Statement

Name: Terese Henning
Address: Known to the Commission
Occupation: Director Tasmania Law Reform Institute
Date: 9th March 2016

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission into Institutional Responses to Child Sexual Abuse. The statement is true and correct to the best of my knowledge and belief.

2. My full name is Terese Henning and my date of birth is the REDACTED 1954.

Background

Qualifications:

3. BA (Tas Uni - 1974); Dip Lib (TCAE - 1975); TTC (Ed Dept Tas 1975); LLB Hons 1 (Tas Uni 1984); M Phil Crim (Cambridge 1991); Admitted as a Barrister and Solicitor of the Supreme Court of Tasmania and the High Court of Australia (1986).

4. I am the Director of the Tasmania Law Reform Institute (TLRI) and have lectured in Evidence Law, Criminal Procedure and Criminology at the University of Tasmania since 1989. After completing my tertiary studies at Cambridge University in the United Kingdom, I worked as a Barrister and Solicitor in Tasmania, and then as Assistant to the Law Reform Commissioner of Tasmania, the Hon Henry Cosgrove QC, in the Legislation and Policy Division of the Tasmanian Government.

5. I have had a long involvement in law reform, particularly in the area of evidence law, criminal law and procedure, vulnerable witnesses and human rights. I have been a member of State and Commonwealth law reform committees and have provided law reform advice to the Justice Department of Tasmania and the Tasmanian Parliament. As TLRI Director I now focus on law reform research involving the investigation of the operation of Tasmanian laws with a view to their potential reform.

Signature: [Signature]

Witness: [Signature]
6. My research has resulted in a number of publications relevant to the Inquiry of the Royal Commission into Institutional Responses to Child Sexual Abuse. I have listed them at Annexure A.

7. My particular areas of expertise are in evidence law and criminal trial procedure and to these areas that I primarily direct my answers to the questions I have been asked to address, rather than to the investigative stages of the criminal justice process, which I touch upon only in a general manner.

Summary of the minimum requirements that a person must be able to meet in order to be a complainant witness in the investigation and prosecution of a child sexual abuse matter.

8. Much of the Information given in the answers to the following questions is taken from two of my publications, copies of which are attached:


9. At the most fundamental level, in order to participate in the criminal justice process, children and witnesses with cognitive impairments who allege sexual abuse must be able to give a comprehensible account of what has happened. This also means that they must be able to comprehend questions they are asked and communicate comprehensible answers to questions. These matters will determine whether they can be heard at all, both in the investigative stages of the criminal justice process and at trial.

10. The legal limits to participation in criminal trials reside in the rules relating to competence to testify. The general test for competence in the uniform Evidence Act jurisdictions is found in s 131 of that Act. It is now concerned exclusively with witnesses' capacity to understand questions about a fact and to give comprehensible answers to those questions and with the determination of whether any incapacity to do so can be overcome. In recommending this test for the uniform...
legislation the Australian Law Reform Commission argued that the question of general competence should focus on the witness’s ability to “function as a witness”.

11. Section 13 permits the disqualification of people from testifying only if any incapacity they have cannot be overcome. Accordingly, if competence is in issue, s 13 arms the court with the power to permit the employment of mechanisms like intermediaries or communication assistants to overcome any difficulties people may have in understanding and responding to questions. It also arms the court with the power to take expert advice on and prescribe the kinds of questions that may be asked during the course of questioning.

12. In addition, at the level of practice, children and people with cognitive impairments must meet perceptions of reliability held by those conducting investigations, making prosecutorial decisions and determining guilt or innocence.

Outline common challenges for children and people with disability in meeting these minimum requirements.

13. During police investigations, while children and people with cognitive impairments are capable of providing comprehensive and reliable accounts of events, they may encounter impediments to doing so because of misconceptions about their cognitive capacities and/or reliability and because they are not able to access the support they need to explain adequately what has occurred.

14. Because of their significance for prosecution assessments of conviction prospects, the communication and comprehension capacities of children and people with cognitive impairments will determine whether any offences they allege will be tried. If they are, their ability to understand and be understood and to withstand the rigours and meet the particular demands and standards of the adversarial trial, will determine its outcome. Withstanding the rigours of the criminal trial centrally involves not being shredded in cross-examination and meeting juror expectations of what constitutes reliability, both of which also set particular, often unachievable, standards of comprehension and communication for these groups of people.
In the trial context, it is the conventions, particularly the questioning conventions of the adversarial trial process itself that prevent children and those with cognitive impairments from participating adequately in the trial process. The nub of the problem appears to be that these groups of people are generally questioned inappropriately:

a. They are asked questions that sit well beyond their cognitive capacities and developmental levels; questions are often complex, syntactically confusing and couched in arcane language. They may conflict with these people’s social expectations;

b. In responding to questions, children and people with cognitive impairments rarely seek clarification when confused and may attempt to answer questions that are ambiguous, nonsensical or meaningless;

c. Even where questions appear clear, comprehension discrepancies between the questioner and the witness may produce a significant mismatch between what the questioner thinks s/he is asking and what the witness understands him/her to be asking – ditto with the witness’s answers;

d. Questioning can be abusive, hostile, repetitive and overly lengthy. Such questioning intimidates children and witnesses with intellectual impairments “into silence, contradictions, or general emotional and cognitive disorganization ...”

