BENCH BOOK FOR CHILDREN GIVING EVIDENCE IN AUSTRALIAN COURTS

Updated February 2015

The Australasian Institute of
Judicial Administration Incorporated

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The Australasian Institute of Judicial Administration for access to the Aboriginal Bench Book for Western Australian Courts (2nd ed.).

The Judicial College of Victoria for access to the Victorian Criminal Charge Book.

Foreword

In July 2004 the AIJA convened a Seminar on "Child Witnesses – Best Practice for Courts". The Seminar was held in the District Court of New South Wales at Parramatta which hosts a special facility for child witnesses.
The idea for the Parramatta Seminar was a proposal then under consideration by the AIJA's Project and Research Committee for the development of a best practice in relation to the taking of evidence from child witnesses, together with the development of a benchbook.

There has been considerable consideration of the particular issues and difficulties attendant upon the giving of evidence by child witnesses in criminal proceedings over the past 10 years or so. Many jurisdictions have considered the matter and have adopted procedures for the taking of such evidence. The Project and Research Committee formed the view that any project for the development of a benchbook would be best informed by a Seminar at which ideas and concerns could be canvassed. The Seminar involved presentations from the judicial perspective, the practising profession's perspective and the particular difficulties attendant upon child witnesses giving evidence in jury trials.

A Committee was formed, consequent upon the Seminar, to prepare a child witnesses' benchbook. Judge Helen O'Sullivan of the District Court of Queensland was appointed to chair the Committee. The other members of the Committee were Justice Marcia Neave AO, Court of Appeal, Melbourne, Dr Annie Cossins, Faculty of Law, University of New South Wales, Justice Robyn Layton, Supreme Court, Adelaide, Justice Richard Refshauge, Supreme Court of the Australian Capital Territory, Judge Meryl Sexton, County Court of Victoria, Judge Ann M Ainslie-Wallace, District Court of New South Wales and Judge Kevin Sleight, District Court of Western Australia. Judge Hal Jackson QC, District Court of Western Australia and Judge David Freeman, District Court of New South Wales also served upon the Committee.
An initial working draft was prepared by Dr Michael King, former Western Australian magistrate and now Senior Lecturer, Faculty of Law, Monash University.
The Committee has worked tirelessly in relation to the preparation of the benchbook and the quality of the benchbook is to be commended. The Committee is to be commended for its work and also Ms Danielle Andrewartha for her editing. The benchbook looks at the position of child witnesses not only from the viewpoint of the

legal issues involved but with a view to the psychological aspects of the child giving evidence. It will be a valuable resource for both judicial officers and practitioners.

The AIJA has committed resources to the continuing update of the benchbook to ensure its ongoing accuracy and relevance.

Virginia Bell
Justice, High Court of Australia
Former President of the AIJA

Introduction

1. This Bench Book is intended primarily for judicial officers who deal with children giving evidence in criminal proceedings as complainants or witnesses, not as accused. It is not limited to child sexual abuse, although this forms a substantial proportion of criminal proceedings involving children. The Bench Book does not deal with the sentencing of child offenders or child protection hearings.

2. The objectives of this Bench Book are:

    i. To promote accurate knowledge and understanding of children and their ability to give evidence.

    ii. To assist judicial officers to realise the goal of a fair trial for both the accused and the child complainant.

    iii. To assist judicial officers to create an environment that allows children to give the best evidence in the courtroom.

3. The material currently available to judicial officers in each jurisdiction varies greatly and includes articles, websites, detailed jury directions, Bench Books, and Practice Directions. This Bench Book is an attempt to collate these materials and write a comprehensive text. The focus throughout the Bench Book is on the provision of helpful information to judicial officers for use in court. This Bench Book is not intended to duplicate existing materials, or to be in any way inconsistent with them. The value of existing Bench Books is acknowledged and respected.

4. This Bench Book is the first attempt in Australia, and possibly internationally, to collate legal material and psychological material on child witnesses in the same text, with an emphasis on usefulness for judicial officers.

5. In July 2004, the Australasian Institute of Judicial Administration (AIJA) held a conference 'Child Witnesses - Best Practice for Courts' at the Parramatta Court in Sydney. This was prompted by the NSW Specialist Child Sexual Assault

Jurisdiction Pilot. The need for judicial officers to be provided with clear information about child witnesses became apparent from informal discussions at the conference.

6. Initial members of the AIJA Committee 'Children Giving Evidence' were Judge Helen O'Sullivan and Judge Hal Jackson (Co-Chairs), Dr Annie Cossins, Judge Shauna Deane, Judge David Freeman, Justice Robyn Layton, Professor Marcia Neave, and Judge Roy Punshon.

7. Current members of the Committee are Judge Helen O'Sullivan (Chair), Judge Ann Ainslie-Wallace (New South Wales), Dr Annie Cossins (New South Wales), Justice Robyn Layton (South Australia), Justice Marcia Neave (Victoria), Justice Richard Refshauge (Australian Capital Territory), Judge Meryl Sexton (Victoria), and Judge Kevin Sleight (Western Australia).

8. Dr Michael King undertook initial research of the existing literature and produced a compilation. This work was then expanded and refined into Bench Book format by the members of the Committee.

9. The members of the Committee are mindful that this is a first attempt and there may be errors and omissions. The Committee warmly welcomes comments and suggestions to be sent to the AIJA so that these may be incorporated on a continuing basis.

10. The Benchbook was updated by Associate Professor Annie Cossins, 2010, 2012 and 2015. The law is stated as at February 2015.

Disclaimer

The *Bench Book for Children Giving Evidence in Australian Courts* contains information prepared and collated by the Australasian Institute of Judicial Administration Committee (the Committee).

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Chapter 1
Sexual Abuse of Children and Their Experience of the Justice System

1.1 The Nature and Impact of Child Sexual Abuse

The problem of child sexual abuse is the subject of a growing body of research by professionals in multiple disciplines including medicine, psychology and social work. Although research is continuing, research to date has provided substantial details as to the short- and long-term effects of child abuse on physical, psychological and behavioural health.

Research has also been conducted on child complainants' participation in the justice system. An important part of this research has been interviewing these children in relation to different aspects of the process: the reporting of abuse to family and the police, waiting for court proceedings, giving evidence in court, the behaviour of justice system professionals including police, lawyers, judges and magistrates, and the impact of the outcome of the case.

This chapter outlines the nature of child sexual abuse; summarises key findings from the research as to the physical, psychological and behavioural effects of such abuse; and describes the impact of the justice system experience on child complainants based on reports from children themselves. These topics are grouped together as the literature suggests that some of the dynamics involved in the acts of child sexual abuse – such as a lack of control and self-determination – are replicated in the trial of child sexual abuse cases.

Child sexual abuse is frequently associated with the following:[1]

- An offender who is known or related to the child.
- Grooming by the offender over time to engage a child's trust and to test his/her reactions to non-sexual and sexual touching.
- A relationship of dependence, control, or power between the child and the offender.
- No eyewitness to the actual sexual contact.
- Delayed complaint.

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[1] A. Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 153; A. Cossins, *Masculinities, Sexualities and Child Sexual Abuse* (London: Kluwer Law International, 2000).

- No forensic evidence, such as the presence of semen or medical evidence of penetration.
- Counter-intuitive behaviour on the part of the offender.
- Counter-intuitive behaviour on the part of the complainant.

These characteristics mean that the primary focus of trials involving child sexual abuse, more so than in other criminal trials, is on the credibility of the complainant. The appraisal of the complainant's credibility will include an assessment of his/her responses to the alleged abuse and his/her relationship with the accused.

This means that jurors, making decisions about guilt and innocence, will be required to make assessments of credibility 'that go beyond the laypersons' common-sense knowledge.'[2] This calls into question the appropriateness of the comment often made to jurors that common-sense is what is important.

Children who are the victims of child sexual assault can experience the following health and behavioural problems:

- Poor academic performance.[3]
- Anxiety, depression, and emotional problems.[4]
- HIV.[5]
- Feelings of hopelessness and hostility, low self-esteem and self-concept.[6]
- Running away from home.[7]
- Obsessive compulsive behaviour.[8]
- Paranoid ideation.[9]
- Pregnancy in adolescence.[10]
- Post-traumatic stress disorder.[11]
- Sexualised behaviour.[12]

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2 J. A. Quas, W. C. Thompson, K. Alison and C. Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behavior* 425, 426.
3 M. Purvis and A. Joyce, 'Child Sexual Abuse Is a Global Public Health Problem: Where Is Australia?' (2005) 12 *Psychiatry, Psychology and Law* 334, 336.
4 Ibid.
5 C. F. Johnson, 'Child Sexual Abuse' (2004) 364 *The Lancet* 462, 463.
6 Purvis and Joyce, above n 3, 336.
7 Johnson, above n 5, 463.
8 Purvis and Joyce, above n 3, 336.
9 Johnson, above n 5, 463.
10 Ibid.
11 Purvis and Joyce, above n 3, 336.
12 Johnson, above n 5, 462-463; Purvis and Joyce, above n 3, 335.

- Suicide attempts, self-mutilation and substance abuse.[13]
- Conduct disorders like obsessions, compulsions and eating disorders.[14]
- Sexual promiscuity.[15]
- Increased likelihood of perpetuating a cycle of violence, including sex crimes.[16]
- Withdrawal from social interactions.[17]
- Decreased likelihood of completing secondary studies due to learning difficulties or poor academic performance.[18]
- Social relationship problems in later life, such as difficulty with intimate relationships and divorce.[19]

These, together with the grooming, sexualisation, and threats by the abuser, challenge the perception that sexual abuse victims are able to exercise their free will to extricate themselves from the abuser and to promptly report the abuse.

Victims of child sexual abuse, compared to non-victims, also more frequently report pain in relation to other health problems, and have a greater disposition to depression.[20]

In addition, women subjected to sexual abuse as children are between two and 11 times more likely to be the subject of sexual assault as adults.[21] Problems commonly experienced by victims of child sexual abuse, such as depression, substance abuse,

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13 D. A. Neumann, B. M. Houskamp, V. E. Pollock and J. Briere, 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1 *Child Maltreatment* 6.

14 D. M. Fergusson, L. J. Horwood and M. T. Lynskey, 'Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: II. Psychiatric Outcomes of Childhood Sexual Abuse' (1996) 35 *Journal of American Academy of Child & Adolescent Psychiatry* 1365; E. C. Nelson, A. C. Heath, P. A. Madden, M. L. Cooper, S. H. Dinwiddie, K. K. Bucholz, A. Glowinski, T. McLaughlin, M. P. Dunne, D. J. Statham and N. G. Martin, 'Association between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study' (2002) 59 *Archives of General Psychiatry* 139; Neumann et al., above n 13; L. Smolak and S. K. Murnen, 'A Meta-Analytic Examination of the Relationship between Child Sexual Abuse and Eating Disorders' (2002) 31 *International Journal of Eating Disorders* 136.

15 E. O. Paolucci, M. L. Genuis and C. Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135 *Journal of Psychology* 17.

16 C. P. Widom and A. Ames, 'Criminal Consequences of Childhood Sexual Victimization' (1994) 18 *Child Abuse & Neglect* 303.

17 S. Boney-McCoy and D. Finkelhor, 'Psychosocial Sequelae of Violent Victimization in a National Youth Sample' (1995) 63 *Journal of Consulting and Clinical Psychology* 726; Paolucci et al., above n 15.

18 Boney-McCoy and Finkelhor, above n 17; Paolucci et al., above n 15.

19 J. Fleming, P. Mullen, B. Sibthorpe and G. Bammer, 'The Long-Term Impact of Childhood Sexual Abuse in Australian Women' (1999) 23 *Child Abuse & Neglect* 145; Nelson et al., above n 14; Johnson, above n 5; K. Hughes, H. Stephens, A. Difranco, L. Manning, N. van der Toorn, C. North and M. Taylor, *The Health Impacts on Adult Women of Childhood Sexual Violence before the Age of Twelve Years* (Ipswich: MIMS & Associates, 1998).

20 N. Sachs-Ericsson, K. Kendall-Tackett and A. Hernandez, 'Childhood Abuse, Chronic Pain, and Depression in the National Comorbidity Survey' (2007) 31 *Child Abuse & Neglect* 531.

21 T. L. Messman-Moore and P. J. Long, 'The Role of Childhood Sexual Abuse Sequelae in the Sexual Revictimization of Women: An Empirical Review and Theoretical Reformulation' (2003) 23 *Clinical Psychology Review* 537.

and a lack of social support, place victims at a higher risk of cardiovascular and other diseases later in life.[22]

Child sexual abuse not only affects the victim, it can also have significant consequences for the victim's immediate family and social network and for the wider community. Dysfunctional family members inevitably have an adverse effect on the functioning of other family members and the family unit as a whole. Victims of child sexual abuse are at an increased risk of becoming perpetrators of such abuse in adulthood. The problem can therefore be transmitted across generations. There is also the cost to the community in terms of health and justice system resources and community support structures for those in need.[23]

Research has reported that adults who were victims of sexual abuse when they were children may experience problems such as:

- Adjustment problems.
- Anxiety.
- Binge eating.
- Bipolar disorder.
- Depression.
- Marital conflict and breakdown.
- Maternal functioning problems.
- Panic disorder.
- Premenstrual stress.
- Post-traumatic stress disorder.
- Sexual dysfunction.
- Substance abuse.
- Suicide or suicide attempts.[24]

22 Purvis and Joyce, above n 3, 336.
23 Paolucci et al., above n 15.
24 Johnson, above n 5, Table: Some behavioural consequences of child sexual abuse, p 463; Purvis and Joyce, above n 3, 336.

1.3 The Extent of Child Sexual Abuse

Child sexual abuse is a problem affecting many nations around the world, including Australia. It occurs amongst all races, classes and ethnic groups.

An editorial by Andrews and colleagues in the *Medical Journal of Australia* in 2002 referred to seven studies of child sexual abuse which had been conducted in Australia between 1988 and 2002. The adjusted prevalence estimate, meaning the percentage of the sample population affected, for males was 5.1% and for females was 27.5%. For abuse that involved genital touching or fondling and oral, anal or vaginal intercourse, the rates were 3.6% of males and 17.9% of females.[25]

In 2003, a telephone-based survey conducted by Dunne and colleagues of 876 males and 908 females randomly selected from the community, found that for non-penetrative child sexual abuse, 15.9% of the males and 33.6% of the females surveyed reported they had been abused as children. With regard to penetrative child sexual abuse, 4% of the male sample reported a history of abuse compared to 12% of the females.[26] A meta-analysis of pre-existing studies in four countries (Australia, New Zealand, Canada and USA) which reported self-report and parent-report data concluded that 15-30% of women and 5-15% of men experienced any form of sexual abuse as a child.[27] Sexual abuse was defined as 'any completed or attempted sexual act, sexual contact, or non-contact sexual interaction with a child by a caregiver.'

Differences between prevalence rates for males and females may be due to different definitions of child sexual abuse, the methods by which abuse has been assessed, or the characteristics of the research populations.[28]

In any event, the results of the Dunne survey were unlikely to represent the true rates of child sexual abuse in the community given the reluctance of victims to

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25 G. Andrews, B. Gould and J. Corry, 'Child Sexual Abuse Revisited' (2002) 176 *Medical Journal of Australia* 458, 459.

26 M. P. Dunne, D. M. Purdie, M. D. Cook, F. M. Boyle and J. M. Najman, 'Is Child Sexual Abuse Declining? Evidence from a Population-Based Survey of Men and Women in Australia' (2003) 27 *Child Abuse & Neglect* 141, 141.

27 R. Gilbert, C. Spatz Widom, K. Browne, D. Fergusson, E. Webb and S. Janson, 'Burden and Consequences of Child Maltreatment in High-Income Countries' (2009) 373 *The Lancet* 68, 71.

28 Purvis and Joyce, above n 3, 335.

report.[29] Further, male sexual abuse may be underreported due to factors such as socialisation of males in a culture that values independence, sexual prowess and self-reliance, whilst vulnerability, fear, dependency and homosexuality are considered as weaknesses and likely to lead to rejection and denigration.[30]

In attempting to ascertain the true extent of child sexual abuse, two methods are commonly used. One is to interview adults as to their childhood experience (a retrospective survey). The second measure relates to contemporary reports of child sexual abuse to the police. There is likely to be substantial under-reporting of child sexual abuse for the reasons discussed later in this Chapter (see **Disclosing Child Sexual Abuse**), and discussed in the Victorian Law Reform Commission **Interim Report on Sexual Assault** in 2003 and in its **Final Report** in 2004.[31]

1.4 Who are the Abusers?

In Australia, a victim self-report study undertaken by Fleming reported, in 1997, that 8% of child sex offenders were strangers to the victims.[32]

The seven studies of child sexual abuse in Australia appearing in Andrews and colleagues' 2002 editorial referred to above,[33] indicate that the abuser is a family member in about 40% of cases, and is known to the child in 75% of cases.[34]

Additionally:

- The abuser is typically male, with a mean age of 32 years.[35]
- Abuse is more common in families that experience other problems. [36]
- Isolated or lonely children are particularly vulnerable.[37]

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29 Dunne at al., above n 26.
30 Purvis and Joyce, above n 3, 335.
31 Victorian Law Reform Commission, *Sexual Offences: Interim Report*, (2003) <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+-+Sexual+Offences+-+Interim+Report> at 6 March 2009, chs 2, 3; Victorian Law Reform Commission, *Sexual Offences: Final Report*, (2004) <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+-+Sexual+Offences+-+Final+Report> at 6 March 2009, paras 1.5, 2.1.
32 J. M. Fleming, 'Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women' (1997) 166 *Medical Journal of Australia* 65.
33 Andrews et al., above n 25.
34 Ibid 458.
35 Ibid.
36 Johnson, above n 5, 466.
37 Ibid.

- Children with an intellectual disability are also vulnerable to being exploited in this way.[38]

1.5 Disclosing Child Sexual Abuse

The Report of the United Kingdom Criminal Justice System's ***Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures***[39] lists the following points as being relevant to disclosure of child sexual abuse:

- Statements may be accidental or 'deliberate', verbal or non-verbal.
- Suspicion may arise from one or more sources: medical query, witness reports, confession, photographic evidence, and children's behaviour or verbal statements.
- Children may not report all the details of their abuse at once - they may minimise or withhold information.
- Disclosure may be immediate, but is very often delayed for long periods, even into adulthood.[40]
- A significant number of people who were abused as children never report their experience.[41]
- Children may deny or retract statements disclosing sexual abuse, even if other evidence exists, and this may be symptomatic of the abuse itself.
- The presence of an earlier informal statement does not guarantee an allegation will be repeated in a formal interview.
- Age, culture and many other factors may affect children's willingness and ability to report sexual abuse.[42]

  (See also the discussion on disclosure in **Disclosing Child Sexual Abuse**).

1.5.1 Delay and Non-Disclosure

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38 New South Wales Law Reform Commission, *Report 80: People with an Intellectual Disability and the Criminal Justice System*, (1996) <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC> at 6 March 2009, para [2.30].

39 *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures*, 2nd ed. (Criminal Justice System, 2007) <http://www.cps.gov.uk/Publications/docs/Achieving_Best_Evidence_FINAL.pdf> at 12 March 2009.

40 London et al., below n 43; Roesler, below n 43; Resnick et al., below n 43; Finkelhor et al., below n 43.

41 London et al., below n 43.

42 Ibid Box 2.8: How and when children talk about abuse, 19.

Research consistently shows that sexually abused children commonly delay their complaint of abuse for months or years,[43] and many never disclose it.[44] Research suggests that some children do not disclose the abuse within the first year after the abuse.[45]

A comprehensive analysis by the National Child Sexual Assault Reform Committee of studies reported in the literature over a 20 year period showed that there are particular patterns of disclosure by children.[46] Key findings included:

- A majority of sexually abused children do not disclose immediately or within one month of abuse. Most report the abuse one or more years after it occurred or not at all.
- Children abused by strangers are more likely to disclose within one month.
- Children abused by family members are more likely to delay disclosure longer than one month.
- Repeated abuse is more likely to occur if the abuser is a relative.
- Children who experience multiple abuses are less likely to disclose.
- Less intrusive forms of abuse are more likely to be reported.
- The younger the child at onset of abuse, the less likely she/he will disclose.
- Threats and use of force may be associated with delay in reporting.
- Authority figures (police, clergy, social workers etc) are the least common type of confidant.
- Friends are the most common type of confidant and disclosure to peers increases with age.

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43 See e.g., K. London, M. Bruck, S. J. Ceci and D. W. Shuman, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11 *Psychology, Public Policy, and Law* 194; T. A. Roesler, 'Reactions to Disclosure of Childhood Sexual Abuse: The Effect on Adult Symptoms' (1994) 182 *Journal of Nervous and Mental Disease* 618; H. S. Resnick, D. G. Kilpatrick, B. S. Dansky, B. E. Saunders and C. L. Best, 'Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women' (1993) 61 *Journal of Consulting and Clinical Psychology* 984; D. Finkelhor, G. Hotaling, I. A. Lewis and C. Smith, 'Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors' (1990) 14 *Child Abuse & Neglect* 19.

44 In their meta-analysis, London et al. concluded that two thirds of adults who stated in retrospective surveys that they had been abused as children reported that they did not disclose the abuse during childhood: London et al., above n 43.

45 J. Henry, 'System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure' (1997) 12 *Journal of Interpersonal Violence* 499; L. D. Sas and A. H. Cunningham, *Tipping the Balance to Tell the Secret: The Public Discovery of Child Sexual Abuse* (London, Ontario, Canada: London Family Court Clinic, 1995) ; D. M. Elliott and J. Briere, 'Forensic Sexual Abuse Evaluations of Older Children: Disclosures and Symptomatology' (1994) *Behavioral Sciences and the Law* 261.

46 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010) National Child Sexual Assault Reform Committee, UNSW, Sydney; see also A Cossins, "Time Out for *Longman*: Myths, Science and the Common Law" (2010) 34 *Melbourne University Law Review* 69, 79-80.

Delay in reporting is a typical, rather than an aberrant, feature of child sexual abuse.

1.5.2 Barriers to Disclosure

Researchers have posited a range of explanations for the prevalence of delayed and absent reporting of sexual abuse by children. These include the victims:

- Not understanding that abusive behaviour is wrong or abnormal.[47]
- Being embarrassed or desiring privacy.[48]
- Being warned to 'keep your mouth shut'.[49]
- Being denied contact with people who could intervene (e.g. a doctor) or having that contact monitored.[50]
- Believing they caused the violence/abuse.[51]
- Having no trusted adult in their lives.[52]
- Fearing the consequences for themselves (e.g. being taken from the family).[53]
- Fearing the consequences for the family (e.g. arrest of perpetrator, divorce of parents, non-abusing parent or sibling being hurt).[54]
- Feeling as though they are risking more abuse.[55]
- Seeking to avoid being pitied, shunned, or teased by other children.[56]
- Being concerned that their family will be angry at them and/or force them out of home.[57]
- Fearing the perpetrator and threats made by him/her.[58]
- Responding to bribes by remaining silent.[59]
- Doubting they will be believed or thinking they will be blamed.[60]

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47 Alison Cunningham and Linda Baker (2007) *Little Eyes, Little Ears: How Violence against a Mother Shapes Children as They Grown*, The Centre for Children and Families in the Justice System, Ottawa, 36.
48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid.
52 Ibid.
53 Ibid; London et al., above n 43, 195, 202.
54 Cunningham and Baker, above n 47, 36.
55 Ibid.
56 Ibid.
57 Ibid.
58 London et al., above n 43, 195, 202
59 Johnson, above n 5, 463.

- Feeling ashamed, embarrassed, or responsible for the abuse.[61]
- Responding to family pressures and/or a desire to protect the abuser. These phenomena are particularly salient when the abuser is a family member.
- Exhibiting 'learned helplessness', which is a psychological inability to complain about abuse at the hands of a trusted person.

Further reasons for children failing to report sexual abuse immediately or at all include that:

- The abuse has stopped.
- The coping and survival strategies that sexually abused children adopt are mental blocking or disconnecting emotionally, which invariably prevent or delay disclosure.[62]
- Children do not have the language skills to describe what has happened to them, particularly if they are very young.
- The perpetrator is a caregiver, who may keep the child away from school and other relatives to allow some healing of the trauma to occur, thereby avoiding detection.[63]
- The presence of complex family dysfunction, such as having a drug user in the household, may be a contributing factor.[64]

1.5.3 Impact of Delay on Available Evidence

Delay in disclosing child sexual abuse may preclude any or any meaningful medical examination of the alleged victim. As a result, most or all forensic evidence on which the parties could have relied may be lost. However, medical examination in child sexual abuse cases may not assist in determining whether abuse has occurred one way or the other (see for discussion: **PART B – MEDICAL EVIDENCE AT TRIAL** in Chapter 6).

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60 Jessie Anderson et al, 'Prevalence of Childhood Sexual Abuse Experiences in a Community Sample of Women' (1993) 32 *Journal of the American Academy of Child and Adolescent Psychiatry* 911, 915.

61 Jillian M Fleming, 'Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women' (1997) 166 *Medical Journal of Australia* 65, 68.

62 Cunningham and Baker, above n 47, 24.

63 Johnson, above n 5, 464.

64 Cossins, above n 46, 80.

1.6 What Do Children Say About Their Experiences in Court?

1.6.1 Introduction

The New South Wales Education Centre against Violence has stated that the court process causes children to be anxious and fearful of:[65]

- Underperforming as a witness and not measuring up to others' expectations.
- Being the one in trouble or of getting into trouble.
- Feeling embarrassed at having to discuss personal issues in public.
- Having to face the accused in court.
- The accused being sent to prison.
- The accused not being sent to prison.
- Losing her or his family.
- Giving evidence in court generally, with the anticipatory phase prior to trial being quite stressful.

Child complainants reported to the New South Wales Education Centre against Violence that:

- Receiving information about the court process reduced their anxiety.
- They wish to be consulted about what information they need to prepare for court to prevent information overload.
- They wish to be given the opportunity to express worries and concerns about court.
- Those worries and concerns should inform the provision of court preparation services at each stage of the trial process.
- They need help to understand how to deal with the court appearance as a stressful event and to help them identify coping mechanisms they have used in the past to deal with stressful events.[66]

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65 NSW Health-Education Centre Against Violence, *Nothing but the Truth: Court Preparation for Adult and Child Witnesses in Sexual Assault Criminal Proceedings* (The Education Centre Against Violence, 2002).

66 Ibid; see also C. White and K. Parker, 'Challenges in Preparing Child Witnesses to Give Evidence in Court', paper presented at the Child Witnesses: Best Practice for Courts Conference, Parramatta, 30 July 2004.

Ongoing surveys of child witnesses conducted by the Child Witness Service in Victoria found respondents had similar anxieties and fears of the court process to those reported in New South Wales. The majority of responses reported involve anxiety about giving evidence and seeing the accused. Asked which part of their preparation for court they found most helpful, recent respondents detailed features such as meeting with the child support worker, running through the process and talking things through prior to giving evidence, having the support worker sit by them as they gave their evidence, and being de-briefed after the giving of evidence.

