



Questioning child witnesses

Exploring the benefits and risks of intermediary models

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The opinions expressed in this report are those of the authors unless otherwise stated. They do not necessarily represent the views of any funding agency or any individual who contributed data or any other information to the project.

This report is dedicated to Chief District Court Judge Russell Joseph Johnson (1947-2011)
for his wisdom and for his commitment to justice and children.

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Beyond the genuine thanks, the point is more substantive. Such multi-disciplinary independently-funded research grounded in the experience of senior practitioners is critical if we are to improve the courts' facilitation of best evidence from children.

EXECUTIVE SUMMARY

The whole point of the exercise is that there should never be a question which is unfair to a child witness. ... And so that's why it has to be recrafted. And it's not about the theatre and it's not about having an argument with the witness or confusing the witness. The whole idea is that we are trying to establish a system ... where the witness is *not* confused. That's the point. (Defence lawyer 2)

Ensuring that all accused persons have a fair trial is critical to the quality of justice delivered by the courts. This includes obtaining the most accurate and complete testimony from witnesses. The two most significant barriers to obtaining this best evidence from children who are witnesses are the long delays in processing their cases through the courts and poor questioning practices, particularly during cross-examination. While delays could be addressed through pre-recording children's entire evidence prior to trial, questioning practices might be improved by training counsel and the judiciary, and by involving people with specialist skills in child language ("intermediaries") to assist counsel to question children appropriately.

New Zealand can learn from overseas jurisdictions that have already developed intermediary systems to improve children's evidence. For example, in South Africa, intermediaries relay counsels' questions one-by-one to the child, rephrasing each question into appropriate language. In England/Wales, intermediaries typically make an assessment of a child witness's communicative competencies before trial, advise on the ground rules for questioning the child, then monitor counsels' performance at trial, alerting the judge when a question is inappropriate (intermediaries may also assist earlier in the process, at the police interview). While both models offer some advantages over the *status quo* in New Zealand, neither can address the extent of the linguistic issues nor the difficulties caused by question sequences designed to confuse, because intermediaries are largely limited to relaying or intervening on individual questions at trial.

The purpose of the current study is to explore the potential benefits and risks of different intermediary models at trial by conducting mock examinations of a "child" witness (role-played by an adult). Exploration of intermediaries was not undertaken on the basis that all children will be truthful. A thoughtfully constructed model might, by improving questioning, highlight false allegations more efficiently and effectively than now. The basis for this project is that regardless of whether a witness is thought to be truthful or not, the best approach to any child witness is one which does not increase the risks of contaminating his or her evidence.

Table 1: Intermediary models considered

Full intermediary model: The intermediary is briefed by both counsel before trial on which aspects of the child's testimony they want explored and tested. At trial, the intermediary takes responsibility for putting the requested exploration and testing into question form, including determining how questions are phrased and the order in which they are put.

Question-by-question model: Counsel determines the questions and poses them one at a time to the intermediary, who translates the question into developmentally appropriate language for the child.

Topic-by-topic model: The intermediary is briefed as per the "full intermediary model," but counsel breaks the questions up into chunks or topics, based on the areas of challenge or exploration. At trial there is an iterative process whereby the intermediary questions the child on the first topic, then refers back to the lawyer for further instructions (e.g., to put a question differently or to pick up on an inconsistency), before moving on to the next topic.

Mock examinations of the first two models in Table 1 were conducted on 14 May 2011 in a courtroom with a District Court judge, prosecutor and defence lawyer each taking their respective roles; the "child" witness was role-played by an adult and the intermediary role was shared principally between a forensic interviewer and a speech language therapist. The trials were observed by a judge, defence lawyers, prosecutors, a legal scholar and a paediatrician; each examination was followed by facilitated discussion. The participants' perceptions of the full intermediary and question-by-question models were generally poor. However, towards the end of the day, participants began exploring the possibility of the third (topic-by-topic) model (see Table 1). The participants, both actors and observers, were subsequently interviewed individually to explore their perceptions of the examinations.

During interviews, participants were asked to consider the potential benefits and risks of the topic-by-topic model, imagining that there was a pool of highly trained, highly skilled intermediaries. The anticipated benefits cited by participants included:

- Better evidence from children through better and appropriately sequenced questions
- Improved pre-trial preparation by counsel
- Clearer evidence for the fact-finders to assess
- Neutralising negative perceptions of the defence side
- Increasing counsels' and judges' understanding of appropriate questioning for children
- Allowing the child breaks in their testimony

The anticipated risks included:

- Increased duration of cross-examination
- The potential for conflict between the intermediary and counsel
- Defendants being dissatisfied with the process and dismissing counsel after the examinations
- Interference with defence counsels' ability to fulfil obligations to their clients to put the case and challenge evidence
- The risks associated with poor implementation of the model

During the course of interviews it became apparent that participants were interested in conducting a further mock examination to explore the topic-by-topic model in practice. This mock examination took place on 7 June 2011, followed once again by facilitated discussions with the actors and observers (this time including three judges). During those discussions, participants noted that a number of the anticipated benefits and risks had been realised. For example, there was evidence that the defence lawyer had indeed increased his understanding of developmentally appropriate questioning of children as a result of working with the intermediary during the pre-trial briefing; the potential of the briefing process to improve pre-trial preparation was also evident. However, some participants remained concerned about intermediaries' ability to put the defence case effectively and counsels' ability to respond effectively to the emerging, and in particular "bombshell", evidence.

In summary, there was broad consensus between project participants that children are often poorly cross-examined in New Zealand's criminal courts and that intermediaries might improve the quality of children's evidence. Most participants perceived the idea of an intermediary system as worthy of further careful exploration and, while cautioning against precipitous action, the authors also see promise in the idea. The topic-by-topic model was generally perceived to be more effective than the other two models considered; however, there is more than one viable model of operation. For example, intermediaries could conduct communications assessments of individual children and then monitor proceedings as in England/Wales; or they could assist counsel to prepare their questions in advance of trial and then monitor counsels' questioning of the child at trial; or they could question the child directly under the directions of counsel and the presiding judge in something similar to the topic-by-topic model. Whichever model, a pre-trial assessment of the child's communicative competencies would be an ideal component.

While we are far from having developed a fully workable model, the exercise helped to highlight some of the issues that would need to be carefully considered in developing an intermediary system, including:

- The context of pre-recording children's entire testimony
- The criteria for children's access to an intermediary
- The need for highly trained intermediaries with skills in children's language and relevant law
- Delineation of roles (including the intermediary's and the judge's, bearing in mind that the judge would remain responsible for controlling the questioning, as is the case now)
- The recruitment of suitable candidates

- Guidelines on how the pre-trial briefing should be conducted and on maintaining a paper-trail of interactions in case of appeal.
- Consideration as to pre-trial interactions between the intermediary and child, on the one hand, and between counsel, the intermediary and the judge on the other.

Next steps

Reflecting on the mock examinations and participants' views, the authors propose the following as next steps towards enhancing the courts' facilitation of children's best evidence:

1. Create a legislative presumption in favour of pre-recording children's entire testimony and evaluate implementation of pre-recorded hearings.
2. Develop training programmes for the judiciary and counsel on communicating with children, particularly during cross-examination (Institute of Judicial Studies, New Zealand Law Society and Law Schools).
3. Establish a multidisciplinary Child Witnesses Working Group with terms of reference over an extended period to:
 - Communicate research findings on children's language and the problem of poor communication with children in the criminal courts to inform legal discussions about ways the courts can improve the quality of evidence from children.
 - Draft guidelines to depict best practice in cross-examining children, drawing from expertise in children's communication as well as the law.
 - Explore the possibilities of mandatory training for judges and counsel on best practice with children.
 - Develop an intermediary model for New Zealand including:
 - Framing the roles and responsibilities of the intermediary and counsel;
 - Developing a code of conduct for intermediaries;
 - Specifying the core components of a training package for intermediaries;
 - Outlining pre-trial processes of engagement between the intermediary and other parties;
 - Establishing protocols for courtroom practice; and
 - Determining criteria for children's access to an intermediary.
 - Contribute advice on legislation.
 - Monitor and evaluate the first six cases which use an intermediary in a similar process to Whitney and Cook's (1990) evaluation of the first six cases using closed-circuit television in New Zealand.

INTRODUCTION

The presumption of innocence is the primary value underpinning the trial. Our challenge is to work out how to maintain the rights of defendants while better accommodating child complainants and witnesses in the pursuit of fact. More practically, it is to improve how, when and where children's evidence is challenged in order that the fact-finder may have a better opportunity to assess the evidence. This report looks at the viability of achieving these aims through the use of intermediaries to question children on behalf of counsel. It documents some of the issues as well as the potential benefits and risks of different models of intermediaries to improve this questioning of children, particularly during cross-examination. The report concludes with suggestions on how New Zealand might move forward in its bid to ensure children's evidence is appropriately and fairly challenged in criminal proceedings.

Problem definition

...It is particularly important in the case of a child witness to keep a question short, and even more important than it is with an adult witness where it also matters to avoid questions which are rolled up and contain, inadvertently, two or three at once. It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions which do not contain a statement of the answer which is sought. [e.g., this happened, didn't it?] That said, when it comes to directly contradicting a particular statement and inviting the witness to face a directly contradictory suggestion, it may often be difficult to examine otherwise. ([2010] EWCA 1926, para 30).

Some children lie. Some tell what they believe to be the truth, yet are mistaken. Many more tell the judge and the jury what happened to them or what they saw happen to someone else. Determining which children are lying about which allegations is of course a fundamental problem.

We have previously identified types of questions that are known to increase the risks of contaminating children's evidence or decrease the chances of best evidence in other ways (Davies, Henderson, & Hanna, 2010; Hanna, Davies, Crothers, & Henderson, In press). For example, children's responses to open-ended free-recall questions (such as *Tell me about X*) are more likely to be accurate than responses to closed and leading questions (such as *Did X happen?* or *X happened, didn't it?*). Yet studies of the way children are questioned in New Zealand courtrooms have shown that cross-examination in particular is characterised by a heavy reliance on these riskier question types (Davies & Seymour, 1998; Hanna, et al., In press; Zajac & Cannan, 2009). New Zealand studies have also shown that the questions posed to child witnesses at court are often complex, characterised by high-register vocabulary, legal terminology, and sentences containing complicated grammatical constructions¹ (Hanna, et al., In press); yet such language

¹ The complex grammatical constructions common to courtroom language include the use of tag questions (e.g., *You went to town, didn't you?*) as well as sentences containing multiple subordinate clauses (e.g., *If he told the police that that was what he thought you wanted to do, are you saying that you don't think he could have thought that?*).

may be difficult for younger children as well as adolescents to comprehend (Perry, et al., 1995). Indeed, experimental studies conducted in New Zealand have shown that cross-examination style, with its reliance on leading and complex questions, is associated with a decrease in the accuracy of 5- and 6-year-olds' testimony (Zajac & Hayne, 2003) as well as 9- and 10-year-olds' (Zajac & Hayne, 2006).

In order to elicit accurate evidence from children, lawyers must use language in a way which is within the comprehension and communicative competence of the individual child, recognising that children's acquisition of a mother tongue is a process which extends well into adolescence and beyond (Nippold, 2007; Perera, 1984). However, when Henderson (2003) interviewed 19 British and New Zealand lawyers in the late 1990s about their practices when dealing with child witnesses, she found that most believed it was unnecessary to adjust their language with children of normal intelligence over 10 to 12 years of age. The potential for lawyers to unwittingly overestimate children's language competencies, and for confusion and inaccuracies to result, is considerable.

Eliciting accurate and full evidence from witnesses is fundamental to the trial process; being asked complex questions is unlikely to result in best evidence. However it is not only the questions posed that can affect children's ability to give best evidence, but also the stress of testifying itself (Goodman, et al., 1992). Sources of children's anxiety include facing the accused (Sas, 2002) and being questioned by the defence lawyer (Freshwater & Aldridge, 1994); indeed cross-examination is often described by children as "the most stressful part of the trial" (Sas, 2002, p. 11). Some of the tactics common to cross-examination—and recommended in manuals on the art of advocacy—no doubt contribute to its stressful nature. For example, one technique is to ask questions in an unpredictable sequence, moving rapidly from one topic to an unrelated one without the use of conventional means of heralding a topic shift. This technique is favoured by Levy (1991, as cited in Ellison, 2001, p. 361) as a means of ascertaining whether children have memorised their testimony and by Stone as a means of putting a liar off-balance:

Rapid questioning, especially in an unpredictable order, may give a liar too little time to invent answers ... Off balance he can be led into inconsistencies, improbabilities, or testimony which can be contradicted by other evidence. (1995, as cited in Henderson, 2000, p. 90)

Yet it seems possible that such a tactic could just as easily confuse the child who is trying to answer questions honestly. The following is an example of this device (sometimes referred to as the "skiparound" tactic) taken from a 2008 trial held in New Zealand:

Defence: Now you were aware that there were some arguments between your mother and your uncle. Is that correct? Child: Yes. Defence: Okay. There was a bit of argument over family things and over a funeral. Would that be correct? Child: Yes. Defence: You say he had ripped trousers – sorry ripped boxers – I put it to you that he didn't have ripped boxers at all. (Hanna, et al., In press).

