and avoid adjournments; Solicitor-General's Prosecution Guidelines: Prosecutors must be "prompt" and act "without delay".

[16] Judicial College (UK), above n 14, at 2 - 13 [40].

[17] Criminal Procedure Act, s 39(1).

[18] Criminal Procedure Act, s 113; Crown Prosecution Guidelines, at 16.6.

[19] Criminal Disclosure Act 2008, s 26(10(b)).

[20] Criminal Disclosure Act, s 12(1).

[21] Criminal Disclosure Act, s 12(2).

[22] Criminal Disclosure Act, s 13 ; see also Crown Prosecution Guidelines: the prosecutor's obligation to act "without delay" [19.1; see also 20.2] and to comply with disclosure obligations [19.4].

[23] Criminal Procedure Act, s 58 states that the Court can of its own or a party's motion depart from the standard regime and "give any other [case management] directions" it considers "will facilitate resolution of the proceeding, or it is otherwise in the interests of justice"; both s 56(1)(e) Criminal Procedure Act 2011 and R.4.8(1)(h) state that parties (singly or jointly) can seek any additional directions they want.

[24] Evidence Act, s 104.

[25] Criminal Procedure Act, s 55(1)(b).

[26] Criminal Procedure Rules, R.4.6.

[27] Criminal Procedure Act, s 56 & Criminal Procedure Rules, R.4.8.

[28] Criminal Procedure Rules, R.4.8(1)(e).

[29] District Courts "Sexual Violence Court Pilot: Guidelines for Best Practice" (2016) The District Court of New Zealand <http://www.districtcourts.govt.nz/assets/Uploads/Publications/Best-Practice-Guidelines.pdf>

[30] Criminal Procedure (Mentally Impaired Persons) Act, s 38(1).

[31] Otherwise due 25 working days before the TCO.

[32] EVI release in the Whangarei Court is streamlined via a specific protocol.

[33] Evidence Act, s 107.

[34] Criminal Procedure Rules, R 48(1)(e)

[35] Note expert evidence may also be needed to explain and dispel unfavourable behaviour by a witness or defendant: *R v Thompson* [2014] EWCA 836 [31-34]; *R v Monaghan* (No.2) [2011] ACTSC 62 [31].

[36] A "Read" means a formal witness statement which the parties agree will be read aloud by the Registrar without the witness appearing, because no cross-examination is sought. While a time-saving to the witness, some counsel encourage Reads of opposition evidence because it can sound less interesting or memorable when read by a Registrar as opposed to the real witness.

[37] A Ground Rules Hearing is an important innovation allowing a specific, longer TCO to consider detailed directions on such matters as language or practical details for using measures such as CAs or support dogs.

[38] Evidence Act, s 4. See also the English CA's description of usual accommodations for vulnerable people in *R v Lubemba*, above n 1, at [42] to [45], cited by the NZCA in *R v Hetherington*, above n 1, at [25].

[39] Evidence Act, s 105(1)(b).

[40] Evidence Act, s 105(1)(c) and Courts (Remote Participation) Act 2010, ss 5 and 6.

[41] See for example *Re M* [2012] EWCA Civ 1905 in which the English Court of Appeal endorsed the need for civil courts to take flexible and enabling approach to vulnerable parties in civil proceedings.

[42] Evidence Act, s 107(1)(a)(i). See *R v E*, above n 14, at [17]; *R v Salt*, above n 14, at [17]; *R v L*, above n 14, at [78].

[43] Evidence Act, s 107(1)(a)(iii). Screens were once common but are now considered inferior to CCTV as stress-reducers.

[44] Evidence Act, s 107(1)(a)(ii).

[45] Evidence Act, s 79 (see "Support Persons).

[46] Evidence Act, s 105(1)(a)(ii) ; see e.g.: witnesses; *R v Willeman* [2008] NZAR 644 [5]; *R v Olsen* [2012] NZHC 1885 (adult complainants in sex case with mental distress allowed to testify via AVL from remote location but not to have EVIs [20-21]); *R v Aitchison* [2017] NZHC 3222 at [19], [25] (Court would have allowed but facilities not available); Defendants: *D'Ath v Police* [2015] NZHC 2605 at [7] adult defendant with mental distress to attend trial via AVL ; *State of Western Australia v Mack* [2012] WASC 127 at [47] (autistic defendant allowed to attend trial via AVL).

[47] Evidence Act, s 103.

[48] Evidence Act, s 80.

[49] Evidence Act, s 105(1)(b).