1.6.2 Scepticism About Outcomes

It is widely accepted in Australia that child sexual assault has particular features that make it one of the most difficult crimes to prosecute[67] since

> [i]n no other type of case must a prosecutor put forward a child as the most important and, frequently, the only witness. In no other type of case are the alleged offenders as likely to be trusted family members or friends of family members.[68]

Compared to crimes such as robbery, there has been a sustained increase in the recorded rates of sexual assault during the 1990s which has continued into the mid 2000s.[69] A major contributor to this increase has been a rise in the recorded rates of sexual assault of children:

> [i]n the 10-year period between 1995 and 2005, the incidence of recorded sexual assault for children aged 0-14 years accounted for around 40 percent of all recorded sexual assaults.[70]

Despite this increase in recorded rates of sexual assault involving children, there is less chance of an accused being convicted for child sexual offences than for any other criminal offence. Statistically, if 100 children are sexually abused, it is likely that only about 10 of those children will actually report the abuse. Of those who disclose, only about six will reach committal proceedings in the lower courts, and only two or

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67 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010) National Child Sexual Assault Reform Committee, UNSW, Sydney, 41.

68 N Cowdery QC, *Inquiry into Child Sexual Assault Matters (Submission No 27)* (2002) Submission to the NSW Legislative Council, Standing Committee on Law and Justice, DPP: Sydney, 2.

69 Cossins, above n 67, 41.

70 S Bricknell, "Trends in Violent Crime", *Trends & Issues in Crime and Criminal Justice* (No 359) (2008) Australian Institute of Criminology: Canberra, 3.

three will reach the higher courts. Of those that appear before the higher courts, only about one or two cases will result in a conviction.[71]

In 2003, the Queensland Crime and Misconduct Commission opined that of the 6,500 child sex assault offences reported to the Queensland Police Service on average each year in the years leading up to publication of its report, just over half of those offences would come before the lower courts, about one-quarter would reach the higher courts, and about 17% would result in the conviction of an offender.[72]

In its final report on sexual offences in Victoria released in 2004, the Victorian Law Reform Commission referred to statistics covering the years 1997 to 1999 for all sexual offences reported in Victoria (not restricted to children) and received submissions expressing concern at the low reporting rates and difficulties in successful prosecution.[73] In the County Court of Victoria for 2007/2008, in cases where there was a child complainant, 37% were pleas of guilty at initiation, 24% were plea reserved, and 39% recorded not guilty pleas.[74] There is no data available as at the time of writing in 2009 for the results of those trials that concerned child complainants. For the period 2005 to 2008, in all Victorian sexual offences cases going to verdict after trial, the overall conviction rate ranged between 52-54%.[75] In December 2008, the 13 month average of accused persons pleading guilty in all sex offences cases was 59%. There are no separate figures for child complainants at the time of writing in 2009.

In South Australia, the Office of Crime Statistics and Research conducted a study tracking child victims of sexual offences from police incident report to finalisation in court. These statistics, released in 2007, indicated that for the years 2000 to 2001, 952 reports of sexual offences were made to police. Of those reports, 569 cases were cleared for the year, and of those cleared cases 27.76 % requested no further action and did not proceed to court. Of those cases that proceeded further, 26.4% requested no further action, or a *nolle prosequi* was entered. Of those that proceeded to the District and Supreme Courts, 43% were found guilty. Therefore, from a total of 569

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71 C. Eastwood, S. Kift and R. Grace, 'Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got It Wrong' (2006) 16 *Journal of Judicial Administration* 81, 90.

72 Crime and Misconduct Commission (Queensland), *Seeking Justice: An Inquiry into the Handling of Sexual Offences by the Criminal Justice System* (Brisbane: Crime and Misconduct Commission, 2003).

73 Victorian Law Reform Commission (2004), above n 31, [1.5] – [1.8].

74 Ibid.

75 Ibid.

cleared child sexual offence cases during the years 2000 to 2001, there was a resultant guilty verdict rate of 17% in the higher courts.[76]

The most comprehensive data on the prosecution of child sex offences come from NSW and show the following characteristics:

(i) high attrition rates both after first report to police and prior to trial;

(ii) a low guilty plea rate for those charged with a sex offence compared to other offences;

(iii) the low probability of conviction if a case goes to trial with only 8% of all reported cases resulting in a conviction[77]; and

(iv) more than half of appeals against conviction being successful, with the success rate for appeals increasing from 43.5% to 73.3% between 2000-2003.[78]

1.6.3 Stress and Embarrassment

Eastwood and Patton's study of the experiences of child complainants in sexual abuse cases in Queensland, New South Wales and Western Australia found that the reporting of the abuse to the police can be very difficult and stressful.[79] Some cases are reported without the consent of the child, which can cause the child anxiety, for example, where the police initiate an investigation and are the first to bring the abuse to the family's attention.[80] Children report feeling shame and discomfort in detailing the incidents to police, particularly if the non-abusive guardian is present. Children also found that having to go into the detail required by the police was gruelling.[81]

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76 Office of Crime Statistics and Research, *Crime and Justice in South Australia 2006-Offences Reported to Police, the Victims and Alleged Perpetrators: A Statistical Report*, (Office of Crime Statistics and Research, South Australian Attorney-General's Department: Adelaide, 2007) <http://www.ocsar.sa.gov.au/docs/crime_justice/OFF_REPORT2006.pdf> at 13 March 2009.

77 J Fitzgerald, "The Attrition of Sexual Offences from the New South Wales Criminal Justice System" (2006) *Crime and Justice Bulletin,* No 92, NSW Bureau of Crime Statistics and Research: Sydney.

78 Hazlitt, G, Poletti, P & Donelly, H (2004) *Sentencing Offenders Convicted of Child Sexual Assault*, Judicial Commission of NSW: Sydney.

79 C. Eastwood and W. Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) *Criminology Research Council* <http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf> at 6 March 2009, 45-49.

80 Ibid 48.

81 Ibid 46-48, 113.

At least in the short term, involvement in child sexual abuse prosecutions for some child complainants involves heightened anxiety, behavioural problems and emotional distress.[82] However, an American study conducted by Quas and colleagues in 1999 found that 12 to 14 years after legal involvement, measures of mental health were the same for testifiers and non-testifiers.[83]

1.6.4 Problems Caused by Delays

The delay between reporting the abuse to the police and the trial can also be a cause of significant distress for children and their families. Parents interviewed in Eastwood and Patton's study reported that their children experienced trauma and behavioural problems during that period. Children also suffered nightmares and other sleep disturbances.[84]

Some comments made by children and recorded by Eastwood and Patton include:

- 'That was two years of my life just waiting and worrying' (WA child, 16 years).[85]
- 'It was really bad. I had nightmares like anything – just the waiting. It gets to a stage where you feel like nobody's on your side' (WA child, 16 years).[86]
- 'It affected my schoolwork because I was usually high graded, high placed and I started to get low grades because I was scared and stuff. It was affecting my work. I was thinking about court and how it was going to end up' (WA Child, 14yrs).[87]

1.6.5 Court Facilities

Where there were no child-friendly facilities at court, children found waiting to give evidence quite stressful. A 13 year old child from New South Wales, who waited at a

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82 G. S. Goodman, E. P. Taub, D. P. H. Jones, P. England, L. K. Port, L. Rudy, L. Prado, J. E. B. Myers and G. B. Melton, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57 *Monographs of the Society for Research in Child Development* i; D. Whitcomb, D. K. Runyan, E. Devos and W. M. Hunter, *Final Report: Child Victim and Witness Research and Development Program* (US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., 1991).

83 J. Quas, A. Redich, G. Goodman, S. Ghetti and K. Alexander, 'Long Term Consequences on Child Abuse Victims of Testifying in Criminal Court: Mental Health Revictimization and Delinquency' (1999) *Biennial Conference of the Society for Research in Child Development* Albuquerque NM.

84 Eastwood and Patton, above n 79, 49-53.

85 Ibid, 51.

86 Ibid.

87 Ibid 68.

court on five consecutive days from 9:00am until 4:00pm, complained about being required to stay 'in a little room with nothing…he [the accused] was allowed to walk around and we weren't.'[88] This contrasts with the experience of children in Western Australia and Victoria[89] who are able to wait in the supportive surroundings of the Child Witness Service, which has videos, games and other activities to engage them during any waiting period.[90]

Since Eastwood and Patton's research findings were released in 2002, both New South Wales and Queensland courts have opened new facilities for children giving evidence. In these States, a number of remote rooms have been established from which sexual assault complainants give evidence. In Parramatta, for example, these rooms are located in a separate building which is a secure facility away from the court precinct and has a child-friendly waiting room. In Brisbane, a suite of rooms has been purpose-built and equipped for child witnesses giving video evidence.

1.6.6 Seeing the Accused

Children may not wish to see the accused and the thought of having to do so can be very stressful for them. [91] Children appreciate processes, such as giving evidence by closed circuit television from a remote location rather than being forced to see the accused in the courtroom.[92] See for discussion **Closed Circuit Television**.

1.6.7 Cross-Examination

As may be expected, and like most adult witnesses, children say cross-examination is the most stressful part of the court process.[93] Eastwood and Patton's study[94] detailed the problems for children of cross-examination. They noted that:

> The sexually assaulted child…is forced to describe intimate intrusions to their body in great detail, usually a number of times. The child has no control over the questions, or over how they can respond…they are not permitted to tell their story in their own words,

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88 Ibid, 53.
89 For details of the Victorian Child Witness Service, see: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Courts/Going+to+Court/Child+Witnesses/.
90 Ibid.
91 Ibid 53-56 concerning child complainants in Western Australia, Queensland and New South Wales.
92 Ibid.
93 Sas, below n 106.
94 Ibid 45-49.

> nor are they permitted to defend themselves against accusations of lying in any way whatsoever. The child must do as they are told. The child must answer every question. The child has no right to challenge offensive treatment, or try to defend themselves.[95]

In the study, children cross-examined via video link (rather than in the courtroom) still found the process difficult, but they commented that the use of the video link diminished the risk of intimidation by defence counsel. For example, a 16 year old child from Western Australia stated that '[i]t's easier because it's like if someone is yelling at you through the TV there, its [sic] not as bad as someone yelling at you from like five feet away'.[96]

The controlling nature of cross-examination can be particularly difficult for adolescents who are at a developmental stage where they are seeking to assert their self-determination and autonomy and who are also more aware of social mores and taboos concerning sexual behaviour.[97]

More of a problem, however, is the role of cross-examination in the creation of inaccurate testimony. Recent studies have shown that 'far from ensuring that the truth is revealed, [cross-examination] often causes inaccuracies in the evidence of children'[98] through the use of language and linguistic techniques that are designed to create inconsistencies and confusion.[99]

Judicial officers need to ensure that the cross-examination of a child is conducted in such a way that there is an appropriate balance between the right of the accused to test the evidence and the right of the child to be treated with respect and dignity. See for detailed treatment of the role of judicial officers in this regard: **Chapter 4 The Judicial Role in Child Sexual Abuse Cases and Preparation for Trial**.

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95 Ibid 127-128.
96 Ibid 61.
97 R. Manley, 'Management of Child Witnesses: Practical Problems Judges Should Know About', paper presented at the District Court Judges Conference, Perth, September 2002.
98 A Cossins, "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?", (2009) 33 *Melbourne University Law Review*, 68, 68.
99 M Brennan, "The Discourse of Denial: Cross-Examining Child Victim Witnesses" (1995) 23 *Journal of Pragmatics*, 71; R Zajac, and H Hayne, "I Don't Think That's What *Really* Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports" (2003) 9 *Journal of Experimental Psychology*, 187; R Zajac, J Gross, J and H Hayne, "Asked and Answered: Questioning Children in the Courtroom", (2003) 10 *Psychiatry, Psychology and Law*, 199.

1.6.8 Not Being Believed

Not being believed is an issue that concerns children from reporting to trial outcome. A verdict of guilty provides validation to the story they have told. However, a verdict of not guilty can generate hurt, anger and stress for a complainant. Children are also concerned about prosecutors agreeing to accept a plea of guilty to a lesser charge and consequent perceived inadequate sentences.[100]

1.6.9 Not Being Treated with Respect

Children's experiences of a judge in court may quickly shatter or bolster any positive expectations they had of the trial process. Eastwood and Patton's study demonstrates that children are acutely aware of how judges act in the courtroom. They said that '[c]hildren frequently described judges and magistrates as grumpy, nasty, grouchy and cranky.'[101] Children expressed appreciation where there was some positive action on behalf of the judge:

> One child was particularly impressed by a judge who thanked the child for coming and said she "hoped everything goes okay for the future" (WA Child 17yrs). Children also recalled helpful comments that made the child feel more comfortable. "The judge tried to make me feel comfortable before it all started. And she asked me if I wanted a break" (WA Child 14yrs). "The judge asked me if I wanted to have a rest" (WA Child 14yrs). [102]

Children also found the court environment harsh and stated that it felt like they were there to be punished. One child in Eastwood and Patton's study commented that defence counsel should be more caring.[103] Another child remarked:

> It makes me feel like it is no good going to court or anything. It is just a waste of time. I think it is not even worth doing anything with the courts. They are pathetic really. They don't look after you. They couldn't care less. They are not interested… It is the hardest thing and it ruins your life. You never forget it.[104]

Eastwood and Patton's study also found that court support services help children deal with the court process, but do not overcome all of its negative aspects. Having a

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100 Eastwood and Patton, above n 79, 62–64.
101 Ibid, 125.
102 Ibid 65.
103 Ibid 73.
104 Ibid 2.

separate Child Witness Service with facilities for the giving of evidence by remote video link helps children feel protected and supported[105] (see further **The Role of Child Witness Services**).

1.6.10 Unrealistic Expectations

Sas has observed that children have high expectations – sometimes unrealistic – as to judges and their interaction with them:

> Children's feelings of goodwill and their high expectations of the adults in the court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as someone who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend.[106]

1.6.11 Would Children Report Again?

When Eastwood and Patton asked child complainants whether they would ever report sexual abuse again, 33% in New South Wales, 44% in Queensland, and 64% in Western Australia said they would. The higher rate in Western Australia perhaps reflects the more child-friendly procedures in place there since 1992.[107] However, all jurisdictions now have such procedures in place to alleviate the trauma associated with giving evidence.[108]

1.7 The Role of Child Witness Services

The experience of dedicated Child Witness Services has indicated that proper preparation and support for a child leading up to their court appearance can assist in alleviating their anxiety and help make the giving of evidence less stressful.[109] Eastwood and Patton's study

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105 Eastwood and Patton, above n 79, 65-66.
106 L. Sas, 'The Interaction between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency' (2002) <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/index.html> at 6 March 2009.
107 Eastwood and Patton, above n 79, 111.
108 See further, Chapter 5.
109 NSW Health-Education Centre Against Violence, above n 65; White and Parker, above n 66.

demonstrated universal support from child complainants and their parents in relation to the child witness support services provided to them.[110]

A number of Australian jurisdictions have dedicated Services, either government or private, to help prepare children for their appearance in court. Officers of these agencies will meet with the child soon after the matter is brought to their attention and will assess the child's situation and formulate a plan suited to the child's unique needs. The officer involved may also liaise with the prosecutor about any issues that may arise, including the child's ability to give evidence in court and any special needs.

Proper preparation for child sexual offence trials includes empowering children by involving them in deciding the preparation strategy; familiarising them with the court/remote witness room; providing them with information as to their role at court and that of other people in the courtroom; facilitating their development of stress coping skills; and promoting their self-esteem and self-confidence.

1.8 Useful Links

- **Child Witness Service**
- **Child Witness Service**
- **Director of Public Prosecutions, Witness Assistance Service, South Australia**
- **Child Witness Support Program: Protect All Children Today (PACT), Queensland**

[110] Eastwood and Patton, above n 79, 65-66.

Chapter 2
Child Development, Children's Evidence and Communicating with Children

2.1 Introduction

This chapter highlights important issues to assist judicial officers to respond more appropriately to children. A more effective approach ensures judicial officers fulfil an important part of their role, namely, to aid understanding of, and communication with, the child witnesses in their court. It is essential that the judicial officer makes certain that children are treated with respect and dignity, thus enabling them to give the best possible evidence in court.

2.2 Assessing the Credibility of Children as Witnesses

As noted by Spigelman CJ , '[t]here is a substantial body of psychological research indicating that children, even very young children, give reliable evidence.'[111]

The assessment of the credibility of children giving evidence is an inherently human and imprecise exercise. Judges and counsel often tell jurors that they are the best people to assess whether the child complainant is telling the truth, and that it is a matter of 'commonsense' and 'life experience.'

The reality is that the reliability of the evidence of children is a complex issue, and 'commonsense' and 'life experience' may not be enough **to assess a child's credibility**.

2.3 Judicial Assumptions about Child Witnesses

In *JJB v The Queen*,[112] Spigelman CJ noted:

> Their Honour's observations [Deane and McHugh JJ in *Longman*][113] are based on assumptions about child psychology which are widely held but which are not necessarily well founded. Many judges share a conventional wisdom about human behaviour, which may represent the limitations of their background.... Legislative intervention was

111 *JJB v The Queen* (2006) 161 A Crim R 187, 189.
112 (2006) 161 A Crim R 185.
113 Spigelman CJ's comments were made in the context of the judgments of Deane J (at 101) and McHugh J (at 107-8) in *Longman v The Queen* (1989) 168 CLR 79.

> required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in Longman reflect a similar legal tradition that treated children as unreliable witnesses. In the past both categories of witnesses required corroboration.[114]
>
> Jurors may also reflect these widely held assumptions about children, as they may also do about sexual assault complainants. Such prejudices may be reinforced by the profession and the bench in the conduct of a criminal case.[115]

In 1996, Cashmore and Bussey surveyed 37 magistrates and 23 judges in New South Wales. Children were perceived by the judicial officers to be honest but highly suggestible, prone to fantasy, and prone to the influence of others.[116] Hence it is important for Judges to avoid perpetuating stereotypes in their summing-up and also to direct juries when they are considering their verdict, to disregard particular stereotypes which may have been raised by counsel in the course of their addresses.

2.3.1 Demeanour

Reliance on the juror's commonsense and life experience is based on the assumption that the dishonest witness will betray him- or herself by his or her demeanour.[117] However, a number of psychological studies show that non-verbal behaviour is an unreliable indicator of truthfulness. These studies have shown that professionals (including judges and police officers) are no better than laypeople at predicting veracity through observing a person's demeanour such that *both* groups misinterpret behavioural cues at or below chance levels.[118]

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114 *JJB v The Queen* (2006) 161 A Crim R 185, 189.

115 Ibid 189. The psychological research to which Spigelman C referred in his Court of Appeal judgment was: A. Ligertwood, *Australian Evidence* 4th (Chatswood: LexisNexis Butterworths, 2004) [7.3.1]; J. D. Woolley, 'Thinking About Fantasy: Are Children Fundamentally Different Thinkers and Believers from Adults?' (1997) 68 *Child Development* 991; M. Taylor, 'The Role of Creative Control and Culture in Children's Fantasy/Reality Judgments' (1997) 68 *Child Development* 1015; T. Sharon and J. D. Woolley, 'Do Monsters Dream? Young Children's Understanding of the Fantasy/Reality Distinction' (2004) 22 *British Journal of Developmental Psychology* 293; R. J. McNally, *Remembering Trauma* (Cambridge: Belknap Press, 2003).

116 J. Cashmore and K. Bussey, 'Judicial Perceptions of Child Witness Competence' (1996) 20 *Law and Human Behavior* 313. On judicial perceptions, see also N. Bala, K. Ramakrishnan, R. Lindsay and K. Lee, 'Judicial Assessment of the Credibility of Child Witnesses' (2005) 42 *Alberta Law Review* 995; K. Makin, 'School Days for Judges' (2002) 26 *Canadian Lawyer* 30; B. L. Bottoms and G. S. Goodman, 'Perceptions of Children's Credibility in Sexual Assault Cases' (1994) 24 *Journal of Applied Social Psychology* 702; J. L. Hamblen and M. Levine, 'The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses' (1997) 21 *Law and Psychology Review* 139.

117 Cashmore and Trimboli, below n 126.

118 See, e.g., P. Ekman, M. O'Sullivan and M. G. Frank, 'A Few Can Catch a Liar' (1999) 10 *Psychological Science* 263; S. Porter, M. Woodworth and B. A. R., 'Truth, Lies and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception' (2000) 24 *Law and Human Behavior* 643; S. Mann, A. Vrij and R. Bull, 'Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies' (2004) 89 *Journal of Applied Psychology* 137.

Surveys of jurors show that they link credibility with a perception of self confidence in the witness. Psychological research shows that demeanour of either an adult or a child witness is a doubtful indicator of reliability.[119] In fact there are few specific behaviours or mannerisms that are reliable indictors of deception. Children, like adults, may be reacting to the stress of the courtroom, or their family situation, or any number of factors totally unrelated to truthfulness.[120]

Additionally, it is important to note that appearance, behaviour and body language are all heavily culturally-determined. As such, an Aboriginal person may appear and behave in a particular situation in a manner that may be different to that of an Anglo-Irish Australian (see further Error! Reference source not found.; REF _Ref229475679 \h * MERGEFORMAT **Demeanour**; see also ***Equality before the Law Bench Book***; ***Aboriginal***).

2.3.2 Jury Misconceptions

In the only published Australian study on misconceptions about children and child sexual abuse, Cossins, Goodman-Delahunty and O'Brien reported that there was considerable variability in the misconceptions held by 659 jury-eligible citizens.[121] A substantial proportion of participants lacked knowledge about the reality of children's experiences of sexual abuse and their ability to provide reliable evidence. The results showed that the less than half the participants held accurate views about issues to do with children and sexual abuse, indicating that the most critical information about child sexual assault cases was actually outside the experience and common knowledge of laypeople. The study also reported there was considerable uncertainty amongst participants about the reliability of children's memory and accounts of sexual abuse. Juror uncertainty or lack of information is of particular concern in a legal case since it may render the jury more malleable and susceptible to suggestions by counsel.

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119 See, e.g., L. Re, 'Oral Evidence V. Written Evidence: The Myth of the "Impressive Witness"' (1983) 57 *Australian Law Journal* 679, 193-194; M. D. Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 4 *Judicial Review* 189; G. Downes, 'Oral Evidence in Arbitration' (2003) *Speech to the London Court of International Arbitration's Asia-Pacific Users' Council Symposium in Sydney* <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/pdf/oral.pdf> at 13 March 2009. Kirby J also addressed this theme in a judicial context in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588.

120 Bala et al, above n 116, 1002.

121 A. Cossins, J. Goodman-Delahunty and K. O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435.

At a sexual assault conference held in Sydney in February 2003, Chief Justice Wood commented on jurors' perceptions of evidence in sexual assault cases:

> Of concern is the circumstance that normally expert evidence of human sexual behaviour, whether normal or abnormal, and of victim response, is not admissible, with the consequence that the determination by juries of such cases will to a large extent depend, in a practical sense, upon their own sexual orientation, experience, practices and beliefs. In many instances, although most particularly in relation to child sexual assault, the dynamics of such an assault and of the typical response of the victim, may be quite unappreciated by lay jurors, many of whom may believe in the several myths which surround such conduct.[122]

A study of jurors conducted by Quas and colleagues published in 2005, support the validity of the concerns raised by Chief Justice Wood.[123] The study found that, although jurors were aware of some significant issues surrounding child sexual abuse and the giving of evidence, some also held beliefs that were consistent with such myths.[124] It would appear that courts in the past have overestimated the knowledge and capabilities of jurors in this context and underestimated the usefulness of expert evidence in child sexual abuse cases.[125]

Cashmore and Trimboli conducted a survey of the perceptions of 277 jurors from 25 juries hearing child sexual assault trials held in four District Courts in Sydney between May 2004 and December 2005.[126] Jurors considered that significant predictors of children's credibility were: the degree of consistency in their evidence, the perceived confidence of the child in giving evidence, and whether the witness could remember particular details of events.[127]

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122 Wood J., 'Sexual Assault and the Admission of Evidence', paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference, Sydney, 12-14 February 2003 [25]. Contrast the view of King CJ in *C* (1993) 70 A Crim R 378, 383-385. On jury perceptions, see also G. S. Goodman, J. M. Golding, V. S. Helgeson, M. M. Haith and J. Michelli, 'When a Child Takes the Stand: Jurors' Perceptions of Children's Eyewitness Testimony' (1987) 11 *Law and Human Behavior* 27.

123 Quas et al., above n 2.

124 Ibid 452.

125 See for e.g., *C* (1993) 70 A Crim R 378, 383-385 and *Doggett v The Queen* (2001) 208 CLR 343, 377 (Kirby J).

126 J. Cashmore and L. Trimboli, 'Child Sexual Assault Trials: A Survey of Juror Perceptions' (2006) 102 *Crime and Justice Bulletin* 1 <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB102.pdf/$file/CJB102.pdf> at 21 March 2009.

127 Ibid, 14.

A jury survey carried out in New Zealand in 2005 by Blackwell identified a 'CSI phenomenon' and described it in these terms:

> Jurors have watched forensic science programmes which feature instantaneously available, highly technical and scientific forensic evidence...and want such evidence in child sexual assault cases. One juror thought DNA and eye-witness evidence would be necessary to convict in these cases.[128]

Blackwell concluded that for jurors involved in child sexual assault cases, myths are alive and well. For example, some jurors believed that delay in disclosure of abuse is evidence of lying; that if a child returns to or spends time with an offender this is evidence that no abuse occurred; that children can fabricate detailed complaints of child sexual abuse; and, if sexual abuse actually occurred, children would remember it in considerable detail.[129]

As Ceci and Friedman have commented:

> There is no reason to assume that the average potential juror, much less the overwhelming majority of jurors, has a good understanding of all the insights that decades of psychological research have yielded. Consider, for example, the effects of repeated questions and the plausibility of children making false statements about physical events that would be of central concern to them.[130]

The Judicial Commission of New South Wales' ***Equality before the Law Bench Book***[131] states that the trial judge in a child sexual abuse case may need to:

> Draw the jury's attention to any evidence presented in court about the particular child or young person's developmental age and capacities, the actual evidence presented by the child, any conflicting evidence presented by others and how they should relate these matters to the points they need to decide;
>
> Caution the jury against making any false assumptions about children's evidence generally, or the particular child's or young person's evidence.[132]

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128 S. Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand', paper presented at the Children and the Courts Conference, National Judicial College of Australia, Sydney, 5 November 2005, 13.

129 Ibid.

130 S. J. Ceci and R. D. Friedman, 'Suggestibility of Children: Scientific Research and Legal Implications' (2000) 86 *Cornell Law Review* 33, 101.

131 Judicial Commission of New South Wales, *Equality before the Law Bench Book*, (Sydney: Judicial Commission of New South Wales, 2006) <http://www.judcom.nsw.gov.au/benchbks/equality/index.php> at 13 March 2009.

It cannot be assumed that the average juror, or even the average lawyer or judge, has a good understanding of the insights that decades of psychological research have yielded about the effects of child sexual abuse.

2.4 The Reliability of Children in Giving Evidence

Some people, including lawyers and judicial officers, believe that children often lie and are suggestible. Brennan has noted that '[c]hildren are thought of as socially, emotionally and intellectually inferior to their adult models and their validity and reliability as individuals is reduced in direct proportion to their age.'[133] Transposed to the child sexual abuse case, this conception manifests in the belief that even young children fantasise about sexual matters. This section will discuss the reliability of children's evidence.

Spencer and Flin have found that children's cognitive skills, particularly those relevant to giving evidence (e.g. perceiving and remembering people, places and events) may have been undervalued.[134] Indeed, there is no scientific basis for any presumption against a child's credibility as a witness. Children are often as accurate as adults at discriminating the origins of their memories.[135] Further, recent forensic research has highlighted the ubiquitous imperfections of adult testimony, showing that mature witnesses' memories can be fragile and susceptible to the distorting influences of suggestion and misinformation. 'In sum, the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated.'[136] This was recognised in a survey of Canadian judges reported by Bala and colleagues in 2005.[137]

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132 Ibid, [6.3.7].

