



Justice  
Victims Services

# **Children's Champion (witness intermediary)**

**Procedural guidance manual  
(2016)**



Produced by Victims Services, NSW Department of Justice

Further copies may be obtained from

Victims Services  
Locked Bag 5118  
Parramatta NSW 2124

P: 1800 633 063

F: 02) 8688 9632

E: [vs@justice.nsw.gov.au](mailto:vs@justice.nsw.gov.au)

W: [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

March 2016

## Contents

Terminology.....	4
Introduction.....	4
Acknowledgements.....	5
Code of conduct for children’s champions.....	5
Professional information.....	7
Background to the children’s champion pilot scheme.....	8
Existing provisions for witnesses.....	11
The role of the children’s champion.....	12
Witness competence.....	13
Law and practice in New South Wales.....	13
Children’s champion procedural steps.....	15
Children’s champion assessment.....	18
Preliminary report for the police case officer.....	19
Assessment report for court.....	20
Children’s champions intervening during cross-examination.....	25
Appendix 1: Law and intermediary practice in England and Wales.....	26
Appendix 2: Sexual Assault Communications Privilege (SACP).....	31
Appendix 3: Further resources.....	32
References.....	32

## Terminology

In this publication the term ‘witness’ should be taken to include a complainant (the alleged victim) as well as a person who provides evidence of the alleged crime, for example through their observation as a bystander.

The Joint Investigation Response Team (JIRT) process is a formal arrangement arising from a Memorandum of Understanding (MoU) between the New South Wales Police Force, Family & Community Services (FaCS) and NSW Health. This process exists to provide a timely, coordinated and comprehensive response to children and young people who have been subjected to sexual abuse, serious physical abuse and/or serious neglect, (where the abuse constitutes a criminal offence). The process is collaborative, however each agency has their own individual roles and responsibilities, which are clearly defined. Police investigate the criminal offences and initiate criminal proceedings where appropriate. FaCS receive and assess child at risk reports and ensures the safety and ongoing care of children. NSW Health provide for medical examinations and ongoing counselling.

## Introduction

The NSW Government has made a commitment to pilot a specialist child sexual assault evidence program to include the introduction of children’s champions to support child witnesses through the trial process and expand the use of pre-recorded evidence in criminal court proceedings. These reforms aim to reduce trauma experienced by child witnesses in the criminal justice process while preserving the rights of an accused to a fair trial. The initiative will initially be piloted in Sydney and Newcastle District Courts.

This procedural guidance manual is intended to be a reference document for children’s champions. The role of the children’s champion (who may also be called a witness intermediary) was established by the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*. Children’s champions are officers of the court. Their advice is impartial and their aim is to facilitate communication between the police and the child when s/he is interviewed and later, if the matter goes to trial, to facilitate communication in court if s/he is called as a witness.

Victims Services within the NSW Department of Justice will administer the children’s champion pilot scheme. This procedural guidance manual reflects the position as at February 2016. It is expected that over the course of the children’s champion pilot scheme as knowledge and usage of children’s champions grows, procedures and practices will evolve. Suggestions for inclusion in future updates to the procedural guidance manual may be sent to Victims Services.



Mahashini Krishna  
Commissioner of Victims Rights

Victims Services  
Locked Bag 5118  
Parramatta NSW 2124

P: 1800 633 063

F: (02) 8688 9632

E: [vs@justice.nsw.gov.au](mailto:vs@justice.nsw.gov.au)

W: [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

## Acknowledgements

Victims Services, Department of Justice (NSW) acknowledges and thanks Members of the Child Sexual Assault Task Force and Implementation and Monitoring Group for their assistance in the development of the children's champion pilot scheme and this procedural guidance manual.

The Department of Justice also acknowledges the contribution of Ms Amy Watts for her Churchill Fellowship research and extensive work in the area of child witnesses and the use of intermediaries.

The Department of Justice engaged Professor Penny Cooper to write this procedural guidance and to develop and deliver training for the first children's champions based on her extensive experience designing, developing and researching the witness intermediary role in the United Kingdom. We would also like to acknowledge the assistance of Dr Michelle Mattison who co-facilitated training with Professor Cooper, delivered to the children's champions as well as Judicial Officers, legal practitioners and police in the pilot locations.

## Code of conduct for children's champions

This Code of Conduct applies to children's champions (also known as 'witness intermediaries') as defined in and appointed under the Criminal Procedure Amendment (*Child Sexual Offence Evidence Pilot*) Act 2015).

1. A person appointed as a children's champion for a witness must communicate and explain to the witness, questions put to the witness, and to any person asking such a question, the answers given by the witness in replying to them and explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
2. A children's champion is an officer of the court and as such must conduct themselves in a professional and courteous manner at all times.
3. A children's champion's duty to the court is paramount.
4. A children's champion must act in accordance with the *Children's champion (witness intermediary) procedural guidance manual*.
5. A children's champion must impartially facilitate communication by and with the witness.
6. A children's champion must have qualifications, training, experience or skills as prescribed by the relevant regulations and maintain such qualifications, training, experience or skills as are necessary to perform the functions of the role of children's champion.
7. A children's champion should only accept a referral that is within their skills, expertise and capabilities.
8. A children's champion must not accept or continue to undertake an appointment as a children's champion for a witness if they are a relative, friend or acquaintance of the witness, or have assisted the witness in a professional capacity (other than as a children's champion), or are a party or potential witness in the proceedings concerned.

9. A children's champion must keep records of their involvement in a case from referral onwards and process all case information securely and in accordance with NSW privacy law and good practice.
10. A children's champion must act in such a way as to support the upholding of victims' rights as set out in the Charter of Victims Rights.<sup>1</sup>
11. The children's champion appointed for a witness must ensure that appropriate informed consent by or on behalf of the witness for assistance from the children's champion is obtained, maintained and recorded.
12. The children's champion appointed for a witness must, if requested by the court, provide a written report ('the assessment report') on the communication needs of the witness.
13. The children's champion must make available a copy of their assessment report so that it may be provided to the parties to the proceedings concerned before the witness gives evidence in the proceedings and no later than the date directed by the court.
14. The children's champion's assessment report should be impartial and independent. A useful test of independence is that the children's champion would provide the same report and recommendations regardless of whom they provide the report for.
15. If, after producing an assessment report, the children's champion's recommendation changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.
16. If required by the court, the children's champion must be available at court when the witness, for whom they have been appointed, is to give evidence.
17. The children's champion must take the children's champion oath or affirmation, at court.
18. A children's champion should not be alone with the witness at any time.
19. When the children's champion is with the witness giving evidence to the court, the children's champion must ensure that the judge and the legal practitioners acting in the proceedings are able to see and hear the giving of the evidence, see and hear the children's champion and communicate with the children's champion.
20. A children's champion must neither enter into discussions, nor offer or express an opinion on the veracity of a witness's complaint or on the strength or otherwise of any case they are appointed in.
21. A children's champion must not discuss any aspect of the witness's evidence with the witness. A children's champion must inform the police case officer/ ODPP case worker/ prosecution counsel straightaway if the witness discloses information to them which is relevant to the case.
22. A children's champion must notify the Witness Intermediary Registration Panel (Victims Services) immediately of any criminal investigation or proceedings against them or any other complaint or investigation into their conduct or competence.
23. A children's champion must at all times respect the authority and judgement of the court.
24. A children's champion must keep the person engaging them informed of any actual or perceived conflict of interest that arises or becomes apparent in the course of their appointment.
25. A children's champion must keep the person engaging them informed of any difficulty that arises or that may arise in the course of their assignment that may affect the prospects of best evidence being given by the witness.
26. A children's champion must not use improperly any information or knowledge gained during the course of their work to benefit themselves or anyone else. Confidentiality of information provided must be maintained.

## Professional information

### Governance of the children's champion pilot scheme

Governance is undertaken by Victims Services, Department of Justice (NSW). The Implementation and Monitoring Group, convened by Victims Services, will monitor progress of the pilot and consultation will occur through this group.

### Quality assurance of children's champions

Quality assurance, regulation and monitoring of the professional standards are undertaken by the Witness Intermediary Registration Panel, convened by Victims Services.

Children's champions are expected to commit to a minimum of 12 days a year in the role, that is in direct face-to-face contact with witnesses.

Where a children's champion anticipates that they will be unavailable to be offered work in this role for known or extended periods of time they should inform Victims Services as soon as possible.

### Children's champion continuing professional development (CPD)

Each children's champion must undertake no less than 14 hours per year role specific continuing professional development (CPD). Peer support group meetings will constitute CPD as well as any post-accreditation training provided by Victims Services.

It is a requirement of the role that a children's champion undertakes role specific CPD and maintains an annual record of their CPD from 1 April of one year to 31 March of the following year. When required, the children's champion must submit their CPD log to Victims Services for review. Failure to submit a CPD log when required may result in suspension or removal from the panel of children's champions.

Children's champions will be offered the opportunity to attend a local children's champion peer support group meeting. Children's champions are strongly advised to attend these meetings. Attendance and participation will count as role specific CPD activity.

### Rates of remuneration for children's champions

Rates of remuneration for children's champions are set by Victims Services.

### Invoicing and taxation

Invoices are to be submitted by the children's champion to Victims Services.

Children's champions are classed as self-employed individuals (although they may be employed elsewhere and make arrangements (for example, take annual leave) with their employer to act in the role of children's champion). Children's champions are not employees of Victims Services and they are therefore under no compulsion to accept work offered to them.

Children's champions are responsible themselves for fulfilling any financial (including tax) obligations in relation to any income received in this role.

### Data privacy

Children's champions must ensure that they act in accordance with NSW privacy law and good practice. The children's champion should seek the advice of Victims Services should they receive a request for information for example from a family court or from legal representatives in other proceedings seeking disclosure of their report. As a general rule children's champions should not disclose details of their involvement, including their assessment report, without a court order.

