

# Obtaining the best evidence from children and witnesses with cognitive impairments – “plus ça change” or prospects new?

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*The purpose of this article is to consider some apparent lacunae in the current legal landscape for obtaining the best evidence from children and witnesses with cognitive impairments. The most critical and intractable problems facing these witnesses in testifying are comprehension and communication. The article considers whether particular measures that have been implemented elsewhere to improve the questioning of these witnesses and to enhance the prospect of obtaining reliable evidence from them might be available in those Australian jurisdictions that are yet to legislate specifically for them without the necessity for further statutory reform. The measures in question are the use of advance directives to control cross-examination, the video recording of witnesses' entire testimony in the absence of the jury and the use of intermediaries/interpreters to aid their communication with the court. The implications of these measures for the right to a fair trial are briefly considered.*

## INTRODUCTION

Article 12 of the UN Convention on the Rights of the Child (1989) places an obligation on courts to create the optimum circumstances in which a child as witness is free to give his or her account of events.<sup>1</sup>

Decades of research have resulted in widespread and well-grounded understanding of the problems faced by children and witnesses with cognitive impairments<sup>2</sup> in testifying in criminal trials, particularly where they are the complainants of the offences tried. This understanding has prompted the enactment of “special measures” for these witnesses, which most commonly enable them 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.<sup>3</sup> There is no doubt that these reforms have opened the way for a greater number of children and people with cognitive impairments to testify – and they have made it easier for them to do so. But this in turn has exposed the limitations of these particular reforms and the persistent, seemingly intractable nature of the barriers these witnesses face in giving reliable evidence. The most intransigent of these problems and least susceptible to resolution can be sourced to issues around comprehension and communication. At the most fundamental level, because they are determinative of witnesses' competence to testify, these issues will decide whether these witnesses can be heard at all and

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<sup>1</sup> Bar of England and Wales, Submission to the European Commission, *Consultation on the European Commission Communication on the Rights of the Child 2011-2014* (September 2010) p 2, [http://ec.europa.eu/justice/news/consulting\\_public/0009/contributions/unregistered\\_organisations/127\\_bar\\_council\\_england\\_wales\\_sept10.pdf](http://ec.europa.eu/justice/news/consulting_public/0009/contributions/unregistered_organisations/127_bar_council_england_wales_sept10.pdf). See to the same effect Article 13 of the United Nations *Convention on the Rights of Persons with Disabilities*.

<sup>2</sup> The definition in the *Evidence Act 1977* (Qld), Sch 3 of “person with an impairment of the mind” encapsulates the sense in which the terms “cognitive impairment”, “intellectual impairment” and “intellectual disability” are to be understood in this article: “[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.”

<sup>3</sup> See, for example, *Evidence (Children and Special Witnesses) Act 2001* (Tas), s 5; *Evidence Act 1906* (WA), s 106H; *Criminal Procedure Act 1986* (NSW), Pt 6, Div 1; *Criminal Procedure Act 2009* (Vic), ss 366, 369; *Evidence Act 1929* (SA), ss 13A-13D; *Crimes Act 1914* (Cth), Pt 1AD; *Evidence Act 1977* (Qd), ss 21A-21AZC. In some jurisdictions there are also restrictions on unrepresented defendants personally cross-examining specified witnesses.



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concomitantly, because of their significance for prosecution assessments of conviction prospects, whether any offences they allege will be tried. If they are, these witnesses' ability to understand and be understood and, tangentially, 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 a reliable witness, both of which also set particular, often unachievable, standards of comprehension and communication for these groups of witnesses. In relation to all these matters one might be forgiven for thinking of the impact of existing reforms: "plus ça change, plus c'est la même chose".

Most of these problems can be seen writ large in a South Australian case that has achieved some notoriety as a result of a 2011 *Four Corners* expose.<sup>4</sup> In July 2011, the South Australian Director of Public Prosecutions (DPP) discontinued the prosecution of a bus driver alleged to have sexually abused a child with an intellectual disability. The prosecution formed the view that the child could not give reliable evidence and would not be able to withstand cross-examination. The accused was released. The complainant's parents were shocked and dismayed. So too was the wider community, as well as the parents of other children allegedly abused by the accused.

Here the primary driver of the decision not to prosecute was a negative assessment of the complainant's capacity to perform under cross-examination. He had apparently limited comprehension levels, which had clear implications for his ability to understand questions about the events in issue and, importantly, to deal with cross-examination and adhere to a credible account of those events. To the public, the decision not to prosecute appeared to demonstrate that the criminal justice system was incapable of protecting children with cognitive impairments from sexual predation. Adapting the words of the Canadian Supreme Court in *R v Dai*,<sup>5</sup> the decision suggested that the law permits violators to sexually abuse children with cognitive impairments with near impunity. The apparent inability to prosecute jeopardises one of the fundamental desiderata of the rule of law: that the law be enforceable. It also effectively immunises an entire category of offenders from criminal responsibility for their acts and further marginalises the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

A number of Australian jurisdictions have enacted a patchwork of reforms, additional to those noted above, that mirror developments overseas and whose specific target is the comprehension and communication difficulties faced by children and witnesses with cognitive impairments. The reforms include:

- control of cross-examination;
- setting ground rules for cross-examination by the provision of advance directives;
- recording of witnesses' entire testimony in the absence of the jury; and
- obtaining expert advice and/or the assistance of intermediaries to facilitate these witnesses' communication with the court.

Experience with many of these measures, both in Australia and overseas, suggests that they are capable of enhancing the ability of children and witnesses with cognitive impairments to participate properly in the trial process. The problem is that there is no uniformity in either the adoption or the utilisation of these mechanisms across Australia. Only in Western Australia is there legislation that encompasses all these measures. Elsewhere, there appear to be significant lacunae in the mechanisms dedicated to the taking of reliable evidence from children and witnesses with cognitive impairments.

All jurisdictions make provision in one form or another for the control of cross-examination.<sup>6</sup> In all jurisdictions, there is also the potential for courts to give advance directives at a directions hearing

<sup>4</sup> Australian Broadcasting Corporation, "St Ann's Secret", *Four Corners* (26 September 2011), [www.abc.net.au/4corners/stories/2011/09/22/3323669.htm](http://www.abc.net.au/4corners/stories/2011/09/22/3323669.htm).

<sup>5</sup> *R v Dai* [2012] SCC 5 at [67].

<sup>6</sup> *Evidence Act 1929* (SA), ss 22-25; *Evidence Act 1906* (WA), ss 25-26; *Evidence Act 1977* (Qd), ss 21, 21A(2)(f); *Evidence (National Uniform Legislation) Act 2011* (NT), *Evidence Act 1995* (NSW), *Evidence Act 1995* (Cth), *Evidence Act 2001* (Tas), *Evidence Act 2008* (Vic), *Evidence Act 2004* (Norfolk Island), ss 26, 29, 41-42, 192A, 193; *Crimes Act 1914* (Cth), s 15YE and at common law, *Libke v The Queen* (2007) 230 CLR 559 at 597-604.



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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.<sup>7</sup> However, these particular powers do not appear to have been used extensively or creatively in aid of children and witnesses with cognitive impairments.<sup>8</sup> Western Australia, Victoria, South Australia, Queensland, the Northern Territory and the Australian Capital Territory (ACT) have also enacted legislation that enables the totality of particular witnesses' testimony to be pre-recorded in the absence of the jury<sup>9</sup> but these provisions may apply only in certain cases.<sup>10</sup> Only in Western Australia and New South Wales is there provision for witnesses' communication and comprehension during court proceedings to be facilitated by the employment of experts or intermediaries.<sup>11</sup> Yet these provisions are rarely, if ever, activated.

When *Four Corners* revealed the South Australian DPP's decision in the case noted above, the instant political reaction was to promise the enactment of further measures to assist vulnerable witnesses. Yet there are existing South Australian legislative provisions that were not brought into play to deal with the barriers facing the complainant in this case. Similarly, existing statutory provisions in other jurisdictions that might be exploited to assist children and witnesses with cognitive impairments appear to be under-utilised, overlooked or ignored.

It is the purpose of this article to consider what statutory tools courts may have at their disposal that may not have been used to date and that may fill gaps in the provisions specifically devoted to children and witnesses with cognitive impairments. The primary question explored is whether these measures might be applied even in the absence of specific statutory provisions, and without the enactment of further reforms by utilising existing general evidence and criminal procedure provisions. To some extent, the discussion focuses upon provisions of the uniform evidence legislation that is now the "majority" evidence law in Australia, having been enacted in seven jurisdictions<sup>12</sup> and in Australian's largest criminal justice systems.<sup>13</sup> The discussion is located within the human rights framework of the right to a fair trial. This inevitably provokes the question whether this right might limit the scope and achievement of the protective potential offered by the mechanisms reviewed here, and, consequently, raises the spectre of perennially perceived tensions between defendants' and complainants'/witnesses' rights. Past experience has often been that such tension bodes ill for complainant- or witness-focused initiatives and prospects for protection. The article begins by providing a brief overview of the particular difficulties faced by children and witnesses with cognitive impairments in testifying, referencing the extensive research and expressions of judicial concern they

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<sup>7</sup> See, for example, *Criminal Procedure Act 2009* (Vic), ss 179, 181, 199; *Evidence Act 2008* (Vic), s 192A; *Evidence Act 1977* (Qld), s 21AX; *Criminal Code 1899* (Qld), s 590AA; *Justices Act 1886* (Qld), s 83A; *Justices Act* (NT), s 201A; *Supreme Court Rules* (NT), r 81A.18; *Evidence (National Uniform Legislation) Act 2011* (NT), s 192A; *Criminal Procedure Act 1986* (NSW), ss 130, 136, 139-140, 247D, 247G-247H; *Evidence Act 1995* (NSW), s 192A; *District Court Rules 1973* (NSW), rr 53.10-53.11; *Criminal Procedure Act 2004* (WA), ss 64, 98; *Evidence Act 1995* (Cth), s 192A; *Criminal Law Consolidation Act 1935* (SA), s 285A; *Evidence Act 2001* (Tas), s 192A; *Criminal Code 1924* (Tas), s 361A; *Criminal Rules 2006* (Tas), Pt 1A.