[50] Evidence Act, s 107 states there is a rebuttable presumption in favour of their use for under 18s.

[51] *R v Driver*, above n 2, at [13]; *R v Eruera* (No.6) NZHC 3320 at [40, 47].

[52] R v Kaukasi High Court, Akld T 014047 4 July 2002 (cited in Te Wini v R[2011] NZCA 405 at [19]) for screens; *Te Wini v R* [2011] NZCA 405 for CCTV at [26]; *Jeong v R* (2012) NZCA 455 at [29].

[53] *R v Driver*, above n 2, at [13].

[54] Examples from Judicial College (UK), above n 14, at 2.20 [71].

[55] See discussion of how this should be done in Judicial College (UK), above n 14, at 2.20 [72].

[56] Linda Hand, Megan Pickering, Sally Kedge and Clare McCann "Oral Language and communication factors to consider when supporting people with FASD involved in the legal system) in Monty Nelson and Marguerite Trussler (ads) Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives (Springer, Switzerland, 2016) 139 at 145.

[57] *R v Aitchison*, above n 46, at [17]. See also Joyce Plotnikoff and Richard Woolfson Intermediaries in the Criminal Justice System (Bristol University Press, 2015) at 152-53; Hand and others, above n 56, at 145.

[58] *R v IA and others* [2013] EWCA Crim 1308 [17]; *R v Aitchison*, above n 46, at [17].

[59] Hand and others, above n 56, at 145.

[60] *Dixon v R* [2013] EWCA Crim 465 [94]; *Hemi and Police* [2017] NZHC 714 [17].

[61] *R v Aitchison*, above n 46, at [37]; Plotnikoff and Woolfson, above n 57, at 152-53.

[62] *Dixon v R*, above n 60, at [94] ; *Hemi and Police*, above n 60, at [17].

[63] *Dixon v R*, above n 60, at [94]; CA helps VD follow evidence and read documents; *R v Beards and Beards* [2016] EW Misc B14 (CC) at [7].

[64] *R v Beards and Beards*, above n 59, at [7]; *Dixon v R*, above n 60, at [94].

[65] *Hemi v Police*, above n 60, at [17].

[66] *R v Poutawa* [2009] NZCA 482 at [11].

[67] *R v Jonas* [2015] EWCA 562. See also *R v Butt* [2005] EWCA Crim 805 for the general rule on the avoidance of repetitious and prolix questioning. In practice this means defence counsel consult each other prior to the GRH and decide who covers what topic.

[68] *R v AGR HC Akld 29.10.2007* (CRI 2006-092-11084) per Stevens J [13]-[14]; *D'Ath v Police*, above n 46, at [4].

[69] Caregiver: *H v R [2016] NZCA 360* at [18]-[19]; Parent: *R v E [2007] NZCA 404* at [42], *Smith v R [2015] NZCA 217* at [28]-[34]; spouse: *R v AGR*,above n 68, at [13]-[14].

[70] *H v R*, above n 69, at [18-19]; *R v E*, above n 69, at [42].

[71] *H v R*, above n 69.

[72] *Ruka v R* [2011] NZCA 404 at [84-85]; *R v Beards and Beards*, above n 63, at [7]; *Burling v Police [2015] NZHC 2526* at [29]; *R v Sutherland [2012] ACTSC 62* at [98]; *R v Hamberger [2017] EWCA Crim 273* at [44]; *R v Kaukasi*, above n 52.

[73] *R v Monaghan*, above n 35; *R v Kaukasi*, above n 52 (cited in Te Wini [19]); *Stanley v Police* [2017] NZHC 790 [7]; *Ruka v R*, above n 72, at [85].

[74] Evidence Act, s 79(5); cf: *R v AGR*, above n 68 at [13 - 14] per Stevens J although here there were two support people including the witness's husband and so special considerations applied.

[75] *R v Christian* [2015] EWCA 1582 at [29]. In some jurisdictions it is not unheard of to allow a child to testify sitting on the support person's lap.

[76] *R v Aitchison*, above n 46, at [32]; *R v Lubemba*, above n 1, at [43].

[77] *R v BL* [2016] ACTSC 209 at [131]; *R v Beards and Beards*, above n 63, at [7].

[78] Plotnikoff and Woolfson, above n 57.

[79] *R v BL*, above n 77 (10 year old witness with ASD was allowed to wear a hat or visor while giving evidence to reduce sensory overload).

