TASMANIA
LAW REFORM
INSTITUTE

An Evaluation of the Pre-recorded Evidence Scheme in Tasmania

RESEARCH PAPER NO 7

SEPTEMBER 2024

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Cite as: Tasmania Law Reform Institute, *An Evaluation of the Pre-recorded Evidence Scheme in Tasmania* (Research Paper No. 7, September 2024)

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About the Tasmania Law Reform Institute

The Tasmania Law Reform Institute (**TLRI**) is Tasmania's peak independent law reform body. The TLRI was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the TLRI was part of a Partnership Agreement between the University and the State Government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The work of the Institute is to conduct impartial and independent reviews or research on areas of law and legal policy in order to provide independent and impartial advice and recommendations on the area investigated, with a view to, or for the purposes of:

i. the modernisation of the law; and/or

ii. the elimination of defects in the law; and/or

iii. the simplification of the law; and/or

iv. the consolidation of any laws; and/or

v. the repeal of laws that are obsolete or unnecessary; and/or

vi. adopting new or more effective methods for administering the law and dispensing justice; and/or

vii. providing improved access to justice; and/or

viii. uniformity between laws of other states, territories and the Commonwealth; and/or

ix. the codification of laws; and/or

x. promoting equality before the law

The TLRI's Director is Professor Jeremy Prichard of the University of Tasmania (appointed by the Vice-Chancellor of the University of Tasmania). The members of the Board of the Institute are: Craig Mackie (Chair, appointed by the Tasmanian Bar Association), Professor Gino Dal Pont (Interim Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Kristy Bourne (appointed by the Attorney-General), Rohan Foon (appointed by the Law Society), Ann Hughes (appointed at the invitation of the Board), Kim Baumeler (appointed at the invitation of the Board), Dr Yvette Maker (Appointed by Council of University) and Rosie Smith (appointed at the invitation of the Board as a member of the Tasmanian Aboriginal community).

The Board oversees the TLRI's research, considering each reference before it is accepted, making recommendations and approving publications before their release.

Acknowledgements

This study was funded by a grant from the Solicitors' Guarantee Fund. This Research Paper was prepared for the Board by Ms Jemma Holt and Dr Rebecca Bradfield.

This project enjoyed the support and guidance of the TLRI Director, Professor Jeremy Prichard, and was assisted throughout by the TLRI Executive Officer (Administration), Kira White.

Adjunct Associate Professor Terese Henning kindly provided comment on a draft of this Research Paper. It was edited and prepared for publication by Dr John Emerson. Dr Nina Hudson also assisted with the finalisation of this Paper for publication.

This research could not have been undertaken without necessary legislative amendments being enacted. The TLRI is grateful for the assistance of the Department of Justice and, in particular, the guidance and support of TLRI Board member and Deputy Secretary of the Office of the Secretary, Kristy Bourne, as part of that process. The TLRI further acknowledges the role of the Attorney-General in providing the TLRI with the requisite approval to access and view pre-recorded evidentiary material as part of this project.

The TLRI thanks Assistant Deputy Registrar Kate Brown and Supreme Court Registrar Penelope Ikedefe, as well as other Supreme Court staff, for the sharing of court data regarding special hearings as well as facilitating the on-site access to pre-recorded evidence and related court records. The TLRI also thanks the Office of the Director of Public Prosecutions and the Child Abuse Royal Commission Response Unit who also shared data with the TLRI in connection to this project.

The TLRI expresses appreciation to all interview participants for generously contributing their time, knowledge and expertise to this study.

This study is part of ongoing collaboration with the South Australian Law Reform Institute in the area of witness special measures.

An electronic copy of the Research Paper is available at the TLRI website.

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Ethical Conduct of Research

This research has been approved by the University of Tasmania's Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this project, please contact the Executive Officer of the Human Research Ethics Committee (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H0016021.

Executive Summary

The criminal trial process can be so stressful for some witnesses that it impedes their ability to give evidence properly, or at all. The strains can be particularly acute for, among others, child witnesses, those who have experienced sexual violence, witnesses with a disability, and witnesses in cases involving serious violence offences and family violence matters. A range of strategies have been implemented worldwide to appropriately assist witnesses in such circumstances, such as: witness intermediaries, who assist witnesses to communicate; screens in the courtroom to obscure the witness' view of the accused; the use of an audio-visual link to allow a witness to give their evidence remotely outside of the courtroom; and procedures for witnesses to have some or all of their evidence video-recorded prior to trial, so that the video can be played to the court later on.

Tasmania's system for pre-recording evidence has two components. They may be used by themselves as standalone measures, or in combination:

(1) the investigative interview — an interview conducted by police or other investigating authority with the witness. The recording is admitted into evidence as the witness' substantive evidence-in-chief (that is evidence from a prosecution witness when asked questions by the prosecution).

(2) the pre-trial special hearing — this is where the court lists a pre-trial hearing for the purpose of hearing and recording the rest of the witness' evidence, that is, any further evidence-in chief, evidence given in response to questions by defence counsel (cross-examination) and evidence given in response to any further questions asked by the prosecution (re-examination). This second component is called the Special Hearing Scheme, and it is the particular focus of this paper.

Background of Research Paper and Scope of Review

This study has its origins in the Tasmania Law Reform Institute's (TLRI) previous work in the area of witness special measures. In 2016–2018 the TLRI conducted an examination of the feasibility of instituting an intermediary scheme in Tasmania. While witness intermediaries and pre-recorded evidence are separate and distinct measures, they are interrelated insofar as the use of witness intermediaries often coincides with the use of pre-recorded evidence and pre-trial special hearings. Pre-recorded evidence and, specifically, the special hearing scheme presented as a necessary subsequent inquiry for the TLRI.

This Research Paper is the first study into the operation of the Tasmanian pre-recorded evidence scheme and presents the findings of a mixed method study addressing:

(1) the operation of the pre-trial special hearing scheme in practice

(2) an evaluation of whether the scheme is achieving its legislative intent

(3) the advantages and disadvantages of a pre-trial special hearing scheme, and

(4) any improvements or reforms that may be necessary.

Data for this study was obtained from quantitative and qualitative sources, as well as providing a summary of relevant literature and reforms in other jurisdictions.

A significant issue that arose in the preliminary stages of this study was the absence of organised and accessible records or data in relation to the use of pre-recorded evidence in Tasmania, particularly pre-trial special hearings. However, drawing on available quantitative data, interviews with experts and relevant international literature, this study provides a key foundational insight into special hearings and pre-recorded evidence in Tasmania. The study's findings provide important indications as to how special hearings and pre-recorded evidence, more generally, are operating in practice and identifies areas for improvement. Significantly, this study aims to bring special hearings and pre-recorded evidence *into focus* in Tasmania for the first time.

Key findings of the Research Paper

(1) The pre-recorded evidence scheme may be underutilised in Tasmania

Whereas analyses in the United Kingdom indicate that special hearings are overutilised, available Tasmanian data show that there has been a relatively low level of use of special hearings and only a modest increase in use since its introduction in 2016. In fact there are indications that special hearings may be underused in the Magistrates Court. This is despite the fact that the majority of matters eligible for the use of special hearings are within the jurisdiction of the Magistrates Court (namely, many family violence matters, and care and protection matters as well as sexual offences). The TLRI recommends that a more in-depth assessment is undertaken regarding access to and provision of special measures in the Magistrates Court jurisdiction (see Recommendation 1).

The pre-recorded evidence scheme may also be underutilised in the Supreme Court. As noted, while special hearings are now available to a wider cohort of witnesses, including a greater number of adult witnesses, the use of special hearings in Tasmania remain predominantly for child witnesses in sexual offence matters. In the period between 2019–2020 to 2021–2022, the number of special hearings held in the year had increased from 9 to 17, with a majority of the hearings involving child complainants in sexual offence matters. For instance, in the 2022 TLRI study, of the 22 special hearings that had taken place across 12 cases in 2022, it was found that:

- 17 involved child witnesses (77.3%);
- 4 involved adult witnesses (18.2%); and
- 21 involved sex offences (95.5%) (11 of the 12 cases).

Accordingly, it may be that pre-recording and special hearings are not being used in cases of adult witnesses (for example, in relation to family violence and sexual assault) where it may be appropriate. Monitoring of the use of the pre-recorded evidence scheme in the Supreme Court is set out in the discussion of Recommendations 16 and 17.

(2) There are issues with the eligibility criteria in the* Evidence (Children and Special Witnesses) Act 2001 *(Tas)

While the findings of this study did not indicate any concern about the eligibility criteria for the use of special hearings being expanded, there were other concerns expressed regarding eligibility for the scheme. These concerns echoed those recently raised by the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings ('the Commission of Inquiry'), namely that the special measure provisions in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) are 'unnecessarily complex, poorly drafted and extremely difficult to understand.' The TLRI agrees with the Commission of Inquiry's recommendation that the eligibility criteria for special hearings and other special measures under the Act 'be simplified and rationalised as much as possible'. Issues were also raised in relation to problems caused by the removal of aggravated sexual assault (contained in the repealed *Criminal Code* (Tas) s 127A) from some of the definitions in the Act. Accordingly, even if existing eligibility criteria provisions are to remain, the TLRI recommends amendments

are made to ensure consistency across relevant definitions, that the definitions include repealed offences where the offences may still be used and to remove duplicitous references (see Recommendation 2).

The issue of appropriate terminology is related to the eligibility criteria for special hearings and other special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas). Recent research and literature have identified the issue of language such as 'vulnerable' witnesses, 'special' and 'intimated' as being problematic. It is the view of the TLRI that terminology such as 'special witness', 'special measures' and 'special hearings' used in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be changed to more neutral language, similar to the models that exist in Victoria and New Zealand (for example, 'alternative ways of giving evidence' or 'alternative arrangements for giving evidence') (Recommendation 3).

(3) There are many benefits of the Tasmanian pre-recorded evidence scheme

The dominant overall view of special hearings and pre-recorded evidence in Tasmania provided in the interviews was positive. Further, in contrast to the marked shift in attitudes towards pre-recorded evidence, such as that evident in the UK at present, the dominant overall view of special hearings and pre-recorded evidence in Tasmania remains positive. As with other reviews of pre-recorded evidence schemes, many participants expressed their support for full pre-recording as being *a step in the right direction*. The potential advantages or benefits of special hearings and pre-recorded evidence, more generally, was a topic mentioned by all interview participants. Participants reported benefits which fell into either one or both of two interrelated categories of the welfare of the witness and/or the integrity of the evidence. The predominant themes in this respect were, in the words of interview participants, as follows:

- earlier, certain hearings; can move on;
- more powerful, rich evidence;
- quicker, less stressful;
- focus on witness; everyone working together.

(4) There were procedural or process issues with the operation of the Tasmanian pre-recorded evidence scheme

Reflecting the views expressed in other reviews, the majority of participants qualified their support for the scheme by the fact that there was room for improvement**.** A defining pattern to emerge from participant interviews was an apparent avoidance on the part of participants to refer to 'disadvantages' of the special hearing scheme. Rather than 'disadvantages', participants spoke of 'procedural' or 'process' issues which either prevented or limited the advantages of the scheme being realised in practice — issues with implementation as opposed to *disadvantages*. In this regard, the predominant issues identified in this study were:

- the listing and relisting of special hearings;
- witnesses being recalled at second or subsequent special hearings or at trial;
- issues with disclosure contributing to delay;
- witnesses having multiple pre-recorded investigative interviews;
- the need for best practice guidance about contact by the witness with the prosecution pre-trial;

- issues associated with witnesses being required to watch the investigative interview at the special hearing;
- problems with technology; and
- inconsistency in the judicial approach to procedural matters at special hearings.

The TLRI makes recommendations to address concerns and issues raised (see Recommendations 4 to 15).

(5) There is a need for data collection and monitoring of the pre-recorded evidence scheme in Tasmania

A key issue that arose in this inquiry was access to data about the use of special hearings and the use of pre-recorded evidence in Tasmania. It was apparent that agencies did not hold specific records or collect data in relation to the use of pre-recorded evidence in Tasmania, particularly pre-trial special hearings. It follows that central recommendations of the TLRI from this study are the introduction of comprehensive and organised record keeping and data collection practices with respect to special hearings and pre-recorded evidence, more generally, in Tasmania (Recommendation 16) and the introduction of a structured review framework to evaluate the special hearing scheme on an ongoing basis (Recommendation 17).

Recommendations

Recommendation 1

The TLRI recommends improved systems and supports for witnesses giving evidence in the Magistrates Court, including access to and provision of special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for eligible witnesses. This includes, but is not limited to, the use of pre-recorded evidence.

The TLRI further recommends that a more in-depth assessment should be conducted which considers the access to and provision of special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for eligible witnesses in the Magistrates Court jurisdiction.

Recommendation 2

The TLRI recommends that the eligibility criteria for special hearings and other special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should 'be simplified and rationalised as much as possible' in line with the Commission of Inquiry's Recommendation 16.11(1).

If existing eligibility criteria provisions are to remain, the TLRI recommends amendments should be made to ensure consistency across relevant definitions, that the definitions include repealed offences where the offences may still be used and to remove duplicitous references.

Recommendation 3

The TLRI recommends that terminology such as 'special witness', 'special measures' and 'special hearing' in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) be replaced with more neutral language, similar to the models that exist in Victoria and New Zealand.

Recommendation 4

The current initiative whereby control of listing in criminal cases is shifted from the ODPP to the court should continue.

Recommendation 5

(a) The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to introduce clarity and guidance to the circumstances in which a witness may be recalled to give further evidence following a special hearing.

(b) In line with other jurisdictions, particularly NSW and Victoria, a witness ought only be recalled to give further evidence following a special hearing if:

> (i) a party has become aware of a matter of which the party could not reasonably have been aware at the time of the special hearing; or
>
> (ii) it is otherwise in the interests of justice.

Recommendation 6

The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to specify that any application to recall a witness following a special hearing should consider the principles of the Act and stipulate that any further evidence must, to the extent practicable, be given at a further special hearing, unless the court otherwise directs.

Recommendation 7

The recommendation of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to the professional development of Tasmania Police, specifically, to ensure that all police are trained in approaches to interviewing child and adult victim-survivors and vulnerable witnesses in the context of pre-recorded investigative interviews (Recommendation 16.3) is endorsed.

Recommendation 8
The implementation of Recommendation 16.3 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

Recommendation 9
The ODPP and Police Prosecutions should develop best practice guidelines and/or policy relating to the preparation and briefing of witnesses who have provided a pre-recorded investigative interview which the prosecution intends to rely upon in an upcoming special hearing or trial. Further, any such guidelines and/or policy should be trauma informed.

Recommendation 10
The recommendation of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to specialist training on trauma informed practices for both the ODPP and Tasmania Police (Recommendations 16.8 and 16.3) are endorsed.

Recommendation 11
The implementation of Recommendations 16.8 and 16.3 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

Recommendation 12
The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to provide that a witness who gives evidence at a special hearing must not, unless the witness otherwise chooses, be present in the court, or be visible or audible to the court by audiovisual link, while the court is viewing or hearing a pre-recorded interview or any other pre-recorded evidence.

Recommendation 13
The recommendations of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to the technology utilised for pre-recorded investigative interviews (Recommendation 16.5) and special hearings (Recommendation 16.12) in Tasmania are endorsed.

Recommendation 14
The implementation of Recommendations 16.5 and 16.12 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

Recommendation 15
The special hearing scheme framework under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be supplemented by practice directions or guidelines, developed by the Courts and Government as appropriate for their respective processes, in order to achieve greater consistency in key procedural aspects of the scheme.

Recommendation 16
Comprehensive and organised recordkeeping and data collection practices with respect to special hearings and pre-recorded evidence, more generally, should be introduced in Tasmania.

Recommendation 17
A structured review framework should be introduced to evaluate the special hearing scheme on an ongoing basis.

Part 1

Introduction

1.1 Pre-recorded evidence

1.1.1 Special hearings are a component of **pre-recorded evidence**. In the ordinary course of a criminal trial, a witness gives evidence *at trial* and, subject to certain exceptions, pre-recorded evidence and other out of court statements are not admissible at trial. Pre-recorded evidence schemes now exist in all Australian jurisdictions as well as in many other countries including the UK, Canada, New Zealand and the US. These schemes permit the admission of pre-recorded evidence at trial and for a special hearing to be held.

1.1.2 Pre-recorded evidence is a way in which certain categories of witnesses can give some or all of their evidence *before* trial. Their evidence is audio-visually recorded separate from the trial itself and the recording(s) are played at trial as the witness' evidence. This is different from the usual way in which a witness would give evidence in a criminal trial. At a trial, the usual process is that a witness attends court and gives evidence in front of the jury and judge or judge only (in a judge alone trial). At a trial, the prosecution and the defence (including the accused) are present in the court room as well.

1.1.3 Pre-recorded evidence schemes arose out of concerns about the operation of the usual adversarial criminal justice system trial process for witnesses who had experienced sexual assault, particularly child witnesses, and other 'vulnerable' witnesses. As discussed in more detail in Part 4 of this Research Paper, concerns related to the trauma of the trial process for victims in sexual assault cases, lower rates of guilty pleas and conviction rates at trial for sexual assault matters were identified as areas that required reform to address witness welfare issues as well as the quality or integrity of the evidence that was available at trial. The pre-recording process also offers greater opportunity for judges to control cross-examination because intervention could be edited out.[1] Pre-recorded evidence schemes are one of several reforms that have been introduced to address these concerns.

1.1.4 Pre-recorded evidence schemes were originally available primarily for child complainants in sexual offence cases, expanding over time to be more widely available to a broader range of vulnerable witnesses.[2] Accordingly, under pre-recorded evidence schemes, the witnesses who are able to give pre-recorded evidence are predominantly witnesses for the prosecution. The usual process for a prosecution witness is to be asked questions by the prosecution (**evidence-in-chief)**, then asked questions by the defence (**cross-examination)** and then asked any further questions by the prosecution (**re-examination)**.

[1] See, for example, Terese Henning (2013) 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – "plus ça change" or prospects new?' 37(3) *Criminal Law Journal* 155.

[2] For further details regarding eligibility for the pre-recorded evidence scheme in Tasmania, see **Part 2** of this Research Paper. For further details regarding the pre-recorded schemes in other jurisdictions, including respective eligibility criteria, see **Part 3** of this Research Paper. It is noted that the appropriateness of the term 'vulnerable' witness has since been the subject of consideration in other reviews, see [5.5.3] and [6.4.9]–[6.4.11], and is also the subject of consideration and recommendation in this Research Paper (see Recommendation 3).

1.1.5 Generally speaking, there are two main components of most modern pre-recorded evidence schemes:

(1) an out of court statement made by a witness that is audio-visually recorded. Commonly this is in the form of an **investigative interview**, an interview conducted by police or other investigating authority[3] with the witness. The recording is admitted into evidence as the witness' substantive evidence-in-chief, but the prosecution can lead additional evidence-in-chief from the witness as need be (usually, requiring the permission of the court);

(2) a **pre-trial special hearing** where the court lists a pre-trial hearing for the purpose of hearing and recording the rest of the witness' evidence. That is, any further evidence-in-chief, the entirety of the witnesses' cross-examination and any re-examination.

1.1.6 These two components: (1) the **investigative interview** and (2) the **pre-trial special hearing**, are present in *most* contemporary pre-recorded evidence schemes. Together, they are often referred to as **'full pre-recording'**. Initially most jurisdictions used investigative interview pre-recordings only and then subsequently introduced pre-trial special hearings as well.

1.1.7 The concept of modern pre-recorded evidence schemes can be traced from the UK and the now well-known 'Pigot Report'.[4] In 1989 a UK Home Office advisory group, chaired by his Honour Judge Thomas Pigot QC, was established to consider the use of video recordings as a means of taking the evidence of children and other witnesses. The Pigot Report and the recommendations it contained are widely accepted as the basis for 'full pre-recording' schemes being introduced in the UK and subsequently in the majority of other common law jurisdictions.[5]

1.1.8 In addition to the use of pre-recorded evidence, there are a number of other measures that are available to assist children and other witnesses to give evidence. These measures were introduced, along with pre-recorded evidence, to address the concerns related to the welfare of particular witnesses and the quality or integrity of their evidence. They include:[6]

(a) a support person to be present with the witness when they are giving evidence;

(b) the use of a screen or partition in the courtroom to obscure the witness' view of the accused;

(c) the use of an audio-visual link to allow a witness to give their evidence remotely from a witness suite outside of the courtroom and for it to be relayed live to the courtroom; and

(d) the use of a witness intermediary.

These measures are designed to be used in combination with each other and/or separately to accommodate for individual witness needs. In this way, there is no single iteration of the use of pre-recorded evidence in practice, and the scheme and its two main components may be used in various different combinations.

1.1.9 For example, as depicted in Figure 1, opposite, the two components of pre-recorded evidence schemes — **pre-recorded investigative interviews** and **pre-trial special hearings** — may each be used as standalone measures or in combination:

(a) **a pre-recorded investigative interview may be used by itself without a pre-trial special hearing**, so that the pre-recorded investigative interview is admitted at trial as the witness'

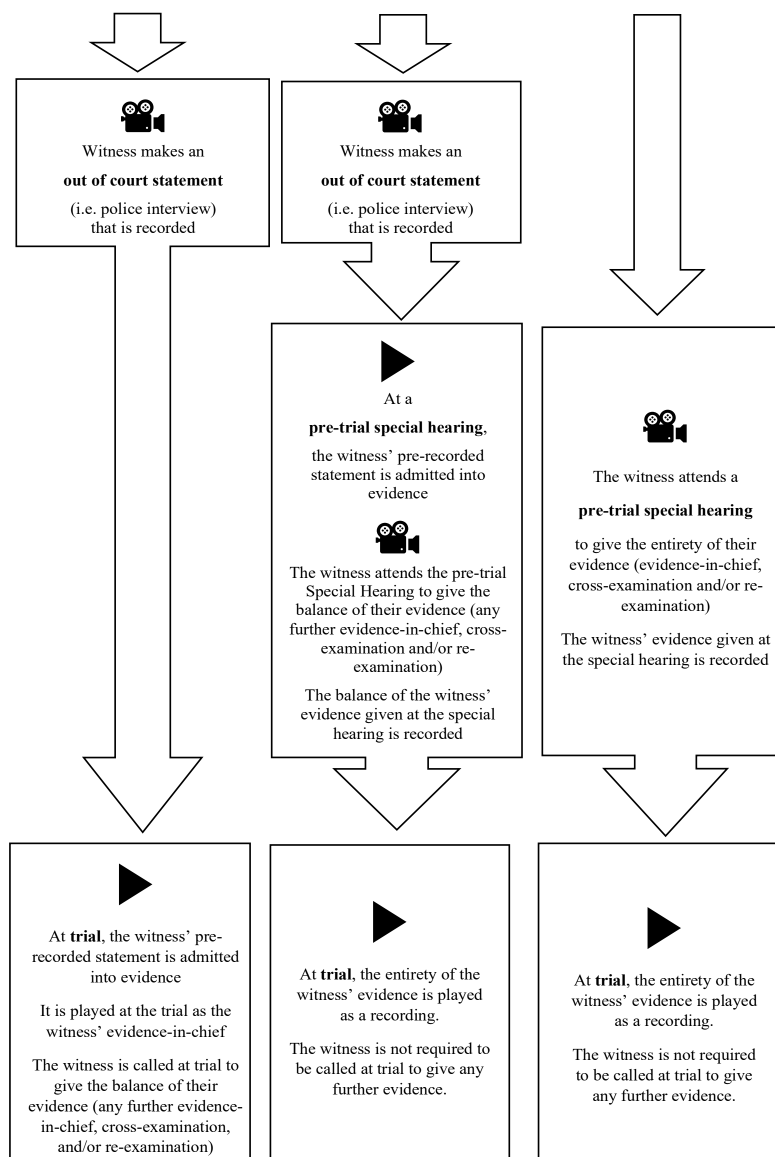
[3] For example, a forensic child psychologist working for another government agency.
[4] Home Office (UK), *Report of the Advisory Group on Video Evidence* (1989) ('Pigot Report').
[5] The Pigot Report is not only accepted as the impetus for the introduction of pre-recorded evidence, it is also now synonymous with the concept of pre-recorded evidence. The use of investigative interviews only is often referred to as a '*half Pigot*' and full pre-recording schemes as a '*full Pigot*'.
[6] This list is not exhaustive.

substantive evidence-in-chief. The witness attends trial to give the remainder of their evidence (any further evidence-in-chief, cross examination and any re-examination); or

(b) **an investigative interview may be used in conjunction with a special hearing** such that the investigative interview is admitted as the witness' substantive evidence-in-chief, the witness attends a special hearing and records the balance of their evidence. Both pre-recordings are admitted at trial as the witness' complete evidence, and the witness has no involvement in the trial; or

(c) **a special hearing may be used by itself without an investigative interview**, so that the witness attends the special hearing and records all of their evidence and that pre-recording is admitted at trial as the witness' evidence and the witness has no involvement in the trial.

Figure 1 – Pre-recorded evidence schemes in practice



1.1.10 Pre-recorded evidence may also be used in conjunction with various other measures as necessary. For example, a witness who attends court to give evidence — whether that is at trial *or at a **pre-trial special hearing*** — may give their evidence in the courtroom. This may be done potentially with the assistance of a support person, an intermediary, and/or screen, or alternatively they may give their evidence from a remote witness suite outside of the courtroom with their evidence relayed to the courtroom live via audio-visual link. These measures are also aimed to address concerns related to the welfare of witnesses and the quality or integrity of their evidence. This is because a pre-trial special hearing (while in the absence of a jury) still involves the same courtroom attendance of the judge, counsel and accused and so additional special measures may be appropriate. Accordingly, a common occurrence is for a witness who gives evidence at a pre-trial special hearing to give their evidence remotely via audio-visual link (that is, not from the courtroom). In these circumstances, the pre-recording of the special hearing is comprised of a split screen, which depicts simultaneous recordings of the witness suite and the courtroom. This is then played to the jury at the trial itself. This is contrary to a common misconception that a witness who gives evidence at a pre-trial special hearing, does so to enable them to give their evidence *in the courtroom*.

1.1.11 Legislation sets out the circumstances when a witness can give evidence by pre-recorded evidence.[7] In some jurisdictions, the use of pre-recorded evidence is mandatory in certain circumstances.[8] The use of pre-recorded evidence is otherwise at the discretion of investigating and prosecuting authorities and, ultimately, the court. There may be reasons why a pre-recorded investigative interview is not used in the trial and the witness attends court (either at trial or at a pre-trial special hearing) to give all their evidence.[9] Possible reasons for this include that the prosecution are dissatisfied with the quality and/or content of the pre-recorded interview, or the court may deem the pre-recorded investigative interview inadmissible if it contains irrelevant, prejudicial or otherwise inadmissible content that cannot be edited out.[10] The views of a witness (or their guardians) may also play a role in the decision making process regarding pre-recorded evidence.[11] However, as is discussed in more detail in this Research Paper,[12] witnesses are often not aware of the various options available to them about how they may give evidence and therefore lack agency in this decision-making process.

[7] For further details regarding eligibility for the pre-recorded evidence scheme in Tasmania, see **Part 2** of this Research Paper. For further details regarding the pre-recorded schemes in other jurisdictions, including respective eligibility criteria, see **Part 3** of this Research Paper.

[8] For example, in many jurisdictions it is mandatory for pre-recorded investigative interviews to take place in cases of alleged sexual offences against children.

[9] In these circumstances, the pre-recorded investigative interview assumes the status of an out of court statement akin to a written witness statement which may become admissible in the context of proving inconsistent statements.

[10] Commonly pre-recorded investigative interviews are criticised for their use of leading questions by interviewers. This represents an inherent tension in the purpose of pre-recorded investigative interviews as both a key part of an unfolding investigation and ultimately as the witness' evidence in court.

[11] For example, if a witness (or their guardians) expresses a strong view in favour of the witness giving evidence at trial, this may impact a prosecutor's decision to lead evidence from the witness at trial instead of relying upon a pre-recorded investigative interview and/or pre-trial special hearing.

[12] See **Part 5** for a detailed discussion about contemporary issues regarding witness agency and informed consent regarding mode of evidence and pre-recorded evidence in the UK context. See also discussion in **Part 6** of this issue in the Tasmanian context.

1.2 Background to this study

1.2.1 In 2018, the TLRI released a Final Report *Facilitating Equal Access to Justice: An Intermediary / Communication Assistant Scheme for Tasmania?*, recommending that legislation be enacted to create an intermediary scheme in Tasmania.[13] While witness intermediaries and pre-recorded evidence are separate and distinct special measures, they are interrelated because the use of witness intermediaries often coincides with the use of pre-recorded evidence and pre-trial special hearings.[14] Aligned with the TLRI's research and recommendations on witness intermediaries, aimed to reduce the stress of children and other eligible witnesses who give evidence in Tasmanian courts, the TLRI also considered that it was necessary to review the operation of the pre-recorded evidence scheme. Accordingly, this study is a self-referred project.

1.2.2 The Special Hearing Scheme Study was initially devised in 2015 by the then TLRI Director, Associate Professor Terese Henning. It sought to examine the recently introduced[15] pre-trial special hearing scheme and the surrounding processes and procedures in order to learn how the recorded hearing process was operating and to gain a preliminary view about whether it was achieving its legislative intent.

1.2.3 Despite securing funding, ethics approval, and in principle agreement from the Chief Justice and the Supreme Court for TLRI to have access to relevant court hearings and records,[16] s 7C of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) remained an impediment. That provision imposes strict parameters upon authorised possession and dealings with video-taped evidence under the Act.

1.2.4 From 2 October 2019,[17] a new s 7D was inserted into the Act which provided for the viewing of video-taped evidence by a prescribed law reform body by application to the Attorney-General.[18] Subsequently, on 30 June 2021, the *Evidence (Children and Special Witnesses) Regulations 2021* (Tas) were enacted, which, pursuant to regulation 4, prescribed the TLRI as a law reform body for the purposes of s 7D of the Act. The TLRI's Special Hearing Scheme Study then commenced in August 2022.

1.2.5 It is noted that the amendments required to allow the TLRI to undertake this study took some time and effort to achieve. The TLRI is grateful for the assistance of the Department of Justice and, in particular, Institute Board member and Deputy Secretary of the Office of the Secretary, Kristy Bourne, for her guidance and assistance as part of this process.

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[13] Tasmania Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary / Communication Assistant Scheme for Tasmania?* (Final Report No. 23, 2018) Recommendation 1 ('*Facilitating Equal Access to Justice*').

[14] See further discussion below at [2.4.7]–[2.4.13] regarding witness intermediaries and pre-recorded evidence in Tasmania.

[15] The pre-trial special hearings were introduced in Tasmania from 1 March 2014.

[16] On 25 July 2016, Justice Tennent confirmed on behalf of the Chief Justice and the Supreme Court, the court's willingness to permit the TLRI to have access to relevant court hearings and records for the purpose of the study, subject to the discretion of individual presiding judges and an agreed 'protocol'. The TLRI entered into an *Agreement for the Conduct of Research* with the Supreme Court of Tasmania, dated September 2016. The Chief Justice subsequently confirmed the court's ongoing willingness to co-operate with the TLRI with respect to this research project on 14 October 2019 and, most recently, on 18 September 2023.

[17] *Criminal Code and Related Legislation Amendment (Child Abuse) Act 2019* (Tas) (No. 29 of 2019) s 16. The TLRI notes that amendments were also made to s 7C, which provided for exceptions to unauthorised access and dealings with video-tape evidence for police training purposes.

[18] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7D(2).

1.3 Terms of Reference

1.3.1 The terms of reference for this Special Hearing Study essentially remain unchanged from those originally devised in 2015:

(a) to learn how the pre-trial special hearing scheme is operating in practice;

(b) to evaluate whether it is achieving its legislative intent;

(c) to consider the advantages and/or disadvantages of the pre-trial special hearing scheme; and

(d) to assess whether and to what extent it may be improved.

1.3.2 It remains the intention for the research undertaken as part of the study to collate and analyse empirical evidence regarding the use of special hearings with the view to providing an evidence-based approach to the development of the pre-recorded evidence scheme in Tasmania.

1.4 Scope of this study

1.4.1 The scope of this study covers the following key aspects:

(a) To consider pre-recorded evidence generally, whilst retaining a focus on pre-trial special hearings.

(b) To undertake a broad inquiry to determine the extent of data available regarding pre-trial special hearings (and pre-recorded evidence more generally) in Tasmania.

(c) To consider how the special hearing scheme was working in conjunction with the Witness Intermediary Scheme.

(d) To consider the views not only of legal counsel who had been involved in special hearings, but also the views of a wider range of individuals with knowledge and/or experience with pre-recorded evidence in Tasmania.

1.4.2 This expanded scope built upon the original scope of this study, which was, in large part, determined by the fact that the study was initially intended to take place in such close proximity to the introduction of special hearings in Tasmania. This meant that very few pre-trial special hearings were anticipated to be occurring, and as such that they could easily be identified in advance, observed in person and otherwise be the subject of detailed comparative analysis. From a combination of observing pre-trial special hearings (and other related hearings) and conducting interviews with legal counsel it was originally the intention to learn:

(a) What judicial orders are made in pre-trial directions hearings in relation to the questioning of witnesses in recorded hearings under s 6A *Evidence (Children and Special Witnesses) Act 2001* (Tas).

(b) What judicial orders, if any, are made under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) in cases where s 6A is available but not utilised.

(c) How those orders are implemented at the recorded hearings or during trials.

(d) Whether and how questioning differs during pre-trial recorded hearings and in-trial recorded questioning.

(e) How legal counsel view the recorded hearing process.

1.4.3 Given the passage of time between the early design of the special hearing scheme in 2015 and the formal commencement of this TLRI study in late August 2022, much had changed, not least the fact that the special hearing scheme had been in operation in Tasmania for almost seven and a half years. During that time, the uptake and use of pre-trial special hearings had increased not only simply by virtue of awareness and exposure to the scheme but also as a result of incremental legislative amendments which served to broaden the application of the scheme by introducing new criteria of witnesses and/or proceedings eligible for the scheme. Further, the closely related Witness Intermediary Scheme had commenced in March 2021 and witness intermediaries had been operating in conjunction with special hearings for some 18 months. In 2015, preliminary information obtained by the TLRI suggested as few as two to four pre-trial special hearings were taking place each year.[19]

1.4.4 By 2022, 22 special hearings were being conducted across 12 cases, spanning Hobart, Burnie and Launceston courts.[20] Of the 22 special hearings which took place in 2022, 15 involved a witness intermediary (across 10 cases).[21]

1.5 Conduct of this study

1.5.1 Quantitative and qualitative data were obtained for this study.

1.5.2 In regard to quantitative data, a preliminary stage of this study involved undertaking a broad inquiry to determine the extent of data available regarding pre-trial special hearings (and pre-recorded evidence more generally) in Tasmania. The TLRI sought to collect data from a range of different sources, including:

(a) General case management data from the courts and/or the Office of the Director of Public Prosecutions (ODPP) regarding the use of pre-recorded evidence;

(b) Viewing court files that contained transcripts of special hearings (including limited and select viewing of recordings of special hearings); and

(c) Conducting interviews with legal counsel, judges, and other individuals within the Department of Justice and Tasmania Police with knowledge and/or experience with pre-recorded evidence.

1.5.3 A common theme to emerge from this preliminary inquiry was the absence of any accurate and specific record keeping in relation to the use of pre-recorded evidence in Tasmania, particularly pre-trial special hearings. Neither the courts,[22] nor any government agency could provide readily available statistics on the number of special hearings which occurred annually.[23]

[19] This estimate was based on information obtained from the Office of the Director of Public Prosecutions about the number of cases where the pre-trial recording process has been used since the inception of the procedure.
[20] These figures were obtained from the preliminary data provided by the Supreme Court, coupled with the TLRI's inspection of these relevant court files. See further detailed explanation below at [1.5.4]–[1.5.7].
[21] These figures were obtained as a result of the TLRI's inspection of relevant court files, in conjunction with the data obtained from the Child Abuse Royal Commission Response Unit (CARCRU). See further detailed explanation below at [1.5.6]–[1.5.9].
[22] It is to be noted that whilst the Supreme Court was not recording or collecting data on *all* special hearings, the court was actively recording all special hearings involving child complainants in sexual offence matters as part of the court's case management pilot. See Supreme Court of Tasmania, *Supreme Court of Tasmania Annual Report 2022/2023* (2023) 29–33 <https://www.supremecourt.tas.gov.au/wp-content/uploads/2024/05/SCT-Annual-Report-2023-FINAL.pdf> ('*Annual Report 2022/2023*').
[23] See detailed discussion regarding record keeping and data collection in **Part 6**.

1.5.4 The TLRI was, however, greatly assisted by the Supreme Court in manually extracting and collating statistics regarding special hearings from general case management data for the period of 2019–2023.[24] For each year, the data contained:

(a) the number of special hearings which occurred;

(b) the duration and date/s of each special hearing; and

(c) the number of cases in which special hearings occurred (i.e. it was not uncommon for multiple special hearings to occur in a single case).

1.5.5 With the benefit of the preliminary data provided by the Supreme Court, the TLRI was able to identify potentially 24 special hearings which occurred in 2022, across 13 court files.[25]

1.5.6 The TLRI sought and obtained approval from the Supreme Court and the Attorney-General[26] to access and inspect these 13 court files, including the audio-visual recordings of the special hearings and corresponding transcript, transcript and/or records relating to other court appearances before/after the special hearing, and applications and other documents filed with the court.

1.5.7 Of the 24 special hearings across 13 cases which the Supreme Court had originally identified as taking place in 2022, upon further inspection, only 22 special hearings across 12 cases had occurred in 2022.[27]

1.5.8 The TLRI was also assisted by the ODPP contemporaneously reporting on the special hearings which took place during each court sittings throughout 2023.[28]

1.5.9 The TLRI was further provided data from the Child Abuse Royal Commission Response Unit (CARCRU) within the Department of Justice which had been collected in connection to the use of intermediaries as part of the Witness Intermediary Scheme Pilot. Whilst intermediaries and pre-trial special hearings are separate and distinct special measures, there is much overlap in their use, particularly in matters involving child witnesses.[29]

1.5.10 All data obtained by the TLRI was deidentified and subject to content analysis.

1.5.11 The *Supreme Court of Tasmania Annual Report 2022/2023* was another source of data regarding the use of pre-recorded evidence in Tasmania. This publicly available resource specifically reported on the court's case management pilot in relation to sexual offence cases with child complainants, which was a priority listing initiative designed to reduce the delay in listing child sexual offence matters.[30] Given this focus, the report includes data representing a particular cohort of eligibility for pre-trial special hearings, namely, child complainants in sexual offence cases.

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[24] See **Appendix A** (and **Appendix B**). The data obtained from the Courts only encompassed 2019–March 2023.
[25] 2 March 2022 (1 witness); 15–17 March 2022 (1 witness); 23 March 2022 (1 witness); 6 April 2022 and 7 April 2022 (2 witnesses); 24 May 2022 and 27 May 2022 (2 witnesses); 20–23 June 2022 (6 witnesses); 6 July 2022; 7 July 2022; 8 July 2022; 17 November 2022 (4 witnesses); 12 July 2022 (1 witness); 12 July 2022 (1 witness); 8 November 2022 (1 witness); 10 November 2022 (1 witness); 1 December 2022 (2 witnesses); and 12 December 2022 (1 witness).
[26] Pursuant to s 7D(2) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).
[27] The pre-trial special hearing identified as having occurred on 12 December 2022 had actually been adjourned (on multiple occasions) and ultimately took place across two days on 17–18 January 2023. Upon closer inspection of the relevant court files, three other matters were clarified: (1) the special hearings which were recorded as occurring on 6–7 April 2022 was actually a single special hearing, involving one witness; (2) one of the special hearings recorded as having occurred on 12 July 2022 actually occurred on 20 May 2022; and (3) the four special hearings recorded as having occurred on 6 July 2022, 7 July 2022, 8 July 2022 and 17 November 2022 had actually occurred on 15 June 2022, 6 July 2022, 7 July 2022 and 8 July 2022.
[28] See **Appendix C**.
[29] See further discussion below at [2.4.7]–[2.4.13] regarding witness intermediaries and pre-recorded evidence in Tasmania.
[30] Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22) 29–33.

1.5.12 The TLRI also conducted a total of 14 interviews with individuals who had knowledge and/or experience with pre-trial special hearings or pre-recorded evidence more generally.[31] Interview participants included:

- 2 Supreme Court Justices (**SCJ1**, **SCJ2**)
- 4 Defence Lawyers, comprised of 2 members of the Independent Bar, a practitioner at a private firm and a practitioner at Tasmanian Aboriginal Legal Service (TALS) (**DL1 – DL4**)
- 1 Senior Prosecutor at the ODPP (in both a personal and representative capacity) (**P1**)
- 2 Police Prosecutors (**PP1**, **PP2**)
- 2 officers at Victim Support Services (in both a personal and representative capacity) (**VSS1**, **VSS2**)
- 1 Witness Assistance Officer at the ODPP (in both a personal and representative capacity) (**WAO1**)
- 2 employees of the Witness Intermediary Scheme, within the Department of Justice (**DOJ1**, **DOJ2**)

1.5.13 Ahead of time, interview participants were provided with some introductory information regarding the study, including the interview questions. Interviews were recorded in note form and subsequently verified by participants as an accurate record of the interview. Participants were required to provide signed consent regarding their participation, including whether they consent to be quoted verbatim and/or paraphrased in publication of the research results. All interview participants were deidentified, save for generic labels regarding their role.[32] The interview data was otherwise manually coded to identify and collate information and themes.[33]

1.5.14 Whilst the pool of interview participants in this study is small, TLRI is aware of the complex and specialist nature of working with vulnerable witnesses in the criminal justice system and the requisite expertise that is required for such roles. In the context of a highly specialist area of practice within the already small jurisdiction of Tasmania, it was always anticipated that the pool of interview participants would be limited. Despite the small total number of participants, the pool of participants nevertheless represents a broad range of experience and perspectives across the criminal justice system in Tasmania and included lawyers and judges who practice both in metropolitan and regional areas. Four interview participants spoke both in a personal and representative capacity, having consulted with colleagues ahead of the interview and obtained information and insights from other colleagues within their organisation to share with the TLRI.

[31] The TLRI approached a total of 29 prospective interview participants with known experience and/or knowledge of pre-recorded evidence in Tasmania.

[32] See [1.5.13] above.

[33] The qualitative coding of the interview data utilised both deductive and inductive approaches as well as simultaneous (double) coding where appropriate.

1.6 Structure of this Research Paper

1.6.1 This Research Paper is divided into six parts.

- **Part 2** provides an overview of the pre-recorded evidence scheme in Tasmania. It explains the statutory framework of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) and how pre-recorded investigative interviews and pre-trial special hearings operate in Tasmania.

  It outlines the relevant eligibility criteria for both components of the pre-recorded evidence scheme, as well as covering the principles and procedures which impact the use of pre-recorded evidence in practice. It also includes an overview of the other special measures available in Tasmania, including witness intermediaries under the framework of the Witness Intermediary Scheme Pilot.

  Part 2 also details the development of the pre-recorded evidence scheme in Tasmania and, in particular, the amendments to the scheme since the introduction of special hearings in 2014.

- **Parts 3, 4 and 5** provide the necessary context for this review of pre-recorded evidence in Tasmania.
  - **Part 3** provides an insight into the pre-recorded evidence schemes in other jurisdictions.
  - **Part 4** reviews the body of previous research and literature which may be generally characterised as providing, to date, the overwhelming support in favour of pre-recorded evidence and that has served to reinforce and confirm the development of law and policy towards the increasing use of pre-recorded evidence. Accordingly, it is referred to in this Research Paper as *the case for pre-recorded evidence.*
  - **Part 5** considers a recent and marked shift in emerging research and attitudes with respect to the expansion of the use of pre-recorded evidence, which represents a renewed focus on pre-recorded evidence that seeks to consider the use and impact of pre-recorded evidence more critically and with greater scrutiny. Accordingly, it is referred to in this Research Paper as *the emerging case against the widespread use of pre-recorded evidence*.

- **Part 6** provides an in-depth consideration of the operation of special hearings and pre-recorded evidence, more generally, in Tasmania. **Part 6** presents the findings of this mixed method study and contains the TLRI's recommendations.

Part 2

Pre-recorded evidence in Tasmania

2.1.1 **Part 2** provides an overview of the pre-recorded evidence scheme in Tasmania. It traces the historical development of the scheme since the introduction of the special hearing scheme in 2014. It sets out the current eligibility criteria, and the legislative framework for the use of pre-recorded investigative interviews and pre-trial special hearings. It also provides an overview of other special measures that may be used in conjunction with pre-recorded evidence, including the witness intermediary scheme introduced in 2021.

2.2 Historical development of pre-recorded evidence scheme

2.2.1 As with many other jurisdictions,[34] Tasmania's pre-recorded evidence scheme was introduced incrementally. The *Evidence (Children and Special Witnesses) Act 2001* (Tas) ('the Act') commenced on 1 July 2002. It was introduced as part of a significant reform package to uniform evidence laws.[35] Many of the provisions in the new Act were not new, but had previously existed under the *Evidence Act 1910* (Tas).[36] Under the *Evidence Act 1910* (Tas) and subsequently the early versions of the Act, only pre-recorded out of court statements were permitted.[37] This related to the admission in a trial of a pre-recorded investigative interview. Special hearings were introduced from 1 March 2014[38] and from that date, full pre-recording has been available in Tasmania.[39]

2.2.2 As shown in Table 2.1, the amendments to the pre-recorded scheme under the framework of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) have served to make pre-recorded evidence and other related special measures increasingly available to a wider cohort of witnesses. The eligibility criteria set out in the Act apply for all special measures, including pre-recorded evidence and pre-trial special hearings, and have consistently been amended to broaden their scope to make more witnesses eligible.

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[34] See discussion at [1.1.6] and **Part 3**.

[35] Including the *Evidence Bill 2001* (Tas), *Oaths Bill 2001* (Tas), *Evidence on Commission Bill 2001* (Tas), *Evidence (Consequential Amendments) Bill 2001* (Tas), *Criminal Code Amendments (Evidence) Bill 2001* (Tas), and *Parliamentary Privilege Amendment Bill 2001* (Tas).

[36] Those provisions regarding witness special measures have been previously contained in the *Evidence Act 1910* (Tas) since their introduction in 1995.

[37] Per s 5 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas), which was previously s 122F of the *Evidence Act 1910* (Tas). See *Evidence Amendment (Children and Special Witnesses) Act 1995* (Tas) (No 37 of 1995).

[38] *Evidence (Children and Special Witnesses) Amendment Act 2013* (Tas) (No. 63 of 2013), which inserted ss 6 and 6A into the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

[39] It is noted that the Law Reform Commissioner of Tasmania had recommended that a pre-recorded evidence scheme be introduced as early as 1990: Law Reform Commissioner of Tasmania, *Child Witnesses* (Report No 62, 1990) Recommendations 4–5, cited by Law Reform Commission of Western Australia, *Project No 87*: *Evidence of Children and other Vulnerable Witnesses* (Report, April 1991) 53–4 <https://www.wa.gov.au/system/files/2021-03/LRC-Project-087-Final-report.pdf> ('*Evidence of Children and other Vulnerable Witnesses*').

2.2.3 Only select child witnesses were originally eligible, when pre-trial special hearings were introduced in 2014. This was expanded to include 'eligible adults' from 2 October 2019, which included all victims of child sexual abuse proceedings, regardless of their age at the time of the proceedings.[40] The eligibility criteria for special hearings was also expanded to include any children who are under 18 years and any other witness ordered by the court upon application by the prosecution where it is in the interests of justice to conduct the pre-recording.[41] From 20 April 2023, a special hearing may be held in relation to *any* witness' evidence if it is in the interests of justice and parties agree.[42] Also from this date, the new s 5A of the Act was inserted to provide an express statutory basis for the use of a pre-recorded investigative interview as the whole or part of a witness' evidence-in-chief for certain categories of witnesses, which expanded so the availability of this feature of pre-recorded evidence.[43]

2.2.4 The substantive amendments to the provisions of the Act which govern pre-recorded evidence, special hearings and other related special measures are set out in Table 2.1.

Table 2.1: The substantive amendments to the provisions of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) which govern pre-recorded evidence and other related special measures

Commencement Date	Amendment	Amending Act
15 December 2003	The definitions of affected child and prescribed proceeding[44] were amended to include the offence of indecent act with a child or young person.[45]	*Justice (Miscellaneous Amendments) Act 2003* (Tas) (No. 69 of 2003).
16 November 2004	The definitions of affected child and prescribed proceeding[46] were amended to include the offences of indecency,[47] ill-treatment of children[48] and obscene exposure in public.[49]	*Justice and Related Legislation (Miscellaneous Amendments) Act 2004* (Tas) (No. 44 of 2004).
1 March 2005	The definitions of affected child and prescribed proceeding were amended to include family violence matters.[50]	*Family Violence Act 2004* (Tas) (No. 67 of 2004).

[40] Tasmania, *Parliamentary Debates,* House of Assembly, 30 July 2019, 47 (Mrs Rylah).
[41] *Fact Sheet — Justice Miscellaneous (Royal Commission Amendments) Bill 2022* 3 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0015/52044/55_of_2022-fact20sheet.pdf>.
[42] *Clause Notes — Justice Miscellaneous (Royal Commission Amendments) Bill 2022* 6 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0011/53300/55_of_2022-clause20notes.pdf>. See also *Fact Sheet — Justice Miscellaneous (Royal Commission Amendments) Bill 2022* 3 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0015/52044/55_of_2022-fact20sheet.pdf>.
[43] *Clause Notes — Justice Miscellaneous (Royal Commission Amendments) Bill 2022* 6 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0011/53300/55_of_2022-clause20notes.pdf>. See also *Fact Sheet — Justice Miscellaneous (Royal Commission Amendments) Bill 2022* 3 <https://www.parliament.tas.gov.au/__data/assets/pdf_file/0015/52044/55_of_2022-fact20sheet.pdf>.
[44] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3.
[45] *Criminal Code 1924* (Tas) s 125B.
[46] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3.
[47] *Criminal Code 1925* (Tas) s 137.
[48] Ibid s 178.
[49] *Police Offences Act 1935* (Tas) s 8(1A)(a).
[50] The definition of affected child was amended to include a child who is giving, or is to give, evidence in respect of family violence (as defined by the *Family Violence Act 2004*). The definition of prescribed proceedings was amended to include a proceeding in which a person has been charged with a family violence offence and an application to a court regarding police family violence orders or family violence orders (pts 3 and 4 of the *Family Violence Act 2004* (Tas), respectively).

Commencement Date	Amendment	Amending Act
1 January 2006	The definition of prescribed proceeding was amended to include proceedings in which a person has been charged with a crime under various provisions of the *Sex Industry Offences Act 2005.*	*Sex Industry Offences Act 2005* (Tas) (No. 42 of 2005).
1 November 2006	The original ss 4 and 8 of the *Evidence (Children and Special Witness) Act 2001* (Tas), regarding support persons and declarations of special witnesses, were originally confined to prescribed proceedings. This requirement for the proceedings to be prescribed proceedings was removed.	*Justice and Related Legislation (Miscellaneous Amendments) Act 2006* (Tas) (No. 16 of 2006).
18 December 2006	The definitions of affected child and prescribed proceeding were amended to include the offences of procuring a child for sexual abuse,[51] communications with intent to procure a child,[52] involving a person under 18 years in production of child exploitation material,[53] and procuring a child to be involved in making child exploitation material.[54]	*Justice and Related Legislation (Further Miscellaneous Amendments) Act 2006* (Tas) (No. 43 of 2006).
1 March 2014	The definitions of affected child and prescribed proceedings were amended to include the offences of murder, manslaughter, acts intended to cause grievous bodily harm or avoid apprehension,[55] wounding or causing grievous bodily harm,[56] female genital mutilation,[57] aggravated assault,[58] kidnapping,[59] robbery.[60] The definition of child was changed from under 17 years to under 18 years. Pre-trial special hearings were introduced into the Act.[61] Introduction of the principles in relation to child witnesses under s 3A. Introduction of s 6B regarding the use of audio-visual links. Amendments to s 8 regarding pre-recorded evidence.[62]	*Evidence (Children and Special Witnesses) Amendment Act 2013* (Tas) (No. 63 of 2013).

[51] *Criminal Code 1924* (Tas) s 125C.
[52] Ibid s 125D.
[53] Ibid s 130.
[54] *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 73.
[55] *Criminal Code 1924* (Tas) s 170.
[56] Ibid s 172.
[57] Ibid s 178A.
[58] Ibid s 183.
[59] Ibid s 191A.
[60] Ibid s 240.
[61] By inserting ss 6 and 6A into the *Evidence (Children and Special Witnesses) Act 2001* (Tas).
[62] Namely, ss 8(2)(b)(iia), (iib), (iic).

Commencement Date	Amendment	Amending Act
28 April 2017	Further amendments to s 8, regarding special witness declarations in family violence related matters.	*Family Violence Reforms Act 2017* (Tas) (No. 6 of 2017).
10 December 2018	The definition of prescribed proceedings was amended to include bail proceedings in which family violence offences are charged.	*Family Violence Reforms Act 2018* (Tas) (No. 26 of 2018).
2 October 2019	The definition of affected child was amended to include a child who is giving, or is to give, evidence in respect of a child sexual offence (and the corresponding definition of child sexual offence was introduced). The definition of affected child was also amended to include the witnessing of certain offences. The new eligibility criteria of affected person was introduced and included in ss 6 and 6A. Inserted s 9A regarding special hearings for other witnesses in proceedings for child sexual offences. Amended s 7B to allow for the use of recorded evidence in later civil or criminal proceedings.	*Criminal Code and Related Legislation Amendment (Child Abuse) Act 2019* (Tas) (No. 29 of 2019).
1 March 2021	Introduced the Witness Intermediary Scheme.[63] Introduced the term prescribed witness. Amended definition of affected person to include prescribed witness. Introduced the terms specified proceeding and specified offence. Included prescribed witness to ss 4 and 8. Including specified proceeding to ss 5, 6, 9. Including both prescribed witness and specified proceeding to s 6B.	*Evidence (Children and Special Witnesses) Amendment Act 2020* (Tas) (No. 26 of 2020).
18 March 2022	The definition of affected child was amended to include the offence of carjacking.[64]	*Justice and Related Legislation (Miscellaneous Amendments) Act 2022* (Tas) (No. 2 of 2022).

[63] By inserting pt 8A into the *Evidence (Children and Special Witnesses) Act 2001* (Tas).
[64] *Criminal Code 1924* (Tas) s 240A.

Commencement Date	Amendment	Amending Act
22 December 2022	The definition of prescribed proceedings was amended to include the offences of persistent family violence[65] and stalking or bullying.[66]	*Family Violence Reforms Act 2022* (Tas) (No. 21 of 2022).
20 April 2023	Amending the definitions of affected child, child sexual offence, prescribed proceeding and specified offence to include the offence of penetrative sexual abuse of a child by a person in authority.[67] Inserted s 5A. Amended s 6A. Amended ss 7I and 7J (re administration of witness intermediary scheme).	*Justice Miscellaneous (Royal Commission Amendments) Act 2023* (Tas) (No. 2 of 2023).

[65] Ibid s 170A.
[66] Ibid s 192.
[67] Ibid s 124A.

2.2.5 Table 2.2 sets out the discrete amendments to the provisions of the Act which provide for pre-trial special hearings.

Table 2.2: The discrete amendments to the provisions of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) which provide for pre-trial special hearings.

Commencement Date	Amendment
1 March 2014	**6. Application for order for special hearing** (1) In a prescribed proceeding, the prosecutor may apply to a judge for an order directing: (a) that the whole of an affected child's evidence (including cross-examination and re-examination) be: (i) taken at a special hearing and audio-visually recorded; and (ii) presented to the court in the form of that audio-visual recording; and (b) that the affected child not be present at the trial. (2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1). **6A. Special hearing to take and record child's evidence in full** A judge who hears an application under section 61(a), or on his or her own motion, may make such orders as the judge thinks fit, including ordering a special hearing to take and record a child's evidence in full.
2 October 2019	**Section 6 amended (Application for order for special hearing)** Section 6(1) is amended as follows: (a) by omitting from paragraph (a) 'child's' and substituting 'person's'; (b) by omitting from paragraph (b) 'child' and substituting 'person'. **Section 6A amended (Special hearing to take and record affected person's evidence in full)** Section 6A is amended by omitting 'a child's' and substituting 'an affected person's'.
20 April 2023	**6A. Special hearing to take and record person's evidence in full** (1) A judge who hears an application under section 6(1)(a), or on the judge's own motion, may make such orders in relation to the affected person's evidence as the judge thinks fit. (2) A judge may, in a prescribed proceeding or a specified proceeding, make an order for the holding of a special hearing to take and record a witness's evidence in full if – (a) the judge is satisfied that it is in the interests of justice to hold a special hearing; and (b) both parties consent to the special hearing.

2.3 Overview of current scheme

2.3.1 The pre-recorded evidence scheme in Tasmania is governed by the *Evidence (Children and Special Witnesses) Act 2001* (Tas) ('the Act'). As noted at [1.1.8], pre-recorded evidence is one of the several special measures available under the Act for the taking of the evidence of children and other eligible witnesses. Legislation sets out the principles that apply to child witnesses, when a witness is eligible for use of the pre-recorded evidence scheme and the way in which the scheme operates.

Principles under the Act

2.3.2 In addition to the eligibility criteria and statutory pre-conditions for the use of special measures under the Act (see [2.3.3] below), the Act also includes a set of principles relating to child witnesses. Section s 3A(1) states: it is the intention of Parliament that, as children tend to be vulnerable in dealings with persons in authority, child witnesses be given the benefit of special measures. Further, s 3A(2) provides that the following principles apply where a child is a witness in any proceeding:

(a) measures are to be taken to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;

(b) the child is to be treated with dignity, respect and compassion;

(c) the child should not be intimidated when giving evidence;

(d) prescribed proceedings or specified proceedings in which a child is a witness are to be resolved as quickly as possible.[68]

Eligibility criteria

2.3.3 For all special measures, including pre-recorded evidence and pre-trial special hearings, the Act utilises a range of eligibility criteria which may attach to either the witness, or the proceedings, or both. The relevant eligibility criteria and related definitions are set out in Tables 2.3 and 2.4. Broadly speaking, eligibility for the pre-recorded evidence scheme exists for complainants in sexual offence matters, child witnesses for a range of offences, witnesses with a disability, and witnesses in cases involving serious violent offences and family violence matters. However, in many respects, the eligibility criteria are complex and duplicitous. A witness may be eligible for access to pre-recorded evidence and a pre-trial special hearing under various legislative provisions. The TLRI discusses this further and makes recommendations for reform at [6.4].[69]

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[68] An example of the practical application of these principles in the context of pre-recorded evidence is the refusal to admit a pre-recorded investigative interview where a child witness had provided an account in their recorded interview which they subsequently recanted in evidence given at preliminary proceedings. Whilst the witness' pre-recorded interview was strictly admissible pursuant to the relevant statutory pre-conditions, in circumstances where the witness had a clear preference to attend court to give evidence at trial and it was highly unlikely that the pre-recorded interview would constitute the witness' actual evidence at trial, the trial judge was guided by the principles under s 3A of the Act to exercise the available discretion under s 5 to refuse admission of the pre-recorded interview. See, e.g., *Tasmania v Dolega* [2016] TASSC 65 [47]–[62]; '… In those circumstances, I was of the view that it was artificial and inconsistent with the principles expressed in s 3A, to place the child in the position of having what she had already acknowledged to be a false statement, played to the jury as her evidence-in-chief. To take such a course would not, in my view, limit the distress and trauma she would suffer when giving evidence, would not be treating her with dignity, respect and compassion, and would increase the potential for her to be intimidated when giving evidence': at [59].