<sup>8</sup> Boyd R and Hopkins A, "Cross-examination of Child Sexual Assault Complainants: Concerns about the Application of s 41 of the Evidence Act" (2010) 34 Crim LJ 149; Cashmore J and Trimboli L, *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2005), [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/pages/bocsar\\_mr\\_r57](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_r57).

<sup>9</sup> *Criminal Procedure Act 2009* (Vic), ss 198, 369-370, 374; *Evidence Act 1929* (SA), ss 13(1), 13(2)(b), 13(f), 13A, 13C; *Evidence Act 1906* (WA), ss 106I, 106RA; *Evidence Act 1977* (Qld), ss 21A(2)(e), 21AB, 21AI-21AO; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), Div 4.2B; *Evidence Act* (NT), s 21B.

<sup>10</sup> For example, the provisions in Div 6, Pt 8.2 of the *Criminal Procedure Act 2009* (Vic) are limited to sexual offences. See also the provisions of Div 4.2B, Pt 4 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

<sup>11</sup> *Evidence Act 1906* (WA), ss 106F, 106R(4)(b); *Criminal Procedure Act 1986* (NSW), ss 275B, 306ZK(3)(b).

<sup>12</sup> *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (Norfolk Island); *Evidence Act 1995* (Cth). The Northern Territory became the most recent jurisdiction to enact the uniform evidence legislation in August 2011. It was assented to in November 2011 but at the date of writing was yet to come into force pending the gazetting of a commencement date by the Administrator and the implementation of transitional provisions in the *Evidence (National Uniform Legislation) Consequential Amendments Bill 2012*. Accordingly, for the Northern Territory, this article refers to relevant provisions in both the *Evidence (National Uniform Legislation) Act 2011* (NT) and to those provisions in the *Evidence Act* (NT) which, it appears, will continue to operate.

<sup>13</sup> Gans J and Palmer A, *Uniform Evidence* (Oxford University Press, 2010) pp 1-2.



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have generated. This provides the background and justification for the questions explored here. It answers the question why an imaginative or even creative approach should be taken to existing statutory provisions in order to expand the assistance available to these groups of witness.

## COMPREHENSION AND COMMUNICATION

It has now been incontrovertibly established that the adversarial trial process exacerbates the particular comprehension and communication problems experienced by children and those with cognitive impairments when testifying. Consistently research has shown that these groups of witnesses are too frequently asked questions that sit well beyond their intellectual capacities and developmental levels.<sup>14</sup> Questions are often complex, syntactically confusing, and couched in arcane language. They may conflict with these witnesses' social expectations and experience. Sometimes questions are nonsensical. Further, in responding to questions, these groups of witnesses rarely seek clarification when confused and may attempt to answer questions that are ambiguous or that have no readily apparent meaning.<sup>15</sup> Even where questions appear clear, comprehension discrepancies between the questioner and the witness may produce a significant mismatch between what a questioner thinks she/he is asking and what the witness understands him/her to be asking – ditto with the witness's answers. In addition, questioning can be abusive, hostile, repetitive and overly lengthy.<sup>16</sup> Such questioning intimidates children and witnesses with intellectual impairments "into silence, contradictions, or general emotional and cognitive disorganization".<sup>17</sup>

Additionally, studies have repeatedly demonstrated that adversarial questioning conventions, particularly those of cross-examination, prevent these witnesses from giving a full, accurate and coherent account.<sup>18</sup> The result is that questioning strategies that are considered to be well designed to expose the unreliability of evidence, in fact, render it unreliable.<sup>19</sup> Unfortunately, there is also evidence that cross-examiners exploit witnesses' developmental and cognitive limitations and

<sup>14</sup> See, for example, Kebbell M, Hatton C and Johnson S, "Witnesses with Intellectual Disabilities in Court: What Questions are Asked and What Influence Do they Have?" (2004) 9 *Legal and Criminological Psychology* 23; Plotnikoff J and Woolfson R, *Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings: Good Practice Guidance in Managing Young Witness Cases and Questioning Children* (NSPCC & Nuffield Foundation, 2009), [www.nspcc.org.uk/inform/.../measuring\\_up\\_guidance\\_wdf66581.pdf](http://www.nspcc.org.uk/inform/.../measuring_up_guidance_wdf66581.pdf); Cashmore J, "Child Witnesses: The Judicial Role" (2007) 8 *The Judicial Review* 281; Cashmore and Trimboli, n 8; Zajac R, Gross J and Hayne H, "Asked and Answered: Questioning Children in the Courtroom" (2003) 10 *Psychiatry, Psychology and the Law* 199; Brennan M and Brennan RE, *Strange Language: Child Victims under Cross-Examination* (3rd ed, Charles Sturt University, 1988); Hoyano L, "The Child Witness Review: Much Ado About Too Little" (2007) (Nov) *Criminal Law Review* 849; Carter CA, Bottoms BL and Levine M, "Linguistic, Social and Emotional Influences on the Accuracy of Children's Reports" (1996) 20 *Law and Human Behavior* 335; Davies E, Henderson E and Seymour FW, "In Reply To: The Interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings" (1997) 4 *Psychiatry, Psychology and Law* 217; Henderson E, "Persuading and Controlling: The Theory of Cross-examination in Relation to Children" in Westcott HL, Davies GM and Bull R (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (John Wiley & Sons, 2002).

<sup>15</sup> Zajac et al, n 14; Sas L, *The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency*, Research Report No RR02-6e (Department of Justice, Canada, 2002) [http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02\\_6/rr02\\_6.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/rr02_6.pdf).

<sup>16</sup> Eastwood C, "Child Sexual Abuse and the Criminal Justice System: What Educators Need to Know" (2003) 8 *Australia and New Zealand Journal of Law & Education* 111.

<sup>17</sup> Carter et al, n 14 at 336.

<sup>18</sup> Henderson, n 14; Oates RK, "Problems and Prejudices for the Sexually Abused Child" (2007) 81 *ALJ* 313; Ellison L, "Cross-examination and the Intermediary: Bridging the Language Divide?" (2002) (Feb) *Criminal Law Review* 114; Mortimer A and Shepherd E, "The Fragility of Children's Testimony" in Heaton-Armstrong A, Shepherd E and Wolchover D (eds), *Analysing Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford University Press, 1999) p 48; Bull R, "Interviewing Children in Legal Contexts" in Bull R and Carson D (eds), *Handbook of Psychology in Legal Contexts* (John Wiley & Sons, 1995) p 242; Zajac R and Hayne H, "'I Don't Think That's What Really Happened': The Effect of Cross-Examination on the Accuracy of Children's Reports" (2003) 9 *Journal of Experimental Psychology: Applied* 187.

<sup>19</sup> O'Kelly CME, Kebbell MR, Hatton C and Johnson SD, "Judicial Intervention in Court Cases Involving Witnesses with and without Intellectual Disabilities" (2003) 8 *Legal and Criminological Psychology* 229; Zajac and Hayne, n 18; Powell MB, *Improving the Reliability of Child Witness Testimony in Court: The Importance of Focusing on Questioning Techniques*, Presented at The Australian Institute of Judicial Administration (AIJA) Child Witnesses – Best Practice for Courts Conference (Parramatta, 30 July 2004), <http://www.aija.org.au/ChildWitnessSem04/Powell.pdf>.



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vulnerabilities to hamper their ability to recall and recount events. The Australian Law Reform Commission (ALRC) has characterised such practices where children are concerned as “clear examples of the legal abuse of children”.<sup>20</sup>

While all these matters are now well understood, for a raft of reasons, courts may still hesitate or fail to intervene to impose standards of questioning on counsel that eliminate these problems.<sup>21</sup> As noted by Wood CJ at CL:

[P]roper 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.<sup>22</sup>

A primary reason for non-interference is fear of rendering the trial unfair for the accused. As noted by Ellis J of the District Court of New South Wales:

Traditionally, trial judges have been very careful about interrupting or restricting cross-examination. It is likely that this reluctance stems from concern about jeopardising a fair trial for the accused and/or concern regarding the approach to be taken by the Court of Criminal Appeal. The potential for mistake and the consequential ordering of a new trial are all too real and no trial judge wants to make a mistake that may cause an accused and complainant to endure a re-trial. Anecdotally this seems to me to have caused trial judges to err on the side of caution, which means to err in favour of the accused and permit questionable cross-examination from time to time.<sup>23</sup>

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”.<sup>24</sup> In a slightly different but similar vein, intervention has been eschewed as potentially casting the trial judge in the role of a partial advocate. More prosaically, intervention has been frowned upon for interfering with the flow of questioning. So in *R v Lars*, the court held that:

the decision whether or not to intervene must always be taken by the trial judge with due regard to the undesirability of an interruption to the flow of cross-examination and above all and especially in a jury trial with regard to the undesirability of interventions which may give the appearance that the judge has descended into the arena and aligned himself with one or other of the combatants.<sup>25</sup>

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.<sup>26</sup> It has also been observed that 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 recognising or rejecting questioning that is unfair to children and

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<sup>20</sup> ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) at [14.111], <http://www.alrc.gov.au/publications/report-84>.