The result is that adversarial trial questioning conventions can prevent children and people with cognitive impairments from giving a coherent account of events. This means that questioning strategies that are considered to be well designed to expose the unreliability of evidence, in fact, render it unreliable. Unfortunately, there is also evidence that cross-examiners exploit witnesses’ developmental and cognitive limitations and vulnerabilities to hamper their ability to recall and recount events. The Australian Law Reform Commission has characterized such practices where children are concerned as “clear examples of the legal abuse of children.”

Unfortunately, even though judges understand these problems and are empowered to intervene to impose standards of questioning on counsel that eliminate these problems, for various reasons they may not do so. Primarily they appear to fear rendering the trial unfair for the accused.

The barriers children and people with cognitive impairments face to participation in the trial process jeopardise one of the fundamental desiderata of the rule of law: the recognition of
everyone as equal before the law and entitled to the equal protection of the law. They also, to paraphrase the Canadian Supreme Court in DAI, effectively immunize certain categories of offenders from criminal responsibility and further marginalize their already vulnerable victims.

The provisions under Australian evidence law that might be utilized to assist with meeting these minimum requirements, in particular provisions that could be better used.

Outline any additional methods that, in your opinion, could be used that would better meet the challenges facing children and people with disability in the investigation and prosecution of child sexual abuse matters.

19. I have addressed these two questions together.

20. All jurisdictions in Australia have enacted 'special measures' which enable children and other vulnerable witnesses to give their evidence via closed circuit television (CCTV) and/or by pre-recorded video statements, to be screened in court from the defendant and to have support persons with them while they are testifying. These measures target the stress of testifying but, with the exception of the pre-recording measure, do not primarily seek to redress the comprehension and communication difficulties experienced by children and people with cognitive impairments when testifying except in a tangential manner as a collateral effect of stress reduction.

21. The critical measures for achieving access to justice for children and people with cognitive impairments are:

a. Control of cross-examination;
b. Setting ground rules for cross-examination by the provision of advance directives;
c. Recording of witnesses' entire testimony in the absence of the jury;
d. Obtaining expert advice and/or the assistance of intermediaries to facilitate these witnesses' communication with the court.
22. The necessity for such measures is located in the human rights framework of Article 12 of the UN Convention on the Rights of the Child and Article 13 of the Convention on the Rights of Persons with Disabilities, which place an obligation on courts to create the optimum circumstances in which children and people with disabilities as witnesses are free to give their accounts of events. Also applicable are the right to a fair trial, the right to be treated with dignity and humanity, the right to equality before the law and the right not to be discriminated against.

23. The need to provide special mechanisms to facilitate eliciting evidence from children and people with cognitive impairments is often said to reside in concern about the harmful psychological impact of testifying upon these people and the need to reduce the trauma for them of testifying in the orthodox way. While I agree that this is a major objective of these mechanisms, an equally important function is to maximize the possibility of obtaining reliable and cogent evidence by promoting changes in the traditional adversarial trial modus operandi, and, in particular, changes in the nature and style of questions put to children and people with cognitive impairments and changes in how they may communicate their answers.

24. Unless this is understood to be perhaps the primary purpose of these mechanisms they may not be afforded appropriate value and significance. For example, the New Zealand Court of Appeal in M v R & E v R [2011] NZCA 303 at (36)-(41) stated that the "sole advantage" of pre-recording witnesses' entire testimony is to reduce the stress which long delays can cause to witnesses, thereby hastening their recovery. It concluded that that benefit will rarely outweigh the disadvantages to the accused, the court and the witness. Accordingly, pre-recording will only be appropriate in extreme situations, such as where the witness is dying or going overseas, and only where it can be completed significantly in advance of trial. The reasons given by the court for rejecting pre-recording ignored the 20 years of experience in Western Australia (and the research on that regime and the commentary of practitioners working with that system) which shows that the problems with pre-recorded testimony identified by the court are illusory and can be refuted.

25. It is important to be aware of these resistant views because they fundamentally misapprehend the purpose of the special witness mechanisms, which is to overcome the persistent, seemingly intractable barriers people with complex communication needs face in giving reliable evidence and, in particular, understanding the rigours of cross-examination.
26. All Australian jurisdictions make provision, for the control of cross-examination. In all jurisdictions, there is also the potential for courts to give advance directives at a directions hearing in relation to the cross-examination of witnesses. This power might reside in the inherent jurisdiction of the court or be supplemented by statutory rules and provisions. However, these particular powers do not appear to have been used extensively or creatively in aid of children and witnesses with cognitive impairments in the absence of other measures (like the use of intermediaries or pre-recording procedures) that may create a specific need to hold a pre-trial directions hearing where issues about the nature and style of questioning are likely to be considered.

27. Western Australia, Tasmania, Victoria, South Australia, Queensland, the Northern Territory, New South Wales and the ACT have also enacted legislation that enables the totality of particular witnesses’ testimony to be pre-recorded in the absence of the jury.

28. Only in Western Australia, New South Wales and South Australia is there provision for witnesses’ communication and comprehension during court proceedings to be facilitated by the employment of communication assistants or intermediaries. In New South Wales and Western Australia these provisions have rarely been activated. In South Australia the relevant provisions were enacted in 2015 and are yet to come into effect. It is expected that these provisions will come into effect in mid-2016. In 2015, NSW supplemented the existing pre-recording measures in ss 275B and 3062K(3)(b) of the Criminal Procedure Act 1986 (NSW) by inserting Part 29 into Schedule 2 of that Act, which creates a pilot scheme for two District Courts incorporating a ‘children’s champion’ regime for children in prescribed sexual offences cases. It is too early to say how these provisions are working but review of their operation is to occur within two years of their commencement.