[80] Support dogs are now available in some NZ courts: http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-898/louie-the-courthouse-dog. People may also use their own animals: *R v BL*, above n 77, at [28], [89-90] [94] (10 year old witness with ASD was allowed to have her assistance dog with her while she gave evidence to help reduce anxiety); *Forest v Queensland Health* [2007] FCA 936; (2007) 161 FCR 152 at 181 at [113].

[81] *Police v VT*, above n 14, at [26(b)], [30]: A case against a young, intellectually impaired defendant with FASD was dismissed due to delays which, bad in themselves, impacted more greatly on his memory because of his cognitive difficulties.

[82] Practice note 22 January 1992: applications to reschedule in sex cases or those involving child witnesses are to be heavily scrutinised. See also similar advice in Judicial College (UK), above n 14, at 2.15 [49-51].

[83] *R v Ruka*, above n 72, at [84-85].

[84] *Rackham v NHS* Ltd [2015] UKEAT 0110_15_1612 at [7] (a party with Asperger's left the courthouse after 3 hours waiting); E.g.: in the Child Witness and Serious Sexual Offences Pilot courts, children are usually scheduled to give evidence on the second morning of trial, even if they are complainants, to ensure they testify promptly and only during the morning, when they are most able to concentrate. An expert witness can be called on the first day instead, as they often prefer a firm time slot. See also similar practice recommendations in Judicial College (UK), above n 14, at 2.15-16 [52-55].

[85] *R v Hetherington*, above n 1, at [27]; *Jones v R* [2015] NZCA 601 at [49] ; *Monk v R* [2015] NZCA 113 at [22] ; *R v Beards and Beards*, above n 63, at [8] (the Court sat for two two hour slots: 10.30am-12.30pm; 1.30pm-3pm). See also similar practice recommendations in Judicial College (UK), above n 14, at 2.16 [56].

[86] *R v Lubemba*, above n 1, (45 minutes for a 10 yr old) at [32], [43], [51-52]); *R v Hamberger*, above n 72, at [44]; *R v Willeman*, above n 46 (only one hour xx every day) [5]; *R v W & M* [2010] EWCA Crim 1926 (8 yr old complainant's cross-examination limited to 45 minutes in the morning and one 45 and one 15 minute slot in the afternoon). See also Judicial College (UK), above n 14, at 2.16 [56], 2.30 [133].

[87] *R v Hetherington*, above n 1, at [27]; *R v Beards and Beards*, above n 63, at [8] (breaks every 30 minutes); *R v Hamberger*, above n 72, at [44]; *R v JPA* [2014] NZHC 1534 at [52] (breaks every 45 minutes); *R v Willeman*, above n 46, at [5] (only one hour of questioning a day); *G v R* [2015] NZCA 327 at [18], [54]* (breaks every hour); *Jones v R*, above n 85, at [49]; *Police v HJ* [2016] NZYC 168 at [17]; Stanley v Police, above n 73, at [7]; *Wiltshire Council v A* [2013] EWHC 3502 (Fam) at [51]; *R v Grant-Murray* [2017] EWCA Crim 1228 at [205] (every hour).

[88] *R v Burling*, above n 72, at [29].

[89] *R v Aitchison*, above n 46, at [22].

[90] *R v Beards and Beards*, above n 63, at [8] (30 minutes); *Te Wini v R*, above n 52, at [19] (30 minutes); *R v Grant-Murray*, above n 87, at [205] (20 minutes).

[91] Where everyone remains in place in court but the VW has a few minutes' privacy in the CCTV room (only the judge's camera remains on).

[92] Judicial College (UK), above n 14, at 2-20 [73]

[93] Plotnikoff and Woolfson, above n 57, at 146.

[94] *R v Kaukasi*, above n 52 (cited in R v Te Wini, above n 52), at [19].

[95] Examples from Judicial College (UK), above n 14, at 2.36 [157].

[96] Plotnikoff and Woolfson, above n 57, at 144.

[97] Judicial College (UK), above n 14, at 2.36 [157].

[98] *R v BL*, above n 77 (10 year old witness with Autism/ASD was allowed to where a visor to reduce glare and sensory overload while giving evidence).

[99] Examples from Judicial College (UK), above n 14, at 2-18 [61-63].

[100] Examples from Judicial College (UK), above n 14, at 2-18 [61-63].

[101] Examples from Judicial College (UK), above n 14, at 2-18 [61-63].

[102] Example from Judicial College (UK), above n 14, at 2-20 [71] and [18A.2] of EW Criminal Practice Directions 2015 [2015] EWCA Crim 1567.