### Insurance to practice in the role of a children's champion

Children's champions are required to have, and maintain, adequate and appropriate indemnity insurance to practice in the children's champion role. As self-employed, independent practitioners it is the individual responsibility of the children's champion to ensure that they have, and maintain, adequate and appropriate insurance to act in this role.

### Criminal records check

Children's Champions criminal history will be checked through a National Police Check and Working with Children Check.

## Complaints policy and procedure

Any complaints should be made to Victims Services who will progress them to the Witness Intermediary Registration Panel for review and action.

## Background to the children's champion pilot scheme

In 2013 a NSW Parliamentary Joint Select Committee was appointed to inquire into sentencing and sentencing option for perpetrators of child sexual assault. On 14 October 2014 the Joint Select Committee produced its report *Every Sentence Tells a Story*.<sup>2</sup>

A recommendation of that report was that 'the NSW Government introduces trial measures to expand the use of pre-recorded evidence to include all evidence given by child victims (similar to the Western Australian and Victorian models) with a view to assessing whether this approach effectively lessens the stress and duration of court proceedings for child witnesses, without affecting the defendant's right to a fair trial.'<sup>3</sup>

Another recommendation was that 'the NSW Government establishes a Child Sexual Assault Offences Taskforce to investigate and report to the Government on a preferred model for a Child Sexual Assault Offences Specialist Court in NSW.'<sup>4</sup>

In 2015 in response<sup>5</sup> the Government noted that the 'work of the Committee will continue to inform government policies and initiatives that aim to protect children, improve victim experience of criminal proceedings, prevent child abuse, punish offenders appropriately and provide access to effective treatment and rehabilitation to make communities safer.'

The response also noted that, consistent with the committee's recommendations, the government had already committed to a number of initiatives including 'assisting victims of child sexual assault through the criminal trial process by piloting the use of children's champions, specialised judges and pre-recording of a child's testimony.'<sup>6</sup>

In July 2015 the Department of Justice convened a Child Sexual Assault Taskforce to advise the NSW Government on the design and implementation of special measures to better support children in child sexual assault proceedings in particular a pilot scheme for "Children's Champions" and for the pre-recording of the entire testimony of child witnesses.



Subsequently in 2015 Government approval was given for a 'Specialist Child Sexual Assault Pilot Scheme'. This pilot of specialist measures in child sexual assault (CSA) proceedings includes:

- pre-recording of the child's evidence in chief, cross-examination and re-examination in the absences of a jury, and
- the assistance of an accredited children's champion during the child's investigatory interview and in court; the children's champion role will be to facilitate the communication of and with the child witness.

Approval was given for the pilot to last for three years to commence by 31 March 2016 and to take place initially in two areas: in Newcastle (incorporating the Newcastle Joint Investigative Response Team (JIRT) and the District Court sitting at Newcastle) and Sydney (incorporating the Chatswood JIRT and the District Court sitting in Sydney at the Downing Centre).

The *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* became law, amending the *Criminal Procedure Act 1986*. The effect of these amendments is to introduce provisions (pre-recording of evidence and children's champions) for a specialist child sexual assault pilot scheme. These provisions add to the existing provisions which support children giving evidence in criminal proceedings concerning prescribed sexual offences.<sup>7</sup>

Section 88<sup>8</sup> sets out the role of a children's champion (who also may be referred to as a witness intermediary):

### Section 88 Role of children's champions

- (1) A person appointed as a *children's champion* (who may also be called a *witness intermediary*) for a witness is to communicate and explain:
  - (a) to the witness, questions put to the witness, and
  - (b) to any person asking such a question, the answers given by the witness in replying to them,
 and to explain such questions or answers so far as necessary to enable them to be

understood by the witness or person in question.

- (2) A children's champion for a witness is an officer of the court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.

Section 89<sup>9</sup> covers who may establish a panel of children's champions, their qualifications and when they must be appointed. It includes that they must, if requested by the court, produce a written assessment report of the witness's communication needs:

### Section 89 Appointment of children's champions

- (1) Victims Services in the Department of Justice (or another agency nominated by the Attorney General) is to establish a panel of persons who are suitable persons to be appointed as children's champions.
- (2) A person must not be included on a panel unless the person has a tertiary qualification in psychology, social work, speech pathology or occupational therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).
- (3) For the purposes of proceedings to which this Part applies, the Court:
  - (a) must (except as provided by subclause (4)) appoint a children's champion for a witness who is less than 16 years of age, and
  - (b) may, on its own motion or the application of a party to the proceedings, appoint a children's champion for a witness who is 16 or more years of age if satisfied that the witness has difficulty communicating.
- (4) The Court is not required to appoint a children's champion if it considers:
  - (a) there is no person on the panel established under this clause available to meet the needs of the witness, or
  - (b) it is otherwise not practical to appoint a children's champion, or

- (c) it is unnecessary or inappropriate to appoint a children's champion, or
  - (d) it is not otherwise in the interests of justice to appoint a children's champion.
- (5) A person must not be appointed as a children's champion for a witness if the person:
- (a) is a relative, friend or acquaintance of the witness, or
  - (b) has assisted the witness in a professional capacity (otherwise than as a children's champion), or
  - (c) is a party or potential witness in the proceedings concerned.
- (6) The children's champion appointed for a witness must, if requested by the Court, provide a written report, on the communication needs of the witness.
- (7) A copy of any such report is to be provided to the parties to the proceedings concerned before the witness gives evidence in the proceedings.'
- (b) except in the case of evidence given under Part 6 of Chapter 6 or this Part by a recording, the jury are able to see and hear the giving of the evidence.
- (3) During any part of the proceedings to which this Part applies in which a children's champion for a witness is present, the children's champion is exempt from any requirement or direction under this Act that requires the proceedings or part of the proceedings to be heard in camera.
- (4) The provisions of the *Evidence Act 1995* apply to and in respect of a person who acts as a children's champion for a witness in the same way as they apply to and in respect of an interpreter under that Act.

**Note.** Section 22 of the *Evidence Act 1995* requires an interpreter to take an oath, or make an affirmation, before acting as an interpreter.

- (5) The regulations may prescribe the form of oath or affirmation to be taken by the children's champion for the purposes of subclause (4).'

Section 90<sup>10</sup> sets out that requirement that at court the children's champion should be present when the child gives evidence, the court and legal practitioners should be able to communicate with the children's champion and the children's champion is required to take an oath or affirmation before acting.

Section 91<sup>11</sup> requires the court to inform a jury that the use of pre-recorded evidence or children's champion is 'standard practice'<sup>12</sup> and the jury should not 'draw any inference adverse to the accused' or 'give the evidence any greater or lesser weight' because it was pre-recorded or facilitated by a children's champion.<sup>13</sup>

### **s90 Giving of evidence of witness in presence of children's champion**

- (1) Subject to the rules of Court and any practice direction, in a proceeding to which this Part applies, the evidence of a witness for whom a children's champion has been appointed is to be given in the presence of the children's champion.
- (2) The evidence is to be given in circumstances in which:
  - (a) the Court and any Australian legal practitioner acting in the proceedings are able to see and hear the giving of the evidence and are able to communicate with the children's champion, and

## Existing provisions for witnesses

There are a number of existing legislative provisions in NSW which provide additional support for children and other vulnerable witnesses who are required to give evidence in court. These include:

- having a person to assist the witness to give evidence, but only if the witness ordinarily receives assistance to communicate from such a person or persons on a daily basis;<sup>14</sup>
- using a communication aid to assist the witness to give evidence, but only if the witness ordinarily uses such an aid to assist him or her to communicate on a daily basis;<sup>15</sup>
- a pre-recorded interview with police investigators can be played in court and admitted in evidence as the child's evidence in chief.<sup>16</sup>

Also in prescribed sexual offences proceedings the following may be ordered by the court:

- The complainant giving evidence from a place other than the courtroom using CCTV or other technology.<sup>17</sup>
- The complainant giving evidence using screens to restrict the contact (including visual contact) between the complainant and the accused.<sup>18</sup>
- A support person being present while evidence is being given.<sup>19</sup>
- Seating arrangements to restrict contact/visual contact between the complainant and people who have an interest in the proceedings.<sup>20</sup>

In addition, in the case of sexual offences proceedings, a child cannot be directly cross-examined by the defendant.<sup>21</sup>

It is widely acknowledged that despite these provisions, the court process can still be extremely traumatic and stressful for children, particularly the process of cross-examination, which can take place many months following the initial investigatory interview. In 2013, only around 20 percent of child sexual assault offences reported to police proceeded to court. The high rate of attrition in matters of child sexual assault has been partially attributed to the negative impact of the process on the wellbeing of child victims. These figures are particularly

acute in respect of indigenous victims: in 2013, 12 percent (368) of child sexual assault matters reported to police included an Aboriginal child complainant. Aboriginal and Torres Strait Islander child witnesses may face distinct difficulties in their interaction with the criminal justice system, resulting not just from language issues but from the particular socio-economic disadvantage experienced by indigenous communities.

## The role of the children's champion

The function of the children's champion is as set out in section 88 (1) of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*, that is to:

- communicate and explain to the witness questions put to the witness
- and to any person asking such a question, the answers given by the witness in replying to them, and
- to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

'A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.'<sup>22</sup>

Within the pilot scheme, there is a presumption that the court will appoint a children's champion for any witness who is 'less than 16 years of age',<sup>23</sup> and the court may of its own motion or on the application of a party 'appoint a children's champion for a witness who is between 16 and 18 years of age if satisfied that the witness has difficulty communicating.'<sup>24</sup>

The court is not required to appoint a children's champion if:

- there is no person on the panel established under this clause available to meet the needs of the witness, or
- it is otherwise not practical to appoint a children's champion, or
- it is unnecessary or inappropriate to appoint a children's champion, or
- it is not otherwise in the interests of justice to appoint a children's champion.<sup>25</sup>

The appointment of a children's champion is not a matter which may be merely 'agreed' between the parties. The court is obliged first to decide whether the children's champion is required and if so to make an appropriate direction. The court may or may not direct other special provisions (such as pre-recorded evidence, a support person or giving evidence over remote TV link) together with the use of a children's champion.