[69] See [6.4], Recommendation 2.

Table 2.3: Eligibility criteria relating to a witness

child	A person under the age of 18 years.[70]
affected child	A child in respect of whom a care and protection order application has been made.[71]
	A child who is giving, or is to give, evidence in respect of family violence offence/s.
	A child who is giving, or is to give, evidence in respect of, or has witnessed, a charge or murder or manslaughter.[72]
	A child upon or in respect of whom the following offences are alleged to have been committed[73] or who has witnessed[74] one of the following offences: bestiality,[75] penetrative sexual abuse of a child,[76] penetrative sexual abuse of a child by a person in authority,[77] person permitting penetrative sexual abuse of a child on premises,[78] persistent sexual abuse of a child,[79] indecent act with a child,[80] procuring a child for sexual abuse,[81] communications with intent to procure a child,[82] penetrative sexual abuse of a person with mental impairment,[83] indecent assault,[84] procuring a person for penetrative sexual abuse by threats or fraud,[85] involving a person under 18 years in production of child exploitation material,[86] incest,[87] indecency,[88] acts intended to cause grievous bodily harm or avoid apprehension,[89] wounding or causing grievous bodily harm,[90] ill-treatment of children,[91] female genital mutilation,[92] aggravated assault,[93] rape,[94] abduction,[95] kidnapping,[96] robbery,[97] carjacking,[98] and participation of children in sexual services business[99] (including inciting,[100] attempts of[101] and being an accessory to[102] any of these offences).[103]
	A child who is giving, or is to give, evidence in respect of a 'child sexual offence'.
	A child upon or in respect of whom the following offences are alleged to have been committed: obscene exposure in public,[104] assault with indecent intent;[105] procuring a child to be involved in making child exploitation material is alleged.[106]

[70] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3.
[71] Ibid s 3(a). A care and protection order pursuant to s 42 of the *Children, Young Persons and Their Families Act 1997* (Tas).
[72] Ibid s 3. Family violence as defined by the *Family Violence Act 2004* (Tas).
[73] Ibid s 3(b)(i).
[74] Ibid s 3(ca)(i)
[75] *Criminal Code 1924* (Tas) s 122.
[76] Ibid s 124.
[77] Ibid s 124A.
[78] Ibid s 125.
[79] Ibid s 125A.
[80] Ibid s 125B.
[81] Ibid s 125C.
[82] Ibid s 125D.
[83] Ibid s 126.
[84] Ibid s 127.
[85] Ibid s 129.
[86] Ibid s 130.
[87] Ibid s 133.
[88] Ibid s 137.
[89] Ibid s 170.
[90] Ibid s 172.
[91] Ibid s 178.
[92] Ibid s 178A.
[93] Ibid s 183.
[94] Ibid s 185.
[95] Ibid s 186.
[96] Ibid s 191A.
[97] Ibid s 240.
[98] Ibid s 240A.
[99] *Sex Industry Offences Act 2005* (Tas) s 9.
[100] *Criminal Code 1924* (Tas) s 298.
[101] Ibid s 299.
[102] Ibid s 300.
[103] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3(b)(ii). The definition of 'affected child' also includes repealed offences under ss 127A and 128 of the *Criminal Code 1924* (Tas).
[104] *Police Offences Act 1935* (Tas) s 8(1A)(a).
[105] Ibid s 35(3).
[106] *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 73.

prescribed witness	A witness in respect of whom a witness intermediary order has been made.[107]
special witness	A person declared as a special witness under s 8 of the Act,[108] namely, a witness who by reason of intellectual, mental or physical disability, is or is likely to be, unable to give evidence satisfactorily in the ordinary manner;[109] or a witness who by reason of age, cultural background, relationship to any party in the proceeding, the nature of the subject matter of the evidence or any other factor the court considers relevant, is likely to suffer severe emotional trauma, or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily.[110] It is to be noted that an order is not to be made under s 8 in respect of an affected child or a prescribed witness.[111]
affected person[112]	An affected child; a prescribed witness; or a person who has attained the age of 18 years upon, or in respect of whom, a child sexual offence was committed, or is alleged to have been committed, when the person was a child.

Table 2.4: Eligibility criteria relating to type of proceedings

prescribed proceeding	Means an application for a care and protection order;[113] an application regarding police family violence orders[114] or family violence orders;[115]or an application regarding bail proceedings in which family violence offences are charged.
	A proceeding in which a person has been charged with one of the following offences: a family violence offence, bestiality,[116] penetrative sexual abuse of a child,[117] penetrative sexual abuse of a child by a person in authority,[118] person permitting penetrative sexual abuse of a child on premises,[119] persistent sexual abuse of a child,[120] indecent act with a child,[121] procuring a child for sexual abuse,[122] communications with intent to procure a child,[123] penetrative sexual abuse of a person with mental impairment,[124] indecent assault,[125] procuring a person for penetrative sexual abuse by threats or fraud,[126] involving a person under 18 years in production of child exploitation material,[127] incest,[128] indecency,[129] murder,[130] manslaughter,[131] acts intended to cause grievous bodily harm or avoid apprehension,[132] persistent family violence,[133] wounding or causing grievous bodily harm,[134] ill-treatment of children,[135]

[107] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3. A witness intermediary order per s 7J.
[108] Ibid s 3.
[109] Ibid s 8(1)(a).
[110] Ibid s 8(1)(b).
[111] Ibid s 8(5).
[112] It is to be noted that there is a separate and distinct use of the term 'affected person' under the *Justices Act 1969* (Tas) in the context of preliminary proceedings. See *Justices Act 1959* (Tas) s 61(2). See also ss 61(4), 63, 65.
[113] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3(a). A care and protection order pursuant to s 42 of the *Children, Young Persons and Their Families Act 1997* (Tas).
[114] *Family Violence Act 2004* (Tas) pt 3.
[115] Ibid pt 4.
[116] *Criminal Code 1924* (Tas) s 122.
[117] Ibid s 124.
[118] Ibid s 124A.
[119] Ibid s 125.
[120] Ibid s 125A.
[121] Ibid s 125B.
[122] Ibid s 125C.
[123] Ibid s 125D.
[124] Ibid s 126.
[125] Ibid s 127.
[126] Ibid s 129.
[127] Ibid s 130.
[128] Ibid s 133.
[129] Ibid s 137.
[130] Ibid s 158.
[131] Ibid s 159.
[132] Ibid s 170.
[133] Ibid s 170A.
[134] Ibid s 172.
[135] Ibid s 178.

	female genital mutilation,[136] aggravated assault,[137] rape,[138] abduction,[139] kidnapping,[140] stalking or bullying,[141] robbery,[142] (including inciting,[143] attempts of[144] and being an accessory to[145] any of these offences).[146]
	A proceeding in which a person has been charged with obscene exposure in public,[147] or assault with indecent intent.[148]
	A proceeding in which a person has been charged with one of the following offences: commercial operator of sexual services business;[149] an offence against sex workers;[150] accosting a child for the purposes of offering or procuring sexual services in a sexual services business;[151] or participation of children in sexual services business.[152]
	A proceeding in which a person has been charged with procuring a child to be involved in making child exploitation material.[153]
specified proceeding	A proceeding (including a preliminary proceeding) in which a person has been charged with a specified offence.
specified offence	Means the following offences: failing to report the abuse of a child;[154] bestiality,[155] penetrative sexual abuse of a child,[156] penetrative sexual abuse of a child by a person in authority,[157] person permitting penetrative sexual abuse of a child on premises,[158] persistent sexual abuse of a child,[159] indecent act with a child,[160] procuring a child for sexual abuse,[161] communications with intent to procure a child,[162] penetrative sexual abuse of a person with mental impairment,[163] indecent assault,[164] procuring a person for penetrative sexual abuse by threats or fraud,[165] involving a person under 18 years in production of child exploitation material,[166] production of child exploitation material,[167] incest,[168] indecency,[169] female genital mutilation,[170] rape,[171] or any offence under chapter XVII of the *Criminal Code*[172]

[136] *Criminal Code 1924* (Tas) s 178A.
[137] Ibid s 183.
[138] Ibid s 185.
[139] Ibid s 186.
[140] Ibid s 191A.
[141] Ibid s 192
[142] Ibid s 240.
[143] Ibid s 298.
[144] Ibid s 299.
[145] Ibid s 300.
[146] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3(b)(ii).
[147] *Police Offences Act 1935* (Tas) s 8(1A)(a).
[148] Ibid s 35(3).
[149] *Sex Industry Offences Act 2005* (Tas) s 4.
[150] Ibid s 7.
[151] Ibid s 8(2).
[152] Ibid s 9.
[153] *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 73.
[154] *Criminal Code 1924* (Tas) s 105A.
[155] Ibid s 122.
[156] Ibid s 124.
[157] Ibid s 124A.
[158] Ibid s 125.
[159] Ibid s 125A.
[160] Ibid s 125B.
[161] Ibid s 125C.
[162] Ibid s 125D.
[163] Ibid s 126.
[164] Ibid s 127.
[165] Ibid s 129.
[166] Ibid s 130.
[167] Ibid s 130A.
[168] Ibid s 133.
[169] Ibid s 137.
[170] Ibid s 178A.
[171] Ibid s 185.
[172] Ibid ss 153–167C.

	regarding homicide, suicide, or concealment of birth (including inciting,[173] attempts of[174] and being an accessory to[175] any of these offences).[176]
	A proceeding in which a person has been charged with obscene exposure in public,[177] or assault with indecent intent.[178]
	A proceeding in which a person has been charged with one of the following offences: commercial operator of sexual services business;[179] an offence against sex workers;[180] accosting a child for the purposes of offering or procuring sexual services in a sexual services business;[181] or participation of children in sexual services business.[182]
	A proceeding in which a person has been charged with procuring a child to be involved in making child exploitation material.[183]
child sexual offence	Means any one of the following offences, committed in relation to a child: penetrative sexual abuse of a child,[184] penetrative sexual abuse of a child by a person in authority,[185] person permitting penetrative sexual abuse of a child on premises,[186] persistent sexual abuse of a child,[187] indecent act with a child,[188] procuring a child for sexual abuse,[189] communications with intent to procure a child,[190] penetrative sexual abuse of a person with mental impairment,[191] indecent assault,[192] procuring a person for penetrative sexual abuse by threats or fraud,[193] involving a person under 18 years in production of child exploitation material,[194] production of child exploitation material, incest,[195] or rape.[196]
sexual offence	Means any one of the following offences: bestiality,[197] penetrative sexual abuse of a child,[198] penetrative sexual abuse of a child by a person in authority,[199] person permitting penetrative sexual abuse of a child on premises,[200] persistent sexual abuse of a child,[201] indecent act with a child,[202] penetrative sexual abuse of a person with mental impairment,[203] indecent assault,[204] procuring a person for penetrative sexual abuse by threats or fraud,[205] production of child exploitation material, incest,[206] or rape[207] (including inciting,[208] attempts of[209] and being an accessory to[210] any of these offences); or assault with indecent intent.[211]

[173] Ibid s 298.
[174] Ibid s 299.
[175] Ibid s 300.
[176] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3(b)(ii).
[177] *Police Offences Act 1935* (Tas) s 8(1A)(a).
[178] Ibid s 35(3).
[179] *Sex Industry Offences Act 2005* (Tas) s 4.
[180] Ibid s 7.
[181] Ibid s 8(2).
[182] Ibid s 9.
[183] *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas) s 73.
[184] *Criminal Code 1924* (Tas) s 124.
[185] Ibid s 124A.
[186] Ibid s 125.
[187] Ibid s 125A.
[188] Ibid s 125B.
[189] Ibid s 125C.
[190] Ibid s 125D.
[191] Ibid s 126.
[192] Ibid s 127.
[193] Ibid s 129.
[194] Ibid s 130.
[195] Ibid s 133.
[196] Ibid s 185.
[197] Ibid s 122.
[198] Ibid s 124.
[199] Ibid s 124A.
[200] Ibid s 125.
[201] Ibid s 125A.
[202] Ibid s 125B.
[203] Ibid s 126.
[204] Ibid s 127.
[205] Ibid s 129.
[206] Ibid s 133.
[207] Ibid s 185.
[208] Ibid s 298.
[209] Ibid s 299.
[210] Ibid s 300.
[211] *Police Offences Act 1935* (Tas) s 35(3).

The full pre-recording scheme

2.3.4 The Act provides for full pre-recording by containing provision for:

(1) the **investigative interview**; and
(2) the **pre-trial special hearing**.

2.3.5 They can be used as standalone measures (that is only using a pre-recorded investigative interview or a pre-trial special hearing) or both.[212]

Investigative interview

2.3.6 The Act provides for two avenues for the admission of a pre-recorded investigative interview either as: (1) a *'prior statement recorded by any means'*, or (2) an '*audio-visual statement taken by an investigating official'*.

'Prior statement recorded by any means'

2.3.7 In a **prescribed proceeding** (including a special hearing ordered under the Act, s 6A) or a **specified proceeding**, a judge may admit into evidence a statement made by an **affected child** or a **prescribed witness** and recorded by any means if:

(a) the statement relates to a matter in issue in the proceeding;

(b) the defendant has been given a copy of the record of the statement; and

(c) the defendant is given the opportunity to cross-examine the witness.[213]

2.3.8 Additionally, if a witness is declared a ***special witness***, a judge may also make an order admitting into evidence a prior statement of the special witness *as if* the special witness were an affected child or prescribed witness in respect of whom s 5 applies.[214]

'Audio visual statement taken by an investigating official'

2.3.9 A more tailored means of admitting a pre-recorded investigative interview in a pre-trial special hearing or the trial itself is contained in the Act, s 5A. This provides that an audio-visual statement[215] taken by an investigating official[216] in respect of an offence may be tendered or treated as all or part of the evidence-in-chief of the witness who made the statement in a proceeding for that offence.

2.3.10 This provision applies in criminal proceedings if the witness is:

(a) a **child**, other than the defendant, who is to give evidence in respect of an offence; or

(b) the alleged victim of a **sexual offence**;[217] or

[212] Section 5(1) of the Act expressly provides for the admission of a pre-recorded statement of a witness at a pre-trial special hearing: 'In a prescribed proceeding (*including a special hearing ordered under s 6A*) or a specified proceeding, the judge may admit into evidence a statement made by an affected child or prescribed witness and recorded by any means …' (emphasis added).

[213] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5.

[214] Ibid ss 8(1), 8(2)(b)(iia).

[215] 'Audio-visual statement' is defined in s 5A(1) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) to mean a statement made by a witness and recorded by any means.

[216] 'Investigating official' is defined in s 5A(1) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) to have the same meaning as in s 3 of the *Evidence Act 2001* (Tas): (a) a police officer, other than a police officer who is engaged in covert investigations under the orders of a superiors; or (b) a person appointed by or under an Australian law, other than a person who is engaged in covert investigations under the orders of a superior and whose functions include the prevention or investigation of offences.

[217] 'Sexual offence' is defined in s 5A(1) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) to have the same meaning as in s 3 of the *Evidence Act 2001* (Tas).

(c) the alleged victim of a family violence offence; or

(d) a **special witness.**

2.3.11 The defendant is still given the opportunity to cross-examine a witness in a proceeding. Further, there is a discretion for a judge to not admit a pre-recorded investigative interview if it would be contrary to the interests of justice to treat the investigative interview as the witness' evidence-in-chief.[218]

Pre-trial special hearing

2.3.12 Provision also exists for pre-trial special hearings. In a **prescribed proceeding** or **specified proceeding**, the prosecutor may apply to a judge for an order directing:

(a) that the whole of an **affected person's** evidence (including cross-examination and re-examination) be taken at a special hearing and audio-visually recorded and presented to the court in the form of that audio-visual recording; and

(b) that the **affected person** not be present at the trial.[219]

2.3.13 A defendant is to be served with a copy of, and is entitled to be heard on, any such application.

2.3.14 A judge may, in a **prescribed proceeding** or a **specified proceeding**, make an order for the holding of a special hearing to take the record of a witness's evidence in full if:

(a) the judge is satisfied that it is in the interests of justice to hold a special hearing; and

(b) both parties consent to the special hearing.[220]

2.3.15 There is also power to hold pre-trial special hearings if a witness is declared a **special witness**.[221]

2.3.16 The Act also provides a wider power for the court to conduct a special hearing in relation to *other* witnesses in a child sexual offence proceeding who would not otherwise be eligible as an affected person or a special witness, if it is in the interests of justice.[222] The factors that may be taken into account in determining whether it is the interests of justice include:

(a) whether the unavailability of the witness to give evidence in the ordinary manner would cause undue delay in prosecution; and

(b) whether the giving of evidence in the ordinary manner by a witness might, because of the relationship between that witness and another witness, cause that witness or the other witness emotional trauma or distress.[223]

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[218] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5A(3).
[219] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 6.
[220] Ibid s 6A(2).
[221] Ibid ss 8(1), 8(2(b)(iib), 8(2(b)(iic). If a witness is declared a special witness, per s 8(1), a judge may make orders per ss 8(2)(b)(iib), (iic), namely, that a special hearing be held to take and record evidence *as if* the special witness were an affected person in respect of whom s 6 applies and, if such an order is made, that the special witness not be present at trial.
[222] Ibid s 9A. Section 9A(1) states that in a proceeding for a child sexual offence, a judge may make any one of the following orders if the judge is satisfied that it is in the interests of justice to do so: (a) an order that a special hearing be held to take and record evidence *as if* the witness were an affected person in respect of whom s 6 applies; and (b) if such an order is made, a further order that the witness not be present at the trial.
[223] Ibid s 9A(2).

2.4 Use of other special measures in conjunction with pre-recorded evidence

2.4.1 As noted at [1.1.8], pre-recorded evidence is one of several special measures that are available under the Act to assist in the taking of evidence from children and other eligible witnesses. These special measures can be used alone or in combination with other measures to allow the trial process to accommodate for individual witness needs (see [1.1.10]).

Support person

2.4.2 A **child** or a **prescribed** witness, in any proceeding, is entitled to have near him or her a person approved by the judge who may provide the witness with support.[224] The support person cannot be, or likely to be, a witness in or a party to the proceeding. An order for a support person may also be made if witness is a special witness.[225]

Screen/partition

2.4.3 There is a common law basis in Tasmania for the use of a screen or partition to allow for a witness's view of an accused to be obscured whilst giving evidence in the courtroom.[226] This measure may be granted when it is required 'for justice to be done'[227] in the particular circumstances of the case. However, there is no specific provision for this special measure in the Act.[228]

Audio-visual link

2.4.4 The evidence of **an affected child** or **prescribed witness** in a **prescribed proceeding** or **specified proceeding** is to be given by audio-visual link.[229] This means that the witness gives their evidence from a remote witness suite outside of the courtroom with their evidence relayed to the courtroom live via audio-visual link. This is the usual rule. However, if the witness is able and wishes to give evidence in the presence of the accused in the courtroom, the prosecutor may apply for an exemption to permit the witness to give their evidence in the courtroom.[230]

2.4.5 There is also provision for a **special witness** to have been allowed to give evidence by audio-visual link.[231]

2.4.6 As mentioned at [1.1.10], the combination of an order for a pre-trial special hearing and the special measure of giving evidence remotely means that commonly a witness who gives evidence at a pre-trial special hearing gives their evidence remotely via audio visual link and so that the pre-recording of the special hearing is comprised of a split screen, which depicts simultaneous recordings of the witness suite and the courtroom.

[224] Ibid s 4.
[225] Ibid s 8(1).
[226] See, eg, *R v Sparkes* [1996] TASSC 106.
[227] See *R v Sparkes* [1996] TASSC 106 [75]–[78], citing and applying *DJX, SCY, GCZ v R* (1990) 91 Cr App R 36 [40].
[228] It is to be noted that the TLRI has previously recommended for this special measure to be expressly included in s 8(2)(b) of the Act as part of submissions to the Department of Justice on the draft *Criminal Code and Related Legislation Amendment Bill 2018* (Tas), by letter dated 26 October 2018. Further, more recently, the DPP told the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings into Tasmania that the use of a screen should be expressly provided for in the *Evidence (Children and Special Witnesses) Act 2001* (Tas), a suggestion that the Commission agreed with. See Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me? Prioritising the Safety of Tasmanian children. Volume 7: The justice system and victim-survivors* (2023) 71 ('*Who was looking after me?*').
[229] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 6B.
[230] Ibid s 7.
[231] Ibid ss 8(1), 8(2)(b)(ii).

Witness intermediary

2.4.7 The role of a witness intermediary is to provide communication assistance to a witness. Witness intermediaries are a witness assistance measure separate and distinct from pre-recorded evidence and pre-trial special hearings. However, they are interrelated to the extent that the use of witness intermediaries often coincides with the use of pre-recorded evidence and pre-trial special hearings.[232]

2.4.8 The Act, Part 2A allows for the use of witness intermediaries in court in specified proceedings. In court, a witness intermediary's functions are to:

(a) assess the witness's communication and other related needs and to prepare and provide an assessment report about those communication and other related needs … ; and
(b) provide recommendations during a **specified proceeding** to the judge, and any lawyer appearing in the proceeding, as to adjustments to be made in the proceeding to enable the most effective communication with the witness; and
(c) otherwise provide assistance during a **specified proceeding** to the judge, and any lawyer appearing in the proceeding, in relation to communication with the witness; and
(d) perform any other function that a judge in a **specified proceeding** considers is in the interests of justice.

2.4.9 A witness will be taken to have a communication need if the quality or clarity of evidence given by the witness may be significantly diminished by the witness' ability to understand, process or express information.[233] This may be a temporary, permanent or reoccurring communication need and the degree of severity of the witness' communication need may change over time or due to circumstances. It does not matter if the witness' communication need is caused by disability, illness, injury, trauma or some other cause. [234] However, a witness is not to be taken as having a communication need solely because the witness does not have a knowledge of the English language that is sufficient to enable the person to understand questioning.[249] In this case, the witness would be able use an interpreter.

2.4.10 In a **specified proceeding**, a judge must order an assessment report be prepared and provided for certain categories of witnesses.[235] This applies if a witness is: a **child** upon or in respect of whom the **specified offence** is alleged to have been committed; or

(a) a **child**, other than the defendant, who is to give evidence in respect of the **specified offence**; or

(b) an adult –
  i) upon or in respect of whom the **specified offence** is alleged to have been committed; and
  ii) who has been identified by the judge, or any lawyer appearing in the **specified proceeding**, as a person who may have a communication need; or

(c) an adult, other than the defendant –
  i) who is to give evidence in respect of the **specified offence**; and
  ii) who has been identified by the judge, or any lawyer appearing in the **specified proceeding,** as a person who may have a communication need.[236]

[232] See above at [1.2.1] and [1.5.9].
[233] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7F.
[234] Ibid ss 7F(2)(a)–(c).
[235] Ibid s 7I.
[236] Ibid.

2.4.11 Based on the assessment report, a judge is to make an order that a witness intermediary be used in a specified proceeding if the judge is satisfied that the use of a witness intermediary in respect of the witness will assist the proceeding.[237] In addition, a judge may, at any time, make an order that a witness intermediary be used in respect of a witness in a **specified proceeding** if that witness satisfies the criteria set out at [2.4.10], and the judge is satisfied that it is in the interests of justice.[238] There is no need in this case for an assessment report to be made.[239] In making such an order, without limiting the matters that may be taken into account in determining the interests of justice, the judge is to take into account whether the witness does or does not wish the order to be made.[240]

2.4.12 Witness intermediaries *may* also be used by Tasmania Police in connection to pre-recorded investigative interviews. However, this practice is not currently governed by legislation, but instead by internal police guidelines and procedures.[241] In this regard, one of the recommendations of the Commission of Inquiry report was that the Tasmanian Government should consider whether legislation should be enacted requiring police to use witness intermediaries in police interviews of children and young people and adults with communication needs (including defendants), relating to sexual offences.[242] This was also the recommendation of the TLRI in its intermediary report, where it was recommended that intermediaries be used for police interviews as well as in court.[243]

2.4.13 The witness intermediary scheme commenced in Tasmania on 1 March 2021.[244] It was introduced as a 3-year pilot programme. It was reviewed after 12 months in operation.[245] A final review of the pilot programme is currently being conducted, with consultation closing on 24 March 2024. The final review is scheduled to be provided to the Department of Justice by July 2024.

2.5 Procedure for additional measures

Preliminary directions hearings

2.5.1 In cases where additional measures to assist a witness give evidence, such as a special hearing, are likely to be required, the Act s 9, provides that an additional pre-trial directions hearing is to occur. The onus is on the prosecutor or the party who is to call the witness to apply for a preliminary hearing to be listed by the court to deal with those matters at a preliminary stage before the trial.

2.5.2 Court rules provide that it is not necessary for the child or other witness to give evidence at a preliminary hearing as a judge may inform himself or herself in any way he or she thinks fit and may accept statements and assurances of the prosecutor.[246]

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[237] Ibid s 7J(1).
[238] Ibid s 7J(1A)
[239] Ibid s 7J(3).
[240] Ibid s 7J(1B).
[241] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 64, citing: Tasmania Police, *Tasmania Police Manual* (4 August 2021) 234 [4.4.10.9], 249 [4.6.3]. See also Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 65.
[242] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 68, Recommendation 16.10(2).
[243] Ibid 65, citing Tasmania Law Reform Institute, *Facilitating Equal Access to Justice* (n 13) Recommendation 2.
[244] *Evidence (Children and Special Witnesses) Amendment Act 2020 (No. 26 of 2020)* (Tas).
[245] Miriam Vandenberg, *Witness Intermediary Scheme Pilot in Tasmania* (Report, Sprout Labs & WISP, Department of Justice Tasmania, December 2022) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0020/710264/WISP-12-Month-Evaluation-Report.PDF>.
[246] *Criminal Rules 2006* (Tas) r 41A.

Ground rules hearings

2.5.3 A ground rules hearing is a particular type of pre-trial directions hearing and is mandatory in **specified proceedings** in which an order has been made for the use of an intermediary.[247] It is not part of the special hearings procedure, but given the overlap between cases where a special hearing is ordered and an order is also made for a witness to have the use of an intermediary, it is relevant to the procedure that may apply in cases where there is a special hearing.

2.5.4 A ground rules hearing must be attended by the prosecutor; the legal practitioner representing the defendant or, if the defendant is unrepresented, the defendant; and the witness intermediary. The relevant witness is not required to attend.

2.5.5 At a ground rules hearing, a judge may make any direction that the judge considers appropriate including any of the following:

- a direction about how the witness may be questioned;
- a direction about how long the witness may be questioned;
- a direction about the questions that may or may not be asked of the witness;
- a direction as to when the questions that are to be asked of the witness are to be provided to the witness intermediary;
- if there is more than one defendant, a direction about the allocation among the defendants of the topics about which the witness may be asked;
- a direction about the use of models, plans, body maps or other aids to help communicate a question or an answer.

2.5.6 If an assessment report has been made in respect of the prescribed witness, in making a direction under this section the judge is to consider any matters mentioned in that report.

Case management

2.5.7 A case management pilot program for sexual offence cases with child complainants has been implemented in the Supreme Court since 2019. This is a procedural reform that operates for a category of cases where special hearings may also be ordered. As with the implementation of pre-recorded evidence schemes, which were aimed at improving the timeliness of a witness' evidence from the point of view of trauma as well as improving the quality of the evidence, the purpose of the pilot was to expedite these cases and, in particular, expedite the evidence of the child complainants in these matters so that their evidence is given at a much earlier time in proceedings.[248] Targeted case management pursuant to this pilot program commenced in February 2019.[249]

[247] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7K(1).
[248] Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22) 29.
[249] Inclusion in the pilot is based on the following criteria: sexual offence; committed to the Supreme Court for trial; complainant aged under 18 years at the date of the accused's first appearance in the Supreme Court. See Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22) 29.

2.5.8 As discussed further at [6.5.14]–[6.5.19], criminal trial listings are currently still managed in Tasmania by the ODPP (in conjunction with the Supreme Court). The ODPP prioritises sexual offence prosecutions, giving precedence to matters where the victim is still a child, where there are child witnesses and where a pre-recording will be conducted. Also, where the victim is still a child there is a direction from the Chief Justice that the ODPP informs the Supreme Court. Once this occurs, a judge case manages the matter.[250] Further, often the ODPP has also provided pre-charging advice to police before an accused person is committed for trial.[251]

2.6 Other recordings of proceedings

2.6.1 In addition to the pre-recorded evidence scheme, it is also the current practice for *all* Supreme Court trials and appeal proceedings to be recorded. Court rules provide that, subject to any direction of the court or a judge, *all* proceedings in any court of trial or Court of Criminal Appeal are to be recorded by a recording apparatus.[252]

2.6.2 Further, the Act, s 7A requires that if an **affected person** or **special witness** is to give evidence at trial in any **prescribed proceeding** or **specified proceeding**, and facilities are available for making an audio-visual record of the evidence, an audio-visual record is to be made of the affected person's or special witness's evidence. This applies regardless of whether or not the affected person or special witness is giving evidence by audio-visual link or in the court room itself. The audio-visual recording then forms part of the records of the court.

2.6.3 The Act, s 7B, provides that these recordings may be admitted into evidence in a later civil or criminal proceedings if the judge is satisfied that the recording is relevant to the later proceeding and admission of the evidence would not be contrary to the interests of justice. This includes any subsequent trial, re-trial or appeal.[253] Before the judge admits such an audio-visual record into evidence, the judge may have the recording edited to exclude irrelevant material or material that is otherwise inadmissible in the later proceeding. If a judge admits an audio-visual record into evidence under this section, the judge may relieve the witness wholly or in part from an obligation to give evidence in the later proceeding.

[250] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 42.
[251] Ibid. See also Director of Public Prosecutions Tasmania, *Prosecution Policy and Guidelines* (Updated 5 February 2024) 28 <https://www.dpp.tas.gov.au/__data/assets/pdf_file/0011/681167/DPP-prosecution-guidelines_v10.pdf>.
[252] See *Criminal Rules 2006* (Tas) r 12. See also r 15 regarding the period for which the Registrar is required to retain the recordings (for proceedings heard on or after 1 January 2005, a period of 50 years).
[253] Tasmania, *Parliamentary Debates,* House of Assembly, 30 July 2019, 47 (Mrs Rylah).

Part 3

Pre-recorded evidence in other jurisdictions

3.1 Introduction

3.1.1 **Part 3** provides an overview of the pre-recorded evidence schemes that exist in other Australian jurisdictions. While no two legislative frameworks are the same, as noted at [1.1.5]–[1.1.6], most comprise of the same two components — the **investigative interview** and the **pre-trial special hearing** — and many share similar categories of eligibility. Other jurisdictions also have other special measures that are typically aimed at supporting complainants in sexual assault or family violence cases as well as child witnesses and witnesses with intellectual impairment.

3.1.2 Table 3.1 provides a comparative overview of the pre-recorded evidence schemes across Australian and other international Commonwealth jurisdictions.[254] A brief explanation of the pre-recorded evidence scheme in each jurisdiction then follows. More detail about the specifics of each of the schemes is set out in **Appendix D**.

Table 3.1: Comparative Overview of Pre-recorded Evidence Schemes

Jurisdiction	**Pre-recorded Evidence Scheme**	
	'Investigative Interview'	***'Pre-trial hearing'***
Tasmania	**'prior statement recorded by any means'** s 5 of the *Evidence (Children and Special Witnesses) Act 2001* (Tas) and **'audio-visual statement taken by investigating official'** s 5A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas)	**'special hearing'** ss 6, 6A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas)
Australian Capital Territory	**'police interview audio-visual recording'** div 4.3.3 and 4.5.2 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT)	**'pre-trial hearing'** div 4.3.4 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT)
Commonwealth	**'a video recording of an interview'** s 15YM of the *Crimes Act 1914* (Cth)	--
New South Wales	**'recorded statement' / 'JIRT interview'** ss 289F and 306U of the *Criminal Procedure Act 1986* (NSW)	**'pre-recorded evidence hearings'** s 294G of the *Criminal Procedure Act 1986* (NSW)
Northern Territory	**'recorded statement'** ss 21B and 21H of the *Evidence Act 1939* (NT)	**'special sitting'** ss 21B and 21E of the *Evidence Act 1939* (NT)
Queensland	**'recorded statement'** ss 93A and 103D, of the *Evidence Act 1977* (Qld)	**'video-recorded evidence'/'preliminary hearing'** ss 21A(2)(e) and 21AK of the *Evidence Act 1977* (Qld)

[254] The table is not exhaustive. Pre-recorded evidence schemes operate in other Commonwealth jurisdictions (i.e. Canada).

Jurisdiction	Pre-recorded Evidence Scheme	
	'Investigative Interview'	*'Pre-trial hearing'*
South Australia	**'recorded interview'** ss 13BA and 13BB of the *Evidence Act 1929* (SA)	**'pre-trial special hearing'** s 12AB of the *Evidence Act 1929* (SA)
Victoria	**'recorded evidence-in-chief' / 'VARE' ('VATE')** ss 367 and 387E of the *Criminal Procedure Act 2009* (Vic)	**'special hearing'** s 370 of the *Criminal Procedure Act 2009* (Vic)
Western Australia	**'visually recorded interview'** s 106HB of the *Evidence Act 1906* (WA)	**'special hearing'** s 106I and 106RA of the *Evidence Act 1906* (WA)
New Zealand	**'video record'/ 'police video record' / 'EVI'** ss 103, 106, 106A, 106D and 107 of the *Evidence Act 2006* (NZ)	**'video record'** ss 103, 106D and 107 of the *Evidence Act 2006* (NZ)
United Kingdom	**'ABE interview'** s 27 of the *Youth Justice and Criminal Evidence Act 1999* (UK)	'**Recorded cross-examination**' / '**s 28 hearing'** s 28 of the *Youth Justice and Criminal Evidence Act 1999* (UK)
Scotland	**'prior statement'** ss 271M and 271BZA of the *Criminal Procedure (Scotland) Act 1995*	**'Evidence by Commissioner (EBC)'** ss 271I and 271BZA of the *Criminal Procedure (Scotland) Act 1995*

3.2 Australian Capital Territory

3.2.1 The pre-recorded evidence scheme provides for 'full pre-recording' (both investigative interview and pre-trial hearing) and is governed by the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).[255] Pre-recorded evidence is one of the 'special requirements'[256] available to eligible witnesses in the ACT.

3.2.2 Eligibility is broadly like the approach taken in Tasmania,[257] with investigative interviews being available for family violence offences, certain violent offences and sexual offences that are included in the scheme for complainants, child witnesses and witnesses with intellectual impairments. Eligibility for pre-trial special hearings exists for serious violent offences and sexual offences for certain classes of witness.[258] It is noted, however, that the format of the eligibility criteria is more accessible than in Tasmania as a separate table is provided for each type of proceeding, with a list of the witnesses and special requirements provisions that apply for that witness.

3.2.3 Further details about the scheme are set out in **Appendix D**.

[255] See Table 3.1. See also *Evidence (Miscellaneous Provisions) Regulation 2009* (ACT).
[256] Other special requirements include the accused being screened from a witness in court (s 47); a support person (s 49); a closed court (s 50); and giving evidence by audio-visual link (div 4.3.5).
[257] See Tables 2.3 and 2.4 above at [2.2.3].
[258] See **Appendix D**.

3.3 Commonwealth

3.3.1 The *Crimes Act 1914* (Cth) provides for the use of pre-recorded investigative interviews, but not full pre-recording. There is no provision for pre-trial hearings. In line with the approach in Tasmania, pre-recording is available for child or vulnerable adult witnesses for some sexual offences as well as slavery offences.

3.3.2 Further details are set out in **Appendix D**.

3.4 New South Wales

3.4.1 In NSW, pre-recorded evidence scheme provides for full pre-recording with investigative interviews available to be used for children, cognitively impaired persons (collectively termed 'vulnerable persons')[259] and domestic violence complainants.[260] However, full pre-recording — by way of '*pre-recorded evidence hearings'* — is only available for a smaller cohort of witnesses, namely, child witnesses in sexual offence proceedings.[261] Pre-recorded evidence hearings under the *Criminal Procedure Act 1986* (NSW) are subject to legislated review as part of the Child Sexual Offence Evidence Program (CSOEP).[262] The CSOEP commenced in 5 November 2015,[263] and over time there have been changes to the pilot with the most recent change being to make amendments to eligibility criteria to include child witnesses under 18 years (previously only child witnesses under 16 years were eligible).[264]

3.4.2 It is also noted that the *Criminal Procedure Act 1986* (NSW) provides more broadly for other alternative means of giving evidence (i.e. giving evidence from another location via audio visual link) and alternative arrangements (i.e. the use of a screen, seating arrangements, support persons etc).

3.4.3 For more details for the NSW scheme, see **Appendix D**.

3.5 Northern Territory

3.5.1 Under the *Evidence Act 1939* (NT), 'full pre-recording' is available in the Northern Territory. Pre-recorded investigative interviews are provided for in the *Evidence Act 1939* (NT), s 21B, which provides for the admission of a recorded statement[265] from a vulnerable witness in a sexual offence case or serious violence offence[266] case. A vulnerable witness includes a witness who is a child, who has cognitive impairment or an intellectual disability, who is the alleged victim of a sexual offence, who is a complainant in a domestic violence offence proceeding, or whom a court considers to be vulnerable.[267] There is also provision for the admission of a recorded statement in some circumstances in domestic violence proceedings.[268] Pre-trial special hearings are allowed under the *Evidence Act 1939* (NT), s 21B,

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259 *Criminal Procedure Act 1986* (NSW) s 306U.
260 Ibid s 289F.
261 Ibid s 294G. Specifically, 'prescribed sexual offence' proceedings as defined in s 3 of the *Criminal Procedure Act 1986* (NSW).
262 Ibid s 294S.
263 See *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW).
264 Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (Judicial Commission of NSW, 2007 – Reissued 2022, updated April 2024) [5–400], [5–410] <https://jirs.judcom.nsw.gov.au/public/assets/benchbooks/criminal/> at 22 April 2024 ('*Criminal Trial Courts Bench Book*').
265 *Evidence Act 1939* (NT) s 21AA. A 'recorded statement' means an interview, recorded on video-tape or by other audio visual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to a proceeding. 'Authorised person' is also defined in s 21AA.
266 As defined in s 21AA of the *Evidence Act 1939* (NT).
267 Ibid s 21AB.
268 See Ibid pt 3A. *Evidence Act 1939* (NT) s 21G: A 'complainant', for a domestic violence proceeding, means an adult against whom a domestic violence offence the subject of the proceeding is alleged, or has been found, to have been committed.

which provides that a court may hold a special sitting in relation to a vulnerable witness in a sexual offence case or serious violence offence, for the purpose of taking evidence, audio visually recording that evidence and admitting the recording into evidence as the whole of part of the witness' evidence at trial.[269]

3.5.2 The *Evidence Act 1939* (NT) also provides more broadly for other 'arrangements' for vulnerable witnesses when giving evidence.[270] Further, contained in s 21D are principles in relation to child witnesses in similar terms to s 3A(2)(a)–(d) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

3.5.3 For further details see **Appendix D**.

3.6 Queensland

3.6.1 In Queensland, there is provision for full pre-recording, by way of investigative interview and special hearing. Pre-recorded investigative interviews between police and a child witness or a witness with an impairment of the mind are admitted into evidence under the *Evidence Act 1977* (Qld), s 93A.[271] There is also provision for pre-recorded investigative interviews in relation to domestic violence offences.[272]

3.6.2 There is also provision under the *Evidence Act 1977* (Qld) for the balance of an eligible witness' evidence to be pre-recorded (i.e. full pre-recording). Broadly, this applies for certain child witnesses in family violence or sexual offence matters,[273] 'special witnesses' such as children under 16, a person with a mental, intellectual or physical impairment (in certain circumstances),[274] witnesses in relation to serious offences by criminal organisations, the commission of an offence by another person, sexual offences and family violence offences.

3.6.3 It is noted that proposed amendments to the pre-recorded evidence scheme in Queensland were introduced to Parliament in May 2024.[275] The amendments would introduce a presumption in favour of pre-recorded evidence as well as the requirement for additional directions hearings in matters in which full pre-recording is to take place.[276]

3.6.4 Further details about the scheme are set out in **Appendix D**.

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[269] Ibid s 21B(2)(b).
[270] Ibid s 21A. Including giving evidence remotely by audio-visual link, the use of a screen, and/or a support person. Also, a vulnerable witness's evidence is routinely recorded per s 21E (if not already pre-recorded).
[271] Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (2011–2024, updated March 2024) 'Child Witnesses: 93A Statements' <https://www.courts.qld.gov.au/__data/assets/pdf_file/0006/260493/sd-bb-10-child-witnesses-93a-statements.pdf> at 22 April 2024 ('*Supreme and District Courts Criminal Directions Benchbook*').
[272] *Evidence Act 1977* (Qld) s 103D.
[273] Ibid s 21AK
[274] Ibid s 21A.
[275] *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024* (Qld) sub-div 4.
[276] See, eg, Explanatory Notes, *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024* (Qld) 8–14 <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2023-078>.

3.7 South Australia

3.7.1 South Australia's pre-recorded evidence scheme provides for 'full pre-recording' and is contained within the *Evidence Act 1929* (SA).

3.7.2 Pre-recorded investigative interviews can be admitted in evidence for children under 14, people with a disability if it adversely affects the person's capacity to give evidence and a person who is the victim of a child sexual assault.[277] There is also provision for admission of a pre-recorded investigative interview in family violence matters.[278]

3.7.3 There is also provision for pre-trial special hearings in the *Evidence Act 1929* (SA), s12AB. In broad terms, pre-trial special hearings can be used for child witnesses and persons with disability, and for children, victims and vulnerable witness in a trial relating to a child sexual offence.

3.7.4 The *Evidence Act 1929* (SA) also provides more broadly for special arrangements for protecting vulnerable witnesses when giving evidence and for otherwise protecting witnesses from embarrassment, distress etc when giving evidence.[279]

3.7.5 In the South Australian District Court, since 17 May 2021, a priority listing programme has been piloted, which impacts the usual operation of the pre-recorded evidence scheme. The *Criminal Priority Programme* relates to a select group of matters that are eligible for pre-trial special hearing, namely in a trial of sexual offence[280] where the alleged victim is (1) a child, or (2) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions.[281]

3.7.6 Those matters eligible for the programme are listed for a priority trial within 3–4 months of arraignment, instead of being listed for a pre-trial special hearing within the same period of time. It removes the need for a pre-trial special hearing in those matters. Following the initial introduction of the Programme in May 2021, it has subsequently been revised and/or expanded in December 2021, May 2022 and November 2023.[282] The programme is yet to be formally reviewed or evaluated.

3.7.7 Further details of the scheme are set out in **Appendix D**.

[277] *Evidence Act 1929* (SA) s 13BA. *Summary Offences Act 1935* (SA) s 74EA. 'Child sexual offence' means a sexual offence committed in relation to a person under the age of 18 years. 'Sexual offence' means: rape, compelled sexual manipulation, indecent assault, any offence involving unlawful sexual intercourse or an act of gross indecency, incest, any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest, sexual exploitation of a person with a cognitive impairment, including any attempt to commit, or assault with intent to commit, any of these offences.

[278] *Evidence Act 1929* (SA) s 13BB.

[279] Ibid ss 13, 13A. Including giving evidence remotely by CCTV, the use of a screen, a support person, and canine court companion. Also, a vulnerable witness's evidence is routinely recorded per s 13C (if not already pre-recorded).

[280] *District Court Act 1991* (SA) ss 50B(a)–(f). 'Sexual offence' means: rape; indecent assault; any offence involving unlawful sexual intercourse or an act of gross indecency; incest; any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; an offence of sexual exploitation of a person with a cognitive impairment under s 51 of the *Criminal Law Consolidation Act 1935* (SA); or any attempt to commit, or assault with intent to commit, any of the offences referred to above.

[281] The Programme operates by virtue of s 50B of the *District Court Act 1991* (SA), which states 'the Court will give the necessary directions to ensure that a trial of a sexual offence where the alleged victim of the offence is a person to whom this section applies is given priority over any less urgent criminal trial and is dealt with as expeditiously as the proper administration of justice allows'.

[282] To coincide with the introduction of the Programme and each subsequent expansion/revision, the Court published the following guidance: Courts Administration Authority of South Australia, 'Priority Matters – Information for the Profession 14 November 2023' (14 November 2023) <https://www.courts.sa.gov.au/download/district-court-sitting-in-adelaide>.

3.8 Victoria

3.8.1 Full pre-recording is available in Victoria for child witnesses and cognitively impaired[283] witnesses. The pre-recorded evidence scheme is governed by the *Criminal Procedure Act 2009* (Vic). Pre-recorded investigative interviews are commonly known as Video and Audio Recorded Evidence, or 'VARE'[284] and are admissible for these witnesses in proceedings relating to a sexual offence, family violence offence, any indictable offence that involves an assault on, or injury or threat of injury to, a person, or any associated summary assault matters.[285] There is also provision for pre-recorded investigative interviews to be admitted for a complainant in family offence proceedings.[286]

3.8.2 There is a different approach taken to special hearings in Victoria, when compared to the current approach in Tasmania. Special hearings are mandatory for a child witnesses or cognitively impaired witnesses who are complainants in sexual offence proceedings.[287] The prosecution may also apply for the witness to give evidence at the trial itself instead of at a special hearing.[288] A special hearing may be held either before the trial or *during* the trial.[289] Special hearings in Victoria have evolved, in practice, from a strictly pre-trial recording process to be available also as an 'in-trial' recording process. A special hearing must be held within 3 months after committal.[290] If a special hearing is to occur during trial, the date of the special hearing will nevertheless be set at a pre-trial directions hearing.[291] For special hearings that are held during trial, the jury is present in the courtroom and the complainant gives evidence from a location outside the courtroom via CCTV.[292] In this respect, these in-trial special hearings are akin to the 'live' evidence via audio-visual link (CCTV) that is available in other jurisdictions (but which are not considered pre-recorded evidence).

3.8.3 The *Criminal Procedure Act 2009* (Vic) also provides more broadly for other 'alternative arrangements' for giving evidence.[293]

3.8.4 Further details of the Victorian scheme are set out at **Appendix D**.

[283] *Criminal Procedure Act 2009* (Vic) s 3. 'Cognitive impairment' is defined to include impairment because of mental illness, intellectual disability, dementia or brain injury.
[284] Previously also known as 'VATE'; video and audio taped evidence.
[285] *Criminal Procedure Act 2009* (Vic) s 367.
[286] Ibid s 387E.
[287] Ibid ss 369, 370.
[288] Ibid s 370.
[289] Ibid s 370(1A).
[290] Ibid s 371. This time limit may be extended, subject to the court considering that it is in the interests of justice to do so, having regard to a range of factors in s 371(2). Noting also, that s 212 of the *Criminal Procedure Act 2009* (Vic) also imposes time limits for commencing trials for sexual offences.
[291] Ibid ss 181(2)(d)(iii), 371A. The court must, as far as possible, commence the special hearing on this specified date and ensure that the complainant's evidence is disrupted to the least extent possible.
[292] *Criminal Procedure Act 2009* (Vic) ss 372(1)(ba), (d).
[293] Ibid div 4, pt 8.2. Including the giving of evidence outside of the courtroom via CCTV — ss 360(a), 363; the use of screens — ss 360(b), 364; and the presence of a support person — ss 360(c), 365; requiring counsel not to robe and/or remain seated while examining or cross-examining a witness — ss 360(e)–(f). See also pt 8.2A regarding intermediaries.

3.9 Western Australia

3.9.1 In Western Australia, there is also provision for full pre-recording. Investigative interviews are admissible for children or persons with a mental impairment.[294] Further, for a visually recorded interview with a person with a mental impairment to be admissible the person must be a 'special witness'.[295]

3.9.2 The *Evidence Act 1906* (WA) further provides for 'full pre-recording' by way of a 'special hearing' for 'affected child' witnesses in 'schedule 7 proceedings', which broadly includes a range of sexual offences or serious violent offences where there is a family relationship between the child and the accused.[296]

3.9.3 There is also provision for the wider use of special hearings in the *Evidence Act 1906* (WA), s 106RA for special witnesses, or it is likely the witness will be out of the state at the time of the proceeding for the offence and will not be able to give evidence at the proceeding by means of a video or audio link.

3.9.4 The *Evidence Act 1906* (WA) provides for a range of other special measures available to witnesses, which are intended to be used in conjunction with pre-recorded evidence as need be.[297] Section 106S provides that an additional pre-trial directions hearing is to occur in cases where special measures such as a special hearing are likely to be required. The onus is on the party who is to call the relevant witness to apply for a 'special hearing' to be listed for the purpose of having all such matters dealt with before the proceeding.

3.9.5 Further details for the scheme are set out in **Appendix D**.

[294] *Evidence Act 1906* (WA) s 106H. Mental impairment is defined as intellectual disability, mental illness, brain damage or senility. *Evidence Act 1906* (WA) s 106A; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8.

[295] *Evidence Act 1906* (WA) s 106HB(1a). Per s 106R(3), a person may be declared a 'special witness' if: (a) by reason of physical disability or mental impairment, the person is unlikely to be able to give evidence; or (b) the person is likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant. A declaration must be made in respect of the victim of an offence in a serious sexual offence proceeding or a criminal organisation offence proceeding, unless the above-mentioned criteria does not apply to the witness and the witness does not wish to be declared a special witness.

[296] Ibid s 106I, sch 7. Proceedings that come within sch 7 include those listed in pt B of sch 7 (a range of sexual offences under the *Criminal Code* (WA) and the *Prostitution Act 2000* (WA)) and those listed in pt C of sch 7 (a range of serious violence offences under the *Criminal Code*, provided that the accused is a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt of the complainant; or a person who is or was, at the time when the offence was committed, living in the same household as the complainant; or a person who at any time had the care of, or exercised authority over, the complainant in the household on a regular basis).

[297] See provisions under the *Evidence Act 1906* (WA) for other special measures such as: a support person — ss 106E, 106R(4)(a); a communicator — ss 106F, 106R(4)(b); evidence to be given from a remote room via AVL/CCTV — ss 106K, 106N, 120); screen — s 106N(4).

3.10 New Zealand

3.10.1 Full pre-recording is available in New Zealand. Pre-recorded evidence is one of the 'alternative ways of giving evidence' available in New Zealand under the *Evidence Act 2006* (NZ). Section 103 makes general provision that a court may make a direction that a witness is to give their evidence-in-chief *and be cross-examined* in an alternative way, including by a video recording made before the hearing of the proceeding.[298] There is a broad category of situations in which such a direction can be made relating to the age of the witness, impairment, fear or intimidation, cultural difference, the nature of the proceedings, the evidence to be given and the relationship between the witness and the accused.[299]

3.10.2 There is also provision for the admission of a pre-recorded investigative interview.[300] There are provisions that expressly deal with family violence complainants (who are not children),[301] sexual case complainants and propensity witnesses (or any age),[302] and child witnesses.[303]

3.10.3 Further details of the scheme are set out in **Appendix D**.

3.11 United Kingdom

3.11.1 Full pre-recording is available in the UK and the pre-recorded evidence scheme is governed by the *Youth Justice and Criminal Evidence Act 1999* (UK) (YJCEA). Pre-recorded evidence is one of the various special measures available to eligible witnesses.[304]

3.11.2 Eligible witnesses include: children;[305] witnesses whose evidence the court considers will likely be diminished in quality by reason of mental disorder, significant impairment of intelligence and social functioning, physical disability or physical disorder,[306] or fear or distress on the part of the witness in connection with testifying in the proceedings;[307] complainants in proceedings relating to sexual, modern slavery or domestic abuse offending;[308] or a witness in proceedings relating to a 'relevant offence'.[309]

3.11.3 Pre-recorded evidence-in-chief is mandatory in cases of child witnesses and witnesses who are complainants in sexual offence proceedings.[310] However, the court retains a discretion not to admit the pre-recorded evidence.[311]

3.11.4 Full-recording by way of special hearing is allowed under the YJCEA, with s 28 providing that where a pre-recorded evidence-in-chief is admitted, the court may also direct for any cross-examination or re-examination to be recorded and for such a recording to be admitted into evidence. This means that admission of pre-recorded evidence-in-chief is a precondition for the witness to be eligible for a special hearing

[298] *Evidence Act 2006* (NZ) s 105(1)(a)(iii). 'Video record' is defined in s 4 of the *Evidence Act 2006* (NZ) as 'a recording on any medium from which a moving image may be produced by any means; and includes an accompanying soundtrack.'
[299] Ibid ss 103, 104.
[300] Ibid s 106.
[301] Ibid s 106A.
[302] Ibid s 106D.
[303] Ibid s 107.
[304] Other special measures include the use of a screen (s 23), use of a live link (s 24), use of an intermediary (s 29), and use of aids to communication (s 30).
[305] Witnesses under the age of 18 years: *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16(1)(a), 18.
[306] *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16(1)(b), (2), 18.
[307] Ibid ss 17(1), 18.
[308] Ibid ss 17(4), (4A), 18.
[309] 'Relevant offences' are listed in sch 1A: *Youth Justice and Criminal Evidence Act 1999* (UK) ss 17(5), (6), 18.
[310] Ibid ss 21, 22A.
[311] See **Appendix D**.

3.11.5 Further details of the operation of the English scheme are set out in **Appendix D** and is the subject of further discussion in **Part 5**.

3.12 Scotland

3.12.1 Full pre-recording is available in Scotland. Pre-recorded evidence is one of the special measures available to eligible witnesses in Scotland under the *Criminal Procedure (Scotland) Act 1995*.[312] 'Vulnerable witnesses' may be authorised to give evidence-in-chief in the form of a prior recorded statement (pre-recorded investigative interview) and/or have evidence taken by a commissioner at a pretrial hearing that is also pre-recorded (special hearing).[313]

3.12.2 'Vulnerable witness' includes a child witness; a witness whose quality of evidence is at significant risk of being diminished by reason of mental disorder or fear or distress in connection with giving evidence; a complainant in proceedings for a sexual offence, traffic in prostitution offence, trafficking people for exploitation offence, human trafficking, domestic abuse or stalking; or a witness who is considered to be at significant risk of harm by reason only of the fact that they are giving or is to give evidence in the proceedings.[314]

3.12.3 Section 271BZA of the *Criminal Procedure (Scotland) Act 1995* provides that in certain proceedings involving child witnesses, the court must enable full pre-recording of the child's evidence unless the court is satisfied that an exception is justified.[315]

3.12.4 Further details of the scheme are set out in **Appendix D**.

[312] *Criminal Procedure (Scotland) Act 1995* s 271H(1). Other special measures include use of a live television link (s 271J), use of a screen (s 271K), and use of a 'supporter' (s 271L).
[313] Ibid ss 271H(1)(a), (e).
[314] Ibid s 271(1).
[315] The exceptions are set out in ss 271BZA(7), (8). They include: the giving of all of the child witness's evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and, that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to give evidence at the hearing; or the child witness is aged 12 or over, the child witness expresses a wish to give evidence at the hearing, and it would be in the child witness's best interests to give evidence at the hearing.

Part 4

The case for pre-recorded evidence

4.1 Introduction

4.1.1 **Part 4** provides a chronological account of reports and reviews that have examined the operation of pre-recorded evidence and special hearings schemes in Australia and elsewhere. Starting with the 1991 Pigot Report in the United Kingdom, it outlines previous reviews that have set out the rationale for the use of pre-recorded evidence schemes as well as considering concerns about the use (and expansion of) the schemes. It also considers research evidence conducted to address possible concerns about the use of pre-recorded evidence in criminal trials. In this way, **Part 4** outlines the case for pre-recorded evidence by considering previous research and inquiries that can generally be characterised as supporting the use of pre-recorded evidence and, which have served to reinforce and confirm the development of law and policy towards the increasing use of pre-recorded evidence.

4.1.2 As outlined in this Part and discussed at [1.1.3], pre-recorded evidence schemes arose out of concerns about the operation of the usual adversarial trial process for child witnesses, and other witnesses who had experienced alleged sexual assault. The concerns that pre-recorded evidence schemes were intended to address can be broadly categorised into two broad (and interrelated) categories: (1) the welfare of the witness; and (2) the quality of the evidence that was heard at the trial.

4.1.3 However, while there has been strong support for pre-recorded evidence, which has underpinned the adoption and expansion of pre-recorded evidence schemes, this has certainly not been universal nor without reservations. As discussed in this Part, much of the early arguments against pre-recorded evidence were those made by or on behalf of the defence perspective, relating to the perceived unfairness of pre-recorded evidence on the defendant and the defence case (i.e. the fact that the cross-examination of a witness at a pre-trial special hearing necessarily results in the early disclosure of the defence case, to the detriment of the defendant).[316] There have also long been concerns raised about whether the *potential* benefits of pre-recorded evidence are being realised *in practice*.

[316] See, for example, Scott Corish, 'Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses' (2015) 39(4) *Criminal Law Journal* 187, 187: 'Much has been written … about constructive changes that have been or need to be made to the way in which the evidence of vulnerable witnesses is adduced in court. Very little has been written about the challenges pre-recording presents for the defence, the impact on the adversarial trial process from an accused's point of view or how one might adapt to these changes…'. See also, Cait Hollywood, 'The Sexual Violence Legislation Act 2021: Pre-recorded Cross-examination and the Right to a Fair Trial' (2022) 53 *Victoria University of Wellington Law Review* 281, 283: 'Firstly, pre-recorded cross-examination directly conflicts with defendants' rights to have adequate time and facilities to prepare a defence. This is because disclosure processes are often incomplete and unpredictable, with widespread accounts of disclosure not occurring until close in time to the trial. Secondly, pre-recorded cross-examination cannot be reconciled with the prosecution's burden of proof. By its nature, pre-recording cross-examination requires the defendant to reveal a major portion of its defence before the trial, thereby assisting the prosecution. This impacts on the right to avoid self-incrimination, which is arguably encompassed in the common law right to silence. The adversarial nature of the justice system values a defendant's right to hear the case against them before taking any step in the trial. It is therefore ill-suited to pre-recorded cross-examination.'