Short clear questions in a predictable sequence are an asset to any trial. Training lawyers and judges on how to ask simpler questions might help to reduce the gap between the knowledge of

children's linguistic and cognitive development and current techniques and practices of cross-examination. However, training is unlikely to be sufficient as the sole mechanism to improve the questions used to challenge children's evidence (Davies, et al., 2010). The reasons span the philosophy of advocacy and practical issues including lawyers' lack of time and funding to engage in training, lack of widespread interest in the legal profession and acculturation to courtroom jargon. The Ministry of Justice's Issues Paper (2010) makes a similar point:

Training may not be sufficient to bring about significant change in the questioning styles of the legal profession or to assist Judges to intervene when necessary. This may be partly because the purpose of cross-examination is to provide the opposing party with the opportunity to scrutinise, challenge and test the reliability of a witness' evidence, which means it is confrontational by nature. Further, the language comprehension of children is a specialist area, and it may be difficult to adequately cover all the necessary skills and knowledge in training modules. (Ministry of Justice, 2010, para 94)

The reference to children's language comprehension as a "specialist area" is a significant point and it is this specialism that is core to the profession of speech language therapy. Knowledge in this profession includes the areas which are needed for competent communication (for example, the vocabulary, grammar and phonology of a language), how these normally develop in children and through the lifespan, how they most commonly break down or result in disability, and how bilingual and multicultural contexts affect these developments and disorders. In terms of the courtroom, while children's comprehension of questions is an issue, so too is their production of a comprehensible and coherent, intelligible response. Analysing and intervening with these aspects of communication is part of the core skills of a speech language therapy professional.

In tandem with other modifications to the court process, as explored in this report, there may be wisdom to drawing on the expertise currently sitting within the speech language therapy profession to increase judges' and lawyers' understanding of how to question children in ways that enhance communication and maximise children's ability to provide best evidence.

Intermediaries

The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. (Lady Hale, England and Wales Court of Appeal, 2010)

This report pursues how to complement expert training of judges and lawyers by exploring the idea of using an intermediary to relay lawyers' questions and challenges to child witnesses. Exploration of intermediaries is not undertaken on the basis that all children will be truthful. A thoughtfully constructed model might, by improving questioning, highlight false allegations more efficiently and effectively than now. The basis for this project is that, regardless of whether a witness is thought to be truthful or not, the best approach to any child witness is one which does not increase the risks of contaminating his or her evidence. The idea of an intermediary to improve the way children are questioned in an adversarial criminal justice system is not new. For example, Lord Pigot recommended the introduction of intermediaries in the UK more than 20

years ago; implementation has been slowly evolving in the last decade. Experiences in England/Wales and South Africa show that intermediaries'—or, put another way, specialists'—involvement in helping the courts to communicate with children has not proved problematic in adversarial jurisdictions.

South Africa

In South Africa, intermediaries translate and relay every question to the child during examinations. Thus, theoretically, every question is developmentally appropriate. Intermediaries sit with the child in the closed-circuit television suite listening to counsel's questions through headphones so that the child never hears anyone else unless, exceptionally, the judge intervenes. This is often conducted concurrently with language-to-language translation. Intermediaries must not alter the meaning of questions. There are no juries. There has been debate in the courts over whether intermediaries impede the defendant's right to a fair trial but the higher courts have rejected this firmly.² Practitioners and academics report that intermediaries reduce children's stress (Child Law & Childline, 2007; Müller & Hollely, 2009; Schutte, 2005), reduce miscommunication (Schutte, 2005),³ and enable far more children to testify (Jonker & Swanzen, 2007). However, there are some concerns about the expertise of South African intermediaries and there is no government training or oversight (Jonker & Swanzen, 2007; Schutte, 2005). There are also significant criticisms of implementation with technological support seriously lacking.⁴ Moreover, many argue that the role is too limited with intermediaries unable to alert the court if the child needs a break⁵ or as to the suitability of question sequences (Müller & Hollely, 2009).

England and Wales

In England and Wales the intermediary system is somewhat different. In 2010, there were 111 active, government-trained and registered intermediaries (Cooper, 2011), all with extensive experience in a relevant profession. Most are speech language therapists in private practice.

Intermediaries can be appointed either for the police investigation and/or at trial. If involved at either stage, the intermediaries begin by assessing the witness's communicative competencies. Prior to the forensic interview, they brief the Officer in Charge, and remain available to assist with planning or conducting the forensic interview if needed. If intermediaries go on to assist at trial, they will present a written report to the court on the child's communication needs and how best to question the child, and are available to monitor and assist with communication at court.

One of the most critical elements of the intermediaries' involvement is their report on the child's communicative needs. The Criminal Procedure Rules require a hearing to be held (involving the trial judge, intermediary and counsel) before the witness gives evidence, at which hearing the

² *Klink v Regional Court Magistrate* (Supreme Court, 3: 666, 1996). *S v Mokoena*; *S v Phaswane* [2008] ZAGPHC 148.

³ See also *S v Mokoena*; *S v Phaswane* [2008] ZAGPHC, 148, p 21.

⁴ See *S v Mokoena*; *S v Phaswane* [2008] ZAGPHC 148 at para 27.

⁵ See *S v Mokoena*; *S v Phaswane* [2008] ZAGPHC 148 at para 34.

intermediary's report and recommendations are discussed and ground rules are agreed for questioning the witness.⁶ Occasionally, the witness's problems are so acute that the intermediary must literally translate for them. More commonly intermediaries merely monitor questioning, alerting the judge to problems; when these arise, the judge then may ask counsel to rephrase the question. If they are unable to do so, the judge may direct the intermediary to rephrase the question for counsel, without affecting meaning.

Our discussions with judges, barristers and police officers in a study tour to the UK in 2009 suggested that intermediaries were well regarded by those who had worked with them. They described intermediaries as highly professional and neutral. Lawyers and judges were particularly enthusiastic about the written reports prior to trial.

Neither barristers nor judges expressed concern that there was any intrusion into the defendant's rights or undue interference with their control of examinations or rapport with witnesses (Henderson, 2010a). This might be because intermediaries apparently seldom intervene in the trial.⁷

Further, the assistance of intermediaries meant that younger children and those with conditions like ADHD, autism or serious disabilities, often regarded as incapable of coping with testifying at trial, were rendered more able to testify. Intermediaries are being asked to assess many more very young witnesses, including 3- and 4-year-olds, although it is not known how many of these are giving evidence at court.⁸ Those who worked with intermediaries also believed that their involvement helped them to recognise and drop poor cases and reduced miscommunication at trial (Plotnikoff & Woolfson, 2008).

However, some have commented that intermediaries still let inappropriate language pass and some intermediaries are too diffident to intervene frequently (Plotnikoff & Woolfson, 2008). Of equal concern, and despite policy that the judge is always in control of questioning, during early evaluation of the scheme some judges and prosecutors said that the presence of an intermediary made them less likely to intervene in questioning they perceived as inappropriate (Plotnikoff & Woolfson, 2007). Some intermediaries themselves have also commented that the speed of questioning can make it difficult to monitor.⁹

While both communication systems in South Africa and England and Wales offer some advantages over the status quo in New Zealand, neither can easily deal with examinations involving the

⁶ We note that, despite being compulsory, these pre-trial ground rules hearing are not always held (Cooper, 2011).

⁷ This may be because, if the lawyers accept the intermediary's recommendations on how to question the witness, the intermediary will not need to intervene. Furthermore, some intermediaries will be more interventionist than others when counsel do not observe the ground rules. It may also be difficult for an intermediary to continue intervening if a lawyer persists with poor questioning and if the judge does not back up the intermediary (J Plotnikoff, personal communication, 15 September 2011).

⁸ J Plotnikoff, personal communication, 15 September 2011.

⁹ Jones J (2007, 12th June) Working with Defendants. *National Roll-Out and Beyond: Intermediaries Shaping the Future. Fourth National Registered Intermediary Conference*. London, OJCR.

frequent use of developmentally inappropriate questions as well as the difficulties caused by question sequences designed to confuse, because intermediaries are largely limited to relaying or intervening on individual questions at trial.

The current study

The purpose of this study is to explore the potential of an intermediary system to improve the questioning of child witnesses in New Zealand criminal trials. The system was explored through conducting mock examinations of a “child” witness using three different intermediary models: one inspired by the South African model and two in which the intermediary questions the child on behalf of counsel, giving the intermediary wider rein at trial than counterparts in South Africa and England/Wales.

The current project follows on from an earlier study in which the authors proposed that such a system might be feasible in the New Zealand courts (Davies, et al., 2010). Subsequently, in December 2010, the Ministry of Justice released an issues paper on alternative pre-trial and trial processes for child witnesses with a series of questions for discussion, including two questions on intermediaries (Ministry of Justice, 2010). The publicly available New Zealand Law Society response to this paper, prepared with the assistance of their Criminal Law Committee, suggested that there is support within legal circles for the introduction of some form of intermediary within the New Zealand criminal courts:

The Ministry asked: What do you see as the key benefits and risks of using intermediaries?

NZLS responded: “There is a considerable body of overseas evidence that can be drawn on. Most of this suggests that the use of intermediaries does not unduly interfere with legitimate trial approach of counsel. There is some chance that legitimate lines of examination and cross-examination might be hindered by intermediaries, but it is more likely that the use of intermediaries will lead to the giving of clear evidence, with less stress on child witnesses and complainants.”

The Ministry also asked: If intermediaries were to be introduced, what do you believe should be the extent of their role and who do you think would be best to undertake the role?

“The Society is attracted to the view that the intermediary should be the person who puts into suitable language the questions tendered by counsel. This would allow the intermediary the right to determine the nature of the questions, rather than the lawyer doing so. However, there should be an overriding discretion for the trial judge to require the intermediary to put questions in a particular form, if it can be demonstrated by counsel that this is necessary. A higher threshold should be maintained for this.” (New Zealand Law Society, 2011)

The researchers are keenly aware that any system which replaces cross-examination by lawyers directly must include adequate opportunity for defence counsel to observe and to direct an intermediary to question the child further or on further issues as its absolute cornerstone. Defence counsel bring an insistence that other hypotheses are explored and that a critical perspective is put on the witness’s veracity and credibility. The central point of an intermediary system is to ensure that such challenges to children’s evidence are fairly put.

Our starting point is:

...children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. (*R v Barker* [2010] EWCA Crim. 4, para 40)

We hope this report contributes to keeping children visible in discussions about improving the criminal justice system. The majority of children who give evidence in jury trials are complainants alleging sexual abuse. Whether truthful, mistaken or lying, they have a right to be treated as children when they speak to the court.

Unlike the accused, these children are not at risk of incarceration. Nevertheless, they are vulnerable and need to be treated fairly. New Zealand's commitment to the United Nations Convention on the Rights of the Child reinforces the need to consider the best interests of the child as a primary consideration in courts of law (Article 3(1)), a point reinforced by the UN Committee on the Rights of the Child in its Concluding Observations on New Zealand (Committee on the Rights of the Child, 2011).

Improving the ways that the courts treat children is not only in the interests of children. The quality of their evidence is often critical to case outcomes. Timely cross-examination using developmentally appropriate questioning techniques will likely improve the evidence that informs the jury's determination of fact.

METHOD

The project was jointly funded by the New Zealand Law Foundation and J R McKenzie Trust. The research process was approved by AUT University's Ethics Committee and the Judicial Research Committee prior to commencement of the project.

Two sets of mock examinations were conducted as part of this study: the examination of the full intermediary and question-by-question models on 14 May 2011; and the examination of the topic-by-topic model on 7 June 2011.

First mock examinations

Actor participants

The first mock examinations were conducted under conditions approximating as closely as possible an actual trial, with a District Court judge, a prosecutor and a defence lawyer each taking their respective roles. The 8-year-old "child" witness was role-played by an adult with experience in questioning children in forensic contexts. The intermediary role was undertaken by a practising forensic interviewer with vast experience in questioning children in developmentally appropriate ways. A paediatrician and prior Children's Commissioner took the role of the child's support person. Finally, two court staff were present to operate the CCTV equipment and accompany the "child" witness in the CCTV room.

Observer participants

The mock examinations were observed by one District Court judge, two defence lawyers, two prosecutors, a legal scholar, an academic (and practising) speech language therapist, and the researchers. All observer participants were provided with a full copy of the evidence prior to the mock examinations.