Control of cross-examination

29. This is critical if reliable evidence is to be obtained from children and people with cognitive impairments.

30. In most uniform Evidence Act jurisdictions and South Australia, the relevant legislation empowering courts to control cross-examination imposes a duty on the court to intervene to disallow improper questioning as statutorily defined.
31. Nevertheless, there remains an inescapable discretionary element in these provisions, as a result of the necessity for judgment to be made on what is improper questioning in any given case.

32. Research suggests that, despite their mandatory nature, these provisions do not displace courts' traditional reluctance to intervene in the cross-examination process.

33. There is also the view that judicial intervention might be exploited by the defence to garner sympathy from the jury on the basis that it is not being given a 'fair run'.

34. In a slightly different but similar vein, intervention has been avoided as potentially casting the trial judge in the role of a partial advocate. More prosaically and somewhat regretfully, intervention has been frowned upon for interfering with the flow of questioning.

35. Further, non-intervention also reflects the orthodox view of the role of judges in the adversarial trial as involving minimal interference, respect for the autonomy of the parties and intrusion into the examination of witnesses only to the extent that the rules of evidence and procedure strictly require.

36. It has also been observed that, (and this represents one of the biggest and most intransigent obstacles to intervention by both judges and counsel) the conventions of cross-examination are so entrenched in and intrinsic to the adversarial trial and to conceptions of what fairness to defendants demands, that they actually prevent trial judges and counsel from recognizing or rejecting questioning that is unfair to children and people with cognitive impairments.

37. Further, the statutory provisions do not lend themselves easily to use during trials. For example, in judging whether a question offends a relevant provision, the court may be required to take into account the person's age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding, personality and any mental, intellectual or physical disability to which the person is, or appears to be, subject. This can only be done if the trial judge has some background information about the person. The judge must then also fully comprehend the implications of that information for the questioning.
of the person. This requires trial judges to be finely tuned to what amounts to inappropriate questioning for different groups of people so that they can identify the type of questions that are likely to be misleading or confusing etc within the meaning of the applicable section. This demands a high level of expertise, experience and awareness that trial judges who do not encounter people with complex communication needs on a regular basis may not have the opportunity to acquire. While assistance is provided by bench books in various jurisdictions, which, based on the research outlined earlier, list the kinds of questions to disallow, the question remains how that information is practically to be marshalled and applied during the course of trials.

38. Moreover, as noted by Boyd and Hopkins, lawyers' and judges' perceptions of proper questioning derive from long accepted adversarial tactics. These perceptions and the conventions that drive them are often in direct conflict with research findings concerning the type of questioning that is particularly inimical to eliciting reliable evidence from children and witnesses with cognitive impairments. This suggests that the logic of cross-examination itself dictates against the effective use of provisions like s 41 of the uniform Evidence Acts and s 25(3) of the South Australian Evidence Act to control cross-examination.

39. Also relevant to the control of questioning in uniform Evidence Act jurisdictions is s 42, which focuses exclusively on leading questions. There are no similarly dedicated provisions in non-uniform Evidence Act jurisdictions. However, at common law courts have the power to control the form of questions and cross-examination in particular. Use of leading questions is particularly inimical to the taking of reliable evidence from children and witnesses with cognitive impairments.

40. Under s 42(3) of the uniform evidence legislation a court must disallow a leading question if satisfied that the facts would be better ascertained if leading questions were not used. Relevantly, s 42(2)(d) directs courts, in deciding whether to disallow leading questions, to take into account the witness's age, or any mental, intellectual or physical disability to which the witness is subject that may affect his or her answers. Clearly this provision has particular relevance to children and witnesses with limited intellectual abilities who are susceptible to being misled by leading questions into answering as they think the questioner wishes them to.
Nevertheless, it is probable that courts should not assume, in the absence of evidence about a particular witness, that s 42(3) will apply. In applying both s 42(3) and 42(2)(d) courts are faced with similar practical problems as are posed by s 43.

So if judges will not intervene sufficiently in court before juries during questioning of witnesses, measures that preclude the problems associated with in court non-intervention should be instituted and exploited. This is where pre-trial directions hearings, the pre-trial recording of the entirety of witnesses’ testimony and the provision of communication assistance for witnesses enter the frame.

Pre-trial directions hearings

Good practice guidance tells us that the pre-trial setting of ground rules with counsel for questioning of children and people with cognitive impairments is crucial to restraining improper questioning and maximizing proper questioning.

Across Australia, there are a large number of statutory and regulatory provisions, which might be brought into play to enable ground rules to be set pre-trial for questioning witnesses. They expressly or implicitly give courts quite broad powers to hold directions hearings, to give advance directives about the conduct of cases and the admissibility of evidence and to make rules in relation to these matters. Further, courts may rely on their inherent jurisdiction to control their own proceedings. Prof Wencie Lacey describes this jurisdiction as “the ability of superior courts to prevent an abuse of process and to develop rules that regulate and protect its procedures and process.” She further states that, “It has long been accepted that a court’s inherent powers may be invoked by a court to ensure the Integrity, efficiency and fairness of its process, and in a manner that protects, among other things, due process and the provision of a fair trial.”