4.1.4 However, regardless of these concerns, the general position has been that such concerns are outweighed by the idea that pre-recorded evidence represents a marked step in the right direction towards improving the trial process for witnesses particularly child witnesses and complainants in sexual offence cases. The potential disadvantages of using pre-recorded evidence, while acknowledged, have been taken to be outweighed by the benefits of using pre-recorded evidence, for example:

> Obviously, videotapes are not a magic solution to every problem with child witnesses. But they do offer a very greatly improved method of setting up a system under which the evidence of young or highly traumatized children is taken in advance of trial … .[317]

4.1.5 Further, while it has been recognised that there may be factors which limit the full realisation of the potential benefits of pre-recorded evidence in practice, these have not been seen as a limiting factor in the expansion of the schemes from the use of pre-recorded investigative interviews to the use of pre-trial special hearings, as well as an expanded category of eligible witnesses.

4.1.6 The nature and tenor of the *case for* pre-recorded evidence set out in this Part can be compared to the more recent shift in emerging research and attitudes that has accompanied the expansion of the use of pre-recorded evidence. The *emerging case against the widespread use of pre-recorded evidence* (outlined in **Part 5**) represents a heightened focus on pre-recorded evidence that seeks to consider the use and impact of pre-recorded evidence more critically and with greater scrutiny. An understanding of the basis for pre-recorded evidence schemes and concerns that exist in relation to their operation are important context for the evaluation of the Tasmanian scheme in **Part 6**.

4.2 The Pigot Report – UK (1991)

4.2.1 Modern pre-recorded evidence schemes can be traced from the UK model and the now well-known Pigot Report.[318] The Pigot Report and its recommendations are widely accepted as the origins of 'full pre-recording' schemes being introduced in the UK and subsequently in most common law jurisdictions, including Australia.[319]

4.2.2 In 1988, it was proposed that pre-recorded interviews of witnesses conducted by police officers and social workers should be admissible as evidence in criminal proceedings.[320] The basis for this initiative was to improve the experience of child witness in sexual offence cases. However, there was disagreement about the extent to which such a reform would improve the experience for child witnesses and the quality of the evidence given that the child would still need to be cross-examined, would depend on an interview conducted for another purpose (that is, aiding the police and caring agencies).[321] Accordingly, a Home Office advisory group chaired by his Honour Judge Thomas Pigot QC, was established in 1989. This was to address issues in relation to use in a trial of a pre-recorded investigative interview of child witnesses and also (potentially) a wider category of witnesses.

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[317] J R Spencer and R Flin, *The Evidence of Children: The Law and Psychology* (2nd ed, 1993) 200.
[318] Home Office (UK), Pigot Report (n 4).
[319] The Pigot Report is not only accepted as the impetus for the introduction of pre-recorded evidence, it is also now synonymous with the concept of pre-recorded evidence. The use of investigative interviews only is often referred to as a '*half Pigot'* and full pre-recording schemes as a '*full Pigot*'.
[320] This was by way of a proposed *Criminal Justice Act 1988* (UK) being introduced into Parliament.
[321] Home Office (UK), Pigot Report (n 4) ii, 7.

4.2.3 This was a comprehensive inquiry involving meetings, reviewing research evidence, viewing video-recorded interviews, written and oral evidence provided by judges and the legal profession, the police, social workers, paediatricians, psychiatrists, academics and a range of voluntary and professional organisations concerned with the welfare and protection of children.[322] The Inquiry reported a high degree of unanimity in the submissions received. Ultimately, the Pigot Report reported that:

> Almost all of those who submitted evidence to us believed that the existing law is far too restrictive and that some general provision ought now to be made for video-recorded evidence to be admissible, especially in child abuse cases. Their arguments have two main aspects. One may be said to centre on the child's welfare and the other upon the integrity of the evidence. These are related … .[323]

4.2.4 Key findings of the Report addressed the two central elements of: (1) child welfare, and (2) integrity of the evidence.

Child welfare

4.2.5 In the report, the traumatic and harmful nature of the trial process created by giving evidence in court for children was recognised relating to '[t]he confrontation with the accused, the stress and embarrassment of speaking in public especially about sexual matters, the urgent demands of cross-examination, the overwhelming nature of courtroom formalities and the sense of insecurity and uncertainty induced by delay'.[324] Although it was recognised that these concerns arose for many witnesses, the harmful, oppressive and traumatic nature of the trial was increased by children due to having fewer developed intellectual and emotional resources than adults.[325] This was supported by psychiatric opinion, as well as evidence from paediatricians, psychiatrists, social workers and a range of organisations and individuals with professional and voluntary responsibility for child care and the care of victims.[326] Accordingly, it was suggested that 'quite radical changes are now required if the courts are to treat children in a humane and acceptable way'.[327] This involved the identification of the principle that matters involving children should be dealt with as rapidly as possible consistent with the interests of justice and that 'children should give evidence in surroundings and circumstances which do not intimidate or overawe them and there should be the smallest number of people present'.[328]

Integrity of the evidence

4.2.6 The report noted evidence given by experts (practitioners, psychiatrists, social workers and police) that 'if an interview takes place shortly after the child's first allegation or disclosure it will usually provide the freshest account least tainted by subsequent discussions and questioning'.[329] It was also considered that the stress of the trial process itself would undermine the quality of a child's evidence by having 'a deleterious effect on the fullness and accuracy of children's testimony'.[330] This applied to both evidence-in-chief and cross-examination, with the view expressed that 'the quality of evidence which children give on cross-examination will improve where this takes place in informal surroundings as soon as can be practicably arranged. Regardless of the child's welfare we think such changes can only be in the interests of justice'.[331]

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[322] Ibid 8.
[323] Ibid 14.
[324] Ibid 15.
[325] Ibid.
[326] Ibid 15–16.
[327] Ibid 17.
[328] Ibid.
[329] Ibid 18.
[330] Ibid.
[331] Ibid.

Conclusion

4.2.7 In conclusion, the Pigot Report recommended that full pre-recording be available for all children and other vulnerable witnesses.[332] The extension of the Report's findings and recommendations regarding children to 'vulnerable' adult witnesses was justified as a matter of principle: 'there [was] no obvious reason why measures designed to reduce the stress experienced by witnesses and so ensure that the court receives clearer and fuller testimony should be permanently restricted to children'.[333] It was recognised that there may be adult witnesses who would also 'be likely to suffer "an unusual and unreasonable degree of mental stress" if required to give evidence in an open court'[334] and that judges should have a 'substantial discretion in this area, both in determining the eligibility of vulnerable witnesses to testify in this way and in deciding which particular techniques should be allowable in a particular case'.[335]

4.3 Law Reform Commission of Western Australia (1991)

4.3.1 The first Australian jurisdiction to consider the introduction of a pre-recorded evidence scheme was Western Australia. In February 1989, the Law Reform Commission of Western Australia was given a reference to review the law and practice governing the giving of evidence by children and other vulnerable witnesses in legal proceedings. In the Commission's report, published in April 1991, there were three main arguments provided in favour of the admissibility of videotaped statements (pre-recorded investigative interviews):

(1) capturing a fresh account and the best possible evidence for use in a trial;

(2) reducing stress for a child, possibly by reducing the number of interviews; and

(3) encouraging admissions of guilt, so the child would not need to appear in court.[336]

4.3.2 However, it was recognised that concerns existed about the method of conducting the videotaped interview and the resulting quality of the interview.[337] Further, it was noted that 'videotaping of interviews does not, in itself, reduce the number of interviews experienced by the child', and that reduction of interviews is best achieved by closer co-ordination of agency services.[338]

4.3.3 The Commission ultimately made recommendations for full pre-recording to be available to a child witness in proceedings relating to sexual offending or other select offences.[339] The Commission's report also made recommendations regarding legal education, namely continuing legal education for lawyers and judges, including guidelines to assist judicial officers in dealing with children and other vulnerable witnesses.[340]

[332] Ibid 69–70, Recommendations 1–4, 7–11.
[333] Ibid 27.
[334] Ibid 28.
[335] Ibid 31.
[336] Law Reform Commission of Western Australia, *Evidence of Children and other Vulnerable Witnesses* (n 39) 45, 46. See also *The Video Recording of Interviews with Suspected Victims of Child Sexual Abuse: A Discussion Paper on Recommendation 20 of the Child Sexual Abuse Task Force* (1987) (1991) 19, 23.
[337] Law Reform Commission of Western Australia, *Evidence of Children and other Vulnerable Witnesses* (n 39) 48.
[338] Ibid 46.
[339] Ibid 135 (Recommendations 10, 11).
[340] Ibid 144 (Recommendation 24).

4.4 NSW Judicial Commission (1997)

4.4.1 In 1997, consideration was given to the introduction of a pre-recorded evidence scheme in New South Wales.

4.4.2 As with prior reports, the NSW Judicial Commission observed that in relation to a contemporaneous statement that was not 'induced by improper interviewing techniques', there was 'no argument "of logic or fairness" which should prevent acceptance of pre-trial statements recorded on video'.[341] Benefits were said to be an increased reliability of the evidence, a reduction in the likelihood of contamination (integrity of the evidence) and a reduction in trauma for the child.[342]

4.5 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission – *Seen and Heard: Priority for Children in the Legal Process* (1997)

4.5.1 In August 1995, the Commonwealth Attorney-General provided the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission ('the Commissions') with a reference to inquire into and report on matters relating to children and young people in the legal process. The report, published in September 1997, considered the use of pre-recorded investigative interviews and recommended that all jurisdictions permit the video recording of the entire evidence of a child witness prior to trial.[343]

4.5.2 In considering the use of pre-recorded investigative interviews, the Commissions had regard to an evaluation of cases in the UK in which pre-recorded interviews were utilised as the witness' evidence-in-chief.[344] The findings of the evaluation suggested there was no significant difference in jury verdicts between pre-recorded and live evidence-in-chief, but children were much less anxious during the pre-recorded interviews than while giving live evidence at trial.[345] The Commissions canvassed various 'problems' with pre-recorded interviews, including: problems with technology and its use; witnesses not being adequately prepared for in-person cross-examination; where there is a considerable time lapse between the interview and subsequent cross-examination; deciding which interview and how many should be recorded; the manner and procedure for recording; storage and production of tapes and associated privacy issues.[346]

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[341] Patricia Gallagher, Jennifer Hickey and David Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994* (Judicial Commission of New South Wales Monograph Series No 15, 1997) 72 <https://server.judcom.nsw.gov.au/sites/default/files/2024-02/research_monograph_15.pdf>.
[342] Ibid.
[343] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) ('*Seen and Heard*').
[344] Ibid [14.40], citing Andreas Kapardis, Psychology and Law: A Critical Introduction (Cambridge University Press, 1st ed, 1997) 99.
[345] Kapardis (n 344) 99. The evaluation involved 1199 trials involving a child witness between October 1992 and June 1994.
[346] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard* (n 343) [14.42]–[14.43].

4.5.3 While recognising these problems, the Commissions ultimately concluded, 'there are real advantages to the video or audio taping of interviews with children.'[347] The Commissions' support for the use of pre-recorded interviews was qualified as support for 'the continuation of pilot interview taping programs and their evaluation,' explaining that the 'evaluations of these programs should include research on in-court and out-of-court uses for such taped interviews, the means of interviewing children on tape and the maintenance and storage of tapes.'[348] The Commissions ultimately recommended a multidisciplinary working group be established for this purpose, including to evaluate the advantages and disadvantages of various uses of recorded interviews.[349]

4.5.4 The Commissions also considered other ways in which video recording technology was being used to reduce the traumas facing children who must give evidence in court, including full pre-recording, and endorsed the full pre-recording scheme by way of pre-trial special hearings that was operating in WA. The Commissions observed:

> This process has particular advantages for child witnesses, including better controls over the arrangements to prevent the child coming into contact with the accused or family or supporters of the accused and as a means of capturing the child's evidence closer to the event. It can also reduce the stress to a child witness by reducing the number of times he or she may come to court only to be told that the trial has been postponed. The videotape could also be used in any retrials, rather than, or in addition to, having the child reappear to give evidence in the new trial.[350]

4.5.5 The Commissions also noted that feedback from legal practitioners, including those in jurisdictions without full pre-recording, 'were particularly interested in this system, seeing it as the future of children's evidence.'[351]

4.5.6 The Commissions ultimately recommended that pre-trial hearings for these purposes should be conducted whenever the interests of justice require, but particularly when the child may be at risk of prejudice or trauma due to lengthy delays.[352]

4.6 Victorian Law Reform Commission – *Sexual Offences* (2004)

4.6.1 In line with increased concern about the impact of a trial process, in 2001, the Victorian Attorney-General gave the Victorian Law Reform Commission (VLRC) a reference to review current legislation relating to sexual offences to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases. As part of the review, the VLRC considered the existing pre-recorded investigative interview scheme in Victoria and proposed extending the use of pre-recorded evidence to include full pre-recording for child witnesses (that is, the use of special pre-trial hearings).

4.6.2 In relation to pre-recorded investigative interviews, the VLRC noted that it received relatively few submissions which specifically addressed the existing process and whether it should be retained.[353] However, the VLRC referred to an evaluation of the electronic recording of children's evidence, which found that 'it improved the quality and completeness of the statement.'[354] The VLRC also identified other advantages including the recording of the child's appearance, demeanour, gestures and emotional

[347] Ibid [14.44].
[348] Ibid.
[349] Ibid [14.44], Recommendation 93.
[350] Ibid [14.46].
[351] Ibid [14.47].
[352] Ibid [14.47], Recommendation 94.
[353] Victorian Law Reform Commission, *Sexual Offences* (Final Report, 2004) 273 ('*Sexual Offences*').
[354] Ibid, citing Diana McConachy (Youth and Child Protection Team, NSW Police), *Evaluation of the Electronic Recording of Children's Evidence* (Department of Community Services NSW, 2002) ii.

state close in time to the initial report.[355] It concluded that the practice of pre-recording interviews should continue, and clarified that the recommendation made for full pre-recording by way of pre-trial hearings did not make pre-recorded interviews redundant.[356]

4.6.3 In the report, the VLRC recommended the introduction of a presumption in favour of full pre-recording for all child witnesses.[357] It reported that most submissions supported this reform,[358] and identified eight advantages it considered to be significant. These related both to lessening the trauma of the trial and improving the integrity of the evidence by introducing full pre-recording as a way to reduce the time gap between the commencement of proceedings and the child giving evidence. These advantages were as follows:

- Ongoing delay meant that the criminal process had not been completed and so it was difficult for a child to begin to recover from the events.[359]
- Producing better quality evidence because the evidence was provided when it was fresher in the mind of the witness and given in a less stressful environment.[360]
- A less intimidating procedure because the child would not be required to wait to give evidence, the proceedings could be more informal and the child would also not need to give evidence in the same room as the accused, the judge and lawyers if the evidence was given by CCTV.[361]
- It would reduce the discretion of the prosecution to decide whether or not to use the tapes.[362]
- The pre-recorded evidence could be played at the trial, and the child would not normally need to attend.[363]
- Once pre-recording is completed, the child is usually not required to give evidence again, and so allows for 'a relatively early sense of at least partial 'closure' and the chance to move on to counselling and eventually, healing'.[364]
- If there is an appeal and re-trial, the recording can be played at the subsequent trial, and so the child does not need to give evidence again.[365]
- Objections to any aspects of the evidence could be argued before the judge after the witness has finished giving their evidence as it is not heard immediately by a jury. This would mean that 'child complainants would be interrupted less than in conventional testimony and permitted to tell their stories in a more direct manner'.[366]

[355] Victorian Law Reform Commission, *Sexual Offences* (n 353) 273.
[356] Ibid 273, Recommendations 113–115.
[357] Ibid 286, Recommendations 123–129.
[358] Ibid 278.
[359] Ibid 280–1.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid.

4.6.4 Full pre-recording was opposed by the Victorian Bar and the Criminal Bar Association on the basis that it would be unlikely to reduce the trauma of the trial process for children who were distressed by giving evidence, and that the evidence was likely to have less impact on the jury as 'taped evidence is not as illuminating for a jury as evidence given "live". The demeanour and body language of a witness are significant, and the jury is likely to perform less well in its function of assessing the witness'.[367] It was also suggested that if a judge was available to hear a special hearing, it was better to have an early trial.[368] Further, concerns were raised that there were disadvantages for the defence as pre-recording cross-examination might occur when the defence was not adequately prepared, and at 'trial evidence may be given that is inconsistent with evidence given previously by a child complainant and the child may not have been cross-examined by the defence on this issue'.[369]

4.6.5 Other possible problems identified by the VLRC included resourcing implications and safeguarding the accused's right to test the evidence.[370] While it was acknowledged that there would be an increase in judicial and lawyer workloads, the benefits for child complainant and also the 'likelihood that such changes will contribute to an increase in the number of people who are willing to report child sexual assault to the police because they have more confidence that the child will be treated appropriately' were said to outweigh these.[371] It was also thought that there may be some cost savings in retrials (following successful appeals) if the child was not required to give evidence again.[372]

4.6.6 In recommending a full pre-recording scheme, the VLRC also looked to other jurisdictions in which full pre-recording was already operating. The VLRC acknowledged the existing pre-recorded evidence scheme in WA, including its endorsement by the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission in their 1997 report.[373] Further, the VLRC met with legal practitioners in WA who confirmed that, whilst practitioners were initially concerned that the process would be unfair to the accused, the process was now well accepted, though some concerns were still expressed about delays occurring before the pre-recording was conducted.[374] The VLRC also referred to a study of the experiences of child complainants in WA, NSW and Queensland as evidence that child complainants in WA find the criminal justice process less stressful than complainants in NSW and Queensland, where pre-recording was not used.[375]

4.7 Australian Institute of Criminology (2005)

4.7.1 In New South Wales, concerns about the trauma of the trial process for sexual assault complainants and low rates of reporting and conviction for sexual assault matters provided the impetus for research to examine an evidence base for concerns that existed about juror perceptions of pre-recorded evidence or evidence provide remotely.[376] In January 2005, the Australian Institute of Criminology was commissioned by the New South Wales Attorney General's Department to conduct research investigating whether adult sexual assault complainant testimony delivered via pre-recorded

[367] Ibid 279.
[368] Ibid.
[369] Ibid. This relates to the rule in *Browne v* Dunn, which 'requires a person who wishes to introduce evidence inconsistent with the evidence given by a witness for the other side, to give the witness an opportunity to comment during cross-examination on the evidence that has been led': at 279.
[370] Victorian Law Reform Commission, *Sexual Offences* (n 353) 284.
[371] Ibid.
[372] Ibid.
[373] Ibid 273, citing Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard* (n 343).
[374] Victorian Law Reform Commission, *Sexual Offences* (n 353) 282.
[375] Ibid, citing Christine Eastwood and Wendy Patton, *The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System* (Report to the Criminology Research Council, Canberra, 2002) 2. The study involved interviews with 63 child complainants aged between 8 and 17 years, 39 parents/guardians and 28 lawyers variously from WA, NSW and Queensland. It is to be noted, as was noted by the VLRC, that only 9 children interviewed were from NSW and 18 from Queensland.
[376] Natalie Taylor and Jacqueline Joudo, *The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study* (Australian Institute of Criminology: Research and Public Policy Series No 68, 2005) 2–4.

videotape or closed-circuit television (CCTV) impacts on jury deliberations and perceptions differently from when such evidence is presented face-to-face in the courtroom.[377]

4.7.2 The research comprised mock sexual assault jury trials in which 210 'jurors' participated in 18 'juries'. The trials involved three different modes of testimony — face-to-face, live CCTV or pre-recorded video — as well as two styles of victim presentation: neutral or emotional. The jurors completed individual questionnaires both after watching the trial but before deliberating and again after deliberation. The jurors were asked about their perceptions of complainant credibility, empathy with the complainant, overall impression of the complainant, empathy with the accused, overall impression of the accused and personal beliefs about guilt of the accused. A 'key outcome' from the study was that 'the mode of testimony did not have a meaningful impact on the jury outcomes.'[378] The findings did not suggest that mode of presentation *per se* impacts detrimentally in any meaningful or consistent way on jury outcomes for either the complainant or the accused.[379]

4.7.3 The report also addressed in some detail the prior existing research on the way testimony is presented in the courtroom. The report considered the accumulating body of research, primarily conducted overseas, which had investigated the impact of CCTV and/or video recorded evidence on perceptions of jurors compared with face-to-face testimony. The report explains that while some experimental studies had found mode of presentation to impact on perceptions — sometimes guilt, sometimes credibility — others have found no differences. Further, qualitative interviews with child victims, and defence and prosecution counsel suggested that, anecdotally, there is not strong support for favouring face-to-face testimony over CCTV or video evidence.[380]

4.7.4 The report then supported the use of pre-recorded evidence given that its findings and the other research it considered suggested that the way in which evidence was given did not influence juror decisions. However, it was noted that the technology used in the study 'meant that the image of the complainant was large, clearly visible and clearly audible to jurors who were seated about six metres from the screen', and that it was not possible to say how lesser quality audio/visual technology would impact on jury perceptions.[381] In this context, the report stressed the importance of jurors being able to see and hear the complainant clearly if audio-visual technology was to be used.[382]

4.7.5 It was also noted that the study was not conducted with a live jury and so it may not apply to the response of all jurors in an actual trial. However, it was stated that the 'the value of this study was in its ability to hold mode of presentation constant across jurors while controlling as many other sources of variance as possible to try to isolate an effect if it existed under such conditions'.[383] It 'broke new ground'[384] in its attempt to investigate juror responses to the way in which evidence was given in sexual assault trials and was a 'strong attempt was made to try to replicate, … a real court case in a real court setting with members of the public who are representative of actual jurors in order to be able to generalise the findings to actual juries in adult sexual assault cases'.[385]

[377] Ibid 2.
[378] Ibid iii. The report also found that there was not any consistent impact on the jurors' perceptions or decisions from the victim's presentation style.
[379] Ibid 66.
[380] Taylor and Joudo (n 376) 12, citing Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony' (1999) 22(3–4) *International Journal of Law and Psychiatry* 241, 249, which reviewed the impact of televised testimony, concluding that: 'Studies based on laboratory research and simulated trials provides little support for those who fear miscarriages of justice as a result of the availability of CCTV … Juries may show a preference for live witnesses but do not appear to allow that preference to influence their decision-making'. See also Taylor and Joudo (n 376) Tables 3.1, 3.2.
[381] Taylor and Joudo (n 376) xii–xiii.
[382] Ibid 68.
[383] Ibid.
[384] Yvette Tinsley and Elisabeth McDonald, 'Use of Alternative Ways of Giving Evidence By Vulnerable Witnesses: Current Proposals, Issues and Challenges' (2011) 42 *Victorian University of Wellington Law Review* 705, 736–8.
[385] Taylor and Joudo (n 376) 68–9.

4.8 The Stern Review – UK (2010)

4.8.1 Ongoing concern about the operation of the traditional criminal justice for sexual assault complainants led in 2009 to Baroness Vivien Stern commencing an independent review into how rape complainants are handled by public authorities in England and Wales. The 'Stern Review' was published in March 2010.

4.8.2 As part of the matters addressed, the review considered pre-recorded investigative interviews and, while it supported pre-recorded interviews in principle, it referred to a number of problems in practice.[386] It highlighted concerns about the impact on the 'smooth running of trials'[387] and the distress caused to some victims, concluding that 'currently this is a big hindrance to effective trials and action needs to be taken'.[388] Other concerns related to the negative impact caused by the technological quality of the pre-recordings, the way in which the interview was conducted and the excessive length of some interviews.[389] Whilst the 'concept' of pre-recorded interviews was 'warmly supported' by the judges who were consulted in the course of the review, there were 'doubts about practice and the need to use the recording method so widely'.[390] The review reported that many judges believe that live evidence has more impact on juries and it was suggested that cases might be prosecuted more successfully if some complainants could give their evidence live with the protection of screens.[391] The review highlighted the need for 'a solution that preserves the benefits for the victim and is more effective in the courtroom'.[392]

4.9 Australian Law Reform Commission – *Family Violence Report* (2010)

4.9.1 In July 2009, the Commonwealth Attorney-General tasked the Australian Law Reform Commission (ALRC) with conducting an inquiry together with the New South Wales Law Reform Commission (NSWLRC) into specified family violence laws and legal frameworks to improve the safety of women and their children. The ALRC and the NSWLRC ('the Commissions') published a final report in October 2010.

4.9.2 The Commissions' report addressed pre-recorded evidence in the context of their focus on reforming pre-trial processes in sexual offence proceedings to reduce the trauma caused to complainants of sexual assault. From the outset, the Commissions identified the use of pre-recorded evidence as important because it may lessen or eliminate the need for complainants to give evidence in person at trial.[393] In the Commissions' Consultation Paper, it was proposed that federal, state and territory legislation should extend the potential use of pre-recorded evidence to all adult complainants of sexual assault and for appropriate education and training to encourage such use.[394] The Commissions reported that stakeholders generally expressed support for this proposal.[395] The advantages of the use of pre-recorded evidence (as with earlier reviews) related to the benefits to the complainants by 'minimising system abuse of witnesses'[396] and improving the quality of the evidence.[397] Other advantages related to

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[386] Vivien Stern, *The Stern Review* (Home Office, 2010) 19 ('Stern Review').
[387] Ibid 19, 69–70.
[388] Ibid.
[389] Ibid.
[390] Ibid 90.
[391] Ibid.
[392] Ibid 19, 69–70.
[393] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Final Report No 114, NSLRC Report 128, 2010) 1225 ('*Family Violence*').
[394] Ibid 1229.
[395] Ibid.
[396] Ibid 1228.
[397] Ibid.

efficiency in the court process by 'facilitating pre-trial decisions by the prosecution and the defence' and 'helping with the scheduling and conduct of the trial'.[398]

4.9.3 Nevertheless, it was recognised that there were drawback and potential issues with the use of pre-recorded evidence. Summarising the views expressed in earlier reviews, the Commission identified fairness to the defence in requiring cross-examination prior to the trial, issues with technology and the potential negative impact on jury decision making in contrast to 'live' testimony as possible drawbacks.[399] The Commissions reported consultation feedback which was critical of the proposed increased use of pre-recorded evidence. Submissions highlighted the need to retain flexibility in the use of pre-recorded evidence[400] and, notably, the NSW Director of Public Prosecutions opposed the routine use of pre-recorded evidence.[401] The Commissions were told by stakeholders of a range of other concerns about the use (or over-use) of pre-recorded evidence, including:

- pre-recorded interviews may, in practice, have limited value as evidence-in-chief, and the complainant may still be required to give evidence at the trial;
- where evidence is recorded at a pre-trial hearing and then replayed at the trial, the use of court resources is duplicated; and
- there may be problems where there is lack of continuity in legal representatives or judicial officers.[402]

The Commission did not receive any stakeholder feedback which raised any particular disadvantage of pre-recorded evidence for defendants, '[i]f anything, it was considered [by stakeholders] that pre-recorded evidence of a victim would generally make less of an impression on a jury than in court testimony'.[403] Other concerns were said to relate to issues relating to the nature and quality of the interview (dependent on the skills of the interviewer) and that a complainant may still be required to 'undergo multiple interviews to give a full account of the complaint and may suffer more stress and trauma where cross-examination is not preceded by giving evidence-in-chief in court'.[404]

4.9.4 Other possible disadvantages include that the quality of the evidence is overly dependent on the skills of the interviewer, the evidence may be insufficiently tested by cross-examination, the witness may have to undergo multiple interviews to give a full account of the complaint and may suffer more stress and trauma where cross-examination is not preceded by giving evidence-in-chief in court. In this context, Women's Legal Services NSW stated that complainants should be advised of any possible disadvantages (including any possible effect of tendering pre-recorded material on the persuasiveness of the evidence, the experience of being cross-examined 'cold' without giving evidence-in-chief, potential delays etc) prior to the tendering of the evidence-in-chief. It was considered important that the complainant was advised they have a choice and could make an informed decision.[405]

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[398] Ibid.
[399] Ibid.
[400] Ibid 1230. It was submitted to the Commissions that legislation should allow for the use of pre-recorded evidence, while not making it the only possible option (i.e. a 14 year old complainant who expresses a strong desire to give evidence in court in the accused's presence [26.175]; and while one advantage of pre-recorded investigative interviews is to address forensic disadvantage caused by delay between the making of the complainant and the trial, it may not be as worthwhile to pre-record evidence where trials are listed expeditiously [26.176]).
[401] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence* (n 393) 1229: The NSW Director of Public Prosecutions was quoted as stating: 'Given that trials in NSW do proceed relatively expeditiously and any wholesale change to a system of pre-recording would, by adding an extra step, delay the final outcome, we are not in support of this change … in some cases, it would be desirable for the prosecution to have the option of applying to the court (possibly at committal stage) to pre-record the evidence — including in matters where it is known there is likely to be a delay in proceeding to trial.'
[402] Ibid 1231.
[403] Ibid.
[404] Ibid 1228.
[405] Ibid 1228–9.

4.9.5 The Commissions noted that 'most states and territories have enacted regimes for the comprehensive pre-recording of evidence for child victims of sexual assault (and those who are cognitively or intellectually impaired)'.[406] Although it was recognised that there was limited evidence about the extent to which 'pre-recording is used or its effects on the experience of complainants or outcomes of trials'[407] ultimately it was recommended that pre-recorded evidence schemes be extended to adult complainants as well for sexual offence proceedings.[408]

4.9.6 The Commissions clarified, however, that the use of pre-recorded evidence should not be inflexible and should be used with discretion. It was recognised that there may be reasons relating to the nature and quality of pre-recorded evidence that meant that the prosecution formed the view that it was better for the witness to give evidence in person at the trial itself.[409] While the Commissions observed that the wishes of the complainant should be taken into account by the court and prosecutors as part of this process, greater emphasis was placed on the role of the prosecutor in making decisions about the way in which a case was run at trial.[410] The Commissions also acknowledged the concerns raised about the interview techniques and the technical quality of the recordings in earlier reports and in submissions,[411] and recommended that legislation permitting wider use of pre-recorded evidence be supported by investment in up-to-date technology and a comprehensive training program for interviewers and, further, that all participants in the criminal justice system should receive training in relation to the new provisions, including the rationale for them.[412] In this way, the Commission recognised that realising the benefits of the scheme was dependent on the extent to which pre-recorded evidence was fit for purpose.

4.10 *Sexual Assault Reform Strategy: Final Evaluation Report* – Victoria (2011)

4.10.1 The Sexual Assault Reform Strategy (SARS) was developed to address the concerns raised by the VLRC's 2004 report on Sexual Offences.[413] The evaluation of the SARS commenced in August 2008 and a final report was prepared for the Department of Justice in January 2011.[414] The report considered legislative amendments introduced in Victoria, which underpin SARS, including those relating to pre-recording evidence. The evaluation was informed by interviews and focus groups with key stakeholders.[415]

4.10.2 Based on complainant feedback, the report describes the complainant's role in making a pre-recorded interview as 'a fairly straight-forward experience'.[416] Police officers were also reported to speak positively about pre-recorded interviews.[417] However, prosecutors and defence counsel were reported to be critical of pre-recorded interviews. Specific matters raised by prosecutors included: the dual nature of pre-recorded interviews as both investigatory and evidentiary in purpose; the fact that recorded interviews may not present the evidence in the most useful or logical way; and the fact that

[406] Ibid 1231. See also Recommendations 26–6, 26–7, 26–8: at 1233.
[407] Ibid. See also Recommendations 26–6, 26–7 and 26–8: at 1233.
[408] Ibid. See also Recommendations 26–6, 26–7 and 26–8: at 1233.
[409] Ibid 1232.
[410] Ibid.
[411] Ibid, citing M Powell and R Wright, 'Professionals' Perceptions of Electronically Recorded Interviews with Vulnerable Witnesses' (2009) 21 *Current Issues in Criminal Justice* 205, 209–13. It is to be noted, as it was by the Commissions, the study found that, 'given the numerous benefits of the VATE [video and audio taping of evidence] process', several stakeholders proposed that it should be extended to a wider range of witnesses and to all sex offence cases: at 208.
[412] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence* (n 393) 1232.
[413] Victorian Law Reform Commission, *Sexual Offences* (n 353). The VLRC's 2004 report made substantive recommendations regarding pre-recorded evidence in Victoria: see [4.6] above.
[414] Success Works Pty Ltd, *Sexual Assault Reform Strategy: Final Evaluation Report* (Prepared for Department of Justice, January 2011) <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1293991>.
[415] Ibid. See ch 3 regarding the evaluation methodology and specifically 18–19 regarding qualitative data collection.
[416] Ibid 57.
[417] Ibid 58.

the editing of recorded interviews for court may leave the recording as a disjointed and inadequate representation of the case. Matters raised by defence counsel included the skill of interviews and inadequate technology used by police and difficulties viewing the recordings in the court setting.[418] The report stated that several interviewees (including police and other stakeholders) favoured the wider use of pre-recorded interviews with adults.[419]

4.10.3 Concerns were also raised about the negative impact on the court process created by using pre-trial special hearings. A feature of the legislative scheme required special hearings to be held within three months of committal with an extension of time possible in 'exceptional circumstances'. The report states that qualitative evidence from complainant and other stakeholder interviews conducted as part of the evaluation suggested that special hearings and the timelines that apply to such matters have reduced the waiting time for children to give evidence.[420] However, while the legislative timeframe was reported to have been 'achieved wherever possible', feedback from judges was that the requirement to only grant an extension of time for a special hearing in exceptional circumstances has required judges to 'push' the definition of 'exceptional circumstances', which none of them were comfortable with. Ultimately, the special hearing scheme was experiencing 'difficulties with meeting required timelines'.[421]

4.10.4 The report also quoted feedback from judges regarding the 'significant drain' that special hearings had on judges and counsel:

> Judges and counsel not only need to be present during the taping of the Special Hearing but then need to sit through the same time period again as the tape is shown to the jury. In addition, there is the time needed to edit the tapes. Judges noted that editing in itself is a time-consuming task that takes several days for both the OPP to edit the tape and the defence to review the tape, which not only increases their time involved in the trial but also adds to the time delay between the Special Hearing and the trial.[422]

Feedback from judges also reported difficulties regarding the listing of special hearings. Despite the case management initiative of a Sexual Offences List, difficulties arose when a 'list judge' was responsible for the pre-trial preparation of a matter only to hand the matter over to a trial judge just before the trial or special hearing. It was reported that this could lead to inconsistencies in terms of expectations about the trial between the list judge and the trial judge causing pre-trial issues being re-opened and resulting in delays to a special hearing or trial.[423]

4.10.5 As with earlier reviews, the report also noted that there were concerns about the impact of pre-recorded evidence on the jury. The views of some legal practitioners (both prosecution and defence) were that while it might be better for the witness, the use of pre-recorded evidence can reduce the impact of the evidence for the jury.[424] In particular it was commented that judges and counsel can behave differently in the absence of a jury and that this also impacted on the 'flavour' of the evidence as well as on the protection and care of the witness giving evidence.[425]

4.10.6 Ultimately, the report concluded that the implementation and operation of the pre-recorded evidence scheme, along with other SARS recommendations, were, figuratively speaking, 'a journey begun, not a journey ended and now is not the time to 'take the foot off the accelerator'.[426]

[418] Ibid.
[419] Ibid 59.
[420] Ibid 200.
[421] Ibid 215–16.
[422] Ibid 107.
[423] Ibid 106.
[424] Ibid 107.
[425] Ibid.
[426] Ibid i.

4.11 Law Commission (*Te Aka Matua o te Ture*) – NZ (2015, 2019)

Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes (2015)

4.11.1 Concerns about the way sexual violence cases are handled in an adversarial criminal justice system was a fundamental issue considered in the Law Commission's 2010 reference to undertake a high-level review of criminal trial processes, and to consider whether the essentially adversarial framework within which those processes operate should be modified or fundamentally changed. At this time, pre-recorded interviews (called EVI's) could be used for complainants' evidence-in-chief and the Commission considered the use of the pre-recorded investigative interviews. The Commission also considered the use of the legislative provision that allowed for the pre-recording of cross-examination. While this was technically available as an option, it was rarely used in practice following the decision of the Court of Appeal in the case of *M v R*,[427] where a particularly conservative approach to the use of pre-recorded cross-examination was adopted.[428]

4.11.2 In December 2015, the Commission released its report, *Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*,[429] in which the Commission recommended expanding the use of pre-recorded interviews to include all complainants in sexual violence cases.[430] Further, the Commission recommended that complainants in sexual violence cases be able to pre-record their cross-examination evidence in a hearing prior to the trial, unless a judge makes an order to the contrary.[431] The Commission also recommended that to give operational effect to these recommendations, the Ministry of Justice should be responsible for issuing up-to-date memoranda outlining operational processes to be followed where cross-examination is to be done in a pre-recorded hearing before trial.[432] It was recognised that it was important to provide full disclosure to the defence before pre-recording cross-examination, so that the defence was able to be adequately prepared for cross-examination. This issue was seen to be a problem requiring a practical solution and not an impediment to the expansion of the scheme.[433]

4.11.3 In relation to pre-recorded interviews, the Commission found that there was a lack of consistency in their use between different regions in New Zealand.[434] The Commission considered that there were 'strong argument in favour of more consistently using the EVI as the evidence-in-chief of a complainant in sexual violence cases' on the basis that it would 'minimise stress on witnesses' and 'help ensure that good quality evidence [was] out before the court'.[435]

4.11.4 Concerns were also expressed about the lack of witness involvement/agency in the decision-making process relating to giving evidence by alternative means. While it was acknowledged that not all complainants in sexual violence cases will necessarily want or need an alternative mode of giving

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[427] [2011] NZCA 303.

[428] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report No 136, 2015) [4.58] ('*The Justice Response to Victims of Sexual Violence*').

[429] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428).

[430] Ibid [4.53], Recommendation 3.

[431] Ibid [4.79], Recommendation 5. Per recommendation 6, reasons for a judge making such an order should include those that pertain to the fair trial rights of defendants and circumstances where it would be impractical or excessively costly to undertake cross-examination in a pre-recorded hearing before trial.

[432] Ibid [4.80], Recommendation 7. Note that this recommendation simply endorsed the continuation of a pre-existing practice. The Commission, earlier in its report, had observed that previously held pre-trial special hearings were being conducted according to memoranda developed by the Ministry of Justice, which outlined operational processes for use of pre-recorded cross-examination evidence. This includes, for example, the procedure whereby the witness views any pre-recorded interview the day before the hearing: Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428) [4.61], citing Emma Davies et al, 'Prerecording children's entire testimony' (2011) *New Zealand Law Journal* 335, 335.

[433] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428) [4.69]–[4.71].

[434] Ibid [3.54], [4.39].

[435] Ibid [4.69]–[4.71].

evidence,[436] it was found that complainants generally did not know of their ability to request to give evidence by alternative means.[437] The Commission referred to a study of sexual violence complainants commissioned by the Ministry for Women, in which only two out of 14 research participants said they had been informed of the options regarding mode of evidence.[438] The Commission further drew attention to published statements by a Senior Prosecutor which indicated that, in their experience, sexual violence complainants are either casually consulted about mode of evidence or are not consulted at all.[439] Accordingly, the Commission emphasised that prosecutors will need to consult with complainants on modes of evidence, noting, '[t]hough a complainant may be entitled to give evidence in one of many different ways, such an entitlement is worth little if the complainant does not know that it exists.'[440]

4.11.5 In relation to pre-recorded cross-examination, the Commission set out the potential benefits and drawbacks of such as scheme. Potential benefits related to a reduction in stress and anxiety for complainants and also the possibility of providing a witness with more breaks. There was also the benefit of providing a greater protection for the integrity of evidence, if there was a reduction in the time between the event giving rise to the charge and the cross-examination, by having cross-examination take place sooner than if it occurred at the trial.[441] A further benefit was to provide for 'judges to more robustly control questioning in the knowledge that interventions could be edited out'.[442]

4.11.6 In its report, the Commission also referred to a 2011 evaluation of pre-recorded examination which considered nine cases involving the pre-recorded evidence of child witnesses (pre-dating *M v R*).[443] Interviews were conducted with defence counsel, prosecutors and victim advisors. The participants were asked about their perceptions of the advantages and disadvantages of pre-recorded cross-examination, with the overall conclusion being that pre-recorded hearings were making a positive contribution to the justice system. One prosecutor interviewed as part of the study commented:

> I don't see that there is any drama in connection with the innovation. It's just another step to ensure that the best evidence is put before the court. And there is provision to permit both sides to recall the witness if necessary.[444]

4.11.7 The Commission reported that many stakeholders were supportive of the greater use of pre-recorded cross-examination, including the collated views of 20 District Court Judges. The stakeholders who remained in opposition to pre-recorded cross-examination, did so on the basis of disclosure related issues.[445]

4.11.8 The Commission ultimately concluded that while pre-recorded cross-examination would not be suitable for all cases, it 'could be of benefit to many complainant witnesses in cases involving sexual violence, as a means of shielding complainants from delay-related harm and with the concomitant benefit of shielding the evidence itself against deterioration by the passage of time'.[446] The costs associated with this process were thought to be offset by a reduction in time that the trial itself would take (given that cross-examination had already taken place).[447]

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[436] Ibid [4.54].
[437] Ibid [4.43].
[438] Ibid.
[439] Ibid, citing Jeremy Finn, Elisabeth McDonald and Yvette Tinsley, 'The Potential Impact of other proposed reforms on the processes in sexual violence cases' in Elisabeth McDonald and Yvette Tinsely (eds), *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Te Herenga Waka University Press, 2011) 105, 116.
[440] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428). [4.55], Recommendation 4.
[441] Ibid [4.69]–[4.71].
[442] Ibid.
[443] Ibid [4.62], citing Emma Davies and Kirsten Hanna 'Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences in nine cases' (2013) 46 *Australian & New Zealand Journal of Criminology* 239, 304.
[444] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428) [4.62], citing Davies and Hanna (n 443) 304.
[445] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Justice Response to Victims of Sexual Violence* (n 428) [4.72]–[4.75].
[446] Ibid [4.76]–[4.78].
[447] Ibid.

The Second Review of the Evidence Act 2006 (2019)

4.11.9 In February 2019, the Commission released its report following its second operational review of the *Evidence Act 2006*, which gave further consideration to the expansion of the pre-recorded evidence scheme for family violence complainants, other witnesses in sexual and family violence cases and/or vulnerable witnesses generally. The Commission adopted the view that:

> greater use of pre-recorded evidence could have benefits for many of these witnesses but that any legislative reforms should be directed at the highest need witnesses, namely complainants in sexual and family violence cases.[448]

4.11.10 In relation to the use of pre-recorded evidence-in-chief for family violence complainants, the Commission reasoned that any reforms relating to the pre-recorded evidence-in-chief for sexual violence complainants should also be extended to family violence complainants. This was on the basis that they experienced similar issues when giving evidence in court, including the burden of waiting to give evidence and the stress of giving evidence in front of the defendant (who may be their spouse or partner).[449] This position was supported by most stakeholders and all judges with whom the Commission consulted.[450] The Commission further commented, 'if an EVI is available … then regardless of when it was recorded, it seems logical that it should be used wherever possible to minimise the stress on the complainant and to help ensure that good quality evidence is put before the court.'[451]

4.11.11 The Commission further considered whether pre-recorded cross-examination should be available to family violence complainants. Again, the Commission highlighted the similar challenges faced by sexual violence and family violence complainants when giving evidence in court and other similarities between both types of cases: the defendant is known to the complainant; there is a power imbalance between the defendant and the complainant; the violence usually occurs in private and is difficult to corroborate; complainants are at risk of being re-traumatised by the criminal justice process; complainants are likely to require enhanced services and support during the criminal justice process; and complainants may be persuaded or pressured to recant their statement to police.[452] The Commission reported that stakeholders held divided views on this issue. Those who supported greater use of pre-recorded cross-examination generally thought this would assist complainants and the court by facilitating the complainant's best evidence. It was also suggested the benefits of pre-trial resolutions (including time and cost savings) would outweigh the costs of pre-recording cross-examination. Those stakeholders who were opposed were concerned about adding to existing delays as well as disclosure issues. All of the judges consulted by the Commission supported the greater use of pre-recorded evidence, although some judges recommending an incremental approach to any changes.[453]

4.11.12 Based on the similar challenges faced by sexual violence complainants and family violence complainants, the Commission concluded that there are 'good policy reasons' why family violence complainants should be entitled to pre-recorded cross-examination. Benefits would 'include minimising the stress complainants experience by participating in the criminal justice process, promoting their recovery and facilitating their best evidence'.[454] Based on the experience in other jurisdictions, it was also noted that there may be benefits in terms of the administration of justice by allowing the strength of the prosecution and defence cases to be assessed in advance, potentially leading to the withdrawal of (some) charges and/or guilty pleas.[455] The possibility that some witnesses would need to be recalled to give further evidence was not considered a sufficient reason to remove the availability of using pre-recorded cross-examination in appropriate cases.[456] It was recognised that it would not be appropriate

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448 Law Commission of New Zealand (Te Aka Matua o te Ture), *The Second Review of the Evidence Act 2006* (Report No 142, 2019) [9.3] ('*The Second Review of the Evidence Act 2006*').
449 Law Commission of New Zealand (Te Aka Matua o te Ture), *The Second Review of the Evidence Act 2006* (n 448) [9.26].
450 Ibid [9.22].
451 Ibid [9.26]. See also Recommendation 12.
452 Ibid [9.31].
453 Ibid [9.36]–[9.37].
454 Ibid [9.40]–[9.44]. See also Recommendation 13.
455 Ibid.
456 Ibid [9.49].

in all cases, and more likely to have benefits 'for family violence complainants in proceedings that take a long time to resolve, for example, in cases where the violence is more serious and/or there is an extensive history of family violence' rather than in less serious matters heard by a judge alone, and matters where 'an additional hearing to pre-record the complainant's cross-examination may not appreciably reduce the time for complainants waiting to give their evidence and may even prolong resolution'.[457] In addition, if a witness could give most of their evidence before the trial, then the benefits of a pre-recorded evidence scheme would still exist.[458]

4.11.13 The Commission also recognised the importance of witnesses being able to make informed choices about the different ways in which evidence could be given by having the advantages and disadvantages explained, with it being anticipated 'that a prosecutor would inform the complainant if pre-recording their cross-examination may not have any appreciable benefits in the complainant's particular circumstances'.[459]

4.12 *Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)* – Ministry of Justice UK (2016)

4.12.1 In 2016, the Ministry of Justice published a report detailing the findings of a 'process evaluation' of the use of pre-recorded cross-examination in the pilot program operating in UK.[460] The process evaluation involved interviews with both practitioners and witnesses.[461]

The purpose of the process evaluation was to help understand whether the pilot processes worked as intended and to help guide policy decisions on whether and how best to roll out pre-recorded cross-examination more widely after the pilot.[462] The relevant pilot period was between December 2013 and October 2014 and in this period, there were 194 cases that involved full pre-recording and 196 cases that involved pre-recorded evidence-in-chief only.

4.12.2 The evaluation sought to examine the extent to which the pilot program met the aims of full pre-recording: (1) for the cross-examination to happen earlier in the process than if cross-examination occurred at trial; and (2) to improve the quality of the evidence provided by the witness.[463]

4.12.3 As part of the review, the report provided a summary of some of the existing research relevant to these aims, including the effectiveness of special measures. Prior research suggested that the special measures did have a positive impact on the experiences of child witnesses as well as other vulnerable witnesses. However, technical issues were noted with problems being experienced with the equipment.[464] In contrast to the overall satisfaction with special measures reported, it was observed that '[t]he effect of video-recorded testimony on juror decision-making, however, is less clear', but that several studies had found that video medium in itself does not affect overall credibility judgements about the witness or case outcome when compared to live testimony in the courtroom.[465]

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[457] Ibid [9.40]–[9.44]. See also Recommendation 13.
[458] Ibid [9.49].
[459] Law Commission of New Zealand (Te Aka Matua o te Ture), *The Second Review of the Evidence Act 2006* (n 448) [9.45]. See also Recommendation 14.
[460] Ministry of Justice UK, *Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28)* (Ministry of Justice Analytical Series, 2016) ('2016 *Process Evaluation (Section 28)*').
[461] Ibid 19.
[462] Ibid 3.
[463] Ibid 13.
[464] Ibid 15–16.
[465] Ibid 15–16.

4.12.4 As part of the evaluation, practitioners reported that the scope of eligibility was generally well-pitched, with some issues raised regarding it being a little too prescriptive, and the need for any further expansion to be incremental and resource managed.[466] Further, there was widespread acknowledgement of issues in the early identification of eligible witnesses,[467] issues amongst investigators regarding the use of pre-recorded evidence (lack of awareness, cross-agency communication and staffing issues),[468] and workload challenges associated with the expedited timetable.[469] All practitioners agreed that pre-recorded cross-examination enabled witnesses to be cross-examined at an earlier point in time (also supported by data collected as part of the evaluation).[470] Most practitioners were of the opinion that the pre-recorded cross-examination process was reducing the level of distress/trauma suffered by witnesses,[471] and the majority of practitioners were of the view that defence counsels' questioning of witnesses in pre-recorded cross-examinations was more witness-friendly (more 'focussed, relevant and pared down') than in conventional trials.[472] However, some practitioners believed that any overall reduction in distress was limited by the fact that the trial remained yet to be completed for some time thereafter.[473] The report summarised salient views of practitioners as follows:

> Most practitioners felt that there were benefits for witnesses from … [full pre-recording], which helped their recall. Practitioners were not able to accurately gauge the extent to which witnesses were able to better recall events though, due to each witness and case being different. They also could not confirm if evidence was of higher quality … but may have thought that this was the case.[474]

4.12.5 There were conflicting views amongst practitioners regarding the impact of pre-recorded evidence on jury decision-making. The report noted the following comments from practitioners:

> … there had been a high number of convictions in … cases [utilising full pre-recording] and, in their view, the decisions to convict in those cases had been 'right'. In addition, some felt that juries nowadays were accustomed to watching evidence on a TV screen.[475]

Reflecting prior research, practitioners raised further issues with the adequacy of remote witness suites and technology.[476]

4.12.6 The interviews conducted with witnesses involved both those who utilised full pre-recording as well as those who utilised pre-recorded evidence-in-chief only.[477] The qualitative data obtained from the witness interviews indicated that full pre-recording may help facilitate an improvement in witnesses' experience of cross-examination, for example, through considerably shorter in-court waiting times and shorter cross-examination.[478] However, witnesses did not have a sense that their evidence was completed 'early' as it was being taken many months or almost a year after their ABE interview.[479]

4.12.7 Some witnesses who pre-recorded their evidence-in-chief reported that when they came to be cross-examined at trial they had to watch their ABE interview. The report commented that this was despite recent guidance and practice for vulnerable witnesses stating that they should not have to watch their ABE interview in the presence of the jury.[480] The report further stated:

> Witnesses in both groups had already seen their ABE recording in the fortnight before being cross-examined. Seeing it again was widely regarded as unpleasant, even traumatic, but helpful in terms of

[466] Ibid 26–7.
[467] Ibid 27.
[468] Ibid 27–8.
[469] Ibid 29.
[470] Ibid 35. See also ch 6.
[471] Ibid 35.
[472] Ibid 35–6.
[473] Ibid 37.
[474] Ibid 68.
[475] Ibid 38.
[476] Ibid 38–40.
[477] Ibid 41.
[478] Ibid 46, 57.
[479] Ibid 42.
[480] Ibid 47, citing Criminal Practice Directions 2015, 18C.3.

> refreshing memories. The fact that many months passed between the ABE and the cross-examination for both … [groups of] witnesses meant the interviews found no difference in how fresh their memories were; both groups considered them patchy.[481]

4.12.8 Half of the witnesses interviewed reported some form of technological hitch with the equipment when being cross-examined (both pre-recorded and/or via CCTV.)[482] This included some witnesses being able to see the accused because of the way in which the screens were set up.[483] The report commented:

> This supports the evidence reported by practitioners of technological issues. Although the issues experienced by witnesses and practitioners were different, they indicate the technological solution would need further consideration if the pilot is to be rolled out.[484]

4.12.9 The witnesses interviewed primarily evaluated their cross-examination experience in relation to how defence counsel dealt with them.[485] The witnesses who utilised full pre-recording expressed views that were more positive than those who had not. Whilst not all witnesses who utilised full pre-recording reported a positive cross-examination experience,[486] only those witnesses who fully pre-recorded their evidence used positive or neutral descriptions to refer to defence counsel[487] and all witnesses who only provided pre-recorded evidence-in-chief and were cross-examined live at trial described defence counsel in negative terms.[488] Further, generally speaking, the positive experiences of defence counsel questioning were clustered among pre-recorded cross-examination cases and the negative experiences amongst those cases that utilised re-recorded evidence-in-chief only.[489] There was no simple association between full pre-recording and the witnesses' reflective view of whether participation in the prosecution process had been 'worth it'.[490]

4.12.10 The evaluation also involved monitoring data of the 390 cases, of which 194 cases involved full pre-recording and 196 cases involved pre-recorded evidence-in-chief only. From the comparison of data regarding outcomes, observations indicated:

> more guilty pleas before trial in cases where there was full pre-recording;[491] and
>
> little difference in the rates of conviction (46% in cases involving pre-recorded evidence-in-chief only and 54% in cases involving full pre-recording).[492]

The report, noted, however, that the numbers of the pilot were small and that the above observations regarding outcomes may not be replicated under any roll out.[493]

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481 Ibid 47.
482 Ibid 48.
483 Ibid 48, 67.
484 Ibid 48.
485 Ibid 49, 57.
486 Ibid 49–50, 57.
487 Ibid 50.
488 Ibid 51–2.
489 Ibid 54, 57.
490 Ibid 55.
491 Ibid 59–60.
492 Ibid 60.
493 Ibid 59.

4.12.11 From the comparison of data regarding timeliness, the cases in which full pre-recording took place were quicker, on average, across all time measures than cases in which only evidence-in-chief was pre-recorded.[494] The report observed that it appeared to take around half the time for pre-recorded cross-examination to occur compared to cross-examination at trial.[495] Regarding the duration of hearings, preliminary hearings were considerably longer in cases involving full pre-recording,[496] and trial durations were slightly shorter.[497]

4.12.12 Whilst the evaluation report did not address the issue of witnesses having to be recalled after full pre-recording, commentators informally recorded the incidence as only one out of hundreds of witnesses, as of 2016.[498]

4.12.13 It is to be noted that long before the publication of the evaluation report, the decision had been made to continue the pilot beyond the initial pilot period in 2014. This was because 'so many benefits emerged'.[499] Indeed, ahead of the publication of the evaluation report, there was widespread support for the expanded roll-out of the pilot.[500] Commentators attributed the following comments to the lead judges in England and Wales:

> 'It would be a gross mis-service to the administration of justice and vulnerable witnesses if s 28 is not rolled out. There are so many advantages if it is operated correctly.'
>
> 'It could be one of the single most beneficial improvements in delivering justice to some of the most vulnerable in society.'
>
> 'There are no downsides.'[501]

4.12.14 Comments which accord with the formal remarks of the Lord Chief Justice regarding the 'very significant benefits'[502] of full pre-recording and the fact that '[t]he judges continue to commend it unanimously because it greatly improves the administration of justice by reducing stress and anxiety for vulnerable witnesses and encourages early guilty pleas'.[503]

4.13 Royal Commission into Institutional Responses to Child Sexual Abuse (2017)

4.13.1 The Royal Commission into Institutional Responses to Child Abuse (the 'Royal Commission') considered the use of pre-recorded evidence as part of its inquiry into and recommendations on criminal justice (as part of its broader consideration of institutional responses to child sexual abuse) and made significant recommendations regarding pre-recorded evidence, which continue to have an impact on the law and policy underpinning the use of pre-recorded evidence throughout Australia. As part of its

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[494] Ibid 61. The time measures included: days between date case sent to Crown Court and cross-examination, days between date sent to Crown Court and trial, days between charge date and cross-examination, and arrest date to cross-examination (whether pre-recorded or at trial).
[495] Ibid 61. A median of 94 days compared to 182 days.
[496] Ibid 62. A median of 23 minutes compared to 6 minutes.
[497] Ibid 62. A median of 680 minutes compared to 725 minutes.
[498] Joyce Plotnikoff and Richard Woolfson, *Worth Waiting for: The benefits of s 28 pre-trial cross-examination* (2016) 8 *Archibold Review* 6, 7. And that witnesses' further evidence was also dealt with by pre-recording.
[499] Ibid 6.
[500] Ibid.
[501] Ibid.
[502] Judiciary of England and Wales, *The Lord Chief Justice's Report 2015* (Judicial Office, 2016) 9 <https://www.judiciary.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf>.
[503] Ibid.

process, the Commission commissioned a research report which addressed pre-recorded evidence in some detail.[504]

4.13.2 Table 4.1 sets out the potential benefits of pre-recorded evidence, as identified in the research report.

Table 4.1: Potential benefits of pre-recorded evidence[505]

Pre-recorded investigative interviews	Pre-recorded cross-examination
Captures an early account nearer the time of offending, with less opportunity for distortion.	Captures a report when the memory is fresher.
Captures a more complete and accurate account.	The child can exit the system earlier.
Conducted in an environment free from distractions and interruptions, enabling a free-flowing narrative account.	Can be scheduled, resulting in fewer delays on the day.
Potential for a less stressful environment.	Potential to reduce anxiety.
Can scrutinise questioning that may have influenced recall.	Inadmissible evidence can be edited out, resulting in fewer mistrials.

4.13.3 In relation to the effectiveness of pre-recorded investigative interviews, the report summarises pre-existing research, which found that 'vulnerable witnesses have reported that its use as evidence-in-chief was beneficial, relieving their stress and anxiety at trial because they were not required to testify in court'.[506] It also found 'strong consensus among legal professionals that using the interview as evidence-in-chief is more reliable than live evidence due to the closer proximity in time to the events at issue'.[507] However, concerns existed about the quality of police interviews, which were sometimes overly long and containing irrelevant details.[508] It also reported on previous studies which showed that while jurors perceived children 'who testify on video as less confident and honest than children who testify live'[509] this 'did not lead to any differences in credibility judgments, which are poor irrespective of how the child gives evidence'.[510]

[504] Martine Powell et al, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (Report for Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016). It was one of several research reports commissioned and considered by the Royal Commission in the course of its inquiry.

[505] Ibid 12.

[506] Ibid 15, citing Eastwood and Patton (n 375).

[507] Martine Powell et al (n 504) 15, citing K Burrows and M Powell, 'Prosecutors' perspectives on using recorded child witness interviews about abuse as evidence-in-chief' (2014) 47 *Australian and New Zealand Journal of* Criminology 374 ('Prosecutors' perspectives on using recorded child witness interviews about abuse as evidence-in-chief'); Davies and Hanna (n 443); N Westera, M Kebbell and B Milne, 'It is better, but does it look better? Prosecutor perceptions of using rape complainant investigative interviews as evidence (2013) *Psychology, Crime and Law* 595.