The legal participants,¹⁰ both actors and observers, had well over 150 years' combined legal experience and had acted as judge, prosecutor or defence in over 1000 child witness cases in New Zealand, Britain and Australia.

Process

Child abuse case

For the purposes of the study, a child abuse case was developed based on the evidence presented at an actual trial. The alleged offences involved the sexual assault of a 6-year-old girl by a male family friend, with disclosure occurring two years after the events. All of the evidence was

¹⁰ That is, the judges, prosecutors and defence lawyers.

anonymised, then modified to increase the potential lines of cross-examination. The amended evidence comprised the child's evidential interview ("EVI"), the briefs of evidence of the child's parent, police officers, and a medical doctor, along with a floor plan of the location in which the alleged assaults occurred, the indictment and summary of facts.

Preparation for mock examinations

In anticipation of the mock examinations, the actor judge, prosecutor, defence lawyer, intermediary and researchers worked together to determine the process. It was agreed that two intermediary models would be explored. In the first model, the intermediary would be briefed by both counsel before trial on which aspects of the child's testimony they wanted explored and tested; at trial, the intermediary would take responsibility for putting the requested exploration and testing into question form, including determining how questions were to be phrased and the order in which they were to be put ("full intermediary model"). In the second model, inspired by the South African system, counsel would determine the questions and pose them one at a time to the intermediary, who would then translate the question into developmentally appropriate language for the child ("question-by-question model").

The defence lawyer then prepared his case and briefed the intermediary, explaining his case theory and identifying all of the areas of the child's evidence he wanted tested and challenged. The prosecutor similarly briefed the intermediary on the areas of the child's evidence he wanted clarified. The intermediary then prepared questions to probe the various areas of the child's evidence, based on the lawyers' instructions. The "child" witness was instructed to thoroughly familiarise herself with the testimony so that her answers could be as consistent with the written evidence as possible.

Conduct of mock examinations

The mock examinations were held in a courtroom at the Auckland District Court on 14 May 2011. They were conducted as if in the context of a pre-recorded hearing, following the standard protocols for that process, and with the child testifying via CCTV.

The actor judge, lawyers and intermediary were located in the courtroom, while the "child" and support person were in the CCTV room (along with a court staff member). The observer participants watched the proceedings from the courtroom.

The mock examinations were conducted as if the child had previously been introduced to the intermediary, had been given an explanation of the intermediary's role, and the child had viewed her EVI in preparation. The intermediary began by explaining the ground rules to the child, i.e., what the child should do if she didn't understand a question or didn't know/remember the answer to a question. The intermediary then asked supplementary questions on behalf of the prosecution. There was a short break, then the intermediary questioned the child on behalf of defence, taking one further break to receive instructions from the defence lawyer. In total, the "child" was

questioned for around 60 minutes (eight minutes of supplementary questions; 52 minutes of cross-examination).

At the conclusion of the first examinations, the participants and observers debriefed to explore perceptions of the process. There then followed a set of rather more impromptu examinations of the “child”, each focusing on only one or two areas of the evidence, with three different individuals taking the role of intermediary (an observer defence lawyer, the actor defence lawyer, and the speech language therapist). Each examination was followed by facilitated group discussion. In the final examination of the child, the question-by-question model was adopted, with the speech language therapist taking the intermediary role.

All examinations were videotaped and the discussions audiotaped.

Towards the end of the discussions, for reasons which will be discussed, the participants began to explore a possible third model. In this model, the intermediary would be briefed as per the “full intermediary model” but counsel would break up the questions into “chunks” or “topics” (loosely based on the identified areas of challenge or exploration). At trial there could be an iterative process whereby the intermediary questioned the child on the first topic, then referred back to the lawyer for further instructions (e.g., to put a question differently or to pick up on an inconsistency), before moving on to the next topic (the “topic-by-topic” model).

Interviews

Following the first mock examinations, all actors and observers (excluding the two court staff members) ($n=13$) were interviewed using a semi-structured interview format to explore their perceptions of the process as observed and perceptions of intermediary systems in principle. Participants were also asked to rate a set of statements using a Likert scale; the statements related to the *status quo* in terms of questioning children in New Zealand criminal courts and the potential of an intermediary system (see Appendix I).¹¹

Second mock examination

Participants and process

During the course of the interviews, it became apparent that actors and observers were interested in exploring the topic-by-topic model in practice. Therefore, a further mock cross-examination was held on 7 June 2011 to explore this model, again in a courtroom at the Auckland District Court.

A different defence lawyer took the role of defence and the speech language therapist acted as intermediary; all other actor participants were the same as for the first mock examination and the

¹¹ The speech language therapist was not asked to complete this questionnaire as she had not, at that point, observed children being questioned during a trial, nor had access to transcripts of such testimony.

same child abuse case was used. Two days before the mock cross-examination, the defence lawyer briefed the intermediary. At court, the intermediary questioned the “child” from the courtroom via CCTV; however, for one section of the questioning, the intermediary joined the “child” in the CCTV room.

Observing were the same judge, defence lawyers and prosecutors who had attended the 14 May examinations, along with one other District Court judge, a High Court judge, two forensic interviewers (including the one who had acted as intermediary in the 14 May examinations), a senior policy advisor for the Ministry of Justice, one court staff member to operate the CCTV equipment, and the researchers. The examination was followed by facilitated discussion.

The exploration of the topic-by-topic model on 7 June was not anticipated when the research was designed. While it would have been preferable to schedule the interviews *after* the model was explored to capture participants’ perceptions of it, time constraints rendered this impossible.

Table 2: Summary of mock examinations conducted

Date	Examination	Model	Intermediary role taken by
14 May 2011	1	Full intermediary	Forensic interviewer
	2	Full intermediary (impromptu)	Observer defence lawyer
	3	Full intermediary (impromptu)	Actor defence lawyer posed his own questions
	4	Full intermediary (impromptu)	Speech language therapist
	5	Question-by-question	Speech language therapist
7 June 2011	6	Topic-by-topic	Speech language therapist

FINDINGS

In this section, we report on views expressed during discussions at the first mock examinations (14 May 2011) and in interviews. Specifically, we report on participants' perceptions of the problems with the way children are questioned in courts, perceptions of the full intermediary and question-by-question models, and anticipated benefits/risks of the topic-by-topic model. There follows a summary of views expressed by participants in group discussions following the topic-by-topic model experiment on 7 June 2011 and a summary of key issues for consideration.

Problem definition and the potential of an intermediary system

I don't think it's all bad. Cross-examination ... in certain cases, of a child, certainly can be age-appropriate. It can be fair. It can be all of those things that you want it to be. But I think that it can also, under the current system, go horribly wrong. That's not to say that under any other system it's not going to go horribly wrong either. But I think at the moment the risk is greater than perhaps it should be that cross-examination may be conducted in a way which is, looked at objectively, unfair to the child. (Defence lawyer 3)

While the research evidence suggests there are problems with the way children are questioned in New Zealand courts (see page 9), the researchers wished to ascertain whether the participants held the same view and, if so, explore their perceptions of the problem. All but one agreed with the statement that there are problems with cross-examination (see Table 3), but all participants cited specific issues of concern during the course of the interview. These concerns related principally to the language used by lawyers, training and experience, the nature of traditional cross-examination, and counsels' pre-trial preparation.

Table 3: Responses statements (n=12 participants)

	Strongly agree/agree	Neutral	Strongly disagree/ disagree
NZ has a problem with the ways that children are questioned in court	10	2	0
NZ has a problem with the ways that children are cross-examined	11	1	0

Starting with language, 10 participants¹² identified the comprehensibility and/or age-appropriateness of questions as an issue, such as the use of multi-clause questions and/or ones containing too many ideas. The speech language therapist, having observed the defence lawyers' questioning practices in examinations 2 and 3 (see Table 2), was even more specific in this regard, noting for example the predominance of time references and time concepts, tag questions (e.g., *Mum told you something happened to her, didn't she?*), conditional clauses (e.g., *You knew that, if you told somebody that Bob had touched you, then Bob would get into trouble*) as well as sentences with multiple subordinate clauses (e.g., *So you knew that was something that people*

¹² This included seven legal participants and three non-legal participants.

shouldn't do or weren't allowed to do). As she pointed out, the lawyers may have been aiming for clarity of meaning, rather than simplicity of grammatical structure. It should be noted, however, that the lawyer in examination 2 had only a few minutes to prepare his questions.

The issue of training and experience was raised by seven legal participants: specifically, that neither lawyers nor judges are trained in how to question children in developmentally appropriate ways (for example, this is not part of the New Zealand Law Society's Litigation Skills Programme); they may therefore not know when (and in what way) language is inappropriate or when miscommunication has occurred, despite best efforts; they may hold unfounded assumptions about child development; and there is considerable variation in lawyers' skill and experience in questioning children.

Ten of the 13 participants (including six participants with legal training) raised concerns about the inappropriateness of some traditional techniques of cross-examination for children. The specific issues identified included the use of inappropriate language for effect rather than truth-seeking; that the "confirm, confirm, put" style of cross-examination is inappropriate;¹³ the use of "hook" questions, which lead children's evidence down a particular path; that traditional practices of cross-examination do not elicit best evidence from children; and, related to this latter point, that there is a fundamental conflict between the need to pose questions that are appropriate for child witnesses and the need to pose questions that are deemed to adequately challenge (or confront) the child's evidence.

In addition, two legal participants pointed to counsels' inadequate (or tardy) pre-trial case preparation as a significant problem:

The biggest problem is probably defence counsel preparing adequately so that there is no waste of time ... [questioning the child witness] on issues that you don't really need to cover off. So, it seems to me, if you've spent whatever time it takes—three hours or ten hours or whatever it be—properly preparing cross-examination, then that is a huge step forward (and of course it should be done, but it probably isn't done). But that's a huge step forward, regardless of who asks the questions. ... You should have questions prepared for a child witness, because it will mean you've thought about the appropriate language in advance. (Defence lawyer 2)

You've just got to prepare more for a child witness. (Defence lawyer 2)

Other problems raised were the bullying of child witnesses by some defence counsel; the potential for re-traumatising children through cross-examination; and the alien or hostile environment of the court from the child's perspective:

¹³ That is, the style of cross-examination whereby counsel asks the witness to confirm a set of points before putting an issue or challenge: "Now, you were there [confirm] and this is what you said [confirm]. But that's not right because of x, y and z [put the challenge]".

I was reminded ... of how alien the court proceedings are to a child and how alien a child is to the way that a court is set up ... the whole body of behaviour in courts, the whole justice system ... has not been established with children in mind. (Non-legal participant 4)

Perceptions of the full intermediary and question-by-question models

We turn now to participants' assessments of the examinations conducted on 14 May 2011. Beginning with perceptions of the full intermediary model, these were generally poor. With the intermediary taking responsibility for conducting the examination, from beginning to end, and with limited inbuilt opportunity for counsel to interrupt the questioning, there was a perception it left counsel too little control over the questions, the direction of the questioning and of the case. It also placed an enormous responsibility on the intermediary, highlighting that such a model would require a significant investment in intermediary training to ensure their practices were safe for all parties. The lack of flexibility from counsels' perspective was raised as a concern. Under traditional cross-examination, counsel has the flexibility to respond to the dynamism of the evidence as it emerges, to change tack on the hoof in response to the evidence; under the full intermediary model, this flexibility was perceived to be lost. Furthermore, participants felt that in examination 1 (see Table 2 on page 19) the child's evidence had not been properly tested and/or the case had not been adequately put. This raised the spectre of appeals on the basis, for example, that the intermediary did not properly follow counsel's instructions or counsel did not instruct the intermediary sufficiently.

While the model was not as workable as some had expected, one observer commented that there was nonetheless something to be said for cross-examination by proxy:

There is some attraction [to the idea of] vicarious cross-examination through somebody else and then doing a storming closing address... (Defence lawyer 2)

...from a defence lawyer's perspective. You're not the foot soldier; you're not the one that has to fire the bullets. You just get to utilise the evidence later on. (Defence lawyer 2)

Reactions to the question-by-question model were similarly lukewarm. The need for the intermediary to "translate" the questions one-by-one, with an inevitable delay between the child's last response and hearing the next question, meant that the process was perceived to be "clunky" and "stop-start". Some participants feared that the child might lose focus due to the poor flow of the question-and-answer sequences. However it did result in counsel having more control over the questions and direction of questioning, and restored the flexibility to respond to emerging evidence. It would also require less training of intermediaries, as their role would essentially be a translation one; yet the exercise raised the question of what language-related issues intermediaries would be permitted to address—would they be allowed only to rephrase complex language into simpler language or would they also have leeway to rephrase closed and leading

questions as open and non-leading wherever possible?¹⁴ Finally, with control of the questioning more firmly in the lawyers' hands (compared to the full intermediary model), the risk of appeals was seen to be reduced. Nonetheless, this model too was less successful than some had expected and participants were generally unimpressed:

It seemed like a classic compromise in that it didn't please anybody. (Crown prosecutor 2)

Perceptions of the topic-by-topic model: Benefits

Although the topic-by-topic model was not explored in practice during the first mock examinations, several participants expressed a view during interviews that it had potential or seemed workable. Participants were therefore asked to imagine that there was a pool of highly skilled, highly trained intermediaries, and to consider the potential benefits and risks/difficulties of the model. Note that these comments were given during the interviews, *before* the model was explored on 7 June 2011 (see page 32 for participants' perceptions *after* the topic-by-topic model examination was conducted).