[103] *R v Lubemba*, above n 1, at [43]. See also recommended practice in Judicial College (UK), above n 14, at 2-17 [56]. Meetings are held in the Sexual Offences Pilot Courts but are not always appropriate: *R v Aitchison*, above n 46, at [19].

[104] Lexicon Limited, "Planning to Question Someone with an Autism Spectrum Disorder Including Asperger Syndrome"(August 2014) Lexicon Limited <https://lexiconlimited.co.uk/wp-content/uploads/2018/03/3-AUTISM-Aug-14-PDF.pdf> at 7.

[105] *Te Wini v R*, above n 52, at [19]; *R v Grant-Murray*, above n 87, at [109-10].

[106] *R v Monaghan*, above n 35; *R v Sutherland*, above n 72, at [98]; *Te Wini v R*, above n 52, at [19]; *Titford v R* [2017] NZCA 331 [51-52].

[107] *Re D* (No.3) [2016] EWFC 1; *Re R* [2014] EWCC B41 Fam; Re C [2014] EWCA Civ 128; *Wiltshire Council v A*, above n 87; *R v Rashid* [2017] EWCA Crim 2.

[108] *State of Western Australia v Mack*, above n 46, at [47].

[109] *R v Cox* [2012] EWCA 549; *R v Monaghan*, above n 35, at [31]; *Barton v R* [2012] NZCA 295 [34].

[110] *Barton v R*, above n 109, at [34] the Court made suggestions as to language directions for trial including checking comprehension regularly by having the defendant repeat in his own words "everything said in court"; *Police v HJ*, above n 87, at [17].

[111] *R v Hetherington*, above n 1, at [27]; *Jones v R*, above n 85, at [49]; *Monk v R*, above n 85, at [22]; *R v Beards and Beards*, above n 63, at [8] (the Court sat for two two hour slots: 10.30am-12.30pm; 1.30pm-3pm).

[112] *R v Ruka*, above n 72, at [84-85].

[113] *R v Monaghan*, above n 35.

[114] Increased breaks to consult counsel during trial *Police v HJ*, above n 87, at [17]; *Stanley v Police*, above n 73, at [7] ; *R v Ruka*, above n 72, at [84]; *R v Monaghan*, above n 35; *R v Sutherland*, above n 72, at [98]; *Hemopo v R* [2016] NZCA 398 at [13] and before court during trial *Titford v R*, above n 106, at [51-52].

[115] *R v JPA*, above n 87, at [52].

[116] *R v JPA*, above n 87.

[117] *R v Monaghan*, above n 35 (psychologist to assess whether vulnerable defendant following proceedings at end of first day – cost to be borne by state); *R v Kaukasi*, above n 52 (cited in *Te Wini v R*, above n 52, at [19]) (psych to monitor VDs' coping regularly during trial).

[118] *Stanley v Police*, above n 73, at [7]; *Ruka v R*, above n 72, at [85].

[119] *Ruka v R*, above n 72, at [84-85]; *R v Beards and Beards*, above n 63, at [7]; *Burling v Police*, above n 72, at [29]; *R v Sutherland*, above n 72, at [98]; *R v Hamberger*, above n 72, at [44]; *R v Kaukasi*, above n 52.

[120] *Stanley v Police*, above n 73, at [7]; *Ruka v R*, above n 72, at [85].

[121] *R v Kaukasi*, above n 52 (young defendants sitting at special table in well of court with counsel& support person able to join for periods); *Titford v R*, above n 106, at [52] (paranoid adult defendant sat at table close to counsel with materials to write notes); *R v Grant-Murray*, above n 87, at [109-10] (easy access to counsel at all times).

[122] *Ruka v R*, above n 72, at [84-85]; *R v Beards and Beards*, above n 63, at [7].

[123] *Ruka v R*, above n 72, at [84-85]. See also *Burling v Police*, above n 72, at [29]; *R v Sutherland*, above n 72, at [98]; *R v Hamberger*, above n 72, at [44]; *R v Kaukasi*, above n 52.

[124] *R v Beards and Beards*, above n 63, at [7].

[125] *Te Wini v R*, above n 52, at [26]; *R v Kaukasi*, above n 52. ; R v Hamberger, above n 72, at [44].

[126] *R v Beards and Beards*, above n 63: co-defendants sat separately.

[127] *State of Western Australia v Mack*, above n 46, at [43].