133 M. Brennan, 'The Battle for Credibility-Themes in the Cross Examination of Child Victim Witnesses' (1994) 7 *International Journal for the Semiotics of Law* 51, 65.

134 J. R. Spencer and R. H. Flin (eds.), *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990), 297.

135 D. Lindsay and M. Johnson, 'Reality Monitoring and Suggestibility: Children's Ability to Discriminate among Memories from Different Sources', in Ceci, Toglia and Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987) 92 <http://memlab1.eng.yale.edu/PDFs/1987_Lindsay_Johnson_ChildrenSources.pdf> at 13 March 2009, 103-107.

136 Spencer and Flin, above n 134, 287.

137 A survey of Canadian judges in 2005 sought to ascertain how they assessed the credibility of child witnesses, and the accuracy of their assessments. Significantly, judges believed that in the context of the

In 1992, Dent reported that for three groups – 102 children of normal ability aged nine to 10 years; 78 children with learning difficulties aged eight to 12 years; and 65 adults of normal ability aged 16-41 years – all of the participants gave equally accurate reports of an incident in response to free recall and non-leading general questions.[138]

These additional points are important to note when considering the evidence of children in sexual abuse cases:

- There is no evidence that children are in the habit of fantasising about sexual incidents with adults.
- Each child witness will have strengths and vulnerabilities that may potentially bear upon his or her ability to give evidence. The same may be said of adult witnesses. Whether the strengths and vulnerabilities have any impact at all is a matter to be considered in the circumstances of each case. As Westcott has stated, '[a] balanced view of strengths and vulnerabilities is required, not an over-riding focus on children's inadequacies'.[139]
- Children, including very young children, are able to remember and retrieve from their memory large amounts of information, especially when the events are personally experienced and highly meaningful.[140]

Children can and do give clear, credible accounts in court as to what they have seen and heard and as to what has happened to them. A particular factor that tends to affect the reliability of children's evidence is how they are questioned.[141]

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cases that are brought before them, children are less likely to lie than adults: Bala et al, above n 116, 1011, 1014-1015.

138 H. Dent and R. Flin (eds.), *Children as Witnesses* (Chichester: John Wiley & Sons, 1992) 5.

139 H. L. Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going?' (2006) 18 *Child and Family Law Quarterly* 175, 188.

140 S. J. Ceci and M. Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *Psychological Bulletin* 403 <http://psyencelab.com/library/documents/docs/Suggestibility%20of%20the%20Child%20Witness_A%20Historical%20Review%20&%20Synthesis.pdf> at 21 March 2009, 434.

141 R. K. Oates, 'Problems and Prejudices for the Sexually Abused Child' (2007) 81 *Australian Law Journal* 313 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_oates-problems_and_prejudices_for_sexual_abused_child.html> at 20 March 2009, 317-319; W. C. Thompson, K. A. Clarke-Stewart and S. J. Lepore, 'What Did the Janitor Do? Suggestive Interviewing and the Accuracy of Children's Accounts' (1997) 21 *Law and Human Behavior* 405; R. Zajac and H. Hayne, 'I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of

2.5 Do Children Lie More or Less Than Adults?

- Any assumption that children have any greater or lesser propensity to lie than adults has not been able to be proven.
- The literature suggests that children are capable of telling deliberate lies at the age of four.[142]
- Young children may lie when they anticipate punishment, or when they are threatened by someone not to disclose the truth. [143]
- As children grow older, they may gain additional reasons for lying - to obtain a reward; to protect their self-esteem; to regulate relationship dynamics; and to conform to norms and conventions.[144]
- Oates has stated that children aged five to six are more likely to keep a secret than children aged three. Further, children aged nine to ten years are not likely to report an incident they have been asked to keep secret, but are more likely to do so under direct questioning than children aged five to six.[145]
- The fact that children sometimes are confused more easily than adults and consequently may suffer a loss of confidence, may place them at a disadvantage within the adversarial system because jurors may disbelieve children who lack apparent confidence.[146]
- There is no evidence that indicates that the honesty of children is less than that of adults. For a variety of ethical and practical reasons, it is virtually impossible to meaningfully conduct this type of research, as children and adults have very different motivations to lie.

Children's Reports' (2003) 9 *Journal of Experimental Psychology: Applied* 187; see also M. Powell, 'Improving the Reliability of Child Witness Testimony in Court: The Importance of Focussing on Questioning Techniques', paper presented at the The Australian Institute of Judicial Administration: Child Witnesses-Best Practice for Courts Conference, District Court of New South Wales, Parramatta, 30 July 2004 <http://www.aija.org.au/ChildWitnessSem04/Powell.pdf> at 21 March 2009; Sas, above n 106.

142 A. Vrij, 'Deception in Children: A Literature Review and Implications for Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 175, 177.

143 Ibid 188.

144 Ibid 179.

145 Oates, above n 141, 314-315.

146 Dent and Flin, above n 138, 86.

There is no evidence that children have a greater tendency to lie than adults.

2.6 The Difference between Errors of Commission and Errors of Omission

According to Oates, in cases of child sexual abuse, errors of disclosure that children make are most commonly errors of omission – not stating all of the details of the alleged abuse – rather than errors of commission – describing events that did not happen. The latter comprise less than 2% of allegations of child sexual abuse.[147]

Oates has remarked that an important reason for errors of omission is that:

> the abuser often tells the child that the sexual behaviour is a secret they must never tell anyone, that no-one would believe them anyhow and threatens the child with severe punishment if the behaviour is revealed.[148]

Errors of omission may also arise because children disclose alleged abuse incrementally, especially when it is common for a child to have multiple interviews with police. Omissions in evidence may also be a result of fear or becoming flustered due to repetitive questions and difficult cross-examination. Children may also become emotional as a result of disturbing evidence or questions, and not being given the chance to fully describe the events as a result of questions that are too specific.[149]

It is important for judicial officers to be aware of the capacities of children, and understand that the behaviours described in the foregoing are more likely to signify confusion and frustration rather than deception or lack of memory. Judicial officers must therefore be vigilant in this regard (see for detailed treatment of the role of judicial officers: **Chapter 4 The Judicial Role in Child Sexual Abuse Cases and Preparation for Trial**).

2.7 Cognitive Development

147 Oates, above n 141, 315.
148 Ibid .
149 Bala et al, above n 116, 1017.

Giving evidence involves language skills, cognitive skills, and emotional coping skills. In a 2007 conference paper, Tucker, a psychologist, described the necessary skills required of child witnesses as including the following:

> For children to give evidence, an array of skills is required. For example, children need the memory skills to encode information about an experience, store that information and retrieve it when 'cued' to do so. They need the verbal skills to describe that experience. They need the meta-cognitive skills to differentiate between what happened and what did not. Children also need the social-relational skills to be questioned by unfamiliar adults and respond to those questions. They need the emotional regulation skills to stay "integrated" under stress and continue to function in a coherent way.[150]

In recent years it has been generally recognised that children's cognitive abilities are dynamic - constantly shifting as they grow older - and that there are individual differences between children.[151] Children under the age of 10 have problems describing what others are feeling; are not very astute at inferring intent; and may simply project their own feelings and their own perceptions onto others.[152] This is particularly so for children under the age of seven, who will also have difficulty in appreciating the perspectives of others. Therefore, these children will need assistance to accomplish this task.[153] Over the age of 10, children's cognitive abilities will depend largely on their individual experiences.[154]

Generally speaking, young child witnesses do not have the capacity to appreciate another person's point of view and to comprehend hypothetical questions because both of these skills involve abstract reasoning abilities which they do not have. Although awareness of one's abilities in respect of comprehension improves with age, older children tend to be unwilling to share their ignorance in relation to a question with those around them, usually out of embarrassment. Therefore, their comprehension must be monitored as well.[155]

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150 A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Seminar on Child Witnesses Conference, Darwin, 26 November 2007, 2; see also K. Fitzgerald and A. Tucker, 'Child Development Issues Presentation Paper', paper presented at the Child Witness Workshop, 8-9 February 2007 .

151 Sas, above n 106, 13.

152 Ibid 17.

153 Ibid 18.

154 Ibid.

155 Ibid, 21.

Appreciating another person's point of view and comprehending hypothetical questions are two examples of skills that involve abstract reasoning abilities that are not present in young child witnesses.[156] It is generally reported that children do not, as a rule, understand that other people do not know something that they themselves know. As a result, young children will often assume that the lawyer asking the questions really knows what has happened, and so they tend not to offer spontaneous information. Children are inclined to offer little or no detail in their accounts because they assume that the adult listener knows the details and has the same information as they do.[157] They therefore may provide only the bare facts in their free narrative.[158]

Children often fail to realise that they have insufficient information to correctly interpret the world around them. This has important implications for children who are testifying because they must actively monitor their own comprehension throughout the court proceedings in order to give accurate evidence. Monitoring capacity develops slowly over time as the child grows older. Children often need external assistance to help them monitor their comprehension. This is particularly true of children under 10 years old.[159]

Children may also be unaware that they have not understood questions put to them. Questioners should therefore check the comprehension of the child witness by asking them to either paraphrase what has been said to them or explain what they believe the words mean.[160]

Judicial officers and counsel should not assume that a child witness understands the question being put to him/her. Judicial intervention may be necessary.

Giving time estimates is particularly problematic for younger children who have not yet learnt to tell time. Being able to give accurate evidence of seconds, minutes,

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156 R. Fivush and J. Hudson (eds.), *Knowing and Remembering in Young Children* (Cambridge: Cambridge University Press, 1990) 1190; R. Selman, M. Schorin, C. Stone and E. Phelps, 'A Naturalistic Study of Children's Social Understanding' (1983) 19 *Developmental Psychology* 82.

157 Ibid 19.

158 Sas, above n 106, 20.

159 Ibid.

160 Ibid [2.7].

hours, days, weeks, months, and years, 'develops very slowly over elementary school'.[161] This is because these concepts are very abstract and children only understand them once they can make a connection to real-life events.[162]

Children may also confuse calendar dates and may have trouble reporting events in chronological order. Sas has noted, in respect of children's difficulties with estimating frequency of events, that:

> Observations of children on the stand suggest that they have great difficulty estimating the number of times an event occurred. This is especially true when children are asked to recount the frequency of abusive incidents that have spanned several years. Children tend to be able to talk about the first and last time an event occurred, but have difficulty enumerating the other times in between.[163]

It may be beyond the developmental capacity of an individual child to give accurate evidence of the time lapse between the date of the alleged abuse and when the child first complained of it. Equally, it may be difficult for a child to give accurate evidence of how long ago the alleged abuse occurred.

Difficulties with time estimates, frequency of events, and chronological order of events may arise because of the developmental capacity of an individual child.

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161 Sas, above n 106, vi, citing K. Saywitz and L. Camparo, 'Interviewing Child Witnesses: A Developmental Perspective' (1998) 22 *Child Abuse & Neglect* 825.

162 Sas, above n 106, 21, citing Saywitz and Camparo, above n 161.

163 Ibid.

Table 1 - Cognitive Skills Present in Children Relevant to Testimonial Competency[164]

Cognitive Abilities	**Preschool (3-5)**	**Early Primary (6-9)**	**Later Primary (10-12)**	**Early Adolescence (13-14)**
Domain specific court knowledge	No	Minimal	Yes	Yes
Comprehension of oath, lie, truth and promise	Minimal	Yes, but not the term oath	Yes	Yes
Ability to infer other's intentions, motives and feelings	No	No	Yes	Yes
Comprehension of ambiguous verbal messages	No	No	Yes	Ye
Ability to comprehend a hypothetical question	No	No	With difficulty	Yes
Ability to estimate times, tell time and provide accurate measurements	No	No	Yes	Yes
Ability to monitor one's own comprehension	No	No	Yes	Yes

Judicial officers should bear in mind that the stages of children's various developmental skills do not necessarily occur at the same time. For example, a child may attain language skills expected of their age without having yet attained the

[164] Sas, above n 106, 26.

relevant cognitive skills.[165] Thus their conceptual understanding may not match their 'words'. Further, a child may have good cognitive and language skills, but lack the psychological maturity to deal with the emotional pressure of a courtroom.[166]

2.8 Factors Affecting Children's Memory

Research into children's memory has revealed the following:

- There is no universal rule concerning children's memory, particularly in the context of giving evidence. Children may give very detailed accounts of an event or they may provide a paucity of detail.
- Memory, whether that of children or adults, does not operate like a video recorder; it is a product of the subjective reality of the individual and the interaction of the individual with his or her environment, and accordingly may change over time.[167]
- Subsequent events may impact positively or adversely upon the quality of memory. Depending on the nature of intervening events, memory may be diminished or strengthened[168] and the longer the gap between an event and its recall, the more likely the memory details will be lost.
- Children's ability to encode, store and retrieve information develops over time. From three years of age, children form detailed and enduring memories of events that happen to them, particularly events that are in some way distinctive and emotionally positive or negative.[169] Children older than three are also more able to engage in a conversation about such events with others, which may serve to reinforce their memories. In relation to negative memories, see: **Memory for Traumatic Events**.
- Children's recall depends on language development, conceptual development, memory, and emotional development and the context in which recall is undertaken. However, children generally lack the same memory retrieval strategies that are available to an adult. Preschoolers may rely on the prompting of adults in order to retrieve their memories, although as children

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165 J. Schuman, N. Bala and K. Lee, 'Developmentally Appropriate Questions for Child Witnesses' (1999) 25 *Queens Law Journal* 251, 258.
166 Ibid.
167 L. Baker-Ward and P. A. Ornstein, 'Cognitive Underpinnings of Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 22.
168 Ibid 26.
169 Ibid 60.

progress through their pre-school years, they become more able to provide information about events that occurred several months previously with less reliance on external prompts.

- As children progress through school they develop more sophisticated retrieval strategies. However, a comprehensive memory search – for instance, the question 'have you ever done X?' – may not develop until the end of primary school or until adolescence.[170]
- In general, adults do not recall events that happened before they were three and a half years of age.[171] On the other hand, Fivush has stated that children aged eight and above can accurately recall events that occurred when they were three years of age.[172] Similar memory performance between an eight to nine year old group and a 12 to 13 year old group has also been observed.[173]
- Children may provide different, but nonetheless accurate, details about the same event at different interviews.[174] This discrepancy may be due to the fact that young children have difficulty presenting information in an organised manner, because as they develop, different aspects of the experience may become more relevant to them.[175] This means that inconsistency in children's accounts does not necessarily equate to inaccuracy, especially in repeated recalls that follow open-ended questioning.
- In addition, children have a different perspective from adults as to what is important to remember. Children may remember the presence of an iPod or Playstation in a room, while adults may remember a person's clothes or an antique clock on a mantelpiece.
- Although a child may not entirely understand what they are observing, they may still be able to recall and relate details of the event that can assist a court.[176]
- Young children have particular difficulty isolating a specific incident that occurred as part of a routine experience, and may not differentiate a discrete event from that routine experience. They use their experience to fill in the gaps

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170 K. J. Saywitz, 'Developmental Underpinnings of Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 8.

171 R. Fivush, 'The Development of Autobiographical Memory', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 56.

172 Ibid 58.

173 Baker-Ward and Ornstein, above n 167, 29.

174 R. Fivush and A. Schwarzmueller, 'Say It Once Again: Effects of Repeated Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress* 555; Fivush, above n 162, 58.

175 Fivush and Schwarzmueller, above n 174, 573.

176 Sas, above n 106, 15.

when they are trying to remember peripheral details that occurred on a particular day. For example, a child giving evidence about having been inappropriately touched following a family dinner might, in response to a question enquiring whether his/her sister was present at *that* dinner, answer 'yes', even though the sister was not in fact there, because that is the child's routine experience – that the sister is generally present for all family dinners.[177]

- The literature suggests that repeated experiences of an event – such as an act of abuse – decrease a child's ability to remember the specific details of each single experience.[178] With the lapse of time, the interference in memory between events is likely to increase. This is particularly the case with younger children. Therefore, the errors children may make in recalling and distinguishing particular acts of abuse from others are more likely to be about identifying particular details, rather than reporting details that never happened.[179] However, if a particular incident of abuse was distinctive in some way – such as being the first or last act, or being in a different location and/or at night rather than in the daytime – then the child is more likely to be able to distinguish the individual event from others in the series.[180]
- Emotional factors may also affect memory and the ability to recall past episodes of abuse. Children gain greater self-consciousness and the ability to feel embarrassment from about seven years of age. Given the intimate and traumatic nature of abuse, such feelings may limit the amount of information that a child is willing or able to divulge.[181] Goodman has stated that children between the ages of four and seven showed a clear demeanour change when they were asked abuse questions, showing signs of embarrassment, disgust, surprise or disbelief. Goodman's findings suggest that young children are well aware of the cultural meanings associated with their bodies.[182]

It is a natural phenomenon of memory that individuals remember different details at different times. Inconsistency does not necessarily indicate unreliability.

177 Ibid, 40.
178 M. Powell and D. Thomson, 'Children's Memories for Repeated Events', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 72.
179 Ibid 73.
180 Ibid 74.
181 Saywitz, above n 170, 13.
182 G. Goodman, L. Rudy, B. L. Bottoms and C. Aman, 'Children's Concerns and Memory: Issues of Ecological Validity in the Study of Children's Eyewitness Testimony', in Fivush and Hudson (eds.), *Knowing and Remembering in Young Children* (Cambridge: Cambridge University Press, 1990) 249.

2.8.1 Memory for Traumatic Events

To date, studies have not reported any difference between the basic memory processes of maltreated and non-maltreated children. Further, the fact that certain experiences were traumatic does not in itself prevent or hinder them being recalled.[183]

There have been some contradictory findings with respect to whether heightened anxiety and stress at the time of an event have a positive or negative effect on children's memory.[184] In some cases it has been suggested that high levels of stress increase children's abilities to focus and thus to encode the information.[185] Others have suggested that too much stress at the time of the event can cause memory impediment.[186]

Appreciating the impact of trauma on children is extremely important when attempting to understand the evidence that they have given. As Tucker has remarked:

> The effects of trauma on brain functioning can explain what seems counterintuitive such as a child failing to disclose abuse at the time, lack of emotion (disassociation) or extreme emotion (hyperarousal), and risk taking and aggressive behaviour. This understanding can assist judicial officers when considering evidentiary issues such as apparent inconsistencies and credibility, and/or instructing the jury.[187]

Research suggests that children are able to provide accurate details of a traumatic event they experienced years after it occurred.

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183 M. L. Howe, D. Cicchetti and S. L. Toth, 'Children's Basic Memory Processes, Stress, and Maltreatment' (2006) 18 *Development and Psychopathology* 759.

184 Sas, above n 106, 36.

185 L. Terr, 'What Happens to Early Memories of Trauma? A Study of Twenty Children under Age Five at the Time of Documented Traumatic Events' (1988) 27 *Journal of Amer Academy of Child & Adolescent Psychiatry* 96.

186 Ceci and Bruck, above n 140; K. A. Merritt, P. A. Ornstein and B. Spicker, 'Children's Memory for a Salient Medical Procedure: Implications for Testimony' (1994) 94 *Pediatrics* 17; D. P. Peters (ed.), *The Child Witness: Cognitive and Social Issues* (Deventer: Kluwer, 1989) ; D. P. Peters, 'The Influence of Stress and Arousal on the Child Witness', in Doris (ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (Washington, D.C.: American Psychological Association, 1991) 60.

187 Tucker, above n 150, 4.

> For example, a study of children who experienced Hurricane Andrew, a class IV system that hit the coast of Florida in 1992, involved interviews with the children within a few months of the event and then again 6 years later. They were 3-4 years of age at the first interview and 9-10 at the second. They recalled the event in 'vivid detail' in the second interview. Remarkably, the study found that the children described substantially more details about the event in the second interview than they did at the first. That may be due to developmental changes that the children experienced between the two interviews. Children in a higher stress group gave less information in free recall than the other children and required more questions and prompts to provide the information.[188]

Like memory for non-traumatic events, memory for traumatic events may be subject to deterioration. However, research indicates that the core elements of traumatic events are less likely to be forgotten than non-traumatic events. Cordón and colleagues have commented:

> In so far as traumatic experiences are, almost by definition, distinctive, significant, salient, and associated with intense emotional reactions, what we know about memory more generally suggests they are frequently likely to be well remembered. Moreover, traumatic events are often experiences that punctuate our life stories, perhaps becoming a part of who we are, marking turning points, closing options, and changing directions.[189]

2.9 Are Children Suggestible?

A number of studies conducted by Ceci and colleagues indicate that children are highly resistant to suggestion. However, young children can be suggestible when they:

- Receive incorrect suggestions that create negatives stereotypes about a person (for example, that a person is bad or has done something wrong).
- Receive false suggestions through misleading questions. Children's acquiescence to misleading questions is a well-documented phenomenon, but other research has shown that some suggestibility studies are flawed because they do not take into account the differences in suggestibility when children actually experience an event compared with children who observe, or are told about, an event.[190]

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188 R. Fivush, J. M. Sales, A. Goldberg, L. Bahrick and J. Parker, 'Weathering the Storm: Children's Long-Term Recall of Hurricane Andrew' (2004) 12 *Memory* 104.

189 I. M. Cordón, M.-E. Pipe, L. Sayfan, A. Melinder and G. S. Goodman, 'Memory for Traumatic Experiences in Early Childhood' (2004) 24 *Developmental Review* 101, 123.

190 Goodman et al., above n 182, 256; T. Murachver, M. E. Pipe, R. Gordon, J. L. Owens and R. Fivush, 'Do, Show and Tell: Children's Event Memories Acquired through Direct Experience, Observation, and Stories' (1996) 67 *Child Development,* 3029; Gobbo et al, below n 195.

- Are repeatedly requested to visualise fictitious events.
- Are asked about personal events that happened a substantial period of time ago and there has been no 'refresher' in the interim.
- Are suggestively asked to use anatomical dolls to re-enact an alleged act of abuse.
- Are questioned by a biased interviewer who pursues a hypothesis single-mindedly.[191]

The extent to which children of different ages are vulnerable to suggestion has been the subject of much experiential analysis. Research into this issue has produced inconsistent results, largely because of the use of different methodologies and the varying ages of the subject children.[192] However, some conclusions can be drawn from the research:

- Zajac and colleagues have stated that 'children may be particularly prone to answering questions that they do not understand during the cross-examination process.'[193]
- Poole and Lindsay have concluded that if children are asked 'WH' questions (who, what, where, why, when and how) following their free narrative, the completeness of their accounts is increased, without decreasing its accuracy.[194]
- The degree of suggestibility varies markedly between children who have participated in an event (as is the case when a child is abused) and those who were merely observers of events.[195] For example, Goodman found that the response of four year olds, when compared to seven year olds, depended on whether they were bystanders or participants. In response to suggestive questioning, none of the four year olds who were participants included information about events which had not in fact occurred. Irrespective of age, none of the participant children made a single commission error in response to

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191 S. Ceci, A. Crossman, M. Scullin, L. Gilstrap and M. Huffman, 'Children's Suggestibility Research: Implications for Courtroom and the Forensic Interview', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 117, 118.

192 T. D. Lyon, 'New Wave in Children's Suggestibility Research: A Critique' (1999) 84 *Cornell Law Review* 1004; S. J. Ceci and M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, D.C.: American Psychological Association, 1995); Thompson et al., above n 141; Sas, above n 106, 43.

193 Zajac et al., below n 285, 201, citing A. H. Waterman, M. Blades and C. Spencer, 'Do Children Try to Answer Nonsensical Questions?' (2000) 18 *British Journal of Developmental Psychology* 211.

194 D. A. Poole and D. S. Lindsay, 'Interviewing Preschoolers: Effects of Non-Suggestive Techniques, Parental Coaching, and Leading Questions on Reports of Non-Experienced Events' (1995) 60 *Journal of Experimental Child Psychology* 129.

195 Goodman et al., above n 182; C. Gobbo, C. Mega and M.-E. Pipe, 'Does the Nature of the Experience Influence Suggestibility? A Study of Children's Event Memory' (2002) 81 *Journal of Experimental Child Psychology* 502, 504.

suggestive abuse or non-abuse questions.[196] It is therefore invalid to extrapolate from a study on children as observers the idea that children who are sexually abused will respond to suggestibility in the same way.[197]

- Reports of misinformation in free recall by children are rare.[198]
- Generally it is more difficult to mislead children to report negative or abuse-related events than positive events, regardless of age.[199] Further, children are fairly resistant to suggestions that they have been hurt when they have not.[200]
- Gobbo and colleagues investigated the suggestibility of three and five year olds in relation to misleading responses. They observed that the difference in suggestibility between the two age groups was confined to questions involving peripheral items relating to the period immediately after the relevant event. However, after a one week delay this suggestibility had disappeared from the three year olds, indicating that they had forgotten the misinformation. The three year olds also forgot more factual information over time, which suggests that there is more rapid forgetting in younger children due to differences in the way memories are encoded at that age, compared with older children.[201]
- Children who have been the subject of abuse are not more susceptible to suggestibility than other children.[202]
- The level of a child's overall cognitive functioning (including memory encoding, storage and retrieval capabilities) as well as his/her self-esteem and temperament may also be relevant to suggestibility.[203]
- Two factors that predict children's suggestibility are:
    - 'Yield' – a tendency to respond affirmatively to leading questions; and
    - 'Shift' – a tendency to be socially sensitive to negative feedback which may cause a child to change his or her responses to please an interviewer.[204]

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196 Goodman et al., above n 182; Gobbo et al., above n 195.

197 Gobbo et al., above n 195, 504.

198 K. Pezdek, K. Finger and D. Hodge, 'Planting False Childhood Memorie: The Role of Event Plausibility' (1997) 8 *Psychological Science* 437; K. Pezdek and T. Hinz, 'The Construction of False Events in Memory', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 99; B. M. Schwartz-Kenney and G. S. Goodman, 'Children's Memory of a Naturalistic Event Following Misinformation' (1999) 3 *Applied Developmental Science* 34.

199 M. L. Eisen, G. S. Goodman, J. Qin and S. L. Davis, 'Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Abuse', in Lynn and McConkey (eds.), *Truth in Memory* vol. 67, (New York: Guilford Press, 1998) 163; Sas, above n 106.

200 Sas, above n 106, 44.

201 Gobbo et al., above n 195, 512.

202 Howe et al., above n 183, 764.

203 Ibid 127, 760.

204 G. S. Goodman and A. Melinder, 'Child Witness Research and Forensic Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological Psychology* 1, 9-10, citing G. H. Gudjonsson, 'A New Scale of

- Repeated interviewing in a neutral context, in which children are questioned about an event on more than one occasion and no false information is provided to them during the process, can facilitate children's recall and resistance to false information. However, when strongly leading interviewing occurs in a repetitive fashion, children are more likely to incorporate incorrect information in their accounts and may even form false memories of the relevant event. Therefore, multiple interviews can assist the receipt of accurate evidence from children, so long as care is taken not to introduce misleading information.[205]
- Where there are a series of acts of abuse alleged and certain details are common to all, then the child will be more resistant to suggestibility as to those details than children who only experienced one isolated event.[206]

2.10 Children's Use of Language

2.10.1 The Importance of Language in the Courtroom

Brennan has commented that '[l]anguage has the capacity to include or exclude experiences, to create taboos, to provoke guilt and to create deep psychological states.'[207] Knowing a particular child's language skills is important for understanding and communicating with the child.