Children's champions are not expert witnesses and thus they cannot, for instance, give an opinion on the accuracy of a witness's recall of the facts or whether a witness is competent to give evidence. They are **NOT** a witness supporter. They are not interpreters where English is not the first language of the witness. They are **NOT** advocates. Their paramount duty is to the court and their role is to support effective communication.

## Witness competence

It does not fall within the children's champion's role to comment, advise or give evidence on the competence of a witness to give evidence. The question of competence is decided in accordance with a legal test which is found in section 12 and 13 of the *Evidence Act 1995*. Every person is competent to give evidence.<sup>26</sup> However a person is not competent to give evidence if 'for any reason (including a mental, intellectual or physical disability): (a) the person does not have the capacity to understand a question about the fact, or (b) the person does not have the capacity to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome.'<sup>27</sup>

The court may seek evidence from an appropriately qualified person to help it determine of a witness is competent. This is not within the remit of the children's champion.<sup>28</sup> However it is the children's champion's role to help overcome a witness's communication incapacity and, for example, to assist the court and advocates to ask questions of the child to establish if s/he is a competent witness.<sup>29</sup>

## Law and practice in New South Wales

The children's champion legislation and practice sits within the context of existing NSW legislation and case law provisions relating to the questioning of child witnesses<sup>30</sup>/witnesses<sup>31</sup>. Key principles include:

***The court is permitted to control the questioning of a witness.*** 'The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned, and
- (b) the production and use of documents and things in connection with the questioning of witnesses, and
- (c) the order in which parties may question a witness, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.'<sup>32</sup>

***The court must disallow improper questions put to a witness in cross-examination.***<sup>33</sup> An improper question is one which

- '(a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).'<sup>34</sup>

This is the court's duty whether or not an objection is raised to the question<sup>35</sup> and the court must take into account

- '(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

- (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
- (c) the context in which the question is put, including:
  - (i) the nature of the proceeding, and
  - (ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and
  - (iii) the relationship (if any) between the witness and any other party to the proceeding.<sup>36</sup>

*The age of a witness is not determinative of his or her ability to give truthful and accurate evidence.*<sup>37</sup>

*Trial judges should avoid unjustifiable interventions during witness questioning.*<sup>38</sup>

‘[T]he ultimate question must always be whether the intervention was unjustifiable and resulted in a miscarriage of justice.’

‘In *R v T*, [WA \[2014\] SASCFC 3; \(2013\) 118 SASR 382](#) at [38], Kourakis CJ stated three ways in which a judge’s intervention may be excessive and lead to miscarriage of justice:

“I would state the grounds on which a judge’s intervention might vitiate a conviction a little differently, as follows:

- (i) the questioning unfairly undermines the proper presentation of a party’s case (the disruption ground);
- (ii) the questioning gives an appearance of bias (the bias ground); and
- (iii) the questioning is such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the judge’s advantage in objectively evaluating the evidence from a detached distance (the dust of conflict ground).”<sup>39</sup>

***English Intermediary Law (not binding on NSW)***

The children’s champions’ pilot scheme of 2016 may well give rise to new case law in NSW. This has been the experience in England and Wales

following the introduction of a similar intermediary scheme in 2004. The law in England and Wales may prove to be a useful reference source for the children’s champions (witness intermediary) pilot scheme, though it is important to note that it does not represent the law in NSW. See Appendix 1: ‘Law and Intermediary Practice in England and Wales’. on page 26.



## Children's champion procedural steps

The following is a summary of the steps in the process describing the children's champion's involvement before the witness is interviewed. In some cases the need for a children's champion may not be realised at the outset of the witness's involvement with the police. For the purpose of the pilot referrals may be made from police at the investigative interview stage or from the court when a children's champion is appointed by the court.

If the police case officer has identified that a referral for a children's champion (witness intermediary) may be required:

1. The police case officer seeks the services of a children's champion having first obtained the witness's informed consent. If the child witness does not have the capacity to consent they should obtain informed consent from a suitable adult.<sup>40</sup>
2. A written request for a children's champion is sent by the police case officer to Victims Services<sup>41</sup> – this should include information available to the police case officer about the witness's communication needs.
3. A suitable children's champion is identified by Victims Services and the children's champion is contacted with details of the proposed referral, for example the venue, the timescale for the children's champion assessment and police interview, details of the witnesses' communication needs. Children's champions are self-employed and as such choose whether or not to take a case.
4. If the children's champion accepts the referral, they open a case file (they must keep confidential case notes throughout their involvement) and they establish contact with the police as soon as possible.
5. The police case officer will supply only limited information about the alleged offence. This limited information should assist the children's champion to know what evidence or evidence-related topics to avoid in their witness assessment.
6. The children's champion and the police case officer arrange the witness assessment visit. Venues vary and the assessment may take place at the witness's school, their home, JIRT interview suite, depending on which is the most suitable for the witness. The children's champion may make suggestions to the police case officer about the venue for the assessment but the decision rests with the police case officer.
7. The children's champion meets the witness and conducts their assessment of the witness.<sup>42</sup>
8. There must be a responsible third party present. Preferably the police case officer/interviewing officer<sup>43</sup> will be present as this will enable the officer to gain significant first-hand experience of the witness's communication needs. It should not be anyone (apart from the case/interviewing officer) who is or is likely to be a witness in the case.
9. The children's champion should make notes of their assessment and may also audio record the assessment, with the witness's permission, if it will assist when they prepare their written court report, for example by giving verbatim examples of the witness's communication. The children's champion should not be left alone with the witness during the assessment.
10. The children's champion prepares their preliminary report (verbal or written) for the police interviewer.
11. The police interviewer and the children's champion have a planning meeting to review the children's champion preliminary assessment and to discuss how best the interviewer can communicate with the witness in the police interview. This is likely to include, for example, discussion on the venue (interview suite or home for example), the layout of the interview room, the frequency of breaks, the vocabulary which is developmentally appropriate for the witness, cultural considerations which

may affect communication, how to make sentences clear and unambiguous, the use of communication aids<sup>44</sup> (for example, pen and paper for drawing, body maps, pictures, models) and how and when communication aids might be introduced during the interview.

12. The police interview is conducted by a specially trained police officer with the children's champion present and visible on camera.<sup>45</sup> The children's champion is not a second interviewing officer. The police interviewing officer has conduct of and manages the interview.
13. The role of the children's champion during the course of the interview is to monitor and provide feedback directly to the police interviewer as to the communication needs of the witness. There should be an understanding between them about how the children's champion will indicate a wish to intervene. It is preferable that this feedback is provided at an appropriate time for example during a break outside the interview suite so as to not distract the witness unless it can be done within the interview without disrupting the flow of the interview.
14. The court will appoint a children's champion where appropriate either on application of either party or of its own motion.
15. Where a children's champion has been appointed, the ODPP bear the responsibility of ensuring that Victims Services and the children's champions are aware of the case listing and the likely or fixed date of any hearing which the children's champion should attend. However the children's champion should also be pro-active when it comes to keeping in touch with the person who is commissioning their services.
16. The children's champion writes an assessment report and submits to the court. The report will be based primarily on their assessment of the witness's communication needs and abilities. Children's champions should note that the Sexual Assault

Communications Privilege (SACP) exists to protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences; children's champions must not act in a way which would undermine the witness's SACP.<sup>46</sup>

17. If an application for a children's champion is opposed the children's champion should be at the contested hearing.
 

'It may be suggested that the intermediary is not needed at trial because:

  - *the interview was conducted without the need for an intermediary*  
Communication during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication
  - *an intermediary was present at the interview but apparently took no active part.*  
This is often because the intermediary had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene
  - *the advocates will comply with guidance in the intermediary's report*  
In practice, many advocates find it more difficult to adapt key questions than they anticipate. It can also be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An intermediary who has already assessed the witness's communication is able to alert the court to any problems or loss of concentration.<sup>47</sup>
18. The children's champion may accompany the witness on their court witness familiarisation visit/s<sup>48</sup> which is usually conducted by the Witness Assistance Service (WAS).<sup>49</sup> The police case officer may also attend. A witness supporter might also be present. The WAS shows the witness the CCTV/ courtroom screens depending on the witness' preference. Special requests for medical needs of the witness may be



discussed with the WAS, for example, if the witness needs to be near to a toilet or the procedure in the event of a medical emergency such as the witness having a seizure. This familiarisation visit might take place two to three weeks before the trial. The witness might require more than one visit. Visits may take place at 9.00 to 9.30am, lunchtime or 4.00 to 4.30pm.

19. Witness memory refreshment, for example viewing the DVD of their video recorded police interview, should take place at a different time to the court visit so as to avoid 'information overload' for the witness. The children's champion may accompany the ODPP case officer and the witness for memory refreshing; the witness may need to see their DVD more than once.
20. The court familiarisation and/or memory refreshment may prompt the need for an addendum children's champion report. For example the witness's communication abilities might have changed since the initial assessment.
21. If a new children's champion is appointed (for example because the original children's champion is no longer available for the trial) they must also meet and assess the witness so that they are speaking from their own experience of the witness. They must then write their own assessment report. Whether this is a fresh report or an addendum to the existing report depends on the individual circumstances.
22. Children's champions must keep in mind that one of the aims of the cross-examining advocate is to 'destroy and/or weaken evidence unfavourable' to their client.<sup>50</sup> The children's champions task here is to help the advocate in phrasing questions in a way that the witness can fairly deal with them but not to 'protect' the witness from being challenged on their evidence. They therefore need to examine the questions from the stand point of the witness's communication needs. Children's champions must not disclose the content of the questions to another party or to the witness in advance of questioning. Children's champions should encourage advocates to consult with them in order to minimise the likelihood of any interruptions to the questioning in court.
23. Memory refreshment is conducted if it has not occurred already.<sup>51</sup>
24. The children's champion attends court to facilitate the advocates' and judge's communication with the witness including if the judge and advocates meet the child witness before s/he gives their evidence. When the children's champion arrives at court they should make themselves known to the court officer, the police officer in charge of the case, the ODPP case worker and to the trial advocates. They should bring spare, clean copies of their assessment report.
25. The judge should explain the role of the children's champion to the jury (where there is one)<sup>52</sup> and give the jury a direction about the standard nature of the use of a children's champion and warn again drawing any adverse inference or giving the evidence any greater or lesser weight because of it.<sup>53</sup>
26. The children's champion takes the children's champion oath or affirmation before the witness gives evidence and intervenes only as necessary, in line with their statutory role and in accordance with any pre-trial directions made by the court.
27. The children's champion should not be alone at court with the witness at any time. There should always be a responsible third party present, preferably a police officer. The court may not always hear every word that the witness says or that the witness communicates by other means. It is the children's champion's duty to bring to the court's attention anything that it said or done (including in the TV link room) which the court may not have heard. The children's champion should do this regardless of what impact they think this may have on the court's perception of the witness's evidence.