[508] Martine Powell et al (n 504) 15, citing Burrows and Powell, 'Prosecutors' perspectives on using recorded child witness interviews about abuse as evidence-in-chief' (n 507) 229; K Burrows and M Powell, 'Prosecutors' recommendations for improving child witness statements about sexual abuse' (2014) 24 *Policing and* Society 189; Westera, Kebbell and Milne (n 507).

[509] Martine Powell et al (n 504) 15, citing S Landström and P Granhag, 'In-court versus out-of court testimonies: Children's experiences and adults' assessments (2010) 24 *Applied Cognitive Psychology* 941; S Landström, P Granhag and M Hartwig, 'Witnesses appearing live versus on video: Effects on observers' perception, veracity assessments and memory' (2005) 19 *Applied Cognitive Psychology* 913 ('Witnesses appearing live versus on video: Effects on observers' perception, veracity assessments and memory'); S Landström, P Granhag and M Hartwig, 'Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and memory' (2007) 12 *Legal and Criminological Psychologyy* 333 'Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and memory').

[510] Martine Powell et al (n 504) 15, citing Landström, Granhag and Hartwig, 'Witnesses appearing live versus on video: Effects on observers' perception, veracity assessments and memory' (n 509); Landström, Granhag and Hartwig, 'Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and memory' (n 509).

4.13.4 Regarding studies examining the effectiveness of full recording (whether evidence-in- chief, cross-examination or re-examination), it was noted that this had not been empirically tested.[511]

4.13.5 One of the 17 studies that made up the research report sought to obtain an up to date and in-depth understanding of the views of criminal justice professionals on the taking of evidence from complainants of childhood sexual abuse.[512] The 'overwhelming' concern expressed about current practices was the quality of pre-recorded investigative interviews, particularly the quality of police questioning.[513] Stakeholders further reported that pre-recorded investigative interviews, along with CCTV and the presence of a support person, were the most effective and frequently used alternative measures for evidence-taking.[514] Support for extending the use of pre-recorded investigative interviews for adult complainants was mixed.[515] Predominant themes which arose from stakeholder interviews regarding pre-recorded interviews were:

- the prevalence of poor-quality police interviews;
- the need to adduce more complete, reliable and credible evidence from child complainants;
- certainty about the evidence leading to better case preparation; and
- credibility assessment being more difficult via video.[516]

4.13.6 An 'overriding' theme in stakeholders' responses was that the issues associated with introducing pre-recorded interviews for adults were similar to those of children, but more varied and complex.[517] There was strong support for full pre-recording for children,[518] but varied support for full pre-recording for adult sexual abuse complainants.[519] The predominant themes which arose from stakeholder interviews regarding full pre-recording were:

- overcomes problems faced by the complainant due to trial delays;
- facilitates trial preparation;
- creates unforeseen legal and logistical problems;
- enables increased flexibility of proceeding in the absence of a jury; and
- has a reduced impact compared with live evidence at trial.[520]

Stakeholders also raised trial scheduling as a further matter they perceived to have an impact on a complainant's ability to give evidence, namely, the delay between date of charging and date of trial and complainants having to wait for extended periods at court before giving evidence.[521]

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[511] Martine Powell et al (n 504) 15.
[512] Ibid ch 2: *Professionals' views on how to improve evidence-taking* (study 1).
[513] Ibid 23.
[514] Ibid.
[515] Ibid 25: 36% were in support; 22% were in support, depending on the circumstances; and 42% did not support it.
[516] Ibid.
[517] Ibid 28.
[518] Ibid 30: 74% were in support; 24% were in support, depending on the circumstances; and 3% did not support it.
[519] Ibid 30: 30% were in support; 30% were in support, depending on the circumstances; and 39% did not support it.
[520] Ibid.
[521] Ibid 44.

4.13.7 A second study which surveyed a large number of criminal justice professionals[522] produced findings, including:

> Perceptions regarding the effectiveness of alternate measures differed according to the age of the complainant. On average, while criminal justice professionals perceived children's evidence to be most credible when it was provided via pre-recorded interview, they perceived adults' evidence to be most credible when it was provided in person, without the use of alternate measures.[523]

4.13.8 A third study, conducted reviews of prosecution case files to explore the reasoning or motivating factors of prosecutors' use or non-use of alternate measures, including pre-recorded evidence.[524] The dominant theme was addressing the complainants' needs, which included the complainants' preferences, but also matters such as the complainants' mental health, their personality/temperament and their credibility at trial. Other themes included legislative compliance, reliance on witness support officers and other criminal justice professionals, and the logistics of using alternate measures.[525]

4.13.9 A fourth study examined the quality of a sample of pre-recorded investigative interviews and pre-trial special hearing recordings, including ratings regarding overall quality of the recording, audio clarity, image clarity, camera perspective, screen display conventions, features of the physical setting and impressions of the complainants' evidence.[526] Significantly, ratings of the overall quality of the recordings showed that only 23% of the recordings were of 'high quality'.[527] Specifically, audio clarity was high in 58% of recordings,[528] but image clarity was only rated as high in 39% of recordings.[529]

4.13.10 Overall, the global findings of the research report found that criminal justice professionals support the use of alternative evidence-taking measures, including pre-recorded evidence, and perceive that they improve the process of eliciting complainant evidence without impeding the rights of the accused. However, a range of factors reduced the effectiveness of the measures in achieving the purposes for which they were designed. Five major areas for improvement were identified, namely:

(1) overcoming obstacles to using technology;

(2) aligning police interviews with evidence-based practice guidance;

(3) improving the quality of court questioning;

(4) making alternate measures more available to adults;

(5) reducing delays and streamlining the prosecution process. [530]

The research report concluded that the use of alternative measures was 'a major step forward in improving the trial process for complainants of child sexual abuse'.[531] However, there were two systemic problems that reduced the value of alternative measures and restricted their intended purpose and benefit: (1) obstacles to using technology; and (2) poor-quality questioning, both in police interviews and in court.[532]

[522] Ibid ch 3: *Professionals' experiences with alternate measures* (study 2).
[523] Ibid 81.
[524] Ibid ch 5: *Prosecution case file review* (study 4).
[525] Ibid 96.
[526] Ibid ch 8: *Non-verbal analysis of video and CCTV evidence* (study 7).
[527] Ibid 147: 51% were rated as moderate quality and 26% rated as sub-standard quality.
[528] Ibid 147: 25% were rated as moderate quality, 10% rated as poor quality, and 8% rated as substandard.
[529] Ibid 147: 44% were rated as moderate and 16% as substandard.
[530] Ibid 242.
[531] Ibid 245–6.
[532] Ibid.

4.13.11 The Commission concluded, with respect to pre-recorded interviews, that there were benefits for a complainant (both child witnesses and other vulnerable witnesses, including witnesses with a disability) and the quality of the evidence if the investigative interview was conducted by skilled investigators.[533] However, the Commission observed that there was 'room for improvement',[534] with the continued use of pre-recorded interviews being done in in accordance with a detailed set of principles.[535] Similarly, in relation to full pre-recording, the Commission considered that this was likely to have clear benefits for witnesses by reducing 'the trauma associated with participating in the criminal justice process'.[536] Accordingly, the Commission recommended that full pre-recording should be extended beyond child witnesses in sexual offence matters to include: all complainants in child sexual abuse prosecutions; any other witnesses who are children or vulnerable adults;[537] and any other prosecution witness that the prosecution considers necessary.[538] However, it was stressed that full pre-recording would not be appropriate in all cases, and that it was important for there to be discretion about whether this was to occur or not. The Commission also focused on the importance of the role of victim choice in this process.[539] It was also recommended that ground rules hearings be held not only in cases involving intermediaries but also in all cases where full pre-recording is to occur by way of a pre-trial special hearing.[540] A final recommendation of the Commission targeted the technological issues which plague pre-recorded evidence, with the Commission observing '[t]he full benefits of pre-recorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence'.[541]

4.14 *The Impact of the Use of Pre-recorded Evidence on Juror Decision-making: An Evidence Review – Scotland (2018)*

4.14.1 As previously noted, an issue that has been identified is how pre-recorded evidence is received by the jury, in contrast to evidence given 'live' in a trial. In 2018, the Scottish Government published an 'evidence review' of the impact of the use of pre-recorded evidence on juror decision-making, which considered the existing literature and research, mostly from the 1990s onwards, spanning UK,

[533] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report: Executive Summary and Parts I–II, August 2017) 25 ('Executive Summary and Parts I–II').
[534] Ibid.
[535] Ibid 26, Recommendation 9.
[536] Ibid 78: 'We are satisfied that prerecording the entirety of a witness' evidence is likely to have clear benefits for both the witness and the parties in a case. Where the witness is a child complainant of child sexual abuse, the benefits are even greater in minimising the trauma associated with participating in the criminal justice system.'
[537] Ibid 78, Recommendation 53. The Commission summarised their rationale as follows: 'We consider that eligibility should be extended beyond child complainants to all child witnesses in recognition of the difficulties that may be faced where a number of children in a single family or children in the same school or other social group are required to give evidence. The benefits that a child complainant may gain, for example, from giving their evidence as early as possible in proceedings may be significantly reduced if a sibling who witnessed the abuse was unable to also give their evidence at that earlier stage of proceedings. While most jurisdictions already make these provisions available for children and adults with a cognitive impairment, the most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have disability. It is clear to us, including from what we have heard in public hearings and private sessions, that many survivors of institutional child sexual abuse who are now adults and do not have disability are 'vulnerable', particularly when they are describing their experiences of abuse and particularly in the very unfamiliar and stressful environment of a court. While CCTV and audio-visual links may be available currently, some adult survivors are likely to benefit significantly from … [full pre-recording].'
[538] Ibid 79, Recommendation 53. The Commission summarised their rationale as follows: 'In terms of 'other prosecution witnesses that the prosecution considers necessary', we include this category to cater for circumstances where an adult who is not the complainant, and does not have disability, is required to give evidence, and there may be some benefit to the evidence being given pre-trial. For example, the parents or carers of a child complainant may be required to give evidence in the prosecution. Similar to the example of a complainant's siblings giving evidence used above, some of the advantages to the child of prerecording their evidence and then being able to move on with their life will be missed if the parent cannot give their evidence until the trial itself takes place.'
[539] Ibid 79.
[540] Ibid 79, Recommendation 54.
[541] Ibid 79, Recommendation 55.

Commonwealth and European jurisdictions — almost all of which was experimental (that is, not conducted with involving actual jurors).

4.14.2 The review encompassed evidence in relation to pre-recorded evidence as well as 'live link' (or CCTV) evidence on the basis that 'it is often difficult to clearly disentangle the effects of the TV screen medium itself from the effects associated with the timing and conditions of the actual testimony.'[542] Of the existing body of research, it was noted that there was 'considerable diversity in terms of the scale and methodological rigour' which was relevant 'to evaluating the study findings, both on their own terms and in terms of their transferability to the real courtroom.'[543] It found that the majority of existing evidence in this area specifically focussed on the evidence of child witnesses, which broadly demonstrates that jurors are not significantly better able to reach the truth and discern signs of deception when children testify in person as compared to pre-recorded evidence or via live link (contrary to many people's misplaced confidence in their ability to do so). While some studies have suggested that jurors may prefer children's evidence to be given live in person, there is no clear evidence that this impacts in any significant way upon verdict outcomes.[544]

4.14.3 The review found that fewer studies had been undertaken regarding the evidence of adult witnesses.[545] The majority of these related to adult female rape complainants and suggested that the level of impact of evidence being pre-recorded (or via live link) was low *and* unpredictable. That is, the use of special measures 'may increase one person's empathy for an adult rape complainer at the same time that it raises another's suspicion about her credibility in equal measure.'[546] Beyond adult witnesses in sexual offence trials, there was extremely limited research regarding other adult witnesses and the position is less clear and requires further research.[547] Nevertheless, the review reasons: '[a]s things stand, however, there is good reason to think that, as with child witnesses, any juror preferences for live testimony may be mitigated in the process of deliberation.' [548]

4.14.4 The review also considered the 'small but important' body of research regarding the use of pre-recorded evidence (and live link evidence) *in practice*.[549] Particularly, additional factors associated with the way in which the evidence is operationalised at trial which may also interact with the influence upon jurors associated with the mode of evidence. These factors include the length and format of pre-recorded investigative interviews and poor audio and visual quality.[550]

4.14.5 Ultimately, the review found that, from the available research, there appears to be no compelling evidence of an impact *per se* from the use of pre-recorded evidence or live-links, whether by child or adult witnesses, that translates reliably into an effect on verdict outcomes in criminal trials.[551] It was noted that some studies showed that jurors had a preference for live evidence but that 'this preference does not impact significantly upon verdict outcomes'.[552] This is consistent with the findings of previous Australian research.[553]

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[542] Vanessa Munro, *The Impact of the Use of Pre-recorded Evidence on Juror Decision-making: An Evidence Review* (Scottish Government, 2018) i.
[543] Ibid 31.
[544] Ibid ii, ch 3. Any initial preference for child witnesses' evidence to be live and in-person, appears to be neutralised in cases where a group deliberation is incorporated into the research design (to mimic the real trial process) such that it does not translate in any consistent or reliable way into verdict outcomes: at 31.
[545] Ibid 20. Although fewer in number the review observed that these studies were more robust in methodology than many previous jury simulation studies.
[546] Ibid ii, ch 4.
[547] Ibid ii, ch 31.
[548] Ibid.
[549] Ibid iii, ch 5, 31.
[550] Ibid.
[551] Ibid 31.
[552] Ibid iii.
[553] See discussion above and elsewhere in **Part 4**.

4.15 Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (2023)

4.15.1 In the Tasmanian context, the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings ('the Commission of Inquiry') addressed pre-recorded evidence (pre-recorded investigative interviews and full pre-recording) as part of its review of criminal justice responses to child sexual abuse.[554]

4.15.2 As with other reviews, the Commission of Inquiry outlined the aims of pre-recorded interviews as being 'to reduce the stress placed on the complainant by giving evidence in court' and to 'improve the quality of the evidence the complainant gives, because the interview can be conducted shortly after the abuse is reported to police, rather than months later when the trial begins'.[555] A further advantage was that it allowed the jury to see 'a more accurate visual representation of the age and vulnerability of a child closer to the time of the offence'.[556] However, as with other Australian and international reviews, the technical quality of investigative interviews was identified as an issue.[557] In response, the Commission of Inquiry recommended Tasmania Police should:

(a) review the adequacy and availability of equipment used to record evidence by video or audio, and ensure this equipment is available in all police facilities where victim statements relating to child sexual abuse are taken; and

(b) ensure specialist child sexual abuse police officers receive training on the use of recording equipment and refresher training if they have not used the equipment for six months or more.[558]

4.15.3 Recommendations were also made in relation to improving the quality of technology for the recording of special hearings. The Director of Public Prosecutions of Tasmania (DPP) told the Commission of Inquiry that the audio-visual recording facilities in the Supreme and Magistrates Courts are 'poor' and that the quality of the recordings of special hearings is 'far from desirable': [559]

> The recordings often do not adequately capture the subtle emotions of a witness. We have instances where the recording has not worked and the witness has been required to participate in the pre-recording again. In one other matter a prerecording included a portion where the witness listened to some telephone intercept material. In court it was evident that the material was highly distressing to the witness; however, on the recording the image of the 'recording playing' [audio only] was the predominant image with the image of the witness being in a small box.[560]

The Commission of Inquiry was also told in the course of wider consultation with ODPP staff of problems with the court's technology and capability, causing image quality to be grainy, making it difficult for the jury to assess the witness and their credibility and even resulting in complainants having to give evidence again.[561] Defence counsel described in-court technology, particularly live links, as and 'notoriously bad'.[562] The DPP also advised the Commission of Inquiry that the ability of court staff to operate audio-visual facilities 'diminish[ed] the presentation of the recordings and the way these recordings are played in court.'[563]

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[554] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) ch 16.
[555] Ibid 32.
[556] Ibid.
[557] Ibid.
[558] Ibid 32, Recommendation 16.5.
[559] Ibid 72.
[560] Ibid 72–3.
[561] Ibid 73.
[562] Ibid.
[563] Ibid.

4.15.4 The Commission of Inquiry ultimately recommended that the Tasmanian Government should:

(a) update the audio-visual equipment available to the Supreme and Magistrates Courts; and

(b) discuss with the Supreme and Magistrates Courts ongoing training for relevant staff on using audio-visual equipment.[564]

4.15.5 The Commission of Inquiry heard support for full pre-recording, with the DPP indicating that full pre-recording was routinely used child sexual abuse trials. The DPP also informed the Commission of Inquiry that, on some occasions, this process has resulted in an earlier plea of guilty because several people have entered pleas shortly after the pre-recording. Other benefits (in line with findings in other reviews) were that full pre-recording:

- lessen[ed] stress on the witness, in that the witness can come at an appointed time and have their evidence heard;
- create[ed] a more streamlined process than a trial and providing the ability to edit the evidence played to the jury. This allows children and special witnesses to be 'eased into' the proceedings in a less formal way and may enable them to take more frequent breaks;
- increase[ed] the likelihood that judges will intervene and control questioning.[565]

4.15.6 In conclusion, the Commission of Inquiry confirmed its position regarding the expanded use of full pre-recording to adult victim-survivors of child sexual abuse.[566]

4.15.7 Further, the DPP told the Commission of Inquiry that he thought it would be beneficial to have a presumption in favour of full pre-recording for adult victim-survivors of child sexual abuse (not just for child witnesses).[567] The Commission of Inquiry ultimately recommended that adult complainants in child sexual abuse proceedings be allowed to give their evidence at a special hearing unless the judge considers that it would be contrary to the interests of justice, regardless of whether the accused consents.[568] The Commission of Inquiry also recommended that the special measures provisions under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be simplified to clarify when special measures are available to adult witnesses.[569]

4.15.8 The Commission of Inquiry also made related recommendations regarding the establishment of specialist units within Tasmania Police to investigate child sexual abuse and to partner with other agencies and support services involved in responding to child sexual abuse to create multidisciplinary teams. It was also recommended that there be access to 'soft' interview rooms, ideally offsite from police stations (and potentially in multidisciplinary centres).[570] These multidisciplinary centres have now been established with the creation of ARCH centres in Hobart and Launceston.[571]

[564] Ibid 73, Recommendation 16.12.
[565] Ibid 70.
[566] Ibid.
[567] Ibid.
[568] Ibid 72, Recommendation 16.11(1)(b).
[569] Ibid 72, Recommendation 16.11(1). See further discussion below at [6.4].
[570] Ibid 21–2, Recommendation 16.1.
[571] See Tasmanian Government, *ARCH* (Web Page) <https://arch.tas.gov.au/>.

4.16 The Australasian Institute of Judicial Administration Incorporated (AIJA) – *Bench Book for Children Giving Evidence in Australian Courts*

4.16.1 The Australasian Institute of Judicial Administration Incorporated (AIJA)'s *Bench Book for Children Giving Evidence in Australian Courts* provides assistance to judicial officers to support children giving evidence in criminal proceedings as complainants or witnesses.[572] It is expressly endorsed by the Tasmanian Director of Public Prosecutions *Prosecution Policy and Guidelines*[573] and the Commission of Inquiry Report.[574]

4.16.2 As with other reviews, it endorses the following benefits of pre-recorded evidence:

- It allows a child to get on with life sooner, including continuing their education without anxiety or participating in therapy without the risk of contamination.
- There is less waiting time at court because other aspects of the trial are handled separately.
- The pre-recorded evidence can be used in the event of a re-trial, thus preventing the child having to give evidence several times.
- The evidence is likely to be more reliable as there is less of a gap between the original incident and the giving of evidence.
- The tape can be edited to remove parts of the evidence ruled inadmissible.
- Both parties know the strength of the child's evidence well before trial. The prosecution can determine whether the evidence justifies proceeding with the charges. The defence can decide whether a change of plea is warranted.[575]

4.16.3 It also observes that the increased use of pre-recorded evidence has led to the creation of a 'legal culture that is more sensitive to child complainants' issues'.[576]

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[572] Australasian Institute of Judicial Administration Incorporated (AIJA), *Bench Book for Children Giving Evidence in Australian Courts* (Updated March 2020) <https://aija.org.au/wp-content/uploads/2020/04/Child-Witness-BB-2020.pdf> ('*Bench Book for Children Giving Evidence*').

[573] Director of Public Prosecutions Tasmania (n 251) 53. Noting that the link cited in the ODPP Guidelines is to a previous 2015 edition of the Bench Book.

[574] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 45.

[575] Australasian Institute of Judicial Administration Incorporated (AIJA), *Bench Book for Children Giving Evidence* (n 572) 113, citing Judy Cashmore, 'Innovative Procedures for Child Witnesses' in Helen Westcott, Graham Davies and Ray Bull (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (John Wiley & Sons Ltd, 2002) 203.

[576] Australasian Institute of Judicial Administration Incorporated (AIJA), *Bench Book for Children Giving Evidence* (n 572) 113.

4.17 *Process Evaluation of Section 28: Evaluating the Use of Pre-recorded Cross-examination (Section 28) for Intimidated Witnesses* – Ministry of Justice (UK) (2023)

4.17.1 In April 2023, the Ministry of Justice published a further 'process evaluation' of the use of pre-recorded evidence in the UK,[577] which specifically focussed on the use of pre-recorded evidence by adult 'intimidated' witnesses who are eligible for full pre-recording in sexual offence or modern slavery offence proceedings on the basis of a fear or distress about testifying.[578] Full pre-recording was piloted for this cohort of witnesses from June 2019 onwards.

4.17.2 The evaluation conducted interviews with practitioners and adult intimidated witnesses with an aim of understanding whether the expansion of pre-recorded evidence to 'intimidated' adult witnesses was working as intended and to identify which parts of the process were working well and any improvement that could be made.[579] It was noted, however, that the interviews were only conducted with a small number of practitioners and witness from a select few pilot areas.[580] Both practitioners and witnesses generally reported an improved experience for adult 'intimidated' witnesses with full pre-recording, but caution was observed about the wider roll-out of the scheme given the lack of empirical evidence about the benefits for adult witness and the impacts on attrition, guilty pleas and convictions rates. Difficulties were identified in relation to negative features relating to the trial persisting for witnesses, the absence of an informed choice about the way in which to give evidence and negative impacts on the court process and delay.[581]

4.17.3 Witnesses reported that the cross-examination experience could still be unpleasant and stressful, mostly due to the style of questioning by defence counsel. The wait to know the outcome of the trial could also be difficult, made worse by minimal contact from police. Additionally, some witnesses reflected that pre-recording did not improve their experience or evidence, with reasons including perceived loss of impact and the presence of the defendant at the court building.[582] Although some practitioners suggested that delays were less likely with pre-recording, there were witnesses who reported delays to their cross-examination, which were found to be unsettling. This was particularly true if there was little notice of the delay, and the delay was of a sufficient length to necessitate re-watching their ABE interview again. [583]

4.17.4 As with concerns raised in other reviews about witness autonomy, practitioners raised concerns about whether witnesses were able to make an informed choice about mode of evidence, with some suggestions that police may be influencing their decisions on what special measures to use or providing incorrect information.[584] Although witnesses believed that they had made the decision themselves, there appeared to be limited discussion of alternatives and a lack of complete information, which suggests that their decision may not be fully informed. [585]

4.17.5 In terms of the perceived impact on court services and resources, trial counsel and court staff reported the expanded use of full pre-recording to have had a negative impact on scheduling and court listings due to the additional pre-trial special hearing, replaying the pre-recorded evidence at trial and a

[577] Ministry of Justice UK (Daisy Ward, Irina Pehkonen and Molly Murray) with Ipsos UK (Caroline Paskell et al), *Process Evaluation of Section 28: Evaluating the Use of Pre-recorded Cross-examination (Section 28) for Intimidated Witnesses*, (Ministry of Justice Analytical Series, 2023) ('2023 *Process Evaluation (Section 28)*').
[578] *Youth Justice and Criminal Evidence Act 1999* (UK) s 17(4) (YJCEA).
[579] Ministry of Justice (UK) and Ipsos UK, 2023 *Process Evaluation (Section 28)* (n 577) 1.
[580] Ibid 2.
[581] Ibid 2, 55.
[582] Ibid 2.
[583] Ibid.
[584] Ibid 3.
[585] Ibid.

requirement for the same judge and advocates to be available at all hearings.[586] Members of the judiciary were not interviewed, but a written submission was provided which set out the views of seven judges with the most experience of the operation of pre-recorded evidence.[587] In this submission, the judiciary reported 'a significant and adverse impact on the operation of the Crown Courts, and the listing of all cases'.[588] They estimate that adult 'intimidated' witness cases which involve full pre-recording take well beyond double the time required for other cases involving full pre-recording (i.e. with child witnesses.)[589] Where the pre-recorded cross-examination of a child witness generally takes 'very little' time and can sometimes be completed in as little as 15–20 mins, the pre-recorded cross-examination of adult 'intimidated' witnesses is 'very different', taking much longer — up to half a day or more.[590] For this reason, adult 'intimidated' witness special hearings cannot be listed in the same way as other special hearings without displacing or causing significant delay to other listings. The judiciary also reported additional pressure and stress on court staff regarding listing, data collection and liaising with the third-party provider (Vodafone).[591] The judiciary also raised issues such as a shortage of judges and counsel,[592] and 'acute' disclosure issues (which may result in witnesses having to be recalled).[593]

4.17.6 Time saving from the use of full pre-recording was also not evident in the view of most practitioners, who took the view that full pre-recording for adult 'intimated' witnesses had a minimal impact on the time it took for the case to be resolved. Other than bringing the cross-examination forward and shortening it slightly, the length of time for a case to be resolved was said to be roughly the same.[594] However, there appeared to be some support for a positive impact of full pre-recording on the attrition and engagement of adult 'intimidated' witnesses. Some practitioners suggested that witnesses tend to stay engaged once the suspect has been charged, whereas other practitioners gave examples where they felt the witness would not have given evidence without a pre-recording. Some witnesses corroborated the latter suggestion, stating that they would have likely dropped out or could not have survived if they had to wait for the trial.[595] However, the judiciary commented that, despite the lengthy pilots of pre-recorded evidence, there is no reliable information to understand the impact of full pre-recording on attrition rates.[596]

4.17.7 Contrary to the perceived benefit of full pre-recording on an increase in guilty pleas, most practitioners thought it would have a minimal impact because defendants in sexual offences tend not to plead guilty due to the shame/stigma of these crimes.[597] The perceptions of the judiciary were that there has been a 'negligible impact' on the guilty plea rate for the adult 'intimidated' witness cohort.[598]

4.17.8 Consideration was also given to the impact of full pre-recording on convictions and acquittals at trial, with most practitioners believing that full pre-recording would have minimal impact. Although some practitioners suggested that witnesses' testimony would be more impactful when delivered live in court, most practitioners also recognised that this was just their perception and stated that they did not have the data or evidence to say whether this was actually the case, or indeed, whether it impacted on the jury's decision. Some witnesses suggested that, in retrospect, they would have chosen not to pre-record their evidence because they did not think it was as impactful.[599] The judiciary also expressed caution and observed that there was no reliable information about the effect on conviction rates with the expansion of full pre-recording for intimidated witnesses potentially leading to 'an *increase* in the

[586] Ibid.
[587] Ibid 8 (Appendix A).
[588] Ibid 60 (Appendix A).
[589] Ibid.
[590] Ibid 60–1 (Appendix A). Relevantly, several practitioners noted that the pre-recorded examination of adult 'intimidated' witnesses was longer compared to other vulnerable witnesses, but some practitioners suggested that the pre-recorded cross-examination of adult 'intimidated' witnesses was 'slightly' shorter than if they were cross-examined live at trial: 24.
[591] Ibid 62 (Appendix A).
[592] Ibid 63–4 (Appendix A).
[593] Ibid 64 (Appendix A).
[594] Ibid 4.
[595] Ibid 3.
[596] Ibid 63 (Appendix A).
[597] Ibid 3.
[598] Ibid 63 (Appendix A).
[599] Ibid 3–4, 25.

acquittal rate in such cases'.[600] It was noted that 'there is a general view that pre-recorded evidence of adults inevitably has less impact with juries than if the adult had given evidence in person. The same concerns do not arise in respect of children, as juries instinctively seem to understand why such evidence is recorded'.[601]

4.17.9 Caution was expressed about the practical implications of a wider rollout such as technology, scheduling, and courtroom availability, concerns expressed even by those practitioners who were positive or neutral about the wider rollout of full pre-recording for adult 'intimidated' witnesses.[602] Concerns were raised about the lack of testing to know whether it was working as intended for witnesses[603] and testing of the effectiveness and impact of pre-recorded evidence, particularly on juror perceptions and outcomes.[604]

4.18 *Vulnerable Witnesses Act – section 9 Report* – Scotland (2023)

4.18.1 In Scotland, a review of amendments to the *Criminal Procedure (Scotland) Act 1995*, including the introduction of a presumption for the full pre-recording for all child witnesses in relation to specific offences was published in December 2023.[605] Other reforms that were considered in the review included the requirement for ground rule hearings to be held in cases where there was full pre-recording. The review consulted with a number of key individuals, justice partners and stakeholders. It also examined data in relation to cases where full pre-recording was used. During the reporting period, of 870 eligible cases, 650 cases utilised (or would utilise) full pre-recording.[606]

4.18.2 The report states that an evaluation of the data and information gathered demonstrates the amendments have resulted in the benefit of a significant increase in full pre-recording for child witnesses as well as the much wider use of full pre-recording for adult witnesses. Ground rules hearings were also found to have played a key role in taking the pre-recorded evidence of vulnerable witnesses.[607] These were 'essential to ensuring adequate preparation ahead of the relevant hearing and to ensure that full advantage was taken of the opportunities afforded by pre-recording a witness' evidence ahead of trial' and to have a 'clear focus on the questions to be asked at the hearing'.[608]

4.18.3 In setting out the advantages of full pre-recording, the evaluation relied on previous reviews in Scotland, namely the Scottish Court Service's *Evidence and Procedure Review (2013–2015)*,[609] which identified benefits for the witness and the quality of the evidence arising from evidence being taken as soon as possible after the alleged offence 'to secure a more accurate and contemporaneous account of events and allowing witnesses to "move on with their lives"'.[610] It was said to enhance participation in the justice system and improve well-being by giving evidence 'earlier and in a less daunting and intimidating environment'.[611]

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[600] Ibid 63 (Appendix A).
[601] Ibid 64 (Appendix A).
[602] Ibid 4.
[603] Ibid 27.
[604] Ibid 29.
[605] Scottish Government, *Vulnerable Witnesses Act – Section 9 Report* (December 2023) ('*Vulnerable Witnesses Act – Section 9*'). The amendments were made by the *Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019*, which commenced in January 2020.
[606] As at 6 December 2023, 503 witnesses had completed their pre-recorded evidence and in 373 cases, the pre-recorded evidence had been played at trial.
[607] Scottish Government, *Vulnerable Witnesses Act – Section 9* (n 605) 5.
[608] Ibid 14–15.
[609] Ibid.
[610] Ibid.
[611] Ibid.

4.18.4 The evaluation also identified challenges associated with the operation of the amendments. These included the fact that implementation was resource-intensive and places additional pressures on the justice system and the need for further review and improvements to technology and facilities used for pre-recorded evidence hearings.[612] However, the evaluation ultimately concluded that while there are some challenges associated with the operation of the amendments, the legislative framework continues to support witnesses to participate in the criminal justice system, explaining:

> This conclusion is based on the evidence of a substantial increase in the use of … [pre-recorded evidence], a special measure that is known to improve the quality of evidence provided by vulnerable witnesses and to reduce their risk of re-traumatisation both of which are key tenets of participation in the criminal justice system.[613]

The evaluation states that the Scottish Government remains committed to further implementation of pre-recorded evidence, such that the presumption in favour of pre-recorded evidence extends to further groups of child and vulnerable witnesses.[614]

4.19 Conclusion

4.19.1 In summary, as set out in this Part, the key benefits of pre-recorded investigative interviews and full pre-recording at a special hearing are to reduce the trauma of the criminal justice system process and to improve the quality of the evidence. Generally, the position has been that pre-recorded evidence schemes are a positive step towards improving the trial process for certain witnesses who depending on their age or other characteristics, and/or the nature of the offence, may find the usual trial process particularly difficult or distressing. Pre-recorded investigative interviews are also said to improve the quality of the evidence by providing a potentially more reliable account being given closer to the event than evidence given at trial. Pre-recorded evidence has also been said to increase the early resolution of matters by increasing the likelihood of guilty pleas. While concerns have been expressed about the effect on jury decision-making by the use of pre-recorded evidence rather than evidence given live at trial, the studies set out in this Part suggest that pre-recording does not make a difference to jury verdicts.

4.19.2 Consistently, concerns have been raised about the practical operation of pre-recorded evidence schemes relating particularly to technological challenges, with the result that the perceived benefits may not being realised by the practical operation of the scheme. There has also been hesitation expressed about the expansion of pre-recorded evidence from child witnesses to a broader category of witnesses. However, in the studies and reviews set out in this Part, the potential disadvantages of using pre-recorded evidence, while acknowledged, have been taken to be outweighed by the benefits of using pre-recorded evidence.

[612] Ibid 5.
[613] Ibid.
[614] Ibid. Further groups of child and vulnerable witnesses identified in the ‘implementation plan’.

Part 5

The emerging case against the widespread use of pre-recorded evidence

5.1 Introduction

5.1.1 As set out in **Part 4**, the previous case *for* pre-recorded evidence, whilst not universal nor without reservations, has been consistently made out as jurisdictions have generally confirmed the benefits of the schemes and expanded their operation. However, the expansion of the use of pre-recorded evidence has given rise to increased concerns, particularly regarding the expanded and widespread use for adult witnesses. **Part 5** sets out the *emerging case against the widespread use of pre-recorded evidence* based broadly on four (interrelated) issues:

(1) whether the delays inherent in the court process limit the perceived benefits of improving the quality of the evidence and reducing the trauma of the witness;

(2) the impact on other components of the criminal justice system;

(3) technological issues;

(4) whether the expansion has led to the best quality evidence and how such evidence is received by jurors.

5.1.2 It is noted that the emerging case presented in this Part is concerned with the expanding and widespread use of pre-recorded evidence schemes, particularly in the United Kingdom. Accordingly, it cannot be assumed that these concerns necessarily are applicable to the operation of the scheme in other jurisdictions, including Tasmania (especially in light of the findings of the TLRI that special hearings may be underutilised in some areas, particularly in the Magistrates Court jurisdiction). However, the issues explored in this Part, are used as the basis of the framework to evaluate the Tasmanian scheme set out in **Part 6**.

5.2 UK Parliament Justice Committee Inquiry – *The Use of Pre-recorded Cross-examination under s 28 of the Youth Justice and Criminal Evidence Act 1999* (2023–present)

5.2.1 A current UK Parliamentary Justice Committee Inquiry is examining the use of pre-recorded cross-examination under s 28 of the *Youth Justice and Criminal Evidence Act 1999.* The inquiry arose out of the Ministry of Justice's 2023 process evaluation of pre-recorded evidence, and particularly the written submission from members of the judiciary which called for a 'full independent evaluation' of the effects of pre-recorded evidence.[615] The Committee received 35 written submissions but, as at the date of publication, the Committee had not yet published a report of its findings or recommendations.[616]

5.2.2 This section sets out some of the predominant themes to arise from the evidence before the Committee of the emerging case against the widespread use of pre-recorded evidence. They include:

- full pre-recording is overused;
- consistently and substantially lower conviction rates;
- agency and informed consent;
- the intrinsic difference between live and pre-recorded evidence;
- technology is not fit for purpose;
- limited closure for witnesses with a trial 'hanging over' them;
- the 'monster' of timing, preparation, conduct and listing that has been created;
- pre-recording being blamed for wider issues with the courts system; and
- a fundamental reassessment of special measures is required.

5.2.3 The evidence before the Committee has been critical of the expansion of the pre-recorded evidence scheme in the UK in circumstances where there was 'a dearth of robust research into how the roll-out of s 28 is working in practice.'[617] The Commission has heard about a heightened awareness of the need for scrutiny of the existing research and evidence-based development of law and policy regarding pre-recorded evidence.[618]

[615] See discussion at [4.17]: Ministry of Justice UK and Ipsos UK, 2023 *Process Evaluation (Section 28)* (n 577) 8, Appendix A.

[616] The Committee's Report was originally due to be published in July 2024. However, due to the UK general election, there was the dissolution of Parliament on 30 May 2024 and all committees, except some statutory committees, ceased to exist until the new Parliament appoints or reappoints committees following the election.

[617] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 7 (Victims' Commissioner for England and Wales). See also, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 15 (Criminal Bar Association): '… [s 28 was] rolled out nationally before there was any empirical data on the impact of the s 28 regime in England and Wales: for instance, on juries' perceptions of pre-recorded evidence both in chief and in XXN; on the perceptions of eligible witnesses; on counsel's engagement and continued preparedness to undertake RASSO [Rape and Serious Sexual Offences] work; on listing delays after the s 28 recording and before the balance of the trial process; on conviction rates.'

[618] See, for example, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1–2 (Transform Justice).

5.2.4 Evidence before the Committee was particularly critical of the Ministry of Justice's 2023 process evaluation and its findings.[619] The Committee heard that the evidence base was limited, with only a small number of stakeholders consulted.[620] The findings of the evaluation could therefore be foundational and impressionistic only,[621] with a more detailed and continuing, statistically-based evaluation necessary.[622] Whilst previous evaluations, including the 2016 process evaluation,[623] had provided positive signs and indications, findings were largely anecdotal and in-principle.[624] Noting, however, that such limitations were clearly declared in the respective evaluation reports.

5.2.5 The (lack of) robustness of the research evidence that underpinned the expansion was highlighted. The Committee chair provided the following commentary with respect to the evidence behind the s 28 expanded rollout:

> In 2021, the Lord Chief Justice came and gave evidence to the Committee that basically said, *'Be careful'*. He said that everybody agrees this could be a good and valuable tool in principle, but there are *'quite fundamental questions about it to which everybody ought to know the answer'*… Lord Burnett made the point that he is a lawyer and *'I like to proceed on evidence'*. And the evidence either way for the speed of the roll-out — leaving aside the principle — was pretty thin, looked at objectively, wasn't it?[625]

Significantly, the evidence before the Committee suggests that the issue of inadequate empirical evidence is not necessarily limited to full pre-recording and the more recent expanded use of full pre-recording for adult witnesses, but also extends to the use of pre-recorded investigative interviews which have been in use for some time now.[626] The Committee heard evidence that the expanded use of pre-recorded evidence to adult witnesses was 'ill-advised',[627] 'done without any apparent assessment of the consequences'[628], with 'many unresolved issues'[629] and with the effectiveness of s 28 remaining in contention.[630] It has been reported that the Lady Chief Justice recommended in oral evidence to the Committee: 'I think we should pause the roll-out.'[631]

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[619] See discussion above at [4.17].

[620] Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q21–Q22 (Professor Cheryl Thomas): Of the 2023 evaluation, Committee member Maria Eagle stated: 'I was surprised when I read about the methodology …' Professor Thomas responded: 'I would hesitate to call it an evaluation of section 28 because I think that most people would be expecting that to be evaluating the impact of section 28 in terms of guilty pleas, conviction rates, timeliness, and those types of things. To be fair to the people who conducted that evaluation, they make it clear in the document that their evaluation does not cover any of that. Instead, it was a sort of foundational look at section 28 in relation to adult witnesses. Their methodology was purely through interviews. They interviewed, I think, 13 witnesses … a very small number. I would say that that would amount to about 1% or fewer of any adult witnesses that had used section 28, so of course that is just going to give impressionistic information about how a few people experienced section 28. There is a value in that, but you certainly cannot generalise from those few interviews to exactly how section 28 is operating. The other issue is that it excluded quite a number of key actors in relation to section 28. No judges or jurors took part in the evaluation, and … there were only three in-trial advocates … so you cannot generalise from the findings … if you read the summary, it talks about, "Most in-trial advocates felt this way," or, "Most witnesses felt that way," and I think we just have to be a bit cautious about the findings …'.

[621] Ibid (Professor Cheryl Thomas).

[622] Ibid Q24 (Professor Cheryl Thomas).

[623] See discussion above at [4.12].

[624] See, Evidence to Justice Committee, UK Parliament (House of Commons), London, 10 July 2023, Q68–69 (The Rt Hon Edward Argar MP, Minister of State, Ministry of Justice and Amy Randall).

[625] Ibid (The Rt Hon Edward Argar MP, Minister of State, Ministry of Justice and Amy Randall).

[626] Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q29 (Professor Cheryl Thomas).

[627] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 1 (Dr Samantha Fairclough).

[628] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (David Wurtzel).

[629] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 5 (Dr Samantha Fairclough).

[630] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 2 (Claire Waxman OBE, Independent Victims' Commissioner for London).

[631] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, May 2024, 1 (Rape Crisis England and Wales). The transcript of this oral evidence hearing does not appear to be publicly available.

5.2.6 Instead, the Committee heard substantive evidence of a number of 'unintended consequences' on complainants, defendants, and the administration of justice.[632] The Criminal Bar Association told the Committee in no uncertain terms that the use of full pre-recording in the context of a criminal prosecution is not a 'neutral litigation step without consequence'.[633] The Committee was also told of 'the 'monster' of timing, preparation, conduct and listing [that] has been created.'[634] Contrary to pre-existing notions — of any disadvantages of using pre-recorded evidence being outweighed by the benefits of using pre-recorded evidence — the Committee was told of witnesses' experiences being 'just as traumatic'[635] and 'still poor'.[636] Experienced practitioners expressed disagreement with the basic finding of the 2023 process evaluation that s 28 improved the witness experience.[637]

5.2.7 It is to be noted, however, that the evidence before the Committee was not all critical of the scheme. The Committee was told of exceptional results from the use of full pre-recording, which have long been hallmarks of the case *for* pre-recorded evidence:

> We interviewed the mother of a child complainant who explained how the section 28 hearing had been a very positive experience for her daughter, with the hearing lasting only 10 minutes. Whilst her daughter was understandably very nervous prior to the hearing, she came out smiling. The mother described s 28 as 'absolutely amazing. That's the best thing, perhaps, [to] come out of the criminal justice system, it's absolutely fantastic.'[638]

5.2.8 The Committee also heard evidence of the many positive aspects of pre-recorded evidence and received positive and constructive suggestions for improvements and reform. However, overall, the evidence received by the Committee may be characterised as representing a shift from an overwhelming case *for* pre-recorded evidence to an emerging case against the widespread use of pre-recorded evidence. Indeed, subsequent written submissions have referred to the 'increasingly negative rhetoric surrounding s 28'[639] and consequential negative attitudes, narratives and trends associated with s 28.[640]

[632] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 1 (Dr Samantha Fairclough). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, June 2023, 5 (John Riley): '… unintended consequences and problems'; Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Criminal Bar Association): '…a number of practical and professional problems, and unintended consequences … which have not been properly been thought through'; and Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q35 (Professor Cheryl Thomas): 'What we are looking at is an awful lot of unintended consequences that may have flowed from some very good intentions.'

[633] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 8 (Criminal Bar Association): '… it adds considerable unnecessary burden to the case, and by extension to the workload of the court and stakeholders overall'.

[634] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, June 2023, 6 (John Riley).

[635] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Professor John Jackson et al).

[636] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 33 (COEUS Group).

[637] Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q26 (Mary Prior KC).

[638] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 2 (Justice in COVID-19 for Sexual Abuse and Violence project research team). See also Lorna O'Doherty et al, *Justice in Covid-19 for Sexual Abuse and Violence: Impacts of the Covid-19 pandemic on criminal justice journeys of adult and child survivors of sexual abuse, rape and sexual assault – Project Report* (Justice in COVID-19 for Sexual Abuse and Violence (JiCSAV) and Economic and Social Research Council, Project Report, November 2022) <https://www.coventry.ac.uk/research/research-directories/current-projects/2020/jicsav>. A UK collaboration of academic, third sector, police, and lived experience partners, it aimed to explore the impacts of the Covid-19 pandemic on the criminal justice journeys of adult and child survivors of rape, sexual assault, and sexual abuse, and to learn lessons that could inform practice both in, and beyond, the pandemic. JiCSAV gathered the voices and perspectives of 108 participants across 7 stakeholder groups via semi-structured interviews with 19 complainants/family members; 20 third sector professionals; 14 professionals from Sexual Assault Referral Centres; 21 police officers; 9 CPS professionals; 6 criminal barristers; and 19 judges.

[639] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, May 2024, 1 (Rape Crisis England and Wales).

[640] Ibid 4, 5 (Rape Crisis England and Wales).

Full pre-recording is overused

5.2.9 A theme in the evidence given to the Commission was that full pre-recording was being overused and that special measures, such as pre-recorded evidence, were no longer 'special'. While it was accepted that full pre-recording was appropriate for young children and truly vulnerable witnesses the concern was that they were now used routinely for adult witnesses in rape and serious sexual offence (RASSO) cases.[641] Contrary to views expressed in earlier reviews that discretion should be used to determine whether pre-recording was appropriate in a particular case, there appears to be an assumption that it is beneficial as a matter of course without due consideration being given to the individual case either by prosecuting authorities [642] or judicial officers.[643] However, the Bar Council noted, that 'the culture on s 28 appears to be slowly changing, at least so far as the judiciary are concerned … Judges are now looking far more critically at the applications which is welcome'.[644]

5.2.10 The evidence of the Criminal Bar Association stated that full pre-recording is 'too widely applied'[645] when it should only be used where necessary.[646] They reported that all too often it is being used for inappropriately identified witnesses.[647] Whilst accepting that full pre-recording 'may be an extremely useful tool in some cases'[648] and it 'has an important role to play where suitable witnesses will benefit from its use',[649] a 'bespoke approach should be taken'.[650] The view was expressed that it should not be used routinely and it should not be offered or simply applied for as a matter of course, and without proper consideration, discussion with the witness concerned, or real consultation with prosecution counsel. Full pre-recording should be 'the exception rather than the rule'.[651] The Criminal Bar Association considered that for teenagers (witnesses aged 13 and above) and adults, pre-recorded cross-examination (as provided for in s 28) should 'be dealt with on a case-by-case basis, with something more being required than simply age, for example: trauma as a result of the incident, a mental health issue, or learning difficulty'.[652]

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[641] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, June 2023, 1 (John Riley).
[642] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Matthew Roberts). For example, the COEUS Group reported that investigating authorities 'usually do not give in-depth consideration to each complainant's individual characteristics and needs…[including] their capacity to testify in court using a screen or live link, when considering whether to use the s 28 procedure': Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 11 (COEUS Group). 'COEUS is an international group of experts dedicated to evidence-based and practice-based justice reform. … The COEUS group is convened by Professor Laura Hoyano of the Faculty of Law, University of Oxford, and a practising barrister at Red Lion Chambers, London. COEUS membership includes practising barristers of all levels of seniority from England and Wales and Canada (including those who both prosecute and defend RASSO cases, and some who only accept defence or Crown briefs), members with judicial experience, current and former criminal justice professionals, academics in law, social science, empirical legal studies and other fields such as linguistics. The expertise of our members extends to legal systems in England, Wales, Northern Ireland, Scotland, Ireland, Canada, India, Germany, the US and other jurisdictions using adversarial systems of justice as well as inquisitorial justice systems': Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 1–3 (COEUS Group).
[643] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Erim Mushtaq).
[644] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (The Bar Council).
[645] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 15 (Criminal Bar Association).
[646] Ibid 5 (Criminal Bar Association).
[647] Ibid 11 (Criminal Bar Association).
[648] Ibid 5 (Criminal Bar Association).
[649] Ibid 1 (Criminal Bar Association).
[650] Ibid (Criminal Bar Association).
[651] Ibid (Criminal Bar Association).
[652] Ibid 28 (Criminal Bar Association).

5.2.11 Similarly, the Bar Council's view was that full pre-recording was 'overused'. Whilst it is appropriate for young and very vulnerable complainants, it is being used in far too many other cases.[653] The Bar Council explained that the 'temptation' of 'over-wide promotion of s 28 must be resisted':[654]

> Section 28 hearings are used far too frequently. The default appears to be that s 28 is the only way, not the question as to whether it is the best way. It has also led to the "turbo charging" of one part of the system. The true utility of s 28 lies in having young or vulnerable witnesses give their account whilst events are still fresh for them. However, they are often being used in cases where it has taken 18 months to charge the defendant (and where the defendant is going to be giving evidence another 18 months down the line). Or it is used in absurdly unhelpful cases such as s 28 being conducted the day or the week before the trial commences.'[655]

5.2.12 The Bar Council were of the view that restricting the use of s 28 to those few witnesses who truly require it would improve the situation; 'blanket eligibility is driving the system into the ground'.[656] Dr Samantha Fairclough of the University of Birmingham gave evidence to the Committee that full pre-recording is 'particularly suitable to very young children'[657] and its use should be 'properly targeted'.[658] She reported that '[t]he overall impression among those interviewed is that Section 28 is a good initiative on paper but it is now too readily available in cases where witnesses do not really need it to improve the quality of their evidence.'[659] In oral evidence before the Committee, Amy Randall of the Ministry of Justice spoke to the intention of s 28 that was that not all victims in the eligible cohort would use section 28.'[660]

Consistently and substantially lower conviction rates

5.2.13 A concern that had previously been raised about pre-recorded evidence schemes was its impact on jury deliberation when compared to evidence given live in the trial. Previously, it was noted that there was a lack of research concerning the relative conviction rates in such cases. In providing evidence to the Committee, Professor Thomas of UCL reported on a detailed analysis of the use and impact of s 28 in all cases in the Crown Court from June 2016 – June 2023 for all charges against all defendants in all cases in all Crown Court Centres where s 28 pre-recorded cross examination recordings were made.[661] Professor Thomas reported that 'jury conviction rates are consistently and substantially lower for all offences when s 28 evidence' and that this finding 'is very strong correlational evidence that juries experience pre-recorded cross examination differently than they do other forms of live cross examination'.[662] This was contrary to earlier reports that suggested that there was no difference in conviction rates.[663]

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[653] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (The Bar Council).
[654] Ibid 2 (The Bar Council).
[655] Ibid 1 (The Bar Council).
[656] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 5 (The Bar Council).
[657] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 2 (Dr Samantha Fairclough).
[658] Ibid 2 (Dr Samantha Fairclough).
[659] Ibid 6 (Dr Samantha Fairclough).
[660] Evidence to Justice Committee, UK Parliament (House of Commons), London, 10 July 2023, Q83 (Amy Randall, Ministry of Justice).
[661] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 15–16 (Professor Cheryl Thomas).
[662] Ibid 15–16, 20 (Professor Cheryl Thomas).
[663] See, for example, discussion at [4.12] and [4.14] above.

5.2.14 The reported findings included:

- the jury conviction rate was almost 10 percentage points lower when s 28 evidence was used (61%) compared to when it was not used (70%);[664]
- the hung jury rate was 3 times higher with s 28 (2.3%) than without s 28 (0.7%);[665]
- the jury conviction rates for every single offence are lower when s 28 evidence is used than when it is not used. This is regardless of whether the s 28 witness is a child/vulnerable or an adult/intimidated, whether the s 28 witness is female or male;, or whether the offence is a sexual offence or a non-sexual offence.[666] Such a strong and consistent correlation between the use of s 28 evidence and lower jury conviction rates regardless of the type of offence or witness was said to indicate that s 28 evidence can have an impact on jury decision-making;[667]
- the jury conviction rate when s 28 is used with offences that fall within the adult intimidated witness category are markedly lower than the jury conviction rate for the same offence in the same time period but where s 28 evidence is not used. The variations in the jury conviction rates with and without s 28 are more substantial with adult witnesses than child or other vulnerable witnesses, ranging from 11–18% lower; [668]
- the jury conviction rate is markedly lower when s 28 is used with non-sexual offences, ranging from 8–23% lower;[669]
- the jury conviction rates when s 28 evidence is used in rape cases are substantially lower for all types of rape offence, whether for adult rape offences or child rape offences. In most instances, the jury conviction rate for rape offences is 20 percentage points lower when the complainants' cross examination is pre-recorded compared to when the complainant's cross examination is not pre-recorded.[670]

Further, it was stated that contrary to suggestions made early in the piloting of s 28, the existence of a s 28 recording does not lead to more guilty pleas and instead is associated with fewer guilty pleas. The guilty plea rate in s 28 cases in 2016–2023 was 10%. This represents the percentage of guilty pleas on all charges in all s 28 cases, and is the lowest guilty plea rate in the Crown Court. The guilty plea rate in s 28 cases is five times lower than the guilty plea rate for all charges on all offences in the same time period (51%).[671]

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[664] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 15–16 (Professor Cheryl Thomas): The overall jury conviction rate on charges where s 28 evidence was used is 61%.
[665] Ibid 15–16 (Professor Cheryl Thomas): The overall jury conviction rate on charges where s 28 evidence was used is 61%.
[666] Ibid 16 (Professor Cheryl Thomas).
[667] Ibid (Professor Cheryl Thomas).
[668] Ibid 18 (Professor Cheryl Thomas).
[669] Ibid (Professor Cheryl Thomas).
[670] Ibid 19 (Professor Cheryl Thomas).
[671] Ibid 9–10 (Professor Cheryl Thomas): 'To some extent the low guilty plea rate might be thought to reflect the fact that there are a large proportion of sexual offences charges in s 28 cases (88%), and it is already known that sexual offences (especially rape) tend to have lower than average guilty plea rates. However, the guilty plea rate in s 28 cases (10%) is more than five times lower than the guilty plea rate for all sexual offence (56%). While the s 28 guilty plea rate is closest to the guilty plea rate for rape charges, the overall s 28 guilty plea rate is even lower than the guilty plea rate for all rape offences (15%), and rape charges make up only a small proportion (17%) of all charges in s 28 cases.'

5.2.15 Other evidence supported these findings, with the COEUS Group reporting to the Committee that '[s]ection 28 does not appear to be assisting complainants, especially adults, with achieving convictions. It appears to be hindering them.'[672] The Committee also received other evidence which anecdotally supported Professor Thomas' findings regarding conviction rates.[673] Other submissions more generally voiced support for comprehensive quantitative research of this kind instead of qualitative research or process evaluation. [674]

5.2.16 Other evidence heard by the Committee expressed caution about Professor Thomas' findings. Dr Kelly Johnson et al warned of the 'risk of limiting measures of effectiveness in respect of s 28 solely to outcomes.'[675] Citing relevant victim-survivor research in the UK, they make the point that 'victims' ideas of justice are wider than charges and convictions' and that special measures (including special pre-trial hearings) may encourage a victim to come forward. They explain that 'an aspect of the intended effect of s 28 is not just to enable victims to give their best evidence during the trial, but for victims to support the prosecution knowing this option is available to them'.[676]

5.2.17 They also raised the fact that there may be 'other more salient factors causing the observed effect' in conviction rates.[677] The submission of Dr Johnson et al ultimately called for further study and analyses to explore the range of factors that might explain the observed differences before drawing conclusions based on this dataset and for the relevant dataset to be made available to other researchers.[678]

5.2.18 Further, Dr Natalie Kyneswood provided evidence to the Committee about 'some issues' with Professor Thomas' data and its presentation to the Committee which 'exemplifies why it is difficult to produce definitive research on conviction rates in sex offence cases involving different types of measures and categories of witness'. Dr Kyneswood urged that it is important to adopt a cautious approach because 'it is complex to disentangle the impact of s 28 from other variables which may have a bearing on the verdict'.[679] Dr Kyneswood also referred to the wider aims of pre-recorded evidence, beyond case outcomes such as reducing attrition at all stages of the criminal justice process by encouraging complainants to come forward and report sexual offending and to persevere with the process. [680]

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[672] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 6 (COEUS Group).
[673] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (The Bar Council): ' … [it] is thought to lead to fewer convictions because recorded evidence is less compelling than live evidence'; Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 11 (Dr Natalie Kyneswood): 'Barristers were generally of the view that the poor quality of much pre-recorded evidence may result in more acquittals in sex offence cases'; Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 and 4 (Matthew Roberts): ' … serious concerns about the use of this procedure and believe it has often weakened a prosecution resulting in an acquittal which should have been a conviction … it is my personal view based on my experience in these cases that section 28 actually provides a defendant with a greater chance of being acquitted'.
[674] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1–2 (Transform Justice).
[675] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 1 (Dr Kelly Johnson et al).
[676] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 1 (Dr Kelly Johnson et al).
[677] Ibid (Dr Kelly Johnson et al).
[678] Ibid 2 (Dr Kelly Johnson et al).
[679] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 5 (Dr Natalie Kyneswood), citing N Kyneswood, 'The application of Section 28 and related measures in sex offence cases: is pre-recorded cross-examination achieving best evidence for intimidated complainants?' (PhD thesis, University of Warwick, 2022) 269–72 <https://wrap.warwick.ac.uk/176755/>.
[680] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 6 (Dr Natalie Kyneswood).

5.2.19 Further, Rape Crisis England and Wales told the Committee:

> … no two sexual offence cases are the same and there are a number of variables which mean that comparisons of jury outcome are incredibly difficult, if not impossible. We are therefore cautious about any research which attempts to compare outcomes.[681]

5.2.20 Rape Crisis England and Wales were also critical of the fact that Professor Thomas' analysis failed to consider how many cases would not have made it to completion without the availability of s 28; the fact that justice 'is not always about a conviction', but includes aspects of 'procedural justice' and a complainant's 'day in court'; and whether conviction rates ought to be used as 'a measure for success'.[682] Ultimately, the submission 'echo[ed]' the need for 'further qualitative and quantitative analyses … before any decisions can be made about the implementation and effects of S.28.'[683]

The intrinsic difference between live and pre-recorded evidence

5.2.21 Related to discussion about the conviction rates for cases involving pre-recorded evidence was evidence of concerns about the *intrinsic difference* between live and pre-recorded evidence. Concerns about the limitations of pre-recorded evidence has long been seen in the perception of practitioners that the prosecution case being reduced to 'press play' does not convey the same impact of the evidence as when a complainant gives evidence in court, even if this is done from behind a screen. The Committee was told of the 'disengaging' and 'divorced' effect of *merely* watching pre-recorded evidence,[684] with the Criminal Bar Association referred to a lack of personal engagement with full pre-recording. [685] The Committee heard that with pre-recorded evidence: 'it is often the case that … the eye-line of a witness in the recording means they are not looking at where the jury will be seated … [s]o there isn't even a direct visual engagement between the main prosecution witness and the jury.'[686] And further, the manner in which pre-recorded cross-examination questioning often has to be prepared and shared with the court and counsel in advance can make both the questions robotic and the answers robotic, which is alien to the jury.[687] One perceived disadvantage for juries having all the evidence pre-recorded for complainants or witnesses is that they are deprived of an opportunity of assessing the witness' or complainant's behaviour, reaction and body language when answering questions. There is no evidence to suggest that juries pay less attention to the evidence through recordings. However, its impact is perceived to be less.[688]

5.2.22 The COEUS Group explained to the Committee the significance of the contemporaneity of live evidence whether it be in-person or via remote link, compared to pre-recorded evidence:

> Practitioners are widely reporting their view that s 28 is having a deleterious impact on juries and their ability to react to and interact with the complainant. The general view is that with both the evidence-in-chief and the cross-examination being recorded, there is no personal or interpersonal ability to really assess the witness or interact with them to the extent that is done with witnesses in court or on a live-link. There is a significant deficit of assessment.[689]

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[681] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, May 2024, 2–3 (Rape Crisis England and Wales).
[682] Ibid 3 (Rape Crisis England and Wales).
[683] Ibid 2–3 (Rape Crisis England and Wales).
[684] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, June 2023, 6 (John Riley).
[685] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 12 (Criminal Bar Association).
[686] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 35 (COEUS Group).
[687] Ibid 35–6 (COEUS Group).
[688] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Erim Mushtaq). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 5 (Dr Samantha Fairclough): 'Barristers were also concerned about the loss of impact of the witness' evidence on the jury and noted that some judges are raising this issue with the prosecution in Plea and Trial Preparation Hearings …'; Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (National Police Chief's Council): '… there were still views from other criminal justice partners that it is more impactive for the witness to provide live evidence.'
[689] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 35 (COEUS Group).