[128] Valerie Monro "The impact of the use of pre-recorded evidence on juror decision-making: An evidence review" Scottish Government <https://www.gov.scot/binaries/content/documents/govscot/publications/research-publication/2018/03/impact-use-pre-recorded-evidence-juror-decision-making-evidence-review/documents/00532556-pdf/00532556-pdf/govscot%3Adocument> at iii.

[129] See, e.g.: Goodman et al, Law and Human Behavior, 1998; Eaton et al, Journal of Applied Psychology, 2006; Landstrom et al, Legal and Criminological Psychology, 2010; Landstrom and Granhag, Applied Cognitive Psychology, 2010; McAuliff & Kovera, Psychology, Crime and Law, 2012; Antrobus et al., Psychiatry, Psychology and Law, 2016; Landstrom et al, Psychology, Crime and Law, 2018.

[130] Kirsten Hanna, Emma Davies, Charles Crothers and Emily Henderson "Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross Examination Fair?" (2012) 4 Psych, Psychology, and Law 530 (for a summary). ; G.M. Davies, J.C. Wilson, R. Mitchell, & J. Milsom Videotaping children's evidence: An Evaluation (Home Office, London 1995): comparing videotaped and live evidence-in-chief; Kirsten Hanna, Emma Davies, Charles Crothers and Emily Henderson "Child witnesses' Access to Alternative Modes of Testifying in New Zealand" (2012) 19 Psych, Psych & Law 184 - 197 (tentative results comparing CCTV, in-court screened, in-court unscreened, and pre-recorded evidence-in-chief); H.K. Orcutt and others "Detecting deception in children's testimony: fact-finders' abilities to reach the truth in open court and closed-circuit trials" (2001) 25

Law and human behaviour 339 - 72 (comparing CCTV and in-court testimony); Munro, above n 128, at iii.

[131] For current English practice and what language restrictions are commonly made see Judicial College (UK), above n 14, at 2.30-32 [135-141]. See also *R v Barker*, above n 1 ; *R v Lubemba*, above n 1.

[132] *R v Moeke*, above n 1, at [12] [30]; *R v GJ*, above n 10, at [41]; *R v Chase*, above n 2, at [23]; see also *R v BL*, above n 77, at [28] [60-63], [67-68] [94]; *Ward v R* [2017] VSCA 37. C.f.: *Metu v R* [2016] NZCA 124.

[133] *R v Cox*, above n 109; *R v Hamberger*, above n 72, at [44]; *R v Beards and Beards*, above n 63, at [7-10].

[134] *R v Cox*, above n 109; *R v Monaghan*, above n 35; *Barton v R*, above n 109, at [34].

[135] See recommended practice in Judicial College (UK), above n 14, at 2.31-32 [138-39].

[136] Police v HJ, above n 87; *R v Barker,* above n 1, at [42]; *R v W & M*, above n 86, at [30-31]; *R v Wills* [2011] EWCA Crim 1938 at [28]; *R v Lubemba*, above n 1, at [52]; *R v Monaghan*, above n 51, at [31]; *Barton v R*, above n 109 at [19]; *R v Beards and Beards*, above n 63, at [10].

[137] *R v Barker*, above n 1, at [19], [42]; *R v W & M*, above n 86, at [30-31]; *R v Wills*, above n 136, at [28]; *R v Beards and Beards*, above n 63, at [10]; *Ward v R*, above n 132.

[138] Evidence Act, s 85: judges may disallow "unfair" or "misleading" questions; *R v Edwards* [2011] EWCA Crim 3028; R v W & M, above n 86; *Ward v R*, above n 132; *Jones v R*, above n 82, at [49]; *R v Wills*, above n 132; *Barton v R*, above n 106, at [33]; *Metu v R*, above n 128.

[139] *R v W & M,* above n 86, at [30-31]; *R v Wills*, above n 136, at [30]; *R v Edwards*, above n 138, at [28]; *R v Lubemba*, above n 1, at [52]; *R v Grant-Murray*, above n 87, at [114]; *R v Beards and Beards*, above n 63, at [10]; *Ward v R*, above n 132.

[140] *R v Beards and Beards*, above n 63, at [9-10].

[141] *Burling v Police*, above n 72, at [29]; *R v Poutawa*, above n 66; *R v Lubemba*, above n 1, at [52].

[142] Evidence Act, s 85: judges may disallow questions "expressed in language that is too complicated for the witness to understand"; *Burling v Police*, above n 72, at [29]. See also *R v Barker*, above n 1, at [42]; *R v Lubemba*, above n 1, at [52]. For Australian practice see especially *Ward v R,* above n 132, at [11], [122], 125] [33].