## Children's champion assessment

The children's champion will arrange with the police case officer when and where the children's champion will assess the witness. Experience in England and Wales suggests that most witness assessments can be done in approximately one hour but there will be exceptions.

The assessment should be based primarily on the professional opinion of the children's champion. The purpose of the assessment is to determine the witness's communication needs and abilities in the context of a criminal investigative interview and questioning at trial. This is not a diagnostic assessment and as such full clinical tests are not necessary or appropriate. The children's champion will first need to build rapport with the witness however they should avoid subjects that might lead the witness to disclose/talk about the facts of the case being investigated.

If the children's champion feels it is necessary to obtain background health/medical information about a witness they must seek the informed consent of the child's guardian to do so and obtain advice from the Sexual Assault Communications Privilege Unit within Legal Aid to avoid disclosure of material that is subject to protective confidence. We recommend that they should call Victims Services and discuss this so proper guidance can be provided.

The assessment may assess the witness's ability to:

- describe (for example what he likes)
- sort objects
- sequence (for example using picture cards to place a story in order)
- narrate (for example what is happening in this story)
- tell the time
- respond to leading questions (for example "Did I get the bus here?" – if the child does not know)
- respond to tagged questions ("I've got a red car, haven't I?" – if the child doesn't know)
- understand idioms (for example "If I said Adam and Eve got on like a house on fire, what do I mean?")
- concentrate over a period of an hour.

Each children's champion will have their own witness assessment methodology and 'tools' (for example picture cards, sticky notes and colouring pens) depending on their experience and expertise.

## Understanding the importance of telling the truth

The children's champion should not themselves attempt to assess the witness's understanding of the difference between truth and lies or the importance of telling the truth. However the children's champion should be ready to advise the police officer and the court how best to communicate these concepts to the child.<sup>54</sup> The interviewing police officer or the judge may wish to do so in order to determine if the witness gives sworn or unsworn testimony.<sup>55</sup> *Triangle* has developed a series of 'truth and lies' films on for use with children of various age groups<sup>56</sup> and children's champions may find this to be a useful resource.

Where a person is deemed not competent to give sworn evidence they may nevertheless be competent to give unsworn evidence. The test is set out in law and specifies what the court must say to the person.<sup>57</sup> When this arises the children's champion is likely to be called upon to assist the court to communicate these matters to the person (in this case a child) in a way that the child can understand.

## Preliminary report for the police case officer

A preliminary report to the police case officer may be written or oral; it is not the same as the report for court which comes at a later stage.

The preliminary report is relatively brief compared to the assessment report for court. It may be one or two pages if written. It is likely to focus on guidance for questioning the witness in a way which will promote complete, accurate and coherent communication with the witness. The police interviewer may have had the advantage of sitting in on the children's champion assessment of the witness; this is likely to assist the planning discussion.

The children's champion should agree with the police interviewer how the children's champion will intervene to assist the interviewer if that becomes necessary.

## The Advocate's Gateway toolkits

Children's champions should be familiar with The Advocate's Gateway<sup>58</sup> practice guides on questioning the vulnerable including:

**Toolkit 2** General principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs;

**Toolkit 6** Planning to question a child or young person; and

**Toolkit 7** Additional factors concerning children under 7 (or functioning at a very young age).

Prior to the witness interview, the children's champion may refer the interviewing police officer to one or more of the toolkits if time allows and in so far as the advice may be relevant to that particular witness.

## Aboriginal and Torres Strait Islander witnesses

Children's champions should be aware of the cultural issues which may influence communication with Aboriginal children and young people. They should be familiar with Victims Services' 2015 publication *Service standards for working with Aboriginal victims of crime*.<sup>59</sup>

Great care should be given when formulating questions for some Aboriginal witnesses, particularly when questioned by the police or indeed if they are later 'cross-examined in the course of a trial'.<sup>60</sup>

The children's champion should discuss with the police interviewer how if at all communication ought to be adapted for this particular witness. If the interviewer determines that an interpreter is required the children's champion should meet first with the interpreter and discuss how they will work together.

## Assessment report for court<sup>61</sup>

Having completed an assessment of the witness a children's champion will be required to write a report for the court about the communication needs of the witness. The effectiveness of the pre-trial hearing discussions and court directions about the use of a children's champion will depend on the quality of the assessment and the written report for court. This section contains advice about a full, written report for the court. (This is not the same as a preliminary report which a children's champion may provide to the police officer after the initial assessment but before the police interview. See above.)

The assessment report for the court will be used in two main ways:

- It will advise the prosecution and defence (in particular the advocates) and the judge about how best to communicate with the witness at the trial; and
- It will help shape the pre-trial discussions about how best to adapt the trial to ensure the witness has an opportunity to give their best evidence.

The report for court should be set out in a way that assists the parties and the judge. It should be clear and concise. It should be:

- Written in the first person.
- Suitably structured and headed/sub-headed, following the guidance below.
- One and a half line-spaced.
- Set out with wide margins.
- Printed single-sided.
- Arial font must be used.
- Font size 12 must be used.
- Written in plain English and containing no jargon.
- Written in short sentences and with short paragraphs.
- Any medical or communication abbreviations and terms used should be explained, that is 'X has dysphagia. This means they have difficulty swallowing and this has an impact on their ability physically to form words.'

- Page-numbered, that is page 1 of 5. This should be in the bottom right-hand corner of the page.
- Paragraph-numbered
- Headed on each page with case name, number and the front page headed Children's Champion Report.
- Clearly summarised at the end with conclusions and recommendations (which are supported in the body of the report by assessment findings).
- Recommendations clearly set out for viewing 'at a glance' – a table may be used for this purpose.
- Signed under the children's champion declaration.
- Dated.
- Proof-read and free of grammar, spelling and typographic errors.

Below is a suggested structure for the report and gives a checklist for the written style, formatting and content. However, the content of any report should be adapted as necessary to suit the particular witness.

### Suggested structure of the full court report

Front page

Contents page

Section 1: Summary of qualifications and experience

Section 2: Background, instructions and chronology

Section 3: Witness Communication Needs Assessment

3.1 General observations

3.2 Attention and listening skills

3.3 Auditory comprehension/understanding of spoken language

3.4 Spoken expression (expressive language)

3.5 Speech sound intelligibility

3.6 Reading and writing ability

3.7 Non-verbal communication

3.8 View of witness on being assisted by a children's champion

3.9 Other relevant information, that is social, level of education and development, emotional state, etc.

#### Section 4: Conclusions and recommendations

4.1 Conclusions

4.2 Recommendations for Questioning

4.3 Other recommendations

Children's Champions Declaration

Appendices

Appendix 1: CV of the children's champion

Appendix 2: Description of the Children's Champion Role

Appendix 3: Communication Aids (if relevant)

#### Front page

R v [Name of defendant/s]

Case reference number:

Children's Champion Assessment Report and Recommendations in respect of [Name of witness]

Report prepared at the request of [Name and address]

Author: [Children's champion name]

Accreditation Number: [Number]

[Date of report]

#### Confidential report

This report is addressed to the court on the understanding that it will be provided to the parties and their respective advisors in this matter. In all other respects this report is confidential and may not be used, reproduced or circulated for any other purpose (whether wholly or in part) without the author's prior written consent or order of the court. This report is for advice only and is not evidence in the case.

#### Contents page

For any report longer than ten pages, including the front page, it is also advisable to have a contents page with page numbers to help the parties and the judge find their way around the report. All reports should be page and paragraph numbered whatever their length.

#### Section 1: Summary of qualifications and experience

There should be one or two paragraphs describing the children's champion's relevant qualifications and relevant experience. The children's champion can indicate that their full CV is set out in Appendix 1 and a description of the role is at Appendix 2.

#### Section 2: Background, instructions and chronology

This section should set out clearly the role of children's champion and what questions this report seeks to address. Suggested wording to include in this section:

*"The role of the children's champion was established by section 88 of the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015.*

*My role as a children's champion is to:*

- *communicate and explain to the witness questions put to the witness*
- *and to any person asking such a question, the answers given by the witness in replying to them, and*
- *to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.*

*I have been asked to:*

- i. Indicate whether or not the witness has the ability to communicate and, if so how;*
- ii. Indicate whether the use of a children's champion is likely to assist with the communication of questions to the witness and of the answers given and if so how;*



iii. Advise the advocates on the most effective way of communicating questions to the witness;

iv. Make any other recommendations as to adjustments to enable the best communication with the witness at court.

*I am not instructed as an expert witness. I cannot give an opinion on the accuracy of a witness's recall of the facts in this case nor can I give an opinion on whether a witness is telling the truth in their evidence.*

*My role is limited to providing assistance to facilitate communication before trial and during the witness' evidence and advising how this can best be achieved."*

This section should also succinctly explain who contacted the children's champion, key facts and dates including the name of the witness, their date of birth and the dates of the referral, the intermediary assessment/s (which ordinarily takes places before the police interview) and the police interview.