<sup>21</sup> O’Kelly et al, n 19; Cashmore and Trimboli, n 8; Cashmore J and Bussey K, “Judicial Perceptions of Child Witness Competence” (1996) 20 *Law and Human Behavior* 313.

<sup>22</sup> Wood J, *Child Witnesses: The New South Wales Experience*, Presented at the AIJA Child Witnesses – Best Practice for Courts Conference (Parramatta, 30 July 2004).

<sup>23</sup> Ellis R, *Judicial Activism in Child Sexual Assault Cases*, Presented at the National Judicial College of Australia Children and the Courts Conference (Sydney, 5 November 2005) at [35], [http://www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/ellis-judicial\\_activism.html](http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/ellis-judicial_activism.html).

<sup>24</sup> Wood J, *Sexual Assault and the Admission of Evidence*, Speech presented in the series Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales (12 February 2003) at [101].

<sup>25</sup> *R v Lars* (1994) 73 A Crim R 91 at 126.

<sup>26</sup> *Doggett v The Queen* (2001) 208 CLR 343 at 346; 119 A Crim R 416; *Whitehorn v The Queen* (1983) 152 CLR 657 at 682; 9 A Crim R 107.



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witnesses with cognitive impairments.<sup>27</sup> Yet there is also judicial support for increased intervention in cross-examination, though perhaps some perplexity about just how it is to be achieved.<sup>28</sup>

### CONTROL OF CROSS-EXAMINATION

The statutory provisions that have been enacted in all Australian jurisdictions empowering courts to intervene to prevent inappropriate cross-examination, though not identical in wording and scope, have the same legislative objective of encouraging courts to disallow questioning that might imperil fair trial imperatives.

The most prominently relevant sections in the Uniform Evidence Acts,<sup>29</sup> ss 41 and 42, are qualitatively different to most similar provisions elsewhere. Both ss 41 and 42 impose a *duty* upon courts (as opposed to a discretion) to intervene to prevent inappropriate questioning in specified circumstances. The only other Australian jurisdiction to impose a duty rather than a discretion on courts to intervene is South Australia.<sup>30</sup> Section 42 of the Uniform Evidence Acts focuses exclusively on leading questions. There are no similarly dedicated provisions in non-uniform *Evidence Act* jurisdictions, although at common law, courts have the power to control the form of questions, and cross-examination in particular.<sup>31</sup> 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 for this article, 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.<sup>32</sup> Nevertheless, it is probable that courts should not assume, in the absence of evidence about a particular witness, that s 42(3) will apply.<sup>33</sup> In applying both s 42(3) and 42(2)(d) courts are faced with similar practical problems as are posed by s 41 and considered below.

The duty<sup>34</sup> to intervene imposed by s 41 of the Uniform Evidence Acts and s 25(3) of the *Evidence Act 1929* (SA) seeks to encourage greater judicial intervention where cross-examination exceeds proper limits. The aim is to eliminate discretion in judicial intervention wherever cross-examination is judged to be “disallowable” or “improper” on the grounds specified in those sections.<sup>35</sup>

Yet there is an inescapable element of judgment in ss 41 and 25 determinations which intrinsically retains their discretionary nature and so may leave largely untouched the traditional non-interventionist judicial paradigm. For example, intervention is mandated under s 41(1)(b) where a question is *unduly* annoying, harassing, intimidating, offensive, insulting etc. Similarly, s 25(1)(c) of

<sup>27</sup> Davies E, Henderson E and Hanna K, “Facilitating Children to Give Best Evidence: Are there Better Ways to Challenge Children’s Testimony?” (2010) 34 Crim LJ 347; Boyd and Hopkins, n 8.

<sup>28</sup> Ellis, n 23 at [36]-[37].

<sup>29</sup> See also the same sections in the *Evidence (National Uniform Legislation) Act 2011* (NT).

<sup>30</sup> *Evidence Act 1929* (SA), s 25(3).

<sup>31</sup> *Parkin v Moon* (1836) 7 Car & P 408 at 409; *Mooney v James* [1949] VLR 22 at 28; *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 22-23; *Alcoa of Australia Ltd v McKenna* (2003) 8 VR 452 at [26]; *Stack v Western Australia* (2004) 29 WAR 526 at [24]-[28]; 151 A Crim 112.

<sup>32</sup> Powell, n 19; Ceci SJ and Richard D, “Suggestibility of Children: Scientific Research and Legal Implications” (2000) 86 *Cornell Law Review* 33; Dent H and Flin RH (eds), *Children as Witnesses* (John Wiley & Sons, 1992) p 5.

<sup>33</sup> See *Stack v Western Australia* (2004) 29 WAR 526 at [43] (Murray J); 151 A Crim 112, considering the common law discretion to disallow leading questions in cross-examination; see also Steytler and Templeman LJ concurring at [117]-[129].

<sup>34</sup> In Victoria, the duty to intervene applies only to “vulnerable witnesses” as defined in s 41(4) of the *Evidence Act 2008* (Vic), which, importantly for this article, includes minors and witnesses with intellectual disabilities or cognitive impairments.

<sup>35</sup> See s 41(1) of the Uniform Evidence Acts. Section 25(1) of the *Evidence Act 1929* (SA), though worded slightly differently, nominates essentially the same things as the basis for disallowing a question. Such factors also supply the basis for the discretionary exclusion of questions under s 21(4) of the *Evidence Act 1977* (Qld) and s 26(1) of the *Evidence Act 1906* (WA).



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the South Australian Act refers to questions that are *unnecessarily* offensive or oppressive. Clearly some measure of intimidation, insult, harassment, offensiveness, oppression etc is countenanced as legitimate by these provisions. Accordingly it will be a matter of judgment when the line is crossed. As noted elsewhere, s 41 is “imbued with the type of value judgment that preserves the opportunity for trial judges to continue a wary approach to intervention”.<sup>36</sup>

As observed by Boyd and Hopkins,<sup>37</sup> 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 to control cross-examination.<sup>38</sup>

Further, such provisions, whether couched in mandatory or discretionary terms, do not lend themselves easily to use during trials, particularly in the presence of the jury. In the trial setting, such provisions are difficult to operate and pose a number of practical problems for the trial judge. For example, in judging whether a question offends s 41 or similar provisions in non-uniform *Evidence Act* jurisdictions, the court is to take into account a number of matters, including the witness’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 witness is, or appears to be, subject. This can only be done if the trial judge has some background information about the witness.<sup>39</sup> Then the judge must fully comprehend the implications of that information for the questioning of the witness. This requires trial judges to be finely attuned to what amounts to inappropriate questioning for different groups of witnesses so that they can identify the type of questions that are likely to be misleading or confusing etc within the meaning of the section. This demands a high level of expertise, experience and awareness that trial judges who do not encounter child witnesses or witnesses with intellectual impairments on a regular basis may not have the opportunity to acquire. While assistance is provided by Bench Books<sup>40</sup> in various jurisdictions, which, based on the research outlined earlier, list the kinds of questions to disallow, the question remains how that information is practicably to be marshalled and applied during the course of trials. Such difficulties may explain why s 41 has been invoked to exclude questioning in relatively few significant cases<sup>41</sup> and why the imposition of a *duty* to intervene has had no apparent impact on the rate of intervention.<sup>42</sup> All the foregoing practical difficulties also face courts in making determinations with respect to ss 42(2)(d) and 42(3) of the Uniform Evidence Acts and in relation to applicable common law principles. It seems that statutory and common law mandates, whether they impose a duty or give permission to intervene, are not sufficient in themselves to overcome the systemic constraints on judicial intervention.

### OUT OF COURT MEASURES

Because the trial itself is not the optimum setting for controlling cross-examination under s 41 and its non-uniform counterparts, it may be that opportunities offered in the pre-trial context could be exploited to do so. Of foremost importance in this regard is the potential offered by the pre-trial

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<sup>36</sup> Henning T, “Control of Cross-examination – A Snowflake’s Chance in Hell?” (2006) 30 Crim LJ 133 at 136. The subjective nature of assessments about improper questions and their implications for witnesses is demonstrated by the disparate responses of members of the High Court to questioning described as “egregious” in *Libke v The Queen* (2007) 230 CLR 559.

<sup>37</sup> Boyd and Hopkins, n 8 at 162-164.

<sup>38</sup> See Davies et al, n 27 at 354-355.

<sup>39</sup> On this point see Ellis, n 23 at [36]-[37].

<sup>40</sup> For example, Department of the Attorney-General Western Australia, *Equality Before the Law Bench Book* (2009); Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2001); AIJA, *Bench Book for Children Giving Evidence in Australian Courts* (2010).

<sup>41</sup> *R v TA* (2003) 57 NSWLR 444; 139 A Crim R 30; *National Auto Glass Supplies (Australia) Pty Ltd v Nielsen & Moller Autoglass (NSW) Pty Ltd (No 5)* [2001] FCA 569 being exceptions that prove the rule.

<sup>42</sup> Boyd and Hopkins, n 8.

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directions hearings, which might be used to set ground rules for the conduct of cross-examination and to determine the possibility/desirability of deploying other mechanisms for taking particular witnesses' evidence. These include recording the entirety of witnesses' testimony in the absence of the jury, recording it on video tape and replaying in an agreed edited form to the jury. To determine the nature and extent of control necessary and the suitability of different questioning techniques and question types, and to facilitate communication with and by these witnesses, expert advice might be obtained and consideration given at this point to the use of an intermediary/interpreter both pre-trial and during trials.