Benefits for the child

The anticipated benefits to the child derived principally from the expected improvement in the quality of the questions posed and the intermediary's neutrality. It was envisaged the questions would be more developmentally appropriate and would also be posed in appropriate sequences. Participants saw the potential for improving children's experience of court as a result, as examinations would be less upsetting, stressful and confrontational; children might be less apprehensive about being questioned on behalf of the accused and less worried about being asked incomprehensible questions. Other benefits included better-paced examinations, with the children getting a break between topics, which might suit some children's attention span and reduce fatigue.

A possible indirect benefit arising from any well-functioning model may be an increase in early guilty pleas, obviating the need for children to testify at all. Additionally, some participants believed the process might increase children's access to justice.

Benefits for all parties

Eleven participants suggested that the model could result in better quality evidence from the child. For example, improvements in the quality of the questions and children's experience of court could enhance the child's ability to give accurate, full evidence; in the context of topic-based questioning, the resulting evidence might flow better, allowing the jury to better follow and assess it. The possibility of the improved questioning helping to expose untruthful witnesses was also

¹⁴ We note that, in the England and Wales intermediary system, these sorts of issues are often dealt with in the ground rules hearing (see page 12).

raised. These benefits would of course accrue to all parties, including the defendant who is wrongly charged.

Benefits for defence / defendant

The potential benefits for the defence team related principally to case preparation, increased counsel control of the process and flexibility compared to the full intermediary model, and the prospect of “vicarious” cross-examination, thereby avoiding negative perceptions of the defence side.

In terms of preparation, given the pre-trial briefing of the intermediary by counsel, participants noted that counsel would be forced to prepare their cases earlier¹⁵ and better than some currently do, for example, through refining their lines of cross-examination:

...because [lawyers] are not going to be asking the questions; they're going to have to refine their areas of challenge (for the defence) and explanation (for the prosecution). They're going to have to think a lot harder about what they want the jury to hear. (Judge 1)

Furthermore, breaking cross-examination into topics might assist lawyers to get distinct points across to fact-finders:

...if the evidence flows better and the witness can answer on the topic, you may hopefully achieve what you set out to do in that particular chunk or topic area. Remembering that this is all designed to make a point in front of the jury, you've got that discrete point, rather than the jury trying to search for it amongst a morass of other stuff. (Judge 1)

One participant pointed out that, for counsel with poor skills in questioning witnesses and challenging evidence, an intermediary might help them run their cases more effectively.

There were also perceptions that, compared to the full intermediary model, the topic-by-topic model would give defence comparatively more control over the case, as the lawyer would tell the intermediary which topics to address in which sequence and could direct the intermediary to question the child further within a topic before moving on to the next. This model also reduced—but did not remove—concerns about the inflexibility of the full intermediary model, as the topic-by-topic model allows comparatively greater opportunity for counsel to respond to the emerging evidence.

The majority also saw the benefits of “vicarious cross” and reducing the potential for negative perceptions on the part of the jurors towards the defence lawyer and, by association, the accused:

¹⁵ One judge noted that, in the context of pre-recording, cases conducted using an intermediary would need to be prepared (and the intermediary would need to be briefed) by the first callover.

If the judge steps in to “criticise” you, you wouldn’t feel it was impacting on counsel for the accused. Often, judges are reluctant to intervene and *apparently* criticise the performance of defence for fear of influencing the jury against the accused because the jury thinks the judge has just told the lawyer off—which might not in fact be the case ... So in terms of the relationship with the jury, it’s not the defence lawyer getting caned, which is good, because if the jury thinks the judge is against the defence lawyer, then the judge might think the accused is guilty. So the intermediary is this neutral figure... (Defence lawyer 2)

Furthermore, the model may put lawyers in a better position to monitor the questions being put, and focus their attention on the unfolding scene, than is possible under the *status quo*—that is, counsel is one step removed from the battle and able to watch questions being put from a vantage point, rather than from within the thick of it:

...you're an observer, you're a critic almost, you're watching yourself, you're watching your questions being put. You have this opportunity potentially to ask for something to be asked again, or put differently, better. (Crown prosecutor 2)

You might decide, after you’ve heard [the question being put], ‘Well, actually, just pause there; that’s not really the question I wanted.’ So, again, you’ve got this latitude to reconsider the purpose of the question, or its appropriateness... (Defence lawyer 2)

As a further benefit, three participants noted the potential for lawyers to increase their skills in the appropriate questioning of children as a result of observing and working with intermediaries. Non-legal participants added that lawyers would have the satisfaction of knowing that their case was put fairly and not won through manipulating a child’s language competencies.

Benefits for the prosecution

Many of the benefits for the defence lawyer would also accrue to the prosecution, such as the possibility of increasing skills in questioning children, better preparation, having an overview of the questions being put, and greater control/flexibility over the process compared to the full intermediary model. In addition, there could be time savings as prosecutors may not need to meet the child before trial to build rapport, less need for prosecutors to object to questions during cross-examination (hence less adjudication by the judge between the parties), and greater confidence on the prosecutor’s part that their witness will be protected from inappropriate and/or harsh questioning. The possibility of fewer unfair acquittals was also raised by one participant (that is, through defence losing their ability to take advantage of children’s intellectual and linguistic abilities), while another saw no particular benefits for the prosecution.

Benefits for the judge

The anticipated benefits for the judge related primarily to judicial intervention in questioning and focus of attention. Specifically, there was a perception that, with skilled intermediaries questioning children, judges would have to intervene less often, thereby avoiding perceptions of judicial interference:

Hopefully, the days of a judge having to interrupt cross-examination or asking for the question to be put a different way would be over. That would be my own wish, anyway, because the difficulty is, the more you interrupt (even though you may need to), the more the jury are likely to think, 'Oh, this judge is imposing his or her views on the evidence as a whole and interfering with our role.' (Judge 4)

Three lawyers suggested that it would also allow judges to focus less on *how* the question is phrased and concentrate more on other legal aspects of the questioning, while two participants noted the possibility of increasing judges' knowledge of appropriate questioning for children through observing intermediaries.

A further benefit of the topic-by-topic model was in relation to the control and subsequent editing out of inadmissible evidence in the context of pre-recording:

If there are any inadmissible or irrelevant things that crop up, you can stop [the examination], note it, go on to the next area and then potentially come back to it. So it's not buried in a whole load of other stuff, so it's easier to control because you've only ... halted that particular line. (Judge 1)

Perceptions of the topic-by-topic model: Risks and challenges

Risks/challenges for the intermediary

Intermediaries would be expected to avoid many of the traditional techniques of cross-examination which have been heavily criticised as inappropriate for child witnesses, such as sudden shifts in topic, a heavy reliance on closed and leading questions, and tag questions. However, lawyers may struggle to accept that the *function* of cross-examination can be achieved without using those traditional tools.¹⁶ Hence some participants pointed out that intermediaries may face pressure from lawyers to put questions in a particular way—or to put questions that the intermediary feels are beyond the child's comprehension, such as those involving time concepts—raising the possibility of tension between the intermediary and counsel:

Defence lawyer 1: I can foresee problems with lawyers being able to relate to an intermediary, and even be able to sit alongside them and give them the questions. Interviewer: ... What do you see are the sorts of problems that might come up? Defence lawyer 1: The lawyer believing, 'No one can do it as good as I can. Therefore, if you don't ask it in this way, you're not doing it properly and you're not actually putting my case, you're not challenging my case.' There will be some intermediaries ... who will react against what some defence lawyers are trying to do, in terms of tactics. So you'll get a tension there as well, because there will be some questions that I believe the intermediary won't want to put, but the lawyer will insist because they believe it has to be done this way or their client is pushing the lawyer ... Unless you've got a very very strong intermediary who is very clear in their role and is able to stand up to the lawyers, I could imagine that the intermediary would have a pretty hard time.

¹⁶ We note that there appear to be differences in attitudes and practice in similar jurisdictions. For example, the England/Wales Court of Appeal case, *W & M*, and following *Barker*, indicates that their courts may require counsel to question without leading (J Plotnikoff, personal communication, 15 September 2011).

Further, some participants noted that, if intermediaries are accustomed to a therapeutic role, it may be difficult for them to maintain neutrality—that is, *not* to see themselves as advocates for the child; putting legitimate challenging questions, such as asking whether a child is being honest or not, may also run counter to their normal professional practice (underscoring the importance of intermediary training and a code of conduct that stresses the neutrality of the role).

Risks/challenges for the child

While three participants stated there were no risks to the child with the topic-by-topic model, others saw the breaks between topics as potentially problematic. Three expressed fears that the “topic-break-topic” process would increase the duration of cross-examination, while others raised the possibility of children getting bored during the “inter-topic” breaks, or losing concentration and focus, or finding the process disjointed. One felt that the breaks may be difficult to manage for very young children. Two mentioned the importance of explaining to the child the reason for the breaks—that is, that they are for the adults to confer, rather than because the child has said or done something wrong.

Another anticipated risk was that, if the same intermediary posed questions on behalf of both the prosecution and defence, there may be a difference in the questioning styles, with the intermediary posing softer questions for the prosecution (good cop), then harder, more challenging questions for the defence (bad cop), which may be difficult for both the intermediary and child:

...there was a very obvious, tangible amount of positive rapport [between the intermediary and child during] evidence-in-chief. ... Looking at it in that context, I started thinking, ‘Hold on, how is it going to be for that person, that trusted person, to have to start putting the curly questions and to challenge the child, albeit vicariously, albeit on behalf of someone else?’ But I was concerned about that and I was also concerned about the effect that that could or may have on the child complainant. (Defence lawyer 3)

On the other hand, one participant mentioned the danger of unfair questions being somehow neutralised by the intermediary so that their unfairness was not apparent to the jury. Finally, two participants mentioned the danger of repeated examinations, for example, if new evidence emerged subsequently to the initial examination (for further scenarios, see page 28).

Risk/challenges to the fact-finder

Some participants were concerned that the breaks between topics would result in a loss of flow to the evidence, that it would be rendered cumbersome and disjointed, and difficult for the jury to follow.

Risks/challenges for the defence / defendant

Two participants (one legal, one non-legal) stated there would be no risks to defence in a well-functioning system, although one certainly recognised the challenge to defence counsel of accepting a proxy examiner. Other legal and non-legal participants mentioned the risk of an

intermediary system undermining a barrister's ability to effectively put the case, robustly challenge the child's evidence, fulfil the accused's wishes, and fulfil counsel's obligations to their client:

Cross-examination, [whoever conducts it], needs to be conducted properly. By that I mean obviously fairly and in an age-appropriate way. But what is crucial ... is the case needs to be put. ... Could it be done by an intermediary? Potentially, yes. I don't think that we could say that it's impossible ... but I *am* going to say it would be difficult. And secondly there is this issue of the accused and catering to the wishes [and] instructions of our client—and there are professional obligations which really impact there and which make this process harder than it otherwise would be. ... There are accused people out there who are very demanding and who are not readily going to let anyone conduct cross-examination in a way that they don't want it to be conducted. (Defence lawyer 3)

The issue of whether the process could be flexible enough to allow counsel to respond to the emerging testimony—or unexpected evidence—was the subject of considerable concern for some participants; other concerns specified by participants included the potential for defence counsel to lose control over cases, over witnesses and questions, and over the direction of questioning, even within the topic-by-topic model. The spectre of wrongful convictions because of inadequate testing of the evidence was also raised. Similarly, the prospect of client dissatisfaction with the process leading to dismissal of counsel, and repeated examinations of the child, was mentioned (although not specifically in relation to the topic-by-topic model over the others):

One of the main concerns I have, in the same way with pre-recording, we may well get some defence counsel being dismissed by their client immediately after the pre-recording if they don't think counsel did a very good job. The result might well be that the new counsel comes along, decides that he's got to impress the client by making a better effort than the predecessor did, and will ask, for that reason, for the child to give evidence again. So it will defeat the object of the exercise. So I think we do have to be pretty rigorous in that. My concern with the use of intermediaries is, again, it gives a potential enormous scope for dissatisfied accuseds to say, 'All right, I can't complain about my own counsel. But he didn't have the opportunity to cross-examine and the intermediary didn't do a good enough job.' (Judge 4)

The question of defendants' perceptions of the fairness of the process more generally were also highlighted by one participant:

[There is a risk that defendants] ... don't feel like they're getting a fair trial, they don't feel like their questions are being asked, they don't feel part of it, they feel like it's a PC jack-up. ... A lot of defendants do abdicate the responsibility to defence counsel anyway. Literally, they often put their complete trust in you and you are the person they believe will do it for them ... They need to feel that somebody is in their corner, fighting for them in a way that is meaningful and gives them a best shot at having their defence properly put. (Defence lawyer 1)

Another concern was how the pre-trial briefing of the intermediary might best be conducted. For example, one defence lawyer suggested that counsel should prepare their questions in advance for the intermediary to work with; however, another pointed out that this would be too time-consuming and inflexible:

The problem with [writing the questions out in advance] is it's hugely time-consuming and impractical because cross-examination is just not like that. I plan areas but use, I suppose, my practical experience to be able to ask the right questions. ... You cannot stick to a rigid structure because the skill of an advocate is flexibility. ... It's a flowing process; it's a moving process; it changes. And you have to be alert to those changes to be able to go with them. (Defence lawyer 1)

The lawyers also disagreed on whether a child's evidence could be robustly challenged using predominantly open questions, with one defence lawyer suggesting it could not, and the other disputing this:

If you know the trial file really well, you can actually ask open questions because you know the answer to every question—or what it must be. (Defence lawyer 2)

In any event, the importance of intermediaries understanding the *purpose* of any given question and its function within the overall theory of the case was emphasised:

It seems very difficult, to me, for a person who doesn't know the point of the questions to ask them ... because that's going to affect the very next question they ask, based on the response. If they don't know the purpose, they are unable to navigate. (Defence lawyer 2)

Finally, two legal participants noted that the system would also remove the theatre of confrontation and one suggested it would reduce defence lawyers' ability to use their communicative superiority over children to avoid bringing out the truth.