Foremost among the statutory provisions in the uniform Evidence Acts that empower courts to make rules for the holding of directions hearings are s 192A and 193(2). Section 193 gives courts covered by the uniform Acts the power to “make rules to enable its effective operation.” Similarly, legislation recently enacted in NSW instituting a pilot project to use special measures for taking evidence from children also makes provision for rules of court to be made and for the Chief Justice to issue Practice Directions with respect to the matters covered by the legislation, which would include the holding of pre-trial directions hearings.
46. The power to hold pre-trial directions hearings for the purpose of facilitating the taking of evidence from people with complex communications needs in accordance with the reforms recently instituted by the South Australian Statutes Amendment (Vulnerable Witnesses) Act 2015 would appear to be implicit in those reforms and at least supported by provisions like s 72 of the Supreme Court Act 1929 (SA) and s 285A of the Criminal Law Consolidation Act 1935 (SA).

47. Tasmanian legislation mandates the holding of a preliminary hearing in any case involving the making of orders in respect of taking evidence from children and other 'special witnesses'. The same legislation enables rules of court to be made with respect to the preliminary hearing, which clearly enables the court to prescribe the kinds of matters to be covered in the preliminary hearing. In addition, the Chief Justice of the Supreme Court may issue practice direction in relation to procedural matters. So for example, in December 2015, the Chief Justice of the Tasmanian Supreme Court issued a Practice Direction (No 3 of 2015) in relation to the editing of pre-trial recordings made under the Evidence (Children and Special Witnesses) Act 2001 (Tas), s 6. There is anecdotal evidence that in pre-trial directions hearings conducted to date concerning the pre-recording of children's testimony, some Judges are taking the opportunity to provide guidance to counsel about the kinds of questions that should be used and those that should be avoided.

48. In Queensland, s 21A(3)(f) of the Evidence Act 1977 enables courts to make any order or give any direction about the giving of evidence by 'special witnesses' (which includes children under 16 and witnesses with intellectual impairments). It then lists a number of examples of the kinds of orders that might be made, including the type of questioning that may occur. Clearly this provision empowers Queensland Courts to issue instructions about the nature and style of questioning to be used for particular witnesses.

49. Even with this raft of legislative possibility, I am not aware that Australian judges are exerting the level of control of questioning via ground rules hearings that we see in the United Kingdom. The experience in the United Kingdom is that ground rules hearings are the key to the successful operation of the other witness special measures—pre-recording and appropriate use of communication assistants/Intermediaries. Cross-examining counsel are required to submit their proposed questions for approval at a ground rules hearing and to certify that they have read the relevant protocol applying to the witness special measures as well as the toolkit on the UK Advocates' Gateway. This has meant that questions are phrased appropriately and focus...
only on the issues required to be addressed in cross-examination. The result has been that pre-determined cross-examinations are much shorter than those conducted in the traditional manner, usually lasting no longer than 20 minutes.\textsuperscript{56}

**Intermediaries/Communication Assistants**

50. Communication assistants/intermediaries have different roles in different jurisdictions. The main functions they might perform are:

a. Advisory functions to courts and counsel;
b. Facilitative functions in relation to witnesses’ comprehension and communication and an interpretive function;
c. Interventionist functions.

51. Intermediaries/communication assistants should be able to provide pre-trial advice to courts and counsel about the cognitive and communication capacities of children and witnesses with cognitive impairments and the types and styles of questioning that will optimize or detract from their ability to testify.

52. Such advice may be provided at preliminary directions hearings to help set the ground rules for the type and style of permissible questioning. It might also be provided during the actual questioning process, in which case it would be interventionist in nature. The latter form of advice/intervention is facilitated by pre-recording of witnesses’ testimony, which supports judicial and intermediary intervention because it can subsequently be edited out before the recording goes to the jury.

53. It follows from what has been said thus far that the necessary control of questioning in trials can only realistically be achieved if the court understands exactly what are the comprehension and communication levels and needs of particular witnesses including defendants. To this end expert advice should optimally be obtained from someone who has relevant experience of the particular witness or relevant training in the comprehension and communication capacities of children and people with cognitive impairments either generally or in particular respects. Such advice should address the level of sophistication and style of questioning appropriate for these witnesses.
54. The legislative provisions detailed above for holding ground rules hearings provide a vehicle for courts to obtain this advice pre-trial. Additionally, the legislative provisions dealing with the competence of witnesses that focus on their comprehension and communication capacities (like s. 13 of the Uniform Evidence Act) provide a vehicle for obtaining this advice.

55. At least one court has developed procedures to obtain such advice as a matter of course in cases involving children and witnesses with cognitive impairments. The Practice Note issued by the County Court of Victoria directing that, in sexual offences cases involving complainants who are children or who have cognitive impairments, the prosecution must provide information to the court prior to the first directions hearing about the number of such complainants, their age, relationship to the accused and level of cognitive development and ability. Expert reports in relation to the last matters are also to be supplied at this point. Clearly, this process can serve as a vehicle for determining how questioning should be conducted and therefore for controlling it. I do not know whether it is actually used in these ways, but the potential is there. It may simply be used to bed down matters like competence, need for support persons, CCTV, screens etc.