### Setting ground rules

Good practice guidance<sup>43</sup> in a number of jurisdictions tells us that the pre-trial setting of ground rules with counsel for questioning of child witnesses and witnesses with cognitive impairments is crucial to restraining improper questioning and maximising proper questioning. Doing this may also reduce or even obviate the need to intervene during a trial or, in some instances, to hold a voir dire. In any case where testimony is to be taken from a child witness or a witness with a cognitive impairment, a directions hearing should optimally be held to determine the witness's level of understanding and how questioning should be conducted.

For courts in England and Wales, the Judicial College has developed an extensive checklist<sup>44</sup> of matters that should be settled at different stages of the court process in cases involving children. The same checklist might be applied to witnesses with cognitive impairments. In the pre-trial stage, that checklist covers:

- obtaining information about the development/health/concentration span of the witness;
- determining whether the witness is likely to recognise a problematic question or tell the questioner that she or he has not understood;
- giving directions to counsel about:
  - adapting questions to the witness's developmental level to enable the "best evidence" to be obtained;
  - asking short, simple questions (one idea at a time);
  - following a logical sequence;
  - speaking slowly, pausing and allowing the witness enough time to process questions (which for younger children, is indicated to be almost twice as much time);
  - allowing a full opportunity to answer;
  - avoiding particular question types that may produce unreliable answers. For example, "tag" questions such as, "He didn't touch you, did he?" are particularly problematic for cognitively immature witnesses and should be put more directly: "Did Jim touch you?" and if the answer is "yes": "How did Jim touch you?"
  - avoiding allegations of misconduct without reasonable grounds. Being accused of lying, particularly if repeated, may cause a child or witness with a cognitive impairment to give inaccurate answers or to agree simply to bring questioning to an end;
  - not asking children to demonstrate intimate touching on their body, but instead using a body diagram;
  - prescribing how the witness is to be questioned about matters arising from third party disclosure; and

<sup>43</sup> For example, Plotnikoff and Woolfson (2009), n 14, p 5; Judicial College, *Fairness in Courts and Tribunals: A Summary of the Equal Treatment Bench Book* (2012); Attorney-General Western Australia, n 40 at [4.4.2], [5.1.4]; The Law Commission (New Zealand), *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26 (2006), [http://www.lawcom.govt.nz/sites/default/files/publications/1996/10/Publication\\_60\\_179\\_PP26.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/1996/10/Publication_60_179_PP26.pdf); AIJA, n 40 at [4.6], [5.2]-[5.3]; Commissioner Kevin Sleight, *Managing Trials for Sexual Offences – A Western Australian Perspective*, Presented at the Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference (Sydney, 7-9 September 2011) p 8.

<sup>44</sup> Judicial College, *Bench Checklist: Young Witness Cases* (2012), <http://www.judiciary.gov.uk/publications-and-reports/guidance/2012/jc-bench-checklist-young-wit-cases>.



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- determining how the defence case is to be put. For witnesses with immature levels of cognitive development, it may be appropriate to inform the jury of evidence believed to undermine the witness's credibility, without necessarily addressing the matter in detailed cross-examination.<sup>45</sup>

While Bench Books recommend the setting of ground rules at pre-trial conferences or directions hearings and provide advice about the types of questions that should be asked and those that should be avoided, there is currently no published data about the extent to which courts do set specific ground rules in individual cases. What we do see in some jurisdictions is the development of general guidelines and the issuing of circulars to practitioners<sup>46</sup> whose purpose is to “educate counsel as to appropriate standards”<sup>47</sup> and thus reduce the need for judicial intervention. Such guidance is not, however, provided in all jurisdictions. For example, it is yet to occur in Tasmania despite the fact that the Tasmanian Criminal Rules specify that courts may make any order necessary to give effect to any relevant law or legislative instrument or to ensure the fair and expeditious conduct of the trial.<sup>48</sup>

Further, the advice provided in Bench Books and circulars – though a step in the right direction – cannot be viewed as a substitute for the making of specific determinations about questioning witnesses in individual cases. Bench Book advice is simply that. While it may put flesh on the bones of provisions like ss 41 and 42 of the uniform evidence legislation, it has an aspirational quality. In contrast, pre-trial ground rules set for the treatment of particular witnesses can be tailored to their specific needs and then carefully monitored and enforced during proceedings.

As noted earlier, there are various statutory and regulatory provisions<sup>49</sup> that might be brought into play to enable ground rules for questioning witnesses to be set pre-trial. Foremost among these in the Uniform Evidence Acts are ss 192A and 193(2). Section 193 gives courts covered by the uniform Acts the power to make rules to enable the effective operation of those Acts.<sup>50</sup> This means that courts applying the uniform evidence legislation might make rules prescribing the holding of compulsory directions hearings when children or witnesses with cognitive impairments are to testify. Section 192A<sup>51</sup> allows a court to give advance rulings about the admissibility and use of evidence and the operation of a provision of the Act or another law applying to evidence proposed to be adduced. It could be deployed to make determinations about how the evidence of children and witnesses with cognitive impairments is to be adduced. Specifically, courts might utilise this provision to give advance directives about the way witnesses are to be questioned, the types of questions that will be permitted or not permitted and the procedure for taking their evidence. Together with provisions like s 42, s 192A potentially enables courts to give detailed advance consideration to, and to impose advance control on, specific aspects of questioning. For example, s 192A(b) might be applied to enable an advance direction to be given restricting or forbidding the use of leading questions under s 42.

If pre-trial directions hearings are to work as envisioned, trial judges will require advice about the cognitive capacities of the witnesses in question. Such advice should also address the level of sophistication and style of questioning appropriate for these witnesses. It might include information from those who have day-to-day familiarity with their communication standards and/or peculiarities. There is analogical precedent in this regard in 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

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<sup>45</sup> For details see *R v Barker* [2010] EWCA Crim 4 at [42].

<sup>46</sup> See, for example, the District Court of Western Australia, *Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability*, Circular to Practitioners No CRIM 2010/1 (8 September 2010).

<sup>47</sup> Sleight, n 43, p 22.

<sup>48</sup> *Criminal Rules 2006* (Tas), rr 3H(2)(d), 3H(3)(f).

<sup>49</sup> See n 7.

<sup>50</sup> *Re Z* (1996) 134 FLR 40.

<sup>51</sup> This section was enacted to overcome the High Court decision *TKWJ v The Queen* (2002) 212 CLR 124; 133 A Crim R 574.



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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 matter are also to be supplied at this stage.<sup>52</sup> Such directions could be implemented in other jurisdictions and expanded to require the provision of advice about the questioning of these witnesses. This would set the ground for pre-trial management powers to be exploited to the full to enable not only the early identification of particular witness vulnerabilities, but also the specification of the types of questions that will be allowed and disallowed.

### Expert assistance

Specialist advice is warranted because practitioners' and judges' decisions about proper questioning are likely to be driven by principles of adversarialism and traditional notions of what is necessary to achieve a fair trial for the accused rather than by psychological and linguistic imperatives relating to educating reliable evidence from children and witnesses with cognitive impairments. Further, neither counsel nor judicial officers are likely to have the degree of knowledge about the capacities of particular witnesses that intermediaries can provide. Reliance on an expert intermediary therefore may reduce the intensity of trial judges' role in gauging and being alert to questions that may not be appropriate for the particular witness.

Intermediary schemes take different forms. Intermediaries may act as quasi-interpreters, whose role is solely to reformulate questions into language that the witness can understand and/or where necessary to translate the witness's response to the court.<sup>53</sup> Alternatively, intermediaries may be registered communication specialists who are able to assess and report to the court on witnesses' cognitive abilities. Their reports make recommendations on how best to meet witnesses' specific communication needs and they may provide advice to courts and counsel before and during proceedings about the appropriateness of questioning in a general and specific sense. They also facilitate communication at investigative interview and trial.<sup>54</sup> Optimally, to achieve maximum reliable communication of witnesses' testimony, intermediaries should be able to perform both translation and advisory functions.

In Western Australia and New South Wales,<sup>55</sup> there is statutory provision for children and people with cognitive impairments to be assisted in testifying by an intermediary (called a "communicator" in Western Australia) with expertise in facilitating communication between them and the court. The function of the intermediary is to communicate and explain to witnesses the questions put to them, and to explain to the court the evidence given by a witness.<sup>56</sup> In this role intermediaries function as translators. It would appear that this provision may be little utilised in Western Australia, and that there is a lack of training available to fit people for the role of intermediary.<sup>57</sup>

In New South Wales, children and witnesses with cognitive impairments may have a support person with them when they testify who may act as an interpreter and assist them to give evidence.<sup>58</sup> There is also provision to enable any witness who has difficulty communicating to use a person who

<sup>52</sup> County Court of Victoria, Practice Note PNCr 2-2010 (4 January 2010), <http://www.liv.asn.au/Practice-Resources/News-Centre/eNews/Friday-Facts/Friday-Facts-Issue-718-25-May-2012>.

<sup>53</sup> This would appear to be the role they are accorded under *Evidence Act 1906* (WA), s 106F and is their role in the South African intermediary scheme where they act as interpreters translating counsels' questions according to the cognitive abilities of witnesses and conveying their answers to the court: *Criminal Procedure Act 1977* (Sth Africa), s 170A.