Risks/challenges for the prosecution

Fewer participants noted risks for the prosecution, compared to those anticipated for the defence. One pointed out that, with re-examination being undertaken by the intermediary, the prosecution too would lose some control over their case and witness, as well as be limited in their ability to respond to unexpected testimony. Another participant noted a minor concern whereby the jurors might perceive an imbalance between the way the child is cross-examined (by a neutral questioner) and the way the adult accused is cross-examined by the prosecutor (with all the theatre of traditional cross-examination).

Risks/challenges for the judge

Anticipated risks to the judge centred unsurprisingly on control of the process and parties to the trial. One legal participant mentioned the need for protocols to ensure consistency of practice across courtrooms; another pointed out the risk to the proceedings if intermediaries had an insufficient understanding of the rules of law and evidence, which could require heightened vigilance on the judge's part. Managing the flow of information for the jury was also raised, along with managing any conflicts between the intermediary and counsel.

While some participants had pointed out the benefit to judges of being able to relax their focus on the way questions are phrased, one participant noted the risk that judges might absolve themselves of responsibility for monitoring compliance with s85 of the Evidence Act,¹⁷ relying too heavily on intermediaries to do so, despite having responsibility for controlling the questioning. Finally, one participant noted that the process might be perceived as constraining, given its dissimilarity to current practices:

It's a little regimented. I think some judges would think it was constrained. Perhaps because it's so different from the style at present, 'Is this really giving the proper opportunity to challenge the case?' which is what the trial's all about. But we're always going to have that tension between the adversarial system and questions that the witness can actually understand. (Judge 1)

Risks/challenges for the system

The anticipated risks to the system centred on appeals, the cost of the process, and the risks inherent in any system change. For example, nine participants noted that the intermediary system could open up several lines of appeal: was the case properly put? Was the client properly represented? Were the client's instructions followed? Did counsel brief the intermediary adequately? Did the intermediary follow the instructions? Aligned with this was the need for an adequate paper-trail of the interactions between counsel and the intermediary so the Court of Appeal can make an assessment, should a verdict be appealed.

Participants raised concerns about the costs associated with an intermediary system, including the possibility of increased hearing times, aborted trials or mistrials, and the costs of editing the evidence after the hearings.

In addition, participants noted some of the risks inherent in any system change: the risk of rushed implementation of a model without involving stakeholders (defence lawyers in particular) in genuine consultation, experimentation, and development, and without getting stakeholders' buy-in (again, defence lawyers in particular); the risk of individuals being change-averse and unwilling to let the process work; and the risk of a high-profile case going badly, resulting in bad press for the process more generally. The potential for further *unanticipated* consequences was also raised:

The big thing—and I think it applies to any reform that we put together—is that we need to think really carefully about the onflow effects to other parts of the system. Some of those might be welcome and some of them might be unwelcome. So I think it's just about treading really carefully and taking it slowly, in terms of thinking about, well, what are the possible onflow effects for the way cases are heard and how other evidence is heard? (...) What's going to happen as a result of bringing in this reform? (Academic)

¹⁷ This section of the Act defines “unacceptable questions”, which include questions that are “expressed in language that is too complicated for the witness to understand”.

Other risks noted were the addition of a new role into the system and a perception from one lawyer that the process might undermine the solemnity of the occasion, make things too “cosy” for the child.

How to improve questioning: Alternatives to an intermediary system

Rather than [having] intermediaries like everybody else, can't we be the first country in the world to have lawyers that ask really good questions? (Defence lawyer 2)

The mock examination exercises were intentionally exploratory, aimed at probing perceptions of risks and benefits, issues for consideration, and flushing out unanticipated consequences. The exercise did nonetheless illustrate (or reinforce) to some that there is room for improvement to the way children are questioned in court:

I was impressed with [the specialists']¹⁸ ability to put things into child-friendly language. I think most of us lawyers think that we can do that ... but seeing it being done by the real specialists was impressive. I did think that was a step forward. (Defence lawyer 3)

While recognising the need to improve questioning practices, one participant wondered whether an intermediary system was an overly complicated response:

Why can't you get lawyers working together with linguists, instead of having this new system, this overlay, this extra person involved in the court at the really important period, when it's really stressful?¹⁹ Why do we have to complicate it so much, when ... it's really the question, not the questioner? I don't see that you couldn't find some way to simply improve the questions *before* the child's there. (Defence lawyer 2)

The possibility of improving questioning practices in the courtroom through other means was a common theme in interviews and discussions, with the possibility of training and accreditation raised by several participants. Opinions were certainly divided on this point, with some suggesting that training lawyers might result in improved questioning, while also acknowledging the practical difficulties of getting counsel to undertake training more generally—particularly the private defence bar:

[In relation to existing litigation skills courses] ...the problem is getting people to go on it. The people who really do need the training seem to think that they themselves are perfectly good and they don't need to go. The people who tend to go on the course are those who in fact don't actually need the training. But what can you do? Can you force them to go on the course? I suppose you could make it a condition that you won't get any Legal Aid briefs unless you've been on it, but I don't see how we could force them if there's a privately paid brief. (Judge 4)

For example, if there were an accreditation process whereby only those counsel with the appropriate training could cross-examine children, there could be considerable costs to counsel in

¹⁸ That is, the forensic interviewer in examination 1 and the speech language therapist in examinations 4 and 5.

¹⁹ However, see comment on page 33 concerning the potential for the intermediary system to reduce the stress of cross-examination on counsel.

private practice in terms of attending the training and losing income for the duration. The perennial problem of post-training skills slippage would have to be considered, along with the issue of whether accreditation would impact seriously on the accused's right to choose his/her own counsel (some believed this to be a serious consideration, others did not). The point was also made by two legal participants that while training might improve some lawyers' practices, it would not achieve this for the majority. Another participant made the point that it is not even feasible to train defence counsel in "fair" questioning practices:

The reason defence lawyers can't just be trained up to do it properly is that it's not fair to expect them. There's a conflict sometimes between being fair and representing their client. ... Maybe that's not correct, and I'm not a defence lawyer ... But their job isn't to be fair; it's just not their job. They have to be honest and not misrepresent things and they are, first and foremost, an officer of the court, but they don't have to be impartial and they don't have to be fair. (Crown prosecutor 2)

Other suggestions for improving questioning practices included peer- or expert-review of counsels' questions before trial, although this would raise the question of (amongst other things) whether it was mandatory and who would pay. One defence lawyer raised the England/Wales system of intermediaries as an option that would allay many concerns about the topic-by-topic model, such as control over the questioning and the ability to respond to the dynamism of the emerging evidence. Finally, the possibility of an intermediary system working in concert with other modifications to court processes was raised, such as having child witnesses testify from locations other than the courthouse.

Perceptions of the topic-by-topic model examination of 7 June

The exploration of the topic-by-topic model on 7 June 2011 was an opportunity for participants to consider whether their expectations of the model (as stated in interview) would be borne out or not. Due to time and funding constraints, it was not feasible to interview participants individually after the event; furthermore the opinions raised during the group discussions (after the mock examination was completed) were not necessarily held by all who participated. Nonetheless, some clear points did emerge.

Starting with the briefing, in this case defence counsel and the intermediary worked together to agree on a completed script of the questions to be posed. Both parties were positive about the process; for example, the lawyer appeared to have increased his understanding of appropriate questioning of children as a result of working with the intermediary, and comments from both parties illustrated the potential for the briefing to improve preparation:

So the process ... was fantastic. It was, it was great, just in terms of the discipline, I suppose, of sitting down and being told you're going to be asking questions of less than eight words. (Defence lawyer)

I think it was actually a tremendous process and in some ways it was great for me to see: when I say, 'Well, this isn't going to work,' then, 'OK, so, what do we want to ask? What actually are we trying to get at?' And watching [counsel's] thought processes ... come to the point where actually he got the question was fantastic. (Intermediary)

We refined a few questions. We made them shorter and snappier or broke them down. No subordinate clauses. You're not allowed to use something called 'subordinate clauses'! (Defence lawyer)

Observer: ...did you leave the exercise feeling short-changed and thinking, 'Look, my questions haven't—?' Defence lawyer: No, I didn't feel short-changed. In fact it simply is the way you should cross-examine. You should break it all down. And we should all do that, all the time, for everybody.

Although the briefing was deemed successful, the intermediary noted that in real cases it would not be sustainable or necessary to agree on a complete script; rather, the intermediary might indicate *how* s/he will phrase questions, based on a set of well-defined rules:

It doesn't need to be, 'Exactly how are we going to ask this question?' It can be, 'OK, these questions will be changed so they are...' and there should be a set of rules about that [stating] preferably [that the questions will be] without subordinate clauses, without tag questions etc. So there could be in fact quite a list of that kind of thing. 'These are the points I understand you want to get across; this is the kind of question you are going to get.' (Intermediary)

However, the benefits of having an agreed script were evident from the defence counsel's perceptions of his control over the process:

Facilitator: Was there enough flexibility in this process from your perspective? Did you have enough control? Defence lawyer: I didn't feel uncomfortable about it because I had written the script. I knew where it was going to go. And if it went off the rails, then we'd be able to stop and I'd be able to reload and reposit the question...

The defence lawyer also raised a new point, namely, the impact of questioning by proxy on the *lawyer's* experience of cross-examination:

But it was very relaxing, I must admit, because I'm not having to ask the questions. It's a less stressful experience because you've written the script and, subject to the answers, you can revise it as you go. So I don't find it difficult. (Defence lawyer)

While the cross-examination was generally seen to be more effective than that observed under the other two models, there were still, unsurprisingly, lingering concerns. A topic of robust discussion was the ability of the model to respond to the emerging evidence and, in particular, to accommodate unexpected ("bombshell") testimony. If this occurred, counsel and the intermediary would have to "go into a huddle" to work out appropriate questions in response. This would be time-consuming and the momentum or impact of the testimony might be lost; as one participant put it, it would defuse the bombshell.

There was also concern about the process increasing the duration of cross-examination and whether it would work with very young children (say, 5-year-olds). However, any increase arising

from the breaks between topics might be balanced by the avoidance of the lengthy arguments between counsel and the child that can result from confusing and complicated questions (and which may be frowned upon by the jury);²⁰ it could certainly prevent lengthy “fishing expedition” examinations. Furthermore, the breaks might be beneficial for some children, especially if the intermediary can call for further breaks when the child needs them.

During the briefing between counsel and the intermediary, discussions had arisen about what sort of questions the intermediary could legitimately refuse to put to the child. The discussion was prompted by the child’s evidence, in which she stated that she had endured an hour-long episode of abuse in one location, followed by another hour-long episode in another, raising a strong suspicion that the child’s concept of time was not fully developed. For this reason, the intermediary did not want to put questions to the child that required an understanding of time duration. The issue highlighted the need for clarification about the intermediary’s role and clear rules as to who makes these sorts of calls—whether it is up to the intermediary; whether it is a matter of admissibility hence up to the judge (raising the question of whether judges have the expertise to make such a decision); whether it is up to the fact-finder to decide how to interpret a child’s response to such a question having been briefed by an expert witness on the matter; or whether decisions should be based on a pre-trial assessment of the child’s language and cognitive development, which in the researchers’ opinion would be an ideal, but expensive, option.