56. In only three Australian jurisdictions—South Australia, Western Australia and New South Wales—is there is statutory provision for children and/or people with cognitive impairments to be assisted in testifying by a communication assistant.

57. The designated role of the intermediaries under these schemes is to communicate and explain to witnesses the questions put to them, and to explain to the court the evidence given by them. Deployed in this way, they serve a quasi-translator function. The New South Wales Pilot scheme also gives ‘children’s champions’ an advisory function in relation to the designated child’s needs, but not an interventionist function.

58. Under the South Australian legislation the role of ‘communication partners’ is broadly defined as “providing assistance to witnesses with complex communication needs”. The form, extent and nature of that assistance is not confined narrowly by the legislation to the role of translator, which means that the precise nature of the communication assistance provided can be determined on a case by case basis to meet the needs of particular witnesses and the exigencies of particular cases.

Signature: [Signature]

Witness: [Signature]
59. In some jurisdictions, like the United Kingdom, communication assistants may, in addition to
serving a translator function, monitor questioning and alert the judge to any questions that are
inappropriate to the cognitive and comprehension levels of witnesses.61

60. In Western Australia it appears that intermediaries have not been utilized to any great extent.66
An intermediary does appear to have been used recently in at least one case on the initiative of
the Child Witness Service of WA.66 Further, the Victorian Law Reform Commission has recently
reported that the Western Australian scheme has been used several times since it was first used
in 2011, though does not indicate precisely how often.67 Notably the scheme was enacted in
1992, so the history of its use is not encouraging. The low level of the scheme's use has been
attributed to the fact that the required infrastructure is yet to be created.68

61. It is not known to what extent the New South Wales provisions for intermediaries, s 275B and
306ZK(3)(b) Criminal Procedure Act 1986 (NSW), are actually used but there is no evidence that
their use is widespread. In relation to s 275B this may be because this section provides that
communication assistance may be provided 'only if the witness ordinarily receives assistance to
communicate from such a person or persons on a daily basis'. Further, there are no procedures
or guidelines in place for the administration of this provision and it is not clear from the
provision if parties are entitled to seek assistance on behalf of the witness, or if it is for the judge
to invoke the provision.69

62. It also appears that s 306ZK(3)(b) has never been applied in practice, and there are no
procedures or guidelines in place for its administration. In fact, information provided to support
people appointed under this provision by the New South Wales Department of Justice states
that they must not speak during the hearing or help witnesses to answer questions.70 This
suggests that there may be a misconception abroad that support people must always play a
purely passive role in proceedings as emotional props to witnesses. It further suggests that
courts do not currently utilise these provisions to assist witnesses to comprehend questions and
communicate their answers.

63. In uniform Evidence Act jurisdictions that have not legislated specifically for the use of
intermediaries/communication assistants, where competence is in issue, s 13, because of the
particular way in which it is couched, potentially arms the court with the power to permit the

Signature: [Signature]
Witness: [Witness]
employment of intermediaries/interpreters to overcome any difficulties witnesses may have in understanding and responding to questions.

64. In Queensland, s 21A(3)(f) of the Evidence Act 1977 potentially enables courts to make orders for the use of intermediaries. To date, to my knowledge, it has not been used in this way, but it is permissive rather than restrictive in the kinds of orders that it permits to be made. Effectively, it place courts in the position where they are constrained only by practical and fair trial considerations in facilitating or enabling the reception of witnesses' testimony.

65. There may also be some potential for using provisions relating to interpreters and deaf and mute witnesses to incorporate intermediaries/communicators into the trial process. The uniform evidence legislation and the Queensland Evidence Act provisions in relation to interpreters are certainly couched in sufficiently broad terms to permit them this scope. The New South Law Reform Commission seems tacitly to accept this proposition in relation to the uniform legislation in its 1996 Report, People with an Intellectual Disability and the Criminal Justice System. Nevertheless, the Commission acknowledges that there are major distinctions between the role of an interpreter and that of an intermediary. An intermediary may re-phrase questions to overcome communication difficulties even when the witness speaks the official court language (English), whereas an interpreter translates questions and answers directly from one language into another.

Evaluation

66. Where they are being utilised it appears that intermediary/communication assistance regimes are generally well regarded.

67. In contrast to the apparent under utilisation of the West Australian and New South Wales regimes, in England and Wales, the intermediary special measure has been described as,

"extremely useful in advising those at court how best to communicate with the witness, ensuring that the witness understands questions and that their answers are understood." 76

68. Reliance on an intermediary clearly has advantages over relying solely on counsel to phrase questions appropriately or on judges to disallow inappropriate questions. Neither may have the
degree of knowledge about particular witnesses that intermediaries have and that may be critical to ensuring that questions are framed appropriately. Reliance on an intermediary therefore may reduce the intensity of the trial judge’s role in gauging and being alert to questions that are inappropriate for particular witnesses. Additionally a particular advantage of intermediary schemes is that, unlike a simple witness supporter or a traditional interpreter, an intermediary can help the court by identifying communication problems during questioning and, with the court’s permission, help to resolve them.77

69. There is evidence that use of intermediaries, particularly when coupled with the pre-recording of evidence can increase effective case management and the early disposal of cases resulting in cost savings. Specifically, they facilitate an accurate early assessment of the viability of prosecutions and not guilty pleas with consequent fiscal benefits from reduction in court time.78