<sup>54</sup> As in the United Kingdom model: *Youth Justice and Criminal Evidence Act 1999* (UK), s 29. For a detailed description of the different intermediary schemes see Davies et al, n 14 at 11-14; and Hanna K, Davies E, Henderson E, Crothers C and Rotherham C, *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (Institute of Public Policy, AUT University, 2010) pp 10, 118-147, [http://www.ipp.aut.ac.nz/\\_data/assets/pdf\\_file/0020/119702/Child-Witnesses-in-the-NZ-Criminal-Courts-full-report.pdf](http://www.ipp.aut.ac.nz/_data/assets/pdf_file/0020/119702/Child-Witnesses-in-the-NZ-Criminal-Courts-full-report.pdf).

<sup>55</sup> *Evidence Act 1906* (WA), s 106F, 106R(4)(b); *Criminal Procedure Act 1986* (NSW), ss 275B, 306ZK(3)(b).

<sup>56</sup> See, for example, *Evidence Act 1906* (WA), s 106F(2).

<sup>57</sup> Jackson H, *Child Witnesses in the Western Australian Criminal Courts*, Presented at the AIJA Child Sexual Abuse: Justice Response or Alternative Resolution Conference (Adelaide, 1-2 May 2003) p 9.

<sup>58</sup> *Criminal Procedure Act 1986* (NSW), s 306ZK(3)(b).

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may assist him or her to do so if the witness ordinarily receives such assistance in everyday life.<sup>59</sup> It is not known to what extent these provisions are actually used in this way but there is no evidence that their use is widespread. In fact, information provided to support people by the New South Wales Department of Attorney General and Justice states that they must not speak during the hearing or help witnesses to answer questions.<sup>60</sup> This suggests that there may be a misconception abroad that support people must always have 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.

In contrast to the apparent non-use of intermediaries in Western Australia and New South Wales, in England, Wales and South Africa, the intermediary special measure has been described as offering significant advantages to courts and to witnesses in improving the quality and quantity of evidence given by children and witnesses with cognitive impairments<sup>61</sup> and is “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”.<sup>62</sup>

Additionally it has been found that intermediary services improve access to justice because they enable significant numbers of cases to come to court that would previously have been excluded because of problems with communication and comprehension.<sup>63</sup>

There are flaws in the operation of different intermediary 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.<sup>64</sup> Nevertheless, overall, the evidence to date is that where properly resourced and where they allow adequate interventionist scope, intermediary schemes offer significant potential in facilitating the reception of evidence of children and witnesses 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 position 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. 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.<sup>65</sup> 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 other alternative evidence-taking arrangements.<sup>66</sup>

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<sup>59</sup> *Criminal Procedure Act 1986* (NSW), s 275B.

<sup>60</sup> See, for example, Victims Services, Department of Attorney-General and Justice, *Information for Court Support People*, [http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/V5\\_courtsupportpeopleinfo#whatyoumustnotdo](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/V5_courtsupportpeopleinfo#whatyoumustnotdo).

<sup>61</sup> Hanna et al, n 54, pp 11; 186-187. The Norwegian program, which gives specialist interviewers entire responsibility for conducting forensic questioning according to their own judgment, has been considered to offer optimum returns for witnesses and the courts: (p 11). However, the Norwegian system is not considered here because many of its constituent elements appear to derive from and depend on Norway’s semi-inquisitorial system, which is significantly different to the Australian adversarial process so that it is difficult to see how it could be employed in Australia without specific legislative imprimatur and considerable adaptation of the process itself.

<sup>62</sup> Bar of England and Wales, n 1, p 3.

<sup>63</sup> Hanna et al, n 54, p 187.

<sup>64</sup> Plotnikoff and Woolfson, n 14, p 7; Cooper P, *Tell Me What’s Happening 3: Registered Intermediary Survey 2011* (City University London, 2012) p 13.

<sup>65</sup> See criticism of the United Kingdom and South African processes in Hanna et al, n 54, pp 123-124, 139-142.

<sup>66</sup> Eastwood C and Patton W, *The Experience of Child Complainants of Sexual Abuse in the Australian Criminal Justice System* (Australian Institute of Criminology, 2001) p 127, <http://www.criminologyresearchcouncil.gov.au/reports/eastwood.html>.

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In most Australian jurisdictions, while children and witnesses with cognitive impairments may have a support person with them while they are testifying,<sup>67</sup> there is no specific statutory provision for the use of intermediaries to help them to communicate with the court. Given their potential to improve the reception of reliable evidence from these witnesses, the question is whether and how the employment of intermediaries might be incorporated into the trial process in those jurisdictions that have not specifically legislated for them.

In uniform evidence legislation jurisdictions, issues about appropriate questioning are fundamentally bound up with the question of witnesses' competence to testify. Accordingly, the competency testing process provides a vehicle for courts to obtain intermediaries' advice and thereafter their assistance at trial. This is possible because the general test for competence under the uniform evidence legislation (s 13) is now concerned exclusively with the witness's capacity to understand questions about a fact and to give comprehensible answers to those questions and with the determination of whether any incapacity can be overcome.<sup>68</sup> In recommending this test for the uniform legislation, the ALRC argued that the question of general competence should focus on the witness's ability to "function as a witness".<sup>69</sup> Section 13 permits the disqualification of people from testifying only if any incapacity they have cannot be overcome. It therefore arms the court with the power to permit the employment of an intermediary/interpreter to overcome any difficulties the witness may have in understanding and responding to questions. It also provides the court via s 13(8) with the power to take expert advice on and prescribe the kinds of questions that may be asked both pre-trial and during the course of questioning. Accordingly, in conjunction with advance directives provisions like s 192A, s 13 comprises a neat package for employing creative measures to render witnesses competent and for resolving many difficulties facing child witnesses and witnesses with cognitive impairments. In New South Wales, of course, the powers in s 13 are specifically supplemented by ss 275B and 306ZK(3)(b) of the *Criminal Procedure Act 1986* (NSW).

The competence of children and witnesses with cognitive impairments is not always challenged and tested, though the court may itself raise the issue. When not challenged the competence of witnesses is presumed.<sup>70</sup> In these circumstances, the witness may still require assistance to participate reliably in the court process. To ensure this occurs, adequate pre-trial practices would need to be in place to require information about witnesses' cognitive capacities and the desirability of providing assistance to them to be supplied to the court by the party proposing to call the witness in every case involving children and witnesses with cognitive impairments. This of course assumes the existence of pre-trial processes of the kind considered earlier.

In Queensland and South Australia, courts would appear to have a more direct route available to them to insert intermediaries/communicators into the trial process. While neither jurisdiction has legislated specifically for intermediaries, courts have very broad powers to make orders that might facilitate the reception of evidence from children and witnesses with cognitive impairments. So, in South Australia, ss 13(2)(f) and 13A(2)(f) of the *Evidence Act 1929* (SA) provide that if a witness suffers from a mental disability (which includes an intellectual disability), the court may order that his

<sup>67</sup> *Evidence (Children and Special Witnesses) Act 2001* (Tas), ss 4, 8(2)(b).

<sup>68</sup> 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 comprehend and be comprehended.

<sup>69</sup> ALRC, *Uniform Evidence Law*, Report 102 (2006) at [4.5], <http://www.alrc.gov.au/report-26> quoting ALRC, *Evidence (Interim)*, Report 26 (1985) at [236]. 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 1977* (Qld), ss 9A-9B. So there is at least a degree of commensurability 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 assistance to determine witnesses' competence: *Evidence Act 1929* (SA), s 9(3); *Evidence Act 1977* (Qd), 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), ss 13(3), 13A(3).

<sup>70</sup> See Uniform Evidence Acts, s 13(6); *Evidence Act 1977* (Qld), s 9.



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or her evidence be taken in a way that will, in the court's opinion, facilitate the taking of the evidence. In Queensland, s 21A(3)(f) of the *Evidence Act 1977* (Qld) enables the court to make any order or give any direction about the giving of evidence by "special witnesses" (which includes children under 16 years of age 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. To date, these provisions have not been used as suggested here, but none is restrictive of the kinds of orders that might be made. Effectively, they 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.

There may also be some potential for using provisions relating to interpreters<sup>71</sup> and deaf and mute witnesses<sup>72</sup> 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 (NSWLRC) seemed 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*.<sup>73</sup> Nevertheless, it acknowledged that, and as is clear from the discussion above, there are major distinctions between the role of an interpreter and that of an intermediary.<sup>74</sup>

### Video recording of testimony taken in the absence of the jury

Technology now provides increased opportunities for obtaining reliable evidence from witnesses for whom the normal process of giving oral evidence before the jury may reduce the amount of reliable evidence they give.<sup>75</sup> The particular technological device that targets problems of comprehension, communication and sub-optimal questioning is the pre-recording in pre-trial proceedings in the absence of the jury of the entire (examination-in-chief, cross-examination and re-examination) testimony of children and witnesses with cognitive impairments.

The pre-recording of the entirety of the witnesses' evidence facilitates judicial intervention because agreed editing out of such intervention (and any inappropriate questioning) circumvents the problems associated with it noted above. For the same reason, pre-recording promotes discussion and agreement about the questioning process as that questioning occurs. In this way it promotes the application of ss 41 and 42(2) of the uniform evidence legislation and equivalent non-uniform evidence legislation provisions. While in most Australian jurisdictions there is now specific statutory provision for the totality of particular witnesses' evidence to be obtained in this manner,<sup>76</sup> there is yet to be comprehensive provision in this regard in New South Wales and Tasmania. In South Australia, it appears that the potentially applicable statutory provision to this effect is not actually being utilised.