[143] Recommended practice in Judicial College (UK), above n 14, at 2.31-32 [139].

[144] *R v Barker*, above n 1; *Burling v Police*, above n 72, at [29]; *R v Monaghan*, above n 35, at [31]; *Barton v R*, above n 109, at [19].

[145] *R v Monaghan*, above n 35, at [31].

[146] R v Monaghan, above n 35, at [31]; *Barton v R*, above n 109, at [34] (including having him repeat in own words "everything said in court"); *Police v HJ*, above n 87, at [17]. Recommended practice in Judicial College (UK), above n 14, at 2.34 [150].

[147] *R v Jonas*, above n 67. See also *R v Butt*, above n 67 for the general rule on the avoidance of repetitious and prolix questioning. In practice this means defence counsel consult each other prior to the GRH and decide who covers what topic. This is recommended practice in Judicial College (UK), above n 14, at 2.30 [138].

[148] *Metu v R*, above n 132, at [18]-[19]. But see also the English Court of Appeal in *R v Edwards*, above n 138; *R v W & M*, above n 86; *R v Lubemba*, above n 1 where that Court has effectively ruled that there is sufficient certainty to ban certain question types research has established are very problematic for certain classes of witnesses (i.e.: heavily suggestive "tagged" questions to children).

[149] See for example *R v Aitchison*, above n 46; *R v Edwards*, above n 138; *R v W & M*, above n 86; *R v Lubemba*, above n 1; *Ward v R*, above n 132.

[150] *Metu v R*, above n 132.

[151] *R v Lubemba*, above n 1, at [40], quoting English Criminal Practice Directions para.3 E.4.

[152] See the Questioning Children Guideline; Carole Peterson and Nikki Whalen "Five years later: children's memory for medical emergencies (2001) 15 Int You of Psych 7 - 24; Karen Saywitz and others "Children's Memories of a Physical Examination Involving Genitals for Reports of Child Sexual Abuse" (1991) 59 Journal of Consulting and Clinical Psychology 682 - 691.

[153] *Ward v R*, above n 132 reviews literature. Restrictions are recommended practice in Judicial College (UK), above n 14, at 2.36 [157].

[154] Recommended practice in Judicial College (UK), above n 14, at 2.32[140-41].

[155] Recommended practice in Practice example from Judicial College (UK), above n 14, at 2.31-32 [139-40]. See for example *R v Edwards*, above n 138; *R v Lubemba*, above n 1, at [45]; *Ward v R*, above n 132. The NZ Court of Appeal has said that it may not be appropriate to put the case to a vulnerable witness in detail: *A v R* [2017] NZCA 293 at [32]-[41]. See also *R v Aitchison*, above n 46 at [7] where the NZ High Court agreed defence counsel need not question an intellectually disabled adult complainant on peripheral details. There is also extensive English Court of Appeal case law restricting such questions where the witness is unlikely to be able to give an objectively reliable answer.

[156] *R v Tatai* [2017] NZDC 4374 at [2], [11].

[157] Courts discuss the dangers of allegations of lying: *R v Pipe* [2014] EWCA Crim 2570 at [20, 22]; *R v Edwards*, above n 138, at [28]; *W & M v R*, above n 86, at [30].

[158] *R v Barker*, above n 1, at [42]; *R v Wills*, above n 136, at [28]; Hardy's Trial (1794) 24 How St Trials 199; Ing's Trial (1820) 33 How St Trials 957, 999.

[159] *R v Edwards*, above n 138; *R v Lubemba*, above n 1.

[160] *Brown v Dunn* (1893) 6 R. 67 (HL); *Ward v R*, above n 132, at [12], [119-28] (esp. [125-28]); *R v Aitchison*, above n 46, at [7]; *R v RK* [2018] EWCA 603 at [27].

[161] E.g.: intellectually disabled defendants: *Jones v R*, above n 85; *NZ Police v VT*, above n 14; *Burling v Police*, above n 72; *Police v HJ*, above n 87; *Stanley v Police*, above n 73. FASD defendants: *Police v HJ*, above n 87 (defendant with FASD). ASD defendants: *State of Western Australia v Mack*, above n 46 (intellectually disabled defendant).