### **Section 3: Witness communication needs assessment**

It is important that this section gives details of the facts upon which the children's champion has based their conclusions. The report sub-headings below are suggestions only and may not be suitable in all cases:

#### **3.1 General observations and sources of information, for example meeting a teacher or carer, reading a medical report.**

#### **3.2 Attention and listening skills**

#### **3.3 Auditory comprehension/ understanding of spoken language**

#### **3.4 Spoken expression (expressive language)**

#### **3.5 Speech sound intelligibility**

#### **3.6 Reading and writing ability**

### **3.7 Non-verbal communication**

#### **3.8 View of witness on being assisted by a children's champion.**

#### **3.9 Other relevant information, (social, level of education and development, emotional state, etc.)**

Each children's champion should approach the assessment in the way they feel is most appropriate, having regard to the purpose of the assessment. There is no rule to say how the assessment should be carried out or what it should consist of. The children's champion decides the best way to carry out the assessment in that particular case and the report should reflect that assessment.

In some cases the children's champion may want to include test results or partial test results in an appendix because it will help the reader to understand the communication issues. However in most cases this is not required and a summary of the assessment results in the main body of the report will be sufficient.

This section should also make reference to other information that the children's champion has relied on for their assessment.

The children's champion should therefore **only** include personal confidential information in so far as it is necessary for their report on the witness's communication needs and abilities. They must **not** include information which could further identify or endanger the witness, for instance details that would identify the location (place of residence, name of school, name of day care centre) of a witness. The effect of this is, for example, that they should simply refer to obtaining information from a child witness's school rather than naming the school and the person from whom they obtained that information. Information or reports about a witness should be stored securely along with the rest of the children's champion's notes.

### **Section 4: Conclusions and recommendations**

This section of the report should address the issues that the children's champion has been asked to address as set out earlier in the written report:

## 4.1 Conclusions

- i. Indicate whether or not the witness has the ability to communicate and, if so how;
- ii. Indicate whether the use of a children's champion is likely to assist with the communication of questions to the witness and of the answers given and if so how;

## 4.2 Recommendations for questioning

- iii. Advise the advocates on the most effective way of communicating questions to the witness;

These recommendations should clearly tie in with the assessment findings. For example a recommendation that there should be no use of 'tag' questions would refer back to the part of the witness assessment that showed use of 'tag' questions would be detrimental to clear communication/give rise to meaningless answers.

There should be detailed recommendations as to how questions should be put to the witness. For instance, there might be recommendations on: pace of questioning, prefacing questions with the name of the witness, allowing the witness to process the question and formulate their answer, chronology of topics, whether questions about certain times should be linked to events, length of questions, avoiding inferences and double negatives.

This section should give examples to illustrate in practical terms what is meant by a particular recommendation. For example, if the recommendation is to "avoid tag questions" the report should give an example of a tag question and then also give an example of how the question should be put avoiding the use of a tag.

Recommendations about questioning techniques should be as specific as possible. For example, rather than simply saying that the witness needs "frequent, short breaks", the report should explain how often the breaks should occur, whether snacks should be on hand, how long the breaks should last, whether for a short break the witness should remain in the live link room with the microphones turned off while the judge and advocates remain in the court room.

Where possible, practical tips and strategies should be offered. For example, if the assessment established that the witness has a language-processing delay and a recommendation is to allow the witness sufficient time to answer, the report might suggest that the questioner counts up to five in their head after the question has been asked and before saying anything else.

The recommendations may refer to words used successfully in interview. The report should also address special vocabulary if the witness uses idiosyncratic language for certain body parts. The report should set out the special word/s so that the questioner may use them.

Recommendations for questioning (which must be witness specific and based on the assessment findings) may be most useful if set out in table form. See table on page 24 for examples:

## 4.3 Other recommendations

In addition to advice on formulating questions, the children's champion may also make other recommendations which if implemented should support communication with the witness. This section deals with the final part of the children's champions instructions:

- iv. Make any other recommendations as to adjustments to enable the best communication with the witness at court.

Examples of other recommendations which may be appropriate depending on the individual witness's communication needs:

- Advocates sharing the wording of their proposed questions with the children's champion's to seek their advice.
- Where the children's champion will stand/sit during the trial so that she is able to be seen and can assist with communication.
- How the children's champion will be addressed in court in front of the vulnerable person for example it might be by her first name if that is how the witness knows her.
- How the children's champion will intervene to get the judge's attention if a communication issue arises.

- If communication aids are to be used, what they should be and how the children's champion will assist with these. This may be models or body maps, timelines, charts, pictures. The use of communication aid/s such as body maps for a trial of a sexual offence should always be considered.
- Whether an interpreter is required for the person's testimony and how this will work with the children's champion role.
- Where the advocates will be when they conduct their questioning for example from court over CCTV or in the TV link room.<sup>63</sup>
- The best time of day for the witness to give evidence
- When there will be scheduled breaks during the trial day including the proposed duration and nature of breaks.
- How a request for an unscheduled break will be notified, for example due to an urgent medical need arising
- Whether all breaks should involve adjourning the court or whether brief breaks may speed proceedings for all<sup>64</sup>
- How and when the witness will be familiarised with the court/remote CCTV site if this has not happened already
- How, where and when the witness will have their memory refreshed by watching the DVD recording of their police interview
- Whether and how the judge and advocates will meet the child beforehand. Discussion may include matters such as whether the judge/advocates will be robed for this and for the child's evidence<sup>65</sup>
- Whether the person will need assistance during testimony referring to/accessing written for example maps, photos, diagram, transcripts.
- How the court will be enabled to access the person's nonverbal communication for example indicating, pointing, drawing, writing.

Questioning Recommendation	Advice for questioner	Rationale	v Directed
Avoid implying that AA took an active role in the alleged events, nor that she could have prevented them.	Instead of asking AA about 'sucking', ask about 'something being put in your mouth'	AA may give inaccurate responses to questions that imply that she did things rather than had them done to her. <sup>62</sup>	
Refer to the witness and the children's champion by their first names.	Preface questions with the witness's name for example, 'A, what happened after that?'	AA's attention may wander and using her name is likely to help her focus on the question.	
Use AA's specific vocabulary for body parts	Use 'minnie' for vagina Use 'titties' for breasts	AA may not recognise words such as vagina and breast.	
Use questions that start with a question word.	Rather than 'You have two sisters' say 'Do you have two sisters?'	AA might not recognise a statement with a question implied by intonation.	
Avoid 'tag' questions	Rather than 'It was raining, wasn't it?' ask 'Was it raining?'	AA may give unreliable responses to 'tag' questions as they are usually linguistically complex and may also be powerfully suggestive.	
Avoid idiomatic language	Rather than 'Did they hit it off?' ask 'Were they friends?'	AA may interpret words literally and may not understand idiomatic language in the way that the speaker intended.	



#### 4.4 Children's champion declaration

The declaration should read:

*I solemnly and sincerely declare that I will well and faithfully communicate questions and answers and make true explanation of all matters and things as may be required of me according to the best of my skill and understanding.*

Signed

Dated

#### Appendices

Appendices should be used for relevant reference material that is too detailed for the main body or which would break up the flow of the main body of the report.

#### CV

A full CV of the children's champion's relevant qualifications and experience should be included including when they qualified as a children's champion. It should be no more than two pages in length.

#### Description of the children's champion role

The children's champion should include a summary (up to a page) of the role of the children's champion.

#### Communication aids

It may be useful to explain communication aids in an appendix if they have been recommended in the report. For example, if a recommendation is for the use of a 'bliss board' more detailed notes in the appendix will help the parties and the judge understand exactly how this will work in practice. If a picture book is to be used, this could be described in more detail with examples given of the pictures to be used. The main body of the report might invite advocates, in advance of the trial to indicate other words or ideas which could usefully be represented in the picture book, that is cards to help the witness say "I don't know", "I don't understand". It may also be useful to refer to the communication aids toolkit on:

► [theadvoactesgateway.org](http://theadvoactesgateway.org)

#### Children's champion (witness intermediary) intervening during cross-examination

Children's champions should remember:

- When to intervene is a matter of judgment and balance; it is not a science. It needs to be resolved on the spot on the basis of the children's champion's knowledge of the witness's communication needs and abilities.
- If possible, the questioning should flow and the witness should not feel disempowered.
- The lack of intervention may well reflect the quality of the work carried out before the trial, and that counsel have observed the children's champion assessment report recommendations. Proper preparation and collaboration is likely to drastically reduce the need for intervention.
- Children's champion's interventions should be based on their assessment report. Interventions (if any) should be succinct and suggest a solution in accordance with their report's recommendations.
- It is the decision of the judge whether or not to uphold the children's champion's intervention. Unless the court has indicated otherwise, all interventions should be addressed directly to the judge who will decide whether counsel should change the question or whether the witness should be asked to deal with it as asked.
- However matters may arise spontaneously at trial; difficulties which have been flagged up may not manifest themselves but other matters which were not anticipated may occur.
- The advocate should be given an opportunity to rephrase the question before the children's champion is asked to phrase it differently.

All parties should realise that when a witness is asked a question that they do not understand they can become distressed because they realise that they cannot answer it and therefore they are not assisting the court.

Other witnesses may give answers such as 'Don't know', 'Can't remember' or 'Yeah' as a way of

bringing the questioning to an end even though they are not in fact agreeing with what they have been asked. Children's champions should be alert to this and to the issues which arise if the advocate persistently asks inappropriate questions.

If there is such a fundamental problem during the trial and if no one else takes the initiative then the children's champion should say to the judge, "there is a matter which would best be dealt with in discussion with counsel and Your Honour".