5.2.23 Similar views about the limitations of pre-recorded evidence also expressed in other evidence given to the Committee about a reduction in authenticity and believability.[690] The Committee heard of a 'distancing effect' which diminishes the impact of pre-recorded evidence.[691] The Committee also heard of the 'moral distance' created by pre-recorded evidence.[692] The Committee heard many references to the 'dehumanising' effect of pre-recorded evidence.[693]

5.2.24 Other concerns related to the impact on technological problems on juror engagement with the evidence. Dr Kyneswood reported to the Committee that the different formats of the pre-recorded interview and special hearing footage made the 'playback' of the witness's evidence at trial particularly difficult to engage with; 'the overall effect looks cobbled together and amateurish'.[694] The Committee also heard of the lack of consistency in evidence presentation for the jury when there are different judges and/or advocates involved between the special hearing and trial.[695]

5.2.25 In this way, Professor Thomas explained, in the context of her findings, that '[i]t is possible that there is an *intrinsic difference* in how juries (or any judicial decisionmakers) experience evidence presented as pre-recorded in comparison to evidence that is presented live (either in court with or without screens or via a remote link)'.[696] However, as Professor Thomas noted, other factors may also be contributing to the lower conviction rates.[697]

[690] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 5 (Dr Samantha Fairclough); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Victims' Commissioner for England and Wales); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 7 (Criminal Bar Association).
[691] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Professor John Jackson et al).
[692] Ibid (Professor John Jackson et al).
[693] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024 (COEUS Group): '… "dehumanized" witnesses: one can often not see their facial expressions, movement etc through a television screen … loses the human element – so psychologically, the jury feels more distant' (at 35–6) and '… dehumanization of the Crown's evidence': at 6. See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 18 (Criminal Bar Association): 'many older witnesses *feel* dehumanised'.
[694] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Dr Natalie Kyneswood).
[695] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 35–6 (COEUS Group).
[696] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 21 (Professor Cheryl Thomas).
[697] Ibid (Professor Cheryl Thomas): '… one point to bear in mind in considering this possibility is that this analysis compared jury conviction rates in cases where the jury saw all of the witness's evidence pre-recorded in contrast to cases where the jury saw some evidence live and some pre-recorded … Of course it could be that jury conviction rates would be even higher if no pre-recorded evidence was presented to the jury at all. But the fact that the jury conviction rate is consistently lower when pre-recorded evidence-in-chief is combined with pre-recorded cross-examination compared with similar cases where only the evidence-in-chief is pre-recorded suggests that the difference lies in the combined effect of all of the witness's evidence being shown to the jury in two separate and very distinct pre-recorded films. This means that other factors may be contributing to pre-recorded cross-examination evidence combined with pre-recorded evidence in chief resulting in lower jury conviction rates.'

Agency and informed consent

5.2.26 A concern previously raised has been the importance of providing a witness with information of the options that existed in relation to the ways in which evidence could be given to allow the witness to make an informed choice. In Professor Thomas' evidence to the Committee she recommended that any further changes to the pre-recorded evidence scheme in the UK should be paused and that prosecuting authorities need to advise witnesses of lower conviction rates in s 28 cases to allow an informed choice to be made. [698] Similarly, Dr Kyneswood, who urged the Committee to approach Professor Thomas' findings with caution, agreed that complainants should be informed about the 'possible' impact of s 28 on conviction rates.[699]

5.2.27 The concept of witness agency and informed consent in the context of pre-recorded evidence featured heavily in evidence before the Committee. Reflecting the views expressed that full pre-recording was overused as a matter of course, the Committee heard that prosecuting authorities were *automatically* applying for full pre-recording of a witness' evidence without speaking to witnesses.[700] The Committee was told that there is a 'one size fits all' approach and pre-recording applications are made with little consultation with witnesses,[701] who often don't want or need it.[702] The Committee was told of research conducted with legal practitioners, in which some practitioners reported pressure placed on them from trial judges to use s 28 in cases where a witness qualifies.[703] The Criminal Bar Association told the Committee:

> There is generally a lack of proper consultation with witnesses to whom s 28 could apply, but who need to understand all the options, the potential impact, and what their experience of the trial process will be as a result of giving their evidence in that way. It often appears s 28 is the default rather than as a properly considered application … .[704]

The Committee heard of the 'assumptions'[705] that are made based on how a witness presents themselves, as to whether they qualify or may be offered s 28. Whilst these assumptions are well-intentioned[706] 'a witness will not always be best served by it being assumed that a s 28 process is in their best interests.'[707] The Committee was told that deciding whether to employ s 28 should actually involve intricate processes.[708]

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698 Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q27 (Professor Cheryl Thomas).

699 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 5 (Dr Natalie Kyneswood): 'Complainants should be informed about the possible impact of s 28 on conviction rates, but it may be premature to rely on data collected thus far and it is certainly problematic to rely on the percentages.'

700 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Solace Women's Aid).

701 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Rape and Sexual Abuse Counselling Centre, Darlington and Durham).

702 Ibid 1 (Rape and Sexual Abuse Counselling Centre, Darlington and Durham).

703 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 3 (Dr Samantha Fairclough).

704 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 15 (Criminal Bar Association).

705 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 1 (Sabrina Hussain). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Rape and Sexual Abuse Counselling Centre, Darlington and Durham); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 7 (Criminal Bar Association).

706 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Solace Women's Aid).

707 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 7 (Criminal Bar Association).

708 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Synergy Essex Partnership of Rape Crisis Centres, SERICC, Southend-on-Sea Rape Crisis).

5.2.28 The Committee specifically heard that 'the conversation' was not being had with teenage witnesses who are automatically entitled to the use of pre-recorded evidence, regarding their preference and capacity in how they give their evidence.[709] Further, any conversations with witnesses about mode of evidence that do occur, occur at a very early stage and are not necessarily revisited.[710] Similarly, the Committee was told of the inflexible nature of the process whereby any application for pre-recording needed to be made early.[711]

5.2.29 The Committee heard prosecuting authorities described as the 'gatekeepers' of s 28[712] and the 'erosion' of the concept of there being a choice for witnesses in how they give their evidence as 'it has become less of a choice and more of a prosecutorial steer with significant unintended consequences.'[713] The Criminal Bar Association expressed the view that there was a lack of 'real engagement with complainants on this issue and their understanding of how s 28 may impinge on their evidence giving, and engagement with the trial.[714] Other evidence suggested that 'CPS lawyers and some police officers discourage victims to use S28 informing them that evidence in person is more powerful and conviction more probable.'[715]

5.2.30 Other practitioners called for steps to be strengthened to ensure that witnesses are given an informed choice.[716] The COEUS Group specifically proposed that the CPS develop a vulnerable witness Personal Witness Plans (PWP) so that complainants and other vulnerable witnesses are, and feel themselves to be, fully engaged in the process of case preparation and acquiring knowledge of the trial process.[717] Other suggestions included a model of independent legal representation for complainants from the point at which the complaint is made. It would include independent legal advice about special measures'.[718] It was also suggested that a comprehensive set of guidance (guidelines) on how to better engage with and inform complainants about their criminal justice journey would be useful.[719] The Committee heard that a lack of meaningful engagement with witnesses on special measures 'speaks to a wider problem within the CJS about improving support and provision for survivors in the way cases are handled, and how survivors are accommodated or not.' [720]

[709] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 29 (COEUS Group). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 8 (Criminal Bar Association); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Solace Women's Aid); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 2 (Sabrina Hussain).
[710] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Support After Rape & Sexual Violence Leeds).
[711] Ibid (Support After Rape & Sexual Violence Leeds).
[712] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Professor John Jackson et al).
[713] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 11–12 (Criminal Bar Association).
[714] Ibid 12 (Criminal Bar Association).
[715] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Rape and Sexual Abuse Counselling Centre, Darlington and Durham).
[716] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 7 (Professor John Jackson et al).
[717] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 7 (COEUS Group).
[718] Evidence to the Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q60 (Professor Penney Lewis).
[719] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 43 (COEUS Group). It is to be noted that there is already *some* guidance in the Crown Prosecution Service (CPS) and National Police Chiefs' Council (NPCC), *National Protocol between the Police and Crown Prosecution Service in the Investigation and Prosecution of Offences in Relation to Which the Cross-examination of a Witness will be Pre-recorded* (2019) [6.5]–[6.8] ('*National Protocol*') and the Ministry of Justice UK and National Police Chiefs' Council (NPCC), *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (January 2022) [2.50]–[2.60], [2.112]–[2.121] ('*Achieving Best Evidence in Criminal Proceedings*').
[720] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 2 (Sabrina Hussain).

Technology is not fit for purpose

5.2.31 Aligned with prior concerns arise about the pre-recorded evidence scheme, the benefits of pre-recorded evidence schemes in providing the best quality of evidence were reported as being undermined and hampered by technological issues. A near universal issue raised in evidence before the Committee related to the shortcomings of technology used for all aspects of pre-recorded evidence. Evidence variously described the technology as 'out-of-date',[721] 'archaic',[722] and 'extremely poor'.[723] The Committee heard that the role of technology in pre-recorded evidence schemes is 'crucial yet lacking'[724] and that '[it] does not meet the needs of the legal system and witnesses/victims robustly enough'.[725] The Committee was told of the following comments of a legal practitioner in relation to the quality of both ABE and s 28 recordings:

> … a teenage social media account/podcaster/TikToker has better sound and picture quality than we use in courts. It all looks like it is still filmed in the 1980s. Resolution is poor and sound quality even poorer.[726]

Other evidence queried, '[i]f it is not a good set-up, should we even be using it?[727]

5.2.32 The Committee heard the 'repeated complaint' of poor quality of audio and video equipment used to pre-record evidence. Often during the playback of pre-recorded evidence, there were delays while transcripts of the pre-recorded evidence were produced to assist in following the evidence.[728] The Committee was also told of special hearings that could not commence because of technology failings[729] and instances where pre-recorded evidence had to be taken again where 'one judge explained that they and their colleagues had all had a non-recorded recording … where there's been nothing on the disc, when they've gone to check the editing'.[730] The Committee was told of other occasions when recordings were ruined due to the microphone picking up the typing of the Judge or the court clerk and this not being known at the time.[731] The technology often only allows for a format where the witness is depicted in a 'small box' in the screen, with the recording predominantly featuring the courtroom as the larger frame in the footage.[732]

5.2.33 Other evidence before the Committee suggested that there were also operational issues causing or otherwise contributing to the technological issues associated with pre-recording:

> The general consensus amongst practitioners is that the technology works well when it is known how to operate it properly. The difficulties that have been encountered with the technology tend to be short lived and due to human error or a lack of understanding of how to operate the equipment.[733]

[721] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 5–6 (COEUS Group).
[722] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Matthew Roberts).
[723] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 16 (Criminal Bar Association).
[724] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Synergy Essex Partnership of Rape Crisis Centres, SERICC, Southend-on-Sea Rape Crisis).
[725] Ibid (Synergy Essex Partnership of Rape Crisis Centres, SERICC, Southend-on-Sea Rape Crisis).
[726] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 32 (COEUS Group).
[727] Evidence to Justice Committee, UK Parliament (House of Commons), London, 23 January 2024, Q218 (Dr Mullan, Committee member).
[728] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Professor John Jackson et al). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 4 (Justice in Covid-19 for Sexual Abuse and Violence project research team).
[729] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1, 4 (Professor John Jackson et al).
[730] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 4 (Justice in Covid-19 for Sexual Abuse and Violence project research team).
[731] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Matthew Roberts).
[732] Ibid (Matthew Roberts).
[733] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Erim Mushaq),

The Committee was told that pre-recorded evidence was not easily integrated into the existing trial format and was often difficult to see and hear.[734] The Committee heard that the circumstances of replaying the evidence at trial varied substantially, namely, the quality and placement of screens for the jury to view the recording/s.[735] Suggested improvements included using a single large screen instead of small screens or every juror getting an individual screen, recorded evidence given in a 3D format, and using funding and resources (including, technology) allocated for drug offences and terrorism, where every juror has individual tablets for the evidence.[736]

5.2.34 The Committee was told that 'better resources may lead to better section 28 evidence.'[737] Submissions called for 'significant investment and modernisation'[738] and the Committee heard of upgrades already being piloted and otherwise implemented.[739] In the context of upgrading technology, the COEUS Group highlighted the importance of consultation with relevant stakeholders to ensure that the technology meets the needs and practical applications of practitioners.[740] Dr Kyneswood suggested to the Committee that specialist courtrooms may be the most expedient way of directing resources to upgrade infrastructure where it is most needed, ensure greater consistency in standards of recording and playback quality and prevent delays caused by problems with technology. [741] The Committee was also told, more fundamentally, that, 'what is really needed is a redesign of how pre-recorded evidence is produced, presented and viewed rather than simply upgrading existing facilities.'[742]

Limited closure for witnesses with trials 'hanging over' them

5.2.35 As discussed, one of the perceived benefits of pre-recorded evidence scheme is that it reduces the trauma for complainants by allowing them to give evidence earlier in the process and move on with their lives. However, much evidence before the Committee sought to challenge, or at the very least, qualify the notion that full pre-recording affords a witness 'closure' ahead of trial. The Committee was told that witnesses are, in fact, unable to get 'closure' with the outcome of the trial still 'hanging over their heads'.[743] For example, Support After Rape & Sexual Violence Leeds told the Committee:

> In our experience, the fact that a victim/survivor has used s 28 and completed their evidence, does not mean they can put the trial out of their minds, and move on with their lives. Quite the contrary — it hangs over them, and they worry constantly about the eventual outcome of the trial. This is exacerbated by the longer and longer delays in the Court system, with trials being adjourned at very short-notice, and being re-listed a year or more later.[744]

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[734] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 6 (Dr Natalie Kyneswood).

[735] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 31 (COEUS Group).

[736] Ibid 44 (COEUS Group).

[737] Ibid (COEUS Group).

[738] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Synergy Essex Partnership of Rape Crisis Centres, SERICC, Southend-on-Sea Rape Crisis).

[739] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 7 (Dr Natalie Kyneswood), citing: Ministry of Justice et al, 'New pilots to boost support for rape victims in court' (Press release, Ministry of Justice, 16 June 2022) <https://www.gov.uk/government/news/new-pilots-to-boost-support-for-rape-victims-in-court>. See also, Evidence to Justice Committee, UK Parliament (House of Commons), London, 23 January 2024, Q217 (Chris Hartley, Deputy Chief Crown Prosecutor).

[740] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 31–2 (COEUS Group).

[741] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Dr Kyneswood).

[742] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 7 (Dr Natalie Kyneswood), citing Ministry of Justice et al, 'New pilots to boost support for rape victims in court' (Press release, Ministry of Justice, 16 June 2022) <https://www.gov.uk/government/news/new-pilots-to-boost-support-for-rape-victims-in-court>.

[743] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 6 (Justice in Covid-19 for Sexual Abuse and Violence project research team).

[744] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2–3 (Support After Rape & Sexual Violence Leeds).

5.2.36 It may even exacerbate the situation on the basis that '[i]t is more likely that they have two peaks of worry and anxiety: having their cross-examination recorded, and then being informed of the trial date and having this pending for months or even years'.[745] Instead of waiting a week or so in the regular trial process, with pre-recorded evidence 'any disquiet over how [the witness] did in evidence can last months, years even whilst they worry about how they did. It is the very opposite of providing 'closure'.[746] The delay between pre-recording and trial may also limit the ability of a witness to access therapeutic services ahead of trial,[747] or to support another witness where one witness has pre-recorded evidence and the other witness (a parent or close confidant) needs to wait until the trial itself.[748]

The 'monster' of timing, preparation, conduct and listing that has been created

5.2.37 Significant concerns about an increasing and widespread use of full pre-recorded evidence are the consequences for the broader criminal justice system with the Committee hearing that full pre-recording is 'crippling the capacity of the system to operate.'[749] The Criminal Bar Association described the effect of full pre-recording on court listing, capacity and delays as 'all negative' because it was not introduced with 'sensible forethought as an integral part' of the criminal justice system but is rather 'treated as an unwieldly bolt-on.'[750] The Committee heard that the special hearings have in effect resulted in a vast number of additional 'mini trials' which has put an intolerable burden on the listing system, judicial capacity and counsel's capacity.[751] The Committee was told that it 'doubles' the preparation work for practitioners, with the whole case having to be prepared for a s 28 hearing and then again later for trial.[752] The expedited schedule also requires counsel to be 'trial ready' in a matter of weeks, rather than months.[753] Counsel are also under pressure to conduct s 28 hearings when disclosure was not necessarily full and proper[754] and, in circumstances where there is additional disclosure following a s 28 hearing, counsel are increasingly under pressure to deal with the matter by way of agreed facts to avoid recalling the witness.[755] The Committee heard that delays in obtaining

[745] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 14–15 (COEUS Group). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Victims' Commissioner for England and Wales).

[746] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 34 (COEUS Group).

[747] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2–3 (Support After Rape & Sexual Violence Leeds).

[748] Ibid (Support After Rape & Sexual Violence Leeds); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 4 (Dr Samantha Fairclough). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 6 (Justice in Covid-19 for Sexual Abuse and Violence project research team).

[749] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 16 (COEUS Group).

[750] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 21 (Criminal Bar Association).

[751] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 4 (COEUS Group). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 5 (Erim Mushtaq); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 4 (Justice in Covid-19 for Sexual Abuse and Violence project research team).

[752] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 6 (Professor John Jackson et al). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, July 2023, 3 (Chair and Vice Chair of the Criminal Bar Association): 'prepare twice'.

[753] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Erim Mushtaq). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (The Bar Council): 'insufficient time to prepare'.

[754] The Criminal Bar Association specifically raised mobile telephone evidence as often not ready in time, with cases often involving complex call data from multiple handsets. They also raised the fact that, in the UK, intermediary reports and psychiatric reports are also often not ready in time. See Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Criminal Bar Association). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (The Bar Council); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Erim Mushtaq) and Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Matthew Roberts).

[755] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 4 (Dr Samantha Fairclough); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 11 (Dr Natalie Kyneswood); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Criminal Bar Association).

transcripts from ABE interviews was in turn causing s 28 hearings to be delayed.[756] In her evidence before the Committee, Professor Thomas stated that '[w]hat we are looking at is an awful lot of unintended consequences that may have flowed from some very good intentions' relating to cases taking longer to complete and leading to increased delay.[757]

5.2.38 There is also a sense that concerns about listing pressures and court convenience is being prioritised over the needs of complainants.[758] The Committee was told of many similar examples of witnesses having to change their mode of evidence at a very late stage (i.e. from pre-recorded to live) due to delays in listing the s 28 hearing ahead of trial.[759] Evidence to the Committee described the 'chaotic' manner in which the rest of the trial is listed following a s 28 hearing.[760] The Committee heard that, after a s 28 hearing had concluded, there is no urgency for listing the remainder of the trial.[761] The Committee was told that there are often 'floating' trials which can be adjourned a number of times. which 'works to the disadvantage of the defendant, who can perceive their welfare and rights to be secondary.'[762] It also creates uncertainty and distress for complainants 'who may feel that the case will never reach a verdict', and pressure on counsel as there is an 'issue of new evidence or disclosure of unused material as time goes by, with the Crown's ongoing duty of disclosure'.[763] Other consequences related to attribution caused by delay[764] and a diminishing number of counsel willing to take on this type of work due to its increased pressure and workload.[765] The Committee heard that listing pressures were particularly acute in s 28 matters involving adult witnesses because they simply take longer.[766]

Pre-recording being blamed for wider issues with the courts system

5.2.39 Delays in the criminal justice system are a longstanding issue and the Committee heard that full pre-recording 'is perceived as a 'sticking plaster' for the broader issues of delay experienced due to underfunding.'[767] The Criminal Bar Association told the Committee, s 28 should never be considered

[756] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 3 (Claire Waxman OBE, Independent Victims' Commissioner for London). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 6 (The Senior District Judge of England and Wales).

[757] Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q35 (Professor Cheryl Thomas). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, January 2024, 5 (Justice in Covid-19 for Sexual Abuse and Violence project research team).

[758] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4 (Support After Rape & Sexual Violence Leeds); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 2 (Claire Waxman OBE, Independent Victims' Commissioner for London).

[759] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Solace Women's Aid).

[760] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 4 (COEUS Group).

[761] Submissions described the situation following a s 28 hearing variously as 'the evidence already in the can' and 'evidence in the bag'. See Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 18 (Criminal Bar Association); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (The Bar Council). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 4 (Dr Samantha Fairclough); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 22 (Criminal Bar Association); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Citizen Advice Witness Service).

[762] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Erim Mushtaq).

[763] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 17–18 (COEUS Group).

[764] Ibid (COEUS Group).

[765] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 23 (Criminal Bar Association). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 6–7 (Professor John Jackson et al); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 4–5 (The Bar Council); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 41 (COEUS Group); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Matthew Roberts).

[766] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Dr Natalie Kyneswood).

[767] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, November 2023, 6 (Dr Samantha Fairclough).

as a cure to the backlog of cases within the Criminal Justice System.[768] Other evidence before the Committee referred to the 'false reasoning' of pre-recording being associated with reduced delay[769] and referred to the 'wider issue of delay'.[770] Rape Crisis England and Wales told the Committee current backlog and resultant delays have been caused by numerous factors which pre-date the rollout of s 28,[771] explaining:

> We do not find it helpful to blame the current situation on full pre-recording, particularly its use by adult witnesses, in the context of wider issues with the court system …
>
> If anything, s 28 is holding a mirror to the multitude of issues in the CJS which cannot be disentangled. The issue is not s 28 itself; s 28 is affected by the issues, to the detriment of those who wish to use it.[772]

5.2.40 Accordingly, the view expressed in evidence was that there was a need to address wider systemic issues, and that 'a much better way to deal with the problems of delay is to fast track vulnerable witness trials altogether.'[773]

A fundamental reassessment of special measures is required

5.2.41 Evidence provided to the Committee highlighted the need for a fundamental reassessment and reform of the current laws and policy which provide for special measures in light of concerns raised about their widespread and expanding use. The Criminal Bar Association told the Committee:

> Our concerns are significant, and they are wider than this response, and the issues that we have been asked to address here. We wish to foreshadow that we consider that there is a strong case for a review of Special Measures as a whole, and how they are applied in the modern era. We consider there is a real need for very close revision of this system, that has largely been untouched for the past 24 years, and of the s 28 provisions which have been pasted onto it, with good intention, but without the infrastructure to make it workable in practice.[774]

5.2.42 The Committee also heard from the COEUS Group:

> The YJCEA is now 25 years old, and the innovative measures (including section 28) it created were ones designed to deal with the state of knowledge and technology a quarter of a century ago. All of the YJCEA Special Measures (including section 28) were introduced piecemeal. There is currently no transparency or accountability in their use. We believe there would be value in a fundamental reassessment of how best to achieve the objectives of YJCEA based on the current state of knowledge of vulnerability of both witnesses and defendants, and the current state of technology.[775]

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768 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 5 (Criminal Bar Association). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, June 2023, 6 (John Riley): 'The addition of s 28 for adult witnesses as a cure for court and trial delays is wrong'; Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 38 (COEUS Group); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Dr Natalie Kyneswood).

769 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 18 (Criminal Bar Association).

770 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Citizen Advice Witness Service). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 6 (Matthew Roberts).

771 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, May 2024, 6 (Rape Crisis England and Wales).

772 Ibid (Rape Crisis England and Wales).

773 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Professor John Jackson et al).

774 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 5 (Criminal Bar Association).

775 Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 6 (COEUS Group).

The Committee's findings and recommendations

5.2.43 It is not known how the Committee will respond to the concerns raised in evidence before it given that, as at August 2024, the Committee had not yet published a report of its findings or recommendations.

5.2.44 However, it is noted that the Committee's inquiry has coincided with a more widespread, renewed focus on pre-recorded evidence. The use of pre-recorded evidence is presently the subject of current and ongoing research and inquiries in Australia and the UK which, similar to the Committee's inquiry, seek to consider the use of pre-recorded evidence more critically and with greater scrutiny.

5.3 *Sexual Assault (Police) Review* – ACT (2024)

5.3.1 In the Australian context, the Sexual Assault (Police) Review Report considered the use of pre-recorded investigative interviews in the ACT. The Review was established in 2022 to understand why so few matters reported to ACT Police between 1 July 2020 and 31 December 2021 proceeded to charge.[776] The 2024 report made findings and recommendations regarding pre-recorded investigative interviews and found that pre-recorded investigative interviews ('evidence-in-chief interviews' or 'EICIs') were not achieving their intended purpose.[777] The Review found that ACT police were incorrectly requiring EICIs from complainants as the initial step before proceeding with an investigation and investigative activity *depended upon* the completion of an EICI. Indeed, ACT Policing policies reinforced this practice and of the cases analysed by the Review, every case where a complainant declined an EICI was closed.[778] The Review expressed the view that while there were advantages in some cases of an EICI, it was not required by law and did not reflect best practice to require 'all victim-survivors to participate in a recorded interview early on in the investigative process, where this requirement is too onerous, difficult or traumatic for the victim-survivor to handle'.[779] The current ACT Police practice was criticised on the basis that it failed 'to recognise that the option of an EICI is only one of a suite of special measures that should be considered on a case-by-case basis to support the collection of all relevant evidence'.[780]

5.3.2 The Review recommended:

- ACT Police, in consultation with subject matter experts, review and enhance training on sexual violence, addressing, best practice approaches to investigation, including the purpose of EICIs and relevant law and legal frameworks;[781]

- in consultation with the ODP, ACT Police review and reform the process of conducting EICIs, including the use of EICIs at trial, to reduce the potential impact of re-traumatisation on complainants;[782] and

- the ACT Government engage in a timely manner in necessary law reform to give effect to the recommendations in this Review.[783]

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[776] The Review was in response to recommendations of Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take Action to Prevent, Believe and Heal*: *Presented to the ACT Government by the Sexual Assault Prevention and Response Steering Committee* (Final Report, ACT Government, December 2021).
[777] Sexual Assault (Police) Review Oversight Committee, *Sexual Assault (Police) Review: Responding to Recommendation 15 of the Listen. Take Action to Prevent, Believe and Heal Report (2021)* (Final Report, ACT Government, March 2024) 43.
[778] Ibid.
[779] Ibid.
[780] Ibid.
[781] Ibid Recommendation 9.
[782] Ibid Recommendation 16.
[783] Ibid Recommendation 23.

5.4 Quantitative research in relation to adult domestic violence complainants in NSW (2023)

5.4.1 A 2023 study in New South Wales examined the association between pre-recorded evidence and court outcomes in domestic violence cases. The study observed that the only research that had considered the use of pre-recorded evidence and court outcomes was qualitative and that based on interviews, pre-recording was said to improve convictions rates in three ways:

(1) by enhancing the quality of the evidence by improving the accuracy of a witness' evidence;

(2) provides additional leverage in plea negotiations; and

(3) by reducing the tendency of witnesses to go back on their testimony at trial'.[784]

5.4.2 The NSW study sought to provide some quantitative research in relation to the issue and reported that pre-recorded interviews were associated with a 3.4% increase in the probability of a conviction (an increase from 73.6% to 77%).[785] The study reported that this increase occurred through three channels: a 5.6% increase in the probability of a conviction among the (one in four) cases that proceed to a defended hearing; a 2.4% increase in the probability of a guilty plea; and 2.4% decrease in the probability that the prosecution withdraws their case.[786] It was noted that the findings needed to be interpreted with a high level of caution due to the associative, non-causal estimates but stated that 'while our article does not permit any definitive claims, based on the available evidence, it appears more likely than not that pre-recorded evidence raises the probability of a conviction in cases of DV assault'.[787]

5.4.3 The study further commented that 'there is surprisingly little research examining the impact of policies aimed at reducing DV on court outcomes in Australia and elsewhere.'[788] The study concludes by commenting on the need for policymakers and researchers to work together in co-designing policies that can be more rigorously evaluated.[789]

5.5 Law Commission – *Evidence in Sexual Offences Prosecutions* – UK (2023–present)

5.5.1 In addition to the UK Parliamentary Committee Inquiry examining pre-recorded evidence specifically,[790] the Law Commission (UK) is currently undertaking an inquiry into the trial process and to consider the law, guidance and practice relating to the use of evidence in prosecutions of sexual offences.

5.5.2 In May 2023, the Commission published a consultation paper which addressed special measures, including pre-recorded evidence.[791] The Commission referred to the views expressed by stakeholders that special measures 'do provide benefits for complainants and the wider trial process. They may reduce trauma for complainants, and allow them to give their best evidence, maximising the

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[784] Ibid 43.
[785] Steve Yeong and Suzanne Poynton, 'Can Pre-recorded Evidence Raise Conviction Rates in Cases of Domestic Violence?' (2023) 56(4) *The Australian Economic Review* 487.
[786] Ibid 487, 488.
[787] Ibid 487, 496.
[788] Ibid 487, 496.
[789] Ibid 487, 496: 'For example, staggering the roll-out of pre-recorded evidence in particular police jurisdictions, randomising access to pre-recorded evidence in 'on/off week' or a full scale randomised controlled trial would significantly improve our capacity to identify the causal link between pre-recorded evidence and court outcomes.'
[790] Ministry of Justice (UK) and Ipsos UK, 2023 *Process Evaluation (Section 28)* (n 577). See above discussion and overview of the UK Parliamentary Committee Inquiry at [5.2].
[791] Law Commission (UK), *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, May 2023) ch 7 ('*Evidence in Sexual Offences Prosecutions*').

quality of that evidence'.[792] However, it was made clear that the special measures needed to be 'properly planned for and well executed, with the complainant being given sufficient and timely information to make an informed choice. The impact of ill-equipped courtrooms with poor quality audiovisual facilities must also be acknowledged'.[793] Further, it was noted that 'better data is required to evaluate more broadly the operation of special measures for vulnerable and intimidated witnesses'.[794]

5.5.3 The Commission sought feedback on several provisional proposals relating to pre-recorded evidence:

(1) a model of automatic entitlement to replace the current model of automatic eligibility for special measures,[795] including pre-recorded evidence;[796]

(2) the ability for full pre-recording to occur at a pre-trial special hearing in the absence of a pre-recorded investigative interview;[797]

(3) in sexual offences prosecutions, the more neutral term 'measures to assist with giving evidence' should be used instead of 'special measures';[798]

(4) remove the labelling of 'vulnerable' or 'intimidated' in favour of introducing a separate category for witnesses who are entitled to certain measures because of the nature of the offence.[799]

5.5.4 The Commission also sought broad consultation feedback about ground rules hearings in sexual offences prosecutions.[800] The Commission's consultation period closed in September 2023 and publication of a final report is anticipated in 2024.

5.6 *The Digital Criminal Justice Project: Vulnerability and the Digital Subject* (2021–2024)

5.6.1 The Digital Criminal Justice Project is an example of current and ongoing research into the impact of digital technology on the criminal justice system in Australia. It will consider the use of technologies from the perspective of judges and lawyers and will examine the impact of digital technologies and '*digital criminal justice*' on vulnerable users. It will necessarily include consideration of pre-recorded evidence.[801] The project is led by Dr Carolyn McKay of the University of Sydney and the Sydney Institute of Criminology. It seeks to address the following research questions:

1. What is vulnerability in digital society; and how is vulnerability currently understood, assessed, identified and managed in the digital criminal justice system?

[792] Ibid 289.
[793] Ibid.
[794] Ibid 291.
[795] Ibid 307–12 and consultation question 42.
[796] Ibid 314–23 and consultation question 47.
[797] Ibid 323–4 and consultation question 48.
[798] Ibid 291–2 and consultation question 40.
[799] Ibid 293–6 and consultation question 41.
[800] Ibid 296–305 and consultation question 44.
[801] The University of Sydney is currently undertaking *The Digital Criminal Justice Project: Vulnerability and the Digital Subject* (2021–2024). The research project, led by Dr Carolyn McKay, will evaluate the impact of digital audio-visual communication technologies on fair and inclusive justice for vulnerable users of criminal courts. See The University of Sydney, 'The Digital Criminal Justice Project: Vulnerability and the Digital Subject', *The University of Sydney Law School* (Web Page) <https://www.sydney.edu.au/law/our-research/research-projects/the-digital-criminal-justice-project.html>. See also Carolyn McKay, *The Digital Criminal Justice Project: Vulnerability and the Digital Subject* (Web Page, 2022) <https://www.digitalcriminaljustice.com>.

2. How do digital communication technologies assist or challenge the administration of justice when vulnerable individuals are involved; and what mechanisms could be introduced to oversee the effective participation of vulnerable individuals and ensure inclusive justice?

5.6.2 The project commenced in July 2021 and is anticipated to conclude on 30 June 2024.

5.7 ALRC – *Justice Responses to Sexual Violence* (2024–present)

5.7.1 The Australian Law Reform Commission (ALRC) is currently undertaking a comprehensive inquiry into justice responses to sexual violence, which will consider the use of pre-recorded evidence.[802]

5.7.2 As part of this project, the ALRC recently released an Issues Paper which acknowledges the progress that has occurred over several decades in the form of the many recommendations and reforms made to improve justice responses to sexual violence. Specifically, with regard to pre-recorded evidence, the ALRC's Issues Paper states:

> Past inquiries and reports have considered that pre-recording a complainant's evidence minimises trauma for complainants in the criminal justice process. The advantages have been considered to outweigh disadvantages. The intention has been to promote a trauma-informed approach, for example, by minimising the number of times complainants need to re-tell their experience, reducing the impact of delay upon complainants associated with lengthy trial lists, and enabling complainants to avoid further trauma arising from giving evidence in a courtroom.[803]

5.7.3 The ALRC also summarised the matters raised in past reviews relating to:

(1) the need for adequate technology to be available to police and courts;

(2) the importance of 'standards and guidelines for police questioning of child or vulnerable adult complainants, including the training and use of specialist police officers to conduct the interviews';[804]

(3) the use of intermediaries for child and vulnerable adult complainants to assist police officers; and

[802] Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper No 49, April 2024). The ALRC's terms of reference include having regard to, *inter alia*:

(a) Laws and frameworks about evidence, court procedures/processes and jury directions,
(b) Laws about consent,
(c) Policies, practices, decision-making and oversight and accountability mechanisms for police and prosecutors,
(d) Training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses,
(e) Support and services available to people who have experienced sexual violence, from prior to reporting, to after the conclusion of formal justice system processes. This should include consideration of:
 (i) Current supports such as legal assistance, appropriately trained and accredited interpreters, witness assistance and intermediaries, and the accessibility of those supports,
 (ii) Innovative supports including independent legal representation,
 (iii) Information and resources provided to victims and survivors about supports available and justice processes,
(f) Alternatives to, or transformative approaches to, criminal prosecutions, including restorative justice, civil claims, compensations schemes, and specialist court approaches.

[803] Ibid 10.

[804] Ibid.

(4) the need for there to be a 'safe space for a child or vulnerable adult complainant to disclose the experience of sexual violence to police, including the time at which the recording of interviews should commence'.[805]

5.7.4 The ALRC also noted that previous reviews had raised questions about the scope of pre-recorded evidence, including:

(1) 'whether police interviews of *all* adult complainants should be recorded and used as the examination in chief at trial';[806]

(2) The extent to which special hearings reduced delays to trials;

(3) The process for editing pre-recorded police interviews and court pre-recorded for use at trial; and

(4) The impact of pre-recording on jury or judge decision making compared to evidence given in person.

5.7.5 These concerns inform the ALRC's two specific consultation questions dealing with pre-recorded evidence:[807]

> **Question 14**
> If you are a victim survivor, was your interview (or interviews if more than one) with the police recorded? Was your evidence recorded in court at a pre-trial hearing?
> What was your experience of the recording process?
> Did you see the recording(s) before they were presented by the prosecution at trial?
> How did you feel about not giving evidence in person at the trial?
>
> **Question 15**
> Has the use of recorded evidence been implemented in your jurisdiction? If so, to what extent?
> How is this working in practice? What is working well? What is not working well? What could be improved?
> Do any of the matters discussed when the recommendations were made (some of which are outlined above) need further discussion in the context of the reforms having been implemented?
> Are there any other issues? What do you see as the advantages and disadvantages of using recordings of the complainant's evidence at trial?

5.7.6 The ALRC's final report is scheduled to be completed by 22 January 2025.

5.8 Conclusion

5.8.1 **Part 5** has explored the increased concern that has arisen about the negative and potentially unforeseen consequences of aspects of the operation of special hearings schemes, particularly the widespread use of pre-recorded evidence. The operation of the Tasmanian scheme, and the extent to which these criticisms and concerns also apply, as well as the extent to which the benefits of the scheme are realised are discussed in **Part 6**.

[805] Ibid 11.
[806] Ibid.
[807] Ibid.

Part 6

Into focus: pre-trial special hearings in Tasmania

6.1 Introduction

6.1.1 **Part 6** provides an in-depth consideration of the operation of special hearings and the pre-recorded evidence scheme in Tasmania. It presents findings based on an evaluation of procedural and case management data, the detailed inspection of all special hearings heard in 2022, and an analysis of interviews to address the research aims set out at [1.3] of this Research Paper:

a) to learn how the pre-trial special hearing scheme is operating in practice;

b) to evaluate whether it is achieving its legislative intent;

c) to consider the advantages and/or disadvantages of the pre-trial special hearing scheme; and

d) to assess whether and to what extent it may be improved.

As with other pre-recorded evidence schemes elsewhere, the scheme in Tasmania features a range of special measures that have been introduced with the intention of addressing concerns about the operation of the criminal justice system for child witnesses and complainants in sexual assault cases. As noted at [4.1.2], the dual aims of a pre-recorded evidence scheme are to reduce the trauma of the trial process for the complainant and protect the integrity of the evidence with a view to having the best evidence presented at trial. Previous reviews of special hearing schemes in Tasmania, other Australian jurisdictions and internationally, have highlighted the need for evaluation to monitor the extent to which the schemes are achieving these aims in practice, as well as to consider any flow on or unintended consequences of the expansion of pre-recorded evidence schemes.

6.1.2 As set out at [1.5], this study draws upon:

a) procedural and case management data obtained from the Supreme Court, the Office of the Director of Public Prosecutions (ODPP) and the Child Sexual Abuse Royal Commission Response Unit (CARCRU);

b) the detailed inspection of the 12 Supreme Court files covering every special hearing which occurred in Tasmania in 2022, including the audio-visual recordings of the special hearings and corresponding transcript, transcript and/or records relating to other court appearances before/after the special hearing, and applications and other documents filed with the court;

c) publicly available data on special hearings contained in the Supreme Court's Annual Report 2022/2023; and

d) the analysis of 14 interviews conducted with legal counsel, judges, and other individuals within the Department of Justice and Tasmania Police with knowledge and/or experience with pre-recorded evidence.

6.1.3 As noted at [1.5.3], a significant issue that arose in the preliminary stages of this study was the absence of organised and accessible records or data in relation to the use of pre-recorded evidence in Tasmania, particularly pre-trial special hearings. This issue is addressed in more detail below at [6.10] and is reflected in the TLRI's Recommendations 16 and 17. However, despite this issue and associated limitations, this study nevertheless provides a key foundational insight into special hearings and pre-recorded evidence in Tasmania. The study's findings provide important indications as to how special hearings and pre-recorded evidence, more generally, are operating in practice and identifies areas for improvement. Significantly, this study aims to bring special hearings and pre-recorded evidence *into focus* in Tasmania for the first time; relevantly, at a time when pre-recorded evidence is itself the subject of a renewed focus. The context of this study is significant with the case *for* the expansion of pre-recorded evidence presently subject to new scrutiny and calls for research and evidence which can demonstrate the use and impacts of pre-recorded evidence in practice.

6.2 Overview of findings

Administrative data

6.2.1 As indicated at [1.5], the TLRI obtained statistics from the Supreme Court in relation to special hearings for the period 2019–2023. From the data provided by the court,[808] the TLRI was able to elicit the following information regarding the prevalence of special hearings:

- In 2019, a total of 7 special hearings occurred (for 7 witnesses), across 4 cases, comprising 8 sitting days.
- In 2020, a total of 13 special hearings occurred (for 13 witnesses), across 12 cases, comprising 16 sitting days.[809]
- In 2021, a total of 4 special hearings occurred (for 4 witnesses), across 3 cases, comprising 9 sitting days.
- In 2022, a total of 22 special hearings occurred (for 22 witnesses), across 12 cases, comprising 25 sitting days.[810]

6.2.2 As noted at [1.5], the *Supreme Court of Tasmania Annual Report 2022/2023* provides some additional, albeit limited, data regarding pre-trial special hearings. As the Annual Report specifically reports on the Court's case management pilot in relation to sexual offence cases with child complainants, it covers only this particular cohort of witness and proceeding, eligible for special hearings.

6.2.3 The Annual Report provides data on the total number of child complainants in sexual offence cases who gave evidence by way of a pre-recorded special hearing between the period 2015–2016 to 2022–2023.[811] In this respect, the data, when combined with the data obtained from the Supreme Court regarding *all* special hearings, are able to show the proportion of total special hearings which involve child complainants in sexual offence matters. Significantly, as shown by Table 6.1 below, special hearings are predominantly used in matters involving child complainants in sexual offence matters.

[808] The data provided by the Supreme Court is contained in **Appendix A** in its original format. **Appendix B** contains an excerpt of the data processed and reformatted by the TLRI.
[809] A suspected duplicate entry has been excluded from these totals. See **Appendix B** for further details. If included, the totals become: In 2020, a total of 14 special hearings occurred (14 witnesses) 13 cases (comprising 18 sitting days).
[810] See above discussion at [1.5.3]–[1.5.8].
[811] Supreme Court of Tasmania*, Annual Report 2022/2023* (n 22) 31.

Table 6.1: The number of total pre-trial special hearings which involve child complainants in sexual offence proceedings

Financial year	Total number of special hearings[B]	Total number of special hearings involving child complainants in sexual offence cases[A]	Proportion of total number of special hearings which involve child complainants in sexual offence cases
2019–2020	9	2	22.2%
2020–2021	11	10	90.9%
2021–2022	17	13	76.5%
2022–2023	--	7	--

NOTES
[A] Data obtained from the *Supreme Court of Tasmania Annual Report 2022/2023*[812]
[B] Data obtained from the Supreme Court of Tasmania (see **Appendix A**).[813]

6.2.4 The Supreme Court's Annual Report also provides an insight into the uptake of pre-trial special hearings within this particular cohort of eligibility (see Table 6.2). There is no corresponding data available regarding the uptake of special hearings across *all* categories of eligibility.

Table 6.2: The proportion of child complainants in sexual offence proceedings who gave evidence by pre-recording or at trial[814]

Year	Pre-Recording	Evidence at Trial - No Pre-Recording
2015-16	-	-
2016-17	-	2
2017-18	3	5
2018-19#	5	13
2019-20	2	9
2020-21	10	1
2021-22	13	4
2022-23	7	2
Total	**40**	**36**

#Case management started February 2019.

[812] Ibid.
[813] Whilst the original format of this data (shown in **Appendix A**) is per calendar year, because the date of each pre-trial special hearing was included, figures per financial year could be extrapolated from this data set.
[814] Reproduced from Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22) 31.

6.2.5 In relation to the increase in pre-trial special hearings, the Annual Report states that '[i]t can be seen that the number of cases involving pre-recordings has steadily increased and it is now the norm' for this cohort of eligible witness.[815] Table 6.2 also shows that there was a 'significant increase' in pre-recordings in the 2020–2021 financial year during the COVID-19 lockdown period when trials were suspended but the courts continued to operate and were able to conduct pre-recordings.[816] However, it is noted that, there are limitations in making statistical observations or observing trends given the small number of matters in each year so that a 'single case may have a significant impact on the data'.[817]

6.2.6 The Annual Report also presents data regarding court outcomes (see Table 6.3). As noted above, the small numbers of matters involved limit any meaningful statistical observations or trends regarding the impact of the use of pre-trial special hearings on court outcomes (i.e. conviction rate). Further, it is noted that the court's analysis, particularly regarding court outcomes, utilises *case*-specific analysis. As explained by Professor Thomas in her written evidence before the UK Parliamentary Committee, a *case*-specific analysis had previously been utilised by the Ministry of Justice and the Crown Prosecution Service in attempts to evaluate the use of pre-recorded evidence when a *charge*-based analysis is to be favoured in order to obtain 'a more complete picture' of pre-recorded evidence, including its impact on court outcomes.[818]

Table 6.3: Outcomes of Committals for trial[819]

Year	Found Guilty		Found Not Guilty		Pleaded Guilty		Withdrawn	
	With Pre-Rec	No Pre-Rec	With Pre-Rec	No Pre-Rec	With Pre-Rec	No Pre-Rec	With Pre-Rec	No Pre-Rec
2015-16	-	-	-	-	-	-	-	-
2016-17	-	1	-	1	-	5	-	1
2017-18	-	2	-	1	-	3	-	-
2018-19#	-	3	1	5	-	4	-	7
2019-20	1	9	-	3	1	13	-	4
2020-21	4	-	1	1	-	13	-	4
2021-22	4	-	1	2	-	4	-	1
2022-23	6	1	1	-	1	17	-	1
Total	**15**	**16**	**4**	**13**	**2**	**59**	**0**	**18**

#Case management started February 2019.

[815] Supreme Court of Tasmania*, Annual Report 2022/2023* (n 22) 30.
[816] Ibid.
[817] Ibid 31.
[818] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 [1.4] (Professor Cheryl Thomas): '…a charge-based analysis will necessarily produce a more complete picture of what happens in the Crown Court, and it is required for understanding jury decision-making. In contrast, in a case-based analysis (used for instance by MoJ and CPS) the reality of jury decision-making can be lost. This occurs when case-based analyses categorise outcomes on a case level — for instance, recording a case as a "conviction" if there is a single guilty plea or if a jury reaches any guilty verdict on any charges regardless of how many not guilty or hung jury verdicts that same jury reaches in the same case.'
[819] Reproduced from Supreme Court of Tasmania*, Annual Report 2022/2023* (n 22) 31, which includes the following notes: (1) counts committals for trial, regardless of whether evidence was given by the child complainant; (2) records the outcome by the year in which that outcome occurred, not the year in which evidence was given; (3) records a mixed verdict of 'found guilty' and 'found not guilty' where there are multiple charges on an indictment, as one outcome of 'found guilty'; (4) counts the number of matters rather than the number of complainants, so where there are multiple child complainants for a matter committed for trial this table records only one outcome for that indictment. For example, if an accused was found guilty of sexual offences against four children, the table records a single 'found guilty' outcome, rather than four findings of guilt; (5) if an accused pleads guilty to one charge and went to trial and was found guilty in relation to another child on the same indictment, that would be recorded as a 'found guilty' outcome.

6.2.7 Observations were also made in relation to the time taken to finalise the evidence of child complainants in sexual offence cases (see Table 6.4), specifically focussed on the case management initiatives of the court.

Table 6.4: Time taken to finalise evidence[820]

	Complainants with Pre-Recording	Complainants with No Pre-Recording
2015-16		
Total Cases	**-**	**-**
2016-17		
First appearance to evidence ≤12m	-	1
First appearance to evidence >12 ≤24m	-	1
First appearance to evidence >24m	-	-
Total Cases	**-**	**2**
2017-18		
First appearance to evidence ≤12m	1	-
First appearance to evidence >12 ≤24m	2	5
First appearance to evidence >24m	-	-
Total Cases	**3**	**5**
2018-19#		
First appearance to evidence ≤12m	3	4
First appearance to evidence >12 ≤24m	2	7
First appearance to evidence >24m	-	2
Total Cases	**5**	**13**
2019-20		
First appearance to evidence ≤12m	1	3
First appearance to evidence >12 ≤24m	1	3
First appearance to evidence >24m	-	3
Total Cases	**2**	**9**
2020-21		
First appearance to evidence ≤12m	2	-
First appearance to evidence >12 ≤24m	7	1
First appearance to evidence >24m	1	-
Total Cases	**10**	**1**
2021-22		
First appearance to evidence ≤12m	4	1
First appearance to evidence >12 ≤24m	6	2
First appearance to evidence >24m	3	1
Total Cases	**13**	**4**
2022-23		
First appearance to evidence ≤12m	2	-
First appearance to evidence >12 ≤24m	4	1
First appearance to evidence >24m	1	1
Total Cases	**7**	**2**

#Case management started February 2019.

820 Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22) 33.

6.2.8 The Annual Report states 'it is to be noted that efficiencies in relation to these cases also benefit accused and do not lead to any disadvantage.'[821] Respectfully, in light of the issues highlighted in evidence before the UK Justice Committee,[822] this data is not sufficient to substantiate this claim. Further, whilst the detrimental impacts of such delays in ultimate trial listings are obvious for an accused, they also arguably extend to the complainant and the wider criminal justice system.[823] Without including ultimate trial dates in measures of timeliness, it is not possible to know whether the use of pre-recorded evidence and associated 'front-ended' case management may nevertheless result in disadvantageous delays to the finalisation of a matter post pre-recording.[824] Indeed, as discussed at [6.5.7]–[6.5.8], there is the suggestion that such delays in trial listings are occurring in Tasmania.

Examination of court files (the 2022 special hearing study)

6.2.9 As discussed at [1.5], the TLRI obtained approval to access and inspect the court files relating to 22 special hearings that had taken place in 12 cases in 2022. The files were examined to obtain information about a range of matters including: the category of witnesses using special hearings, the type of proceeding, if a pre-recorded investigative interview was used in conjunction with the special hearing, and the duration of the special hearing (such as whether there were multiple sittings). It is noted that the study did not involve the observation of pre-recorded investigative interviews and only limited viewing of special hearing pre-records.[825]

6.2.10 Of the files inspected of the 22 special hearings across 12 cases in 2022, it was found that:

- 17 involved child witnesses (77.3%);
- 4 involved adult witnesses (18.2%); and
- 21 involved sex offences (95.5%) (11 of the 12 cases).

In 13 of the 22 (59.1%) special hearings (across the 12 cases), one or more pre-recorded investigative interviews were relied upon in addition to the special hearing pre-recording.[826] In the other special hearings, all of the witnesses' evidence (examination-in-chief, cross-examination and re-examination was heard (and pre-recorded) at the special hearing. Further findings from the examination of the court files are set out in this Part where it is relevant to the issue being considered.

[821] Ibid 29.
[822] See discussion in **Part 5** regarding the substantive evidence before the Committee of a number of 'unintended consequences' on complainants, defendants, and the administration of justice: at [5.2.6].
[823] See above discussion in **Part 5** regarding the evidence before the UK Parliamentary Committee which sought to challenge or at the very least to qualify the notion that full pre-recording affords a witness 'closure' ahead of trial at [5.2.35]–[5.2.36] and the above discussion about the 'monster' of timing, preparation, conduct and listing that has been created, specifically, at [5.2.37].
[824] See [6.10] for further discussion of record-keeping.
[825] TLRI researchers did not view all of the special hearing pre-records which occurred in 2022 in their entirety. Limited and select viewing of the special hearing recordings was used to supplement information obtained from court transcripts and other information about the special hearings (and the matter more generally) obtained from court records.
[826] There were other cases in which a pre-recorded investigative interview existed, but it was not relied upon (i.e. the prosecution chose to lead the witness's evidence-in-chief in full at a special hearing).

Interviews

6.2.11 As stated at [1.5], the TLRI conducted 14 interviews with individuals who had knowledge and/or experience with pre-trial special hearings or pre-recorded evidence more generally. The interviews were conducted with legal counsel, judges, and other individuals within the Department of Justice and Tasmania Police with knowledge and/or experience with pre-recorded evidence. The interviews were conducted either in person or via Zoom and all interview participants were asked the same questions in the course of a semi-structured interview which took an average of 45–60 minutes in duration:

(a) Whether the pre-trial special hearing process ('the process') had any benefits and/or disadvantages from your point of view.

(b) What effect, if any, the process had on your normal approach in preparing for and undertaking trial work.

(c) Whether you made adjustments in questioning of witnesses because of the process.

(d) What problems, if any, you experienced with the process.

(e) Your overall assessment of the process, its affect, purpose and utility.

As noted at [1.5.14], the interview participants in the study were experienced in working in a highly specialist area of practice and provided a broad range of experience and perspectives across the criminal justice system in Tasmania.

6.2.12 The dominant overall view of special hearings and pre-recorded evidence in Tasmania provided in the interviews was positive. Interview participants variously described special hearings (and full pre-recording) as 'great' (PP1), 'a good process to have' (DL2), 'a really great scheme' (PP2), valuable (SCJ1) and a 'positive thing' (DOJ1, DOJ2). One participant reported: 'in every one [in which they had been involved] there was significant benefit to the witness and the way in which I/we [other parties] approached the matter to resolution' (P1). Another participant commented: 'I emphasise we don't have to look for more and more benefits, the impact on the individual [witness] … is very significant' (SCJ2). The TLRI was told by many participants of 'exemplar' or 'gold star' examples in which special hearings were used with 'exceptional results' (i.e. SCJ2 and WAO1). The benefits of pre-recorded evidence schemes identified by participants are discussed further in this Part.

6.2.13 As with other reviews of pre-recorded evidence schemes, many participants expressed their support for full pre-recording in the familiar manner[827] of it being *a step in the right direction* ('it's all in a positive direction' (VSS1) and presented notions of *net benefit* (the advantages definitely outweigh disadvantages (WAO1) and 'overall [there are] more positives than negatives' (DL2). Many participants expressed an interest in the continued operation of the scheme, some referring to it continuing ('they should definitely still keep going' (PP2) and it is important that it be maintained (SCJ1) and others voiced support for its expanded use ('I think that pre-recorded evidence should be utilized across the board' (PP1). Other participants were more understated in their support for the scheme, simply referring to the fact that there had been 'no disasters [and the scheme operated] relatively smoothly' (DL3). Positive views of the scheme were also not universal, with one participant reported having 'mixed views' (DL1) about special hearings and another participant stated it was their 'preference not to have them' (DL2).

[827] See above discussion at [4.1.1]–[4.1.5].

6.2.14 The potential advantages or benefits of special hearings and pre-recorded evidence, more generally, was a topic mentioned by all interview participants. Participants reported benefits which fell into either one or both of the two interrelated categories of the welfare of the witness and/or the integrity of the evidence. The predominant themes in this respect were, in the words of interview participants, as follows:

- earlier, certain hearings; can move on
- more powerful, rich evidence
- quicker, less stressful
- focus on witness; everyone working together.

6.2.15 As with the approach elsewhere,[828] the majority of participants also qualified their support for the scheme by the fact that there was room for improvement: we can still work on a lot of aspects (WAO1), 'with proper investment in how it is run, with proper funding, it can be even better' (P1); they are only going to become more valuable with everyone gaining a better understanding of how they work (SCJ1); and 'I think they can be improved' (DOJ1 and DOJ2). Concerns and issues about the operation of the pre-recorded evidence scheme raised by participants are discussed further in this Part. However, a defining pattern to emerge from participant interviews was an apparent avoidance on the part of participants to refer to 'disadvantages' of the special hearing scheme. Rather than 'disadvantages', participants spoke of 'procedural' or 'process' issues which either prevented or limited the advantages of the scheme being realised in practice — issues with implementation as opposed to *disadvantages*. One participant explained that there are 'not so much 'disadvantages' but 'issues' with the 'process', we have a way to go to layer all procedural requirements and practices for it all to be ironed out, to drill down to what it is about' (P1). Similarly, another participant described how 'actual benefits are delivered [with] minimal disadvantage, albeit, the procedural issues' and another participant referred to 'limits on benefits, noting, that these do not fall into 'disadvantages'' (SCJ2). A participant told the TLRI, 'I know in theory what the benefits are … but it doesn't necessarily work [in practice]' (DL1).

6.2.16 This perspective is consistent with the prevailing notion of the longstanding case *for* pre-recorded evidence, that while there may be factors which limit the full realisation of potential benefits of pre-recorded evidence in practice, any disadvantages of using pre-recorded evidence are outweighed by the benefits of using pre-recorded evidence.[829] There now appears to be a reassessment of the *downsides* of using of pre-recorded evidence, particularly when considered in the light of the widespread and expanding use of the scheme, with current and emerging research suggesting that there may in fact be a number of unintended consequences on complainants, defendants, and the wider criminal justice system.[830] Indeed, there are many parallels between the 'issues' identified by interview participants and the predominant themes of the emerging case against the widespread use of pre-recorded evidence as outlined in **Part 5** of this Research Paper.

6.2.17 The benefit of the scheme as well as concerns and issues about the operation of the pre-recorded evidence scheme raised by participants are discussed further in this Part.

[828] See **Parts 4** and **5**.
[829] See above discussion in **Part 4** of this Research Paper
[830] See above discussion in **Part 5** of this Research Paper.

6.3 Are special hearings used widely and/or overused?

6.3.1 A concern that emerged in the recent UK consideration of the expansion of special hearings and the use of pre-recorded evidence is that the measure is being used too widely and without consideration of the need in the case. This was particularly a concern in relation to its expansion to adult witnesses, where it was considered not to be appropriate in all cases, in contrast to evidence given by young children, where it was generally accepted to be appropriate.[831] In the Tasmanian context, as shown by the 2022 TLRI study of court files and administrative data, the use of special hearings and pre-recorded evidence does not appear to have expanded in the same way. Further, there are indications that special hearings may in fact be rarely used in the Magistrates Court jurisdiction.