70. However, there are flaws in the operation of different expert communicator special measures including their under-utilisation, an over-reliance by judges on intermediaries to control questioning of witnesses and consequent entrenchment of their own non-interventionist approach, deficits in intermediaries’ intervention, failure by counsel to adhere to questioning protocols stipulated by intermediaries, and the persistence of adversarial questioning techniques that seem to be beyond the power of intermediaries to influence.79

71. Nevertheless, overall, the evidence to date is that where properly resourced and where they allow adequate interventionist scope, intermediary schemes offer significant potential for facilitating the reception of evidence of children and people with cognitive impairments. But therein, of course, lies the rub – the provision of adequate resourcing and allowing intermediaries to play an adequately interventionist role. The Western Australian situation demonstrates that it is not enough to make statutory provision for intermediaries. The necessary infrastructure (a sufficient number of trained intermediaries and the availability of training programs) is essential to the success of this measure.

72. Additionally, the judiciary and legal practitioners must be prepared to accord intermediaries a meaningful interventionist role, which they support and promote. They should neither strangle that role by overly confining it nor abrogate their own responsibility to ensure appropriate questioning by delegating that responsibility in its entirety to the intermediary.80 This means...
that the success of these schemes essentially depends upon their becoming part of the legal culture in the way that has been achieved in Western Australia for its pre-recording scheme.  

Pre-Recording of Testimony

73. The deficiencies in communication assistants' intervention in questioning appear to reflect traditional concerns about interfering in cross-examination, particularly in front of juries. Pre-trial recording of the entirety of witnesses' testimony can play a valuable role in ameliorating this problem and in supporting the interventionist role of communication assistants. In fact, the deficits in intervention observed in the United Kingdom model might be attributable partly to the slow uptake of pre-recording in that jurisdiction. Until this year, only the examination-in-chief of witnesses was pre-recorded in the United Kingdom. This, of course, is of no assistance in controlling cross-examination. A pilot for the pre-recording of the entirety of witnesses' testimony has been running this year in three court centres. Accordingly, it is not yet known what effect this may have on intermediary or judicial intervention in inappropriate cross-examination as it is occurring.

74. All Australian jurisdictions have enacted legislation enabling the totality of specified witnesses' evidence to be elicited pre-trial in the absence of the jury, video-recorded and subsequently replayed to the jury at trial. The New South Wales scheme however is very limited. It establishes a three-year pilot project in two NSW District Courts for the pre-recording of the entirety of only children's evidence.

75. Pre-recording is of particular value in taking evidence because it opens the way for increased judicial intervention in the questioning process as it is occurring. This is because agreed editing out of such intervention (and any inappropriate questioning) circumvents the problems associated with it noted earlier. In relation to the editing of such recordings, see, for example, the Practice Direction issued by the Chief Justice of the Supreme Court of Tasmania in December 2013 (no 3 of 2015). For this reason as well, pre-recording promotes discussion and agreement about the questioning process as that questioning occurs and in this way also facilitates the application of s 41 Uniform Evidence Legislation and like provisions in other jurisdictions.

76. Any anxiety about the effect of pre-recorded evidence on jurors' perceptions of witnesses' and defendants' credibility may be allayed by an Australian Institute of Criminology study which...
found no systematic effect on juror perceptions from the mode in which the evidence was presented—via CCTV, by face to face testimony or by pre-recorded video tape. 16

77. Western Australia has had experience with pre-recorded testimony since 1992 when s 1061(b) of the Evidence Act 1906 (WA) was enacted. A raft of advantages have been identified for these provisions including improvements in the quality of testimony because it is given closer in time to the events in question; 77 earlier release of witnesses from the stress of testifying; 78 enabling the defence to prepare the rest of its case knowing exactly what are the strengths and weaknesses of the primary prosecution witness 79 and on that basis as well, encouraging early pleas; 80 and enabling the prosecution to amend indictments and adjust its opening address. 81 Research on the Western Australian procedure has also shown that it is working well, is well accepted and has been taken up well. 82

78. Pre-recording of evidence is also now being conducted in Tasmania and even though it is a very recent development, it has been embraced quite enthusiastically by the prosecutors who have used this process to date. They are particularly impressed with the way it enables them to capture in a timely manner the evidence of vulnerable witnesses and witnesses whose memories may be prone to deteriorate over time. This means that they can then manage subsequent trials including trial dates more flexibly unburdened by the need to enable these witnesses to exit the trial process as early as possible.

79. In 2012 the Victorian pre-recording scheme was amended to enable the recording to be conducted during the trial or pre-trial. 83 The reasons for doing this appear to have been based principally on trial efficiency perceptions and considerations said to arise where the recording occurs pre-trial. 84 To some extent they appear to reflect the misconceptions about the purpose of the pre-recording scheme exhibited in M v R & E v R, 85 which privilege case management concerns over the need to preserve the integrity of evidence. The reforms ignore and, in fact, "drive a coach and four" through integrity of evidence considerations and the benefits to witnesses accruing from early pre-trial recording of their testimony. Where the recording is made during the trial, the process abandons the benefits that are to be obtained from withholding the evidence in the absence of the jury which facilitates judicial and intermediary intervention in and control of the questioning process. This is because, where the recording is made during the trial, the jury must be present in the court while the evidence is being taken. 86 The procedure does not occur as an interruption to the trial in the absence of the jury, with the recording
subsequently being replayed to the jury. Accordingly the reformed scheme offers little to overcome the deficiencies in conventional proceedings for children and witnesses with cognitive impairments. Little immediate benefit is to be obtained from the reformed Victorian process except that it may obviate the need for witnesses to testify again in cases that are retried for some reason. This does not happen routinely. The reforms are a retrograde step. There is, of course, still the possibility for the recording to occur pre-trial\(^\text{91}\) and this process should be preferred to the recording of testimony during trials.