## Appendix 1: Law and intermediary practice in England and Wales

Though the term 'children's champion' is specific to New South Wales, the role of children's champions in the criminal justice system is based on the unique witness intermediary model that was introduced in England and Wales in 2003.<sup>66</sup> Witness intermediaries in England and Wales began facilitating communication with vulnerable witnesses<sup>67</sup> in the criminal justice system in 2004 initially within a pilot project. Since then witness intermediaries have been introduced nationally in England and Wales. In 2012 the Department of Justice introduced a pilot scheme in Northern Ireland closely based on the scheme in England and Wales.<sup>68</sup>

'In practical terms, the central part of the intermediary's role is to assist in communication in its widest sense; in other words, to assist the court, both prior to and during the giving of evidence by the witness by facilitating two-way communication in order to allow the witness to give their best evidence.'<sup>69</sup>

In England and Wales intermediaries have assisted in many thousands of cases, thereby helping to make the justice process accessible to some of the most vulnerable people in society. Case law has developed rapidly since 2010.

### How the courts should approach the evidence of children

In 2010 in the Court of Appeal (Criminal Division), the then Lord Chief Justice handed down a ground-breaking judgment in *R v B*.<sup>70</sup> A four year old girl, a rape victim, had given evidence in the trial at the 'The Old Bailey'.

'We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must

be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.<sup>71</sup>

In the Australian case of *CMG v R* [2011] VSCA 416 the Court of Appeal noted that the trial judge repeated the essence of this paragraph in *R v B* and there could be no valid complaint about the trial judge's direction to the jury about how to approach the evidence of a child witness.

### **Adapting the trial process for the needs of child witnesses**

The judgment in *R v B* describes how the trial process should cater for the needs of child witnesses.

'The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair

trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, 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 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>72</sup>

### **Judges meeting children before questioning**

In 2014 in *R v Lubemba*<sup>73</sup> the Court of Appeal emphasised that the 'court is required to take every reasonable step to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process'<sup>74</sup> and,

'In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning,

preferably in the presence of the parties. This seems to us to be an entirely reasonable step to take to put the witness at their ease where possible.<sup>75</sup>

In *R v Lubemba* the court also noted a number of other significant principles in relation to the trial process and how it should be adapted when a witness is vulnerable.

### Judicial control of questioning

‘Considerable emphasis is also placed in judicial training on the role of the judge at trial. The trial judge is responsible for controlling questioning and ensuring that vulnerable witnesses and defendants are enabled to give the best evidence they can. The judge has a duty to intervene, therefore, if an advocate’s questioning is confusing or inappropriate.’<sup>76</sup>

### A ‘radical departure from the traditional style of advocacy’

‘It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round.’<sup>77</sup>

### Restrictions on putting one’s case in the traditional way

‘[Advocates] cannot insist upon any supposed right “to put one’s case” or previous inconsistent statements to a vulnerable witness. If there is a right to “put one’s case” (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness.’<sup>78</sup>

In the earlier case of *R v E*<sup>79</sup> involving a child victim aged five, the traditional form of cross-examination did not occur but was restricted to asking necessary questions. The defendant was convicted and appealed:

‘The real complaint here, in our view, is that the defence was deprived of the opportunity

to confront C in what we might venture to call “the traditional way”. It is common, in the trial of an adult, to hear, once the nursery slopes of cross-examination have been skied, the assertion: “You were never punched, hit, kicked as you have was suggested, were you?” It was precisely that the judge was anxious to avoid and, in our view, rightly. It would have risked confusion in the mind of the witness whose evidence was bound to take centre stage, and it is difficult to see how it could have been helpful. Putting the same thing a different way, we struggle to understand how the defendant’s right to a fair trial was in any way compromised simply because Mr Whitehead was not allowed to ask: “Simon did not punch you in the tummy, did he?”’<sup>80</sup>

The trial had not been unfair.

‘The jury knew that the defendant disputed the evidence of C. The judge clearly explained his decision as to cross-examination technique and why he had taken it. In addition, the jury was specifically directed “to make proper fair allowances for the difficulties faced by the defence in asking questions about this.”’<sup>81</sup>

The potential problems created by putting suggestions to a child witness in the form of ‘tagged’ questions had been highlighted and cautioned against in *R v W and M*<sup>82</sup>:

‘There is undoubtedly a danger of a child witness wishing simply to please. There is undoubtedly a danger of a child witness seeing that to assent to what is put may bring the questioning process to a speedier conclusion than to disagree... It is particularly important in the case of a child witness to keep a question short, and even more important than it is with an adult witness where it also matters to avoid questions which are rolled up and contain, inadvertently, two or three at once. It is generally recognised that particularly with child witnesses short and untagged questions are best at eliciting the evidence. By untagged we mean questions [which] do not contain a statement of the answer which is sought. That said, when it comes to directly

contradicting a particular statement and inviting the witness to face a directly contradictory suggestion, it may often be difficult to examine otherwise. No doubt if a way can be found of engaging the witness to tell the story and then the content differs from what had been said before, that will be a yet better indication that the original account is wrong. But that is difficult to achieve and indeed may itself have the disadvantage of prolonging the child's time giving evidence. Even then there may be no guarantee as to which account is the more reliable.<sup>83</sup>

### Use of guidance on The Advocate's Gateway (theadvocatesgateway.org)

In *R v Lubemba* the Court of Appeal endorsed the use of 'toolkits' on The Advocate's Gateway.

'Experts in the field responded to the [Advocacy Training Council's] recommendations and produced Toolkits on how to treat vulnerable witnesses fairly and to get the best from them, without undermining the accused's right to a fair trial. The Toolkits may be downloaded at no cost from the Advocates Gateway website. They provide excellent practical guides and are to be commended. They have been endorsed by the Lord Chief Justice'.<sup>84</sup>

The use of The Advocate's Gateway toolkit was also endorsed by the Court of Appeal in *R v RL*.<sup>85</sup>

### Reducing questions to writing

*R v Lubemba* supports the practice of judges inviting advocates to provide their questions in writing in advance so that they may be vetted by the judge, as well as by the intermediary if there is one.

'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance.'<sup>86</sup>

In *R v Boxer*<sup>87</sup> the Court of Appeal provided further support for the growing practice of counsel submitting their questions ahead of time to the intermediary<sup>88</sup> and approved the practice for examination in chief should that be necessary.<sup>89</sup>

### A collaborative approach to planning questions

In *Re FA*<sup>90</sup> the Court of Appeal, for the first time, heard live oral evidence from a vulnerable witness ('KK') over a CCTV link to a court in a different location. Prior to the hearing the Court of Appeal had directed, amongst other things, that questions should be supplied in advance to the parties and the intermediary.

The judgment noted:

'Ms Kate Man, registered intermediary, Ms Smart for the applicant and Ms Lindop for the respondent Crown have worked as a team, the better to promote the interests of justice in the conduct of this case. It is clear they have had in mind not only the course of the hearing and the welfare of KK, but also the interests of the applicant himself. Questions to be put by Ms Smart to KK in cross-examination were reviewed by the registered intermediary, whose sensible expert suggestions were unhesitatingly adopted.'<sup>91</sup>

### Dividing questions between defence counsel in 'multi-handed' cases

In *R v Jonas*<sup>92</sup> the Court of Appeal rejected the suggestion that counsel can conduct their own independent cross-examination of whatever length they deem necessary on behalf of their client.

'Over-rigorous or repetitive cross-examination of a child or a vulnerable witness must be stopped. In a multi-handed trial the judge must ensure that the witness is treated fairly over all, and not asked questions on the same topics, to the same end, by each and every advocate. Advocates must accept that the courts will no longer allow them the freedom to conduct their own cross-examination where it involves simply repeating what others have asked before, or exploring precisely the same territory. For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them, provided, of course, there is no unfairness in so doing.'<sup>93</sup>



## When there has been no intermediary at the police interview

In *R v Boxer*<sup>94</sup> the Court of Appeal addressed the not uncommon situation of the intermediary coming into a case after the police interview of the vulnerable witness. The absence of an intermediary at the interview is not an argument for not having an intermediary at trial.

## The role of the intermediary at trial

There have been relatively few appeals based on (or in part based on) the role of the witness intermediary. So far none has concluded that the use of the intermediary rendered the trial unfair.

*R v IA & Ors*<sup>95</sup> was an unsuccessful appeal against conviction in a case where the victim, who is deaf, was assisted at interview and trial by an intermediary who is deaf. The Court of Appeal rejected any challenge to the work done by the RI.

‘He was acting as an intermediary as a result of the judge’s decision after very detailed pre-trial argument. In performing his functions he was entitled to interject in order to ensure that RB could understand what she was being asked. We do not consider that his interjections have been shown to be intended to be disruptive, nor were they widespread. In the course of argument we were taken to certain examples, but we are unpersuaded that they had disruptive effect which resulted in an unfair handicap to the defence. If anything, the extremely lengthy cross-examinations of RB were permitted to go on far too long.’<sup>96</sup>

In *R v Watts*<sup>97</sup> several profoundly disabled adult victims gave evidence. ‘JR’ used an electronic communication device. The intermediary,

‘had assessed her needs and modified the icons on her communicator. She had added icons for “I don’t know” and “I don’t understand” and “not true,” and had also separated the Yes/No icons which had previously been adjacent on the original grid. Her assessment was that in other respects the selections of icons she had was reasonable but she stressed the need to avoid long questions and leading questions, by which she did not mean questions capable of being answered Yes or No.’<sup>98</sup>

In *R v Christian*<sup>96</sup> the Court of Appeal concluded that the intermediary was appropriately performing her role by offering the vulnerable witness sufficient emotional support as to enable them to remain calm enough to clearly express themselves.

This decision supports the notion that witness emotional state management is an integral part of facilitating communication with the witness, albeit this is not expressively provided for in the legislation. It is imperative that the intermediary is and is seen to be impartial and transparent; their role in facilitating communication must not shade into advocacy on behalf of the vulnerable witness.

## Not taking the ‘wait and see how we get on’ approach

In *Re M*,<sup>100</sup> a Court of Appeal judgment in a family case, it was held that a “wait-and-see” how we get on without special measures attitude ran contrary to the right of the party to a fair hearing; the question of special measures should not be set aside until their need becomes apparent, but should be fully explored at early as possible in the proceedings and not left to just before or at the start of the hearing.