[162] E.g.: Intellectually disabled defendants: *Ellery v Police* [2015] NZHC 480; *Burling v Police*, above n 72; *R v Walls*, above n 158; *Dixon v R*, above n 60; *R v Monaghan*, above n 35; *R v Tuigamala* [2007] NSWSC 493 ACTSC 62. Defendants with FASD: *Edri v R* [2013] NZCA 264; *R v Powderface* [2014] ABPC 193. Defendants with autism: *R v Massey-Hunter* [2013] NZHC 166; *Ellery v Police*, above n 162; *R v Tu* [2016] NZHC 1780.

[163] Criminal Procedure Rules, r 5.6; Criminal Procedure Act, s 87(3).

[164] Criminal Procedure Rules, r 5.8.

[165] Prosecution: s.8 8(1)(a); defence: s.88(2)(c).

[166] Criminal Procedure Rules, r 5.8(b).

[167] Criminal Procedure Rules, r 5.8(c).

[168] Prosecution: s.88(10(b); defence: s.88(2)(d).

[169] Prosecution: s.88(10(b); defence: s.88(2)(d).

[170] R.5.8(f). Defence expert witness briefs/reports etc need not be produced until 10 days before trial: Criminal Disclosure Act, s 23.

[171] R.5.8(g).

[172] R5.8(e).

[173] R.5.8(i).

[174] R.5.8(j).

[175] R5.8(d).

[176] R5.8(h).

[177] R.5.8(k).

[178] Criminal Disclosure Act, s 23.

[179] Schedule 4 High Court Rules.

[180] Criminal Procedure Act, s 88(2)(a).

[181] Criminal Procedure Rules, r 5.8(d).

[182] *R v Aitchison*, above n 46, at [32].

[183] Criminal Procedure Rules, r 4.3.

[184] See discussion in Judicial College (UK), above n 14, at 2.26-28 [115-25], where GRH are highly recommended.

[185] So useful are they that in England and Wales it is expected that GRH take place in every case involving a vulnerable witness or defendant, "save in very exceptional circumstances." *R v Lubemba*, above n 1, at [42].

[186] *R v Aitchison*, above n 46, at [6].

[187] *Rackham v NHS Rackham v NHS Ltd*, above n 84, at [60].

[188] See *R v Lubemba*, above n 1, at [43]. Lubemba contains a useful discussion of what can be covered in a Ground Rules Hearing but see also R.3.9(7) Criminal Procedure Rules of England and Wales October 2016.

[189] This is mandatory in England & Wales: CPR 3.9(7)(a).

[190] Bail Act 2000, s 8 and s 30F; s 29 Victims' Rights Act 2002, s 29.

[191] Evidence Act, s 103(4(b).

[192] Criminal Procedure Act, s 200(4).

[193] Victims' Rights Act, s 12.

[194] Victims' Rights Act, s 12(1)(a).

[195] Bail Act, s 200(6).

[196] Crown Prosecution Guidelines 2010 at [16.6].

[197] Victims' Rights Act, s 12(1)(b).

[198] Victims' Rights Act, s 12(1)(e).

[199] Criminal Procedure Act, s 200(4).

[200] Victims' Rights Act, s 12(1)(c); Criminal Procedure Act, ss 201 - 204.

[201] Evidence Act, s 103(4)(b).

[202] Victims' Rights Act, s 12(2)(f).

[203] Victims' Rights Act, s 12(1)(e).

[204] Victims' Rights Act, s 12(c).

[205] MacDonald and Tinsley, above n 6, at 197.

[206] Victims' Rights Act, ss 8 and 11.

[207] Victim's Rights Act, s 14. MacDonald and Tinsley, above n 6, recommendations 6.3-6.4.

[208] MacDonald and Tinsley, above n 6, at 168-220.

[209] Karen Saywitz, Lynn Snyder and Rebecca Nathanson "Facilitating the Communicative Competence of the Child Witness" (2010) 3 Applied Developmental Science 58-68; Rebecca Nathanson and Karen Saywitz "Preparing Children for Court: Effects of a Model Court Education Program on Children's anticipatory anxiety" (2015) 33 Behavioural Sciences and the Law 459-75; J Wheatcroft and L Ellison "Effectiveness of Witness Preparation and Cross-Examination Non-Directive and Directive Leading Question Styles on Witness Accuracy and Confidence" (2012) 30 Behavioural Sciences and the Law 821-40.

[210] *R v Momodou & Limani* [2005] EWCA Crim 177 at [48]-[49].

[211] R v Momodou & Limani, above n 206, at [48]-[49].

[212] Wheatcroft and Ellison, above n 205.