6.3.2 As discussed above at [6.1.3], there is no comprehensive data currently available regarding the uptake of special hearings across *all* categories of eligibility in the Supreme Court. In the data presented in the Supreme Court Annual Report, there would appear to be a shift to using pre-recorded evidence rather than giving evidence at trial for child complainants in sexual offence proceedings. However, the available data also suggests a relatively low level of use of special hearings in Tasmania at present and only a modest increase in use in recent years.[832] This is despite the legislative amendments which have occurred over this same period which have served to expand its potential use (see [2.2.4]–[2.2.5]). As noted, in 2021–22, there were 17 special hearings held and 13 involved child witnesses and in the 2022 TLRI study, there were 22 special hearings across 12 cases, involving 17 child witnesses and 4 adult witnesses and 21 of the special hearings involved sexual offences. The remaining case involved a number of non-sexual serious violence offences (see Table 6.1 and [6.2.10] above).[833] It would appear that while special hearings are now available to a wider cohort of witnesses, including a greater number of adult witnesses for a range of offences including sexual offences and family violence offences, the use of special hearings in Tasmania remain predominantly for child witnesses in sexual offence matters.

6.3.3 There is very little information about the use of special hearings in the Magistrates Court. However, there are indications that special hearings may be underused in the Magistrates Court. In November 2022, the Chief Magistrate informed the TLRI that special hearings were not being utilised by the prosecution in the Magistrates Court jurisdiction. Her Honour had enquired of the Magistracy, state-wide, and only one Magistrate had reported experience with special hearings, having conducted two special hearings, albeit some time ago. This is despite the fact that the majority of matters eligible for the use of special hearings are within the jurisdiction of the Magistrates Court (namely, many family violence matters, and care and protection matters).[834] For example, in 2022–2023, there were 1729 family violence order applications and 659 child protection applications lodged.[835] In 2022–2023 there were 1,683 family violence order applications finalised in the Magistrates Court.[836] During the same period, there were 21 requests for intermediary assessment reports,[837] 15 ground rules hearings which took place, and 6 hearings in which a witness intermediary was involved.[838] Sexual offences are also dealt with in the Magistrates Court, with 51 sexual assault and related offences finalised defendants with in the Magistrates Court in 2022–2023.[839] However, only two special hearings have been reported to have occurred in the Magistrates Court since 2014.

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[831] See discussion in **Part 5** above, specifically at [5.2.10]–[5.2.12].
[832] There were 7 special hearings in 2019, 13 in 2020, 4 in 2021, 23 in 2022 (see [1.5] and [6.2.1] above) and 10 in 2023.
[833] These included attempted murder, unlawful acts intended to cause grievous bodily harm, attempted acts intended to cause grievous bodily harm and wounding.
[834] See [2.3].
[835] Magistrates Court of Tasmania, *Magistrates Court Annual Report 2022/2023* (2023) 16 <https://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0008/760436/FINAL-Magistrates-Court-Annual-Report-2022-2023.pdf> (‘*Annual Report 2022/2023*’).
[836] Ibid 7.
[837] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 7I.
[838] Magistrates Court of Tasmania, *Annual Report 2022/2023* (n 835) 23.
[839] Australian Bureau of Statistics, *Criminal Courts, Australia (Reference period financial year 2022-23)* (Catalogue No 4513.0, 15 March 2024) Table 44 <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release#data-downloads> (‘*Criminal Courts, Australia*’).

6.3.4 Interview participants also reported a ‘gap’ in the use of pre-recorded evidence in the Magistrates Court jurisdiction and that, as a result, there was currently a distinction between the experiences of witnesses in the Supreme Court and Magistrate Court jurisdictions. Interview participants commented generally that more consistent support was provided to witnesses in the Supreme Court and there was a comparative lack of support for witnesses in the Magistrates Court jurisdiction (DOJ1). This related to all special measures, not just pre-recorded evidence, with particular mention of a lack of, or reduced use of, support persons to accompany witnesses when giving evidence in the Magistrates Court (DOJ1).

6.3.5 Interview participants told the TLRI of specific cases in which witnesses would have greatly benefited from a special hearing in a Magistrates Court matter, including complainants who experienced significant trauma responses, family violence complainants and proceedings which had been subject to lengthy delays and adjournments (VSS2). However, no interview participant had been involved in a special hearing in the Magistrates Court. One interview participant explained that special hearings were ‘rarely used’ in the Magistrates Court jurisdiction, with ‘the approach … just to find an earlier hearing, which is usually possible’ (PP2). It was on this basis that the participant did not consider there to be ‘a tangible benefit’ for special hearings in the Magistrates Court. The participant commented that even in the context of family violence matters, in which there was a particularly long delay before hearing, a ‘fast tracked’ hearing listing would be favoured over the use of special hearings (PP2); the lists in the Magistrates Court are ‘already jampacked’ and ‘often you would be waiting as long as the hearing date to list a pre-record’ (PP2). However, in appropriate Magistrates Court cases, special hearings ‘could be utilised and figured out’ (PP2), particularly if a hearing date is still far off, or if a hearing date is repeatedly delayed or a matter is otherwise subject to delays that the prosecution can’t control or prevent (PP2). ‘How it would work in the Magistrates Court would definitely be worth exploring in those circumstances … [and] there are likely to be a few matters that would benefit if it can be done’ (PP2).

6.3.6 An interview participant told the TLRI that the feedback they had received about special witness applications was that the process was often challenging and frustrating for applicants, particularly adult complainants involved in family violence proceedings in the Magistrates Court jurisdiction (VSS2). The participant described there being an ‘onus’ on complainants to make the applications, and the time consuming, stressful and often costly exercise of gathering the necessary supporting documentation (i.e. from a treating GP, psychologist or psychiatrist) (VSS2). The TLRI was told that most practitioners charge an additional fee for an extended consultation required for the preparation of such documentation and many family violence complainants don’t have a regular treating GP, or the opportunity to engage with a specialist (i.e. psychologist or psychiatrist). An interview participant told TLRI that there have been a number of occasions where adult family violence complainants in Magistrates Court matters had been desperately seeking a special witness application but unable obtain the requisite supporting documentation (VSS2).

6.3.7 More generally, while the perceptions of interview participants as to the prevalence of special hearings ranged from ‘it always seems like someone is doing a pre-record’ (DL1) to an acknowledgement that the numbers are not large (VSS2), no interview participant expressed concerns about the expansion of the eligibility criteria for the use of special hearings. One participant estimated that there would be ‘at least 12 [special hearings] in a year’ (DL1). Several participants had an expectation that the use of special hearings would increase: that the use of special hearings and pre-recorded evidence, more generally, would continue to grow over time (VSS2), including an increase in the use of pre-recorded investigative interviews in conjunction with special hearings (‘I anticipate more special hearings involving an original police statement, with police becoming more familiar with the process and more used to using it’ (SCJ1)).

6.3.8 Accordingly, the available information suggests that any increase in the use of special hearings, related to expanded eligibility for the scheme, is either yet to occur or, indeed, may not occur, in Tasmania as it has in other jurisdictions. It would appear that for matters generally in the Magistrates Court, as well as for eligible witnesses in family violence matters,[840] and adult complainants in sexual offences matters in both the Supreme Court and the Magistrates Court, there is scope for greater use of the pre-recorded evidence scheme. Accordingly, the TLRI's view is that the use of special hearings and pre-recorded investigative interviews in the Supreme Court is a matter than requires continued monitoring (see further discussion at [6.10], and Recommendation 17.) In addition, the TLRI's views are that there are preliminary indications of a need for improved systems and supports for complainants and witnesses who give evidence in Magistrates Court proceedings, including access to and provision of special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for eligible witnesses. This includes, but is not limited to, the use of pre-recorded evidence.

Recommendation 1

The TLRI recommends improved systems and supports for witnesses giving evidence in the Magistrates Court, including access to and provision of special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for eligible witnesses. This includes, but is not limited to, the use of pre-recorded evidence.

The TLRI further recommends that a more in-depth assessment should be conducted which considers the access to and provision of special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) for eligible witnesses in the Magistrates Court jurisdiction.

6.3.9 In terms of the use of special hearings in conjunction with pre-recorded investigative interviews, the breakdown of special hearings from 2022 (see [6.2.10]) which showed that in 59.1% of special hearings (13 of the 22 special hearings), one or more pre-recorded investigative interviews were relied upon in addition to the special hearing pre-record.[841] This was consistent with the view expressed by one participant who estimated that, based on their involvement with special hearings to date, about half also involve a pre-recorded investigative interview (SCJ1). This is a matter that also requires ongoing monitoring (see further discussion in [6.10] and Recommendations 16 and 17).

6.4 Concerns in relation to eligibility criteria

Simplification of eligibility criteria

6.4.1 In the interviews, there were concerns expressed regarding eligibility for the scheme relating to its complexity rather than the actual scope of the witnesses who are eligible. As outlined earlier in this Research Paper at [2.2.3], the eligibility criteria for special hearings and other special measures in Tasmania attaches to either the witness, or the proceedings, or both.

[840] State-wide experimental family and domestic violence statistics suggest there were 1,582 defendants with at least one family violence offence in Tasmanian courts in 2022/2023: Australian Bureau of Statistics, *Criminal Courts, Australia* (n 839) 'Experimental family and domestic violence statistics' <https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release#experimental-family-and-domestic-violence-statistics>.
[841] There were other cases in which a pre-recorded investigative interview existed, but it was not relied upon (i.e. the prosecution chose to lead the witness's evidence-in-chief in full at a special hearing).

6.4.2 These concerns echoed those ventilated by the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings ('the Commission of Inquiry'), namely that the special measure provisions in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) are 'unnecessarily complex, poorly drafted and extremely difficult to understand.'[842] The relevant eligibility criteria and related definitions are, in many respects, complex and duplicitous. As the DPP recently told the Commission of Inquiry:

> [the Act is] somewhat clunky and difficult to follow. It is particularly confusing that there are definitions for affected child, affected person, prescribed proceedings, prescribed witnesses, special witnesses, specified offence and specified proceeding.

The DPP further told the Commission of Inquiry that understanding the *Evidence (Children and Special Witnesses) Act 2001* (Tas) was an area in which prosecutors would benefit from more training.[843]

6.4.3 The Commission of Inquiry ultimately recommended that the special measures provisions in the Act should 'be simplified and rationalised as much as possible.'[844] The TLRI agrees with the Commission of Inquiry's recommendation in this respect. The incremental and piecemeal amendments to the eligibility criteria for the scheme have resulted in it being unnecessarily convoluted and complex. This is an issue common to other jurisdictions where pre-recorded evidence and other special measure provisions have been subject to similar incremental development.[845]

6.4.4 From the TLRI's review of the eligibility criteria under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) there were apparent discrepancies in the way in which repealed ss 127A and 128 of the *Criminal Code* were included in the relevant definitions:

- The definition of **affected child** in s 3 of the Act still includes references to ss 127A and 128 of the *Criminal Code*, which are now repealed.
- The definition of **prescribed proceeding** in s 3 of the Act still includes references to ss 127A and 128 of the *Criminal Code*, which are now repealed.
- The definition of **specified offence** in s 3 of the Act still includes a reference to s 127A of the *Criminal Code,* which is now repealed.
- The definition of **sexual offence** in s 3 of the *Evidence Act 2001* (Tas), which is utilised by s 5A of the Act, still includes references to ss 127A and 128 of the *Criminal Code*, which are now repealed.

However, ss 127A and 128 are omitted from the definition of **child sexual offence** in s 3 of the Act.

6.4.5 The ODPP have told the TLRI that problems have arisen in using pre-recorded evidence because s 127A has been removed from the definition of child sexual offence, and further that it would be problematic to remove the repealed offence provisions from the eligibility criteria for the pre-recorded evidence scheme in the definitions of affected child, prescribed proceedings, specified offence and sexual offence, particularly the reference to s 127A (aggravated sexual assault). This is because the s 127A offence is still charged in relation to historical matters and the ODPP confirmed that there are current active files involving s 127A charges. The ODPP told the TLRI that it would be appropriate for s 127A to be included in the definition of *child sexual offence*, explaining that its omission had recently

[842] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 71.

[843] Ibid 46.

[844] Ibid 72, Recommendation 16.11. See also discussion earlier in this Research Paper at [2.3.3].

[845] For example, with respect of the YJCEA in the UK, it has been said that 'the numerous cross-references which must be disentangled by the user … resembled linguistic linguine best digested in a darkened room with two aspirin': Laura Hoyano, 'Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses' (2000) *Criminal Law Review* 251, 256 citing 'John Greenway, MP, Standing Committee E, Hansard, June 22, 1999, 10:45 a.m. debates.' Current criticisms of s 28 of the YJCEA involve eligibility criteria being 'too rigid' and 'too complex': Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 10 (COEUS Group).

caused difficulties in playing the recorded evidence of a complainant in a s 127A matter on retrial. The TLRI agrees that there should be consistency regarding the inclusion or exclusion of ss 127A and 128 in the eligibility criteria and, based on the reasons outlined by the ODPP, there are compelling reasons for inclusion.

6.4.6 From the TLRI's review of the eligibility criteria under the *Evidence (Children and Special Witnesses) Act 2001* (Tas), the following further issues were identified:

- The definition of **affected child** under s 3 of the Act includes duplicity regarding the offences of murder and manslaughter. The definition currently includes both:
  - a child who is giving, or is to give, evidence in respect of a crime under s 158 or s 159 of the *Criminal Code*;[846]
  - a child who has witnessed a crime under s 158 or s 159 of the *Criminal Code*.[847]
- The broad definition of a child who is giving or is to give evidence in respect of these offences would encompass circumstances in which child has witnessed those offences.

6.4.7 The definition of **affected child** under s 3 of the Act also includes duplicity regarding **child sexual offences**. The Act currently provides that an affected child includes a child who is giving, or about to give, evidence in respect of a child sexual offence.[848] 'Child sexual offence' is defined to include 14 offences under the *Criminal Code* which, all bar one, are already included in ss 3(b)(i) and (ca), that is, a child who it is alleged these offences have been committed upon or in respect of, or a child who has witnessed these offences. If the offence of production of child exploitation material is simply included in s 3(b)(i) (and minor changes made to the phrasing of that sub-s), s 3(cb) is rendered otiose and may be omitted.

6.4.8 Accordingly, considering the views expressed in interviews, the TLRI's examination of the legislative framework, the views of the ODPP, and the recommendations of the Commission of Inquiry, the TLRI's view is that the eligibility criteria in *Evidence (Children and Special Witnesses) Act 2001* (Tas) should 'be simplified and rationalised as much as possible' in line with the Commission of Inquiry's Recommendation 16.11(1), which states that the eligibility criteria for special hearings and other special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should 'be simplified and rationalised as much as possible'. If existing eligibility criteria provisions are to remain, the TLRI's views are that amendments should be made to ensure consistency across definitions and to remove duplicitous references (see Recommendation 2).

Terminology

6.4.9 The issue of appropriate terminology is related to the eligibility criteria for special hearings and other special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas). Recent research and literature, including the UK Law Commission, has identified the issue of language such as 'vulnerable' witnesses, 'special' and 'intimidated' as being problematic.[849] Unlike other jurisdictions, the *Evidence (Children and Special Witnesses) Act 2001* (Tas) already avoids the use of the term vulnerable to label witnesses in the context of eligibility for special measures.[850] Further, the use of the term 'intimidated' is used in specific contexts[851] as opposed to being problematically employed as a general label. However, the Act relies heavily on the terminology of '*special* measures', '*special*

[846] *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 3(ab).
[847] Ibid s 3(ca)(ii).
[848] Ibid s 3(cb).
[849] See above at [5.5].
[850] The use of the term in the Act is limited to s 3A(1) in the context of principles in relation to child witnesses, where it is used descriptively as opposed to being employed as a general label: 'It is the intention of Parliament that, as children tend to be vulnerable in dealings with persons in authority, child witnesses be given the benefit of special measures.'
[851] The use of the term 'intimidated' in the Act is limited to ss 3A(2)(c) and 8(1)(b)(ii) where it is used in discrete contexts as opposed to it being employed as a general label.

witnesses' and, indeed, '*special* hearings'. As raised by the UK Law Commission in its recent consultation paper, the use of terms such as these have been criticised.[852] The Commission stated that in relation to special measures:

> A prosecutor has told us that there are negative connotations to the term "special measures", as it is perceived as an advantage given to complainants. One judge has advocated changing the term "special measures" to something more neutral like "methods by which witnesses can choose to give evidence". The equivalent of special measures in New Zealand are referred to as "alternative ways of giving evidence" and in Victoria, Australia they are known as "alternative arrangements for giving evidence". While "special measures" has the benefit of being a well-known and understood term within the criminal justice system, we are persuaded that a more neutral description is appropriate. Therefore, we provisionally propose use of the term "measures to assist with giving evidence".[853]

6.4.10 Other literature discusses the more fundamental issues with the use of terminology of 'vulnerability' (including terms such as 'special' which denote vulnerability) and the allocation of assistance measures on the basis of fixed definitions of vulnerability or 'special needs'. The argument is made that all witnesses called to give evidence in the adversarial criminal justice system are vulnerable and that a particular witnesses' need for alternate measures or additional assistance is a more dynamic and complex concept linked to their level of resilience within that setting. Upon recognising the inherent vulnerability of every witness called to give evidence in an adversarial system, the question has arisen as to whether the underlying policy and framework of '*special* measures' needs to be revisited in favour of an alternate, neutral model.[854]

6.4.11 Based on this pre-existing research, the views set out in the UK Law Commission paper, and the approach taken in New Zealand and Victoria, it is the view of the TLRI that consideration should be given to changing terminology such as 'special witness', 'special measures' and 'special hearings' used in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) with more neutral language, similar to the models that exist in Victoria and New Zealand (for example, 'alternative ways of giving evidence' or 'alternative arrangements for giving evidence').

Recommendation 2

The TLRI recommends that the eligibility criteria for special hearings and other special measures under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should 'be simplified and rationalised as much as possible' in line with the Commission of Inquiry's Recommendation 16.11(1).

If existing eligibility criteria provisions are to remain, the TLRI recommends amendments should be made to ensure consistency across relevant definitions, that the definitions include repealed offences where offences may still be used and to remove duplicitous references.

Recommendation 3

The TLRI recommends that terminology such as 'special witness', 'special measures' and 'special hearing' in the *Evidence (Children and Special Witnesses) Act 2001* (Tas) be replaced with more neutral language, similar to the models that exist in Victoria and New Zealand.

[852] Law Commission (UK), *Evidence in Sexual Offences Prosecutions* (n 791) 291, 294.
[853] Ibid 291–2 and consultation question 40.
[854] See, eg, Samantha Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act (1999): Special Measures and Humane Treatment' (2021) 41(4) *Oxford Journal of Legal Studies* 1066; Samantha Fairclough, 'Vulnerability in the criminal trial' in E Johnston (ed), *Challenges in Criminal Justice* (Routledge, 1st ed, 2022) 83; M Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law & Feminism* 1.

6.5 *Earlier, certain hearings; can move on*

Benefit of earlier hearings

6.5.1 A beneficial feature of pre-trial special hearings and recorded evidence schemes are the advantages for the witness and also the court system of the complainant giving evidence earlier in the process, providing certainty for the complainant and ensuring the integrity of the evidence by having an account provided closer in time to the alleged offence.

6.5.2 There was support for this proposition in the views expressed by interview participants, who highlighted the fact that special hearings afford witnesses with the benefit of 'getting their time in court several years forward in time ahead of trial' (VSS1). The use of special hearings, coupled with case management initiatives, provides 'a different "stream", avenue to trial' (SCJ2). Other participants spoke of not being 'bound' by the timeframe of a trial, the 'waiting', 'they can get it over and done with quicker, closer to the time of the alleged offending … witnesses are not dreading a trial three years down the track' (DL3).

6.5.3 An interview participant provided the following compelling explanation:

> The first thing is we cannot underestimate the benefit for complainants/witnesses who give pre-recorded evidence at the earliest point feasible within the framework and then are able to get on with life. It is interesting to try and gauge where the stress lies: length of time, uncertainty … [t]he listing of matters, matters falling out of the list, not getting on, seems to have a very deleterious impact on individuals' lives … We know it does from the Royal Commission … Judges also know from victim impact statements. Often what witnesses speak of is the court process, the time taken and effect on their lives, stress associated with that. Talking of 'benefits', this a single benefit. You could look for others, but this benefit alone is enough (SCJ2).

Other interview participants referred to the fact that there was reduced trauma when there was not the delay of waiting for trial, coupled with there being more certainty about the listing of a special hearing as opposed to a trial (P1 and WAO1).

6.5.4 The interview participants also indicated that there are potential benefits to an accused from earlier special hearings. An interview participant told the TLRI of the 'old school view' that 'as a general rule, the defence are usually the beneficiaries of delay … [but] with pre-recorded evidence taken sooner rather than later, this potential benefit to defence is removed' (DL3). Another participant told TLRI that there was otherwise 'a degree of assistance for defence' following full pre-recording, there was 'certainty as to the evidence' against the accused and 'more time … [you're] not making forensic decisions on the fly, time to pause and reflect, recalibrate' (DL4). Similarly, another participant added that where a defendant gives evidence at trial, it is useful for the defendant to have the ability to look over and reflect upon the evidence of the main witness in the case against them, rather than it all happening within the space of a few days, with the defendant under considerable stress and pressure (DL2).

Closure not possible until trial finalised

6.5.5 In other reviews, the ability of a witness to obtain 'closure' after giving evidence at a special hearing is hampered by the uncertainty about the outcome of the trial itself. There is also uncertainty (as discussed at [6.5.20]–[6.5.34]) about whether the witness will need to be recalled at a subsequent special hearing or at the trial itself.

6.5.6 In this study, interview participants sought to qualify the purported benefit of special hearings allowing a witness to 'move on'. The TLRI was told that this could only be considered a 'minor positive' with the special hearing scheme being 'only marginally less stressful' than the usual trial process (DL2). Other interview participants referred to this 'assumed benefit' and the fact that the assumption is 'untested' (DOJ1), explaining, '[e]ven when the witnesses' evidence has been taken, without an outcome, it remains untested exactly to what extent their anxiety/stress is alleviated … it is untested'

(DOJ 1). Other participants described the fact that after a special hearing 'there is still underlying angst … it continues when the trial itself is not yet concluded' (P1). To the extent that a participant was caused to comment, 'I'm not sure whether the original benefits of a special hearing are ultimately undermined by the passage of time/delay before the trial proper' (P1). Further, it is important to note that following a conviction at trial, a complainant is then recontacted by the prosecution to provide a victim impact statement as part of the sentencing process (P1).

6.5.7 Relevantly, participants also raised the fact that the finalisation of a trial is often 'on the backburner' once a special hearing has occurred (P1). Currently, trials are often taking place a 'significant time' after a special hearing (P1). There is a 'really big gap' between special hearings and trials (DL3). Interview participants explained, 'because we can get them on more quickly, and there is a great push to get pre-records done as soon as possible, but there remains the backlog with the usual court listings' (DL3). Another participant reported that 'more often than not' a trial date has not been set when a special hearing takes place (DL2). The same concern was raised in evidence before the UK Committee.[855] Of the 22 special hearings which took place in 2022 across 12 cases, 9 cases (involving 20 of the special hearings) had been finalised by November 2023 when the relevant files were inspected by TLRI researchers. Of those 20 special hearings across 9 cases, the median number of days between the special hearing[856] and trial[857] was 258 days. The minimum number of days was 14 and maximum number of days was 713.

6.5.8 Delays to the finalisation of a trial following a special hearing impacts not only the witness, but an accused and the wider criminal justice system.[858] The TLRI was told that the ODPP are 'taking steps to address this [issue]' (P1). However, it is important that the issue of delay be monitored. As discussed in more detail at [6.2.8], any measure of timeliness in the context of the special hearing scheme must encompass ultimate trial dates in order to reflect delays to the finalisation of a matter post pre-recording. With reference to Recommendation 16, the TLRI highlights the importance of collecting data which encompasses the finalisation of trials which take place after special hearings and corresponding review/evaluation of the special hearings which also considers matters such as delays to the finalisation of trials after special hearings.

The listing and relisting of special hearings

6.5.9 While there was recognition of the advantages afforded by the scheme of early evidence provided by a complainant, the TLRI was told that special hearings can lose some of their value and lose some of what could be gained by the special hearing process if they are not being done early enough (SCJ1). Interview participants reported issues with the listing of special hearings such as frequent and last-minute date changes (DOJ1). The TLRI was told of cases where defence counsel applied for the adjournment of a special hearing at the listed start time for the special hearing. On one such occasion, there was legal argument and submissions on the adjournment application for a couple of hours before the matter was ultimately adjourned to a later date; the complainant was sitting around court for three hours (WAO1).

6.5.10 Another example involved a complainant who had been waiting since 2013 to give evidence in connection to 'extremely traumatising' alleged offending. Recently, a listed special hearing date was adjourned 'at the last minute'. Three briefing sessions had been held with the complainant in the lead up to the special hearing and the rescheduling of the hearing was traumatising for the complainant. Further, the special hearing could only be listed after the upcoming extended leave of the allocated prosecutor. The process on the complainant was 'so traumatising' (VSS1).

[855] See above at [5.2.37]–[5.2.38].
[856] If the special hearing comprised multiple dates, the date of the first day of the special hearing. If there were multiple special hearings, the date of the first day of the first special hearing.
[857] The date of the first day of trial.
[858] See discussion of these live issues in the UK context at [5.2].

6.5.11 Interview participants told the TLRI of a perception that special hearings were *easier* to move or relist as compared to a trial (DOJ1 and DOJ2); that the courts are more likely to move or relist special hearings (WAO1). Interview participants also reported the practice of 'dual bookings' whereby two special hearings in two different matters were intentionally booked not only on the same day but at the same time in the hope that at least one will get on (DOJ1 and DOJ2).[859] In those circumstances, both complainants have to attend but only one special hearing will take place. The TLRI was also told of other 'scheduling issues' such as the Magistrates Court and Supreme Court simultaneously booking the same protected witness suite for same date/time without knowing (DOJ1).

6.5.12 Interview participants reported that special hearings were being put off by defence adjournments, court adjournments *and* prosecution adjournments (WAO1). The TLRI was told specifically of illness being a reason why the prosecution would apply to adjourn a special hearing (WAO1 and SCJ1). Disclosure related issues were also cited as reasons why prosecution or defence would apply to adjourn a special hearing (WAO1). A change of defence counsel was mentioned as a reason for a defence application for an adjournment (VSS1).

6.5.13 Some participants had little experience of listing issues with special hearings. One participant reported only knowing of one adjourned special hearing in circumstances where the witness had COVID (SCJ1), explaining that usually the court and counsel deal with any issues in the lead-up to a special hearing, counsel will ask for a directions hearing to be listed in advance to discuss any issues and they can be sorted out before a date is set in stone (SCJ1).

6.5.14 In the study of special hearings from 2022, there were delays to the listing of special hearings in some of cases. These were in cases that involved multiple complainants, due to legal arguments about evidentiary matters as well as waiting for potential further complainants to be joined on fresh indictment.[860] Other cases were delayed due to preliminary proceedings.[861] Other examples of special hearings being adjourned and relisted included late disclosure.[862]

6.5.15 In this context, the TLRI was told that the ODPP remains largely responsible for the listing of criminal matters for trial in the Supreme Court; a listing practice that the TLRI understands is unique to Tasmania. Whilst the court is now taking a more active role in listing and case management, particularly in matters involving special hearings, there remains a 'tension' with both the courts and the ODPP trying to list and manage matters (P1).

6.5.16 Participants conceded that 'there was room for improvement' when it came to listing practices (P1), explaining, that 'for effective listing of special hearings, there needs to be a realistic timeframe' (P1). Another participant commented, with respect to the timeliness of special hearings, we need to do work on getting it as best as it can be (SCJ1). A participant told TLRI that there is currently a post-COVID 'glut' of special hearings, with some special hearings not occurring until two years after the police complaint, as a result, we're losing its value as capturing evidence at the earliest point in time (SCJ1).

[859] Similar 'bulk listing' practices in the UK context were raised in evidence before the UK Committee. See: Written Evidence to Justice Committee, UK Parliament (House of Commons), London, July 2023, 2 (Chair and Vice Chair of the Criminal Bar Association). See also Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 (Citizen Advice Witness Service).

[860] This was the case in 6 special hearings, all of which regarded the same case.

[861] Preliminary proceedings refer to the early listing of a case in the Magistrates Court jurisdiction before it proceeds to the Supreme Court. Preliminary proceedings were mentioned as a factor of delayed listing of four special hearings (all relating to the same case).

[862] In one case, a request was made by the ODPP on the morning of the listed special hearings for an adjournment. This was because it had only become known to authorities the day before that additional evidence had been identified.

6.5.17 There are other issues that arise in relation to listing of special hearings. It is not a case where cases are 'expedited at the expense of all other factors, [but rather], to the extent appropriate' (SCJ2). In bringing forward the taking of evidence, it brings forward in time the consideration of all pre-trial preparation issues. The ODPP have the practice to allocate special hearing matters to individual counsel to retain carriage, so listing is, to some extent, reliant upon availability of the allocated prosecutor. The TLRI was told in this respect that 'it works well, [it is] not inflexible' (SCJ2). And further, that the availability of defence counsel was 'not as much of an issue' (SCJ2). There are also the needs of the particular witness, for example, on occasion a complainant may not be in the position to give evidence for a 3–4 month period for reasons related to mental health, school commitments, exams etc.

6.5.18 The TLRI was told that the courts are about to embark upon a more court-centered listing practice that is court-focused in terms of listing (SCJ1). Noting, however, that the court will nevertheless remain reliant on counsel to inform them of when a special hearing can and should be listed (SCJ1). Other interview participants told the TLRI that the courts should 'definitely' assume greater responsibility for listings (DOJ1 and DOJ2) and one participant commented, 'In my view, the system is fundamentally broken in terms of listing practices being controlled by the ODPP' (DL4). Participants with legal practice experience in other jurisdictions remarked that listing practices were 'better' in those jurisdictions where listing was controlled by the court (DL2).

6.5.19 The TLRI's view is that the current practice of both the ODPP and the courts being involved in the listing of Supreme Court criminal matters, particularly matters involving special hearings and other priority matters, can create difficulties in the scheme realising its aim of reducing delay and the associated trauma for the victim. The TLRI's view is that a movement towards court-centred and court-controlled listing practices are conducive to the most effective case management of cases involving special hearings and other priority matters. The TLRI understands that this shift in responsibility for and control of listing practices is already occurring, to a certain extent, with the court taking on an increasingly active role in this respect. Accordingly, the TLRI recommends that the current initiative whereby control of listing in criminal cases is shifted from the ODPP to the court should continue. The relisting of special hearings should also be monitored (see Recommendations 16 and 17, below).

Recommendation 4

The current initiative whereby control of listing in criminal cases is shifted from the ODPP to the court should continue.

Witness recalled at second or subsequent special hearing or at trial

6.5.20 The benefits to a complainant or other witness of early resolution are lost or at least diminished if the witness has to give evidence on multiple occasions. The fact that a witness may need to be recalled following a special hearing has long been recognised as a possibility. As early as the Pigot Report it was contemplated that this may be necessary and that, if this occurred, the further evidence should be given at a further special hearing.[863] However, it was envisaged that recalling witnesses would be rare.

6.5.21 The frequency is not clear in the Tasmanian context with which witnesses are recalled following a special hearing. Given the relatively low level of use of special hearings in Tasmania (see [6.2.1] above), preliminary indications suggest that the recalling of witnesses is not as 'rare' as it should be, or, indeed, as 'rare' it is in other jurisdictions.[864] Of the 22 special hearings in 2022, there were two

[863] Home Office (UK), Pigot Report (n 4) 24.

[864] See, eg, Law Commission of New Zealand (Te Aka Matua o te Ture), *The Second Review of the Evidence Act 2006* (n 448) [9.49], discussed above at [4.11]. The Commission commented, with regard to ongoing concerns regarding disclosure issues and the prospect of ultimately having the witness recalled: 'In our view, the fact some complainants may need to be recalled to give evidence at trial should not prevent all complainants from being entitled to have their cross-examination pre-recorded. Experience indicates that complainants rarely need to be recalled to give evidence. If they are, they may only need to give evidence in relation to a particular issue. It is still beneficial for complainants to have the majority of their evidence pre-recorded as early as possible to relieve them of the stress of waiting to give this evidence and to facilitate their best evidence.'

instances of a witness being recalled to give further evidence: one at trial and one at a second special hearing. There was a further case in which an application to recall the witness was intimated, but ultimately not proceeded with. While 2 in 22 special hearings may seem a small number, it needs to be recalled that those 22 special hearings involved only 12 different cases. Accordingly, in 2022 witnesses were recalled in 16.7 % of cases. It is to be noted that the case in which two special hearings were conducted, there was a period of 659 days between the two special hearings.[865]

6.5.22 Interview participants told the TLRI of the 'significant problem'(DL2) of witnesses who are recalled to give further evidence following a special hearing. This may occur at a second or subsequent special hearing or at trial. It causes 'a lot of stress and anxiety for the witness' (SCJ2). Participants described witnesses who need to be recalled as being 'particularly distressed' and 'exceptionally distressed' as a result, '*more stressed than if called as part of the usual trial*' (SCJ2). Participants reported these impacts on witnesses featuring in their victim impact statements (SCJ2). It is to be observed that this reported impact on witnesses suggests that there is potential for distress in the event that a witness is recalled and this may undermine the previous reasoning of the *net benefit* for witnesses.[866]

6.5.23 Interview participants told the TLRI that in the ideal world, this would not occur and everyone is conscious of avoiding this, where possible; as time goes on, everyone will get better (SCJ1). Other participants described the occurrence as 'unfortunate but unavoidable' (DOJ1 and DOJ2).

6.5.24 Most participants reported having first-hand experience with a witness being recalled following a special hearing. Some participants described, 'we haven't seen it much; only one that I have seen' (DOJ 1 and DOJ2), others referred to multiple occasions (SCJ1) and the fact that things go wrong in court all the time, there is *often* a need to get witnesses back for further evidence for various reasons (VSS1). A participant told the TLRI, 'it doesn't end until it ends' — when a witness asks following a special hearing, 'is it over now?', we say, 'we can't tell you that' (VSS1). You can never know what is going to happen in court, you can never guarantee and never would, otherwise you're just setting up people to fail (VSS1). Another participant commented on the impact of recalling a witness being particularly distressing in circumstances where the intervening period is significant and if the witness did not know it was a possibility (SCJ2).

6.5.25 The reasons for witnesses needing to be recalled were most commonly disclosure related.[867] One participant explained: 'it really happens because of disclosure, a shift in the Crown case, or because evidence might be led from another witness at the trial; a development in the trial itself' (SCJ2). One participant described a situation where, following a special hearing, the prosecution went and gathered further evidence, '… gathered further proofs … to plug all holes [in the prosecution case]' (DL1). However, other participants described occasions where it is 'no one's fault as such' (SCJ2) and applications to recall a witness not being disputed and made by consent (DL1).

6.5.26 The TLRI was told of examples where witnesses were recalled up to *three years* after a special hearing (VSS1). This included one example where a witness was recalled years after an extensive special hearing in circumstances where the witness had relocated interstate and were to be recalled during a COVID lockdown. The witness was extremely vulnerable, and it was very difficult to arrange support for the witness for their subsequent evidence. The further evidence taken from the witness was not insignificant, as it took at least an hour (VSS1). Another participant described instances where witnesses were recalled on 'discrete matters' and that the further evidence 'not very long, quite confined' (SCJ2).

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[865] The special hearing which occurred in 2022 (on 20 May 2022) was the second special hearing following an initial special hearing on 30 July 2020.

[866] See, eg, Law Commission of New Zealand (Te Aka Matua o te Ture), *The Second Review of the Evidence Act 2006* (n 448) [9.49]. See also [4.11] above.

[867] See discussion at [6.5.35]–[6.5.40] relating to disclosure.

6.5.27 A recurring sentiment of interview participants was there is an apparent lack of clarity surrounding the recalling of witnesses following a special hearing. One participant commented that 'there is no real guidance', suggesting that the inclusion of an applicable test in the legislation may assist (P1). The lack of clarity was also noted by another participant:

> Is there a statutory power to recall a witness following a special hearing? Assuming the power exists, what it the test, the threshold? … Minds will differ about cross-examination. There may well have been strategic advantages in different courses. If an application to recall falls in that category, would it satisfy the threshold test to recall a witness? (SCJ2)

It was suggested that such a test could be that a witness ought only be recalled if it is 'in the interests of justice' or in 'exceptional circumstances' and, further, that the court should be guided by the principles in the Act.[868] The participant noted that any test should involve balancing fairness to an accused and finality and, recognising that, ultimately, 'a witness ought only be recalled after a special hearing if good reason exists for them to be recalled, otherwise what's the point of having had a special hearing' (P1).

6.5.28 Relevantly, the TLRI was told of a case[869] where there was a change of defence counsel following a special hearing and the newly instructed counsel voiced concerns in the week before the listed trial (over a year after the special hearing) that matters were not 'put' to the child witness at the special hearing (i.e. *Browne v Dunn)*. Significantly, this had been a deliberate tactical concession made by previous defence counsel following discussions about the child witness' communication capabilities with an intermediary at a ground rule hearing which preceded the special hearing. Whilst an application to recall the witness was not ultimately pursued, the case illustrates the issues that could conceivably arise in the context of seeking to recall a witness following a special hearing.

6.5.29 The TLRI's view is that, while recalling of a witness to give further evidence following a special hearing is unavoidable and necessary in some circumstances, it is undesirable and should be avoided where possible. The possible impacts on a witness are significant. A witness should not be recalled unnecessarily or to undermine the intent of the special hearing scheme. It is noted that an interview participant observed that it appears some defence counsel take every opportunity to destabilise witnesses, such that it seems to have become a defence strategy (VSS1).) However, the TLRI also considers that it would be equally undesirable if witnesses were not recalled when they should be.[870] Accordingly, the TLRI view is that it would be beneficial to have a threshold test included in the Act to provide greater guidance and clarity in this context and that one should be introduced. Further, the TRLI's view is that the question of the most appropriate threshold test is to be informed by other jurisdictions. The occasions on which a witness is recalled to give evidence following a special hearing should also be monitored (see [6.2] and Recommendations 16 and 17).

6.5.30 In NSW, a witness can only be recalled to give further evidence following a pre-recorded evidence hearing with the leave of the court. A court will only grant leave if satisfied that a party has become aware of a matter of which the party could not reasonably have been aware at the time of the recording, or it is otherwise in the interests of justice to give leave. Any further evidence must, to the extent practicable, be given by pre-recording at a hearing in the same way as the original pre-recorded evidence, unless the Court otherwise directs.[871] Further, as explained in commentary in the NSW Benchbook:

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[868] The principles states in s 3A of the *Evidence (Children and Special Witnesses) Act 2001* (Tas). See discussion at [2.2.2] above.
[869] This case was also inspected by TLRI researchers as one of the cases in which a special hearing occurred in 2022.
[870] For example, see discussion at [5.2.37] in the UK context where it was reported to the UK Committee that in circumstances where there is additional disclosure following a s 28 hearing, counsel are increasingly under pressure to deal with the matter by way of agreed facts to avoid recalling the witness.
[871] *Criminal Procedure Act 1986* (NSW) s 294K.

> An important consideration in exercising the power under s 294K must reflect the dominant purpose of protecting child witnesses from the trauma of giving evidence, so far as it is reasonably possible to reduce that trauma. The use of a pre-recorded evidence hearing is seen to go part of the way, but even then, is not to be repeated unless the interests of justice require it: *PJ v R* [2023] NSWCCA 105 at [47]. Furthermore, the concern that repeat hearings will potentially add to a child witness' trauma requires legal representatives appearing at these hearings to be aware of the statutory policy not to provide further hearings and to address at that hearing (and where appropriate, put to the child witness) any matter then known to the applicant and which is sought to be relied upon at trial: *PJ v R* at [48]–[49].[872]

6.5.31 Similarly, in Victoria, a complainant who gives evidence at a special hearing may only be recalled to give further evidence with the leave of the court. A court will only grant leave if the court is satisfied that the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or, if the witness was giving direct testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or it is otherwise in the interests of justice to permit the complainant to be recalled. If leave is granted, the complainant must attend the proceeding to be cross-examined or re-examined.[873] This power has been interpreted to be a 'broad power'[874] and, in deciding whether it is in the interests of justice to permit the complainant to be recalled, the court may consider the attitude of the complainant.[875]

6.5.32 In the ACT and Queensland, if a witness has pre-recorded their evidence, the criteria for them being recalled to give further evidence include: whether they would be recalled to give further evidence if they were giving evidence in the usual course and if it is in the interests of justice.[876] In Queensland, there is the requirement that any further evidence must be given at another preliminary hearing unless the court is satisfied that it is not possible or practical. [877]In New Zealand, a witness may be recalled after pre-recording their evidence if all parties agree and the judge considers that it would be contrary to the interests of justice not to do so.[878]

6.5.33 In the UK, a witness who has pre-recorded their cross-examination per s 28 can only be subject to further cross-examination if it appears to the court that the proposed cross-examination is sought as a result of having become aware, since the time when the original recording was made, of a matter which that party could not with reasonable diligence have previously ascertained, or that for any other reason it is in the interests of justice.[879]

6.5.34 Other jurisdictions contemplate the need for a second or subsequent pre-trial special hearing but provide little guidance as to the exercise of this power.[880]

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[872] Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (n 264) [5-420] 'Suggested Direction — pre-recorded evidence' (Notes).
[873] *Criminal Procedure Act 2009* (Vic) s 376.
[874] *Alexander v The Queen* [2022] VSCA 47 [44]–[45]. See also Judicial College of Victoria, *Bench Book/Criminal Proceedings Manual* (2004) 448 <https://resources.judicialcollege.vic.edu.au/article/1053061> ('*Bench Book/Criminal Proceedings Manual*').
[875] Ibid 448: 'In deciding whether it is in the interests of justice to permit the complainant to be recalled, the court may consider the attitude of the complainant. As accepted in *Alexander v The Queen*, a judge may consider that 'the legislation ought not be used to prevent a willing and competent complainant from returning to give evidence if the interests of justice require (*Alexander v The Queen* [2022] VSCA 47 [48]).'
[876] *Evidence Act 1977* (Qld) s 21AN; *Evidence (Miscellaneous Provisions) Act 1992* (ACT) s 63(3).
[877] *Evidence Act 1977* (Qld) s 21AN(4).
[878] *Evidence Act 2006* (NZ) s 106H.
[879] *Youth Justice and Criminal Evidence Act 1999* (UK) s 28(6).
[880] For example, in WA, s 106K(5) of the *Evidence Act 1906* (WA) contemplates more than one special hearing being held 'where circumstances s require …'.

Recommendation 5

(a) The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to introduce clarity and guidance to the circumstances in which a witness may be recalled to give further evidence following a special hearing.

(b) In line with other jurisdictions, particularly NSW and Victoria, a witness ought only be recalled to give further evidence following a special hearing if:

> (i) a party has become aware of a matter of which the party could not reasonably have been aware at the time of the special hearing; or
>
> (ii) it is otherwise in the interests of justice.

Recommendation 6

The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to specify that any application to recall a witness following a special hearing should consider the principles of the Act and stipulate that any further evidence must, to the extent practicable, be given at a further special hearing, unless the court otherwise directs.

Disclosure

6.5.35 A feature of the trial process and reasons given by interview participants for delays and adjournments of special hearings relate to disclosure by the prosecution (see [6.5.12]). The disclosure to the defence of relevant material that is within the possession of the prosecuting authority is a vital aspect of the duty to ensure that the prosecution case is presented with fairness to the accused. Participants told the TLRI, that '[i]t might work if defence had all of the evidence at the time of the pre-record … but we don't … we never do' (DL1) and that '[t]he files are *never* ready' (DL1). Disclosure was also mentioned as the most common reason for witnesses having to be recalled to give further evidence following a special hearing (see [6.5.25]). Interview participants told TLRI in no uncertain terms that full disclosure was 'absolutely critical' to the successful operation of the special hearing scheme (SCJ2).

6.5.36 The importance of disclosure to the timing of pre-trial special hearings was identified by the interview participant, who commented that 'on paper, the court could list special hearings six weeks after committal, but the timing was very much confined by full disclosure' (SCJ2). It was further reported that 'disclosure has proven to be an issue from time to time with special hearings' (SCJ2). This included supplemental proofs arising late in the piece ahead of a special hearing. Interview participants also highlighted the fact that the preparation of matters which involve special hearings is not necessarily a matter of attending to matters earlier. The TLRI was told, for example, that in cases where there are multiple victims, evidential matters such as tendency may not have been considered pre-committal by police. This is because such complex evidential matters are most appropriately considered by the ODPP upon receipt of the matter following committal and upon substantive review of the brief (SCJ2).

6.5.37 It is to be noted that there were some interview participants who had not experienced any disclosure issues which had caused delay to or the relisting of a special hearing (DL2, DL3).

6.5.38 As discussed previously in **Part 5** of this Research Paper, much evidence before the UK Committee highlights the effects of full pre-recording on the criminal justice system, including the pressures placed on listing practices, issues of court delays and pressures placed on counsel. It was noted that there were concerns that the special hearing schemes are being used inappropriately as a measure to address wider issues of delay within the court system. Issues relating to potential delays caused by such schemes, and the difficulties that may arise for an accused in the preparation for a trial have been raised in other reviews.[881]

6.5.39 More broadly, separate from special hearing schemes, concerns about the negative consequences of delay in the criminal justice system and the complex reasons for court delay (including issues with disclosure of evidence by the prosecution to the defence) have been long recognised, including in the Tasmanian context.[882] In Tasmania, there have been a number of changes that have sought to address delay and associated matters of disclosure.[883] This was recognised by interview participants who emphasised that the disclosure issues were not specific to special hearings, but rather were a 'bigger issue' impacting the entire criminal justice system in Tasmania (DL1, SCJ1). One participant was particularly critical of the 'fundamental issues with DPP disclosure' as well as 'inhouse practices [within the DPP] regarding witness management' (DL4). The TLRI was told of a 'disconnect' between what is supposed to be disclosed and the timing of that disclosure and what happens in practice (DL4). A participant reported that 'usually in most "normal trials" there is one or more disclosure issues … In fact, in every trial I have done in Tasmania, there is a disclosure issue' (DL4). A practitioner with experience practising interstate remarked, '[i]n Tasmania, I have noticed a cultural reluctance to respond to defence requests for disclosure of material relevant to the preparation of the defence case' (DL4).

6.5.40 The TLRI notes that addressing broader issues of court delay and matters of disclosure are beyond the scope of this study. Delay in the finalisation of a trial can undoubtedly be a matter of concern. However, while it is important to understand both the impact of disclosure on the operation of the special hearing scheme in Tasmania and the role played by the special hearing scheme in potentially contributing to court delay and backlog, the TRLI observes that court delay is a systemic factor in Tasmania, and that the timely pre-trial disclosure of evidence to the defence by the prosecution is one relevant factor. Delay can be caused by a variety of other factors including, for example, the need for further investigation by police once a defendant is committed for trial in the Supreme Court and the defendant confirms their plea of not guilty. Further, delay may be necessary for further investigation or consideration of complex evidentiary matters. The TLRI's view is that the operation of the special hearing scheme needs to be monitored from the point of view of delays (see discussion below at [6.10] and Recommendation 17), but the TLRI's view is also that it is important not to view disclosure issues and delay associated with special hearings scheme as an isolated factor separate from an understanding systemic features that lead to delay in the Tasmanian criminal justice system.[884]

[881] See discussion at [4.6], [4.9], [4.10], [4.11], [4.17], [4.18].

[882] See Sentencing Advisory Council (Tas), *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No 10, October 2018) ch 2; Magistrates Court of Tasmania, *Annual Report 2022/2023* (n 835); Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22).

[883] See for example, reforms contained in the *Magistrates Court (Criminal and General Division) Act 2019* (Tas) are yet to be proclaimed and make provision for disclosure. Its proclamation is waiting for the development of the IT system (see Magistrates Court of Tasmania, *Annual Report 2022/2023* (n 835) 13, and other measures outlined in Sentencing Advisory Council (Tas) (n 882) [2.3.2]. See also Supreme Court of Tasmania, *Annual Report 2022/2023* (n 22). It is to be further noted that delays to the Astria IT system have been flagged. See Tasmanian Government, *Department of Justice Annual Report 2022–23* (2023) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/728569/Department-of-Justice-Annual-Report-2022-23-web-compressed.pdf> ('*Department of Justice Annual Report 2022–23*'): 'There has been a delay in developing and implementing the Prosecution and Courts stream, however work with stakeholders and vendors to progress these parts of the program are continuing': at 56.

[884] This reflects the caution previously expressed by the Sentencing Advisory Council Tasmania, of viewing one element of the criminal justice system as providing a solution to broader systemic issues of delay: see Sentencing Advisory Council (Tas) (n 882).

6.6 *Quicker, less stressful*

Reduction in trauma of the trial due to quicker and less stressful process

6.6.1 Related to the perceived benefit that a pre-recorded evidence provides for the earlier resolution of matters from the point of view of the witness, the quicker process is said to reduce the trauma of the trauma and be less stressful for witnesses.[885] However, interview participants queried the extent to which pre-recorded evidence resulted in less time in court, less contact with court processes and was the least stressful experience of giving evidence. In fact, participants suggested that the use of pre-recorded evidence may, in fact, cause a witness to have greater contact with investigating and prosecuting authorities, require a witness to tell their account on more occasions and to more people, and to be subject to more prolonged and increased levels of traumatisation.[886]

Multiple pre-recorded investigative interviews

6.6.2 Interview participants described pre-recorded investigative interviews as 'a mixed bag' (PP2); 'a few are really good … the ones that are done really well are fabulous' (PP2). However, the quality of recorded statements, as a general rule, is quite poor (SCJ1). Many 'are not specific enough, too vague … not drilling down to the specifics' (P1). The result being that a second or subsequent interview is required, or the witness is required to give further substantive evidence-in-chief at a special hearing or trial; or, indeed, the matter does not proceed. In short, *much of what was to be gained by the recording is lost (*SCJ1).

6.6.3 In 13 of the 22 special hearings which took place in Tasmania in 2022, one or more pre-recorded investigative interviews was relied upon in addition to the special hearing pre-recording. In 7 of these 13 special hearings, there were multiple pre-recorded investigative interviews. The inspection of relevant court files revealed:

- two involved three pre-recorded investigative interviews from the same witness;[887] and
- five involved two pre-recorded investigative interviews from the same witness.

6.6.4 Participants told the TLRI of many examples which illustrated the poor quality of some pre-recorded investigative interviews. These included police attending at a school to take a recorded statement, the whole way through you could hear announcements, bells, noise from outside (SCJ1), police interviewing a young child early the next morning following a serious incident the night before in a room full of distractions (P1), and police interviewing a young person via their body worn camera, with the police officer moving around, the image moving around and it capturing everything but the witness (SCJ 1). Participants also told the TLRI of pre-recorded police interviews which included personal or private information (i.e. a witness disclosing medical conditions not relevant to the matter or private phone number/address etc) (PP2).

6.6.5 Participants attributed the poor quality of pre-recorded investigative interviews to a lack of resources and/or a lack of training (SCJ 1). One interview participant explained, 'the training of the interviewer determines the effect of the interview … trained officers ask the right questions in the right way' (PP2). Other participants highlighted there being a lack of thought given to what the end result is going to look like and how the end product is to be used (SCJ1).

[885] See relevant discussion throughout **Parts 4** and **5**.

[886] Regarding the trauma caused by requiring a witness to repeatedly retell their account of sexual abuse, see, for example, the evidence heard by the Royal Commission into Institutional Responses to Child Sexual Abuse and corresponding findings: *Royal Commission into Institutional Responses to Child Sexual Abuse,* Executive Summary and Parts I–II (n 533) 383, 434. See also *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report Parts III–VI, August 2017) 296–300 ('Parts III–VI').

[887] Noting that in one of the cases in which there were three pre-recorded investigative interviews, the prosecution only relied upon the most recent pre-recorded interview.

6.6.6 Some participants were of the view that 'generally, police do a pretty good job' with pre-recorded investigative interviews. (P1) Other participants added, that the vast majority of cases in which there are two (or more) pre-recorded interviews are some of the 'earlier ones'. More recently, it is apparent that the officers conducting the interviews have had some training and it is expected that the low quality of recorded statements will likely dissipate naturally (SCJ1). As a whole, they are getting better (SCJ1).

6.6.7 The TLRI's view is that the training of police investigators who conduct pre-recorded investigative interviews is integral to the quality and value of the evidentiary product and, in turn, ensuring that much of what was to be gained by the recording is not lost. The Commission of Inquiry recently considered this issue and made specific recommendations regarding the professional development of Tasmania police to 'ensure all police are trained in … approaches to interviewing child and adult victim-survivors and vulnerable witnesses, including the Whole Story framework (or similar specialist interviewer training)'.[888] The TLRI agrees with and endorses this recommendation.

6.6.8 The TLRI further notes that this recommendation was accepted by the Tasmanian Government and is currently being implemented.[889] It follows that the TLRI recommends that the implementation of this recommendation be monitored.

Recommendation 7

The recommendation of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to the professional development of Tasmania Police, specifically, to ensure that all police are trained in approaches to interviewing child and adult victim-survivors and vulnerable witnesses in the context of pre-recorded investigative interviews (Recommendation 16.3) is endorsed.

Recommendation 8

The implementation of Recommendation 16.3 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

Contact with prosecution pre-trial

6.6.9 Interview participants also spoke of the 'preparation impact' for witnesses of special hearing matters (P1). The TLRI was told that prosecutors would ordinarily wait for an actual listing for a special hearing and then prepare — 'brief' or 'proof' the witness as necessary — a short period before. It would normally comprise of three meetings: (1) exclusive a 'meet and greet; (2) a proper explanation of the process and what's involved; and (3) the '*nitty gritty*' (P1). Other interview participants similarly acknowledged that 'more time' was required with a witness to prepare for a special hearing (PP1, PP2). Most participants told TLRI of multiple meetings with witnesses ahead of a special hearing.

6.6.10 Participants were aware of the 'impact' of this contact and mindful of developing best practices in terms of the timing and substance of vulnerable witness preparation (P1) but precisely what such 'best practice' is in this context is not straightforward. Relevantly, the Australian Institute of Judicial Administration *Benchbook for Children Giving Evidence in Australian Courts* states:

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[888] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) Recommendation 16.3.

[889] The Commission of Inquiry published its report in September 2023. The Government accepted all of the Commission's recommendations and, as at December 2023, the Premier told Parliament: '…we are unwavering in our commitment to implement all 191 recommendations, as outlined by the commission in their staged approach. Of the 191 recommendations, 83% of these – 158 – will be completed by 1 July 2026, including 48 priority actions to be completed by 1 July 2024. In many cases, we have already started work on reform.' See: Tasmania, *Parliamentary Debates*, House of Assembly, 7 December 2023, 22–3 (Mr Rockliff, Premier).

> Ideally the prosecutor will have met with the child witness *several times* prior to the day the child is to give evidence to develop a rapport with the child and to prepare the child for the court appearance.[890]

6.6.11 However, the TLRI's view that meeting with a child witness several times ahead of them giving evidence would represent the outer limits of such contact as opposed to an *ideal* or *best practice.* It is a balance and there is a point where contact with a witness becomes unnecessary and, potentially, counterproductive to the preparatory exercise (i.e. excessive briefing/proofing of a witness resulting in ongoing disclosures).[891] Further, contact that is limited and confined to a short period before the special hearing appears consistent with minimising traumatisation. However, an interview participant commented on the tension between late disclosure and best practices for briefing vulnerable witnesses:

> Do you put it off until the very last minute to prepare, brief a witness, so they know the end is near (i.e. the upcoming special hearing) or do you contact, prepare, brief witnesses six months out from a special hearing? Whilst the latter approach may reduce late disclosure issues, at what cost? More traumatic? I don't know. I think the former approach is best practice … (P1).

6.6.12 The TRLI's study found that in the majority of the 22 special hearings in 2022, either a supplementary proof or supplementary statutory declaration was obtained from the witness ahead of the special hearing. In one case, an 8–page supplementary proof from a witness was disclosed by the prosecution on the same date as the listed special hearing. Six of the special hearings which took place in 2022 involved six witnesses in the single case. In this case, supplementary proofs were disclosed by the prosecution in relation to all 6 witnesses within one week of the special hearing.

6.6.13 The TLRI's view is that the ODPP and police prosecutions should consider best practice guidelines and/or policy relating to the preparation and briefing of witnesses who have provided a pre-recorded investigative interview which the prosecution intends to rely upon in an upcoming special hearing or trial. Any such guidelines and/or policy should be trauma informed and reflect research about ways in which to minimise the negative consequences of the trial process for a complainant. In this context, the TLRI notes the recommendations of the Commission of Inquiry, which made specific recommendations regarding specialist training on trauma informed practices for both the ODPP and police.[892] The TLRI agrees with and endorses these recommendations. The TLRI further notes that this recommendation was accepted by the Tasmanian Government and is currently being implemented.[893] It follows that the TLRI recommends that the implementation of this recommendation be monitored.

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[890] Australasian Institute of Judicial Administration Incorporated (AIJA), *Bench Book for Children Giving Evidence* (n 572) 126.

[891] See discussion above at [6.6.1]. Regarding the trauma caused by requiring a witness to repeatedly retell their account of sexual abuse, see, for example, the evidence heard by the Royal Commission into Institutional Responses to Child Sexual Abuse and corresponding findings: *Royal Commission into Institutional Responses to Child Sexual Abuse*, Executive Summary and Parts I–II (n 533) 383, 434. See also *Royal Commission into Institutional Responses to Child Sexual Abuse*, Parts III–VI (n 886) 296–300.

[892] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) Recommendations 16.8, 16.3.

[893] The Commission of Inquiry published its report in September 2023. The Government accepted all of the Commission's recommendations and, as at December 2023, the Premier told Parliament: '…we are unwavering in our commitment to implement all 191 recommendations, as outlined by the commission in their staged approach. Of the 191 recommendations, 83% of these – 158 – will be completed by 1 July 2026, including 48 priority actions to be completed by 1 July 2024. In many cases, we have already started work on reform.' See: Tasmania, *Parliamentary Debates*, House of Assembly, 7 December 2023, 22–3 (Mr Rockliff, Premier).

Recommendation 9

The ODPP and Police Prosecutions should develop best practice guidelines and/or policy relating to the preparation and briefing of witnesses who have provided a pre-recorded investigative interview which the prosecution intends to rely upon in an upcoming special hearing or trial. Further, any such guidelines and/or policy should be trauma informed.

Recommendation 10

The recommendation of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to specialist training on trauma informed practices for both the ODPP and Tasmania Police (Recommendations 16.8 and 16.3) are endorsed.