While the briefing session between the defence lawyer and intermediary appeared to have gone smoothly in this case, the possibility was raised of tensions arising in other cases due to the personality traits that, according to the lawyer quoted below, typify some who work in criminal law:

There’s the obvious situation where you get some relatively strong-minded defence counsel who just can’t work with the intermediary. Then what do you do? How do you do the trial then? I can envisage ... those sorts of confrontations ... I think that you are getting into some real practical problems about personalities, about the sort of people who do criminal law ... which is again getting into the unworkable or unmanageable unless you have specialist lawyers, and you sort of get into the situation where unless you’ve had this training you can’t come and do a case involving anyone under 12 or something like that ... That’s where you are getting to. Otherwise I can see it may not work. (Defence lawyer 1)

The question of how communications between counsel and the intermediary could be recorded for use by the Court of Appeal in the event of appeal was a topic of lengthy debate. Similarly, there were lengthy discussions about the potential of training and ticketing of lawyers and judges to improve questioning practices, with participants noting precedents for specialisation in the Youth Court, the Family Court, and under Legal Aid. The possibility of introducing at least some training at university level was also raised. However, the need to draw lawyers’ attention to the problems was seen as a critical first step to addressing the problem:

²⁰ “...sometimes the question with too many subordinate clauses ends up in a greater argument that takes longer to untangle. You get a greater bird’s-nesting effect going on than if you had just asked it simply.” (Defence lawyer 2)

If you went out to a bunch of defence lawyers now and said, 'There's a problem with your cross-examination,' they'd say, 'No one has told me that before.' You actually have to tell lawyers there's a problem before you want to fix it and provide an overlay of your solution to the problem when the lawyers haven't been told. (Defence lawyer 2)

Finally, the experiment left some participants concerned that the model, which aims to ensure children are not confused by the questions they are asked, would be untenable within the current system of advocacy in which defence counsel's job is indeed to create doubt and confusion. Other participants pointed out that the system does not sanction *unfair* confusion, raising the question of what constitutes fair and unfair (or legitimate and illegitimate) confusion. While the issue was certainly not resolved, it did highlight the need for clarity and consensus on what best practice in cross-examining a child—that is, examinations which are fair for the child and the accused—might in fact look like.

Issues for consideration

While all participants believed there are problems with the questioning of child witnesses (whether due to poor questioning and/or poor preparation), not everyone came to the mock examinations believing that an intermediary system would be a satisfactory solution. However, observing the mock examinations shifted some participants from a position of scepticism to openness to the idea; others, who initially favoured intermediaries, came to realise that there were more difficulties to finding a workable model than they had anticipated.

Nonetheless, reflecting on the examinations conducted on 14 May, most participants indicated that it would be possible for highly trained, highly skilled intermediaries to fairly and robustly challenge children's evidence and that intermediaries could improve the quality of children's evidence (see Table 4). There was, however, less consensus about whether this would interfere unduly with the legitimate trial approach of counsel. Despite stated reservations, all participants indicated that the idea of introducing an intermediary system into the New Zealand criminal courts was worth further exploration.

Table 4: Responses statements (n=12 participants)

	Strongly agree/agree	Neutral	Strongly disagree/disagree
NZ has a problem with the ways that children are questioned in court	10	2	
NZ has a problem with the ways that children are cross-examined	11	1	
In principle, the use of intermediaries does not unduly interfere with legitimate trial approach of counsel	4	5	2
A child could be fairly and robustly challenged through a highly-trained skilled intermediary within carefully thought-out pre-trial and court processes	10	1	
An intermediary might improve the quality of children's evidence	12		
The idea of introducing court-appointed intermediaries into NZ's criminal justice system is worthy of further exploration	12		
The success or failure of this idea will depend on the skill of the intermediary	9	2	1

NB: All instances are excluded where participants selected more than one category (e.g., agree plus neutral; disagree plus neutral).

The topic-by-topic model was perceived to be the most workable of the three models explored, but it was clear that we were still far from having developed a fully workable model—not that such a lofty aim was possible within an exploratory study. But the experiments did begin to uncover some key issues for consideration and what would be needed to make such a system work well for all parties.

Firstly, it was clear to the participants that, for the model to work, the intermediaries need to be highly skilled in communicating with children and informed of court procedures and the laws of evidence.²¹ There would also have to be a clear delineation of the intermediary's role, including clarity surrounding the circumstances in which an intermediary can refuse to carry out counsels' instructions.

Thought would also need to be given to recruiting suitable candidates—there was some disagreement among participants about whether legal professionals should be recruited and trained in language issues or whether language experts should be recruited and trained in legal issues (in England/Wales, the latter option was taken); either way, they would need a high degree of professionalism and the self-assurance to match the confidence of lawyers—and working with a proxy questioner would require a significant shift in thinking on the part of lawyers.

The exercise highlighted the critical importance of pre-trial preparation on the part of counsel and the need for a high level of meaningful collaboration between counsel and intermediaries. Questions were raised about how the pre-trial briefing would work in practice, with the briefing undertaken for examination 1 deemed unsuccessful and the more successful briefing process for

²¹ For example, one participant noted that intermediaries' training should cover competence of counsel trials and two others stressed the importance of intermediaries observing trials as part of the training.

examination 6 deemed too labour-intensive; nonetheless, one judge was quite clear about how it should work:

I would expect the lawyer to be talking to the intermediary, in real life, and say, 'Look, these are the areas of challenge that I want to make. I want to ask the witness about this. How is the best way for me to put that?' So the intermediary will be very much phrasing the questions, but it wouldn't be just ... 'Right, I want you to ask this, this, and this.' (Judge 1)

Hence clear guidelines would be needed to establish how the pre-trial briefing should work in practice, the amount of information provided to the intermediary (e.g., how much of the trial file and defence theory should be provided),²² and how adequate records of those interactions are maintained in case of appeal. Decisions would need to be made about other pre-trial processes: whether there would be a routine pre-trial assessment of the child's language and cognitive competencies to inform the intermediary's practices; a ground-rules meeting between the intermediary, judge and counsel; a pre-trial rapport-building meeting between the intermediary and child—all of which could involve considerable time and costs.²³

Decisions would also need to be made about the practicalities of the courtroom, most notably, whether the intermediary should be in the CCTV room with the child or in the courtroom near counsel. Certainly, the adult who role-played the child felt that the former would be uncomfortable—a view that was confirmed when the intermediary questioned her in the CCTV room in examination 6:²⁴

I don't think that [having the intermediary in the CCTV room] would work for a couple of reasons. One is the size of the room; I think that would be really intimidating, and just far too close. And I think that having that little bit of distance is almost like a third person for kids (...) because they're not right beside you. There's a little bit of distance there. And I think culturally it's probably a bit better as well—I'm just thinking about Pacific Island kids. You know, they don't often like looking eye-to-eye. ("Child" witness, interview)

Having [the intermediary] in the room there was just, like, 'Whoa.' And I think culturally that could be really inappropriate as well. That just might be the size of the room, but that was quite... I think most kids would have found that quite intimidating, whereas actually talking to someone on a screen is actually a lot safer; it feels a lot safer. Kids are used to technology. ("Child" witness, in group discussions after topic-by-topic model examination 6)

It was also clear that the topic-by-topic model, with the breaks for discussion between counsel and the intermediary, could only realistically work within the context of pre-recording, so that breaks could be edited out before the DVD is shown to the jury.

²² On this point, views were mixed, with some legal participants wanting the intermediary to know the file and some non-legal participants believing full knowledge of the file would be unhelpful or might even dilute the neutrality of the role.

²³ In the England and Wales model, a pre-trial assessment is a requirement and the ground rules hearing is considered by many to be essential. In some people's view, the assessments in particular are why judicial opinions of intermediaries appear so favourable (J Plotnikoff, personal communication, 15th September 2011).

²⁴ The decision would depend in part on the model adopted and on the size of the CCTV room. In England and Wales, the intermediary always sits with the child.

Guidelines will be essential in terms of courtroom practices, such as control of the “inter-topic” consultations during examinations, and the judge’s role in refereeing any disputes between intermediaries and counsel:

If [defence] don’t think their intermediary has done it in the first [topic] chunk, they can have another chunk, have a talk to the intermediary and then another chunk. But at some point it’s got to stop. But that’s where the judge may have to referee between continued questions on the same area because the lawyer won’t necessarily get the answer they want. And if they’re working on the assumption that the child’s lying, then they might want to keep wearing the child down. And that’s where the intermediary’s knowledge and perhaps the judge’s knowledge of children may have to prevail ... But I’m talking about more extreme cases. But there is a built-in ability to do that through the judge, and also the prosecutor objecting as well. (Prosecutor 1)

Finally, one participant stressed the importance of trying to appeal-proof the process:

The judge [could] require defence counsel to say whether or not they were satisfied with the intermediary's performance. Because if defence counsel said, ‘No, I’m happy with the way the intermediary conducted the cross-examination,’ that would close off ... any claim later on to the Court of Appeal that the questioning wasn't adequate. But ... you might get the more astute defence counsel never saying they were satisfied! (Judge 4)

However, perhaps one of the most significant issues to emerge from observation and discussions was that the problems with the way children are cross-examined go far beyond the actual questions. The aim of the intermediary system is to have a process which is fair for children and fair for the accused. Although most agreed that training judges and lawyers would be useful, some argued that it would not suffice to achieve these aims. Furthermore, it is not a case of either training lawyers/judges *or* an intermediary system—the two are not mutually exclusive. The more difficult questions are, “What would constitute a best practice cross-examination of a child, one that is fair to the child and fair to the accused? Which elements of traditional advocacy are *essential* to the function of cross-examination, and which are not? Which elements of traditional cross-examination can (and should) be transferred to the closing address?” To look only at the language used is to risk superimposing developmentally appropriate language onto a model of advocacy that is fundamentally inappropriate for children—such as the *confirm, confirm, put* style of cross-examination.²⁵ And to address these questions would require bringing together the two core fields of expertise: criminal law and language.

Defence lawyer 1: I think [that] you’re going to have to put trained, linguistic people together with lawyers. And you’re going to have to do it for more than just a couple of hours in an evening. You’re actually going to have to invest some time, money and energy into it, so you can actually sit down and try and work it out. Facilitator: Something about what a good cross-examination is? Defence lawyer 1: Yeah, it’s both, because I think the intermediary or the specialists need to understand what it is that under our current system lawyers are trying to achieve and why we do what we do.

²⁵ See footnote 13 on page 21.

LIMITATIONS OF STUDY

This study was exploratory in nature. It was not conducted in order to develop a fully operational intermediary model; rather, it was intended to explore the potential of intermediaries to improve the questioning of children within an adversarial system and to outline some of the issues that would need to be considered in the development of such a model.

The report was informed by the views of an experienced, but small, convenience sample of legal practitioners and academics. We do not claim that their views are representative of their respective professional groups; indeed, a different picture might have emerged with a different group of judges and lawyers. Nevertheless, this report provides a starting point for further discussions and debate about the introduction of language specialists into the court process in the interest of eliciting best evidence from children and enhancing the fairness of the trial.

DISCUSSION

...child complainants. Much could and should be done to improve their lot. [2011] NZCA 303 (August 2011).

Ensuring that all accused persons have a fair trial is critical to the quality of justice delivered by the courts. This includes obtaining the most accurate and complete testimony from witnesses. The two most significant barriers to eliciting best evidence from children in New Zealand are poor questioning practices, particularly during cross-examination, and long delays in processing child witness cases through the courts (Hanna, Davies, Henderson, Crothers, & Rotherham, 2010; Ministry of Justice, 2010). Judicial and legal training on questioning children is one starting point to improve communication. Another is pre-recording children's testimony as soon as possible after full disclosure to reduce delays. This project has explored the involvement of an intermediary, in the context of a pre-recorded hearing, to further assist the courts to access better evidence from children. The project is timely:

The Government intends to announce proposals later in the year to reduce the unacceptable average of 15 months which child witnesses are waiting to have their cases processed through the courts, to improve the questioning of children, particularly during cross-examination, and ensure that the most reliable and accurate evidence is elicited. (Minister of Justice, press release, 13 July 2011)

Communication

There was broad consensus between project participants that children are often poorly cross-examined in New Zealand's criminal courts, with concerns raised about the use of confusing language to question children, the legitimacy of "skip-around tactics" designed to confuse and the use of language for effect rather than fact-finding. For some, it is the defence counsel's job to create confusion and doubt—a process of chasing a theory, rather than pursuing accurate information, as one participant stated. For the Court of Appeal in England and Wales, raising confusion and doubt, including undermining the credibility of the child for the jury, can be achieved after the child has given evidence and need not be brought out through the child:

Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well-rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of

comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence. (*R v Barker* [2010] EWCA Crim 4)

Trial preparation

Trials are won and lost in preparation ... I am reassured by counsel who are direct and succinct ... it is very much the result of how well counsel are prepared. (Justice Keane, 2011)

This project indicates that accessing better quality evidence from children is partly about good preparation on the part of counsel. Cross-examination prepared well in advance, with the lines of questioning and end game reasonably clear, is essential. While these attributes arguably apply to all trials, the additional attention to language, order of questions and topics renders more preparation necessary for trials with child witnesses. The involvement of an intermediary would add another dimension to preparation, potentially removing the responsibility for formulating appropriate questions from the lawyer.