80. One of the advantages of early pre-recording of testimony is that in capturing witnesses' testimony early in proceedings it reduces waiting times for witnesses and concomitantly potentially reduces their anxiety-induced withdrawal from the proceedings.

Other evidential measures for capturing the evidence of children and witnesses with cognitive impairments

81. It is now common in most Australian States for sexual assault complainants to make pre-trial video-recorded statements, popularly known as VATE tapes—video and audio taped evidence—during the investigative stage of the criminal justice process. A patchwork of State legislative provisions governs the admissibility at trial of these statements. In New South Wales and Victoria, for example, only the statements of children under 16 and adults with cognitive impairments may be adduced as their examination-in-chief.\(^\text{90}\) In Tasmania, only children's statements may be used in this way.\(^\text{90}\) The problem with these provisions is that they do not obviate the need for the people to whom they apply to submit to cross-examination. Given that one of the major disincentives to testifying for survivors of sexual assault is fear of intimate details being raked over in court, well-intentioned though they are, these provisions do not necessarily encourage vulnerable and fearful witnesses to come to court. Without their doing so, these provisions will not enable a prosecution to proceed.

82. In uniform evidence legislation jurisdictions, hearsay exceptions, including s 65 of the uniform Evidence Acts, offer prosecutors a potential alternative means of adducing the accounts of fearful absent witnesses. Section 65 applies only to statements made by ‘unavailable’ witnesses, and where prosecution evidence is concerned there are relatively stringent preconditions to admission that must be met (s 65(2)). The requirement of unavailability might be satisfied for witnesses who steadfastly refuse to testify at trial.\(^\text{90}\) Whether the other s 65 preconditions to admissibility can be satisfied will depend very much on the nature of the statement made, the
circumstances in which it was made and whether it can meet the indicia of reliability prescribed by the section. These are not insignificant. There is a further impediment to s 65 being utilized as a means of prosecuting cases where the principal witness is unavailable. In such a situation, in the absence of other cogent evidence, there may not be a reasonable prospect of conviction.

Section 34CA of the Evidence Act 1929 (SA) (repealed by s15 of the Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA))

83. This section enabled some out of court statements made by children under the age of 12 and complainants with mental disabilities to be adduced through the people to whom the statements were made. While this section did attempt to restrict the cross-examination of those who made the statements, it did not deal with control of inappropriate cross-examination of the kind detailed here. The restrictions on cross-examination in s 34CA focused on whether it "is likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence".

84. Section 34CA appears to have presented significant interpretive difficulties which have been considered at length elsewhere and resulted in varied interpretations which were the subject of attempted curial resolution in two South Australian Court of Appeal cases: R v J, JA (2009) 105 SASR 563 and R v Byerley (2010) 107 SASR 517. It was the subject of judicial calls for legislative reconsideration. The primary deficiency with the provision was that it enabled out of court statements to be admitted if the people who made them were called to testify and submitted to cross-examination. However, the provision also restricted the circumstances where this could occur. As Doyle CJ noted in R v Byerley (2010) 107 SASR 517 at [18],

In R v J, JA this court considered aspects of the meaning and application of s 34CA of the Act. The court pointed to difficulties attributable to the drafting of the section. There is an obvious difficulty in reconciling s 34CA(1)(b)(ii) and s 34CA(2) on the one hand, with s 34CA(4) on the other hand. If the court refuses permission to cross-examine, as s 34CA(4) contemplates might happen, how does the out of court statement get into evidence? All members of the court agreed that s 34CA warrants reconsideration by Parliament: Duggan J at [59], Nyland J at [154], White J at [180].

85. Section 34LA of the amending legislation does not contain these requirements and so eliminates this particular problem.

86. Further, cross-examination under this section was not conducted in the absence of the jury and pro-edged so as to facilitate judicial control being exerted. Accordingly, s 34CA did not offer
the opportunity to control cross-examination. Overall, it does not appear to have offered a significantly useful means of getting witnesses' out of court statements before the court.

1 The Australian Capital Territory, New South Wales, Victoria, Tasmania, the Northern Territory and Norfolk Island.
2 Since the most recent reforms to the Uniform Evidence Act, s 13 now provides:

s 13. Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
(a) the person does not have the capacity to understand a question about the fact, or
(b) the person does not have the capacity to give an answer that can be understood to a question about the fact—and that incapacity cannot be overcome.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (5), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person—
(a) that it is important to tell the truth; and
(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs; and
(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study, or experience.