2.10.2 Apparent Inconsistencies

Something a child says in evidence may appear to an adult to reflect the child's inconsistency and therefore reflect badly on the child's credibility. A supposed inconsistency may be a function of any or all of the following:

- The child's language skills and the listener's misunderstanding of the child's language.
- The questioner meaning one thing by a question, while the child places another interpretation on it.

Interrogative Suggestibility' (1984) 5 *Personality and Individual Differences* 303; G. H. Gudjonsson, 'A Parallel Form of the Gudjonsson Suggestibility Scale' (1987) 26 *British Journal of Clinical Psychology* 215.

205 Goodman and Melinder, above n 204, 8-9.

206 Powell and Thomson, above n 178, 77.

207 M. Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71, 75.

- Neither the questioner nor the child appreciating there has been a miscommunication.
- An inconsistent response.

Westcott has pointed out that:

> Lawyers are fond of highlighting inconsistencies in children's accounts during cross-examination as indicators of falsehood, a practice which psychological research would suggest is in many cases completely unreliable and misleading to the court. Further, the lawyers' own role in exacerbating inconsistencies through questioning tactics is typically overlooked, or deliberately downplayed.[208]

Westcott has also stressed the need to recognise that there is a mismatch between the requirements of the legal system and the capabilities of young children.[209]

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208 Westcott, above n 139.

209 Ibid 3; see also *R v Ashley* [2005] QCA 293 (Williams JA).

2.10.3 Children Differ in Their Language Development

By the age of five, most children's speech sounds a lot like that of adults.[210] However, simply because a child sounds like an adult does not mean that he or she has an adult's cognitive development or command of language. Cognitive and language development continues through childhood and into adulthood. Although there are general trends in relation to language development, each child is unique. As forensic linguist Walker has commented, 'each child has his or her own unique growth pattern, and his or her own family experience which shaped the learning of language'.[211]

Additionally, conversational styles may differ between families and depend upon one's upbringing. Commonly, children learn language in an environment where adults support the process and correct mistakes that children make. However, some children are raised in an adverse environment – such as an abusive or an impoverished one – which can hinder their language development.

2.10.4 The Environment of the Courtroom

In court, a child witness may assume that the everyday rules of conversation apply. However, the adversarial nature of proceedings may lead to misunderstandings between children and their questioners. For example:

- Children may not understand the need for care and precision in responding.[212]
- Children generally have little understanding or ability to deal with legal jargon. Even teenagers may have an understanding of common legal expressions that differs from courtroom usage. For instance, Crawford and Bull noted that children often confused 'defendant' with a lawyer and reported that one child said a magistrate was 'higher than a judge, a really important judge.'[213]
- When an adult who is in a powerful position, in a forbidding, strange, and formal circumstance, 'suggests' that something is a fact, it becomes extremely difficult, if not impossible, for children - even 11 and 12 year-olds - to know how

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210 A. G. Walker, *Handbook on Questioning Children: A Linguistic Perspective* 2nd (Washington, D.C.: ABA Center on Children and the Law, American Bar Association, 1999), 10.

211 Ibid 9.

212 Saywitz, above n 170, 5.

213 E. Crawford and R. Bull, '"Teenagers" Difficulties with Key Words Regarding the Criminal Court Process' (2006) 12 *Psychology, Crime and Law* 653.

to disagree if necessary, and to hold on, verbally, to what they know or believe to be true.[214]

- Children of all ages - like adults - are less likely to admit that they do not understand a question if they think that they should understand it, particularly if the atmosphere is forbidding and formal, as courts are apt to be.[215]
- It is common for children under pressure in the witness box to simply repeat a previous answer.[216]
- Children may have a problem with presenting a narrative style answer as they may not have the processing capability of retrieving, organising and presenting the information.
- Children may have difficulty in seeing the questions from the listener's perspective; often failing to spontaneously and fully orientate the listener to place, time and person.[217]

2.10.5 Factors Affecting Children's Language Skills

- Children begin to learn language from the particular words they hear and the context in which they are used. They may start using a word before they fully understand its different meanings and the various contexts in which it is used.[218] Further, young children may use words in ways not used by adults or use special words. For instance, a child may refer to semen as 'white glue', which may be entirely understandable given the child's age.[219] As seen from this example, children will draw on words from their own vocabulary to try to describe a situation even when the words may not be appropriate according to conventional use. Walker provides another example of a child describing being stabbed even though there was no evidence of a knife or any injury. The description was simply meant to convey the pain involved in the sexual abuse rather than suggest the use of an instrument.[220]
- Children do not understand questions put in the negative until around 11 or 12 years old.

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214 Walker, above n 210, 48.
215 Ibid 60.
216 Ibid 69.
217 Saywitz, above n 170, 8.
218 Walker, above n 210, 10.
219 Saywitz, above n 170, 15.
220 Walker, above n 210, 67.

- Children under 12 have problems when questions ask more than one thing at a time.
- A lack of language skills and processing capacity means that a child is unlikely to cope with questions and concepts that are ambiguous or confusing, that embody multiple concepts containing several questions, and/or that require many cognitive operations to answer.[221]
- According to Walker, a tag question such as 'he didn't do it, did he?' would require at least seven cognitive operations to process.[222] Thus, questions of this nature are likely to be very difficult for children to answer.
- A child may also have problems in dealing with questions that limit choice as to answers – such as questions that only allow a 'yes' or 'no' answer – particularly when the child knows that neither answer applies in the circumstances.[223]
- The question and answer format used in court is not generally how young children converse. They like to introduce their own topics, ask their own questions and express how they feel, much of it unsolicited. They have difficulty just answering the questions put to them, and they do not like to wait for their turn to speak.[224]

A helpful general rule of thumb is to match the number of words in the question with the age of the child.[225]

Example: 6 year old child = 6 words in the question.

2.10.6 Language and Age Groups

Some general comments can be made about the language development of children of different age groups:[226]

221 See Walker, above n 210.
222 Ibid 49.
223 Ibid 45.
224 Sas, above n 106, 29.
225 Ibid.
226 Derived from Walker, above n 210, 2-5.

(a) Pre-schoolers:

- Do not deal well with abstractions.
- Have difficulties with putting things into adult categories.
- Use words connoting time, distance, kinship or size long before they understand their meaning.
- Define words simply: a mother may be defined as 'she looks after me'.
- Have trouble using pronouns (he, she, we, etc.) correctly.
- Are confused by the use of negatives (for example, 'did you not go to the door?').
- See questions and answers as an invisible pair – a question must have an answer – and may well answer a question even when not understanding it.
- Are at their best when dealing with simple subject-verb-object style sentences.
- May only answer one aspect of a complicated question.
- May not see as important details that adults consider important.
- If they do not understand a question, it may be due to the language used.
- Usually do not know that they do not understand something.
- Believe that adults generally speak the truth, are sincere and would not trick them.

(b) Age 7-10:

- Use and interpret language very literally. An example is that a child may consider 'touching' involves a hand, so touching by a mouth or penis is not included.
- May have problems with adult concepts.
- May have problems with complex questions and in considering the future from the perspective of the past (for example, 'was Uncle John supposed to take you to the movies that day?').
- Have difficulties with passives, the difference between 'ask' and 'tell' and pronoun usage.
- May be easily confused by complex negation.
- Ability to organise matters in an adult style narrative is problematic.
- Do not have the skills to deal with irony, sarcasm and insincerity.

- May still believe that generally adults speak the truth.
- May not understand difficult words and complex syntax.

(c) Adolescents

- May or may not have adult narrative skills.
- May be concerned with the here and now rather than with time as an ongoing phenomenon.
- May have problems with complex negation.
- May often be confused by ambiguous language.
- May not follow complex questions.
- May be hesitant to acknowledge that they do not understand a question and are thus reluctant to seek clarification.
- Where children have been developmentally delayed, their language skills may be equivalent to those of the 7-10 year old group.

2.10.7 Special Vocabulary Problems of Children

There are specific words and concepts that children generally only acquire at certain ages. For example, children may only master the distinction between 'ask' and 'tell' between seven and 10 years of age; between 'come' and 'go' and 'bring' and 'take' at between seven and eight years of age; and between 'before' and 'after' at age seven.[227] Children may only acquire the adult concept of 'remember' at between eight and nine years of age.[228] Younger children may use 'forget' in the sense of not having known.[229]

Research by Schumann and colleagues indicates that children may experience misunderstanding because of difficult vocabulary used by lawyers, such as 'allegation', 'fabrication', 'my learned friend', 'I put it to you', and 'I suggest'.[230]

2.10.8 Typical Examples of Questions That Cause Difficulty for Children

Cashmore, in an unpublished manuscript, has detailed a number of examples of the kinds of questions that cause problems for children in giving evidence.[231] Her research has been relied upon to prepare the following table.

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227 Walker, above n 210, 26-29.
228 Ibid 36.
229 Ibid 31.
230 Schuman et al., above n 165.
231 J. Cashmore, *The Perceptions of Child Witnesses and Their Parents Concerning the Court Process: Results of the DPP Survey of Child Witnesses and Their Parents* (unpublished manuscript, 1993) 11.

Table 2 – Language to Be Avoided in Questioning Child Witnesses

Language	Examples
Legal references	Q: You told His Worship … Q: No, I'll withdraw that. … Q: I put it to you that …
Specific and difficult vocabulary	Q: You walked perpendicular to the road? Q: It's pure fabrication, isn't it? Q: You did that to taunt him?
Use of the negative	Q: It's the case, is it not, that you didn't …? Q: Do you not dispute that? Q: Are you saying none of that ever happened? --> Child shakes head --> Does that mean it did happen or it didn't?
Ambiguous questions	Q: How many times did you tell the policeman X did …? Q: How do you say he forced you to? A: I was forced to. (repeated) --> How do you say you were forced to? --> I just said it.
Conceptually difficult	Q: For how long did he touch you? – A: Frequently answered 'for 5 minutes.'
Challenging	Q: It's all a pack of lies, isn't it? Q: You don't like your step-father, do you, Mary? Q: You've invented all this, haven't you Mary in order to get him out of the house?

See further:

- **Chapter 3**
  Courts, Children's Evidence and Children's Coping Skills
- **Chapter 4**
  The Judicial Role in Child Sexual Abuse Cases and Preparation for Trial

2.11 Indigenous Australians

This topic is covered comprehensively in existing Bench Books, particularly the Judicial Commission of New South Wales' ***Equality before the Law Bench Book*** and the Australasian Institute of Judicial Administration's ***Aboriginal***. What follows relies heavily on those sources.

2.11.1 Aboriginal Language

Fryer-Smith has prepared a comprehensive guide, now in its second edition, concerning Indigenous-Australians for use by the Western Australian Courts (see the ***Aboriginal***).[232] She referred to the 2006 Census results, which found that 12% of Aboriginals aged five years and above spoke an Aboriginal language at home and the majority (86%) spoke English.[233]

The Judicial Commission of New South Wales' ***Equality before the Law Bench Book*** similarly discusses indigenous-Australians living in New South Wales: population numbers, languages, education, employment, housing, health, violence, cultural identity, and cultural differences.[234]

2.11.2 Communication with Indigenous Australians

As Fryer-Smith has pointed out, cultural differences may affect communication with Aboriginals, including child witnesses. These include variations in:

- Forms of greeting and leave taking.
- Use of names and titles.
- Deference to authority or seniority.
- Attitudes and behaviour concerning:
    - Sexual matters.
    - Modesty.
    - Shaming.

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232 S. Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd ed. (The Australasian Institute of Judicial Administration Incorporated, 2008) <http://www.aija.org.au/index.php?option=com_content&task=view&id=436&Itemid=165> at 14 March 2009, [3.2.2.].

233 Ibid, citing Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, (2006) <www.abs.gov.au > at 25 March 2009.

234 Judicial Commission of New South Wales, above n 131.

    - Swearing.
    - Physical touch.
    - Directness in speech and asking questions.
    - The right to seek and the obligation to impart knowledge.[235]
- Conversational style. Aboriginal communication is marked by:
    - The avoidance of direct eye contact as demonstrating politeness and respect.
    - Silence - this plays an important and valued role in communication.
- The wide use of sign language.
    - A preference for indirect communication, rather than asking direct questions.[236]

2.11.3 Communicating Effectively with Children Who Speak Aboriginal-English

Suggested "Dos"[237]

- Speak slowly and clearly.
- Use an ordinary tone of voice.
- Use the name by which the speaker wishes to be addressed.
- Use an indirect approach to ask questions.
- Check if he/ she understands the legal words being used.
- Show respect and consideration at all times.
- Simplify the use of words.
- Be careful of, and follow up, 'I don't know' responses.

Suggested "Don'ts"[238]

- Don't attempt to speak Aboriginal-English.
- Don't use complex sentences or figurative speech.
- Don't ask negative questions.
- Don't use 'either/or' questions.

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235 Ibid [5:4].
236 Ibid [3.1].
237 Judicial Commission of New South Wales, above n 131, [5.4.1].
238 Ibid [5.4.2].

- Don't use technical legal words unless it is essential.
- Don't use terminology and descriptors that may cause offence.

Cross-cultural communication issues that may arise in a trial include:

- Some Aboriginal children may not have a good understanding of English words or of English grammatical construction. In particular, an Aboriginal child witness might use an Aboriginal-English dialect, which can give rise to misunderstandings and miscommunication.
- Many Aboriginal people attribute a different (extended) meaning to kinship terms such as 'mother', 'brother', and 'sister'.
- It may be difficult to convey the meaning of technical legal terms, such as 'guilty' and 'not guilty' to an Aboriginal child witness.
- Aboriginals may tend to agree out of politeness (i.e. to 'gratuitously concur') with authority figures.
- Certain words may be ambiguous in meaning (e.g. the English term 'to kill' may be understood in more traditionally-oriented Aboriginal communities as 'to hurt' or 'to cut', as well as literally 'to kill').
- Aboriginal children may possess different understandings of quantitative specifications (such as time and distance) from non-Aboriginal children.
- Aboriginal body language is different in significant ways from that of non-Aboriginal people. Thus, in traditional Aboriginal culture an averting of the eyes indicates respect, rather than evasiveness or dishonesty.
- Certain health problems, such as deafness, which are very common in Aboriginal communities, can create severe barriers to communication.

Any of the above factors, or a combination of them, may seriously impede the capacity of an Aboriginal child to understand and be understood in court proceedings. Additional difficulties may be caused by cultural factors, such as a witness lacking the authority of his or her group, to speak in relation to a particular matter.[239] The gender of the Aboriginal child may pose additional difficulties.

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[239] Judicial Commission of New South Wales, above n 131 [7.5].

2.11.4 Particular Difficulties Experienced by Female Indigenous Child Witnesses

In addition to the language differences detailed in the foregoing, female Aboriginal child witnesses may also experience the following particular difficulties:[240]

- The physical courtroom environment is intimidating, the legal process is predominantly male, and many legal practitioners appear to be unaware of the issues facing female Aboriginals.
- The presence of the accused person or other Aboriginal people in the courtroom may exacerbate the intimidation experienced by female child witnesses.
- Significant shame attaches to discussing sexual matters in public.
- Sign language may be used by someone in the back of the court to intimidate the witness while she is giving evidence, which may go unnoticed by the court.
- The child witness may lack pre-trial preparation and orientation, especially where evidence is to be given about sexual matters.
- Evidence presented in court about Aboriginal cultural traditions often does not present female perspectives.
- Existing legal and support services may not meet the needs of female Aboriginals, and female Aboriginals do not access them as much as they could.

2.11.5 What Can Judicial Officers Do?

When a matter comes before the court that involves Aboriginal witnesses and issues, judicial officers may need to ensure that:

- Everyone in court avoids any terminology or language that could be seen as either stereotyping or culturally offensive.[241]
- Appropriate measures are taken to deal with children who have a lesser ability to speak or to understand standard English.[242]

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240 Ibid [7.5.2]. See also Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (Toowong: Criminal Justice Commission, 1996), 93-96; Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Project No. 94, Final Report: The Interaction of WA Law with Aboriginal Law and Culture*, (September 2006) <http://www.lrc.justice.wa.gov.au/094-FR.html> at 14 March 2009.

241 Judicial Commission of New South Wales, above n 131, [2.3.3.2].

242 Ibid [2.3.3.4].

- Appropriate measures are taken to ensure that a child's different communication style – non-verbal and/or linguistic – does not disadvantage him/her.[243]
- Appropriate explanations are given about the court process.[244]

See for full treatment of these issues: ***Equality before the Law Bench Book***; ***Aboriginal***.

2.12 People from Other Backgrounds

This topic is covered comprehensively in the ***Equality before the Law Bench Book***, and what follows relies heavily on it.

2.12.1 Introduction

Increasingly, Australia is a country comprised of diverse ethnicities, languages, and cultural groups. In 2006, nearly one in four Australian residents had been born overseas.[245] At that time, two hundred different languages were spoken in the community, with the principal languages, other than English, being Italian, Greek, Cantonese, Arabic (including Lebanese) and Vietnamese. There are a significant number of Australian residents– including young people – who do not have a good command of English. According to the Australian Bureau of Statistics, as at the 2006 Census there were 106,621 people between the ages of 0 and 14 years who spoke a language other than English and who did not speak English or who did not speak it well.

The diversity of the Australian population, and in particular that of New South Wales, is discussed in **Section 3** of the ***Equality Before the Law Bench Book***.[246]

People's cultural backgrounds affect the way they perceive, understand and interact with others. Language and communication methods and customs are shaped by

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243 Ibid [2.3.3.3], [2.3.3.4].
244 Ibid [2.3.3.4].
245 Australian Bureau of Statistics, (2009) <www.abs.gov.au> at 14 March 2009.
246 Judicial Commission of New South Wales, above n 131, Section 3 — People from an ethnic or migrant background.

culture. Child witnesses coming from non-English speaking backgrounds face not only the developmental issues discussed in this bench book, but also have to negotiate a legal system based on different cultural understandings and sensitivities.

Judges, magistrates, lawyers, jurors and others who are not familiar with these cultural issues are at risk of not understanding what is being communicated to them by such witnesses and of not being able to adequately assess their credibility.

Judicial officers should educate themselves about issues surrounding cultural diversity in order to decrease this risk. Juries should be directed about these issues in relevant cases.

2.12.2 English as a Second Language

Those who speak English as a second language have the following additional challenges in giving evidence in court:

- Making sense of what they have heard having regard to different accents, rapid speech patterns, idiosyncratic local language usage, speaker intention and subtleties of language.
- Interference from the speaker's first language – applying a rule from that language that implies something different when used in English.
- A lack of knowledge of local customs and legal language.
- The questioner is on his/ her 'home ground' and the witness is a stranger.
- The questioner is often not trained in conducting age-suitable proceedings.
- The listener, whether judicial officer, juror, or lawyer, assesses manner and content of speech from a personal perspective rather than that of the witness.[247]

See for further discussion:

- **Communication with** .
- **Communicating Effectively with Children Who Speak Aboriginal**-English.
- **People from Other Backgrounds**.
- ***Equality before the Law Bench Book***.

[247] Walker, above n 210, 74.

2.13 Children with Other Special Needs

Child witnesses with other special needs face not only the usual challenges confronting children coming into a court to give evidence, but face additional special challenges by reason of their impairment or disability.

Disabilities or impairments can be due genetic factors, mental retardation, brain injury, sensory difficulties, or emotional disturbance. Examples include: intellectual disability, Down Syndrome, profound visual impairment, hearing difficulties, autism, specific learning disabilities such as dyslexia, auditory processing disorders, attention deficit disorders, conduct disorders, as well as significant depression or anxiety disorders.

Specific learning disabilities refer to a disorder in one or more of the basic psychological processes involved in understanding or using language that results in an impaired ability to listen, think, speak, read, write, spell or do mathematical calculations.

Those who have problems with hearing, sight or mobility may need particular equipment or interpreters. The Australian Law Reform Commission has referred to a case where the court allowed a deaf, intellectually impaired young woman, who was not able to read conventional sign language, to be questioned and to present her answers by computer, with the questions and answers projected onto a screen in the courtroom.[248]

A child can be of normal intelligence, but developmentally impaired by the impact of the disability. Depending on the nature of the disability, cognitive factors may be affected, such as:

- Ability to encode, store, and retrieve memories.
- Language comprehension skills – understanding questions.
- Expressive skills – giving comprehensible responses.
- Information processing style and speed.

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[248] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process, Report No. 84*, (1997) <http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html> at 14 March 2009 [14.128].

The disability may also affect social factors, such as:

- Being more vulnerable to the influence of perceived authority figures and therefore being more suggestible.
- Being more prone to using avoidance strategies.

The disability may also be affected by environmental factors, such as:

- Distractions that interfere with attention.
- Difficulty with conversational exchanges and being less able to give and read non-verbal cues.

These factors will add further complexity to the trial process. See discussion generally on the use of expert evidence in **Chapter 6 Other Trial Issues: Expert Evidence and Summing-Up**.

Chapter 3
Courts, Children's Evidence and Children's Coping Skills

3.1 Children and the Court Process

Walker has described the court process in this way:

> The external forensic system in which children are expected to retrieve information is a system that was built *by* adults *for* adults. It is a system that uses often arcane language in an adult environment under adult rules which are frequently intimidating even for adults themselves. Under such circumstances, it is not surprising that some inconsistencies – both real and imagined – should occur in a child's testimony.[249]

[249] Walker, above n 210, 84.

3.2 Specific Difficulties in the Courtroom

- As emphasised earlier, the experience of coming to court and giving evidence is stressful for children (see

Table 1 - Cognitive Skills Present in Children Relevant to Testimonial Competency).

- Commonly, children are used to an environment where they are supported and assisted by adults. They are used to recalling and talking about memories in such an environment. They come into a legal system, about which they have little knowledge or understanding, and into an environment that at times may appear to be overtly hostile to them.
- They are asked to remember and describe events that contain intimate personal details and that may involve feelings of embarrassment.
- They are not interacting with other children or supportive family, but with adults with far more life experience and understanding of the reasoning and motives of adults and who are on their 'home ground.'
- They are aware that the accused and his/her lawyer are present.
- They may be questioned by people who are insensitive to children's issues.
- Young children may be distracted by the court setting and have difficulty in staying on point.[250]
- If they have not been properly prepared for the court experience, children may be confused as to the reason why they are there or have unrealistic beliefs as to what may happen to them. Some children may think they could be punished if they say something wrong and therefore may be reluctant to say too much about an incident.[251]
- Children under 10 years of age may not be aware of the nature of the adversarial system and of the fact that the defence lawyer is likely to be far from supportive.[252]
- When confronted by a stressful situation in court – such as a demanding cross-examination – children may have limited coping strategies. They may 'regress' to less developed levels of language usage or cognitive functioning and have problems understanding and answering questions they could handle better in a supportive environment.[253]
- Tucker has noted:

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250 Saywitz, above n 170, 14.
251 Oates, above n 141, 320, citing J. Cashmore, 'Problems and Solutions in Lawyer-Child Communication' (1991) 15 *Criminal Law Journal* 193.
252 Sas, above n 106, 24.
253 Schuman et al., above n 165, 278.

> For children giving evidence...at a time when they need to think, to understand what is being asked of them, to access their memories and to give a coherent and considered response, everything in their physiology is saying 'run, fight or be invisible.[254]

- Children do not understand the process of providing information to those questioning them:

> **...**Children generally are reported to view adults as omniscient. [255] This causes them to offer little or no details in their accounts, because they believe that the adults already know what has happened to them. In the courtroom, this can present major credibility problems and children need to be reminded that the judge and the lawyers do not know what has happened to them.[256]

Walker outlined the six different things required of children when giving evidence, namely that they:[257]

(1) Have observed or experienced the event in question.
(2) Can recollect the event in question.
(3) Can communicate their recollection verbally.
(4) Understand the questions put to them.
(5) Are able to give intelligent answers to the questions put to them.
(6) Are aware of their duty to speak the truth.

Additionally, a child witness must also be able to maintain and demonstrate these skills under stressful conditions.[258]

Finally, a child witness must also be able to order the relevant events underlying the complaint in space and time, de-centre their experiences and feelings, and monitor their own responses and comprehension.[259]

Table 3 - Expectations of Child Witnesses and the Developmental Skills Involved[260]

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254 Tucker, above n 150, 2.
255 K. Saywitz and R. Nathanson, 'Children's Testimony and Their Perceptions of Stress in and out of the Courtroom' (1993) 17 *International Journal of Child Abuse and Neglect* 613.
256 Sas, above n 106, vi.
257 Ibid 8, citing A. G. Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 *Law and Human Behavior* 59.
258 Sas, above n 106, 8; G. B. Melton, 'Children's Competency to Testify' (1981) 5 *Law and Human Behavior* 73.
259 Sas, above n 106, 8.

Behavioural Demands	Developmental/Other Skills Involved
Demonstrate familiarity with Court procedures and legal terms	'Domain specific' knowledge and experience
Demonstrate an understanding of the oath, truth, and lie	Abstract thinking, and religious and moral understanding of concepts
Stand alone in the witness box	Self-confidence and social independence
Testify in front of strangers	Self-confidence and social independence
Face the accused	Courage and calm temperament
Understand difficult questions	Adequate 'receptive' language
Withstand intimidation, social pressure, and suggestions by lawyers	Emotional self-regulation
Retrieve memories even after long delays	Well-developed memory function (short and long term)
Respond to questions meaningfully	Adequate 'expressive' language
Appear credible and confident in the witness box	Testimonial competency or all of the above

3.3 Difficulties of Cross-Examination for Children

Two separate studies conducted by Zajac and colleagues raise serious issues about the appropriateness of cross-examination in order to test the accuracy of evidence of children aged between 5 and 13.[261] A study of court transcripts of the evidence of children in this age bracket in sexual abuse cases and controlled studies done in respect of children aged 5 to 6 years, demonstrated that the use of closed questions simulating cross-examination and usual cross-examination techniques resulted in 75% of the children studied changing at least one aspect of their evidence. [262] In the controlled studies, which involved a true situation, closed questions, and a younger age group, 85% changed at least one aspect of their statement.[263]

Additionally, the study of the court transcripts revealed that children were also prone to answering questions even if they were ambiguous, or did not make sense, and that

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260 Ibid 12.
261 Zajac et al, below n 285; Zajac and Hayne, above n 141.
262 Zajac et al, below n 285, 206.
263 Zajac and Hayne, above n 141, 193.

children's responses largely depended on the type of questions asked rather than the lawyer posing them. Both studies reinforced the need for questions to be age-appropriate and open-ended. They also indicated that questions should not involve complex language structure, contain more than one part, or include inappropriate negatives, or be ambiguous or tagged. [264] Therefore, as one of the prime purposes of cross-examination is to discredit the child's testimony through controlling questioning techniques, this is the least likely technique to allow children to give their most accurate evidence.