In New South Wales and Tasmania, there is provision for pre-recorded statements made by designated witnesses to be admitted into evidence in designated cases as all or part of their evidence-in-chief.<sup>77</sup> In Tasmanian criminal proceedings this provision applies only to child complainants in respect of a defined range of offences and does not extend to witnesses with cognitive impairments. Contrary to recommendations made in 1990 by the Tasmanian Law Reform

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<sup>71</sup> Uniform Evidence Acts, s 30; *Evidence Act 1977* (Qld), s 131A; *Evidence Act 1929* (SA), s 14.

<sup>72</sup> Uniform Evidence Acts, s 31.

<sup>73</sup> NSWLRC, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) at [7.8]-[7.9], <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r80toc> viewed 10 January 2013.

<sup>74</sup> See also Bar of England and Wales, n 1, p 3.

<sup>75</sup> ALRC, *The Use of Closed-Circuit Television for Child Witnesses in the ACT: Children's Evidence Research Paper 1* (1992) at [7.23]. Note that, in the pre-recording process, use may still be made of other modes of testifying like CCTV, see for example, *Evidence Act 2011* (WA), s 106K.

<sup>76</sup> *Evidence Act 1977* (Qld), ss 21A, 21AI-21AO; *Evidence Act 1929* (SA), s 13A(2)(b); *Criminal Procedure Act 2009* (Vic), ss 198, 369-370, 374; *Evidence Act 1906* (WA), ss 106I, 106RA; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), Div 4.2B; *Evidence Act* (NT), s 21B.

<sup>77</sup> *Evidence (Children and Special Witnesses) Act 2001* (Tas), s 5(1); *Criminal Procedure Act 1986* (NSW), s 306U(1).

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Commissioner,<sup>78</sup> there is no provision for the pre-recording or external recording of witnesses' cross-examination and re-examination. In New South Wales, the pre-recording provision is similarly limited to examination-in-chief but it does apply to both children and witnesses with cognitive impairments and is not confined to particular offences. It has been suggested that recording statements for use as evidence-in-chief may be of limited value where similar provision is not made for pre-recording of cross-examination and re-examination<sup>79</sup> or unless cross-examination occurs very soon thereafter.<sup>80</sup> Additionally where only evidence-in-chief is pre-recorded, the difficulty remains that monitoring of cross-examination must occur in the presence of the jury with all the attendant disincentives that creates for judicial intervention.

In other jurisdictions, provisions for the pre-recording of the entirety of witnesses' testimony may apply in proceedings for a limited range of offences only. This is the case in the ACT and the Northern Territory.

Western Australia has had experience with pre-recorded testimony since 1992 when s 106I(b) of the *Evidence Act 1906* (WA) was enacted. A raft of advantages has been identified<sup>81</sup> for this provision, including improvements in the quality of testimony because it is given closer in time to the events in question,<sup>82</sup> earlier release of witnesses from the stress of testifying,<sup>83</sup> enabling the defence to prepare the rest of its case knowing exactly what are the strengths and weaknesses of the primary prosecution witness<sup>84</sup> and, on that basis, encouraging early pleas,<sup>85</sup> and enabling the prosecution to amend indictments and adjust opening addresses.<sup>86</sup> Research on the Western Australian procedure has also shown that it is has been accepted into the legal landscape and is working well.<sup>87</sup>

The situation in South Australia is intriguing. While ss 13(1) and 13A(2)(b) of the *Evidence Act 1929* enable courts to order that the evidence of children and witnesses with cognitive impairments be taken outside the trial court, audio-visually recorded, and replayed in the trial court, there does not seem to be widespread recognition of their potential in this regard. For example, the South Australian Attorney-General has announced his intention to enact reforms that will enable the pre-trial recording of witnesses' testimony to obviate the necessity for them to testify at trial.<sup>88</sup> Yet it is clear from the Second Reading Speech for the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA), which introduced the current ss 13(1) and 13A(2)(b) into the *Evidence Act*, that they enacted the recommendation of the Layton Report<sup>89</sup> that the evidence of children be electronically recorded before trial and that that recording replace the witnesses' in court testimony. In fact, these provisions go further than the Layton Report recommendations and extend to vulnerable witnesses<sup>90</sup> more generally, including witnesses with cognitive impairments.

<sup>78</sup> Tasmanian Law Reform Commissioner, *Child Witnesses*, Report No 62 (1990).

<sup>79</sup> ALRC, *Family Violence – A National Legal Response*, Report No 114 (2010) at [26.178].

<sup>80</sup> NSWLRC, n 73 at [7.18].

<sup>81</sup> See those enumerated by the ALRC, n 79 at [26.168]-[26.180].

<sup>82</sup> ALRC, n 79 at [26.168].

<sup>83</sup> ALRC, n 79 at [26.168].

<sup>84</sup> Sleight, n 43, p 13.

<sup>85</sup> Cashmore J, "Innovative Procedures for Child Witnesses" in Westcott et al, n 14, p 213.

<sup>86</sup> Sleight, n 43, p 13.

<sup>87</sup> Hanna et al, n 54, pp 150-151; Richards K, *Child Complainants and the Court Process in Australia*, Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice, Paper No 380 (2009) p 5, <http://www.aic.gov.au/publications/current%20series/tandi/361-380/tandi380.aspx>.

<sup>88</sup> Hon John Rau, *Improving the Justice System for Vulnerable Witnesses*, News Release (29 November 2011).

<sup>89</sup> Layton R, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children*, Department for Education and Child Development, Adelaide (2003) at [15.25]-[15.27].

<sup>90</sup> The definition of "vulnerable witness" in s 4 of the Act includes witnesses under the age of 16 years and witnesses with a mental disability.



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The former Attorney-General, the Hon MJ Atkinson, explained that these provisions would be especially useful in cases where the trial takes place several years after the alleged offence. He also noted that this arrangement would be mandatory for vulnerable witnesses in any case where an application is made for its use and the preconditions for its use are satisfied.<sup>91</sup> In the absence of an application the court is essentially required to act on its own motion.<sup>92</sup> However, these provisions are not easy to operate. The preconditions for their use are quite formidable and in all likelihood discourage applications being made or trial judges making orders under them on their own initiative. Pre-recording facilities must be readily and practicably available and the pre-recording of the testimony must not incur any prejudice to any party to the proceedings. The last matter patently offers fertile grounds for argument and curial wariness. Nevertheless, these provisions exist and an attempt at least should be made to exploit them, particularly in view of the potential they offer for evidence to be taken in the absence of the jury and, thus, for some rigour to be exercised in controlling cross-examination. Section 34CA of the Act appears to be used in preference to these provisions. This section enables out of court statements made by young children and complainants with mental disabilities to be admitted from the people to whom the statements were made. While this section does attempt to restrict the cross-examination of those who made the statements, it does not deal with control of inappropriate cross-examination of the kind under discussion here.<sup>93</sup> Further, cross-examination under this section will not occur in the absence of the jury or be pre-recorded so as to facilitate that kind of control being exerted. Accordingly, s 34CA does not offer the opportunity to control cross-examination in the same way as ss 13 and 13A.<sup>94</sup>

The question for Tasmanian and New South Wales courts is whether, in the absence of specific legislation dealing with video recording of the entirety of a witness's testimony, it might nevertheless occur. Sections 26, 29 and 192A of the Uniform Evidence Acts are relevant in this regard as are s 361A of the *Criminal Code 1924* (Tas) and provisions in the *Criminal Procedure Act 1986* (NSW) such as ss 139 and 247G. Section 26(a) provides that the court may make such orders as it considers just in relation to the way in which witnesses are to be questioned. Section 29(1) provides that a party may question a witness in any way the party thinks fit, except as directed by the court. However, there is some authority to suggest that these provisions are solely "trial in progress"<sup>95</sup> provisions. On this interpretation they could not empower courts to take evidence in or to make orders that evidence be taken in *pre-trial* proceedings. However, this still leaves the possibility for advance directions to be given under s 192A of the Uniform Evidence Acts, s 361A of the Tasmanian *Criminal Code* and ss 139 and s 247G of the *Criminal Procedure Act 1986* (NSW) with respect to the application of ss 26 and 29 at trial. When applying this approach, a court might make pre-trial orders that at trial the evidence of particular witnesses is to be taken in the absence of the jury, recorded on video and the recording replayed to the jury. This same approach might be taken by ACT courts under the *Evidence Act 1995* (Cth) to expand the categories of cases where testimony might be taken in the absence of the jury (even though during the trial) and audio-visually recorded.

While this would of course mean that some of the benefits of pre-trial pre-recording of testimony would be lost, it would still support the desired control of cross-examination that the presence of a jury appears to preclude. Further, this approach avoids some drawbacks identified for the pre-trial

<sup>91</sup> South Australian House of Assembly, *Hansard* (25 October 2007) p 1451.

<sup>92</sup> Section 13(1) of the Act provides that in any case where it is desirable to make special arrangements for taking evidence from a witness the court should, on its own initiative, order special arrangements to be made.

<sup>93</sup> The restrictions on cross-examination in s 34CA focus on whether it "is likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence": *Evidence Act 1929* (SA), s 34CA(2). Section 34CA presents significant interpretive difficulties which have been considered at length elsewhere; see, in particular, Caruso D, "Proposed Reforms for the Cross-examination of Child Witnesses and the Reception and Treatment of their Evidence" (2012) 21 JJA 191 at 208-211, and which the South Australian Court of Appeal has attempted to resolve in two cases: *R v J, JA* (2009) 105 SASR 563; 199 A Crim R 1; *R v Byerley* (2010) 107 SASR 517; 206 A Crim R 157.