While the test for sworn evidence is an understanding of the obligation to give truthful evidence (s 13(3)), the foundational issue remains the witness's capacity to understand and be understood. In Queensland the central concern of the competence rules is the reliability and comprehensibility of witnesses' testimony, which, for sworn evidence is tested by witnesses' understanding of the need to give truthful evidence and for unsworn evidence, by witnesses' ability to give an intelligible account. (Evidence Act 1929 (Qld) s 9A). There is at least a degree of commonality between the rules of this jurisdiction and the uniform evidence legislation jurisdictions. In South Australia, the focus is solely on witnesses' understanding regarding truth and lies, which for sworn evidence requires the additional understanding of the particular obligation to give truthful evidence entailed in giving sworn evidence (Evidence Act 1929 (SA) s 9). As in uniform evidence legislation jurisdictions, in both Queensland and South Australia, courts may receive expert evidence to assist in the determination of witnesses' competence (Evidence Act 1929 (SA) s 9B; Evidence Act 1977 (Qld) s 9C). In South Australia, expert advice specifically extends to advice concerning any special arrangements that might assist the witness in testifying (Evidence Act 1929 (SA) s 11(6)(b) & 13(4)).


Signature: [Signature]

Witness: [Signature]
Uniform Evidence Act s 13(8).

The problems identified here in questioning static training may also be present in investigative interviews and in the gathering of evidence at that stage from children and people with cognitive impairments.


Zygik Gross and Hayne 2009.


Carter Bickettson and Levine 1996 at 206.


Children and the Courts, 5 November 2005, Sydney at (35).

So too Wood CJ at CL has said,

"...proper control of the cross-examination of child witnesses, has not always been well managed by the judges, who very often have felt reluctant to interfere, particularly in the absence of an objection. This may well have arisen from lack of experience, or training, or even attention, on the part of trial judges to the inherent disadvantages of child witnesses." (His Hon Justice James Wood CJ at CL (2004) "Child witnesses: the New South Wales experience" (paper presented at The Australian Institute of Judicial Administration conference, Child Witnesses—Best Practice for Courts, District Court of New South Wales, Parramatta, 30 July 2004 available at


See for example, Evidence (Children and Special Witnesses) Act 2001 (Tas) Part 2; Evidence Act 1996 (WA) ss 106H, s 106K; Criminal Procedure Act 1986 (NSW) Chapter 5, Part B, Division 1; Criminal Procedure Act 2009 (Vic) ss 560-565, 536-368A; Evidence Act 1929 (SA) ss 13A-191; Crimes Act 1914 (Qld) Part 1A0; Evidence Act 1877 (Qld), ss 12A-21A2C. In some jurisdictions there are also restrictions on unrepresented defendants personally cross-examining specified witnesses.


For example, see to this effect Redlich JA in Moran (2013) VSCA 377 at [18].

For detailed critique of this case see Emms Davies, Kirsten Hendron, Emily Henderson and Michael White "Pre-recording children's entire testimony" (2011) MJU 335.


See for example Criminal Procedure Act 2009 (Vic), ss 179, 181 & 189; Evidence Act 2006 (Vic), s 152A; Evidence Act 1977 (Qld), s 21A; Criminal Code 1988 (Qld), s 560AA; Justices Act 1988 (Qld), s 913A; Justices Act (NT), ss 20A, Supreme Court Rules (NT) s 1A1A, Evidence (National Uniform Legislation) Act 2012 (NT), s 152A; Criminal Procedure Act 1886 (NSW), ss 120, 136, 139, 141; Evidence Act 1995 (NSW) s 192A; District Court Rules 1973 (NSW) r 53.10 and 53.11; Criminal Procedure Act 2004 (WA), ss 64 & 98; Evidence Act 1995 (Cth) s 193A; Criminal Law Consolidation Act 1935 (SA), s 258A; Evidence Act 2003 (Tas), ss 192A; Criminal Code 1924 (Tas), ss 258A, Criminal Rules 2006 (Tas), Part 1A.


Laws 12A B 1A8 Evidence Act 1939 (SA); the Evidence Act 1977 (Cth) ss 210, 21A-21AIC; Criminal Procedure Act 2008 (Vic) Part 8.2, Division 6; Evidence Act 1906 (WA) s 106K; Evidence (Miscellaneous Provisions) Act 1991 (ACT) Div 4.29; Evidence Act 1929 (NT) s 21A; Evidence (Children and Special Witnesses) Act 2001 (Tas), ss 6 and 5A; Criminal Procedure Act 1996 (Qld), Schedule 2 Part 29, Division 2.

Evidence Act 1996 (WA), ss 106K & 106H(b); Criminal Procedure Act 1886 (NSW), ss 2758 and 360(2)(b); the Evidence Act 1899 (SA) s 13A & s 14A.

See further below.

The exceptions are r 41 of the Norfolk Island and Victoria Acts, where courts "may" allow a question.

Evidence Act 1929 (SA), s 25(8).

See Uniform Evidence Acts s 41.


42. Leading questions

(1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which—

(a) evidence that has been given by the witness in examination in chief is favourable to the party calling the witness; and

(b) the witness has an interest consistent with an interest of the cross-examining party; and

(c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and

(d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

Signature
...
A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

s 30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.
Annexure A

a. Book Chapters


b. Journal Articles


c. Monographs and Reports


d. Conference Papers


Signature: [Signature]
Witness: [Witness]


e. In 2006 I conducted the consultation for the Tasmanian Law Reform Institute at the request of the Tasmanian Government on a Charter of Human Rights for Tasmania.

Signed: 

Date: 17/3/2016

Witness: 

Date: 17/3/2016