Regardless of where children are required to give evidence (in court or via CCTV), this process is very stressful and difficult for children. Children who have not been prepared to give evidence experience additional trauma and stress on the day that they are required to testify due to their communication needs not being met by the lawyers who ask them questions.[265] Much research has been conducted into the short-term and long-term effects of children giving evidence in court.[266] Findings include the following:

- It is widely recognised that cross-examination is the most distressing and potentially damaging aspect of the experience of a child being a witness.[267]
- Children who are not prepared for defence counsel methods of testing their evidence often experience shock and this may severely impact on their ability to give their evidence in court.[268]
- Sometimes a child's way of coping with overwhelming emotion is to shut down while giving evidence, to fall into silence, or to revert to a series of 'I don't know' or 'I don't remember' responses. Lawyers may incorrectly interpret these responses as evidence of denial or recantation.[269]

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264 Ibid, 141.
265 Manley, above n 97, 21.
266 See, e.g., K. W. Alexander, I. Cordón, R. Edelstein, S. Ghetti, G. S. Goodman, D. P. H. Jones, J. A. Quas, A. D. Redlich and J. Haugaard, 'Childhood Sexual Assault Victims: Long-Term Outcomes after Testifying in Criminal Court' (2005) 70 *Monograph of the Society for Research in Child Development* 1; A. Cossins "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?" (2009) 33 *Melbourne University Law Review* 68.
267 B. L. Bottoms and G. S. Goodman, 'International Perspectives on Children's Testimony: An Introduction to the Issues' (1996) 23 *Criminal Justice and Behavior* 260.
268 Manley, above n 97, 1-6.
269 E. Matthews and K. Saywitz, 'Child Victim Witness Manual' (1992) 12 *California Center for Judicial Education and Research Journal* 5.

- Some cross-examiners have deliberately increased a child's stress in order to hinder the child's recall and communication.[270] They may seek to demean the child's identity, belittle the child, and make the child appear stupid.[271] Some go further: '[t]hat if in the process of destroying the evidence it is necessary to destroy the child – then so be it.'[272]
- Defence questions may also be aimed at portraying the child as being more adult-like than child-like in knowledge and behaviour concerning sexual matters; as being less than innocent; as the instigator of an unfounded allegation; and as an unreliable witness.[273]
- Children have expressed frustration that they were trying to tell their story, but the way they were cross-examined by defence counsel inhibited them from doing so. Being unable to present their case can be a source of unnecessary stress for children.[274]

The Australian Law Reform Commission has recognised these difficulties:

> No child can be expected to give effective evidence under these circumstances. The contest between lawyer and child is an inherently unequal one. Child witnesses are often taken advantage of because they can be easily confused and intimidated, because they are unable to match the skills of an experienced lawyer or because, unlike the lawyer, they are in a hostile, alien environment. These problems were consistently addressed in submissions to the Inquiry. They are clear examples of the legal abuse of children.[275]

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270 E. Henderson, 'Persuading and Controlling: The Theory of Crossexamination in Relation to Children', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (West Sussex: Wiley, 2002) 279, 286.

271 See, e.g., Australian Law Reform Commission, above n 248, [14.111].

272 C. Eastwood, W. Patton and H. Stacy, 'Surviving Child Sexual Abuse and the Criminal Justice System', paper presented at the Children and Crime: Victims and Offenders Conference, Brisbane, 17-18 June 1999, 8.

273 H. Westcott and M. Page, 'Cross-Examination, Sexual Abuse and Child Witness Identity' (2002) 11 *Child Abuse Review* 137.

274 Eastwood and Patton, above n 79.

275 Australian Law Reform Commission, above n 248, [14.111].

Inappropriate, and at times aggressive, questioning of children can generate both factual errors in the evidence and a misunderstanding of the child's evidence by fact-finders.

3.3.1 Leading or Closed Questions

Cross-examination that is largely comprised of leading or closed questions may be particularly difficult for child witnesses. This is exacerbated when the questions also focus the attention of the witness on minute details of events and are out of time sequence.

Non-leading or open-ended questions are used during the investigative interview, and the interviewer is usually friendly and patient. In contrast, cross-examination consists of leading or closed questions that may appear to the child to be asked in an angry and hostile manner. Examples are: 'you didn't see that, did you?' and 'I put it to you that you are lying'.

The approach taken by the questioner may well increase the potential for the child to make mistakes in relaying specific incidents, and may reduce their confidence to answer further questions.

Some closed or leading questioning may be inevitable, but judicial officers should be aware of inappropriate use and should intervene where necessary.

3.3.2 Suggestive Questioning

Some children are vulnerable to suggestive questioning. They may be reluctant to contradict an adult. Repeating suggestive questions at length in cross-examination will increase the possibility of a child falling into error. See **Are Children Suggestible?** in Chapter 2 for detailed treatment of this subject.

3.3.3 Repeating Questions

Repeating questions is likely to promote error as a child may well think that he or she has made an error because a person in authority, whom the child assumes knows more, is putting the question again.[276]

There is a useful discussion of repetition of questions and their impact on children at paragraph 13.5.5 of the Supreme Court of Queensland ***Equal Treatment Bench Book***.[277] There is further analysis of this issue in Poole and White's book chapter 'Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults'.[278]

3.3.4 Age Inappropriate Questions

See for discussion:

- **Cognitive Development**
- **Children's Use of Language**
- **Insist on Appropriate Questioning of the Child**

3.3.5 Cross-examination Aimed at Challenging the Child's Identity as a Victim

Westcott and Page examined extracts from cross-examinations in court transcripts and identified the challenges of cross-examination for children. Primarily, these include examinations that challenge children's identity as alleged victims, by seeking to portray them as:

- 'Un-childlike' because of their knowledge of sexual matters.
- 'Less than innocent' because of their bad character.
- 'Aggressors /instigators' due to their conduct.

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276 Saywitz, above n 170, 9-10.

277 Supreme Court of Queensland, *Equal Treatment Benchbook*, (Brisbane: Supreme Court of Queensland Library, 2005) <http://www.aija.org.au/index.php?option=com_content&task=view&id=258&Itemid=110> at 6 March 2009, 214-216.

278 D. A. Poole and L. T. White, 'Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults', in Zaragoza, Graham, Hall, Hirschman and Ben-Porath (eds.), *Memory and Testimony in the Child Witness* (Thousand Oaks: Sage, 1995) 24.

- Poor witnesses because they cannot cope with the pressure applied.[279]

They argue that such cross-examination has the potential to create further problems for child witnesses and unnecessary stress and trauma resembling those of abuse, rather than ensuring that the best evidence is obtained from the child.[280]

3.3.6 Do Not Understand the Question

Research suggests that children do not understand a high proportion of questions asked in cross examination.[281]

3.4 Brennan and Brennan's Analysis of Cross-examination in Court Transcripts

In a 1988 study, Brennan and Brennan found that children of a range of ages from six to 16 fail to hear about half of what is said to them in court.[282] This famous analysis of court transcripts of the cross-examination of child witnesses reported that children find the following difficult to comprehend or handle:

1. Negative rhetorical
    - Example: 'Now you had a bruise, did you not, near one of your breasts, do you remember this?' It is easier to answer 'yes' to such a question than to interpret the different phrases of the question in the context of the whole so as to understand to what one would say 'no'.

2. Multi-faceted questions
    - Example: 'Well, did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?

279 Westcott and Page, above n 273.
280 Ibid 143-148.
281 Zajac et al., below n 285.
282 M. Brennan and R. Brennan, *Strange Language: Child Victim Witnesses under Cross Examination* (Wagga Wagga: CSU Literacy Studies Network, 1988).

- Example: 'You told the police officer you were kicked on the shin, did you not, and you had a bruise, do you remember that?'

3. Being asked about the implications of actions or inactions
   - Example 'Why didn't you…'.
   - This may suggest to the child witness that they are somehow guilty and responsible.

4. Lack of connection between the parts of the question

5. Juxtaposition of topics of unequal significance, or unrelated topics, which can confuse the witness
   - Example:
     Q: On that occasion when Mum went to… being that night that Mum went to Youth Group, you were at Clareville?
     A: I have made a mistake there, it wasn't Clareville, it was West Hampton.
     Q: It should be West Hampton. You did not see the defendant at any time when he put his penis in your bottom, did you?
     Q: That was after he had stripped you?
     A: Yes.
     Q: And you had your legs together?
     A: Yes.
     Q: And then you said he tried to put his finger in your vagina. Did he put his finger on your vagina or in your vagina?
     A: In my vagina.
     Q: Inside, you felt it inside did you?
     A: (no verbal answer).
     Q: Did he do anything else to you?
     A: No.
     Q: Do you know Frank Murphy?

6. Demanding precise recollection of seemingly obscure facts.

7. Focussing on trivial inconsistencies and presenting them as indicators of unreliability and lack of truthfulness

8. Repeating the witness' answer so as to maintain control of the interaction

9. Intimidating the child by tone of voice, speech rate, emphasis, eye contact, physical gesture and facial expressions

10. Multiple questions within a question:
    - Example: 'When was the last time he did this to you before the time we have been speaking of? We have been speaking of one in February obviously, when was the last time he interfered with you before that?'

11. Questioning a witness over prior statements and controlling what is referred to and the order in which it is referred to

12. Passive voice – which can be used to detach people from their actions or as a mechanism of blame
    - Example: 'The door was then closed behind the person. Is that what you are saying?'

13. Embedding – including a series of qualifying phrases within a sentence
    - Example: 'Taking you back to the time when you were living in Sydney when you first met Fred, at that time and throughout the period that Fred was living with your family, he used to work as a baker, didn't he?'

14. Backward referencing
    - Example: 'So you told us that you don't remember, do you remember saying that a moment ago?'

15. Nominalisation
    - Example: 'Now just stop there. Did you tell the police what is in the statement about the matter of touching boobs?'

16. Unmarked question - i.e. there is no indication that a response is required

- Example 'I put it to you you're telling a lie.'

17. Tagging - Adding a question at the end of a statement
    - The listener has not received a cue from the start that an answer to a question will be required.
    - Example: 'I mean if something happens today, and something happens tomorrow, you're not going to say they're a year apart, are you?'

18. Negative tagging – Adding a negative construction at the end of a sentence
    - Example: 'He took you on a picnic to the park by the river, did he not?'[283]
    - Contrast the above with 'Did he take you on a picnic to the park by the river?'

19. Lawyerese – negatives, double negatives, multiple parts, difficult vocabulary, complex syntax

20. Interruptions when the child is answering a question

21. Persistent questioning
    Young children (to age 10) find persistent questioning very demoralising when they have previously indicated that they do not know the answer. They tend to assume that if the same question is repeated, the original answer must have been incorrect. Therefore, young children who are repeatedly asked the same questions may change their answers.[284] A reason for this may be that children are more likely to be deferential to what they perceive to be the adult's beliefs.

22. Rapid fire questioning
    - This may lead to a child eventually offering a random response to stop the questioning, and the response may therefore be unreliable.

23. Jumping quickly from one topic to another

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283 Brennan, above n 207, 88.
284 Saywitz and Lyon, below n 361; M. Bruck, S. Ceci and H. Hembrooke, 'The Nature of Children's True and False Narratives' (2002) 22 *Developmental Review* 520.

3.5 Analysis of Court Transcripts in New Zealand

Zajac and colleagues analysed court transcripts concerning New Zealand cases in which children aged five to 13 years provided the key evidence in sexual abuse trials.[285] They concluded that child witnesses rarely asked for clarification and often attempted to answer questions that were ambiguous or did not make sense. They pointed to several aspects of the cross-examination process that they considered to be potentially problematic for child witnesses, including:

> Children in the courtroom tend to rely on everyday conversational conventions, where the prevailing atmosphere is likely to be one of politeness, acceptance, and sincerity. As a result, they may expect a degree of sincerity that is not present during cross-examination.
>
> Even if children become aware of this conflict between their expectations and reality, they are likely to find it confusing and difficult to deal with, especially when the apparent sincerity of a defence lawyer may not remain constant within the testifying period.
>
> The unique structure of the cross-examination interview may hinder a child's ability to provide reliable and valid testimony. Contrary to interactions outside the courtroom, where adults readily provide a framework for children's recollection, children's narratives in the legal setting are far less supported.
>
> During cross-examination, the defence lawyer asks questions in such a way as to structure and control the information to be recounted.
>
> Structural cues that children rely on, such as those that signal a change in conversation topic, are seldom present during the cross-examination process.[286]

3.6 Good Practices for Questioning Children

Judicial officers should attempt to ensure that they, and counsel, adhere to best practices when questioning child witnesses. Judicial officers may ask counsel to re-phrase a question or, where necessary, do so themselves. Some examples for best practice in the phrasing of questions for child witnesses are:

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285 R. Zajac, J. Gross and H. Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_zajac-questioning_children_in_the_courtroom.html> at 21 March 2009.

286 Ibid, 200.

1. Phrase questions positively rather than negatively.
    - For example: ‘Do you remember his name?’ as opposed to, ‘You don’t remember his name, do you?’

2. Use an active voice rather than a passive voice.
    - For example: ‘You said the red car hit the blue car?’, rather than ‘You said the blue car was hit by the red car?’
    - A child is likely to interpret the latter as meaning that the blue car inflicted the resulting damage on the red car.

3. Separate questions on separate topics.
    - Do not mix topics, or switch back and forth between topics.

4. Children’s conceptualisation of time, frequency and ordering of events is gradually acquired.
    - It is therefore necessary to provide concrete anchor points, using times or events that are relevant to the child.[287]

5. It may be helpful to use the child’s words to describe people, actions and objects.
    - For example: ‘Did this happen after you came home from school?

6. Avoid ‘front loading’ questions that use a number of qualifying phrases before asking the crucial part of the question.

    - Example of what not to ask: ‘On the evening in question, before you went to the shop, and after you returned from school, while no one else was home but you, did your mother hit you?’
    - Instead: ‘Did your mother hit you after school that day?; ‘Was this before or after you went to the shop?’; ‘Was anyone else at home when your mother hit you?’
    - The key is to keep each sentence separate and simple.

7. Use the child’s vocabulary where possible.

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[287] N. A. Slicner and S. R. Hanson, 'Guidelines for Videotape Interviews in Child Sexual Abuse Cases' (1989) 7 *American Journal of Forensic Psychology* 61.

- Example: ‘What games did you play at play-time?’
- NOT: ‘What did you do at recess?’

8. Use signposting.
    - Example: ‘I want to ask you some questions about your father.’

9. Discuss events in logical sequence.
    - Example: Do not ask questions that require the child to turn their mind from afternoon to morning.

10. Ask questions with the child’s point of view in mind.
    - Example: ‘Did Daddy come into your room?’
    - NOT: ‘Did the accused/my client come into the room?’

11. Include only one query in each question.

12. Avoid questions that may be taken too literally.
    - Example: A question about how many times a child was touched may illicit a response regarding the number of actual touches, as opposed to the number of occasions that the touching occurred.

3.7 Additional Resource

Further assistance can be obtained from the UK video *A Case for Balance: Demonstrating Good Practice When Children Are Witnesses* (1997), which is aimed at judges and lawyers who deal with child witnesses.[288]

The video was funded by the Home Office and the National Society for the Prevention of Cruelty to Children (NSPCC). It was supported by police officers, the Criminal Bar and Victim Support. It is aimed at all children and young people aged 11 to 17 who are called as witnesses in Crown, Magistrates’ and Youth Courts. It consists of an enactment of a trial. The stated purpose of the video is to stimulate discussion about

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288 National Society for the Prevention of Cruelty to Children, *A Case for Balance: Demonstrating Good Practice When Children Are Witnesses (Video, 45 Minutes)* (London: National Society for the Prevention of Cruelty to Children, 1997; Reprinted 2003).

practice among the judiciary and in the wider criminal justice community. It is available for purchase from NSPCC.

Chapter 4
The Judicial Role in Child Sexual Abuse Cases and Preparation for Trial

4.1 The Role of Judicial Officers

The common law adversarial trial traditionally places the judicial officer in the role of an umpire between the competing parties. Those parties have a detailed knowledge of the facts and the arguments they wish to make, and the burdens of proof they have to meet. The parties, therefore, largely determine the course of the trial, by defining the issues in dispute and presenting the applicable evidence. As Chief Justice Gleeson observed of the judicial role in the adversarial system:

> A criminal trial is conducted before a judge who has taken no part in the investigation of the offence, or in the decision to prosecute the offender, or in the framing of the charge, or in the selection of the witnesses to be called on either side of the case, and whose capacity to intervene in the conduct of the trial is limited.[289]

The judicial officer rules on admissibility when there is an objection to certain evidence; sums up to the jury on the law and submissions made by the parties; and is usually not an active player in the trial. This traditional role has been accompanied by a general reluctance to intervene in the conduct of a trial. For example, whilst a judge has the power to call witnesses, that power is, properly, very rarely exercised.[290] Similarly, judicial officers generally refrain from interfering with defence counsel's cross-examination of witnesses, notwithstanding, as is noted in *Cross on Evidence*,[291] there is 'a modern tendency, particularly in criminal cases, for cross-examination to assume an unduly lengthy and repetitive character.'[292]

4.1.1 The Traditional Position

The notion of a fair trial has been that, as far as possible, the parties should be free to present their case and test that of the other party as fully as they wish without interference from the judicial officer. This is perhaps seen most acutely in relation to cross-examination. A culture has developed where defence counsel consider that they should be entirely free to conduct the cross-examination as they wish and it appears that courts have generally allowed this to happen. This has been a problem in the common law world.[293] There are many reasons for this, including that it is the usual

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289 *Crampton v The Queen* (2000) 206 CLR 161, 174.

290 *R v Apostilides* (1984) 154 CLR 564, 571. However, the power is exercisable only in the most exceptional circumstances.

291 J. D. Heydon, *Cross on Evidence* 7th (Sydney: LexisNexis Butterworths, 2004).

292 Ibid [17495].

293 Sas, above n 106, v. For Sas' recommendations on how to obtain good evidence from children, see Sas, above n 106, 50-52.

way in which trials are conducted and thereby provides a degree of familiarity for all participants.

Chief Justice Wood has observed of the power to restrict cross-examination:

> This is a power that is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a 'fair run'. In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.[294]

In a subsequent paper, His Honour also noted other reasons for the power being seldom used, including 'lack of experience, or training, or even attention, on the part of trial judges to the inherent disadvantages of child witnesses.'[295]

4.1.2 Calls for Change

Judicial officers have an obligation to ensure that a trial is fair,[296] and have the power to discharge that obligation.[297] For example, the *Uniform Evidence Act* imposes a positive duty on the Court to disallow questions that are harassing, intimidating, offensive or oppressive.[298] Legislation exists in other States and Territories; some make the disallowance mandatory and some discretionary (see **State and Territory Legislation**).

In *Dietrich v The Queen*,[299] Justice Deane, quoting from *Barton v The Queen*,[300] referred to the need to take heed of 'the interests of the Crown acting on behalf of the community as well as of the accused.'[301] On the same topic, a former NSW Attorney-General noted the need to 'promote the accuracy and coherency of [a sexual assault] complainant's evidence'.[302]

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294 Wood, above n 122, [101].
295 Wood J., 'Child Witnesses: The New South Wales Experience', paper presented at the Child Witnesses-Best Practice for Courts Conference, Parramatta, 4 July 2004.
296 See, e.g., *Paritt v The Queen* (2007) 169 A Crim R 452, 495; *Barton v The Queen* (1980) 147 CLR 75, 109.
297 R. Ellis, 'Judicial Activism in Child Sexual Assault Cases', paper presented at the National Judicial College of Australia, Children and the Courts Conference, Sydney, <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_ellis-judicial_activism.html> at 21 March 2009.
298 *Evidence Act 1995* (NSW) s 41; *Evidence Act* 1995 (Cth), s41 (which applies in the ACT); *Evidence Act* 2008 (Vic), s41. Note the differences between the Victorian and NSW provisions. Section 41 of the *Evidence Act* 2001 (Tas) has not been amended to impose this positive duty.
299 *Dietrich v The Queen* (1992) 177 CLR 292.
300 *Barton v The Queen* (1980) 147 CLR 75.
301 *Dietrich v The Queen* (1992) 177 CLR 292, 445.
302 J. Hatzistergos, *Criminal Procedure Amendment (Sexual Offence Evidence) Bill (Assented on 06/07/2004 - Act No 50 of 2004), Second Reading Speech*, (Parliament of New South Wales, Legislative Council, 4 September 2004)

In an 2004 article in the *Australian Law Journal*, the former Chief Justice of NSW, Jim Spigelman, noted that '[w]hat is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances'[303] and quoted from the judgment of Brennan CJ in *Jago v District Court (NSW)*:[304]

> The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances.[305]

The calls for change from within and outside the courts indicate that a judicial officer has a duty to ensure procedural fairness to all witnesses. To ensure a fair trial, a judge may, on occasion, actively intervene to prevent unfairness. This intervention does not denigrate, but rather enhances the prospects of a fair trial.

These calls for change coincide with the rise of therapeutic jurisprudence,[306] which recognises that court processes impact upon the well-being of all those participating in them and that courts should actively seek to minimise any harm that may arise. They also coincide with the recognition that judicial officers have an ethical obligation to ensure that courts treat all people with dignity and especially those who are vulnerable, such as children.

As Dame Brenda Hale acknowledges in *Ghaidan v Godin-Mendoza,*[307] a central purpose of English human rights jurisprudence is respect for the equal dignity of all persons. Thus, the courts should recognise that, because each person is an individual, he or she is equally worthy of respect and consideration. The vulnerabilities of every

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<http://www.parliament.nsw.gov.au/prod/PARLMENT/NSWBills.nsf/1d4800a7a88cc2abca256e9800121f01/b3d73685d2b99d2fca256e930020eb9d!OpenDocument> at 18 March 2009.

303 J. J. Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29, 44.

304 (1989) 168 CLR 24.

305 *Jago v District Court (NSW)* (1989) 168 CLR 24, 49-50.

306 The Australasian Therapeutic Jurisprudence Clearinghouse provides an extensive bibliography on therapeutic jurisprudence and its applications in Australia and New Zealand: http://www.aija.org.au/index.php?option=com_content&task=view&id=421&Itemid=139. For information on therapeutic jurisprudence internationally, see the International Network on Therapeutic Jurisprudence: http://www.law.arizona.edu/depts/upr-intj/; see also the Australasian Institute of Judicial Administration, International Links: http://www.aija.org.au/index.php?option=com_content&task=view&id=419&Itemid=137. For a review of therapeutic jurisprudence in Australia, see M. S. King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.

307 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [142].

person before the courts should be recognised and appropriate treatment afforded them.

An unfettered right to cross-examine sexual assault complainants is not necessarily absolute and can be subject to controls where necessary, as noted by the former Chief Justice of NSW:

> The difficulties encountered by complainants in sexual assault cases ... has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance. ... In a sexual assault matter, it is appropriate for the Court to consider the effect of cross-examination and of the trial experience upon a complainant when deciding whether cross-examination is unduly harassing, offensive or oppressive.[308]

4.1.3 Legislative Changes: The Role of Judicial Officers

The context in which judicial officers now conduct trials has also changed considerably, with legislative amendments being made in most Australian jurisdictions.

(a) Law Reform Commissions

Several Law Reform Commissions in Australia have recommended more stringent judicial regulation of cross-examination. This followed examinations of child sexual abuse cases.[309] For example, the Australian Law Reform Commission said:

> Magistrates and judges are meant to be "referees" for a fair trial. They therefore have particular responsibility to ensure that child witnesses understand the questions asked and are not harassed or intimidated by tone of voice, aggressive questioning, incomprehensible language and unfair or abusive treatment.[310]

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308 *R v TA* (2003) 57 NSWLR 444, 446.

309 Australian Law Reform Commission, above n 248, Recommendation 110; Victorian Law Reform Commission (2004), above n 31, Recommendations 143-144; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Report No 55, Part 2)*, (Brisbane: Queensland Law Reform Commission, December 2000) <http://www.qlrc.qld.gov.au/reports/r55pt2a.pdf> at 14 March 2009, Recommendation 13.1.

310 Australian Law Reform Commission, above n 248, [14.115].

(b) State and Territory Legislation: Improper Questions

Several States and Territories have acted to strengthen the legislative provisions concerning the power of courts to intervene and to stop inappropriate cross-examination of children.

Although there are slight differences in the wording of the relevant provisions of the Evidence Acts, all Australian jurisdictions have wide-ranging definitions of 'improper questions' or 'disallowable questions' that includes matter relevant to the giving of evidence by child complainants.[311]

Essentially, 'improper questions' or 'disallowable questions' include questions that are misleading or annoying, harassing, intimidating, insulting, offensive, oppressive, repetitive, seemingly premised upon a stereotype, or posed in an inappropriate manner or tone.

In evaluating whether a question meets the definition of 'improper' (or 'disallowable'), the court may to take into account any relevant condition or characteristic of the witness. The most restrictive approach to improper questions is seen in s 41 of the *Evidence Act* 1995 (NSW) & (Cth) and the *Evidence Act 2008*(Vic). In NSW and the Commonwealth, s 41 imposes a positive duty on trial judges to disallow improper questions put to *any* witness, or to warn any witness that he or she is not obliged to answer the question. Improper questions are defined under s 41(1). This duty applies whether or not one of the parties has objected to the question (s41(5)). The imposition of a duty, rather than a discretion, is an indication that Parliament is seeking to give judicial officers greater control of cross-examination than has been the case at common law.

In deciding whether a question is improper the court must take into account 'any relevant condition or characteristic of the witness' such as age, language background and skills, maturity and level of understanding—the type of issues that would need to be considered in relation to a child witness.

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311 Section 41, *Evidence Act 1995* (Cth); s 41, *Evidence Act 1995* (NSW); s 41, *Evidence Act 2001* (Tas); s 41, *Evidence Act 2008* (Vic); s 41, *Evidence Act* 2011 (ACT); s 41, *Evidence (National Uniform Legislation) Act (NT);* s21(1), *Evidence Act* 1977 (Qld); s 26(1), *Evidence Act* 1906 (WA); s 25, *Evidence Act* 1929 (SA).

In Victoria, the duty under s 41 only extends to the cross-examination of vulnerable witnesses (s41(4)), that is, those who are under the age of 18 years, who have a cognitive impairment or those who the court considers to be vulnerable having regard to 'any relevant condition or characteristic of the witness'.

See:

- ***Evidence Act 1977***
- ***Evidence Act 2008* (Vic), s 41**
- ***Evidence Act 1929* (SA) ss 22, 25**
- ***Evidence Act 1995* (NSW) s 41**
- ***Evidence Act 2001* (Tas) s 41**
- ***Evidence (National Uniform Legislation) Act 2013* (NT) s 41**
- ***Evidence Act 2011* (ACT) s 41**
- ***Evidence Act 1906* (WA)**
- ***Evidence Act 1995* (Cth)**
- Judicial College of Victoria, ***Victorian Criminal Charge Book***
- Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***
- Babb, '**What Does s 41 of the Evidence Act Mean to You as a Judicial Officer?**'[312]
- Australian Law Reform Commission, **Uniform Evidence Law**[313]
- A Cossins (2009) "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?" 33 *Melbourne University Law Review*, 68-104.
- J Spencer & M Lamb (eds) *Children and Cross-examination: Time to Change the Rules?*, Hart Publishing: London, 2012.

4.2 The Impact of Increased Use of Pre-recording

It may be that, with increased use of pre-recording, support for child complainants, and greater sensitivity in the legal profession, the need for judicial officers to intervene in cross-examination will become more limited. In Western Australia, where reforms

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312 L. Babb, 'What Does S 41 of the Evidence Act Mean to You as a Judicial Officer?' (2009) <http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/babb-s41_evidence_act.html> at 20 May 2009.