Recommendation 11

The implementation of Recommendations 16.8 and 16.3 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

Watching pre-recorded investigative interview at a special hearing

6.6.14 In circumstances where a witness has provided a pre-recorded investigative interview, which the prosecution intends to play at a special hearing (or at trial), preparation will necessarily involve the witness reviewing that pre-recorded interview, or at least being given the opportunity to do so. Interview participants told the TLRI that the experience of witnesses watching their pre-recorded interview was often 'distressing', 'deregulating' (VSS1) and 'retraumatising' (P1).

6.6.15 Overwhelmingly, it was the preference and practice of interview participants to have a witness watch their pre-recorded investigative interview ahead of attending court to give further evidence (either at a special hearing or at trial). An interview participant explained their practice in this regard:

> My practice is to either show the witness their interview in full during briefing/s ahead of special hearing, or have the complainant read (or be read) the transcript in full during briefing/s ahead of a special hearing. They can refuse. I don't think I can force them to, rather give them the opportunity. My preference is for them to watch it *just* before (P1).

Other participants referred to 'trying to make' a witness view their pre-recorded interview ahead of them giving further evidence at a special hearing or trial (PP2).

6.6.16 However, some participants reported a practice whereby a witness' pre-recorded interview was played to them — in court — at the special hearing. Interview participants told the TLRI of their firsthand experience of the particularly harmful impacts of a witness watching their pre-recorded interview in court: 'I have observed cases where a witness views their recorded interview for the first time in court and it has resulted in a psychological breakdown' (PP2). Explaining further, the participant stated that 'it is important for the witness to view the pre-recorded interview because most of the time they don't remember everything, don't remember the interview, what they said … in fairness to them, it is better not for them to see it in court for the first time' (PP2). An interview participant reported a particularly undesirable situation where a pre-recorded interview was played to a witness at a special hearing where the witness was attending via remote link. The recording produced from the special hearing was ultimately in a format where the complainant's live reaction to watching their interview was captured and part of the special hearing recording. It was noted that whether that reaction is distress or sheer boredom, or something else, it is not appropriate that this is captured and displayed as part of the complainant's evidence (P1).

6.6.17 Other participants agreed that the witness' watching of their interview was a preparatory matter which appropriately 'happens away from the court process' (SCJ2):

> In my experience, it is the practice of crown counsel to simply ask the witness to adopt it as their substantive evidence-in-chief i.e. 'Did you watch, yesterday … everything true … anything you want to correct …?' Then proceed to further evidence-in-chief. Why there is a concern, is that the witness needs to adopt the interview as their evidence …
>
> I can't recall that any counsel have wanted a prior recorded statement/ police interview played. We're still at a relatively early stage of routine use [of full pre-recording] and what was widely done 12 months ago, is not done now (SCJ2).

One participant stated that even when a witness needed to have reference to a previously recorded interview for the purposes of having their memory refreshed by the prosecution, or an inconsistency highlighted by the defence, it was preferable to utilise the transcript of the interview rather than the audio-visual product by 'stopping and starting the recording and taking the witness to parts' (PP2).

6.6.18 A possible reason for playing a witness' pre-recorded interview in full at a special hearing was said to be if the accused is in custody and has not had the opportunity to view the recording in full, because 'if they don't view it, it is difficult for them to fully participate during the special hearing' (DL1). However, other participants were adamant that there were more appropriate ways to achieve this (P1). Indeed, in one of the special hearings in 2022, defence counsel sought to have the witness's interview played because the accused had not yet seen the recording and the judge otherwise arranged for the accused to view the recording away from the court process (during the lunch adjournment).

6.6.19 Some participants told TLRI that the practice of having the witness watch the pre-recorded investigative interview at the special hearing depended on the judge (DL1, WAO1) and, some judges would ask counsel whether they wanted the interview to be played at the special hearing, or not (DL3). It was reported that there is 'certainly is no consistent approach amongst judges' (P1). The TLRI was also told that it is also 'currently an inconsistent practice within the Tasmania ODPP', determined on a case-by-case basis (that is, those witnesses who are old enough and/or resilient enough may be happy to watch it in court, given the choice). The TLRI was further told that this issue is something that has been identified as the subject of continuing professional development 'for prosecutors to think about why they might/might not in each case and bring some greater understanding consistency to approach within the ODPP' (P1).

6.6.20 Of the 22 special hearings in the TLRI study, there were three special hearings in which the witness watched their pre-recorded interview.[894] In one of those cases, crown counsel asked the judge for the recorded interview to be played so that the complainant could 'watch this while we watch it as well'. In another, the judge enquired, '[n]ow it's intended that we'll play this [recorded interview] and [the complainant will be able to see it? To which the prosecutor replied, 'That's certainly the intention, Your Honour.' In other cases, the prosecution informed the court that 'it is not practice that it be played while the witness is in court'.

6.6.21 Given the potential harmful impacts of playing a witness's pre-recorded interview to them in full at a special hearing, the TLRI's view is that that this should not occur in the ordinary course. It should appropriately be attended to by way of pre-trial preparation, separate to the court process. The TLRI also considers that there needs to be consistency in approach and guidance can be sought from the approach of other jurisdictions.

[894] In a further 3 special hearings, defence counsel sought to have the witness's recorded interview played, but were ultimately unsuccessful.

6.6.22 In the ACT, there is specific provision regarding procedure if an investigative interview is played at a pre-trial special hearing, namely, that the witness must not be visible to anyone in the courtroom by audio-visual link while the recording is being played.[895] In the Northern Territory, specific provisions state that a witness may (but not need to) be present in the courtroom when pre-recorded evidence is played.[896]

6.6.23 In NSW, legislation specifically provides that a witness who gives evidence at a pre-recorded evidence hearing must not, unless the witness otherwise chooses, be present in the court, or be visible or audible to the court by audio-visual link, while the court is viewing or hearing a pre-recorded interview or any other pre-recorded evidence.[897] Relevantly, the NSW Benchbook describes best practice regarding child witnesses as providing 'the child to have had the opportunity to watch their interview (or interviews) about 1 to 3 days before the hearing so it is fresh in their memory.'[898] Similar legislative provisions exist in WA for the playing or pre-recorded interviews of children or persons with mental impairment.[899] There are also legislative provisions which allow for the presiding judge to retain discretion regarding the appropriate procedure to be followed at the pre-trial special hearing.[900]

6.6.24 In the UK, it is viewed as a 'requirement' that witnesses view their pre-recorded interview in advance.[901] There is 'guidance' which states that it is the policy of the Crown Prosecution Service to show a witness their pre-recorded interview to refresh their memory ahead of giving the balance of their evidence[902] and, further, that 'the court should enquire at the PTPH [plea and trial preparation hearing] or other case management hearing about arrangements for memory refreshing ... [as] the witness's first viewing … can be distressing or distracting [and] … it should not be seen for the first time immediately before giving evidence.'[903]

6.6.25 Similar practices have been the subject of detailed review in New Zealand. The Ministry of Justice's *Qualitative Evaluation of the Sexual Violence Court Pilot* recognised that 'particularly for young complainants, watching the evidential interview recording can elicit a range of negative emotions and so being cross-examined immediately afterwards is not ideal.'[904] Based on qualitative data,[905] the evaluation confirmed:

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[895] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 60(4). See also s 52(3): 'The witness must not be in the courtroom, or visible to anyone in the courtroom by audiovisual link, while the audiovisual recording is played at the hearing.' See also ss 81B(3), (4) regarding recorded statements in family violence offence proceedings: The complainant may choose not to be present in the courtroom while the court is viewing or listening to the recorded statement. If the complainant is giving evidence by audiovisual link from an external place, the complainant must not be visible or audible to anyone in the courtroom by closed-circuit television or by means of similar technology while the court is viewing or listening to the recorded statement.

[896] *Evidence Act 1939* (NT) ss 21B(5), (6). See also ss 21H(3), (4).

[897] *Criminal Procedure Act 1986* (NSW) s 294I(4).

[898] Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (n 264) [5-410] 'Requirements for, and conduct of, pre-recorded hearings'.

[899] *Evidence Act 1906* (WA) s 106HB(6a): 'If a visually recorded interview of a witness is admitted … then, while the recording is played to the court, the witness must not be present in court, or be visible or audible by closed-circuit television or by means of any similar technology to anyone in the court other than, in the case of a trial by jury, the judge.'

[900] Ibid s 106K(4): '… nothing in this section prevents a visually recorded interview from being presented under s 106HB as the whole or a part of the affected child's evidence in chief at the special hearing, and in that event the judge may give directions as to the manner in which the visually recorded interview is to be – (a) presented at the special hearing; and (b) recorded on, incorporated with or referred to in the visual recording of the evidence taken at the special hearing.'

[901] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 2 (Citizen Advice Witness Service). Although some concerns were raised that there is still not consistency, despite the requirement. Other evidence to the UK Parliamentary Committee stated: 'They will have either had to watch the earlier recorded evidence-in-chief the week before, or, as a worst-case scenario, at court — which is rare, but does sometimes happen': Evidence to Justice Committee, UK Parliament (House of Commons), London, 26 June 2023, Q26 (John Riley).

[902] Ministry of Justice UK and National Police Chiefs' Council (NPCC), *Achieving Best Evidence in Criminal Proceedings* (n 719) [4.54].

[903] Ibid [4.58], Appendix B [B.9.18].

[904] Ministry of Justice (NZ) and Gravitas, *Qualitative Evaluation of the Sexual Violence Court Pilot* (Report prepared by Gravitas Research and Strategy Limited for the Ministry of Justice, June 2019) 52.

[905] Ibid 53: 'We didn't see much point in having everyone in court watching the complainant going through the agony of watching what they had said [in the EVI] perhaps a year ago. Particularly for young women — 12, 14, 16-year-olds — they

> It was considered less re-traumatising for complainant witnesses to allow them to view their EVI in advance of the trial (usually a week prior) in a more comfortable environment (typically either in the complainants' area at court or at the Crown prosecutor's office). Non-simultaneous watching of the EVI means that, rather than having to sit through the entirety of the EVI in one sitting, complainants can take breaks and have time to process it.[906]

6.6.26 It follows that there is a *Best Practice Guideline* in New Zealand, which stipulates that a witness' viewing of a pre-recorded interview is a pre-trial matter to occur separate to the court process:

> At a trial callover, the judge will enquire into and make such necessary directions about a range of matters, including: whether a complainant intends to view his or her evidential video interview before the trial.[907]

6.6.27 In Victoria, legislation requires that a witness 'attest to the truthfulness of the contents' of the pre-recorded interview (VARE) at the special hearing (or trial).[908] The Victorian Criminal Procedure Manual describes the procedure which has developed around this legislative requirement:

> … if a complainant on a special hearing is to give evidence through a VARE, that recording must be played during the special hearing and the complainant must state that the evidence he or she gave during that interview is true and correct. The complainant is then cross-examined and re-examined, as if he or she was giving evidence at the trial …
>
> At present, it does not appear technologically possible to present the VARE and the complainant's reactions to VARE simultaneously. If this becomes possible, the court should consider providing this so that the jury has the same chance to assess the complainant as if he or she gave evidence in the courtroom by VARE in the trial, rather than at a special hearing ... .[909]

6.6.28 As discussed above, this is contrary to the best practice as supported in the research evidence.[910] While this approach reflects the view of the Pigot Report 'that the video-recorded interview, or as much of it as is to be admitted, will be shown to the child at the preliminary hearing and that he or she will be asked to confirm the account which it gives and to expand upon any aspects which the prosecution wishes to explore,[911] it is the TLRI's view that this is a dated practice, which has appropriately developed over time in line with trauma informed practices.

6.6.29 In addressing the best way of providing guidance about a witness accessing and viewing a pre-recorded statement, the TLRI favours a legislative provision to address this issue over more informal measures such as guidelines. It is the TLRI's view that with clear legislative provision, such as that in NSW, the playing of a witness' pre-recorded interview in full at a special hearing will be limited to the few cases in which the witness chooses this course.

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are highly self-conscious and highly embarrassed. (Judge)'; 'They see the video and they refresh themselves on what they've said. They have to go back to that place of what happened, but they've been able to do it privately. They haven't had to do it in front of strangers, while everyone else is watching, which is scary and intimidating. (Victim advisor/advocate)'; My sense is that [complainant witnesses'] anxiety is less where they watch their video the week before. The court staff organise for you to watch your video, it refreshes your memory then you can go home and think about it and take it easy. In my view, [complainant witnesses] appear to be — I wouldn't say relaxed — but less stressed than you would normally see if they have to watch the video in court then woof, get right into being asked questions. (Judge)'; It's good watching it before because then you could process it … especially after a year after. (Complainant)'.

[906] Ministry of Justice (NZ) and Gravitas (n 904) 53.

[907] Ibid 106–08 (Appendix A: 'Sexual Violence Court Pilot: Guidelines for Best Practice'), Guideline 19.2.

[908] *Criminal Procedure Act 2009* (Vic) s 368(1)(c)(i).

[909] Judicial College of Victoria, *Benchbook/ Criminal Proceedings Manual* (n 874) 447 (citations omitted).

[910] See discussion above at [6.6.14]–[6.6.25].

[911] Home Office (UK), Pigot Report (n 4) 23, 69–70.

Recommendation 12

The *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be amended to provide that a witness who gives evidence at a special hearing must not, unless the witness otherwise chooses, be present in the court, or be visible or audible to the court by audiovisual link, while the court is viewing or hearing a pre-recorded interview or any other pre-recorded evidence.

Actually longer; more time in court?

6.6.30 In addition to greater contact with the prosecution in preparation for a special hearing, some interview participants also raised matters that suggested special hearings also *took longer*. One of these matters was the practice of playing a witness' pre-recorded investigative interview in full at a special hearing (discussed at [6.6.14]–[6.6.27]). Other matters involved the fact that it often takes a long time to set up the requisite technology and the witness is made to wait and this is not ideal, particularly in circumstances of a child witness, when they only have a finite period of concentration (DOJ1). There were other reports of special hearings taking longer due to the prosecution commonly asking at least some further evidence-in-chief 'to tidy up' pre-recorded investigative interviews (PP2) and general reports of poor management of the length of questioning (DOJ1, DOJ2). An interview participant told the TLRI of a special hearing involving a child which went for four to five days (SCJ2). Another participant elaborated:

> [It is a] real concern for private clients [privately paying] … Pre-records going for five to six days … Private clients have to pay … Legal aid covers all pre-records appropriately (DL1).

6.6.31 A common retort of interview participants regarding whether special hearings make cross-examination shorter than it would be at trial was that *it depends on defence counsel* (VSS1, P1, WAO1). 'Better' defence counsel will mean cross-examination at a special hearing is shorter with the view expressed that 'good defence counsel get in and out' (P1). Most defence counsel don't want them there any longer than they have to be (WAO1). The TLRI was also told that, without a jury in a special hearing, there is 'no performing' and there are 'tighter controls' with special hearings (P1). Other interview participants were of the view that *if* cross-examination is shorter at a special hearing than it would be at trial, it is not *because of* the special hearing, but because of the nature of the matter (DL4).

6.6.32 Interview participants also specifically referred to the 'preamble' by a judge at a special hearing (P1) and the fact that 'it adds extra time … [when] we're trying to ensure witnesses are only exposed to the justice system for the least time as possible' (P1). Interview participants referred to extended discussions between the judge and witness (and others) about sworn/unsworn evidence which 'adds time … unnecessary delay' (P1). The example was given of a case involving five child complainants where 'there is a lot that takes place …' (P1). The TLRI was told, 'I'm not sure judges really understand what is now required regarding sworn evidence, the process can and should be streamlined, particularly in matters involving very young children' (P1). Interview participants also referred to the fact that it was common in special hearings for witnesses to take many more breaks (which could be edited out of the final special hearing recording) (DL3, DOJ1). This may improve the experience of a witness giving evidence but adds to the time involved in the conduct of the special hearing.

6.6.33 Interview participants also referred to the practice whereby the judge introduces themselves to a child witness outside of the courtroom, showing robes, wig etc — defence counsel, too (P1, DL3). This practice not only represents a matter that adds to the duration of special hearings, generally, but it has, more recently, caused significant disruption and delay to select special hearing matters in Tasmania. This follows a series of Victorian decisions which cast doubt upon the appropriateness of this practice, particularly when there are interactions between the judge and the witness in the absence of defence counsel.[912] Interview participants told the TLRI of at least one special hearing in Tasmania which had to be redone in light of this new Victorian precedent.

6.6.34 While the TLRI recognises that there is a balance between expediency and implementing a procedure that minimises the stress of a witness, it is the TLRI's view that the time a witness spends in court at special hearings should be monitored to allow assessments to be made of the appropriateness of such time (see Recommendations 16 and 17).[913]

6.7 *More powerful, rich evidence*

The quality of the evidence

6.7.1 As discussed in **Part 4**, one of the primary reasons for the introduction of pre-recorded investigative interviews and full pre-recording related to the quality of the evidence in sexual assault matters. Interview participants spoke of the integrity and quality of evidence produced as a result of special hearings and pre-recorded evidence, more generally. Participants described the evidentiary product as 'powerful', the fact that the jury get to see the 'vulnerability' of the witness, the 'powerful emotion that very often goes along with initial police interviews … it is very powerful' (VSS1). Particularly as a complainant will ultimately, over time, 'present dulled down in emotion, numbed' (VSS1). Participants also described pre-recorded evidence as 'much richer', a witness is able to talk through it without having to be stopped, slowed down, interrupted, can just have open dialogue (VSS1). Participants referred to the 'ability to capture every little detail that is said by a complainant — hand gestures, movement, especially especially for a child. Certain things, visual/verbal cues, have greater impact when captured' (PP1). Other participants spoke of the 'much better sense of demeanour' that is obtained from a contemporaneous audio-visual recording (DL2).

6.7.2 The TLRI was also told of the manner in which pre-recorded police interviews maintained the 'integrity' of a witness' account, as opposed to a police officer paraphrasing in a written statement (DL2). Further, the TLRI was told of the 'preservation' of evidence, particularly in circumstances where a complainant may change their mind about their willingness to be involved in proceedings at a later stage (VSS1). The TLRI was also told that pre-recorded investigative interviews could also be a 'double edged sword … binding the witness to a specific version of events that is recorded some time before cross-examination takes place … Small inconsistencies are more likely to arise, these automatically go to their credibility, which is not necessarily fair' (PP1).

An intrinsic difference between live and pre-recorded evidence

6.7.3 As with the views expressed in other reviews,[914] other interview participants stated their preference for the quality of 'live evidence'. A participant commented that the 'body language' of a witness is often not captured in a recording (PP2). A participant referred to the views of colleagues,

[912] *Ramsay Alec (A Pseudonym) v The King* [2023] VSCA 208; *Director of Public Prosecutions v Smith* [2023] VSCA 293 (per Merton P, Priest & Macaulay JJA). This matter is currently subject to a pending appeal before the High Court. A full court hearing of the High Court is listed on 18 April 2024 (Case M16/2024): High Court of Australia, 'Case M16/2024', *Cases* (Web Page, 2020) <https://www.hcourt.gov.au/cases/case_m16-2024>.

[913] The TLRI acknowledges the difficulties and limitations inherent in attempting to compare the time a witness spends in court giving evidence at a special hearing to the length of time a witness typically would be required to attend court for a trial conducted in the regular way. However, the collection of data on the duration of special hearings would nevertheless prove useful in the ongoing monitoring of this aspect of special hearings.

[914] See discussions throughout **Parts 4** and **5**, specifically at [5.2.21]–[5.2.25].

describing a witness giving evidence by pre-recording … as wooden … not as natural as if she had given evidence in the usual way' (SCJ2). The interview participant further explained:

> There are still some people (Judges included) who hold the view that witnesses who give evidence remotely/via AVL pre-record aren't as compelling, that it doesn't give rise to as many convictions. I know that this view is still held, including by judicial officers (in Tasmania and interstate). I'm not sure about that [view]. Sure, the witness may not appear as vulnerable as in person (i.e. not as distressed), but don't think that equates to not as compelling (SCJ2).

6.7.4 Other participants referred to the simple use of a video link (whether live or recorded) as creating a 'communication barrier'. The simple fact of being in another room and having a video link, 'it is not something that everyone is used to or comfortable with. This is largely overlooked; whether or not there is the requisite 'connection' with a witness via video link' (DOJ1).

6.7.5 The TLRI notes that, in the Tasmanian context, given that pre-recorded evidence is at present predominately admitted in relation to child witnesses, any comparison between 'live' and 'pre-recorded' is not a comparison between evidence given by a witness in court in front of the jury (live) and audio-visual means that has been pre-recorded. Rather, it is a comparison between audio-visual evidence given in the trial from a remote witness room and not in the courtroom (live) and pre-recorded evidence given by way of technology. Accordingly, in both cases, the child is not giving evidence 'live' in the courtroom directly to the jury but via technological means. Further, it is common practice in Tasmania, as in other jurisdictions, for a trial judge to give directions to the jury regarding pre-recorded evidence. Such directions include:

- the fact that pre-recorded evidence is common-place;
- it should not lead to any adverse inference in relation to the accused; and
- the fact that evidence is pre-recorded should not have any impact on the weight attributed to the evidence.

The directions to be given to a jury regarding pre-recorded evidence are the subject of legislated provisions in some jurisdictions, including the ACT,[915] the Commonwealth,[916] South Australia,[917] NSW,[918] Qld[919] and WA.[920] However, equivalent provisions do not exist in Tasmania. Nevertheless, it was observed by TLRI researchers when inspecting court files relevant to the 2022 special hearings that

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[915] *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 57(2), 64(2) (re investigating interviews and pretrial hearings, respectively): 'The court must tell the jury that the admission of the audiovisual recording is usual practice; and the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence is given in that way.' See also s 81I regarding recorded interviews in family violence offence proceedings: '… the admission of a recorded statement is a usual practice and the jury must not draw any inference against the accused person. Or give the evidence more or less weight, because the evidence is given in that way.'

[916] *Crimes Act 1914* (Cth) s 15YQ: '(1) … the judge is not the warn the jury, to suggest to the jury in any other way: … (c) that the law requires greater or lesser weight to be given to evidence that is given by a video recording …'.

[917] *Evidence Act 1929* (SA) s 13BA(6): 'If a court admits evidence in the form of an audio-visual record under this section, the judge must – (a) explain to the jury that the law allows the court to admit evidence in this form; and (b) warn the jury – (i) not to draw from the admission of the evidence in that form any inference adverse to the defendant; and (ii) not to allow the admission of evidence in that form to influence the weight to be given to the evidence.'

[918] *Criminal Procedure Act 1986* (NSW) ss 306X, 289J (regarding investigative interviews), 294O (regarding pre-recorded evidence hearings, respectively): '… the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way' and 'If … the evidence of a witness is given by a pre-recording … the Court must – (a) inform the jury that it is standard procedure to give evidence by a pre-recording … and (b) warn the jury not to draw an inference adverse to the accused person or to give the evidence greater or lesser weight because the evidence was given by a pre-recording …'.

[919] *Evidence Act 1977* (Qld) ss 21AW, 21A(8). Both provisions are in substantially the same terms: 'The judicial officer presiding at the proceeding must instruct the jury that: (a) the measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilty from it; (b) the probative value of the evidence is not increased or decreased because of the measure; and (c) the evidence is not to be given any greater or lesser weight because of the measure'.

[920] *Evidence Act 1906* (WA) s 106HB(7)(a): 'if a visually recorded interview is admitted … the judge is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.'

the jury directions given at trial which related to pre-recorded evidence were generally consistent and in line with the interstate provisions.

Problems with technology

6.7.6 Separate and distinct from any 'intrinsic difference' between live and pre-recorded evidence,[921] interview participants reported tangible and practical differences between live and pre-recorded evidence. 'Technology' and the way in which it impacted upon the integrity and quality of pre-recorded evidence was a near universal topic of comment by interview participants.

6.7.7 In the context of pre-recorded investigative interviews, participants reported instances where these have been 'corrupted' and the fact that 'they don't always play properly' (DL3). In cases where body worn cameras are used, the TLRI was told that there can be issues of sound quality and positioning of the camera, 'you might be able to hear the interviewer, but the interviewee is quiet, muffled … the result being it isn't their *best evidence'* (PP2).

6.7.8 With regard to special hearings, participants told TLRI of issues with the poor quality of the recording; where the quality of the recording was just not as good as it ought to have been (SCJ1). Interview participants also reported the quality of the recording being impacted if court staff failed to 'switch cameras to HD [high definition]' (P1). Other issues related to establishing a live link to a witness suite and ensuring that a complainant (and others) are aware when the link is established. A participant described unfair situations when witnesses were given no warning of the link to the courtroom being established – there should be no surprises like this (WAO1).

6.7.9 Interview participants spoke of changes to the recording facilities available at the courts for special hearings. One participant referred to the court's system having been changed, which has by and large rectified this issue of quality of recordings (SCJ1). Previous differences between recording facilities available at different courthouses also no longer exist (SCJ2). Participants expressed a view that pre-existing technological problems had now by and large been alleviated (SCJ1).

6.7.10 However, persisting issues with technology is consistent with the findings of TLRI study of the 22 special hearings from 2022.[922] These observations are based on comments made in the transcripts on court files because, as noted, the TLRI did not view pre-recorded investigative interviews and only undertook limited and select viewing of special hearing recordings, and has relied on comments made in the transcripts of court files. Those observations included 'technology-related' issues ranging from issues during the special hearing such as difficulty initiating the recording/link to the remote witness suite, and issues with the replaying of pre-recorded evidence at trial, ranging from placement of screens for the jury, jurors moving to obtain a better view of the screen/s, and repeatedly adjusting volume and audio. In one case, the disc containing the pre-recorded investigative interview of a complainant was not compatible with the court's software.

[921] See discussion of this issue in the UK context at [5.2.21]–[5.2.25].

[922] The inspection of the court files relating to the special hearings which occurred in 2022 focussed on the quality of special hearing recordings, not pre-recorded investigative interviews. Regarding the quality of pre-recorded police interviews, see [6.6.2]–[6.6.8] above.

6.7.11 The potential limitations of technology on the integrity and quality of pre-recorded evidence is not an issue unique to Tasmania, with the preceding discussion outlining similar and persisting issues in the UK context and in other Australian jurisdictions.[923] In 2017, the recommendations of the Royal Commission in relation to pre-recorded evidence were tempered by cautionary remarks in this respect:

> The full benefits of using pre-recorded or remote evidence may not be realised if there are technical problems with the recording and playback of such evidence, whether through the failure of the technology or through poor use of the technology. Governments should work with courts to improve the technical quality of CCTV and audio-visual links and the equipment and staff training used in taking and replaying prerecorded and remote evidence.[924]

6.7.12 This issue as it currently exists in Tasmania was also recently addressed by the Commission of Inquiry (see [4.15]). The Commission made recommendations relating to the technology utilised in relation to both pre-recorded investigative interviews[925] and special hearings[926] in Tasmania. These recommendations related to the quality of the recording as well as the effectiveness of staff use of the technology. The TLRI agrees with and endorses these recommendations. As noted, the 2022 evaluation did not extend to watching all the pre-recorded evidence with a view to evaluating the technological quality of the recordings. However, the abovementioned observations from interview participants and the TLRI's inspection of the 2022 special hearing court files suggest that technological issues may persist in some cases in relation to the pre-recorded evidence scheme in Tasmania.[927]

6.7.13 The TLRI notes that the Commission of Inquiry's recommendations were accepted by the Tasmanian Government and are currently being implemented.[928] It follows that the TLRI recommends that the implementation of these recommendations be monitored.

Recommendation 13

The recommendations of the Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings which relate to the technology utilised for pre-recorded investigative interviews (Recommendation 16.5) and special hearings (Recommendation 16.12) in Tasmania are endorsed.

Recommendation 14

The implementation of, Recommendation 16.5 and 16.12 of the Commission of Inquiry should be appropriately monitored to ensure effective implementation.

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[923] See discussion throughout **Parts 4** and **5**.

[924] *Royal Commission into the Institutional Responses to Child Sexual Abuse*, Executive Summary and Parts I–II (n 533) 79. See also Recommendation 55.

[925] Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 32, Recommendation 16.5.

[926] Ibid 73, Recommendation 16.12.

[927] These concerns relate to technological issues regarding the playing of these recordings at trial which affect the quality of the evidence received.

[928] The Commission of Inquiry published its report in September 2023. The Government accepted all of the Commission's recommendations and, as at December 2023, the Premier told Parliament: '…we are unwavering in our commitment to implement all 191 recommendations, as outlined by the commission in their staged approach. Of the 191 recommendations, 83% of these – 158 – will be completed by 1 July 2026, including 48 priority actions to be completed by 1 July 2024. In many cases, we have already started work on reform.' See: Tasmania, *Parliamentary Debates*, House of Assembly, 7 December 2023, 22–3 (Mr Rockliff, Premier). See also Tasmanian Government, *Department of Justice Annual Report 2022–2023* (n 883) 55: 'Other projects significantly progressed this year and anticipated to be delivered in 2023-24 include: … upgrading the digital evidentiary recording systems in the Supreme Court and Magistrates Court'.

6.8 *Focus on witness; everyone working together*

The needs of the witness

6.8.1 A focus on the needs and views of the particular witness in any case has been highlighted as a key component of pre-recorded evidence scheme.[929] Interview participants told the TLRI of the fact that special hearings in Tasmania 'allow for focus on witnesses and their difficulties' (SCJ2). It was described as enabling a 'singular focus' for prosecution and defence, whereas, when a trial commences in the ordinary course, there is *a lot going on.* This focus promotes consideration being given to what will suit an individual witness and enables the witness to have more careful attention given to their circumstances — that is, 'special hearings enable very careful and singular consideration of best practice which cannot always happen in the hurley-burley of trial' (SCJ2).[930] Another participant similarly commented that it reminds everyone to be trauma informed and simply that the introduction of the scheme is creating a better culture (VSS1). Other participants also spoke of the special hearing scheme being responsible for a 'shift in culture' (DL4). One participant described, judges having to be more vulnerable themselves, particularly with young children; it gives *them* a platform to teach us (VSS1).

6.8.2 In circumstances where there is such a central focus on the witness, participants described the 'potential for more choice and control on the part of the witness to fully understand the process and all options' (DOJ1, DOJ2). As discussed at [5.2.26]–[5.2.30], the agency and informed consent of a witness regarding their mode of evidence is significant as 'having a choice about how to give evidence can affect the quality of witnesses' evidence'.[931] The need to provide witnesses with relevant information is reflected in the current Tasmania ODPP guidelines, which state 'a witness should be advised of their options and consideration should be given, particularly with a child witness, to having their evidence pre-recorded.'[932] The importance of a victim/witness feeling like an active participant in the justice system was highlighted by the 2023 report of the Victorian Victims of Crime Commissioner, which found that many victims did not feel like participants in the justice system. It was noted that 74% of victims surveyed said that they were either never treated as a participant or only treated as a participant sometimes. The main themes to emerge from this Research Paper in relation to a lack of participation were feeling excluded, not being part of decision making, not having a voice and inadequate information, not having a role and losing personal agency, and many victims would not participate again.[933]

6.8.3 Interview participants also told the TLRI that the collective focus and co-operation — the culture — engendered by special hearings also facilitated the use of other special measures. Interview participants described a shift from 'early push back and limited use' of special measures, generally, to it now being a 'non-issue' (DOJ1, DOJ2). Participants told the TLRI not only of the greater use of special measures but also the greater diversity of techniques used to assist witnesses in giving their evidence. The TLRI was told about the increasing framework and instances of companion dog use. Participants also spoke of the use of fidget toys, which were 'so effective in a witness being able to channel their anxiety, moving its way through the fidgeting' and them being 'really effective to settle and regulate a witness' (DOJ1 and DOJ2). Interview participants described 'squidgy' fidget toys as 'essentially single use; shredded after one use' (DOJ1, DOJ2). The TLRI was also told of chewing gum being used to effectively provide regulation and feedback for a witness (DOJ1, DOJ2).

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[929] See discussion throughout **Parts 4** and **5**.

[930] Relevantly, similar observations about the benefits of an increased focus on the witness were made by Judges in the UK, 'you're not keeping an eye on the jury for attention or difficulty … You're not keeping an eye on the public gallery … Your concentration is solely on the witness and achieving best evidence … the distractions of the judge disappear' (ACJ1)': Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 3 (Professor John Jackson et al).

[931] Plotnikoff and Woolfson (n 498) 6, 9, citing Judy Cashmore and N De Haas, *The Use of Closed-Circuit Television for Child Witnesses in the ACT* (Australian Law Reform Commission, 1992).

[932] Director of Public Prosecutions Tasmania (n 251) 52. See also Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 70.

[933] Victims of Crime Commissioner (Victoria), *Silenced and sidelined: Systematic inquiry into victim participation in the justice system* (Report, November 2023) 17.

6.8.4 In relation to other special measures that are available in Tasmania, the majority of interview participants spoke highly of witness intermediaries: 'I like intermediaries and the intermediary scheme … they are helpful … they work well' (DL1) and 'I have had a positive experience every single time an intermediary is involved (DL3). Many participants spoke of the educative value of intermediaries, with the view expressed that. 'I have learnt a hell of a lot about communication from using intermediaries' (P1).[934] Whilst some participants spoke of 'inconsistent' levels of engagement and co-operation by counsel with intermediaries and their recommendations (DOJ1, DOJ2), other participants reported, that 'I've never had any difficulties from counsel, they generally embrace the recommendations, any matters counsel may have are raised appropriately in advance and I can only speak really highly regarding the response of counsel to the whole [intermediary] process' (SCJ2).

6.8.5 Significantly, many interview participants spoke of special hearings synonymously with the use of witness intermediaries. This appeared to be the result of the fact that many participants' experience of special hearings were special hearings which involved intermediaries. Indeed, of the 22 special hearings across 12 cases in the TLRI study, 16 (72.7%) involved a witness intermediary (across 10 of the 12 cases). It has been difficult, in light of this overlap, to distinguish between benefits obtained by special hearings and benefits obtained through the use of intermediaries. Some participants attributed any changes in questioning of a witness during a special hearing, particularly cross-examination, to the involvement of an intermediary (and associated ground rules hearings) as opposed to the special hearing scheme itself: 'I have (and do) certainly make adjustments in the manner of my cross-examination based of whether the witness is a child, the nature of allegation/s, the relationship between the witness and the accused, whether an intermediary is involved. I don't consider any of that to be specific to the special hearing process' (DL2). Accordingly, while the use of witness intermediaries and special hearings often coincide, it needs to be remembered that they are separate and distinct special measures which need to be assessed very differently (SCJ1). In the TLRI's view, it is particularly important that special hearings and witness intermediaries are not conflated and considered one and the same in the context of reviewing and evaluating the respective special measures and associated schemes. As discussed in further detail below, at [6.10], whilst the witness intermediary scheme in Tasmania benefits from the close monitoring and review framework of the Witness Intermediary Scheme Pilot, it does not and cannot provide the necessary review and evaluation of the special hearing scheme.

Intensive time and effort

6.8.6 The TLRI was told by interview participants of many examples of successful special hearings. A common element of these matters was the extraordinary level of effort and co-operation of *all* involved. Whilst there may be a singular focus on the witness, participants described the fact that everyone is involved; everyone is working together (VSS1). The TLRI was told of a case in which special hearings were used in relation to five complainants with exceptional results (WAO1). Significantly, it was not without work from all involved to make it happen. It took the co-operation and collaboration of defence, prosecution, and the court to make it happen (WAO1). Other examples of successful special hearings similarly involved 'very considerable preparation' (DOJ1, DOJ2).

6.8.7 This gives rise to clear benefits but also is resource intensive. Interview participants highlighted the arduous and problematic' (Dl2) preparation impacts of the special hearing scheme. An interview participant explained that 'you have to prepare three times … first time for the special hearing, a second time for the editing of the special hearing, a third time for trial … [it is] far more labour intensive' (DL1).

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[934] This accords with the submissions from Professor Cashmore to the Commission of Inquiry, namely, namely, witness intermediary schemes having 'particular educative value for lawyers, judges and others involved in the process': Commission of Inquiry into the Tasmanian Government's Response to Child Sexual Abuse in Institutional Settings, *Who was looking after me?* (n 228) 65.

6.8.8 The sheer duplicity and repetition of work was a near unanimous concern amongst participants. Mention was also made that there was still an expectation of continuity of counsel and, indeed, many participants supported this approach (DL4, P1). Participants also viewed continuity of judges as a 'foundational aspect' to the special hearing scheme (DL4).

6.8.9 Whilst the concerns raised by participants in this context do not appear as significant as those currently affecting the UK system (see discussion above at [5.2.37]–[5.2.38]), the TLRI was earnestly told by one participant that 'the number of counsel who do this specialist court work is the smallest ever that I can recall.'(DL4).

6.9 *Each judge does things differently*

Flexibility and consistency

6.9.1 The need for flexibility in the operation of pre-recorded evidence scheme has been recognised in prior research.[935] There is flexibility in the operation of the scheme in Tasmania as it was apparent from this inquiry that there is much variation in the implementation of the special hearing scheme in practice. A common report from interview participants was that 'each judge does things differently' (P1). Interview participants told the TLRI 'there are many examples of different approaches by different judges' (P1). However, there were several key areas identified by interview participants which demonstrate this lack of consistency in approach to special hearings.

Continuity of counsel/ presiding judge

6.9.2 The majority of interview participants agreed that it was preferrable for the same judge and counsel to be involved in all proceedings related to a special hearing (i.e. the pre-trial directions hearings,[936] the special hearing and the trial). One participant described it 'as the most desirable outcome' (SCJ2) and explained that it was 'generally regarded as the preferred option' (SCJ2). Special hearings, particularly those which also involve an intermediary and associated ground rules hearings, 'require a nuanced approach' (SCJ2).

6.9.3 This would appear to be the practice in Tasmania with the TLRI's study finding that there was continuity of the presiding judge in 10 of the 12 cases. There was also continuity of counsel in 10 of the 12 cases with one case involving different defence counsel and one case involving both different defence and prosecution counsel.

6.9.4 The TLRI observes that in other jurisdictions, legislation specifically provides for different judges to preside over a pre-trial special hearing and the subsequent trial.[937] Indeed, the TLRI was told by an interview participant (SCJ2):

> The issue is what is the best system? In Qld, NSW, judges do pre-records all the time and then hand them over. In those jurisdictions there is no preference in that regard. It is a question best suited for law reform, policy-makers to consider all aspects, including whether those systems [in other jurisdictions] work well (are there problems with passing cases over)?

In other jurisdictions, legislation also expressly provides for the flexibility for the judicial officer, counsel, the accused, the witness and any witness intermediary to be at different places appearing by audio-visual link for a pre-trial special hearing.[938] In the UK, whilst there was previously a mandate for continuity of counsel and judges for pre-trial special hearings, it is now merely 'encouraged'.[939] Noting,

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[935] See discussion throughout **Parts 4** and **5**.
[936] Including any s 9 preliminary hearings and/or any ground rules hearings.
[937] *Criminal Procedure Act 1986* (NSW) s 294I(7); *Evidence Act 1977* (Qld) s 21AK(7).
[938] *Criminal Procedure Act 1986* (NSW) s 294I(8); *Evidence Act 1977* (Qld) s 21AK(8).
[939] See *Criminal Practice Directions 2023* (UK) [6.3.50]–[6.3.51].

however, that there is provision for discrete orders to be made regarding continuity of counsel and/or presiding judge in particular cases.[940]

Taking plea at special hearing

6.9.5 Another procedural matter, related to whether the same judge presides over the special hearing and trial is the practice of taking an accused's plea at the special hearing. The TLRI was told that some judges take the view that the plea needs to be taken before the special hearing commences (P1). While there does not appear to be any express statutory requirement for this to occur, the taking of a plea at a special hearing has the significance of formally starting the trial, including the requirement for the judge to preside over the remainder of the trial as well as having other procedural implications.[941]

6.9.6 The TLRI's study found variation in approach in this respect. There was not only a near equal split of approach, but also considerable discussion about the matter and justification for one approach over the other. For example, one judge commented 'if for some reason a different judge does the trial then that would cause issues to take the plea before the pre-record … therefore [I] won't take pleas before the pre-record'. Another judge remarked, 'the next issue that I need to raise with counsel is the taking of the plea to the indictment. In my view … it would be appropriate to take the plea prior to the SH commencing? So you want to be heard about that?'. And, further, counsel for the Prosecution in one matter stated, 'my personal experience with this has been a plea has been taken prior to the pre-recording …').

Recorded evidence tendered as exhibits

6.9.7 A further related procedural matter is the way in which the pre-recorded evidence is received by the court. This refers to whether a pre-recorded investigative interview is tendered as an exhibit at a special hearing, whether it needs to be 're-tendered' at trial along with the special hearing recording and whether the recordings (and corresponding transcript) may be taken into the jury room (as is the ordinary course for trial exhibits) (DL3).

6.9.8 This matter has been the subject of some discussion in other jurisdictions. In New Zealand, the Court of Criminal Appeal has held that a pre-recorded investigative interview, which is relied upon at trial as some or all of a witness's evidence-in-chief, should not be tendered as an exhibit and should not be left with the jury during deliberations.[942] Whilst the Court emphasised that it did not intend to lay down any rule of practice or procedure to be followed in every case, it endorsed the following procedure:

> (a) The videotape evidence of a Crown witness should not become an exhibit and, therefore, should not be sent with the exhibits to the jury on retirement;
> (b) Any transcript given to the jury … should be recovered from the jury after evidence of the witness has been completed;
> (c) It is for the discretion of the trial judge how a jury request to be reminded of the evidence in chief of the witness should be addressed;
> (d) It would be inappropriate for the judge to question the jury as to the purpose for which they wish to have the tape replayed;
> (e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case";
> (f) The judge should consider whether the jury should be reminded of any other evidence, for example the cross-examination of the witness at the time that the tape is replayed or sent to the jury room, if that step is considered to be appropriate.[943]

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[940] See *Criminal Practice Directions 2023* (UK) [6.3.50]–[6.3.51].
[941] See *R v WAH* [2009] QCA 263, in which the accused had been arraigned at a pre-trial special hearing and the prosecution sought to present a new amended indictment at trial.
[942] *R v NZ* (2005) 63 NSWLR 628 [194]–[195].
[943] *R v NZ* (2005) 63 NSWLR 628 [210].

6.9.9 With respect to the Queensland pre-recorded evidence scheme, the High Court has similarly held that a pre-recorded investigative interview should not be admitted as an exhibit[944] and it would rarely be appropriate to give the jury unrestricted access to the recording in the jury room.[945] If the recording is to be replayed, this should take place in court in the presence of the trial judge, counsel and the accused and, depending on the circumstances, it may be appropriate to be accompanied by a warning from the trial judge.[946] This approach has also been adopted in NSW[947] and Victoria.[948]

6.9.10 The Queensland Courts Benchbook sets out specific procedures as follows:

> [The pre-recorded interview] … should be tendered on the pre-recording as the child's evidence-in-chief and admitted as an exhibit in the pre-recording. This should occur before the child is sworn … on the pre-recording … [with any] accompanying transcript [to be] marked for identification …
>
> On the trial where the pre-recorded evidence is played to the jury, the video tape should be marked for identification rather than as an exhibit in the trial. The video tape should be marked with a letter and should not be given into the possession of the jury for the purpose of their deliberations ...[949]

6.9.11 From the TLRI's 2022 special hearing study, confusion appeared to exist about whether pre-recorded evidence was to be tendered as an exhibit or merely 'marked for identification' (MFI). In one case, there was confusion at trial as to whether the pre-recorded interview was merely marked for identification at the special hearing or whether it was 'tendered already as P1'. In another case, a prosecutor attempted to tender a pre-recorded investigative interview at a special hearing but the presiding judge only permitted them to be marked for identification as 'the trial had not started yet'. There were also examples of uncertainty at trial about 'tendering exhibits already tendered at [the] special hearing'. This distinction can have procedural consequences for a trial.

Approach to Intermediaries

6.9.12 Differences in judicial approaches was also identified in relation to intermediaries. Interview participants told the TLRI that 'different judicial officers differ in style of approaching intermediaries' (DOJ1 and DOJ2). Participants explained, 'some make proscriptive orders, some don't … some Judges don't see the need to make specific orders if all parties are in agreement in principle regarding the style/manner of questioning', 'the approaches by particular Judges have [also] changed over time, that is, as they become more familiar with the intermediary scheme' (DOJ1 and DOJ2). Other participants agreed, describing the approach very different from court to court. It depends very much on which judge, defence counsel, which prosecutor and what submissions they make (what they ask for) in relation to the intermediary report (WAO1). Another interview participant described the different approaches to intermediaries and, specifically, intermediary reports as, 'whether intermediary reports are adhered to proscriptively … there has been a movement towards an approach where there are no specific orders made as such, but rather, the report and matters raised therein is taken on notice by counsel [with the] expectation by the court (judge) that counsel have the report, have read and taken on board matters raised … No specific orders as such, but Judge to intervene if not adhered to' (P1).

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[944] *Gateley v The Queen* (2007) 232 CLR 208 [3], [93]. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (n 264) [1–378] 'Pre-recorded interviews by witness — preferred procedure'.

[945] *Gateley v The Queen* (2007) 232 CLR 208 [3] [94], [96].

[946] Ibid [96].

[947] Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (n 264) [5–420] 'Suggested Direction — pre-recorded evidence', citing *CF v R* [2017] NSWCCA 318 [63]–[65]; *R v NZ* (2005) 63 NSWLR 628 [191]–[192], [210](a); *Gately v The Queen* (2007) 232 CLR 208 [93]. See also *AB (a pseudonym) v R* [2019] NSWCCA 82 [40]–[42].

[948] Judicial College of Victoria, *Benchbook/ Criminal Proceedings Manual* (n 874) 445: 'The tape is not an exhibit, but should be marked for identification', citing *R v Lewis* [2020] VSCA 200; *R v BAH* (2002) 5 VR 517.

[949] Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (n 271) 'Evidence of Affected Children', citing *Gately v The Queen* (2007) 232 CLR 208; *R v Nijamuddin* [2012] QCA 124 [44]–[47].

Editing of special hearing recordings

6.9.13 There was also variation in approach regarding the processes and procedures surrounding the editing of special hearing recordings. In some cases, judges required formal submissions to be made to the court regarding any proposed edits, and in other cases the Associate liaised informally with counsel via email to obtain a list of proposed edits which were agreed upon by prosecution and defence.

6.9.14 It appeared that the Court was responsible for editing the special hearing recordings as need be which, upon inspection of court files by TLRI researchers, involved the courts providing the recordings to an external private production company for editing. The TLRI understand that the courts would provide the company with the relevant transcript (with the requisite edits marked up) via email and the audio-visual recording is made available via a secure file sharing portal. The fact that a third-party technical service provider is involved in this way in the Tasmanian special hearing scheme is not unusual, nor is it necessarily a matter for concern. As discussed above, Vodafone has been engaged by the UK courts for some time to provide the operating system for their pre-trial special hearing scheme. However, it raises some matters for consideration:

> (1) it is unclear whether the necessary authority is in place, pursuant to s 7C of the Act, which otherwise deems it an offence to have unauthorised possession or dealing in such recorded evidentiary material.[950]
>
> (2) issues of confidentiality and privacy arise, which are only heightened in the context of engaging a local service provider in a small jurisdiction such as Tasmania.

In this respect, it is also unclear whether there is any additional agreement (or memorandum of understanding) in place between the courts and the company in relation to this arrangement; and whether the court advises the parties and/or the relevant witness of the involvement of an external third party as part of the editing process.[951]

Tension between the need for greater guidance and consistency and the need to retain necessary flexibility and discretion

6.9.15 In response to the variation in the implementation of the special hearing scheme in practice, interview participants queried whether a 'more confined framework' or a 'more proscriptive approach' was required (P1). Participants suggested written guidelines, practice directions or amendments to the Act as possible options (P1). One interview participant told TLRI that 'practice directions could be really useful' (P1). Other participants agreed that guidelines would be great (WAO1).

[950] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 8, 47 (COEUS Group); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 13 (Dr Natalie Kyneswood); Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 1 and 16 (Criminal Bar Association).
[951] The TLRI contacted the Supreme Court in relation to all of these enquiries but did not receive a response.

6.9.16 In the UK, the framework of the pre-recorded evidence scheme in the YJCEA is supplemented by a range of materials, including: a protocol between police and the Crown Prosecution Service,[952] Court issued practice directions[953] and guidance issued by the Ministry of Justice.[954] Further, evidence before the UK Committee called for more detailed practice directions and/or protocols regarding the use of pre-recorded evidence in the UK.[955] In New Zealand, *Guidelines for Best Practice* have been developed by the District Courts and endorsed by the Chief District Court Judge to support the use of pre-recorded evidence.[956] In the Australian context, the NSW and Queensland benchbooks include detailed procedures and directions regarding pre-recorded evidence.[957]

6.9.17 The TLRI acknowledges the need to retain flexibility and discretion in the implementation of the special hearing scheme. It is to be noted that flexibility and discretion in this context not only refers to *the way in which* the special hearing scheme is used in a particular matter, but also *whether or not* a special hearing should be used at all. The TLRI notes the comments of interview participants in this respect: 'special hearings are not always the best/only option … particularly if a special hearing is listed immediately before the trial … [in those circumstances] shouldn't we be looking at … the witness giving evidence at trial and recording of witness' live evidence (as is routine practice for all vulnerable witnesses' evidence at trial) … [it] makes sense from a listing perspective' (P1). Relevantly, the TLRI observed that one of the 2022 special hearings took place only 14 days before the subsequent trial.

6.9.18 With regard to the special hearing scheme in Tasmania, the TLRI recognises the tension between the need for greater guidance and consistency and the need to retain necessary flexibility and discretion. However, given the degree of variation which appears to exist in relation to key procedural aspects of special hearings, the TLRI's view is that the scheme would benefit from additional guidance and greater consistency of approach. The guidance should not be overly proscriptive to retain the necessary flexibility and discretion of the use of pre-recorded evidence in individual cases. The guidance could consist of practice directions or guidelines developed by the Courts and Government, as appropriate for their respective processes.[958]

Recommendation 15

The special hearing scheme framework under the *Evidence (Children and Special Witnesses) Act 2001* (Tas) should be supplemented by practice directions or guidelines, developed by the Courts and Government as appropriate for their respective processes, in order to achieve greater consistency in key procedural aspects of the scheme.

[952] Crown Prosecution Service (CPS) and National Police Chiefs' Council (NPCC), *National Protocol* (n 719).
[953] *Criminal Practice Directions 2023* (UK).
[954] Ministry of Justice UK and National Police Chiefs' Council (NPCC), *Achieving Best Evidence in Criminal Proceedings* (n 719).
[955] See, eg, [5.2.30] above.
[956] Ministry of Justice (NZ) and Gravitas (n 904) 2.
[957] Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (n 264); Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (n 271) '10 – Child Witnesses: 93A Statements' (Updated March 2024); Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (n 271) '11 – Special Witnesses' (Updated January 2020).
[958] As discussed at [6.9.16], in the UK, the framework of the pre-recorded evidence scheme in the YJCEA is supplemented by a range of materials developed by the Courts and Government (i.e. a protocol between police and the Crown Prosecution Service, Court issued practice directions and guidance issued by the Ministry of Justice).

6.10 Recordkeeping, data collection and evaluation

6.10.1 A key issue that arose in this inquiry was access to data about the use of special hearings and the use of pre-recorded evidence in Tasmania. It was apparent that agencies did not hold specific records or collect data in relation to the use of pre-recorded evidence in Tasmania, particularly pre-trial special hearings. As noted at [1.5], despite there being no readily available data on pre-recorded evidence, the TLRI was greatly assisted by Supreme Court staff manually extracting and collating statistics regarding special hearings from general case management data for the period of 1 January 2019–27 March 2023.[959] The TLRI understands this to have been a labour-intensive exercise. This data, while valuable to provide insight into the operation of the scheme, did not allow for a full analysis its operation and any areas for improvement.

6.10.2 The TLRI also benefited from the ODPP contemporaneously reporting on the special hearings which occurred from 1 January 2023–27 March 2023. However, a comparison of the data provided by the Supreme Court and the ODPP for this period revealed an inconsistency between the number of reported special hearings with the court's data showing that two special hearings had taken place across two cases, and the ODPP indicating that no pre-recordings had been held.[960] On the one hand, this inconsistency may be explicable given the difference between the calendar year and the Supreme Court's calendar year (according to which the first sittings of 2023 commenced on 30 January 2023).[961] On the other hand, this inconsistency raises concerns about the reliability, accuracy and completeness of both data sets (which are, perhaps, unsurprising given the manual extraction methods utilised by both the courts and the ODPP in obtaining this data for the TLRI.) In any event, it highlights the need for more systematic data collection in this area.

6.10.3 Data collection and monitoring of the pre-recorded evidence scheme can be contrasted to the close monitoring and review framework of the related Witness Intermediary Scheme Pilot (WISP) in Tasmania. From its inception, a review framework was part of the WISP. Parliament introduced the scheme as 'evidence-based reform',[962] announcing from the outset that '[i]t will undergo a thorough evaluation to ensure its effective operation and review of its scope.'[963]

6.10.4 Following the commencement of the WISP in March 2021 as a 3-year pilot program, it was reviewed after the first 12 months, followed by a final review after the three-year pilot period.[964] As is evident from the data provided by CARCRU to TLRI as part of this inquiry, there has been systematic and organised data collection regarding the use of witness intermediaries during the pilot period. It is to be noted, however, that this data from CARCRU, whilst touching upon special hearings, is of limited use as it only concerns those special hearings in which there is the involvement of an intermediary.[965]

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[959] The data obtained from the Courts encompassed 2019–current and was provided by the Courts on 27 March 2023. The original format of the data as provided by the Supreme Court is shown in **Appendix A**.

[960] Email from ODPP to TRLI, 1 March 2023. For completeness, the ODPP reported 10 special hearings in 2023, see **Appendix C** for full table of data provided by the ODPP to the TLRI regarding special hearings in 2023.

[961] J A Connolly (Registrar), *Supreme Court of Tasmania Calendar 2023* (Supreme Court of Tasmania, 2022) <https://www.supremecourt.tas.gov.au/wp-content/uploads/2022/09/2023_Calendar-for-Web.pdf>.

[962] Tasmania, Parliamentary Debates, Legislative Council, 15 October 2020, 3 (the Hon Elise Archer, Attorney-General).

[963] Ibid 5 (the Hon Elise Archer, Attorney-General).

[964] See discussion above at [2.4.13]. As at 3 July 2024, the Department of Justice website states that the Final Review is scheduled to be received by July 2024. See: Tasmanian Government, Department of Justice, 'Witness Intermediary Scheme' *The Royal Commission Response Unit* (Web Page, 15 February 2024) <https://www.justice.tas.gov.au/carcru/witness-intermediary-scheme>.

[965] The CARCRU data covers all *referrals* to the Department of Justice regarding the involvement of an intermediary and, in the context of special hearings, covers both special hearings at which an intermediary is in attendance and special hearings where an intermediary is not in attendance but there has been a referral and for whatever reason an intermediary is not ultimately required to attend the special hearing. However, as previously discussed in this report, witness intermediaries are only involved in a proportion of special hearings. Further, the data collected by CARCRU was focussed on the WISP and the data regarding special hearings was minimal and variable.

6.10.5 Data collection in Tasmania for the pre-recorded evidence scheme can also be contrasted with the data collection in connection to pre-recorded evidence and, in particular, pre-trial special hearings in other jurisdictions.[966] Neither the courts,[967] nor any government agency could provide readily available statistics on the number of special hearings which occurred annually. There was also no other data available that would allow an assessment to be made about the impact of the use of pre-recorded evidence in Tasmania. As indicated, there is currently no active monitoring of key aspects of the scheme, such as: the number of pre-recorded investigative interviews used at trial and at special hearings, the number of each category of witness that accessed pre-recording (and other special measures), the combination of special measures used, the number of each category of witness that would be eligible for access of special measures and pre-recording but did not, the outcomes of those cases in terms of findings of guilty on all or some of the charges, pleas of guilty, withdrawal of charges and acquittal, the time between the investigative interview, any special hearing and the trial, factors relating to the listing and relisting of special hearings and associated trials.

6.10.6 This finding of the TLRI in relation to the lack of adequate recordkeeping and data collection regarding the use of pre-recorded evidence in Tasmania reflects the observation of Professor Thomas provided in written evidence to the UK Parliamentary Committee about the situation in the UK. Professor Thomas highlighted the deficiencies that existed in the data collection in s 28 cases, given that important information that 'would have aided the analysis was unfortunately either not collected at court or not available in the dataset from the Crown Court'.[968]

6.10.7 Professor Thomas proposed that specific data be collected in relation to s 28 hearings, a proposal which was widely endorsed by other stakeholders in evidence to the Committee.[969] The Ministry of Justice told the Committee of new impact analysis work currently being undertaken in relation to s 28, designed to improve understanding of the impact of the measure by looking at: timeliness of hearings and evidence; length and number of hearings; continuity of counsel; trial efficiency; pleas; outcomes, including conviction and acquittal rates; and sentences and appeal rates.[970]

6.10.8 In the UK, the Victims' Commissioner of England and Wales also told the Committee that there were issues more broadly with criminal justice system data and that there was a lack of data sharing and integrated systems that impeded effective analysis.[971]

6.10.9 These observations about the need for streamline data access and analysis are well recognised in Tasmania and align with the transformational aspirations of the pending Justice Connect program initiative in Tasmania, with the major integrated end-to-end digitalisation of Tasmania's justice system – *Astria* – phased for implementation in the criminal courts and prosecution services in 2025.[972]

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[966] For example, in South Australia, the Annual Report of the Office of the Director of Public Prosecutions records the number of pre-trial special hearings that have taken place over the reporting period, with a further break down of number of special hearings per month during that same period. See: Government of South Australia, *Office of the Director of Public Prosecutions 2020–21 Annual Report* (2021) 19.

[967] It is to be noted that the Supreme Court was actively recording all special hearings involving child complainants in sexual offence matters as part of the court's case management pilot. See Supreme Court of Tasmania*, Annual Report 2022/2023* (n 22) 29–33.

[968] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 22 (Professor Cheryl Thomas).

[969] See, eg, Written Evidence to Justice Committee, UK Parliament (House of Commons), London, February 2024, 8 (COEUS Group). See also Evidence to Justice Committee, UK Parliament (House of Commons), London, 23 January 2023, Q245 (Committee chair and Genna Telfer, Assistant Chief Constable, Hertfordshire Constabulary.).

[970] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023 (Ministry of Justice).

[971] Written Evidence to Justice Committee, UK Parliament (House of Commons), London, December 2023, 9 (Victims' Commissioner for England and Wales).