It is encouraging that defence counsel and the intermediary in the final mock examination both experienced the process as workable. On exposure to expertise on communicating with children, the defence counsel's openness to delete "something called subordinate clauses" from cross-examination suggests such knowledge exchange can be fruitful before cross-examination.

Training lawyers

It's the question, not the questioner. (Defence lawyer 2)

...can't we be the first country in the world to have lawyers that ask really good questions?
(Defence lawyer 2)

Participants in this project believed in-service education for counsel and judges on questioning children is critical. Training practising lawyers and judges on how to ask short clear questions, avoiding complex sentences and difficult words, could help to improve responses from child witnesses. There will need to be more discussion about best practice in cross-examining children (that is, questioning which is fair to all parties) if such training is to be most effective. The idea of child communication specialists assisting law students to learn how to question children was also raised by defence counsel. This idea has merit too, although it may not be considered a high priority by law schools.

In England and Wales, judges are ticketed, trained and mandated to work with cases involving serious sexual assault, ensuring self-selection (an indication of interest in these cases) and a shared bottom line of information to inform proceedings. This possibility was raised by participants, along with the idea of ticketing counsel as well. These ideas are worthy of serious consideration, provided thought is given to mitigating potential risks such as increased delays in

scheduling of cases if there is a shortage of trained judges, prosecution and defence counsel in some areas. Furthermore, in New Zealand, it would be particularly hard to train the private defence bar, in part because most are sole practitioners who do not regularly do trials involving children.

Crown law firms and the Institute of Judicial Studies perhaps hold the best possibilities for education on questioning children in New Zealand by virtue of those organisations' ability to require that individuals undertake this training.²⁶ However, such education is likely inadequate on its own (Cashmore & Trimboli, 2005).

Benefits and risks of intermediaries

The whole point of the exercise is that there should never be a question which is unfair to a child witness. ... And so that's why it has to be recrafted. And it's not about the theatre and it's not about having an argument with the witness or confusing the witness. The whole idea is that we are trying to establish a system ... where the witness is *not* confused. That's the point. (Defence counsel 2)

Most participants perceived the idea of an intermediary as worthy of further careful exploration. While cautioning against precipitous action, the authors also see promise in the idea. Sections 80 and 81 of the Evidence Act 2006 could render it within jurisdiction.²⁷ However, some participants thought it warranted clearer legislation if it were to become common practice. The cautious Court of Appeal judgement on pre-recording ([2011] NZCA 303) perhaps also signifies the importance of clarity of Parliament's intent in legislation.

A well-functioning model of intermediaries might ultimately increase the number of guilty pleas and dropped charges, obviating the need for children to testify at all. Some participants also believed the involvement of an intermediary could enable some children to testify who otherwise could not, e.g., children with communication difficulties.

There is more than one viable model of operation. Intermediaries could conduct communications assessments of individual children and then monitor proceedings as in England and Wales; or they could assist counsel to prepare their questions in advance of trial and then monitor proceedings at trial; or they could question the child directly under the direction of counsel and the presiding

²⁶ The Public Defence Service (PDS), for the same reason, holds similar possibilities. However, we understand that there are concerns within the private bar that the PDS is not attracting sufficient numbers of experienced lawyers who may be best suited to being trained to question child witnesses.

²⁷ Sections 80-81 of the *Evidence Act 2006* (NZ) allow witnesses without "sufficient proficiency" in English to "understand court proceedings" or testify or who have "communication disability[ies]" a broad range of communication assistance including, "oral or written interpretation of a language, written assistance, technological assistance, and any other assistance that enables or facilitates communication" (s 4) terms which might encompass developmental language difficulties.

judge in something similar to the topic-by-topic model. Whichever model, a pre-trial assessment of the child's communicative competencies would be an ideal component.

However, some participants remained concerned that intermediaries in this last model might not be able to put challenges directly and effectively. "Effective for whom?" was the subject of some discussion in the research interviews. There is the potential for tension in the intermediary's obligation to the court to draw out the facts and their obligations to the defence counsel's instructions in particular. It might be useful to try to separate the function of cross-examination to test the evidence from traditional practices to underpin guidelines for good cross-examination of children in New Zealand.

A desire to improve cross-examination techniques with vulnerable witnesses is apparent in other jurisdictions. For example, a Circular to Practitioners issued by the District Court of Western Australia provides brief guidelines for the cross-examination of child and other vulnerable witnesses which note, for example, that "questions should be short and simple"; "Quick fire questions are to be avoided"; "Legalese is to be avoided"; "Counsel should not mix topics ... Events should be dealt with in a logical and/or chronological sequence" (see District Court of Western Australia (2010)). In addition, judges in England/Wales are fairly regularly accepting intermediaries' recommendations that no leading questions be used with particular vulnerable witnesses (Cooper, 2011).

The involvement of an intermediary might improve children's evidence by:

- **Better questions and better evidence:** Asking better questions to elicit accurate responses. The intermediary might inform counsel's questions and the court in pre-trial preparation, and then monitor questions at court. If the intermediary were to have responsibility for formulating the questions, the strategy and direction of the examinations would still remain with counsel. Through observing and working with intermediaries, there is potential for lawyers to improve their questioning skills.
- **Better question sequences:** Improving the sequencing of questions so that they have some flow for the child.
- **Better preparation:** Increasing the amount of preparation done by defence counsel and prosecution. Defence counsel organising their arguments into topics, and then creating short questions with the help of the intermediary, appeared to be useful disciplines; the same process could equally assist the prosecutor.
- **Clearer evidence:** Helping focus on core points of challenge, rather than risking the jury losing those points in other information. For some the evidence flows better if asked topic by topic.

- **Better monitoring of questions:** Two lawyers commented that, by listening to the actual questions being put by the intermediary, counsel has a useful lens to determine whether the questions are being put appropriately and, if not, ask them to be put again or differently.
- **Better perceptions of defence side:** Neutralising the “bad guy” perception of the defence lawyer (and, by association, the accused) as defence counsel would not, as some frame it, be “firing the shots”.
- **Breaks:** In the context of pre-recording, inconveniencing less people if the child or counsel needs a break and allowing the intermediary to monitor the child’s need for a break.
- **Better environments:** Working in concert with other modifications to court processes, such as having child witnesses testify from locations other than the courtroom. In this experiment, the acting child in the CCTV room experienced the intermediary in the same small room as intimidating. In England, intermediaries are always in the same room as the child and this has been found helpful to monitor questioning. This may prove possible in alternative locations, e.g., the multi-agency centres in the Auckland region.

There are also risks, although we contend none are to fundamental principles of the criminal justice system. Most are process-related:

- **Elongated cross-examination:** The process could increase the time that children are questioned and breaks between themes might not be well handled from the perspective of the child.
- **Interpersonal conflict:** There is a risk of strained relationships between intermediaries and lawyers so that the skills and knowledge of both are not used constructively. In this project, a good working relationship between the intermediary and defence counsel was part of getting the job done well.
- **Dissatisfaction of the accused:** There is scope for dissatisfaction from the accused if the intermediary asks the lawyer’s questions. Concern was expressed that dissatisfied accused will dismiss defence counsel after the child is cross-examined. Future counsel would insist on repeating cross-examination of the child, rather than being prepared to rely upon the previous counsel’s pre-recorded cross-examination. This has not caused parallel problems in pre-recording children’s entire testimony in Australia. Perhaps there would be similar acceptance of a new system in New Zealand if the courts’ reliance on one cross-examination was maintained as the norm.
- **Risks to defence counsel’s ability to fulfil client obligations / risks of appeal:** Some counsel will likely not want to work with intermediaries. Some will lament their loss of control of the fluidity and momentum of cross-examination. They will likely appeal convictions: Was the case properly put? Was the client properly represented? Were the client’s instructions followed? Did counsel brief the intermediary adequately? Did the

intermediary follow the instructions? Aligned with this was the need for an adequate paper-trail of the interactions between counsel and the intermediary so the Court of Appeal can make an assessment, should a verdict be appealed.

- **Poor implementation:** As with any innovation, there are risks involved with rushed and poorly resourced development and implementation.

The following section provides a starting point for considering the skill set which would be required of intermediaries. Participants' views differed as to whether intermediaries should be drawn from legal professions (hence they would need training on communicating with children) or from professions with existing expertise in children's language (hence they would need training would on legal issues). If the role were open to candidates from both fields, separate training streams would in all likelihood be necessary.

Training intermediaries

The primary reason for introducing intermediaries into the court system is to enhance children's ability to provide best evidence. Hence a core skill required of intermediaries will be a grasp of how children's communication works.

Comprehensibility is affected by a range of systems in language, from the sound system to the social rules of usage. Difficulties can arise in many places; for example in vocabulary (e.g., technical terms, metaphors), in grammar (e.g., the use of complex clauses), in speech acts (e.g., what exactly is meant to be conveyed by a rhetorical question, or phrases such as *I put it to you that...*), in rules of politeness and face (such as how to constructively disagree with an interlocutor) and in inferencing (such as making the connections between cause and effect). There is also a difference between grasping what is said in one utterance, and following an entire oral text or sequence, in which skills are needed to follow the cohesion and coherence of what is said.

All of these skills are taken for granted by adults competent in a language. However they take time to be learned, and children of 3, 5, 7, 9 and 11 years—to indicate the range—will be different in what aspects of these skills they have mastered. Even adolescents, who may appear adult-like in their language, have not yet fully mastered the social rules of language, and may have many difficulties comprehending complex oral texts. Therefore an intermediary would also need to have a strong knowledge background of these developmental differences.

Additionally, other factors may affect comprehensibility; for example, culture affects communication patterns, children may have a condition which affects their communication (such as a physical or learning disability), or they may have a language learning disability. An intermediary would need to be competent to judge how these might affect comprehension, and be able to adapt accordingly.

Intermediaries will also need an understanding of the court process, including the functions of cross-examination and the relevant laws of evidence. The degree of expertise required in this area will depend in part on the intermediary model adopted.

At present the profession that is likely to be best trained in children's language comprehension/production already is that of speech language therapists. Early childhood, primary school and special education teachers, and child psychologists may also have some background, although it is generally not as detailed in the development and disorders of oral language. Speech language therapists form the majority of those employed in the intermediary role in England/Wales. They appear to have proved that their skills work well and are valued within the court system.²⁸

Intermediaries could use these skills to formulate questions for a live trial or a pre-recorded hearing. One advantage of pre-recording is that it offers more flexibility to develop intermediary practice because any prejudicial and inadmissible evidence can be edited before the jury hears it (New Zealand Law Commission, 1996, para 150). Moreover, pre-recording holds promise to reduce the time between the evidence being taken and cross-examination, so the alleged incidents are likely fresher in the child's mind. This in itself will render communication about the facts easier. Therefore, the following section outlines the status of pre-recording in New Zealand, Australia, England and Wales, and the advantages and risks of pre-recording hearings as a mechanism within which to improve the court's communication with children.

Pre-recorded hearings

Pre-recorded hearings could reduce the delays to children giving evidence where other initiatives have not succeeded. Despite successive practice notes from Chief Judges to fast-track cases involving child complainants since 1992, the time taken to process child witness cases in New Zealand's criminal courts of Auckland, Manukau, Christchurch and Wellington in 2008/2009 averaged 15 months.²⁹ Twelve years earlier, the Courts Consultative Committee's Working Party on Child Witnesses considered eight-month delays unacceptable. They stated, "...reform in this aspect of the court process would have the greatest overall beneficial impact on children and their supporters" (Working Party on Child Witnesses, 1996, p. 7).

The mock examinations in this report were conducted consistent with the Ministry of Justice's recent memorandum outlining operational processes for pre-recording evidence. Pre-recorded hearings are permissible under Sections 103 and 105 of New Zealand's Evidence Act 2006 and under Section 28 of the England and Wales Youth Justice Act 1999. In England, discussion about implementation has resurfaced with the Conference on Children's Evidence in April 2011 and a

²⁸ See, for example, the England/Wales Court of Appeal reference to "...the now well understood and valuable use of intermediaries" with vulnerable witnesses in *R v Barker* [2010] EWCA Crim 4, at para 42.