313 Australian Law Reform Commission, *Executive Summary: Uniform Evidence Law, Report 102*, (2005) <http://portsea.austlii.edu.au/au/other/alrc/publications/reports/102/04> at 20 May 2009.

have been in place since 1992, there appears to be a legal culture that is more sensitive to child complainant's issues.[314]

4.3 Unrepresented Accused

Every Australian jurisdiction places limitations on who may cross-examine a child complainant when the accused is unrepresented in a child sexual assault trial.

Western Australia:

In Western Australia, questions must be conveyed through the judge or a person approved by the court.[315] This procedure has rarely, if ever, been followed.

Tasmania

In Tasmania, s 8A of the *Evidence (Children and Special Witnesses) Act 2001* states that for "prescribed proceedings" a defendant cannot cross examine a witness who is the alleged victim unless that cross-examination takes place through counsel. "Prescribed proceedings" are defined in s 3.

Northern Territory

In the Northern Territory, s 5 of the *Sexual Offences (Evidence and Procedure) Act 1983*. Section 5 states that an unrepresented accused cannot cross-examine a complainant directly. The accused must put the question to the Justice judge or another person approved by the Court who will repeat the question accurately to the complainant.

Victoria

In Victoria, if the accused is unable or unwilling to obtain representation, the court is required to order that Victorian Legal Aid provide representation to the accused for the purposes of cross-examining the complainant or other 'protected witnesses'.[316] The

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314 Eastwood and Patton, above n 79.

315 *Evidence Act 1906* (WA) s 106G; M. Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective', paper presented at the Children As Witnesses Workshop, Melbourne, 14 November 2003, 23.

316 *Criminal Procedure Act 2009* (Vic), s 357.

unrepresented accused cannot cross-examine the complainant.[317] In family violence cases, where adult parties often represent themselves, and seek to call their children in support of, or in response to, applications for intervention orders, children are prohibited from giving evidence without the leave of the court.[318] See: Judicial College of Victoria, ***Victorian Criminal Charge Book***.

New South Wales

New South Wales legislation provides that vulnerable witnesses are not to be cross-examined by an accused but by a person appointed by the court.[319] Cross-examination of a complainant is to be conducted by a person appointed by the court, whether or not there is closed circuit television or other technology available for the giving of the witness' evidence.[320]. The person appointed for the purposes of cross-examination may only ask questions that the accused wants to be put to the witness. This person cannot give legal advice. See: Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***.

Commonwealth:

For Commonwealth prosecutions, the ***Crimes Act 1914* (Cth)** establishes a similar regime, prohibiting an unrepresented defendant from cross-examining a child complainant,[321] but instead allowing a court-appointed person to do so on the defendant's behalf.[322] However, unlike the New South Wales scheme, in some circumstances unrepresented defendants may cross-examine a child witness. Leave to do so must be applied for in writing, and will only be given if the court is satisfied that the child's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination.[323]

Australian Capital Territory:

In the Australian Capital Territory, s 38D of the ***Evidence (Miscellaneous Provisions) Act 1991* (ACT)** prohibits a self-represented litigant from cross-examining a child (or a witness with a disability) in proceedings in respect of a sexual offence (or a violent offence).

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317 *Criminal Procedure Act 2009* (Vic), s 356.
318 *Family Violence Protection Act 2008* (Vic) s 67.
319 *Criminal Procedure Act 1986* (NSW) s 294A.
320 *Criminal Procedure Act 1986* (NSW) s 306ZL.
321 *Crimes Act 1914* (Cth) s 15YF(1).
322 *Crimes Act 1914* (Cth) s 15YF(2).
323 *Crimes Act 1914* (Cth) s 15YG.

If the accused is unable to obtain legal representation, cross-examination questions can only be put to the child by a person appointed by the court (s 38D(4)).

The court may adjourn the proceedings to enable to accused to obtain legal representation or order the accused to obtain legal representation, if it is in the interests of justice do so. The court can also make any other order it considers necessary to secure legal representation for the accused (s 38D(7)).

Queensland:

In Queensland, s 21N of the ***Evidence Act 1977*** prohibits an unrepresented accused from cross-examining a 'protected witness,' which includes a person under 16. The court will arrange for the accused to be given free legal assistance by Legal Aid for the cross-examination (s 21O) and make an order to that effect unless the accused notifies the court that he or she does not want the protected witness to be cross-examined.

South Australia:

In South Australia, s 13B of the *Evidence Act 1929* (SA) prevents a defendant from cross-examining an alleged victim in relation to a serious offence unless the cross-examination is by counsel. The court must inform the accused that he or she may be entitled to legal assistance from Legal Aid and of their rights under the *Criminal Law (Legal Representation) Act* 2001 to obtain the assistance of counsel for the purpose of cross-examining a witness.

The court must ensure the accused has had a reasonable opportunity to obtain such assistance (s 13B(3)).

4.4 Contemporary Obligations

As noted above, there are now significant legislative, judicial and other calls for courts to respect the rights and interests of victims of crime, which include vulnerable witnesses such as children.

In addition, the fair trial objective requires that witnesses be able to give their evidence in the best possible way. Thus, cross-examination which takes advantage of the vulnerabilities of

witnesses, such as children, to confuse their evidence so that the facts are obscured or distorted is not consistent with a fair trial.

4.5 What Can Judicial Officers Do?

There are a range of options for judicial officers to ensure that the trial is fair and that the evidence of children is presented so that the potential for obtaining the truth is maximised.

There are also a range of special procedures that are dealt with in **Chapter 5 Particular Procedures for Children Giving Evidence**.

4.6 Judicial Preparation for the Trial

As Chief Justice Wood has noted, the exercise of the power to control cross-examination requires 'careful consideration' and 'vigilance' on the part of the judicial officer.[324] This invariably requires preparation.

In indictable matters, it is desirable for the judicial officer to be familiar with the prosecution brief and thus aware of background and trial issues. Ideally, it also requires the judicial officer to be familiar with the cognitive and language development of the individual child to consider the appropriateness of the questioning. It is suggested that this information will need to be provided to the court prior to the calling of the complainant or other child witness at a pre-recording or at trial. For example, in the County Court of Victoria, the prosecution is required to provide, as well as the Indictment and Opening, information about the number of complainants, their relationship to the accused and their level of cognitive development, where known, with a report to be submitted to the court.[325] See Judicial College of Victoria, ***Victorian Criminal Charge Book***; County Court of Victoria, ***Practice Note PNCR 2-2010* (updated September 2013)**.

An important issue that can be resolved at a directions hearing before trial is any dispute about pre-recorded evidence. If there is a pre-recording, the tape may be played and stopped at the relevant parts and the issue addressed, or the tape could

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[324] Wood, above n 122, [6].

[325] County Court of Victoria, *Practice Note PNCR 2-2010*, ()
http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_2-2010_County%20Court%20Criminal%20Procedure.pdf; as at 30 November 2010.

continue and any problematic portions of the recording could be edited out. If the evidence is being given at trial, then, as Chief Justice Wood has suggested, the objection could be heard in the absence of the jury.[326] In Victoria, the pre-recording is held immediately before the trial before the same judge, so the time for editing is extremely limited. The preferable approach in that jurisdiction is as suggested above, to deal with issues as they arise during the recording of the evidence.

4.7 An Approach to Trials Involving Children

Set out below are some issues that judicial officers should address in these trials.

4.7.1 Create an Appropriate Environment for the Child

Although child witnesses may well have participated in the preparation programs offered by Child Witness Services prior to coming to court, this does not relieve judicial officers from the responsibility of ensuring that court processes facilitate the child's ability to give evidence in an appropriate environment. The approach which is used will vary between judicial officers, and will depend to a considerable extent on the particular matter before the court. One judicial officer has suggested this approach:

> It is the judicial officer who determines the atmosphere within the court as our own experience with difficult or impatient judges has taught us. If a child is to feel comfortable the judge needs to be personable in her/his dealings with the child. She/he needs to readily, clearly and pleasantly introduce the child to the court process and to demonstrate approachability, fairness and understanding of the child's predicament.[327]

Judicial officers now have judicial responsibilities imposed by legislation (see **State and Territory Legislation: Improper Questions**; **Insist on Appropriate Questioning** of the Child).

4.7.2 Explain the Ground Rules to the Child

After the child is called to give evidence, the judicial officer should spend some time talking with her or him. This would include explaining to the child that if she or he needs a break at any time, she or he can ask for one. The judicial officer should,

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326 Wood, above n 295, [101].
327 Ellis, above n 297, 7.

however, still be vigilant for signs that the child may need a break and adjourn as necessary. Such signs include: fidgeting, inattentiveness and silence, and the repeated response of 'I don't remember' or 'I don't know'.

Many judicial officers follow a practice at the start of proceedings of telling the child to listen carefully to the questions and to not answer a question if it is confusing or they do not understand it, and explaining to the child that he/she is to tell the judicial officer if such difficulty arises.[328] Further, if it appears that the witness does not understand a question, then the judicial officer could ask a question of the witness to clarify this.

4.7.3 Insist on Appropriate Questioning of the Child

Judicial officers should be aware that a child may misunderstand even apparently simple questions. For example, in one case when a judge asked a five and a half year-old child 'Are you comfortable?' the child did 'not know the meaning of the word "comfortable".'[329]

Although the language used by judicial officers should be appropriate to the age and development of the child, it should not be condescending. Consistent with the findings on child development and children's experiences of the justice system, the judicial officer's questions should endeavour to:

- Use simple, jargon-free language appropriate to the child's age or development.
- Use simple construction: subject-verb-object.
- Use active rather than passive voice.
- As far as possible, convey one idea at a time.
- Avoid complex concepts and phrases and negatives.
- Be mostly open questions.
- Require an answer that is within the child's cognitive capabilities.
- Be expressed in a pleasant, clear tone of voice.

Problems with communication experienced by children within the courtroom have been discussed in detail in

328 See, e.g., Yeats, above n 315.
329 *R v Stevenson* [2000] WASCA 301, [27].

Chapter 2
Child Development, Children's Evidence and Communicating with Children. See also **State and Territory Legislation: Improper Questions**; ***Equality before the Law Bench Book***; ***Victorian Criminal Charge Book***.

4.7.4 The Body Language of the Judicial Officer

The judicial officer's body language and activity while speaking to the child witness should reflect a genuine interest in what the child has to say. The judicial officer should not do anything else while speaking to the child – such as looking at documents – as such activity suggests only a half-hearted interest. Attention should be fully on the witness.

Communication techniques should show the judicial officer is listening – such as reflecting back to the child the emotive or factual content of what the child said. For example, the judicial officer could say, 'You said you have a dog. What is its name?'

4.7.5 Treat the Child with Care

By taking these steps, the judge demonstrates an ethic of care to the child, showing that the child's wellbeing is important. By giving the child the ability to have the court adjourn for a short time to give him or her a break, the court returns some degree of control or self-determination to him or her. This can make the court environment less intimidating to the child. As Eastwood and Patton have noted, child complainants have responded positively to such actions.[330]

In any event, such measures are likely to promote a perception in the jury that the judge is fair. Cashmore and Trimboli's study of jurors in child sexual assault trials found that 'the main reasons jurors gave for saying that the judge treated the child complainant fairly was that he/she was 'supportive', 'considerate', 'polite', 'patient', or 'sensitive' to the child's needs'.[331] In addition, by using this approach, the judge can demonstrate 'appropriate behaviour and ways of interacting with child witnesses that

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330 Eastwood and Patton, above n 79, 114.
331 Cashmore and Trimboli, above n 126, 10.

are respectful and allow children to testify in a full and fair manner.'[332] (See **Appendix**).

4.8 Examination-in-Chief

Ideally the prosecutor will have met with the child witness several times prior to the day the child is to give evidence to develop a rapport with the child and to prepare the child for the court appearance.

If there is a visually recorded interview with the child that is to be admitted into evidence, then examination-in-chief will be limited to some introductory questions and perhaps some follow-up questions after the video recorded interview has been admitted in evidence.

It would be expected that the need for a judge to intervene in questioning during examination-in-chief would be very limited. Prosecutors wish to ensure that the evidence of their witnesses is clearly conveyed to the court and the use of linguistically and developmentally appropriate questions is a critical part of this process. Prosecutors are also increasingly being trained to handle child sexual abuse cases in developmentally appropriate ways.[333]

Following the recommendations of the Victorian Law Reform Commission, since 2008 the Office of Public Prosecutions in Victoria now runs seminars which must be attended before briefs will be allocated, and are developing a comprehensive experiential training program. However, as training programs are rare, it is advisable that judicial officers remain vigilant at all times during a child's evidence to ensure that appropriate questions are asked, that the child is not confused, and that regular breaks are scheduled.

4.9 Cross-examination

Cross-examination is an important part of the trial process. It is a vital means by which parties can test the reliability of evidence presented against them in court. On

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[332] J. Cashmore, 'Child Witnesses: The Judicial Role' (2007) 8 *Judicial Review* 281 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_cashmore-child_witnesses-the_judicial_role.html> at 21 March 2009, 288.

[333] See for example Victorian Law Reform Commission (2004), above n 31, xxiv.

the other hand, unfair cross-examination can actually increase the possibility that unreliable evidence is admitted[334] or an unfair view of vulnerable witnesses is gained by the jury or the court.

As has been noted earlier in this bench book (see **Difficulties of Cross-Examination for Children** and **Brennan and Brennan's Analysis of Cross-examination in Court Transcripts**), in many cases the cross-examination of children has been problematic because the cross-examiner has used language that is inappropriate according to the age of the witness. This includes the use of complex phrasing, legal jargon, repetitive questions, and harassing, intimidating and humiliating tactics. Such approaches tend to increase the potential for error in the evidence of children as well as cause them undue stress. This also has the potential to hinder the child witnesses' abilities to give their evidence to the court. Some jurors in child sexual assault trials have considered the children's treatment by defence lawyers to be less fair than that of prosecutors and judges.[335]

At common law, courts have always had the power to control cross-examination.[336]

In addition, all Australian jurisdictions have provisions setting out a court's general power in relation to improper questions[337] (see **State and Territory Legislation: Improper Questions**). Witnesses – whether they have an interest in the outcome of the case or not – are there to assist the court by giving evidence as to matters relevant to the proceedings. As Viscount Sankey L.C. observed in the context of cross-examination, witnesses are entitled to 'courtesy and consideration.'[338]

It may help the orderly conduct of the trial if the judicial officer indicates from the outset that he/she has a positive duty to act to disallow improper or inappropriate questions[339] and will do so as necessary, and to state that the judicial officer expects counsel to carefully consider the questions asked.

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334 See Cossins, above n 98.
335 Cashmore and Trimboli, above n 126.
336 *GPI Leisure Corp. Ltd v Herdsman Investments Pty Ltd (No. 3)* (1990) 20 NSWLR 18, 22-3; *R v Kelly; Ex parte Hoang van Duong* (1981) 28 SASR 271, 273.
337 NSW: *Evidence Act 1995* ss 41(1)(b), 103; *Criminal Procedure Act 1986* s 275A; Vic: *Crimes (Criminal Trials) Act 1999* s 18; *Evidence Act 1958* ss 37, 38-42; Qld: *Evidence Act 1977* ss 20-21; Tas: *Evidence Act 2001* ss 41(1)(b), 103; SA: *Evidence Act 1929* ss 22-25; WA: *Evidence Act 1906* ss 25-27; NT: *Evidence Act 1939* ss 13-17; Commonwealth: *Crimes Act 1914* s 15YE. See also the statement of the English Bar Council set out in S. L. Phipson, *Phipson on Evidence* (London: Sweet & Maxwell, 14th ed, 1990) , [12]-[16]: The ethical position in Australia is similar.
338 *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 360.
339 See, for example, *Evidence Act* 1995 (NSW), s 41.

4.10 Strategies for Judicial Officers to Deal with Distressed Children in the Courtroom

The following are some suggested strategies that judicial officers may find useful for preventing children from suffering undue stress during the trial:

- Before a child is questioned, it is desirable for the judicial officer to lay out the ground rules for both counsel and the child. Such rules include how long questioning will be permitted without a break; a request that counsel respect the immaturity of the child witness and put questions in an appropriate way for his/her age; a prohibition on shouting or raising voices; an indication about when breaks will be taken; and so forth.[340]
- Judicial officers need to give children permission to tell them if they do not understand a question. It is important for judicial officers to be aware that most children, especially those under nine years, will have difficulty identifying questions they do not comprehend.
- The judicial officer should watch for puzzled looks, knitted eyebrows, downcast eyes, long pauses, and irrelevant or senseless responses. These signals can indicate a lack of comprehension or that a child is confused or in need of a break. If after this break, the child still does not adequately respond, the judicial officer should again adjourn to examine the appropriateness of the question and any other difficulties that may have arisen.
- The judicial officer may consider the possibility that young children are more likely to stop answering questions or cry than interrupt the lawyers with a request to go to the toilet or to have a break.
- To avoid complaints about adjournments interfering with cross-examination, judicial officers may advise counsel ahead of time that regular intervals, for example a break every 20 minutes, will be considered. This recognises children's limited stamina and particular needs in court.
- Judicial officers should be mindful of inappropriate body language and tone of voice used by them and by counsel.

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340 M. Rayner, 'Management of Child Witnesses - Practical Solutions for Judges', paper presented at the NSW Local Courts Annual Conference, Brighton-Le-Sands, 4 July 2003.

Chapter 5
Particular Procedures for Children Giving Evidence

5.1 Introduction

A number of jurisdictions have introduced particular reforms designed to meet the obligation to be more sensitive to the needs of child witnesses and to make their participation in the criminal justice system more effective and less traumatic. Some of these procedures are introduced by legislation and others by practice. This chapter is intended to describe a number of such procedures, so that judicial officers might become familiar with them, and to encourage their use.

5.2 Directions Hearings

Over the last fifteen years, courts and the legislature, sensitive to the emotional impact of child sexual abuse on complainants and to the evidentiary problems arising from long delays in proceeding to trial, have introduced procedures for cases to be heard as quickly as possible. Pre-trial orders are often needed to facilitate the smooth and expeditious progress of the matter to trial.

See, for example:

- ***Criminal Procedure Act 1986* (NSW)** ss 129, 130
- New South Wales, *District Court* ***Criminal Practice Note 5*** and ***Criminal Practice Note 6***
- District Court of Queensland, ***Practice Direction No. 1 of 2005***
- Section 590AA, Criminal Code 1899 (Qld) (Pre-trial directions and rulings)
- County Court of Victoria, ***Practice Note PNCR 2-2010***
- Supreme Court of Victoria, ***Practice Note No. 4 of 2010***
- Supreme Court of South Australia, ***Criminal Practice Directions 2007***, *Directions 9-10A*
- Judicial Commission of New South Wales, *Sexual Assault Handbook*, ***Important General Directions in Sexual Assault Trials***
- Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***
- Judicial College of Victoria, ***Victorian Criminal Charge Book***

5.3 Editing of Transcripts

The recording of interviews will almost inevitably require editing, and it is essential to have this determined before trial to avoid delay and to ensure accuracy. A directions hearing is a very useful occasion to deal with the editing of transcripts of interviews. It may avoid an adjournment of the trial. Further, it gives defence the opportunity to raise the question of material that they consider should be excluded. See for additional discussion and recommendations: **Judicial Preparation for the Trial**.

ACT:

- ***Evidence (Miscellaneous Provisions) Act 1991***, s 40V

New South Wales:

- ***Criminal Procedure Act 1986***, s 306V(4)
- ***District Court Criminal Practice Note 5*** – Management Of Prescribed Sexual Offence Proceedings

Northern Territory:

- ***Evidence Act***, s 21B(4)
- ***Practice Direction No. 3 of 2006***

Queensland:

- ***Evidence Act 1977***, s 21AZ

South Australia:

- ***Evidence Act 1929***, s 13D(3)

Victoria:

- ***Criminal Procedure Act 2009***, ss 368(3), 374(3)
- ***Supreme Court of Victoria, Practice Note No. 4 of 2010***

Western Australia:

- *Evidence Act 1906*, ss 106HB, 106M

5.4 Preparing a Child Witness for the Court Appearance

It is important that judicial officers be aware of the issues that child complainants face when waiting for a trial or pre-recording, and what assistance is available to them. This gives the judicial officer general background knowledge that assists in promoting a better court experience for the child complainants, and a fair trial. Judicial officers should aim to minimise any delay on the day the child is due to give evidence, because of the effects this can have, particularly if following a lengthy pre-trial delay (see **Problems Caused by Delays**).

5.5 Benefits of Pre-recording

According to Cashmore, pre-recording has the following benefits: [341]

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

See, further:

- J Spencer & M Lamb (eds) *Children and Cross-examination: Time to Change the Rules?*, Hart Publishing: London, 2012.

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341 J. Cashmore, 'Innovative Procedures for Child Witnesses', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 213.

5.6 Pre-recording Procedures in the States and Territories

Each jurisdiction has its own particular procedures for the pre-recording of the evidence of child witnesses:

Queensland:

- ***Evidence Act 1977*****,** Div 4A, subdivision 3 (procedures for pre-recording evidence of "affected child" witnesses)
- Supreme Court of Queensland, ***Practice Direction No 4 of 2014***

Victoria:

- ***Criminal Procedure Act 2009***, Divs 5, 6 and 7 (procedures for pre-recording evidence of children & complainants in sexual offence matters)
- County Court of Victoria, ***Practice Note PNCR 2-2010*** paras 72, 73, 74
- Judicial College of Victoria, ***Victorian Criminal Charge Book***

South Australia:

- ***Evidence Act 1929* (SA)** ss 13, 13A, 13C, 13D (procedures for pre-recording evidence of vulnerable/child witnesses)

New South Wales:

- **Criminal Procedure Act 1986 (NSW),** Part 2, Div 3 (procedures for recording evidence of "vulnerable persons")
- Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***

Western Australia:

- ***Evidence Act 1906 (WA)***, ss 106HA – 106MB; 106T (procedures for recording evidence of children)

ACT:

- ***Evidence (Miscellaneous Provisions) Act 1991*****,** Div 4.2B (procedures for recording evidence of children, intellectually impaired persons and sexual assault complainants)

Northern Territory:

- ***Evidence Act*, s 21B(2) (procedures for recording evidence of vulnerable witnesses)

5.7 Jury Directions about Pre-recorded Evidence

See:

- ***Evidence Act 1977*s 21A(8), 21AW,**
- ***Criminal Procedure Act* 2009 (Vic), ss 375, 382**
- ***Evidence Act 1906* (WA)HB(7), (8)**
- ***Evidence (Miscellaneous Provisions) Act 1991* (ACT),** s46
- ***Evidence Act 1929* (SA),** ss 13(7), 13A(12)
- ***Criminal Procedure Act 1986* (NSW)** Part 6, Div 3,s 306X
- Queensland Supreme and District Courts' Bench Book, '***Special Witnesses***' and '***Evidence of Affected Children***'
- Judicial College of Victoria, ***Victorian Criminal Charge Book***
- Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***

5.8 Competency Testing

5.8.1 General Principles

A common theme running through the legislation, which is detailed below, is the importance of the child's knowledge of the difference between truth and lie, and their obligation to tell the truth in court.

Children are able to distinguish between truths and lies.[342] However, requiring a child to define the truth is much more problematic. As Lyon notes, '[d]efining and describing require an abstract understanding of the proper use of a word across different contexts and necessitates that one generate rather than merely recognise the proper use of a word.'[343] Even adults may have problems with such a task.

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342 T. D. Lyon, 'Child Witnesses and the Oath', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 245 <http://works.bepress.com/cgi/viewcontent.cgi?article=1040&context=thomaslyon> at 21 March 2009, 257-258.

343 Ibid 246.

Research by Lyon suggests that four to seven year old children are able to identify lies as being bad and as causing authority figures such as a judge, doctor and grandmother to become angry.[344]

Using hypothetical situations where children are asked what would happen to them if they lie may well hinder the task of establishing competency, as children do not do well in hypothesising about events that are undesirable or implausible.[345] Similarly, it is inadvisable for a judicial officer to ask a child whether statements made by the judicial officer are honest or dishonest. Further, the overuse of leading questions of a child may vitiate the competency inquiry.[346]

5.8.2 Procedure

The judicial officer undertakes the inquiry as to the competency of a child to give evidence. Counsel for the accused does not have the right to ask questions of the child in relation to competency.[347] It is important that the questioning is focused on the issue of determining competency and not on intimidating the child or other irrelevant matters.[348] The court is not concerned with substantive issues to be raised at trial, only with whether the relevant criteria have been met under the legislation for the giving of sworn evidence. It is best to avoid abstract or multi-faceted questions.[349] Further, questioning should be appropriate to the child's level of development (see **Appendix**).[350]

For the most part, Australian authorities have determined that an inquiry as to competency should be held in the absence of the jury.[351] However, in Western Australia, it has been held that the inquiry should be recorded as part of the special hearing to take the child complainant's evidence, and that it should be played to the

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344 Ibid 250-251.
345 Ibid 251.
346 *Grindrod v The Queen* [1999] WASCA 44.
347 *R v Garvey* [1987] 2 Qd R 623; *R v RAG* [2006] NSWCCA 343, [46].
348 *R v RAG* [2006] NSWCCA 343, [37]-[38].
349 *R v RAG* [2006] NSWCCA 343, [42].
350 A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Development Day, Adelaide, 2009 .
351 Heydon, above n 291, [11035].

jury at trial.[352] In these circumstances, the judge should not announce his or her decision concerning competency on the tape to be played to the jury.[353]

Additional questioning will be needed in jurisdictions where the court must also be satisfied that the witness understands the seriousness of the obligation to give truthful evidence in court and/or the consequences for not doing so.

5.8.3 Legislation on Competency

Legislation in the states and territories prescribes the tests that courts are to use in determining the competency of children to give sworn and unsworn evidence.

In Uniform Evidence Act jurisdictions (NSW, ACT, Tasmania, Victoria and the Northern Territory) s 12 states that 'every person is competent to give evidence'. This presumption of competency means that a court will not consider the issue of whether a child is competent to give evidence unless it is specifically raised (usually) by the defence. Section 13 then provides the tests for determining competency to give sworn and unsworn evidence. The tests for competency in other jurisdictions are set out below.

Queensland:

- ***Evidence Act 1977* (Qld)**
  - s 9 Presumption of competency
  - ss 9A, 9B Competency to give evidence
  - s 9C Expert evidence about competency

Western Australia:

- ***Evidence Act 1906 (WA)***
  - s 106B Children under 12 may give sworn evidence
  - s 106C Children under 12 and mentally impaired people may give unsworn evidence

352 *Lau v The Queen* (1991) 6 WAR 30.
353 *R v Stevenson* [2000] WASCA 301, [34].

South Australia:

- ***Evidence Act 1929* (SA) s 9**
  - s 9(1) Presumption of competency
  - s 9(2) Unsworn evidence may be given

See also:

New South Wales:

- Judicial Commission of New South Wales, ***Equality before the Law Bench Book*** [note: the ***Equality before the Law Bench Book*** suggests an approach for determining competency that has been cited with approval by the Court of Criminal Appeal in New South Wales.[354]]
- Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***

Victoria:

- Judicial College of Victoria, ***Victorian Criminal Charge Book***

5.9 Unsworn Evidence

If the criteria for giving sworn evidence are not met, then in most jurisdictions the court must consider the criteria in relation to the giving of unsworn evidence. In Uniform Evidence Act jurisdictions, a person who is not competent to give sworn evidence about a fact may give unsworn evidence about the fact (s13(4)) as long as the court informs the person of the matters listed in s 13(5), including that it is important they tell the truth.