In another family case, *Newcastle City Council v WM & Others*,<sup>101</sup> the trial judge described the two intermediaries as “excellent”, and as having performed their role “with great skill and discretion”. He found himself to be “indebted” to the intermediary service for enabling the mother, who suffered from learning disabilities and spoke English as a second language, “to participate in the process as fully and effectively as could possibly be achieved”.

## Case management for vulnerable witnesses and the criminal procedure rules (England and Wales)

Where directions for appropriate treatment and questioning of vulnerable witnesses are required, the courts in England and Wales must invite representations by the parties and by any intermediary. The court will then set ‘ground rules’ about the arrangements that should be in place to facilitate the witness’s evidence and the arrangements for ensuring that questioning is

appropriate for that particular witness. Introduced in April 2015,<sup>102</sup> Criminal Procedure Rule 3.9(7) states:

Where directions for appropriate treatment and questioning are required, the court must –

- (a) invite representations by the parties and by any intermediary; and
- (b) set ground rules for the conduct of the questioning, which rules may include –
  - (i) a direction relieving a party of any duty to put that party's case to a witness or a defendant in its entirety,
  - (ii) directions about the manner of questioning,
  - (iii) directions about the duration of questioning,
  - (iv) if necessary, directions about the questions that may or may not be asked,
  - (v) where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and
  - (vi) directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.' (CPR 3.9(7))

## Appendix 2: Sexual Assault Communications Privilege (SACP)

### What is SACP?

Sexual Assault Communications Privilege (SACP) protection is available for victims of prescribed sexual offences in all NSW criminal proceedings. This protection arises from provisions of the *Criminal Procedure Act 1986* (NSW). Under that legislation, the counselling and health records of victims of sexual offences have a special protected status: SACP protects the confidentiality of a broad range of therapeutic information about any client who has ever been a victim of indecent or sexual assault. This can include counselling or caseworker notes, health files, some school records, drug and alcohol records and more. Material protected by SACP is referred to in the legislation as a "protected confidence."

The purpose of the SACP is to protect the integrity of past, present and future therapeutic relationships between complainants and their health practitioners and to reduce re-traumatisation of complainants in the criminal justice system.

Access to protected confidences will not routinely be granted by the court. If the prosecution or accused wish to obtain or use information of this type, they must seek leave from the court in order to do so.<sup>103</sup> The court has an obligation to ensure that whenever a witness may have a SACP objection they are advised of their SACP rights.<sup>104</sup> The Act also provides that the victim: is entitled to free advice and representation in relation to SACP issues; can make confidential submissions about the harm likely to flow from compulsory production of their records; and, in defined circumstances, can consent to disclosure/use of the information as evidence.<sup>105</sup> Where there is a dispute, the court can order production of the information in order to ensure the fairness of the trial. But unless there is a good reason for ordering otherwise, the details of diagnoses/treatment or mental health, drug and alcohol, sexual health and disability support services accessed by the witness, are not disclosed.<sup>106</sup>

Consistent with the important role that SACP plays in protecting the privacy of sexual assault victims, NSW investigating police do not routinely seek or disclose the details of a victim's treating practitioners and counsellors, nor do they access medical notes of such individuals. This is because information disclosed as a result of such a request could lead to later cross-examination of the victim on the very subject matter that SACP is designed to protect.

### How is SACP relevant to the role of a children's champion?

Children's champions engaged by the police officer to provide an initial assessment of a victim's communication needs, or for the purposes of preparing an assessment report for, may receive information that is otherwise protected by SACP. For example, when a parent or carer discloses that a child has been assessed as having a cognitive impairment such as Asperger Syndrome, or has memory or attention deficits, or has sought treatment as a result of the alleged offence (which is the subject of the police investigation itself).

Protected confidences can also be revealed (and SACP inadvertently undermined) where a children's champion requests information from a child's health practitioner(s) for the purpose of preparing an initial or final assessment of the child's communication needs. For this reason, procedures (and standard documents) have been adopted that will maximise the capacity for victims to make informed decisions and minimise the scope for inadvertent or harmful disclosure.

Children's Champions are encouraged to exercise great caution when seeking or receiving information that may be otherwise protected by the SACP, and will need to draw any concerns they have about SACP in respect of a particular witness to the attention of police/ODPP and the court.

## Appendix 3: Further resources

### Websites

#### New South Wales District Court

▶ [www.districtcourt.justice.nsw.gov.au](http://www.districtcourt.justice.nsw.gov.au)

#### Office of the Director of Public Prosecutions (NSW)

▶ [www.odpp.nsw.gov.au](http://www.odpp.nsw.gov.au)

The Office of the Director of Public Prosecutions (NSW) is the independent prosecuting authority for the State of New South Wales.

#### The Advocate's Gateway

▶ [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

The Advocate's Gateway (part of The Advocacy Training Council, UK) gives free access to practical, evidence-based guidance on vulnerable witnesses and defendants. The 'toolkits' have been widely endorsed by the senior judiciary in England and Wales.

#### The Office of the Australian Information Commissioner (OAIC)

▶ [www.oaic.gov.au](http://www.oaic.gov.au)

The Office of the Australian Information Commissioner (OAIC) has a range of regulatory responsibilities and powers under the *Privacy Act 1988* and other legislation. The website includes guidelines to promote understanding and awareness of the Australian Privacy Principles.

#### Information and Privacy Commission NSW

▶ [www.ipc.nsw.gov.au/privacy](http://www.ipc.nsw.gov.au/privacy)

Further information on information and privacy including NSW privacy laws.



## Victims Services NSW

► [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

Victims Services provide support services, including free counselling and financial assistance to victims of crime. Victims have rights which are set out in the Charter of Victims Rights, which includes the right to be treated with courtesy, compassion and respect. The website provides details of support services for children, victims of sexual assault and other crimes, and families and friends of missing persons.

## Reports and articles

Cooper, P. *Intermediary Podcast Interviews and Surveys 2010 – 2014* (UK).

Marchant, R. (2013) 'How Young Is Too Young? The Evidence of Children under Five in the English Criminal Justice System' *Child Abuse Rev.*, 22(6), pp.432-445.

Mildren, D (2008) 'Aboriginals in the Criminal Justice System', *Adelaide Law Review* (2008) 29.

O'Mahony, B. Milne, B. and Smith, K. (2011) 'The early identification of vulnerable witnesses prior to an investigative interview' *The British Journal of Forensic Practice*, vol. 13, no. 2, pp. 114-123, 2011.

## Books

Eades, D. (2010) *Sociolinguistics and the Legal Process* (MM Textbooks).

Graffam Walker, A., Kennisto, J. & Inada, S. (2013) *Handbook on Questioning Children: A Linguistic Perspective*. 3rd ed. (ABA Professional Education).

Oxburgh, G, Myklebust, T., Grant, T., Milne, R. (2015) *Communication in Investigative and Legal Contexts* (Wiley Blackwell).

Riley, T. (2003) *The Little Red Book of Advocacy* (Law Society Northern Territory).

## References

- 1 [http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs\\_victims/VS\\_victimrightscharter2.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/VS_victimrightscharter2.aspx) (accessed 7 Feb 2016)
- 2 The report is available to download at <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0D25CD5DB3B384061CA257D7100011126> [Accessed 20 Dec 2015].
- 3 Ibid, recommendation 19.
- 4 Ibid, recommendation 21.
- 5 [http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d25cd5db3b384061ca257d7100011126/\\$FILE/Government%20Response%20to%20the%20Joint%20Select%20Committee%20on%20Sentencing%20of%20Child%20Sexual%20Assault%20Offenders.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/d25cd5db3b384061ca257d7100011126/$FILE/Government%20Response%20to%20the%20Joint%20Select%20Committee%20on%20Sentencing%20of%20Child%20Sexual%20Assault%20Offenders.pdf) [Accessed 30 Dec 2015]
- 6 Ibid at page 2.
- 7 For what is a 'prescribed sexual offence' see section 3, *Criminal Procedure Act 1986*.
- 8 *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*
- 9 Ibid.
- 10 Ibid.
- 11 Ibid.
- 12 Section 91 (a), *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*
- 13 Section 91 (b), *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*
- 14 *Criminal Procedure Act 1986* (NSW) s 275B (1)
- 15 *Criminal Procedure Act 1986* (NSW) s 275B (2)
- 16 *Criminal Procedure Act 1986* (NSW) s 306U
- 17 *Criminal Procedure Act 1986* (NSW) s 294B (3) (a)
- 18 *Criminal Procedure Act 1986* (NSW) s 294B (3) (b) (i)
- 19 *Criminal Procedure Act 1986* (NSW) s 294C, s 375B
- 20 *Criminal Procedure Act 1986* (NSW) s 294B (3) (b) (ii)
- 21 *Criminal Procedure Act 1986* (NSW) s 294A
- 22 Section 88 (2), *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*
- 23 Section 89 (3), *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*