²⁹ That is, from the time charges are laid to the time of trial (Hanna, et al., 2010).

follow-up seminar on initial implementation of pre-recorded hearings planned for September 2011.³⁰

At the time of conducting the mock examinations, pre-recording practice was operational in Auckland. There were 13 pre-recorded hearings in the Auckland District Court between December 2010 and June 2011. By August 2011, the use of pre-recording had been restricted to “rare circumstances” by the Court of Appeal ([2011] NZCA 303). Nonetheless, as of September 2011, all but one of the pre-recordings already completed were scheduled to be played at trial.

Consideration of Western Australian experiences with pre-recorded hearings over the last 20 years could have alleviated many of the fears expressed by the New Zealand Court of Appeal. Table 5 outlines nine advantages of pre-recording children’s entire evidence.

Table 5: Advantages of pre-recording children's entire evidence

<p>Reduced delays: Cross-examination is nearer to the timing of the evidential interview.</p> <p>Better quality evidence from children before the courts: Children’s memories, particularly for peripheral detail, erode more quickly than those of adults. Prerecording has the obvious advantage that the evidence is taken when the alleged incident is fresher in the child's mind (New Zealand Law Commission, 1996, para 145).</p> <p>Better pre-trial decision-making: Western Australian lawyers say that because the strength of the child’s evidence is known before trial more cases are disposed of before trial by plea or withdrawal of charges and the prosecution can also amend the charges, avoiding argument at trial. The cases already done in Auckland suggest that this will occur in New Zealand too. Earlier trial preparation can benefit the accused too with the child’s evidence over and done with before trial. Experiences in Western Australia suggest that the pre-trial procedure can improve trial preparation as counsel know exactly what evidence has been given by the main prosecution witness.</p> <p>Timely disclosure: A pre-recording order can assist to ensure disclosure is addressed. In Western Australia, the making of a pre-recording order forces the State to comply with disclosure orders promptly.</p> <p>Promoting recovery of the complainant: Fair trial issues are not solely for the accused. The experiences in Western Australia show that once the child gives their pre-recorded evidence, they are rarely recalled to testify further at trial. Their involvement in proceedings is almost invariably over.</p> <p>Efficiency: If there is a retrial, the child’s pre-recorded evidence can be played to the new jury, potentially reducing legal costs and preventing the child from testifying again.</p> <p>Better scheduling of children’s evidence: Pre-recording reduces the chances that children wait hours before testifying at the court.</p> <p>Breaks: Practitioners say that without a jury to accommodate, judges are more flexible in allowing children breaks.</p> <p>Editing: Pre-recording allows prejudicial and inadmissible evidence to be edited before the jury hears it, preventing possible mistrials (New Zealand Law Commission, 1996, para 150). This allows more flexibility for questions to be asked by intermediaries.</p>

The New Zealand Law Society’s (2011) submission to the Ministry of Justice suggests that the defence bar’s opposition to pre-recording has reduced in the intervening 12 years since the 1999 Law Commission report, cited as evidence by the Court of Appeal, rejected pre-recording of

³⁰ C Smith, Senior Policy Advisor, personal communication, July 2011.

children's cross-examination.³¹ The success of the Western Australian system is indicated by its adoption in Queensland in 2003 and Northern Territory in 2004.

At two recent conferences in Auckland and Cambridge, Western Australian judges have talked about their pre-recording system working well (Jackson, 2011; Sleight, 2010). They told the audiences that applications to re-open for further cross-examination are virtually never made. Children were very rarely recalled to give new evidence at trial.³² Similarly, our inquiries in Western Australian indicated that children were rarely recalled and lawyers were comfortable with the proceedings (Henderson, 2010a).

The key risks are costs and disclosure. The Court of Appeal was concerned about the cost of pre-recording, asserting that court resources will necessarily be increased and that counsel on both sides will "end up having to prepare twice. Overall legal fees will be higher."³³ However, it is also possible that better pre-trial decision-making and early cross-examination mean that some cases may be disposed of before trial by guilty plea or withdrawal of charges. The additional couple of hours upfront might help to reduce costs later. It is also likely that jury costs will be reduced since they will only be required to listen to the edited tapes, and there may be a reduction in aborted trials since prejudicial evidence will have been edited out. An evaluation could determine the facts; a formative evaluation of the pre-recordings that have already been conducted in Auckland would also be useful.

The other key issue is timely full disclosure. Legal scholars have gone to some lengths to investigate the principles involved in such a move. Full disclosure is essentially a practical set of problems to be solved, not principled objections (Henderson, 2010b; Spencer, 2010). The Criminal Disclosure Act 2008 enforces a disclosure regime along with a procedure for third party disclosure, such as from Child Youth and Family Services (CYFS). Furthermore, quicker disclosure from CYFS should be the outcome of current discussions between that organisation, Police and the Crown Solicitor in Auckland. A Memorandum of Understanding between CYFS, Police and the Crown Solicitor in Auckland is likely to be signed in the near future.³⁴

In our opinion, a legislative presumption in favour of pre-recording is now necessary to enable it to become common for child witnesses. Evaluation of pre-recording would give the Court of Appeal more data to inform future decisions. Pre-recording would allow for greater experimentation with intermediaries as a way to further improve the courts' communication with children.

³¹ See [2011] NZCA 303, at para 15. The Court's merging of the role of Parliament and the Law Commission is curious: "Given the uncertainty of exactly what the Law Commission intended, we cannot assume that Parliament intended to render pre-trial cross-examination impossible" (para 19).

³² Judge Hal Jackson stated that, to his knowledge, only two children had been recalled to give new evidence.

³³ See [2011] NZCA 303, para 36.

³⁴ P Hamlin, Crown prosecutor, personal communication, 28 September 2011.

NEXT STEPS: DEVELOPING A MODEL

Some participants' thinking in this project shifted from optimism to realism; pessimism to openness to the idea of intermediaries. There seems to be some consensus that we can do better to improve the courts' communication with children than now, but less agreement about how. From the authors' perspectives, improving the quality of evidence from children is partly about a shift in attitude and thinking that separates the function and practice of cross-examination. Guidelines of what constitutes best practice when cross-examining children (including appropriate question structures) could assist the courts' communication with children, irrelevant of intermediaries.

Careful development of an intermediary model over an extended period of time could create a model of excellence, particularly if it involves the active engagement of key practitioners—most notably judges, defence and prosecution counsel. The authors see the independence of intermediaries and their primary obligations to the court as critical to successful implementation of any model. Participants also identified the need for clear rules of engagement and clear parameters of the intermediary's role. This will need to be balanced with sufficient flexibility so that the process is able to elicit best evidence from children. We should learn from implementation of intermediaries in England/Wales, the costs involved to develop good practice and the value of written individual communication assessments of some children prior to cross-examination.³⁵

Creating and implementing a best practice intermediary service in New Zealand will require thought and resources to develop and implement well. So what would be constructive next steps in New Zealand over the next couple of years? In the authors' opinion there are three paths to improve children's evidence in the courts:

1. Create a legislative presumption in favour of pre-recording children's entire testimony and evaluate implementation of pre-recorded hearings.
2. Develop training programmes for the judiciary and counsel on communicating with children, particularly during cross-examination (Institute of Judicial Studies, New Zealand Law Society and Law Schools).
3. Establish a multidisciplinary Child Witnesses Working Group with terms of reference over an extended period to:

³⁵ For example, as part of the research on intermediaries in England/Wales, Richard Woolfson calculated case and non-case specific costs in the first sample of intermediaries in England. He calculated recruitment and initial training at approximately £3000 (\$6,000) per intermediary and estimated governance costs including fees and expenses to be approximately £10,000 (\$20,000) per annum. There are also establishment costs, the costs of a secretariat, practitioner guidance manuals, peer support, in-service training, management of the service and case-specific professional fees. This data was based on 78 candidates for training and 42 claim forms from intermediaries.

- Communicate research findings on children’s language and the problem of poor communication with children in the criminal courts to inform legal discussions about ways the courts can improve the quality of evidence from children.
- Draft guidelines to depict best practice in cross-examining children, drawing from expertise in children’s communication as well as the law.
- Explore the possibilities of mandatory training for judges and counsel on best practice with children.
- Develop an intermediary model for New Zealand including:
 - Framing the roles and responsibilities of the intermediary and counsel;
 - Developing a code of conduct for intermediaries;
 - Specifying the core components of a training package for intermediaries;
 - Outlining pre-trial processes of engagement between the intermediary and other parties;
 - Establishing protocols for courtroom practice; and
 - Determining criteria for children’s access to an intermediary.
- Contribute advice on legislation.
- Monitor and evaluate the first six cases which use an intermediary in a similar process to Whitney and Cook’s (1990) evaluation of the first six cases using closed-circuit television in New Zealand.

POSTSCRIPT: THE ACCUSED’S CHAIR

During the mock examinations, one participant watched the proceedings from the seat reserved for the accused. After a while, the participant became painfully aware—literally—that:

...for some reason, every seat in that courtroom is a nice and comfortable well-padded seat, apart from the accused’s. And it’s totally unpadded. And I was just wondering why there’s this distinction, somehow.

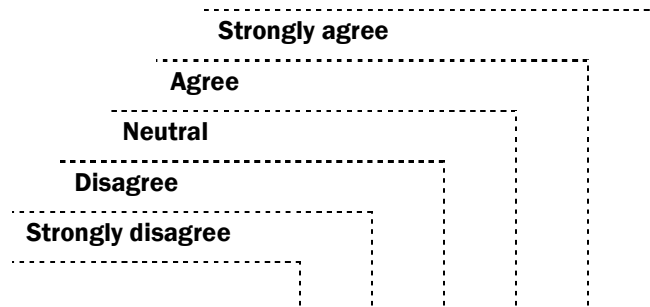
The participant’s quick survey of other courtrooms in the building showed that this was not an isolated case of inattention to the accused’s comfort.

While the accused does not normally use this seat for the whole duration of the trial, the researchers respectfully suggest that the seats reserved for the accused in every courtroom should be as well-padded and comfortable as those used by the jury.

APPENDIX I

Questionnaire

Please rate the following eight statements from 1 (strongly disagree) to 5 (strongly agree).



- | | | | | | |
|--|---|---|---|---|---|
| 1. New Zealand has a problem with the ways that children are questioned in court. | 1 | 2 | 3 | 4 | 5 |
| 2. New Zealand has a problem with the ways that children are cross-examined. | 1 | 2 | 3 | 4 | 5 |
| 3. In principle, the use of intermediaries does not unduly interfere with legitimate trial approach of counsel. | 1 | 2 | 3 | 4 | 5 |
| 4. A child could be fairly and robustly challenged through a highly trained skilled intermediary within carefully thought-out pre-trial and court processes. | 1 | 2 | 3 | 4 | 5 |
| 5. An intermediary might improve the quality of children's evidence. | 1 | 2 | 3 | 4 | 5 |
| 6. The idea of introducing court-appointed intermediaries into New Zealand's criminal justice system is worthy of further exploration. | 1 | 2 | 3 | 4 | 5 |
| 7. The success or failure of this idea will depend on the skill of the intermediary. | 1 | 2 | 3 | 4 | 5 |

Interview questions

1. What were the key points you took from Saturday?
2. Did you learn anything on the day? If so what?
3. What would be the hardest part of an intermediary service to implement?
4. (If participant indicates that the intermediary system is not worthy of further exploration)
 - a. How do you see the insurmountable issues?

- b. *[If also thinks there is a language problem (q1)]:* how can the courts improve communication with children?
- c. *[If thinks there is not a language problem (q1)]:* what do you say in response to research suggesting that there are problems?

[NB: All participant felt the intermediary system was worth exploring further hence questions 4(a-c) were not asked.]

- 5. (If participant indicates that the intermediary system is worthy of further exploration)
 - a. (If believes that **there are** problems with the way children are questioned). What do you perceive the problems to be?
 - b. (If believes **there are no** problems with the way children are questioned). What do you say in response to research suggesting there are problems?
- 6. At the end of Saturday, the group discussion started to explore the notion **of chunking** evidence into themes with a break for consultation with counsel between each theme. Do you remember this part of the discussion? *[Explain if necessary]*. Any thoughts on what would need to be done to make this process fair and robust?
- 7. Assuming well trained, skilled intermediaries
 - a. What could the benefits be? *[Prompt – justice system, child, defence / defendant, prosecution, judge.]*
 - b. What are the risks?
 - c. How could these risks be mitigated?
- 8. Any questions or further comments?
- 9. We intend to run one additional simulation exercise learning from Saturday's proceedings. We anticipate it will take approximately 2 hours in June. Would you like to participate?
- 10. Number of years' experience as a prosecutor [], judge [], defence lawyer [].
- 11. Number of child witnesses cases undertaken as a prosecutor [], judge [], defence lawyer [].

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