Several jurisdictions require a court to be satisfied that a child is capable of giving an intelligible account of events observed or experienced, in order to allow the child to give unsworn evidence. To establish this, the court may take into account answers given on the examination concerning sworn evidence. It may also take into account answers during the pre-recorded interview. In *R v Stevenson*,[355], for example, the Western Australian Court of Appeal said that the requirement concerning an intelligible account of events relates to 'the child's general ability to give an intelligible

354 *R v RAG* [2006] NSWCCA 343, [26]-[27].
355 [2000] WASCA 301.

account of *any* event which the child has observed or witnessed.'[356] Justice Pidgeon said:

> Normally only a few questions would be required of a 5½ year old child to ascertain if the child is able to give an intelligible account of events which he or she has observed. For example, the child could be asked how he or she travelled from home to the court.[357]

The prosecutor should be in a position to provide the court with information as to the child's cognitive and linguistic development. Additional questioning will be needed in jurisdictions where the court must also be satisfied that the witness understands the seriousness of the obligation to give truthful evidence in court and/or the consequences for not doing so.

In Queensland, the court may hear expert evidence on this point.[358] In the Uniform Evidence Act jurisdictions, s 13(8) states that:

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

5.10 Closed Circuit Television

In addition to the pre-recording of evidence, a number of jurisdictions have a facility or requirement for a child witness to give evidence by Closed Circuit Television (CCTV) and usually from a location remote from the court.

ACT:

- ***Evidence (Miscellaneous Provisions) Act 1991*, s 43**

Queensland:

- ***Evidence Act 1977* (Qld) ss 21A; 21AP - AR**
- Queensland Supreme and District Courts' Bench Book, ***Special Witnesses*** and ***Evidence of Affected Children***

New South Wales:

- ***Criminal Procedure Act 1986* (NSW) s 294B(3); s 306ZB-ZD**
- Judicial Commission of New South Wales, **'Evidence Given by Alternative Means'**, ***Criminal Trial Courts Bench Book***

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356 *R v Stevenson* [2000] WASCA 301, [16].
357 *R v Stevenson* [2000] WASCA 301, [18].
358 *Evidence Act 1977* (Qld) s 9C.

Victoria:

- ***Criminal Procedure Act* 2009, ss 359-363**
- Judicial College of Victoria, ***Victorian Criminal Charge Book***

South Australia:

- ***Evidence Act 1929* (SA) ss 13 & 13A**

Western Australia:

- ***Evidence Act 1906* (WA)N; s 106R**

Northern Territory:

- ***Evidence Act*, s 21A**

Tasmania:

- ***Evidence (Children and Special Witnesses) Act*, s6**

5.11 Interviews of Children by Police

Judicial officers are often involved in making rulings on the admissibility of evidence arising from police interviews. It is therefore important that they have some grasp of the best practice for interviewing children. The conduct of the interview often has a significant impact on the accuracy of information presented by the child at trial. Sensitivity is also needed because at the time leading up to and during the interview, the child may be suffering physical or psychological problems as a result of the abuse.

A great deal of research has been undertaken concerning these issues in the United Kingdom,[359] Canada,[360] and the United States.[361] The United Kingdom has had standard protocols for the interviewing of child witnesses for some years, with its

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359 There has been extensive work internationally as to the best practice in interviewing children. There is a substantial degree of consensus as to the principles of best practice: M. Lamb, Y. Orbach, K. Sternberg, P. Esplin and I. Hershkowitz, 'The Effects of Forensic Interview Practices on the Quality of Information Provided by Alleged Victims of Child Abuse', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 131. The discussion in this section is largely drawn from *Achieving Best Evidence in Criminal Proceedings*, above n 39. See also G. M. Davies and H. L. Westcott, 'Investigative Interviewing with Children: Progress and Pitfalls', in Heaton-Armstrong, Shepherd, Gudjonsson and Walchover (eds.), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford: Oxford University Press, 2006) 153

360 C. Peterson and M. Grant, 'Forced-Choice: Are Forensic Interviewers Asking the Right Questions?' (2001) 33 *Canadian Journal of Behavioural Science* 118.

361 K. J. Saywitz and T. D. Lyon, 'Coming to Grips with Children's Suggestibility', in Eisen, Quas and Goodman (eds.), *Memory and Suggestibility in the Forensic Interview* (Hillsdale: Erlbaum, 2002) 85 <http://works.bepress.com/cgi/viewcontent.cgi?article=1044&context=thomaslyon> 18 March 2009.

Memorandum of Good Practice (1992)[362] and its successors, *Achieving Best Evidence in Criminal Proceedings* (2002)[363] and ***Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* (2007)**.[364]

Achieving Best Evidence (2007) suggests steps that should be taken to prepare for an interview, including:

- Consulting professionals from other agencies who may be involved such as:
  - health;
  - educational; and
  - welfare

  agencies.
- Considering whether a support person is to be available at the interview.
- Seeking the child's views as to the whether a support person should be available at the interview and as to the interview generally.
- Considering what is to happen concerning a medical examination of the child if one has not already taken place.
- Consultation with particular specialists where the child has special needs (e.g., autism, psychiatric conditions).
- Consideration of culture, language, and any developmental factors that may impact upon the interview and how to best address them.[365]

In Australia, Professor Martine Powell has undertaken considerable research on this topic.[366] Her observations include the following:[367]

- The goal is to elicit an accurate and detailed account of abuse from a child.
- The central aim is to obtain an account of the alleged offence in the child's own words, at his or her own pace, and without interruption.

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362 Home Office in conjunction with Department of Health, *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (London: HMSO, 1992).

363 Home Office Communication Directorate, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children* (London: Home Office Communication Directorate, 2002).

364 *Achieving Best Evidence in Criminal Proceedings*, above n 39.

365 Ibid, [2.37]-[2.86].

366 Powell, above n 141; see also Cashmore and Bussey, above n 116; Cashmore and Trimboli, above n 126; Cashmore, above n 231; Cashmore, above n 251; Cashmore, above n 332.

367 Ceci and Bruck, above n 140; S. Agnew and M. B. Powell, 'The Effect of Intellectual Disability on Children's Recall of an Event across Different Question Types' (2004) 28 *Law and Human Behavior* 273; M. B. Powell, 'Pride: The Essential Elements of a Forensic Interview with an Aboriginal Person' (2000) 35 *Australian Psychologist* 186.

- The account generally proceeds with the interviewer asking a general or broad, open-ended question (questions that require multiple-word responses and allow interviewees the flexibility to choose which aspects of the event they will describe).
- The interviewer then uses minimal non-verbal encouragers and asks further open-ended questions to steer the interviewee to the next point in the story.
- At the end of the story, the interviewee is then guided back to parts of the narrative and provided with the opportunity for further recall.
- These prompts should focus the interviewee on a particular part of the account but not dictate what specific information is required.
- All witnesses (even those as young as four years old) tend to provide highly accurate information in response to broad, non-leading, open-ended questions.
    - See *Martin v R* [2013] VSCA 377 in which the defendant argued on appeal that the complainant's VARE (video and audio recorded evidence) interview was 'contaminated' because of particular errors associated with the manner in which the interview was conducted. The main criticism was that the interviewing police officer elicited the five year old complainant's allegations of sexual abuse through a series of leading questions and used 'oppressive tactics'. The questioning was also described as 'vague, imprecise or contained multiple propositions' ([20]) although no application had been made at trial to exclude the VARE. The Victorian Court of Appeal considered the VARE in its entirety, in particular the fact that the five year old boy was 'prone to give answers that were quite unclear. He was often distracted and failed to respond directly to the questions' so that many of the supposed 'leading' questions were 'attempts by the interviewer to refocus' his attention. All allegations had been made voluntarily and the leading questions encouraged the child to elaborate further. The Court disagreed that the VARE had been conducted in an improper manner and none of the questions were leading 'in the sense of introducing to the complainant facts about which the witness had not already given evidence' ([52]). See further [39]-[43] (Redlich JA).

      See, further:
    - Handbook for Questioning Children published by the American Bar Association: http://apps.americanbar.org/litigation/committees/childrights/content/article

s/spring2014-0414-book-review-handbook-questioning-children-linguistic-perspective-third-edition.html

Chapter 6
Other Trial Issues: Expert Evidence and Summing-Up

PART A – EXPERT EVIDENCE AT TRIAL

6.1 Introduction: The Common Law

A variety of expert evidence may be led in cases involving allegations of the sexual assault of children: medical, psychological, forensic, scientific, and the like. However, the admissibility of expert opinion evidence about children is controversial. In Australia, there are very few cases that have examined the admissibility of expert opinion evidence about the effects of sexual abuse on children. The general approach under the common law opinion rule has been to exclude such evidence because the behaviour of child sexual abuse victims is within the 'common knowledge' or 'ordinary experience' of the jury. [368]

In *C v The Queen*[369] for example, the trial judge had admitted the evidence of a child psychiatrist to explain why the complainant had delayed her complaint and to re-establish her credibility. On appeal, Chief Justice King concluded that such expert evidence was not admissible in South Australian courts because the behaviour of sexual abuse victims was not considered to be a fit subject for expert opinion.[370] It is worth considering Chief Justice King's reasoning, since the admissibility of expert opinion evidence about children's responses to sexual abuse has reached a turning point:

> In the end this becomes a question whether the subject matter of the proposed evidence is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries. … [It can be expected that] jurors would have much experience of the behaviour and reactions of children in the family situation. Most would not, of course, have encountered child sexual abuse. That of itself is not sufficient reason for the admission of expert evidence. … I am far from convinced … [that the insights of child psychology] are necessary in order to enable a jury to reach a just decision or that their value would outweigh the impairment of the trial process which would result from introducing expert opinion, and probably conflicting expert opinion, into child sexual abuse cases.[371]

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368 *Ingles v The Queen* (Unreported, Supreme Court of Tasmania, Court of Criminal Appeal, Green CJ, Crawford, Zeeman JJ, 29 October 1992, 4 May 1993); *C v The Queen* (1993) 70 A Crim R 378; *F v The Queen* (1995) 83 A Crim R 502; *R v Venning* (1997) 17 SR (WA) 261; *S v The Queen* (2001) 125 A Crim R 526; Cossins (2008), above n 1.

369 *C v The Queen* (1993) 70 A Crim R 378.

370 [1993] SASC 4095 at [29].

371 *C v The Queen* (1993) 70 A Crim R 378, 384.

Blackwell has observed that judges, lawyers and other professionals may 'normalise' their own professionally acquired knowledge of child sexual abuse and therefore consider it 'common knowledge' possessed by the average juror.[372] However, the idea that laypeople possess a common knowledge about the behaviour of children, and especially those who have been sexually abused, is not a valid assumption. In a New Zealand Court of Appeal case, *R v Aymes*,[373] Justice Glazebrook posed the opposite view that:

> Not all jurors will have had children. Some may have had children but who are no longer in the relevant age group. Even jurors with young children may not know what is and what is not normal sexual behaviour for that age group (or may not want to say in case their child is considered abnormal).[374]

Indeed, some of the ways in which children respond to sexual abuse are counterintuitive from a layperson's perspective, such as delay in complaint, secrecy, protecting the offender, and maintaining an emotional bond with the offender. Rather than the jury relying on its commonsense or collective experience, it is arguable that expert testimony about the behaviours of sexually abused children is necessary. Expert evidence of this kind might be used 'to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance',[375] especially where the misapprehension arises because the behaviour in question appears to be inconsistent with sexual abuse from a lay-perspective.

Expert testimony may be in the nature of diagnostic or specific expert evidence on the one hand, and educative or general expert evidence on the other.[376] Judicial officers may consider the possibility of admitting educative or general expert evidence concerning child sexual assault in order to address jury misconceptions.[377]

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372 Blackwell, above n 128, 7.
373 *R v Aymes* (2004) 21 CRNZ 523.
374 Ibid, 551.
375 New Zealand Law Commission, *Evidence Code and Commentary (Rep. 55, Vol. 2)* (Wellington: Author, 1999) 67.
376 Cossins (2008), above n 1,155.
377 Ibid.

6.2 The Common Law and General Principles

The general principle at common law concerning the admission of expert evidence was stated by Justice Kirby in *Farrell v The Queen*:[378]

> While expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness's expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine.[379]

R v ATJ[380] is a recent Australian case on the common law approach to expert opinion evidence about children. In that case, the defence sought to call expert evidence in order to challenge the admissibility of videotaped records of interviews and the complaints made by the child to his mother and brother. The defence argued that the information lacked sufficient probative value to justify its admission. The defence called a psychologist, whose testimony was received *de bene esse*, to give evidence as to the reliability of the information conveyed by the child in the course of each of the interviews and to opine about the circumstances in which the complaints were made.[381]

In evidence, the psychologist first identified 'significant discrepancies' in the information provided by the child and offered four possible explanations for these inconsistencies: embarrassment; hyperamnesia; suggestibility and conscious fabrication.[382] The expert witness excluded hyperamnesia as being applicable and considered that the effect of delay was the most likely explanation for the divergence in the child's accounts.

Justice Riley accepted that the psychologist had relevant expertise, but, in his view, the circumstances of the case and the subject matter of the psychologist's opinion were such that a person without instruction or experience in the area would be able to form a sound judgment on those topics without the expert. In respect of the evidence

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378 *Farrell v The Queen* (1998) 155 ALR 652.
379 *Farrell v The Queen* (1998) 155 ALR 652, 661.
380 *R v ATJ* (Unreported, Supreme Court of the Northern Territory, Riley J, 26 April 2005); see also *R v Joyce* [2005] NTSC 21.
381 *R v ATJ* (Unreported, Supreme Court of the Northern Territory, Riley J, 26 April 2005), [31].
382 Ibid, [33]-[34].

given, Justice Riley considered that the psychologist had not taken adequate account of the fact that incongruity would be expected in a young child's account on different occasions, when being interviewed by different people, in various circumstances, and with differing questions. He stated that the impact of delay upon memory is a commonly understood concept, and that 'suggestibility' and 'interviewer bias' are concepts that could be identified by counsel and the court and understood without the need for expert evidence. Further, Justice Riley was of the view that the responses of the child in the interviews demonstrated that he was not suggestible. As to conscious fabrication, again, the judge considered that this concept did not require the evidence of an expert to be comprehended. For these reasons, Justice Riley rejected the necessity of the psychologist being called to give evidence on these matters.[383] The conclusion by Justice Riley to reject the calling of expert evidence in *R v ATJ* does not mean that expert evidence is inadmissible. The admissibility of such evidence depends on the particular circumstances of each case.

In the 1995 decision in *J v The Queen*,[384] the Victorian Court of Criminal Appeal had to consider the admissibility of the expert evidence that had been admitted at trial to rebut a suggestion by the defence that the complainant's behaviour was inconsistent with that of someone who had been sexually assaulted. Justice Brooking noted that the rehabilitation of impeached witnesses has existed at common law for many centuries, and referred to the expert evidence in the Full Court of South Australia decision in *R v C,*[385] and the Supreme Court of Canada decision in *R v Lavallee*.[386]

The matters raised in cross-examination in *J v The Queen*[387] included the complainant's failure to leave home, her failure to complain, her sending greeting cards to her father, and her otherwise behaving in an apparently affectionate manner towards him. The basis of the cross-examination was that this conduct was inconsistent with the complainant's account of more than two decades of sexual abuse. Justice Brooking held that, where the complainant's credibility has been impeached by a suggestion of inconsistent conduct, the Crown may call expert evidence as to typical behaviour and responses of victims of sexual abuse, not in aid of proof of the fact of abuse, but to rehabilitate the credibility of the complainant.

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383 Ibid, 41.
384 *J v The Queen* (1994) 75 A Crim R 522; see also *R v Johnson* (1994) 75 A Crim R 522.
385 *R v C* (1993) 60 SASR 467.
386 *R v Lavallee* (1990) 55 CCC (3d) 97.
387 *J v The Queen* (1994) 75 A Crim R 522.

Justice Brooking, with whom the Court agreed, held that the particular evidence in *R v Johnson*[388] should not have been admitted because it failed to comply with the rules governing expert evidence. The court held that the expert evidence *could* have been led in an attempt to rehabilitate the credit of the complainant *if*:

(a) the opinions were the subject of a field of expert knowledge;
(b) the witness was a qualified expert in that field; and
(c) the opinion was outside the knowledge and experience of the jury.[389]

Justice Brooking also referred to *R v Tait*,[390] in which the court held that an expert witness may express an opinion about whether evidence of a child complainant's behaviour is consistent with the behaviour generally observed in sexually abused children.[391]

The common law's focus on complainant credibility arises because of the context in which child sexual abuse typically occurs, namely, the absence of corroborating evidence and the nature of the trial as 'word against word'. The complex nature of child sexual abuse is discussed in Chapter 1 at **The Nature and Impact of Child Sexual Abuse**.

The analysis of the witness' credibility will include an assessment of the child complainant's responses to the abuse and her/his relationship with the accused. Yet, as Ceci and Friedman have correctly identified, it cannot be assumed that the average juror, or even the average lawyer or judge 'has a good understanding of all the insights that decades of psychological research have yielded' about the effects of child sexual abuse'.[392] This means that jurors, making decisions about guilt and innocence, will be required to make assessments of credibility 'that go beyond the layperson's commonsense knowledge.'[393]

This reasoning constitutes the basis upon which three Law Reform Commission Inquiries[394] have concluded that expert opinion evidence about child development

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388 *R v Johnson* (1994) 75 A Crim R 522.
389 Ibid.
390 *Rv Tait* [1992] 2 NZLR 666.
391 *R v Johnson* (1994) 75 A Crim R 522.
392 Ceci and Friedman, above n 130.
393 Quas et al., above n 2, 425-426, 456.
394 See Australian Law Reform Commission, above n 248; New South Wales Parliament Legislative Council-Standing Committee on Law and Justice, *Report 22: Report on Child Sexual Assault Prosecutions (Parliamentary Paper No. 208)* (2002) ; Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)*, (2005)

and behaviour, including children's responses to sexual abuse, ought to be more easily admitted to assist juries in child sexual assault trials. These Inquiries culminated in recommendations by the Australian Law Reform Commission, the New South Wales Law Reform Commission, and the Victorian Law Reform Commission to amend the *Uniform Evidence Acts* that were then in operation (*Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW)). Note that Tasmania, Victoria, the ACT and the NT have also enacted Uniform Evidence Act legislation.[395]

6.3 The Uniform Evidence Acts Jurisdictions

The UEA sets out its approach to the admissibility of opinion evidence in the opinion rule under s 76:

> Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

However, like all other exclusionary rules under the UEA a list of exceptions set the boundaries for admitting opinion evidence in certain circumstances. Based on various policy reasons, these exceptions represent an acknowledgement that not all opinion evidence is of the same quality and that some opinions are crucial to the conduct of trials and the fact-finding process of the jury.

Opinions based on specialised knowledge may be admissible under s 79:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Section 79 is broad enough in its scope to allow for the admissibility of opinions from a range of disciplines, not necessarily those based on the typical professional disciplines such as medicine or science. In *Adler v ASIC* [2003] NSWCCA 131 at [629], Giles JA observed that the phrase 'specialised knowledge' had deliberately not been defined under the *Evidence Act*. This is because the term "is not restrictive; its scope is informed by the available bases of training, study or experience"[396] and therefore may encompass a range of callings not previously envisaged by the common law.

<http://www.austlii.edu.au/au/other/alrc/publications/reports/102/> at 18 March 2009; New South Wales Law Reform Commission, above n 38; Victorian Law Reform Commission (2003; 2004), above n 31.

395 *Evidence Act* 2001 (Tas); *Evidence Act* 2008 (Vic); *Evidence Act* 2011 (ACT); *Evidence (National Uniform Legislation) Act* 2013.

396 *Adler v ASIC* [2003] NSWCCA 131 at [629], per Giles JA.

6.3.1 Opinion Evidence in Child Sexual Assault Trials

Section 79(2) was inserted into the *Evidence Acts* in NSW and the Commonwealth in the 2007 amendments to the UEA[397] to deal with the admissibility of expert opinion evidence in child sexual assault trials. Section 79(1) and (2) must be read together:

> (1) If a person has *specialised knowledge* based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
> (2) To avoid doubt, and without limiting subsection (1):
> (a) a reference in that subsection to *specialised knowledge* includes a reference to *specialised knowledge of child development and child behaviour* (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
> (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
> (i) the development and behaviour of children generally,
> (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences (emphases added).

The NSW Court of Criminal Appeal has said that for an opinion to be admitted under s79(1) it must satisfy the two limbs of the section. First, an area of "specialised knowledge" derived from either "training, study or experience" must be identified. Second, the opinion must be shown to be based "wholly or substantially" on the identified area of specialised knowledge.[398] This second requirement ensures that expert witnesses do not give evidence outside of their area of expertise since:

> Experts who venture "opinions" (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.[399]

In *Tang,* Spigelman CJ considered that "[t]he meaning of 'knowledge' in s 79 is … the same as that identified in the reasons of the majority judgment in *Daubert v Merrell Dow Pharmaceuticals Inc* [1993] USSC 114*;* 509 US 579 (1993) at 590:

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397 Section 79(2) is based on the Tasmanian provision, s79A, *Evidence Act* 2001. Section 79(2) was also and incorporated into the Victorian *Evidence Act* 2009 when Victoria adopted the UEA.

398 *R v Hien Puoc Tang* [2006] NSWCCA 167 at [134], per Spigelman CJ. For a detailed account of how these requirements are to be met see Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at [85].

399 *HG v R* (1999) 197 CLR 414 at [44], per Gleeson CJ.

> [T]he word 'knowledge' connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds'".[400]

Section 79(2) must be read in conjunction with another new provision in the UEA, s108C. This provision is an exception to the credibility rule. It allows expert opinion evidence to be given about the behaviour of the child complainant, with the leave of the court, where the opinion is relevant to the complainant's credibility.

Section 108C was recommended by the Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission[401], along with s 79(2), to ensure that expert opinion evidence about children would not be excluded by the credibility rule (s 102):

> (1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:
>
> (a) the person has *specialised knowledge* based on the person's training, study or experience, and
>
> (b) the evidence is evidence of an opinion of the person that:
>
> (i) is wholly or substantially based on that knowledge, and
>
> (ii) could substantially affect the assessment of the credibility of the witness, and
>
> (c) the court gives leave to adduce the evidence.
>
> (2) To avoid doubt, and without limiting subsection (1):
>
> (a) a reference in that subsection to *specialised knowledge* includes a reference to *specialised knowledge of child development and child behaviour* (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse), and
>
> (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:
>
> (i) the development and behaviour of children generally,
>
> (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

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400 *R v Hien Puoc Tang* [2006] NSWCCA 167 at [138], per Spigelman CJ.

401 Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission (ALRC, NSWLRC and VLRC) (2005b) *Uniform Evidence Law Report (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)*, Australian Law Reform Commission: Sydney, Recommendation 9-1.

Section 108C(2) is in exactly the same terms as s 79(2).

As an exception to the credibility rule, s 108C(1) will only need to be considered when the purpose of the admission of the expert evidence is for a credibility purpose, that is, to boost the credibility of the child complainant.[402] The need to do so may arise in circumstances where the complainant has displayed counter-intuitive behaviour, such as delaying their complaint or by maintaining contact with the alleged offender, as occurred in *MA v The Queen* [2013] VSCA 20, discussed below.

The rationale for ss 79(2) and 108C is to encourage the admission of expert opinion evidence about the behaviour of children because of concerns that while much has been said about children's unreliability as witnesses, there are few opportunities to counteract misconceptions about children's capacity to remember and recall events accurately.[403]

The Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission considered that expert opinion evidence about child development and behaviour (including the effects of sexual abuse) could sometimes be important evidence in assisting the jury to "to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour".[404]

One example given by the Commissions was in relation to a witness with an intellectual disability who has difficulty with accurately remembering or estimating dates and times.[405] This problem also arises in relation to children under the age of 10 years (see further, **Table 2 - Cognitive Skills Present in Children Relevant to Testimonial Competency**). In such a situation, a prosecutor might consider calling an expert witness to give evidence about the impact of the intellectual disability or

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402 This means that the expert opinion must fall within the definition of credibility evidence under s101A for it to be admissible under s108C.

403 Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission (ALRC, NSWLRC and VLRC) (2005b) *Uniform Evidence Law Report (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)*, Australian Law Reform Commission: Sydney, at [9.140]. See also Annie Cossins and Jane Goodman-Delahunty, 'Misconceptions or Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors' "Common Sense"' (2013) 22 *Journal of Judicial Administration* 171-190.

404 ALRC, NSWLRC and VLRC, above n 403, [9.155].

405 Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission (ALRC, NSWLRC & VLRC) (2005a) *Review of the Uniform Evidence Acts Discussion Paper (ALRC Discussion Paper 69; NSWLRC Discussion Paper 47; VLRC Discussion Paper)*, Australian Law Reform Commission: Sydney, at [8.171].

about the age at which children acquire the ability to relate to abstract concepts such as time.

In *Bellemore v Tasmania* [2006] TASSC111, the Tasmanian Court of Criminal Appeal considered whether or not evidence given by a psychiatrist about the tendency of victims of child sexual abuse to delay their complaints, as well as evidence about the psychological effects of sexual abuse, had been correctly admitted during Bellemore's trial.

In a case where the complainants had not disclosed the alleged sexual abuse for nearly 30 years, Crawford and Blow JJ held that the psychiatrist's evidence about delayed complaint "tended to rebut an argument that their failure to make an earlier complaint was harmful to their credit".[406] The expert evidence about the psychological impact of sexual abuse was held to be relevant to the fact in issue, namely whether the complainant had been sexually abused. Although relevant, Crawford J considered the probative value of this evidence to be low because sexual abuse was not the only explanation for the complainant's particular behavioural problems which included substance abuse and criminal behaviour.[407]

Arguably, this type of evidence would be admissible under s 108C in other UEA jurisdictions as evidence relevant to the complainants' credibility. At the time, s108C had not been included in the Tasmanian *Evidence Act* 2001, although it has since been inserted.[408]

To date, no case law has specifically interpreted the term '*specialised knowledge of child development and child behaviour*' under ss 79(2) and 108C(2), although in *MA v The Queen* [2013] VSCA 20, the Victorian Court of Appeal considered a psychiatrist's expertise in a child sexual assault trial by reference to the *Makita* principles and the extent of the psychiatrist's professional expertise and clinical experience.[409]

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406 *Bellemore v Tasmania* [2006] TASSC111 at [52], per Crawford J.
407 Ibid, at [55].
408 See *Evidence Amendment Act* 2010 (Tas).
409 *MA v The Queen* [2013] VSCA 20, [57]-[68] (Osborn JA with whom Redlich and Whelan JJA agreed). See *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705, [85] (Heydon JA).

Relevance of s79(2) and s108C(2) evidence

The first consideration in relation to the admissibility of expert evidence concerning child development and child behaviour is its relevance to a fact in issue in the trial, the credibility of the complainant or both.