[213]Randell, I., Seymour, F., Henderson, E., & Blackwell, S. (2018). The Experiences of Young Complainant Witnesses in Criminal Court Trials for Sexual Offences, Psychiatry, Psychology and Law, 25:3, 357-373,

[214] *Te Wini v R*, above n 52, at [19].

[215] *Te Wini v R*, above n 52: Case where it was held a special measure that should have occurred was "The accused being brought to court to meet with counsel who could orientate the accused with the arrangements and layout of the courtroom and procedure".

[216] Plotnikoff and Woolfson, above n 57, at 70.

[217] *R v Aitchison*, above n 46.

[218] Also recommended practice in Judicial College (UK), above n 14, at 2.20-21 [75-80].

[219] See the Questioning Children Guideline.

[220] Ministry of Justice Operational Circular: Pre-recording of Evidence (s 103 to 107 Evidence Act 2006) CRM/11/05 and HCG/11/05 Wellington 19.4.2011; see also the very useful descriptions of process in *R v Aitchison*, above n 46.

[221] Emily Henderson and others "Pre-recording Children's Evidence: The Western Australian Experience" (2012) CLR 3-14.

[222] Emma Davies and Kirsten Hanna "Pre-recording testimony in New Zealand: Lawyer's and victim advisor's experiences in nine cases" (2013) 46 Australian & New Zealand Journal of Criminology 289 at 292.

[223] See for example *R v Willeman*, above n 46, where the witness was tetraplegic and his examination was pre-recorded at his home; *R v Kereopa* [2008] DCR 29 (High Court Tauranga CRI-2007-087-411, 18 Sept 2007 per Heath J) where the witness was dying and unlikely to survive until trial. The Court of Appeal confirmed both cases were appropriate uses in *M v R*, above n 10.

[224] Ministry of Justice Operational Circular: Pre-recording of Evidence (s 103 to 107 Evidence Act 2006) CRM/11/05 and HCG/11/05 Wellington 19.4.2011; see also *R v Sadlier* unreported Akld DC CRI-2010-04404165, 7.12.10 per Wade J, and *R v Aitchison*, above n 46 setting out the procedure in practice.

[225] *M v R*, above n 10.

[226] *R v MS* [2017] NZHC 184 at [6] (five year old child); *R v Aitchison*, above n 46 (vulnerable adult witness).

[227] Evidence Act, s 107.

[228] *Barton v R*, above n 109, at [32].

[229] Evidence Act, s 6(c) and (e); Evidence Act, s 103(4)(a); *R v Hetherington*, above n 1, at [22]; *R v Kahui* HC Akld CRI-2006-057-1135 10 July 2007 per Williams J at [5].

[230] Evidence Act, s 103(4)(a).

[231] Evidence Act, s 103(4)(b).

[232] *R v E*, above n 14, at [17]; *R v Salt*, above n 14, at [17]; *R v L*, above n 14, at [78].

[233] "The court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process." *R v Lubemba*, above n 1, at [42]. Making extra time and special accommodations for a vulnerable witness to understand questioning is entirely reasonable: *R v Barker*, above n 1, at [42]; *R v Hetherington*, above n 1, at [25], citing *R v Lubemba*, above n 1, at [45].

[234] *R v Kereopa*, above n 223.

[235] *R v Willeman*, above n 46.

[236] *R v MS*, above n 222.

[237] *R v Aitchison*, above n 46.

[238] *Barton v R*, above n 109.

[239] See Spencer & Lamb Children and Cross-examination: Time to Change the Rules? Hart London 2011; Henderson E, Hanna K and Davies E "Pre-recording Children's Evidence: The Western Australian Experience" [2012] CLR 3-14; Davies E and Hanna K "Pre-recording testimony in New Zealand: Lawyer's and victim advisor's experiences in nine cases" (2013) 46 Australian & New Zealand Journal of Criminology 289 at 292 ; Baverstock J Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28) Ministry of Justice, London,

2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf.

[240] Evidence Act, s 103(4)(b): the court "must" consider the need to reduce witness stress and promote recovery.

[241] Emily Henderson "Dealing to pre-trial delay for vulnerable witnesses" (17 November 2016) New Zealand Law Society < http://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-901/dealing-to-pre-trial-delay-for-vulnerable-witnesses> ; Baverstock, above n 239.

[242] Emma Davies, above n 122, at 296.

[243] MacDonald and Tinsley, above n 6.

[244] Henderson and others, above n 239, at 7.