<sup>94</sup> See also Caruso, n 93 at 211, who argues on other grounds that s 34CA is unlikely to ameliorate children's experience of cross-examination.

<sup>95</sup> *Finchill Pty Ltd v Abdel-Messih* (unreported, NSWSC, Levine J, 13 July 1998); *Sharp v Rangott* (2008) 167 FCR 225 at [49].



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recording of testimony. For example, it does not require the defence to cross-examine the main prosecution witness before the formal trial has begun and the Crown's opening address given, and in doing so to disclose its hand in advance of the trial proper.<sup>96</sup> It also avoids problems that might arise from tardy disclosure of the prosecution case.<sup>97</sup> Further, many of the advantages of pre-trial recording still apply: any inadmissible evidence and judicial intervention can be edited from the recording; there can be greater flexibility in taking the evidence – for example, an increased number of breaks can be accommodated where the witness is tiring; and the recording can be re-used if there is a retrial so that the witness is not required to testify and submit to cross-examination on multiple occasions.<sup>98</sup>

There is also the potential for courts to exploit their inherent jurisdiction to ensure that trials are conducted fairly<sup>99</sup> to extend the reach of pre-recording procedures. For example, courts in New Zealand and the United Kingdom have held that they have the inherent power and even a duty<sup>100</sup> to enable witnesses who fall outside statutory provisions to give their evidence in alternative ways to ensure their effective participation in proceedings and thus that trials are fair.<sup>101</sup> We see general statements of principle to like effect from the European Court of Human Rights.<sup>102</sup> If courts have the power to control the questioning of witnesses, then it seems logical that they also have the power to control the procedure for that questioning and its mode of presentation to a jury.

Australian courts may, of course, consider such modifications to the conventional trial process as requiring legislative imprimatur. In particular they may be susceptible to the argument that current statutory provisions represent a legislative intent to confine the pre-recording of evidence within defined limits. An exercise of inherent curial powers in order, effectively, to extend the scope of those provisions might be considered to trespass into the legislative arena. This argument may resonate strongly if there is limited infrastructure to support the pre-recording of the entirety of witnesses' testimony, as may the case in New South Wales and Tasmania. The financial implications of implementing this procedure in the absence of specific legislative provision may be perceived to render it practicably beyond the scope of the courts' powers to order. The "legislative intent" and financial implications arguments are less powerful in jurisdictions like the ACT where pre-recording procedures have been enacted and where the argument is simply for the extension of those procedures to witnesses who fall beyond the scope of existing statutory provisions.

## PRACTICAL CONSTRAINTS ON THE DEPLOYMENT OF SPECIAL MEASURES

If courts do have adequate statutory or inherent authority to deploy the measures recommended in this article, then the question remains whether there are any practical or fair trial constraints upon their doing so. In the absence of research into the matter, answers to the question why provisions like s 106F of the *Evidence Act 1906* (WA), ss 275B and 306ZK(3)(b) of the *Criminal Procedure Act 1986* (NSW) and ss 13(1) and 13A(2)(b) of the *Evidence Act 1929* do not appear to be being used must remain speculative. It might be that practitioners are not aware of their potential or that innate

<sup>96</sup> The New Zealand Court of Appeal expressed concern about this in *M v R* [2012] 2 NZLR 485 at [34].

<sup>97</sup> Also a matter of concern to the New Zealand Court of Appeal in *M v R* [2012] 2 NZLR 485 at [35] in relation to early pre-trial recording of evidence.

<sup>98</sup> On all these points see Sleight, n 43, pp 9-12.

<sup>99</sup> In uniform evidence legislation jurisdictions, courts' inherent power to control the conduct of proceedings is preserved by s 11(1) of the Acts.

<sup>100</sup> *R v H* [2003] EWCA Crim 1209.

<sup>101</sup> *R v Rihari* [1989] 1 NZLR 660 at 667-668; *R v Moke & Lawrence* [1996] 1 NZLR 263; *R v Kaio* (unreported, T 259/92, Auckland High Court, Robertson J, 12 March 1993); *R v Vloet (No 2)* (unreported, TY 34/88, Auckland High Court, Hillyer J, June 1988); *R v Accused* [1992] 1 NZLR 257; *R v Daniels* (1993) 10 CRNZ 165 at 168; *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 at [59]; *R(P) v West London Youth Court* [2006] 1 WLR 1219 at [26]; *C v Sevenoaks Youth Court* [2009] EWHC 3088 at [11]-[18]; *R v Walls* [2011] EWCA Crim 433 at [37]; *The Queen on the Application of AS v Great Yarmouth Youth Court* [2011] EWHC 2059.

<sup>102</sup> *SC v the United Kingdom* 2005 40 ECHR 20 at [28]-[29], [35].

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conservatism discourages their use. It may be, as Jackson J suggested in relation to the Western Australian intermediary provision, that there are practical barriers to their employment.<sup>103</sup>

An obvious practical constraint on the pre-recording of the entirety of witnesses' testimony is the availability of the necessary infrastructure for this to occur. In regional and remote areas in particular, this may constitute a real barrier to the adoption of this measure. Yet the majority of Australian jurisdictions have now legislated for the pre-recording of the entirety of specified witnesses' testimony, which suggests that access to the necessary facilities is not an insurmountable problem. In fact, it might be argued that wherever there are courts and police stations, pre-recording should be feasible – or at least equally as feasible as the provision of CCTV facilities for witnesses, which are now available Australia wide. Of course, fiscal considerations cannot be ignored, but courts have, on occasion, delivered judgments that have nudged governments towards the funding of infrastructure perceived to be central to the maintenance of a just criminal justice system.<sup>104</sup>

The use of intermediaries is trickier. A fully fledged professional service such as that operating in the United Kingdom depends upon there being people with adequate training in adequate numbers, which in turn depends upon there being adequate training programs. Neither may be available in the absence of specific government provision for them. However, in all jurisdictions there are child psychologists and government and non-government advocacy service providers skilled in communicating with people with cognitive impairments. It has been suggested that the fiscal implications of providing additional tuition to prepare these people for the role of court intermediary would be negligible<sup>105</sup> and that the cost of their employment in trials should be viewed in the same way as that associated with any expert witness tendered by the prosecution or interpreter appointed by the court.<sup>106</sup> There is also evidence that use of intermediaries and pre-recording 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.<sup>107</sup>

Nevertheless, there may be difficulties in some cases in finding an appropriate intermediary for a child witness or witness with a cognitive impairment. For example, the person who best understands a witness with a cognitive impairment may be a family member with considerable experience in communicating with the witness. Such people may find it difficult to maintain an independent stance in “translating” witnesses' answers for the court. Independent experts formally trained in communicating with children or witnesses with cognitive impairments may be thin on the ground. Without such training it may be difficult to ensure the quality and reliability of the “translation” in individual cases.<sup>108</sup> Further, the degree and nature of the communication assistance required will vary from witness to witness. These matters will be relevant to whether and if the courts are able to apply and are justified in applying the statutory provisions discussed above for the benefit of witnesses.

## HUMAN RIGHTS IMPLICATIONS

In the context of the present discussion, the right of primary concern is the right to a fair trial. This right sits within a broader human rights framework comprising the right to be free from cruel, inhuman or degrading treatment, the right of all persons to be equal before the courts, the right not to be discriminated against, the right to dignified treatment,<sup>109</sup> the right to be protected from degrading

<sup>103</sup> Jackson, n 57, p 9.

<sup>104</sup> As occurred in the wake of the High Court decision in *McKinney v The Queen* (1991) 171 CLR 468; 52 A Crim R 240, which led to the establishment of video recording facilities for police interviews of suspects.

<sup>105</sup> Caruso, n 93 at 216.

<sup>106</sup> Caruso, n 93 at 231.

<sup>107</sup> See Davies et al, n 14 at 360; Hanna et al, n 54, p 181; Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005) p 132.

<sup>108</sup> All these problems were identified by the NSWLRC, n 73 at [7.9].

<sup>109</sup> See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7; *Human Rights Act 2004* (ACT), Preamble. For further consideration see Gans J, Henning T, Hunter J and Warner K, *Criminal Process and Human Rights* (Federation Press, 2011)



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treatment, the right to security of the person, the right to life, and the right to privacy.<sup>110</sup> The once defendant-centric conceptions of the right to a fair trial have been broadened to include a triangulation of fair trial rights comprising the rights of the accused, those of the victim, and the rather more amorphous rights of the community.<sup>111</sup> The rights of victims and community interests in fair trials are violated where witnesses and victims cannot be heard because of a perceived inability to educe evidence from them in a manner that could achieve a reasonable prospect of conviction. International human rights jurisprudence tells us that States and domestic courts have an obligation to uphold victims' rights by redressing defects in existing laws and procedure.<sup>112</sup>

So what are the human rights implications of giving pre-trial directions about the questioning of children and witnesses with mental impairments? Clearly this process will place restrictions on the latitude that has traditionally been granted parties in their cross-examination of witnesses.<sup>113</sup> Care would therefore be required to ensure that such restrictions do not go beyond what is necessary to ensure that the witness is able to communicate his or her account coherently and is not cross-examined in a manner that distorts his or her testimony or deprives him or her of the opportunity to give a reliable account of events. If no more than this is done, the right of the accused to a fair trial will not be imperilled. Cross-examination that produces misleading testimony or so bamboozles a witness that he or she cannot recall an event accurately, or mistakenly agrees to something which is not true does not advance the right of an accused to a fair trial. No participant in the trial process has a *legitimate* interest in producing such consequences.<sup>114</sup> Instead all trial participants share a legitimate interest in fair treatment and accurate fact finding. Therefore control of cross-examination that is conducive of these ends, in fact, accords with the accused's right to a fair trial.