- 24 Ibid
- 25 Section 89 (4), *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*
- 26 Section 12 (a), *Evidence Act 1995*.
- 27 Section 13 (1), *Evidence Act 1995*
- 28 Section 13 (8), *Evidence Act 1995*
- 29 For a competency hearing involving an intermediary see the judgment in the England and Wales Court of Appeal case of *R v F [2013] EWCA Crim 424*: ‘We note that the intermediary’s suggestion of asking the witness to identify body parts by reference to pictures was not adopted.’ [24] ‘We have come to the conclusion that in the circumstances the exercise carried out was not a fair test of the witness’ competency. The shortcomings of this process seem to us to owe much to a lack of preparation and a lack of ability to respond flexibly to the difficulties which arose.’ [27]
- 30 For a general outline of provisions in relation to child witnesses see Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (updated November 2015) [1-100 Child witness/accused](#).
- 31 For a general outline of provisions in relation to cross-examination see Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (updated November 2015) [1-340 Cross-examination – improper; of defendant](#).
- 32 Section 26, *Evidence Act 1995*
- 33 Section 41, *Evidence Act 1995*
- 34 Section 41 (1), *Evidence Act 1995*
- 35 Section 41 (5), *Evidence Act 1995*
- 36 Section 41 (2), *Evidence Act 1995*. See also Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (updated November 2015) at [1-341 Notes](#): ‘Section 41 is not the only source of law for improper questions. In *Libke v The Queen* (2007) 230 CLR 559, Heydon J detailed the law governing cross-examination generally, including the powers of a cross-examiner: at [118]; offensive questioning: at [121]; comments by a cross-examiner during the course of questioning: at [125]; compound questions (simultaneously pose more than one inquiry and call for more than one answer): at [127]; cutting off answers before they were completed: at [128]; questions resting on controversial assumptions: at [129]; argumentative questions: at [131] and the role of the judge: at [133].’
- 37 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (updated Nov 2015)
- 38 *Ellis v R [2015] NSWCCA 262*, para 57
- 39 As cited in *Ellis v R [2015] NSWCCA 262*, para 65
- 40 Such as a non-offending parent or guardian.
- 41 The referral should be sent via email to the designated email address.
- 42 The assessment will address the communication needs and abilities in light of the proposed interview and giving evidence at court. The assessment method will depend on the witness and the expertise of the children’s champion. If the children’s champion determines that they do not have the requisite skills to assist the witness they will return the referral and Victims Services.
- 43 Observing the assessment will often assist the interviewer to understand the witness’s communication needs and abilities.
- 44 See Mattison, M. (2015) *Using Communication Aids in the Criminal Justice System* (London: Advocacy Training Council) 2015 <http://www.theadvocatesgateway.org/images/toolkits/14usingcommunicationaidsinthecriminaljusticesystem060315.pdf> [Accessed 1 Jan 2016]
- 45 Their role must always be transparent. They are not a second interviewer.
- 46 SACP is further explained at Appendix 2.
- 47 *Equal Treatment Benchbook* (London: Judicial College 2013) page 56.
- 48 There might need to be more than one pre-trial visit.
- 49 <http://www.odpp.nsw.gov.au/witness-assistance-service> [Accessed 1 Jan 2016]
- 50 Riley, T. (2003) *The Little Red Book of Advocacy* (Law Society Northern Territory) 2003, 28
- 51 Memory refreshment may happen closer to the hearing rather than at the witness familiarisation visit when it might prove too much in one go for the witness.
- 52 Such a direction to the jury might be along the lines of: ‘You will see that there is a person sitting next to the witness, she is called a children’s champion. A children’s champion is not an expert witness, she does not give evidence; she is an independent person, a communication specialist who is present to assist with two-way communication in court.’

She will only intervene if a communication issue is identified. I have directed and it is agreed by both sides, that the questions of the witnesses will be short simple and straightforward and it is likely we will take breaks in the evidence. I must stress that the giving of evidence with a children's champion present is perfectly normal in a case such as this; the use of a children's champion is to assist communication and to ensure that the witness understands fully the questions and we understand fully the answers that are given. The fact that an children's champion is present in these proceedings must not in any way be considered by you as prejudicial to the accused or give the evidence any greater or lesser weight because it is given in this way.' Adapted from Cooper, P., (2015) *Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court* (London: ATC) 2015 available at <http://www.theadvocatesgateway.org/images/>

53 *Criminal Procedure Act 1986* (NSW) s 294B (7)

54 See *R v RAG* [2006] NSWCCA 343, in particular Latham J at para 26: 'Assessing a child or young person's understanding of the difference between the truth and a lie can only be reliably undertaken by posing simple questions, preferably after putting the child at ease by a series of questions concerning their age, schooling and favourite pastimes. Simple questions assume that the language within the question is as simple and direct as possible. Phrases including "regarding" or "concerning" should be avoided, along with phrases which suggest agreement, or include the use of the negative, for example, "it's true isn't it?" or "is that not true?" Hypothetical questions, questions involving abstract concepts, multi-faceted questions (questions incorporating more than one proposition), legal jargon and passive speech should also be avoided: see Cashmore, *Problems and Solutions in Lawyer-Child Communication* (1991) 15 Crim L J 193–202.' See also *MK v R* [2014] NSWCCA 274 (para 70) which established that asking "Do you know why it's important to tell the truth?" by itself was insufficient.

55 Section 13 (3) of the *Evidence Act 1995* states that 'A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.'

56 <http://www.triangle.org.uk/catalog/resources/cds-dvds-and-videos/truth-and-lies>

57 By virtue of section 13(5) of the *Evidence Act 1995* a witness is competent to give unsworn evidence if the court has communicated the following: '(a) that it is important to tell the truth, and (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.'

58 [theadvocatesgateway.org](http://theadvocatesgateway.org)

59 [http://www.victimsservices.justice.nsw.gov.au/Documents/service-standards\\_atasi.pdf](http://www.victimsservices.justice.nsw.gov.au/Documents/service-standards_atasi.pdf) [Accessed 2 Jan 2016]

60 Riley, T. (2003) *The Little Red Book of Advocacy* (Law Society Northern Territory) 2003, 33

61 Adapted from Cooper, P. report writing guidance in Ministry of Justice (2015) *Registered Intermediary Procedural Guidance Manual* (London: MoJ) 2015

62 With thanks to Registered Intermediary Ruth Marchant of Triangle for this example.

63 Cooper, P. (2014) Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings, *Child and Family Law Quarterly*, (2), 132 – 151, 144 and also Wurtzel, D. (2012) 'Time to Change the Rules: Children and Cross-Examination' in *Counsel* November 2012, 32-34 <http://www.counselmagazine.co.uk/articles/time-change-the-rules>

64 Many courts in England and Wales have agreed breaks of up to 3 minutes for young children; during a short, non-adjourned break (the court stays sitting) and the microphones and cameras to the live link room are temporarily made visible only to the judge, enabling the witness to take a few minutes in the live link room to re-orientate or calm themselves. This avoids the need for the jury to be sent out and brought back which would be unnecessarily time consuming.

65 'In general, experts recommend that the trial judge should introduce him or herself to the witness in person before any questioning, preferably in the presence of the parties. This seems to us to be an

entirely reasonable step to take to put the witness at their ease where possible.’ *R v Lubemba* [2014] EWCA Crim 2064 para 43

- 66 In England and Wales the intermediary is defined in section 29 of the Youth Justice and *Criminal Evidence Act 1999*. In New South Wales, section 88 (1) of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* mirrors the description of the role of the intermediary set out in section 29 (2) of the *Youth Justice and Criminal Evidence Act 1999*.
- 67 In England and Wales, under section 16 of the Youth Justice and *Criminal Evidence Act 1999*, a witness is considered ‘vulnerable’ and eligible for an intermediary if they are under the age of 18 at the time of the hearing or if the court ‘considers that the quality of evidence given by the witness is likely to be diminished’ by reason of the witness’s ‘mental disorder’, ‘significant impairment of intelligence and social functioning’ or ‘physical disability or is suffering from a physical disorder.’
- 68 Cooper, P. and Wurtzel, D. (2014) ‘Better the second time around? Department of Justice Registered Intermediaries Schemes and lessons from England and Wales’, *Northern Ireland Legal Quarterly*, 65(1), pp. 39-61
- 69 Ministry of Justice (2015), [Registered Intermediary Procedural Guidance Manual](#) (London: MoJ) 2015
- 70 *R v B* [2010] EWCA Crim 4.
- 71 Ibid, para 40. (See also Marchant, R. (2016) ‘Age is not determinative – The evidence of young children in the English justice system’ (forthcoming))
- 72 Ibid, para 42.
- 73 *R v Lubemba* [2014] EWCA Crim 2064.
- 74 Ibid, para 42.
- 75 Ibid, para 43.
- 76 Ibid, para 44.
- 77 Ibid, para 45. See also *R v Wills* [2011] EWCA Crim 1938 in particular at para 28: ‘The importance of the limitation on cross-examination in cases such as this is to protect the vulnerable witnesses and enable them to give the best evidence they can. We do not take the view that it follows that the type of cross-examination permitted means that the questions asked by counsel will be less effective in adducing the necessary evidence for the jury.
- Some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or “tagged” manner.’
- 78 Ibid, para 45.
- 79 [2011] EWCA Crim 3028.
- 80 Ibid, para 28.
- 81 Ibid.
- 82 [2010] EWCA Crim 1926.
- 83 Ibid, para 30.
- 84 *R v Lubemba* [2014] EWCA Crim 2064, para 40.
- 85 See *R v RL* [2015] EWCA Crim 1215, paras 7 and 10.
- 86 Ibid, para 43.
- 87 [2015] EWCA Crim 1684
- 88 Ibid, para 15.
- 89 Ibid, para 18. See also *F v CPS* [2015] EWHC 2527 (Admin).
- 90 *R v FA* [2015] EWCA Crim 209.
- 91 Ibid, para 13.
- 92 [2015] EWCA Crim 562.
- 93 Ibid, para 31.
- 94 [2015] EWCA Crim 1684.
- 95 [2013] EWCA Crim 1308.
- 96 Ibid, para 36.
- 97 (Rev 3) [2010] EWCA Crim 1824.
- 98 Ibid, para 29.
- 99 [2015] EWCA Crim 1582.
- 100 [2012] EWCA Civ 1905.
- 101 [2015] EWFC 42.
- 102 In response to a recommendation in the research report, Cooper, P (2014) [Highs and Lows: The 4th intermediary survey](#).
- 103 *Criminal Procedure Act 1986*, ss 297-298.
- 104 Ibid, s299
- 105 Ibid, s299D
- 106 Ibid, s299D. Before disclosure, the court must be satisfied that the information has “substantial probative value” (a high evidentiary threshold), is not available elsewhere and that the harm of disclosure is substantially outweighed by the desirability of disclosure.