[972] Tasmania Government, 'The Justice Connect Program', *The Justice Connect Program: ASTRIA Delivering Astria for Tasmania* (Web Page) <https://astria.tas.gov.au/>. However, it is to be noted that delays have been reported. See Tasmanian Government, *Department of Justice Annual Report 2022–2023* (n 883) 56: 'There has been a delay in developing and implementing the Prosecution and Courts stream, however work with stakeholders and vendors to progress these parts of the program are continuing.'

6.10.10 It is the TLRI's view that given the need to give careful ongoing scrutiny to the operation of the pre-recorded evidence scheme, and to better understand the operation of the scheme in both the Supreme Court and Magistrates Court, data collection needs to be reviewed to allow for evidence-based development of law and policy regarding pre-recorded evidence.[973] Further, the TLRI's view is that there needs to be monitoring and review of the operation of the pre-recorded evidence scheme. The need for an evidence-based review of the special hearing scheme in Tasmania was the subject of some comment by interview participants. One participant stated that any assessment of the scheme on their part would be based on 'assumption' and they 'couldn't necessarily say one way or the other' (DL2). Other participants referred to 'assumed' and 'untested' benefits of the scheme (DOJ1), and being satisfied of the 'genuine benefit of pre-recording … [but] not necessarily convinced we can be sure about how much the benefit is' (DOJ1). Another participant stated 'I can only refer to cases, not data' and continued to explain in some detail:

> One matter that I am really interested in knowing about [and] the potential benefit would be huge … are there less withdrawals of indictments because of this scheme? My suspicions are that some withdrawals are because of delay, uncertainty … frustration/delay with process … query whether you may be able to drill down further into this question of impact of scheme on discharges/discontinuances … (SCJ2).

6.10.11 Accordingly, the TLRI recommends improved record-keeping and data collection practices with respect to special hearings and pre-recorded evidence, more generally, in Tasmania. Further, the TLRI recommends the introduction of a structured review framework to evaluate the special hearing scheme on an ongoing basis. The framework should focus on the special hearing scheme, but also consider pre-recorded evidence more generally. The TLRI notes that any such evaluation will necessarily rely upon the introduction of comprehensive and organised recordkeeping and data collection practices as recommended.

Recommendation 16

Comprehensive and organised recordkeeping and data collection practices with respect to special hearings and pre-recorded evidence, more generally, should be introduced in Tasmania.

Recommendation 17

A structured review framework should be introduced to evaluate the special hearing scheme on an ongoing basis.

[973] See above discussion in **Part 5**.

Appendix A

Data from the Supreme Court regarding special hearings 2019–March 2023 (as provided by the court)

Date	Number of witnesses	2019	2020	2021	2022	2023	Multiple days
28/7/2020	1		1				
4/8/2020	1						
28/2/2020	1		1				
26/2/2020 10/3/2020	1		1				
7/9/2021 8/9/92021 9/9/2021	2			1			3
21-23/7/2020	1		1				
9/9/20 10/9/20	2		1				
30/7/2020	1		1				
21/11/2019	1	1					
30/7/20 20/5/22	1		1				2
13/11/19 18/11/19 19/11/19 20/11/19 21/11/19	4	1					5
3/8/2020	1		1				
2/3/2022	1				1		
24/5/22 27/5/22	2				1		
29/11-3/12/2021	1			1			
2/12/2021	1			1			
12/8/2020	1		1				
1/12/2020	1		1				
23/3/2022	1				1		
12/7/2022	1				1		
31/10/2019	1	1					
9/8/2019	1	1					
2/10/2020	1		1				
1/12/2022	2				1		
17/1/2023 18/1/2023	1					1	2
6/4/22 7/4/22	2				1		2
18/1/2023	1					1	

Date	Number of witnesses	2019	2020	2021	2022	2023	Multiple days
8/11/2022	1				1		
6/7/22 7/7/22 8/7/22 17/11/22	4				1		4
1/12/2020	1		1				
10/11/2022	1				1		
15–17/03/2022	1				1		3
26/2/20 10/03/2020	1		1				2
20/6–23/6/2022	6				1		4
12/12/2022	1				1		
12/7/2022	1				1		
TOTAL	**52**	**4**	**13**	**3**	**13**	**2**	**27**

Appendix B

Data from the Supreme Court regarding special hearings 2019–March 2023 (as reformatted by TLRI researchers)

Year	Number of witnesses/ Number of special hearings	Date/s	Number of sitting days	TOTAL
2019	1	9/8/19	1	**7** special hearings across **4** cases (**8** sitting days)
	1	31/10/19	1	
	4	13/11/19 18/11/19 19/11/19 20/11/19 21/11/19	5	
	1	21/11/19	1	
2020	1	28/2/20	1	**13** special hearings across **12** cases (**16** sitting days)
	1	26/2/20 10/3/20	2	
	1 [A]	26/2/20 [A] 10/3/20 [A]	2 [A]	
	1	21/7/20 22/7/20 23/7/20	3	
	1	28/7/20	1	
	1	30/7/20	1	
	1	30/7/20	2	

Year	Number of witnesses/ Number of special hearings	Date/s	Number of sitting days	TOTAL
		20/5/22 [B]		
	1	3/8/20	1	
	1	12/8/20	1	
	2	9/9/20 10/9/20	2	
	1	2/10/2020	1	
	1	1/12/20	1	
	1	1/12/20	1	
2021	2	7/9/21 8/9/21 9/9/21	3	**4** special sittings across **3** cases (**9** sitting days)
	1	29/11/21 30/11/21 1/12/21 2/12/21 3/12/21	5	
	1	2/12/21	1	
2022	1	2/3/2022	1	**24** special hearings across **13** cases (**23** sitting days)
	1	15/3/22 16/3/22 17/3/22	3	

Year	Number of witnesses/ Number of special hearings	Date/s	Number of sitting days	TOTAL
	1	23/3/22	1	
	2	6/4/22 7/4/22	2	
	2	24/5/22 27/5/22	2	
	6	20/6/22 21/6/22 22/6/22 23/6/22	4	
	4	6/7/22 7/7/22 8/7/22 17/11/22	4	
	1	12/7/22	1	
	1	12/7/22	1	
	1	8/11/22	1	
	1	10/11/22	1	
	2	1/12/22	1	
	1	12/12/22	1	

NOTES
[A] This is a suspected duplicate entry and therefore not included in the 2020 total.
[B] This second subsequent special hearing occurred in 2022 and is not included in the 2020 total. It is included and counted in the 2022 total later in the table.

Appendix C

Data from the Office of the Director of Public Prosecutions regarding special hearings in 2023 (as collated by TLRI researchers)

Sittings dates	Number of special hearings
1st sittings 20/1/23 – 24/2/23	0
2nd sittings 14/3/23 – 6/4/23	2[A]
3rd sittings 1/5/23 – 26/5/23	1
4th sittings 13/6/23 – 7/7/23	2
5th sittings 24/7/23 – 18/8/23	0[B]
6th sittings 4/9/23 – 29/9/23	1
7th sittings 16/10/23 – 10/11/23	2
8th sittings 20/11/23 – 15/12/23	2

NOTES
[A] A third special hearing was listed for the second sittings, but the matter resolved by way of a late guilty plea.
[B] A special hearing was listed in Launceston during the fifth sittings, however, it didn't proceed due to illness and had to be adjourned out.

Appendix D

Pre-recorded evidence schemes in other jurisdictions

Australian Capital Territory

Eligibility criteria for the use of pre-recorded evidence are set out in s 43. It is to be noted that the format of the eligibility criteria is particularly accessible, with a separate table provided for each type of proceedings:[974] family violence offence proceedings,[975] less serious violent offence proceedings,[976] serious violent offence proceedings,[977] and sexual offence proceedings.[978] Within each table, there is a list of 'kind of witness' and a corresponding list of the special requirement provisions which apply to that type of witness in that type of proceeding.

Pre-recorded investigative interviews may be utilised in:

(a) family violence offence proceedings by complainants, similar act witnesses,[979] child witnesses, and intellectually impaired witnesses;[980]

(b) less serious offence proceedings by complainants, similar act witnesses, child witnesses, and intellectually impaired witnesses;

(c) serious violent offence proceedings by complainants, similar act witnesses, child witnesses, intellectually impaired witnesses and special relationship witnesses;[981]

(d) sexual offence proceedings by complainants, similar act witnesses, child witnesses, intellectually impaired witnesses and special relationship witnesses.

Pre-trial hearings may be utilised in:

(a) serious violent offence proceedings by special relationship witnesses and child witnesses if the proceedings relate to the death of a close friend or family member of the child witness;

(b) sexual offence proceedings by 'vulnerable adult'[982] complainants, 'vulnerable adult' similar act witnesses, child witnesses and special relationship witnesses.

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[974] 'Proceeding' is defined broadly in s 37 of the *Evidence (Miscellaneous Provision) Act 1991* (ACT) to include: a trial, including a re-trial; a hearing, including a pre-trial hearing and a ground rules hearing; a committal hearing; a proceeding in relation to bail; an interlocutory proceeding; a sentencing proceeding; and an appeal or other review.
[975] *Evidence (Miscellaneous Provision) Act 1991* (ACT) ss 38, 38A; *Family Violence Act 2016* (ACT).
[976] Ibid s 39.
[977] Ibid s 40.
[978] Ibid s 41.
[979] 'Similar act witness' is defined in s 42 to mean: a witness in a proceeding for an offence who gives, or intends to give, evidence in the proceeding that – (a) relates to an act committed on, or in the presence of, the witness by the accused; and (b) is tendency evidence or coincidence evidence under the *Evidence Act 2011* (ACT).
[980] 'Intellectually impaired witness' is defined in s 42 to mean a person who has: (a) an appreciably below average general intellectual function; or (b) a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder; or (c) a developmental disorder; or any other intellectual disability.
[981] 'Special relationship witness' is defined in s 42 to mean: (a) in a sexual offence proceeding involving a child complainant, a witness who — (i) is a close family friend of the complainant; or (ii) the court considers — (A) has a beneficial supporting relationship with the complainant in the proceedings; and (B) will be able to provide emotional support for the complainant after the proceeding; or (b) in a serious violent offence proceeding involving the death of a person — a witness who is a close friend or family member of the person.
[982] 'Vulnerable adult' is defined in s 42 to mean: an adult complainant, or similar act witness, in a proceeding for an offence who the court considers — (a) has a vulnerability that it likely to affect the complainant's or witness's ability to give evidence because of the circumstances of the proceeding or the complainant's or witness' circumstances; or (b) is likely to suffer severe

Section 63 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) covers the circumstances under which a witness may be recalled to give further evidence at trial.

Part 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) provides specifically for the use of recorded statements[983] of police interviews in family violence offence proceedings. To be admissible, a police officer must tell the complainant, before making the recording, that the recorded statement may be used in evidence at a hearing and the complainant may be called to give further evidence.[984] It must be made as soon as practicable after the events mentioned in the statement happened, and be in the form of questions and answers.[985] The court retains a discretion to refuse to admit all or any part of the recorded statement if the court considers it is in the interests of justice to do so.[986] The recorded statement may also be admitted in Magistrates Court proceedings for a family violence protection order.[987]

Pre-recorded evidence is one of a range of special requirements available to witnesses under the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).[988] Further, contained in s 4A, are principles in relation to child witnesses in similar terms to s 3A(2)(a)–(d) of the *Evidence (Children and Special Witnesses) Act 2001* (Tas).

Commonwealth

Section 15YM of the *Crimes Act 1914* (Cth) refers to the use of 'a video recording of an interview'. It stipulates that the interview must be conducted by a police officer or other law enforcement agency (domestic or foreign)[989] and the witness must be available for cross-examination and re-examination.[990] It applies to:

(a) a child[991] witness in a child proceeding;[992]

(b) a vulnerable adult[993] complainant in a vulnerable adult proceeding; and

(c) a special witness[994] in a special witness proceeding.

emotional trauma, or be intimidated or distressed, by giving evidence in the proceeding otherwise than in accordance with this part; or (c) needs to give evidence as soon as practicable because the complainant or witness is likely to suffer severe emotional trauma, or be intimidated or distressed.

983 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 81. 'Recorded statement' means (a) an audiovisual recording — (i) of a complainant answering questions from a police officer in relation to the investigation of a family violence offence; and (ii) made by a police officer; or (b) an audio recording that complies with paragraph (a) — (i) if the complainant does not consent to an audiovisual recording; or (ii) in exceptional circumstances (i.e. technical difficulties with the visual aspect of the recording identified following the making of the recording.

984 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 81A(1).

985 Ibid s 81A(2). See also s 81A(3): A recorded statement must also include: (a) the name of each person present during any part of the recording; (b) a statement by the complainant — (i) of the complainant's name, age and whether the complainant lives in the ACT; and (ii) about the truth of the representations made by the complainant in the recorded statement.

986 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 81B(2).

987 Ibid s 81K.

988 See *Evidence (Miscellaneous Provisions) Act 1991* (ACT) divs 4.3.2 and 4.3.5. Including giving evidence remotely by audiovisual link, the use of a screen, and/or a support person. See also ch 1B regarding witness intermediaries.

989 *Crimes Regulations 2019* (Cth) reg 13.

990 *Crimes Act 1914* (Cth) s 15YM(4). See further s 15YN re admissibility.

991 Ibid s 15YA: A person who is under 18.

992 Section 15Y(1) of the *Crimes Act 1914* (Cth) lists select offences which are 'child proceedings' when children are involved, i.e. slavery and slavery-like offences, trafficking in persons, child sex offences outside Australia, offences involving child abuse material outside Australia, protection of children, offences relating to use of postal or similar service involving sexual activity with person under 16, and use of a carriage service involving sexual activity, or harm to, person under 16.

993 Section 15Y(2) of the *Crimes Act 1914* (Cth) lists select offences which are vulnerable adult proceedings, i.e. slavery and slavery-like offences and trafficking in persons.

994 Pursuant to s 15YAB of the *Crimes Act 1914* (Cth), in a proceeding for a Commonwealth offence, the court may declare a person to be a special witness if relation to the proceeding if satisfied that the person is unlikely to be able to satisfactorily give

Part IAD of the *Crimes Act 1914* (Cth) relates to protecting vulnerable persons, generally, and provides for other special facilities or special rules for vulnerable persons to give evidence.[995]

New South Wales

In NSW, pre-recorded investigative interviews are available to be used for children, cognitively impaired persons (collectively termed 'vulnerable persons')[996] and domestic violence complainants.[997]

The *Criminal Procedure Act 1986* (NSW), s 306U provides that 'vulnerable persons' are entitled to give evidence-in-chief in form of a recording. 'Vulnerable persons' include a child under the age of 18 years[998] and cognitively impaired persons.[999] Cognitive impairment includes: an intellectual disability; a developmental disorder (including an autistic spectrum disorder); a neurological disorder; dementia; a severe mental illness; or a brain injury.[1000] Specifically, for the purposes of the *Criminal Procedure Act 1986* (NSW) s 306U, s 306R refers to evidence of a previous representation of a vulnerable person made in the course of an interview during which the person is questioned by an investigating official in connection with the investigation of the commission or possible commission of an offence. Section 306T states that the wishes of the vulnerable person are to be taken into account in determining whether the witnesses' evidence is to be given in the form of a pre-recorded interview, or otherwise.[1001] The court retains the discretion to rule as inadmissible the whole or any part of the contents of a recording.[1002] Evidence is not to be given in the form of a recording if it is contrary to the interest of justice.[1003] Pre-recorded interviews between child witnesses and police are commonly referred to as JIRT interviews.

The *Criminal Procedure Act 1986* (NSW), s 289F provides that in proceedings for a domestic violence offence, a complainant may give evidence-in-chief in the form of a recording. Specifically, s 289D defines a 'recorded statement' as: a recording made by a police officer of a representation made by a complainant when the complainant is questioned by a police officer in connection with the investigation of the commission of a domestic violence offence if the recording is made with the informed consent of the complainant, and the questioning occurs as soon as practicable after the commission of the offence.

Section 289F further requires that a recorded statement must be in the form of questions and answers[1004] and contain statements by the complainant as to the complainant's age and as to the truth of the representation/s.[1005] The complainant must also subsequently be available for cross-examination (and re-examination).[1006] In determining whether or not to have a complainant give evidence wholly or partly in the form of a recorded statement, the prosecutor must take into account matters including the wishes of the complainant and any evidence of intimidation of the complainant by the accused.[1007]

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evidence in the ordinary manner because of (a) disability; or (b) intimidation, distress or emotional trauma arising from: (i) the person's age, cultural background or relationship to a party to the proceeding; or (ii) the nature of the evidence; or (iii) some other relevant factor. Such a declaration may be made on the court's own initiative or on application by or on behalf of a party to the proceeding.

[995] Including, but not limited to, giving evidence via closed circuit television (audio-visual link) (ss 15YI–15YK) arrangements for restricting contact (including visual contact) with the defendant and/or other members of the public while giving evidence, i.e. screens, seating arrangements (s 15YL) and presence of a support person (s 15YO).

[996] *Criminal Procedure Act 1986* (NSW) s 306U.

[997] Ibid s 289F.

[998] Ibid ss 306M, 294E.

[999] Ibid s 306M.

[1000] Ibid.

[1001] To be considered in light of, in the case of a child — the child's age and understanding — and, in the case of a cognitively impaired person — the person's cognitive impairment.

[1002] *Criminal Procedure Act 1986* (NSW) s 306V(4).

[1003] Ibid s 306Y.

[1004] Ibid s 289F(2).

[1005] Ibid ss 289F(3)(a), (b).

[1006] Ibid s 289F(5).

[1007] Ibid s 289G.

Full pre-recording — by way of '*pre-recorded evidence hearings'* — is available for a smaller cohort of witnesses, namely, child witnesses in sexual offence proceedings. Noting, however, that a witness is entitled to utilise a pre-recorded evidence hearing even if they become an adult following the committal of the accused.[1008] Indeed, pursuant to s 294G, it is mandatory for such witnesses to give evidence at a pre-recorded evidence hearing, unless a contrary order of the court is made.[1009] In determining whether to override this requirement for a pre-recorded evidence hearing, a court is to consider, as primary factors, the wishes and circumstances of the witness, and other relevant factors, including: the availability of court and other facilities necessary for a pre-recorded evidence hearing to take place, the sufficiency of preparation times for both parties, and the continuity and availability of counsel at both the pre-recorded evidence hearing and the trial.[1010] A court will only make an order dispensing of the requirement for a pre-recorded evidence hearing if satisfied it is appropriate to do so in the interests of justice.[1011] Section 294H stipulates that a pre-recorded evidence hearing must be held as soon as practicable after the date listed for the accused's first appearance in court, but not before the prosecution has made the necessary pre-trial disclosure. Section 294I expressly provides for the use of recorded evidence-in-chief pursuant to s 306U to be used in addition to evidence at a pre-recorded evidence hearing. Section 294K of the *Criminal Procedure Act 1986* (NSW) provides that a witness may only give further evidence following a pre-recorded evidence hearing with leave of the court.

Northern Territory

Pursuant to the *Evidence Act 1939* (NT), 'full pre-recording' is available in the Northern Territory. Section 21B provides for the admission of a recorded statement[1012] from a vulnerable witness in a sexual offence case or serious violence offence case.[1013] Relevantly, a vulnerable witness is defined as a witness who is a child, who has cognitive impairment or an intellectual disability, who is the alleged victim of a sexual offence to which the proceedings relate, who is a complainant in a domestic violence offence proceeding, or whom a court considers to be vulnerable.[1014] In considering whether a witness is a vulnerable witness, the court may have regard to: any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; any mental or physical disability to which the witness is, or appears to be, subject; any relationship between the witness and the defendant to the proceedings; and any other matter the court considers relevant.[1015] Section 21B further states that if a prosecutor asks the court to admit a recorded statement in evidence, the court must accede to the request unless there is good reason for not doing so.[1016]

Part 3A of the *Evidence Act 1939* (NT), provides for the admission of a recorded statement in the specific circumstances of a complainant[1017] in domestic violence proceedings. To be admissible, the recorded statement must be made as soon as practicable after the events mentioned in the statement occurred, and with the informed consent of the complainant.[1018] Further, it must include a statement by

[1008] *Criminal Procedure Act 1986* (NSW) s 294E. 'Witness' is defined to mean – (a) a child who is a complainant or prosecution witness in the proceedings; or (b) a person who – (i) is a a complainant or prosecution witness in the proceedings, and (ii) was a child when the accused was committed for trial or sentence, even if the person has since become an adult.
[1009] *Criminal Procedure Act 1986* (NSW) s 289G(1).
[1010] Ibid ss 289G(3), (4).
[1011] Ibid s 289G(2).
[1012] *Evidence Act 1939* (NT) s 21AA. A 'recorded statement' means an interview, recorded on video-tape or by other audio visual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to a proceeding. 'Authorised person' is also defined in s 21AA.
[1013] As defined in s 21AA of the *Evidence Act 1939* (NT).
[1014] *Evidence Act 1939* (NT) s 21AB.
[1015] Ibid s 21A(1).
[1016] Ibid s 21B(3). However, s 21B(3A) states that when considering the prosecutor's request to admit a recorded statement, the court must take into account whether a recorded statement can be played.
[1017] Ibid s 21G: A 'complainant', for a domestic violence proceeding, means an adult against whom a domestic violence offence the subject of the proceeding is alleged, or has been found, to have been committed.
[1018] Ibid s 21J(1).

the complainant as to the complainant's age and made as a statutory declaration.[1019] It may only be edited or otherwise altered with the consent of both parties or by order of the court.[1020] The court retains the discretion to refuse to admit all or part of the recorded statement if the court considers it is in the interests of justice to do so.[1021]

Section 21B also provides that a court may hold a special sitting in relation to a vulnerable witness in a sexual offence case or serious violence offence, for the purpose of taking evidence, audio-visually recording that evidence and admitting the recording into evidence as the whole of part of the witness' evidence at trial.[1022] Section 21B specifically provides for recorded statements and special sittings to be used both together or separately as the case requires.[1023] If a prosecutor asks the court to hold a special sitting, the court must accede to the request unless there is a good reason for doing so.[1024]

Sub-section 21B(4) states that before the court admits pre-recorded evidence into evidence, whether a recorded statement or the recording of an examination conducted at a special hearing, the court may have it edited to remove irrelevant or otherwise inadmissible material.

Queensland

In Queensland, pre-recorded investigative interviews between police and a child witness or a witness with an impairment of the mind are admitted into evidence pursuant to s 93A of the *Evidence Act 1977* (Qld).[1025] That provision refers to statements made before the proceeding by a child or person with an impairment of the mind,[1026] which are contained in a 'document'.[1027] The pre-recorded interviews admissible under s 93A are subject to the general exclusion powers provided for in s 98 (and s 130).

Section 103D further provides that the evidence-in-chief of a complainant in a domestic violence proceeding may be given, wholly or partly, as a recorded statement. The recorded statement must be made as soon as practicable after the events happen that constitute the alleged domestic violence offence to which the recorded statement relates and be taken by a trained police officer.[1028] The recorded statement must also be made with the complainant's informed consent[1029] and include the complainant's acknowledgement, or declaration that the recorded statement is true to the best of the complainant's knowledge and belief; and the complainant made the recorded statement knowing the complainant may be prosecuted for stating in the statement anything the complainant knows is false.[1030] A recorded statement is admissible if, at the hearing of the proceeding, the complainant attests to the truthfulness of the contents of the recorded statement; and is available for cross-examination and re-examination.[1031] A court may rule all or any part of the contents of a recorded statement inadmissible; and if part of the recorded statement is ruled inadmissible, direct that the recorded statement be edited or otherwise altered to delete the inadmissible part.[1032] In determining whether to present all or part of a

[1019] *Evidence Act 1939* (NT) s 21J(3).
[1020] Ibid s 21P.
[1021] Ibid s 21H(2).
[1022] Ibid s 21B(2)(b).
[1023] Ibid s 21B(2): 'If a vulnerable witness is to give evidence in proceedings to which this section applies, the court may exercise one or both of the following powers …'.
[1024] Ibid s 21B(3). However, s 21B(3A) states that when considering the prosecutor's request to hold a special sitting, the court must take into account whether a special sitting can be held in the courtroom for the proceedings.
[1025] Queensland Courts, *Supreme and District Courts Criminal Directions Benchbook* (n 271) 'Child Witnesses: 93A Statements' (Updated March 2024).
[1026] *Evidence Act 1977* (Qld) sch 3: 'Impairment of the mind' means a person with a disability that – (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and (b) results in – (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and (ii) the person needing support.
[1027] The broad definitions of 'statement' and 'document' in sch 3 of the *Evidence Act 1977* (Qld) allow for investigative interviews to fall within this provision.
[1028] *Evidence Act 1977* (Qld) s 103E(1).
[1029] Ibid s 103E(3(a). See also s 103F regarding when a recorded statement is made with the complainant's informed consent.
[1030] Ibid s 103E(3)(b).
[1031] Ibid s 103H(1).
[1032] *Evidence Act 1977* (Qld) s 103H(2).

complainant's evidence-in-chief as a recorded statement, the prosecution must consider the wishes of the complainant and any evidence of intimidation of the complainant by the defendant.[1033]

The *Evidence Act 1977* (Qld) also provide for a full pre-recording by setting out when the balance of a witness's evidence may be pre-recorded for affected children and special witnesses.

Section 21AK of the *Evidence Act 1977* (Qld) provides for an affected child's evidence to be taken and videorecorded at a 'preliminary hearing'. This includes evidence-in-chief (in addition to or instead of any evidence-in-chief admitted under s 93A), cross-examination and re-examination. An 'affected child' is a child[1034] who is a witness in a proceeding for an offence of a sexual nature; an offence involving violence, if there is a prescribed relationship between a child who is a witness in the proceeding and a defendant in the proceeding; or a civil proceeding arising from any such proceedings.[1035] An affected child's evidence must be taken at a preliminary hearing unless the court makes an order to the contrary. Such an order may be made for good reason having regard to the child's wishes and the purpose of the legislative provisions relating to preliminary hearings.[1036] If a witness has given evidence at a preliminary hearing and has been excused from further attendance, the witness may only be required to give further evidence if the witness would be recalled to give further evidence if they were giving evidence in the usual course and it is in the interests of justice.[1037] Any further evidence must be given at another preliminary hearing unless the court is satisfied that it is not possible or practical.[1038]

Section 21A of the *Evidence Act 1977* (Qld) also provides for the pre-recording of the evidence of 'special witnesses'. Sub-s 21A(2)(e) provides that where a special witness is to give or is giving evidence in any proceedings, the court may, on its own motion or upon application made by a party, order that a video recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video-recorded evidence be viewed and heard in the proceedings instead of the direct testimony of the special witness. The recording is admissible as if the evidence were given orally in the proceedings in accordance with the usual rules and practice of the court.[1039] A 'special witness' includes: (a) a child under 16 years; (b) a person who, in the court's opinion — (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or (ii) would be likely to suffer severe emotional trauma; or (iii) would be likely to be so intimidated as to be disadvantaged as a witness; if required to give evidence in accordance with the usual rules and practice of the court; or (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a participant in a criminal organisation; or (d) a person — (i) against whom domestic violence has been or is alleged to have been committed by another person; and (ii) who is to give evidence about the commission of an offence by the other person; or (e) a person — (i) against whom a sexual offence has been, or is alleged to have been, committed by another person; and (ii) who is to give evidence about the commission of an offence by the other person.

[1033] Ibid s 103B(2).
[1034] Ibid s 21AD.
[1035] Ibid s 21AC.
[1036] Ibid s 21AO
[1037] Ibid s 21AN.
[1038] Ibid s 21AN(4).
[1039] Ibid s 21A(6)(a).

South Australia

The *Evidence Act 1929* (SA) s 13BA(3)(b) provides for the admission of an audio-visual recording of an interview with certain vulnerable witnesses:

> (a) a child under the age of 14 years;
>
> (b) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions; and
>
> (c) a person who is being interviewed as the victim of an alleged child sexual offence.[1040]

If any of the above witnesses are interviewed as a potential witness in relation to the investigation of a 'serious offence against the person',[1041] the interview *must* be recorded.[1042]

For a recorded interview to be admissible, it must also be conducted by a prescribed interviewer[1043] and include all of the following information in the recording: date on which the recording was made, the identity of all persons who were present at any time during the interview, and details of any breaks in the interview, including the time the break commenced and concluded and (so far as practicable) the reason for the break.[1044] Further, the interview must be conducted in a manner such that, so far as practicable, any statement made by the vulnerable witness is not elicited by the use of leading questions, and the witness appears to understand that he or she must tell the truth.[1045] In circumstances where recorded interviews do not fully comply with statutory pre-conditions to admission, there exists a discretionary option for the interview to nevertheless be admitted into evidence if the court is satisfied that it is in the interests of justice.[1046] Before admitting a pre-recorded interview into evidence, the court must also be satisfied as to the witness's capacity to give sworn or unsworn evidence at the time the recording was made, that the defendant was given a reasonable opportunity to view the recording, and the witness is available, if required, for further examination, cross-examination or re-examination.[1047] However, a witness can only be further examined, cross-examined or re-examined (whether at trial or a pre-trial special hearing) with the permission of the court.[1048]

[1040] *Summary Offences Act 1935* (SA) s 74EA. 'Child sexual offence' means a sexual offence committed in relation to a person under the age of 18 years. 'Sexual offence' means: rape, compelled sexual manipulation, indecent assault, any offence involving unlawful sexual intercourse or an act of gross indecency, incest, any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest, sexual exploitation of a person with a cognitive impairment, including any attempt to commit, or assault with intent to commit, any of these offences.

[1041] As defined in s 74EA(2) of the *Summary Offences Act 1935* (SA): murder, manslaughter, a 'sexual offence', criminal neglect, stalking, causing harm, causing serious harm, unlawful threat to kill or endanger life, abduction, blackmail, including any attempt to commit, or assault with intent to commit, any of these offences, an offence of contravening or failing to comply with an intervention order.

[1042] *Summary Offences Act 1935* (SA) s 74EB(a).

[1043] Ibid s 74EB(b); *Summary Offences Regulations 2016* (SA) reg 20. An interviewer must be a police officer or public sector employee of a class authorised by South Australian or other Australian law to conduct interviews with vulnerable witnesses, or have otherwise completed recognised training in interviewing vulnerable witnesses.

[1044] *Summary Offences Regulations 2016* (SA) regs 23(1)(a)(i), (ii), (iii).

[1045] Ibid regs 23(7)(a), (b).

[1046] *Summary Offences Act 1935* (SA) ss 74EC(1)(b), (1b). Per s 74EC(2), if a court admits a non-compliant recorded interview in a jury trial, the court must: (a) draw the jury's attention to the non-compliance by the prescribed interviewer; and (b) give an appropriate warning in view of the non-compliance, unless the court is of the opinion that the non-compliance was trivial.

[1047] *Evidence Act 1929* (SA) ss 13BA(3)(b)(i), (ii), (iii).

[1048] Ibid s 13BA(5).

There are also provisions that apply to complainants in cases of domestic violence. Section 13BB of the *Evidence Act 1929* (SA) specifically provides for the admission of a recording[1049] made by a police officer of a representation made by a complainant[1050] of a domestic violence offence. To be admissible, the recording needs to have occurred as soon as practicable after the commission of the alleged offence, be taken with the complainant's informed consent[1051] and includes a statement by the complainant about their age and that they are being truthful.[1052] The preconditions for admissibility include a requirement that the court is satisfied as to the complainant's capacity to give sworn or unsworn evidence; that the court is satisfied that the defendant has been given a reasonable opportunity to listen to or view the recording; and that the complainant is available, if required, for further examination, cross-examination or re-examination.[1053] The witness can only be further examined, cross-examined or re-examined (whether at trial or a pre-trial special hearing) with the permission of the court.[1054]

Section 12AB of the *Evidence Act 1929* (SA) provides for 'pre-trial special hearings'. Pre-trial special hearings are available to be utilised:

> (a) in the trial of a charge of a serious offence against the person,[1055] or the trial of an offence of contravening or failing to comply with an intervention order:
>
> > (i) for a child witness under the age of 14 years; or
> >
> > (ii) for a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions;
>
> (b) in the trial of a charge of a child sexual offence:[1056]
>
> > (i) for an alleged victim of the offence (regardless of their age at the time of trial);
> >
> > (ii) for a child;
> >
> > (iii) for a vulnerable witness;[1057] or
> >
> > (iv) for any other witness if the court is satisfied that they should be allowed to give evidence in a manner contemplated by s 12AB;
>
> (c) in the trial of an offence involving domestic abuse, for an alleged victim of the domestic abuse.

[1049] Ibid s 13BB(10). 'Recording' means an audio record or an audio-visual record.

[1050] This does not include a person who is under the age of 16 years or who is cognitively impaired.

[1051] *Evidence Regulations 2022* (SA) regs 4(6), (7): A police officer must tell the complainant that they are being recorded and that the recording may be used in court, and the complainant must indicate (whether by words or conduct) that they consent to the making of the recording. A lack of objection by the complainant may, in the circumstances, constitute a sufficient indication of consent to the recording.

[1052] *Evidence Act 1929* (SA) ss 13BB(2)(a)(i), (10).

[1053] Ibid ss 13BB(2)(2)(a)(ii), (iii), (iv).

[1054] Ibid s 13BB(4).

[1055] This definition of 'serious offence against the person' differs from that in s 74EA(2) of the *Summary Offences Act 1935* (SA): attempted murder, attempted manslaughter, a 'sexual offence', stalking, causing serious harm, unlawful threat to kill or endanger life, abduction, blackmail, including any attempt to commit, or assault with intent to commit, any of these offences. The definition of 'sexual offence' is the same as in s 74EA of the *Summary Offences Act 1935* (SA), see above.

[1056] *Evidence Act 1929* (SA) s 4. A sexual offence committed in relation to a child.

[1057] Ibid s 4: (a) a witness who is under 16 years of age; (b) a witness who is cognitively impaired; (c) a witness who is the alleged victim of an offence to which the proceedings relate — where the offence is a serious offence against the person; or (ii) in any other case — where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness; or (d) a witness who — (i) has been subjected to threats of violence or retribution in connection with the proceedings; or (ii) has reasonable grounds to fear violence or retribution in connection with the proceedings; or (e) in the case of proceedings for a serious and organised crime offence — a person who will only consent to being a witness in the proceedings if he or she is treated as a vulnerable witness for the purposes of the proceedings.

Section 12AB states that on an application in relation to an abovementioned witness in abovementioned proceedings, the court *should* order that arrangements be made relating to the giving of evidence by the witness at a pre-trial special hearing if: the facilities necessary to take the evidence of the witness are readily available to the court and it is otherwise practicable to make arrangements for a special hearing to be convened as a proceeding preliminary to the trial; and the arrangements can be made without prejudice to any party in the proceedings.[1058]

The court may only permit examination, cross-examination or re-examination of a witness at a pre-trial special hearing if the court is satisfied as to the witness's capacity to give sworn or unsworn evidence at the time of the pre-trial special hearing.[1059]

The *Evidence Act 1929* (SA), ss 12AB(11a) specifically provides that if an order has been made for a pre-trial special hearing in relation to a witness in a trial of a charge of a child sexual offence, the court may also give: a direction about the manner of questioning the witness; the duration of questioning the witness; about the questions that may or may not be put to the witness; if there is more than one accused, a direction about the allocation among the accused of the topics about which the witness may be asked; about the use of models, plans, body maps or similar aids to help communicate a question or an answer; if a party intends to lead evidence that contradicts or challenges the evidence of the witness or that otherwise discredits the witness, a direction that the party is not obliged to put that evidence in its entirety to the witness in cross-examination.

With regard to any pre-recorded evidence, whether a recorded interview or a recording of a pre-trial special hearing, the court retains its discretion to exclude the whole or part of any recording or, before admitting the recording, order that it be edited.[1060]

Victoria

Full pre-recording is available in Victoria for child witnesses and cognitively impaired[1061] witnesses.

Pursuant to the *Criminal Procedure Act 2009* (Vic), s 367, in proceedings relating to a sexual offence, family violence offence, any indictable offence that involves an assault on, or injury or threat of injury to, a person, or any associated summary assault matters, a child witness or cognitively impaired witness may give evidence-in-chief wholly or partly in the form of an audio or audio visual recording of the witness answering questions put to him or her[1062] by a police officer, or other trained individual, or intermediary.[1063] At the relevant hearing, whether that be a summary hearing, special hearing or trial, the witness is required to identify themselves and attest to the truthfulness of the contents of the recording and be available for cross-examination and re-examination.[1064]

Section 387E of the *Criminal Procedure Act 2009* (Vic) also provides for a complainant in family offence proceedings to give evidence-in-chief (wholly or partly) in the form of a recorded statement.[1065] In determining whether or not to rely upon a complainant's recorded statement as their evidence-in-chief, the prosecution must take into account the wishes of the complainant; and any evidence of intimidation of the complainant by the accused.[1066] At the relevant hearing, the complainant is required to identify themselves and attest to the truthfulness of the contents of the recorded statement and be

[1058] *Evidence Act 1929* (SA) ss 12AB(1)(b), (c).
[1059] Ibid s 12AB(13a).
[1060] Ibid s 13BA(4).
[1061] *Criminal Procedure Act 2009* (Vic) s 3: 'Cognitive impairment' is defined to include impairment because of mental illness, intellectual disability, dementia or brain injury.
[1062] Ibid s 367.
[1063] *Criminal Procedure Regulations 2020* (Vic) reg 6.
[1064] *Criminal Procedure Act 2009* (Vic) s 368(1)(c).
[1065] Ibid s 387C: 'recorded statement' means an audio-visual or audio recording of a complainant answering questions put to the complainant by a trained police officer.
[1066] Ibid s 387E.

available for cross-examination and re-examination.[1067] The court retains a discretion to rule as inadmissible the whole or any part of the content of a recorded statement and, if so, the court may direct that the recorded statement be edited or otherwise altered to delete any part that is inadmissible.[1068] The recorded statement must be made as soon as practicable after the alleged family violence offence; be made with the complainant's informed consent; and must include, at the end of the recording, an attestation by the complainant as to the truth of the content of the statement.[1069]

Special hearings are mandatory for a child witnesses or cognitively impaired witnesses who are complainants in sexual offence proceedings.[1070] A special hearing may be held either before the trial or *during* the trial.[1071] Significantly, in this respect, special hearings in Victoria have evolved, in practice, from a strictly pre-trial recording process to be available also as an 'in-trial' recording process. In determining whether a special hearing is to occur pre-trial or during trial, the court must have regard to: if the complainant is a child, the age and maturity of the child; if the complainant is cognitively impaired, the severity of that impairment; any preference expressed by the complainant to give their evidence before the trial or during the trial; whether conducting the special hearing during the trial is likely to intimidate the complainant when giving his or her evidence or to have an adverse effect on the complainant; the need to complete the evidence of the complainant expeditiously; the likelihood that the evidence given by the complainant will include inadmissible evidence that may result in the discharge of the jury; and any other relevant matter.[1072] The prosecution may also apply for the witness to give direct testimony instead of at a special hearing. A court will only make such an order if satisfied that the complainant is aware of the right to have his or her evidence pre-recorded at a special hearing and the complainant is able and wishes to give direct testimony.[1073] A special hearing must be held within 3 months after committal.[1074]If a special hearing is to occur during trial, the date of the special hearing will nevertheless be set at a pre-trial directions hearing.[1075] For special hearings that are held during trial, the jury is present in the courtroom and the complainant gives evidence from a location outside the courtroom via CCTV.[1076]

A recording of a special hearing that is tendered as evidence by the prosecution must be the best available record, that is, an audio-visual recording of the evidence. Only in exceptional circumstances and having regard to whether the accused would be unfairly prejudiced, the court may admit as evidence an audio recording of the evidence, or any part of the evidence, if an audio visual recording of the evidence is not available.[1077]

A pre-recorded interview or special hearing involving a child is not deemed inadmissible because the child attains the age of 18 years before the evidence is presented in proceedings.[1078] The court retains discretion to rule as inadmissible the whole or any part of the contents of a pre-recording and, if so, the court may direct that the recording be edited or altered to delete any part of it that is inadmissible.[1079]

A complainant who gives evidence at a special hearing may only be further cross-examined or re-examined with the leave of the court. A court will only grant leave if the court is satisfied that the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or, if the complainant were giving direct

[1067] Ibid s 387F(2)(d).
[1068] Ibid s 387F(4).
[1069] Ibid s 387G(1).
[1070] Ibid s 369 and 370.
[1071] Ibid s 370(1A).
[1072] Ibid s 370(1B).
[1073] Ibid s 370(2).
[1074] Ibid s 371. This time limit may be extended, subject to the court considering that it is in the interests of justice to do so, having regard to a range of factors in s 371(2). Noting also, that s 212 of the *Criminal Procedure Act 2009* (Vic) also imposes time limits for commencing trials for sexual offences.
[1075] *Criminal Procedure Act 2009* (Vic) ss 181(2)(d)(iii), 371A. The court must, as far as possible, commence the special hearing on this specified date and ensure that the complainant's evidence is disrupted to the least extent possible.
[1076] Ibid ss 372(1)(ba), (d).
[1077] Ibid s 373.
[1078] Ibid ss 368(2), 374(5).
[1079] Ibid ss 368(3), 374(3).

testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined. If leave is granted, the complainant must attend the proceeding to be cross-examined or re-examined.[1080]

Western Australia

Section 106HB of the *Evidence Act 1906* (WA) allows for the admission of one or more visually recorded interviews with children or persons with a mental impairment[1081] as the whole or part of the witness's evidence-in-chief. For a visually recorded interview to be admissible the interviewer needs to be a police officer or otherwise have completed relevant training,[1082] the interview must be conducted in such a manner that, as far as practicable, statements made by the witness are not elicited by the use of leading questions[1083] and in a manner that provides all or most of the following information: the date and place of the recording, the identity of all persons present, and details of any breaks in the interview.[1084] For interviews conducted with children under the age of 12 years, the interview must be conducted in a manner such that the child appears to understand that participating in the interview is a serious matter and that in giving the interview the child has an obligation to tell the truth, or that it is apparent that the child has reached a level of cognitive development that enables the child to understand and respond rationally to questions and to give an intelligible account of his or her experiences.[1085] For interviews conducted with persons with a mental impairment, the interview must be conducted in such a manner that it is apparent that the person understands that the giving of evidence is a serious matter and that the person must tell the truth, and has a level of cognitive functioning that enables the person to give an intelligible account of his or her experiences.[1086] Further, for a visually recorded interview with a person with a mental impairment to be admissible the person must be a 'special witness'.[1087]

The *Evidence Act 1906* (WA) further provides for 'full pre-recording' by way of a 'special hearing'. Pursuant to s 106I, special hearings may be utilised for 'affected child' witnesses in 'schedule 7 proceedings'.[1088] A special hearing may be utilised either with or without a pre-recorded interview admitted pursuant to s 106HB.[1089] Where circumstances so require, more than one special hearing may be held with respect to a single witness.[1090] The recording of a special hearing may only be edited or

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[1080] *Criminal Procedure Act 2009* (Vic) s 376.

[1081] Mental impairment is defined as intellectual disability, mental illness, brain damage or senility: *Evidence Act 1906* (WA) s 106A; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8.

[1082] *Evidence Act 1906* (WA) s 106HA; *Evidence (Visual recording of interviews with children and persons with mental impairment) Regulations 2004* (WA) reg 4.

[1083] Ibid regs 5(a), 6A(a).

[1084] Ibid regs 5(c), 6A(c).

[1085] Ibid reg 5(b).

[1086] Ibid reg 6A(b).

[1087] *Evidence Act 1906* (WA) s 106HB(1a). Per s 106R(3), a person may be declared a 'special witness' if: (a) by reason of physical disability or mental impairment, the person is unlikely to be able to give evidence; or, (b) the person is likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence, or any other factor that the court considers relevant. A declaration must be made in respect of the victim of an offence in a serious sexual offence proceeding or a criminal organisation offence proceeding, unless the above-mentioned criteria does not apply to the witness and the witness does not wish to be declared a special witness.

[1088] *Evidence Act 1906* (WA) sch 7. Proceedings that come within sch 7 include those listed in pt B of sch 7 (a range of sexual offences under the *Criminal Code* and the *Prostitution Act 2000* (WA)) and those listed in pt C of sch 7 (a range of serious violence offences under the *Criminal Code*, provided that the accused is a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt of the complainant; or a person who is or was, at the time when the offence was committed, living in the same household as the complainant; or a person who at any time had the care of, or exercised authority over, the complainant in the household on a regular basis).

[1089] *Evidence Act 1906* (WA) s 106K(4).

[1090] Ibid s 106K(5).

altered with the approval of the court.[1091] The recording is admissible as the witness's evidence in any trial or retrial in relation to the proceeding.[1092]

The *Evidence Act 1906* (WA), s 106RA provides for the wider use of special hearings. It provides that where a prosecution for an offence has commenced in a court, a judge of the court may make an order that the whole of the evidence (including any cross-examination and re-examination) of a witness whose evidence is or may be relevant in the prosecution be taken at a special hearing and recorded on a visual recording if:

- the witness is a special witness, or
- it is likely the witness will be out of the State at the time of the proceeding for the offence and will not be able to give evidence at the proceeding by means of a video or audio link.

If a special hearing is held for a witness with respect to the latter, the pre-recorded special hearing of the witness's evidence is admissible at the trial (or any retrial) in relation to that proceeding, if the court is satisfied at the time of the trial (or retrial) that:

- the witness is dead;
- the witness's medical or mental condition is such that the witness is not able to give evidence, or to give evidence satisfactorily, in the proceeding;
- the witness is out of the State and is not able to give evidence at the proceeding by means of a video link or an audio link, notwithstanding that the witness might return at some future time;
- that the witness is being kept out of the way by the accused; or
- that all the parties consent and that the interests of justice do not require the presence of the witness.[1093]

Section 106S provides that an additional pre-trial directions hearing is to occur in cases where special measures such as a special hearing are likely to be required. The onus is on the party who is to call the relevant witness to apply for a 'special hearing' to be listed for the purpose of having all such matters dealt with before the proceeding.

New Zealand

Pre-recorded evidence is one of the 'alternative ways of giving evidence' available in New Zealand under the *Evidence Act 2006* (NZ) for a number of categories of vulnerable witnesses.

The *Evidence Act 2006* (NZ), s 103 makes general provision that a court may make a direction that a witness is to give their evidence-in-chief *and be cross-examined* in an alternative way, including by a video record made before the hearing of the proceeding.[1094] Such a direction may be made on the grounds of:

- the age or maturity of the witness;
- the physical, intellectual, psychological, or psychiatric impairment of the witness;

[1091] Ibid s 106M.
[1092] Ibid s 106T.
[1093] *Evidence Act 1906* (WA) s 106T.
[1094] *Evidence Act 2006* (NZ) s 105(1)(a)(iii). 'Video record' is defined in s 4 of the *Evidence Act 2006* (NZ) as 'a recording on any medium from which a moving image may be produced by any means; and includes an accompanying soundtrack.'

- the trauma suffered by the witness;
- the witness's fear of intimidation;
- the linguistic or cultural background or religious beliefs of the witness;
- the nature of the proceeding; the nature of the evidence that the witness is expected to give;
- the relationship of the witness to any party to the proceeding;
- the absence or likely absence of the witness from New Zealand; or
- any other ground likely to promote the purpose of the *Evidence Act 2006* (NZ).[1095]

The court must also have regard to:

- the need to ensure the fairness of the proceeding and, in a criminal proceeding, that there is a fair trial;
- the views of the witness;
- the need to minimise the stress on the witness;
- in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
- any other factor that is relevant to the just determination of the proceeding.[1096]

If an application for directions is made under s 103, before giving any directions about the way in which a witness is to give evidence-in-chief and be cross-examined, the court must give each party an opportunity to be heard in chambers and may call for and receive a report, from any person considered by the court to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way.[1097]

The *Evidence Act 2006* (NZ), s 106 provides for a separate and specific provision for the admission of 'a video record offered by the prosecution as an alternative way of giving evidence-in-chief', including 'police video records'. Corresponding regulations detail who may be present during the interview and other requirements for police video records to be admissible under s 106.[1098] All parties must be given the opportunity to make submissions about the admissibility of all or any part of a video record[1099] and the court may make orders regarding editing of the video record.[1100]

Section 106A expressly provides that a family violence complainant (who is not a child) is entitled to give their evidence-in-chief by a video record before the hearing. The abovementioned requirements of s 106 apply. Additionally, the video record must be made by a police employee no later than two weeks after the incident in which it is alleged the family violence offence occurred.[1101] Per sub-s 106A(3), if a video record is to be or has been used as the complainant's evidence-in-chief, a judge must give a direction under s 103 about how the complainant will give the other parts of their evidence (including any further evidence-in-chief), which may also be by a video record made before the hearing of the

[1095] Ibid ss 103(3)(a)–(j).
[1096] Ibid s 103(4).
[1097] Ibid s 104. 'Ordinary way' is defined in s 83.
[1098] *Evidence (Video Records and Very Young Children's Evidence) Regulations 2023* (NZ) regs 7–12.
[1099] *Evidence Act 2006* (NZ) s 106(5).
[1100] Ibid s 106(7).
[1101] Ibid s 106A(2).

proceeding.[1102] Section 106B provides for a family violence defendant to make an application regarding how a complainant is to give their evidence.

Section 106D specifically provides that sexual case complainants and propensity witnesses (of any age)[1103] are entitled to give their evidence in one or more alternative ways, including by a video record made before the trial.[1104] This can be all or part of their evidence (i.e. with or without a police video record).[1105] Section 106F provides for another party to make an application regarding how a sexual case complainant or propensity witness is to give their evidence. A court will refuse an application for a sexual case complainant or propensity witness to pre-record their cross-examination if it would present a real risk to the fairness of the trial and that risk cannot be mitigated adequately in any other way.[1106] The judge will also have regard to any other relevant matter, including whether the witness is likely to need to give further evidence (including cross-examination evidence) after the making of a video record (for example, due to further disclosure).[1107] All parties must subsequently be given the opportunity to make submissions about admissibility of all or part of the recorded evidence and the judge retains the discretion to make orders regarding the editing of the recording.[1108] Section 106H covers the circumstances in which a sexual case complainant or propensity witness may be recalled to give further cross-examination after pre-recording their evidence, namely, if all parties agree and the judge considers that it would be contrary to the interests of justice not to do so. A sexual case complainant or propensity witness who is a child may only give evidence in the ordinary way if the court provides permission for them to do so. [1109]

Section 107 applies to child[1110] witnesses in any criminal proceedings. It provides that a child witness is entitled to give evidence in one or more alternative ways, including by a video record made before the trial.[1111] If a video record is shown as a child witness's evidence-in-chief, the witness is entitled to give the other parts of his or her evidence (including any further evidence-in-chief), by a video record made before the hearing of the proceeding.[1112] A child witness may only give evidence in the ordinary way if the court provides permission for them to do so. [1113] Section 107B provides for another party to make an application regarding how a child witness is to give their evidence.

[1102] Ibid s 105(1)(a)(iii).

[1103]'Sexual case complainant or propensity witness is defined in s 4 of the *Evidence Act 2006* (NZ) as a person of any age who is one or both of the following: (a) a complainant who is to give or is giving evidence in a sexual case; (b) a witness for the prosecution who is to give or is giving evidence in a sexual case that is or includes propensity evidence (as defined in s 40(1) of the *Evidence Act 2006* (NZ)) related to their personal experience of a sexual nature with any one or more defendants. 'Sexual case' is also defined in s 4.

[1104] *Evidence Act 2006* (NZ) s 106D(1)(a)(i).

[1105] Ibid s 106IA.

[1106] Cross-examination in this context includes any further examination-in-chief (in addition to that admitted in the form of a video record per s 106) and any re-examination: *Evidence Act 2006* (NZ) s 106D(7). Further, per s 106G(4), the risk must be real and demonstrable, not merely presumed: '… it must not be presumed, and must be shown clearly in the circumstances of the case, that the following consequences of cross-examination before trial would present a real risk to the fairness of the trial: (a) the making of a video record will require the defence to disclose all or any of its strategy earlier than if all of the evidence of the complainant or witness were given in the ordinary way or in a different alternative way; (b) the defence will be unable to tailor its cross-examination to a jury's reaction; (c) the making of a video record before the trial will involve preparation and other effort extra to that required for the trial; (d) complying with or using any appropriate practical and technical means for the making of a video record will involve more difficulty for all or any parties than if all of the complainant's or witness's evidence were given at the trial.'

[1107] *Evidence Act 2006* (NZ) s 106G(3).

[1108] Ibid s 106I.

[1109] Ibid s 106E(3). The court will need to be satisfied that the witness fully appreciates the likely effect on them of doing so and the court may call for and receive a report from any person considered by the judge to be qualified to advise on the matter.

[1110] 'Child' does not include a defendant who is a child or a sexual case complainant who is a child: *Evidence Act 2006* (NZ) s 107AA.

[1111] Ibid s 107(1)(a)(iii).

[1112] Ibid s 107(2).

[1113] Ibid s 107A. The court will need to be satisfied that the witness fully appreciates the likely effect on them of doing so and the court may call for and receive a report from any person considered by the judge to be qualified to advise on the matter.

United Kingdom

The pre-recorded evidence scheme in the UK is governed by the *Youth Justice and Criminal Evidence Act 1999* (UK) (YJCEA).

Section 27 of the YJCEA makes provision for a video recording to be admitted as the evidence-in-chief of an eligible witness and s 28 provides for video recorded cross examination (and re-examination) of an eligible witness. Eligible witnesses include: children;[1114] witnesses whose evidence the court considers will likely be diminished in quality by reason of mental disorder, significant impairment of intelligence and social functioning, physical disability or physical disorder,[1115] or fear or distress on the part of the witness in connection with testifying in the proceedings;[1116] complainants in proceedings relating to sexual, modern slavery or domestic abuse offending;[1117] or a witness in proceedings relating to a 'relevant offence'.[1118] Sections 21 and 22A make mandatory provision for the use of pre-recorded evidence-in-chief in cases of child witnesses and witnesses who are complainants in sexual offence proceedings.[1119]

The recorded interviews routinely admitted as a witness's evidence-in-chief pursuant to s 27 are commonly referred to as 'achieving best evidence' interviews, or 'ABE interviews'.[1120] An ABE interview will not be admitted if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or any part of it, should not be so admitted. Where an ABE interview is tendered under s 27, the witness may only give further evidence-chief with the permission of the court[1121] and the witness must be available for cross-examination.[1122]

The YJCEA, s 28 provides that where a video recording has or will be admitted under s 27 as the evidence-in-chief of a witness, the court may also direct for any cross-examination or re-examination to be recorded and for such a recording to be admitted into evidence. A witness who has pre-recorded their cross-examination per s 28 can only be subject to further cross-examination if it appears to the court that the proposed cross-examination is sought as a result of having become aware, since the time when the original recording was made, of a matter which that party could not with reasonable diligence have previously ascertained, or that for any other reason it is in the interests of justice.[1123]

[1114] Witnesses under the age of 18 years. *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16(1)(a), 18.
[1115] *Youth Justice and Criminal Evidence Act 1999* (UK) ss 16(1)(b), (2), 18.
[1116] Ibid ss 17(1), 18.
[1117] Ibid ss 17(4), (4A), 18.
[1118] 'Relevant offences' are listed in sch 1A of the YJCEA. *Youth Justice and Criminal Evidence Act 1999* (UK) ss 17(5), (6), 18.
[1119] *Youth Justice and Criminal Evidence Act 1999* (UK) s 22A.
[1120] This term originates from the corresponding guidelines for the making of pre-recorded investigative interviews in the UK: Ministry of Justice UK and National Police Chiefs' Council (NPCC), *Achieving Best Evidence in Criminal Proceedings* (n 719).
[1121] *Youth Justice and Criminal Evidence Act 1999* (UK) s 27(5)(b).
[1122] Whether by pre-recording pursuant to s 28 or at trial. Noting that the witness does not necessarily need to be made available for cross-examination if the parties so agree: *Youth Justice and Criminal Evidence Act 1999* (UK) ss 27(4), (5).
[1123] *Youth Justice and Criminal Evidence Act 1999* (UK) s 28(6).

Scotland

Pre-recorded evidence is one of the special measures available to eligible witnesses in Scotland under the *Criminal Procedure (Scotland) Act 1995*.[1124] 'Vulnerable witnesses' may be authorised to give evidence-in-chief in the form of a prior recorded statement and/or have evidence taken by a commissioner at a pretrial hearing that is also pre-recorded.[1125]

'Vulnerable witness' includes a child witness; a witness whose quality of evidence is at significant risk of being diminished by reason of mental disorder or fear or distress in connection with giving evidence; a complainant in proceedings for a sexual offence, traffic in prostitution offence, trafficking people for exploitation offence, human trafficking, domestic abuse or stalking; or a witness who is considered to be at significant risk of harm by reason only of the fact that they are giving or is to give evidence in the proceedings.[1126]

Section 271M provides for the giving of evidence-in-chief in the form of a prior statement. The 'statement'[1127] shall be admissible as the witness's evidence-in-chief, or as part of the witness's evidence-in-chief, without the witness being required to adopt or otherwise speak to the statement in giving evidence in court. A statement includes pre-recorded investigative interviews.

Section 271I provides for the taking of evidence by a court appointed 'commissioner',[1128] which is video recorded and received into evidence without being sworn to by the witness. Section 27I also provides for an additional pre-trial directions hearing — a ground rules hearing — to occur in cases where evidence is to be pre-recorded before a Commissioner, for the purpose of preparing for the proceeding.[1129]

Section 271BZA of the *Criminal Procedure (Scotland) Act 1995* provides that in certain proceedings involving child witnesses, the court must enable full pre-recording of the child's evidence unless the court is satisfied that an exception is justified.[1130]

[1124] *Criminal Procedure (Scotland) Act 1995* s 271H(1). Other special measures include use of a live television link (s 271J), use of a screen (s 271K), and use of a 'supporter' (s 271L).
[1125] Ibid ss 271H(1)(a), (e).
[1126] *Criminal Procedure (Scotland) Act 1995* s 271(1).
[1127] 'Statement' is defined broadly in s 262.
[1128] The 'Commissioner' will either be a judge of the High Court (if the evidence being recorded is for a trial to be heard in the High Court), or in any other case, a Sheriff: *Criminal Procedure (Scotland) Act 1995* ss 271I(7), (8).
[1129] *Criminal Procedure (Scotland) Act 1995* s 271I
[1130] The exceptions are set out in sz 271BZA(7), (8). They include: the giving of all of the child witness's evidence in advance of the hearing would give rise to a significant risk of prejudice to the fairness of the hearing or otherwise to the interests of justice, and, that risk significantly outweighs any risk of prejudice to the interests of the child witness if the child witness were to give evidence at the hearing; or the child witness is aged 12 or over, the child witness expresses a wish to give evidence at the hearing, and it would be in the child witness's best interests to give evidence at the hearing.