Extra-curially, Ellis J has endorsed this approach:

it should be borne in mind that there is a considerable imbalance between professional lawyers and child witnesses. It is a very moot point whether the presently accepted defence questioning styles and methods effectively test the efficacy of evidence. Arguably, it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony.<sup>115</sup>

His Honour therefore argued that procedural fairness for all witnesses (including the accused) is difficult, if not impossible to achieve without effective judicial case management.<sup>116</sup>

Restraint in cross-examination does not in any event preclude the defence from putting its case to the witness and testing the credibility of the witness's account. On this point the English Court of Appeal stated in *R v Barker*:

it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the

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Ch 9; Henning T and Hunter J, "Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?" in Roberts P and Hunter J (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing Ltd, 2012) Ch 15.

<sup>110</sup> *Doorson v Netherlands* (1996) 22 EHRR 330 at [70]; *Van Mechelen v Netherlands* (1998) 25 EHRR 647 at [53]. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13; *Human Rights Act 2004* (ACT), s 12.

<sup>111</sup> See, for example, *R v A (No 2)* [2002] 1 AC 45 at [38] (referring to "the familiar triangulation of interests of the accused, the victim and society"); *Attorney General's Reference No 3 of 1999* [2001] 2 AC 91 at 118; *R v H* [2004] 2 AC 134 at [12]; *R v Grant* [2007] 1 AC 1 at [17]; *R v Mayers* [2009] 1 Cr App R 3; *Jago v District Court (NSW)* (1989) 168 CLR 24 at 49-50, 54; *R v Lodhi* (2006) 163 A Crim R 488 at 501-502; *Ragg v Magistrates Court of Australia* (2008) 18 VR 300 at 319. For a detailed consideration of this re-conceptualisation of fair trial rights, see Gans et al, n 109, Ch 9.

<sup>112</sup> *X & Y v Netherlands* (1985) 8 EHRR 235; *X v The Netherlands* (1985) 8 EHRR 235 at [27].

<sup>113</sup> *Wakeley v The Queen* (1990) 64 ALJR 321 at 325.

<sup>114</sup> Ashworth A and Redmayne M, *The Criminal Process* (4th ed, Oxford University Press, 2010) p 44.

<sup>115</sup> Ellis, n 23 at [30].

<sup>116</sup> Ellis, n 23 at [10], [12].

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advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.<sup>117</sup>

What of the recording of testimony in the absence of the jury? The New Zealand Court of Criminal Appeal has expressed reservations about this process. In human rights terms, the court's major concerns centred on the accused losing opportunities to tailor his or her cross-examination in response to juror reactions to the witness, problems that might arise from the non-disclosure of the Crown case until after the pre-recording had occurred and the need for the accused to display his or her hand before the formal trial had begun.<sup>118</sup> Disquiet was also expressed about the cost implications of the process and its impact on trial efficiency. With regard to the fair trial considerations for the accused, for the most part they do not arise under one model proposed here because the recording of the witness's testimony would occur as part of the formal trial. Further the considerable experience of pre-recording in Western Australia does not appear to substantiate the Court of Appeal's concerns.<sup>119</sup> Most significantly, the process of pre-recording greatly facilitates the educing of coherent evidence from child witnesses and witnesses with mental impairments while preserving the accused's right to test that evidence through cross-examination.<sup>120</sup> Further, in *R (D) v Camberwell Green Youth Court*,<sup>121</sup> the House of Lords held that there is nothing intrinsically unfair in witnesses giving their evidence via video recording.

Finally, what is the scope for using intermediaries/interpreters in a confrontational setting where there is a need and a right to achieve effective cross-examination? In this regard a primary issue is whether the use of an intermediary prevents the defence from fully bringing to bear the forensic techniques of the advocate. This is also an issue that arises in relation to restrictions the court might impose on the way cross-examination may be conducted and the questions that may be asked. Clearly both measures truncate the use that can be made of the full panoply of cross-examination techniques. But the rationale for doing so is that the usual practices of cross-examination are likely to involve a violation of all principles of best practice for obtaining a reliable account from child witnesses and witnesses with cognitive impairments.<sup>122</sup> The employment of intermediaries is, in fact, based upon fair trial principles, in particular the right to effective participation in the trial process and to equality before the law. The use of intermediaries probably provides a greater insurance against unsuitable questioning than relying solely on counsel or the trial judge to ensure that questions are appropriately framed. Their particular expertise is not in this area. Their specialist knowledge is rather of the traditional model of cross-examination.

The use of intermediaries also presents practical problems of ensuring that any "translation" of questions and answers actually conforms to the questions asked and the answers given. Counsel can, of course, ensure that any rephrased questions are accurate. However, the accuracy of rephrased

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<sup>117</sup> *R v Barker* [2010] EWCA (Crim) 4 at [42]. See to similar effect, *R v Edwards* [2011] EWCA 3028; *Re W* [2010] 12 at [28].

<sup>118</sup> *M v R* [2012] 2 NZLR 485 at [34]-[35].

<sup>119</sup> Sleight, n 43, p 13. For international commentary, see Hoyano L and Keenan C, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2007); Powell, n 19.

<sup>120</sup> For a detailed critique of the New Zealand Court of Criminal Appeal's reasoning in *M v R* see Henderson E, "Pre-recording Children's Evidence: R v M; R v E" (2011) 35 Crim LJ 300.

<sup>121</sup> *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393 at [48]-[49].

<sup>122</sup> Sleight, n 43, p 3 citing Spencer J and Flinn R, *The Evidence of Children; the Law and Psychology* (2nd ed, Blackstone Press, 1993) p 307.

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answers may be less easy to gauge. For this reason, in Ireland, intermediaries' intervention is limited to the asking of questions not answering them. The New Zealand Law Commission also recommended this approach.<sup>123</sup> Nevertheless, the intermediary should also be able to explain and translate for the benefit of the court any idiosyncrasies in the witness's communication – for example if the witness's nodding of the head means “no” rather than “yes”.

In *Re W*, Lady Hale commented that fairness to the accused does not depend upon how a witness testifies or on how that witness's testimony is tested but upon whether the method used is reliable and thorough:

The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video'd cross examination as proposed by Pigot. Another is cross-examination via video-link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and as used to be much more common than it is now in the courts of this country.<sup>124</sup>

Further, the European Court of Human Rights has made clear that the right to a fair trial does not require questions to be put directly to witnesses by the accused or his or her defence counsel.<sup>125</sup> The approach in all these cases is supported by research that shows that juries' decision-making is not influenced against the accused where alternative measures for testifying are used for witnesses and complainants.<sup>126</sup> This research would also appear to scotch the notion that the use of special measures to educe witnesses' evidence is inherently incompatible with an accused's fair trial rights.

The conclusion of this brief analysis of the fair trial implications of the provisions discussed above is that the fair trial is not compromised because the forensic cross-examination techniques of the advocate have to be adapted to enable a child witness or witness with a mental impairment to give the best evidence of which he or she is capable.<sup>127</sup>

Clothed in the garb of orthodoxy and tradition, cross-examination has often been little more than a legitimated form of bullying.<sup>128</sup> Even where this has not been the case, evidence taking conventions and rules have often prevented children and witnesses with cognitive impairments from testifying either at all or, at least, reliably and coherently. This should never have been and should not continue to be the case, especially not in the name of the accused's right to a fair trial. It has cast a shadow upon the repute of the criminal justice process. It casts the same shadow upon the law and the legal profession. The discussion in this article suggests that courts have at their disposal the means to alter that *modus operandi* via existing statutory provisions that might be deployed to this end. Practical matters do not appear to impose insurmountable impediments and fair trial constraints can be accommodated. All that is necessary then is the will and the courage to use resourcefully the tools that are to hand to break the bonds of the procedural and questioning conventions that have excluded many children and witnesses with cognitive impairments from the protection of the law.

<sup>123</sup> *Criminal Evidence Act 1992* (Ireland), s 14. See also The Law Commission (New Zealand), n 43 at [172]-[173].

<sup>124</sup> *Re W* [2010] UKSC 12 at [28].

<sup>125</sup> *SN v Sweden* (2004) 39 EHRR 13 at [52].

<sup>126</sup> Cashmore and Trimboli, n 8; Hanna et al, n 54; Taylor N and Joudo J, *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), <http://www.aic.gov.au/en/publications/current%20series/rpp/61-80/rpp68.aspx>; Ellison L and Munro VE, *Special Measures in Rape Trials: Exploring the Impact of Screens, Live Links and Video-Recorded Evidence on Mock Juror Deliberation* (University of Nottingham and University of Leeds, 2012); Friedman N and Jones M, “Children Giving Evidence of Sexual Offences in Criminal Proceedings: Special Measures in Australian States and Territories” (2005) 14 JJA 157.

<sup>127</sup> This conclusion is an adaptation of a point made in relation to witness competence by the English Court of Appeal in *R v Barker* [2010] EWCA Crim 4 at [42].

<sup>128</sup> See in particular the disturbing accounts of the cross-examination and patchy protection of children in Eastwood and Patton, n 66, particularly at pp 59-61, 67-68, 74-88, 89-93.