In *MA v The Queen* [2013] VSCA 20, the Victorian Court of Appeal had to consider the relevance of evidence concerning counter-intuitive behaviours. At trial, a psychiatrist, Dr Sullivan, had given general expert evidence on behalf of the Crown about the behaviours of sexually abused children so as to a provide a 'framework within which the evidence of the complainant's reactions to the alleged abuse should be assessed and understood'.[410] This evidence concerned:

> (a) the failure of the complainant to cry out during the sexual assaults when other members of the family were in the vicinity was not an unusual behavioural reaction;
>
> (b) the failure of the complainant's mother to accept the truth of a complaint made to her by her teenage daughter concerning sexual abuse by her father was not an unusual behavioural reaction and could be regarded as relevant to the complainant's behaviour thereafter; and
>
> (c) the fact that the complainant maintained an ongoing relationship with her father for many years after the alleged abuse, despite both its occurrence and the failure of her mother to accept her complaint, was not demonstrative of an unusual behavioural reaction.[411]

The defendant argued that Dr Sullivan did not possess the relevant expertise to give the above evidence, that his evidence was irrelevant to any matter in issue in the trial (s55) and that it was unfairly prejudicial (ss 135, 137).[412] However, cross-examination of the complainant during the committal had focused on:

> behaviour which was said to be inconsistent with the truth of [her] evidence … includ[ing] the failure to yell out or scream at the time of sexual assaults; failures to tell her mother or brother of their occurrence; the fact the complainant remained living at home after the alleged assaults and then, having left home, maintained contact with her father … [which] included inviting him to her wedding and to the christening of her daughter and … a series of family functions at which, amongst other things, photographs were taken of the two together and gifts were exchanged between them.[413]

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410 *MA v The Queen* [2013] VSCA 20, [1] (Osborn JA with whom Redlich and Whelan JJA agreed).
411 Ibid [3].
412 Ibid [4]-[5].
413 Ibid [18].

As a result, at trial the Crown sought to rebut the defence case about counter-intuitive behaviour by calling expert evidence from Dr Sullivan that the complainant's behaviour was not inconsistent with her allegations nor an abnormal response to sexual abuse.

By adopting the view of the New Zealand Law Reform Commission, the Court of Appeal decided the evidence was relevant to the complainant's credibility because:

> the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have … Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called 'counter-intuitive evidence': it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse … may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant's behaviour *neither proves nor disproves that he or she has been sexually abused*. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance.[414]

Because Dr Sullivan's evidence was adduced as credibility evidence, the prosecution relied on s 108C(2), an exception to the credibility rule (s 102), whose purpose was:

> to clarify that evidence can be led under the section in relation to the development and behaviour of children generally and the development and behaviour of victims of child sexual assault. This clarification is designed to overcome a demonstrated reluctance of courts to accept that the development and behaviour of children is a matter of specialised knowledge outside the general knowledge of the community.[415]

The trial judge agreed that the evidence of Dr Sullivan was relevant to the complainant's credibility and admissible under s 108C(2) because 'the dynamics of sexual abuse' was not common knowledge for jury members:

> If they were, … the frequency of this style of cross-examination would be less common. The defence in this case seek to attack the credibility of [the complainant] by pointing to … her behaviour said to be inconsistent.
>
> Well, of course, they are free to do so, but the experience of the courts is that conduct such as … staying in the home or not calling out, and the various other conduct that is raised in the course of the cross-examination of the witness is neither consistent nor inconsistent with the happening of [sexual abuse] … There is a range, a broad range, of responses and the dynamics

414 New Zealand Law Reform Commission, *Evidence: Evidence Code and Commentary*, Report No 55 (1999) vol 2, 67 [C110] – [C111]; emphasis in original; cited at ibid [23].

415 *MA v The Queen* [2013] VSCA 20, [57] (Osborn JA with whom Redlich and Whelan JJA agreed), citing the Australian Law Reform Commission in Report 102.

> are not as simple as might be suggested. The prosecution … are seeking to neutralise what are said to be these erroneously held assumptions so that an assessment of the credibility of the complainant can proceed from a neutral position.[416]

The Court of Appeal agreed with the trial judge's ruling that Dr Sullivan's evidence was capable of substantially affecting the assessment of the complainant's credibility as required by s 108C(1).[417] Nonetheless, the Court also discussed an issue not raised at trial, that is, whether Dr Sullivan's evidence 'went too far in addressing not only the psychological factors affecting the behaviour of the complainant, but also the psychological factors affecting the behaviour of the complainant's mother' who had refused to believe the complaints of abuse when the complainant was 14 years of age.[418] While the defendant argued that the psychiatric evidence about the behaviour of the complainant's parents was irrelevant as to whether the complainant had been abused, the Court considered that 'the real question is … whether such evidence bore on the credibility of the complainant in a relevant way'[419]:

> Once Dr Sullivan stated that the question of whether a child feels supported by his or her parents is directly relevant to the nature of the child's response to sexual abuse, it followed that the question of common parental reactions to complaints about sexual assault was intertwined with Dr Sullivan's evidence as to common behavioural responses of victims (emphasis added):
>
> > It depends upon the individual, their developmental age, how supported they feel in their family, whether they have trusted people that they can go to … [*T]he likelihood of particular emotional outcomes … is strongly associated with perceived maternal support, so that is if a person who is subject to sexual abuse perceives their mother as supportive, they're less likely to suffer any form of emotional or mental disturbance subsequently than someone who doesn't perceive maternal support, so issues of disclosure are very profound in terms of whether a person is able to cope or not*.[420]

Osborn JA concluded that 'the evidence relating to parental response and, in particular, maternal response to complaints by a child of sexual abuse was sufficiently interrelated with and directly relevant to the evidence of potential responses by a victim of sexual abuse' to fall within s 108C.[421] On the issue of the generality of the evidence, the Court concluded that its generality did not preclude its admissibility since:

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416 Ibid [33].
417 Ibid [34].
418 Ibid [37].
419 Ibid.
420 Ibid [42].
421 Ibid [51].

> The evidence went directly to rebut the defence assertion that the complainant's behaviour should be regarded as counter-intuitive in terms of ordinary patterns of behaviour if her complaints were true. It did so by addressing the question whether behaviours of the type in issue can be regarded as atypical or unusual. Such evidence was necessarily general in scope, going as it did to the question of normal behaviour. More specific evidence was deliberately excluded by the judge.[422]

Finally, the Court concluded that the probative value of Dr Sullivan's evidence was not outweighed by the danger of unfair prejudice to the defendant since '[w]hat the evidence did not seek to do, and what it could not do, was establish that the complainant's behaviour was positively confirmatory of sexual abuse'.[423]

Specific versus general expert evidence under s79(2) and s108C(2)

While the enactment of ss 79(2) and 108C(2) indicates an acceptance by various state legislatures that information about sexual abuse and children's responses to sexual abuse is not general knowledge, it appears that courts are unwilling to allow an expert to give a *specific* opinion evidence about whether or not a complainant's actual behaviours are indicative or suggestive of sexual abuse. Although it is possible that a jury may place undue weight on such an opinion, such evidence does not suggest the type of emotional reaction and misuse by the jury as envisaged by McHugh J when he considered the concept of unfair prejudice in *Pfennig*.[424]

Nonetheless, as a result of comments made by Redlich and Whelan JJA in *MA*, it is likely that such specific expert evidence will be excluded:

> We should say before leaving the question of expert evidence bearing upon the credibility of a complainant that one would not ordinarily expect an expert to be asked to express an opinion concerning the complainant's *actual* behaviour after the alleged offending conduct or the reasons of a parent in the case before the court for not accepting the complainant's claim or the complainant's actual reaction to the rejection of her claim. These are questions which are within the jury's province to resolve. The occasion should be relatively rare where an expert should be invited to express an opinion as to the actual behaviour of the victim or the victim's parent and whether it advanced the probabilities of a fact in issue. Where a party seeks to have an expert go so far, the obligation of the trial judge under s 137 … to exclude evidence if its

422 Ibid [52].
423 Ibid [86].
424 *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461, [40]-[42].

> probative value was outweighed by its prejudice may assume greater significance. Such questions did not arise in this trial.[425]

Admissibility of a defence expert's report under s108C

In *R v WR* [2010] ACTSC 89, the ACT Supreme Court considered the admissibility of an expert's report written for the defence on the ability of the complainant's to distinguish reality from fantasy. Since the report was adduced by the defence to undermine the complainant's credibility, s108C applied as an exception to the credibility rule (s102), although the report was not admissible under s79(2), rather s79. In applying the test under s108C, that the report "could substantially affect the assessment of the credibility" of the complainant, Refshauge J considered that the test was not met because the report "expressly disavowed" the inability of the complainant to distinguish fact from fantasy (at [31]). Rather it reported behaviours that are characteristic of children who have experienced some type of child abuse:

> Whilst the presence of a personality disorder may lead a jury to the view that the complainant's credibility was adversely affected, there was no express or rational basis for that [opinion] in Dr Waters' report and it seems to me there is a real danger that such reliance would play to and rely on prejudice and misinformation.[426]

The fact that the complainant also had imaginary friends and fantasies of being "lovable by romantic men" was "a flimsy basis on which to attack the credibility of the complainant" (at [35]). Refshauge J was also concerned that specific statements in the report, such as "is also desperate for attention" did not appear to be specialised knowledge based on Dr Waters' training, study or experience, as required by s79. Overall, the report did not identify "how and why [Dr Waters'] specialised knowledge is brought to bear to justify the statements made".[427]

Admissibility of expert evidence about the defendant's grooming behaviours

In an interlocutory appeal in *SLS v The Queen*[428], the defendant argued that the judge erred in admitting the evidence of a clinical and forensic psychologist, Dr Karen

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425 Ibid [100], emphasis added.
426 *R v WR* [2010] ACTSC 89 at [32].
427 Ibid [47]; citing *HG v R* (1999) 197 CLR 414 at 427, per Gleeson CJ.
428 [2014] VSCA 31.

Owen, who had discussed the patterns of grooming engaged in by those who commit sexual offences against children.

As a recognised expert in the field of sex offender treatment, assessment and management, Dr Owen provided a report to the prosecution containing 'expert opinion in relation to [the appellant's] behaviour with the complainants'; 'whether his behaviour indicates that he was grooming the complainants for later sexual behaviour'; and 'anything else' she considered 'relevant in relation to his behaviour'.[429] Her report concluded that the defendant's contact with the complainants revealed 'an extensive range of behaviours that are highly consistent with known patterns of grooming across every relevant domain'. There was, Dr Owen said, 'significant and concerning detail contained within the material that appears consistent with entrenched patterns of grooming empirically identified in recidivist sexual offenders'.[430]

The Court of Appeal ruled that Dr Owen's evidence was inadmissible on a number of grounds[431]:

(i) the range of behaviours identified related to convicted child sex offenders, rather than non-convicted persons;
(ii) the modus operandi questionnaire used to characterise the defendant's behaviours 'is generally used as a self-report instrument that assesses the modus operandi of sexual offenders against children' which is not 'forward looking, or predictive', something that Dr Owen admitted in evidence.
(iii) the report was specifically about the alleged conduct of the defendant, rather than a 'hypothetical individual who coincidentally acted in the same alleged fashion';
(iv) the report detailed 'the entirety of the charged conduct' alleged to have been committed by the defendant. While 'such conduct was relied upon only as grooming behaviour … and not as proof of offending, '[t]here would be very little chance of a jury understanding and maintaining that distinction'.

The prosecution relied on s79(1) for the admissibility of Dr Owen's opinion, and submitted that it satisfied the 'six propositions' set out in *Makita*. The defendant sought exclusion of the evidence on the basis that it was tendency evidence because

429 *SLS v The Queen* [2014] VSCA 31, [194] (Ashley, Redlich and Priest JJA).
430 Ibid [195].
431 Ibid [197]-[200].

Dr Owen's opinion 'amounts to no more than saying a person does these things … has a particular character, reputation, conduct or tendency, namely that of child sex offender'[432] and that any probative value was outweighed by its prejudicial effect under s 137 of the *Evidence Act* (2008).

The Court of Appeal agreed that the prosecution had sought to:

> establish that certain of the [defendant's] conduct toward the complainants, rather than being that of ordinary and innocent interaction between teacher and student, instead bore the hallmarks of the modus operandi of a child sex offender. Seen in that light, the evidence plainly was tendency evidence.[433]

As well, the Court held that Dr Owen's opinion evidence 'ought to have been excluded because it did not fall within s 79 of the Act'[434] because it related 'to the evaluation and treatment of *known* sex offenders. Here, however, what the prosecution sought to elicit was forward looking, rather than a retrospective characterisation, of conduct; a characterisation which could not assume the commission of the offences'.[435] Further, the Court of Appeal said that 'the attempt to adduce Dr Owen's evidence starkly revealed a disconnect between the field of 'specialised knowledge' in which the witness is expert and its application to the facts to be assumed for purposes of her opinion. As the plurality made clear in *Dasreef*, such a disconnect goes to admissibility, not simply to weight'.[436]

However, an argument based on relevance illustrates the problematic nature of Dr Owen's evidence. The fact in issue in the trial was whether or not SLS committed the sexual acts complained of. Therefore, were the grooming behaviours described by the complainants and the subject of Dr Owen's opinion relevant to that fact in issue? Essentially, the evidence was adduced to prove that certain 'grooming' behaviours made it more probable that the person who engaged in those behaviours was a child sex offender. The Court of Appeal discussed the 'subtle yet seductive vice associated with Dr Owen's proposed evidence':

> She has been involved in the treatment of proven sex offenders over a number of years, so that the grooming behaviours that she has observed … were of proven or admitted child sex offenders. Some of the conduct of those offenders — which was described generically as

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432 Ibid [206].
433 Ibid [215].
434 Ibid [210].
435 Ibid [211].
436 Ibid [212].

> 'grooming' — could be recognised as such once the commission of the sexual offending against the relevant children had been established. Prior to that point, however, … the conduct could not be properly be characterised as grooming, since by and large the impugned conduct was also consistent with innocent interaction … [and] only took on the characteristics of grooming for sexual purposes once the offending had been established.[437]

Thus, the reasons for admitting the evidence amounted to 'circular and illogical reasoning' because 'the commission of the charged offences was a circumstance called in aid in proof of the [defendant's] grooming behaviour' which could not be established until he was found guilty of those offences.[438] In fact, the evidence invited the jury to engage in 'syllogistic reasoning — child sex offenders exhibit a range of grooming behaviours; the appellant exhibited a number of those behaviours; therefore the appellant is a child sex offender and committed the charged acts'.[439]

6.4 Legislation on Expert Evidence

See:

- ***Evidence Act 1906* (WA)**http://www.legislation.sa.gov.au/LZ/C/A/EVIDENCE ACT 1929.aspx
- ***Evidence Act 1995* (Cth), s 79**
- ***Evidence Act 1995* (NSW), s 79**
- ***Evidence Act 2001* (Tas), s 79**
- ***Evidence Act 2008* (Vic), s 79**
- ***Evidence Act 2011* (ACT), s 79**
- ***Evidence (National Uniform Legislation) Act* 2013 (NT), s 79**

437 Ibid [213].
438 Ibid.
439 Ibid [219].

See also:

- A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153-170.
- A Cossins and J Goodman-Delahunty, 'Misconceptions or Expert Evidence in Child Sexual Assault Trials: Enhancing Justice and Jurors' "Common Sense"' (2013) 22 *Journal of Judicial Administration* 171-190.
- '**Suggested Direction**' on Expert Evidence, Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book***
- Judicial College of Victoria, ***Victorian Criminal Charge Book***

PART B – MEDICAL EVIDENCE AT TRIAL

6.5 Introduction

The vast majority of child sexual abuse cases do not involve forensic evidence. Johnson, for example, reported that 'as many as 96% of children assessed for suspected sexual abuse will have normal genital and anal examinations.'[440] Judicial officers should consider the possibility of raising these matters with jurors in the context of a particular trial. A thorough and respected article on this topic has been prepared by Dr Jean Edwards (see **Dr Edwards' Article – Medical Examinations of Sexual Assault Victims Forensic Use and Relevance** following).[441] Other useful references are included in the ***Recommended Reading***.

For example, the NSW Court of Criminal Appeal considers that it may be unnecessary for the prosecution to call 'neutral' medical evidence when sexual abuse is alleged to have occurred many months before.[442] There is now a practice of not adducing neutral medical evidence as a result of the decision in *R v Dann*[443] since the Court of Criminal Appeal considered that it was 'regrettable' that court time and the time of busy professionals should be wasted on evidence with 'such limited materiality'. As a result,

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440 Johnson, above n 5, 462-470.

441 J. Edwards, 'Medical Examinations of Sexual Assault Victims: Forensic Use and Relevance' (2003) 15 *Judicial Officers' Bulletin* 65 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_edwards-medical_examinations_of_sexual_assault_victims.html> at 22 March 2009.

442 *Thorne v R* [2007] NSWCCA 10 at [24]; *R v RTB* [2002] NSWCCA 104.

443 (2000) NSWCCA 185.

a practice has developed in which the Crown and defence agree 'that the evidence not be called' and 'join in a request that the trial judge direct the jury that the jury should attribute no significance to the absence of the evidence because it is immaterial' in order to prevent jury speculation.[444]

Such instructions commonly address: the absence of signs of physical injuries to the complainant; the unavailability of DNA evidence; and what conclusions can be drawn from medical examinations, including those conducted close in time to the complaint.

These instructions are necessary because the knowledge of jurors may not be consistent with medical expert evidence[445] and jurors may expect that medical evidence would be available to prove a complainant's allegations.

Even when the medical evidence in a criminal case is not neutral, it may not be accepted as conclusive of a complainant's allegation of sexual abuse. In *R v C, Ap*[446], medical evidence of penetration and a vaginal infection was admitted in a child sexual assault trial. In this particular judge-only trial, in which the defendant was found guilty in relation to four out of five counts of sexual abuse, Judge Beazley stated:

> I accept the evidence of the medical witnesses. The combined evidence of the four medical practitioners is neutral in either establishing or excluding the commission of any of the counts alleged in the Information or any of the uncharged acts. I have no doubt, as found by Dr Kummerow, that there had been trauma to the hymen of SLC and that that trauma had been caused by a penetrative injury. It does not in any way assist in determining who or what caused that trauma or when it occurred. At its highest that evidence is consistent with the allegations of SLC. I remind myself that such evidence should not be treated as in any way bolstering the evidence of SLC.[447]

6.6 Dr Edwards' Article – Medical Examinations of Sexual Assault Victims Forensic Use and Relevance

Trials involving child sexual abuse often involve these key questions:

1. Why are there no (or only minor) injuries resulting from the alleged incident?

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444 Ibid [15]. See further *Thorne v Regina* [2007] NSWCCA 10, [24] (Howie J).
445 Cossins, A. (2008) "Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us", *Psychiatry, Psychology and Law*, 15: 153-170.
446 [2006] SADC 53.
447 *R v C, Ap* [2006] SADC 53, [71] (Judge Beazley), referring to *R v Dann* (2000) NSWCCA 185.

2. Why do children who have accurately described penetration have no medical injuries that are consistent with the reported penetration?

Edwards' article[448] addresses these issues. It also explains the scope and limits of medical evidence regarding sexual assaults involving adults and children. The full text of the article can be found via the hyperlink contained above. The article includes the following discussion, which has particular relevance to child sexual abuse trials.

Edwards has observed that children frequently use play words to describe the human genital area, and may use the same word for both the vagina and the anus (for example, 'bottom'). It is extremely important that the actual words used by the child are considered, as the following errors may otherwise occur:

- The child may use the word 'vagina' to mean the genital area and, hence, penetration may be into the genital area but not, anatomically, into the vagina.
- The person to whom the child spoke of the assault may also use the term 'vagina' to mean the genital area, not the anatomical structure of the vagina.
- A similar error may occur when a child says things like 'he put his willy into my bottom' or 'he put his front bit in my back bit.' For both girls and boys, this may mean that the penis was placed between the buttocks, not necessarily into the anal canal.
- When the child says 'in' they may mean 'on', 'against', or 'partially inserted' into the genital area.

It is possible for a young woman to have partial penetration of the vagina when physically and sexually mature with little damage to the hymen, if the hymen is of the type that is folded and elastic. However, there will usually be some disruption of the hymen, seen as a healed transection extending to the vaginal wall, if full penile penetration has occurred.

In examining a hymen which has been transected or ruptured, it will not be possible to state when the injury occurred unless the examination is done within a few days of the event. The edges of the rupture will heal rapidly and the transection that remains could be a week old or a year old without a difference in appearance.

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448 Ibid.

In most instances, a pre-pubertal child will not accommodate a full penetrative act into the vagina and the penis will be placed sideways into the genital area across the opening of the vagina, leaving no physical evidence of penetration. If full penetration does occur in a very young pre-pubertal child, she will probably suffer severe genital injury requiring surgical repair. Partial penetration, by fingers, narrow objects, and the tip of the penis may cause minor disruption of the hymen tissue. Unless an examination takes place within 25-58 hours of such an event, it is not possible to state when the penetration took place.

There is no structure similar to the hymen in the anal canal and, consequently, anal assault is difficult to diagnose by a medical examination. Also, severe constipation may cause linear anal abrasions similar to those caused by a penetrative assault.

The medical findings from an examination performed fairly soon after a sexual assault may be extremely important forensically or may be almost totally irrelevant. The medical examination and its findings – the absence or presence of semen, and the absence or presence of trauma – are only one small part of the investigation of a child sexual assault matter. Medical evidence must be given due weight, but the absence of injuries does not mean that a sexual assault has not taken place.

PART C – SUMMING-UP TO THE JURY

6.7 Introduction

This section is concerned with some specific issues that can arise in relation to summing-up in cases involving alleged child sexual abuse and not with matters relating to summing up generally. The trial Bench Books of the different courts exercising jurisdiction in criminal cases concerning alleged child sexual abuse give general advice and standard directions that can be used in relation to different aspects of summing-up.[449]

The Law Reform Commissions of Victoria, New South Wales and Queensland have recently reviewed jury directions, especially their length and complexity.

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449 See, e.g., Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, (Sydney: Judicial Commission of New South Wales, 2008) <http://www.judcom.nsw.gov.au/publications/benchbks/criminal> at 16 March 2009.

See:

Victoria:

http://www.lawreform.vic.gov.au/wps/wcm/connect/107ca000404a0c5e965efff5f2791d4a/VLRC_JuryDirections_FinalReport.pdf?MOD=AJPERES

Queensland:

http://www.qlrc.qld.gov.au/reports/r66_Summary_web.PDF

NSW:

http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp04toc

Commonly, prior to summing-up, a trial judge will speak with counsel in the absence of the jury and solicit their submissions as to matters to be included in the judge's summing-up to the jury. Matters particular to cases involving sexual abuse and also the evidence of children may be raised at this point. The general contents of this Bench Book and the remainder of this section discuss some of the more important issues.

6.7.1 Comments about the reliability of children's evidence

In recent years, a number of cases have raised the issue of how much a judge can say about the reliability of a child's evidence in her/his summing up without risking an appeal on the grounds of impermissible directions to the jury. In other words, how far can a trial judge push the boundaries after having read this Benchbook and/or other material about children's evidence?

This issue has arisen in Victoria, NSW and the Northern Territory in *CMG v R* [2011] VSCA 416, *KRI v R* [2012] VSCA 186, *RGM v R* [2012] NSWCCA 89 and *NJB v R* [2010] NTCCA 5, respectively.

In *NJB*, one of the grounds of appeal was that the trial judge "impermissibly interfered with the function of the jury in giving directions as to how the jury should approach the evidence of children".[450] The controversial directions were as follows:

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450 *NJB v R* [2010] NTCCA 5, [9].

> First, I am going to talk to you, in a general sense, about the weight which may be given to the evidence of children. Courts now recognise the following factors in relation to the evidence of children:
>
> 1. While children generally do not experience full cognitive development until about the age of 14 years, children, even children of tender years, can give reliable evidence if questions are tailored to their cognitive development.
> 2. From about the age of six onwards children do not have a less accurate memory than adults. However, recall is more likely to decline with time for children than for adults and children are likely to recount, when describing past events, in much less detail than adults.
> 3. Children do have the ability to distinguish fact and fantasy and the danger of children fabricating allegations without the encouragement of older persons is no different to that of adults. However, children are suggestible and on occasion like everyone else they do tell lies.
> 4. With younger children recall is less likely to be organised because of the level of their cognitive development and because of underdevelopment of concepts such as time, space and distance. The spontaneous collating and organisation of recall is a learned skill which improves as language skills, vocabulary and cognitive development improve.
> 5. Children may experience difficulty in supplying information at a particular time, or in a particular place, or in an unusual or formal situation. Stress and anxiety may inhibit the capacity of a child to supply information at a particular point in time.
>
> So far as courts are concerned, the days when children were considered to be incapable of giving reliable evidence are long gone."

Although these remarks represent a summary of the psychological evidence about the reliability of children's evidence, Martin CJ (with whom Riley and Kelly JJ agreed) was concerned about:

> how the jury would have understood [them]. If it is possible that the jury would have understood that they were required to assess the evidence of the children in accordance with what the trial Judge had said, the trial Judge would have impinged impermissibly upon the function of the jury as the sole arbiters of the facts.[451]

Because the above remarks were "expressed in firm and direct terms" and "as the incontrovertible view of the Court" without any qualifications and without a statement "that it was a matter for the jury whether [they] agreed or disagreed with the five propositions":

> the jury would have understood [them] as directions which the jury was required to apply in approaching the evidence of the children. … [T]he overall impression created by the five

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451 Ibid [11].

> propositions was supportive of the children's evidence and tended to explain why their evidence might be reliable notwithstanding the absence of detail and, in the case of TC [the complainant's sister], her loss of memory.[452]

Furthermore, the direction that children are no more likely to lie than adults "possessed a strong tendency to undermine the submission made by [the defence] that the complainant might lie to avoid embarrassment or to avoid getting into trouble, and to do so without a full appreciation of the devastating consequences of making false allegations against the appellant".[453]

It is at this point in the judgment that we see the tension between psychological evidence about the reliability of children, as the trial judge summarised it for the jury, and inexpert layperson's views about children:

> the effect of the direction by the trial Judge was to tell the jury that, regardless of their life experiences or views they might otherwise hold, they were obliged to approach the evidence of the children from the starting point that children are no more likely to tell lies than adults. In this way the trial Judge impermissibly directed the jury as to how they were to approach critical evidence in the trial.[454]

Because the five propositions were expressed as a direction rather than a comment which the jury could disregard, Martin CJ felt it was unnecessary to determine if these five propositions were now recognised by courts, other than to say that perhaps most of them are. However, if the five propositions had been "[c]ouched in terms such as 'it is a matter for you, but based on your experience you might think …' … and clearly advanced as comments, they may have been helpful to a jury". If such comments are to be made, "they must be accompanied by clear and unequivocal directions that the jury is free to accept or reject the comments" and should not convey the impression that they are recognised by the courts "as general statements of truth".[455]

Because of the impermissible directions "went to the heart of the case", a miscarriage of justice had occurred which warranted the setting aside of the convictions.[456]

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452 Ibid [13]-[14] (Martin CJ).
453 Ibid [15].
454 Ibid [11].
455 Ibid [16].
456 Ibid [17].

Similar impermissible directions were given by the trial judge in *CMG*. As a result of various statements made by defence counsel in his closing address about the complainant's intellectual capacity and reliability as a witness, the trial judge gave a long direction about children's reliability as witnesses which appeared to contain some of the information set out in this Benchbook.[457] Defence counsel took exception to this direction and asked for the jury to be discharged. In refusing counsel's application, Her Honour stated that the directions given about children's reliability were "directions of law … [t]hey are not comments, and they are not evidence".[458]

The Victorian Court of Appeal disagreed with the trial judge's view that the directions had not resulted in an unfair trial because of the manner in which they had been given to the jury:

> The judge herself categorised what she had said to the jury as directions of law. If so, they were binding on the jury. The very real danger, therefore, is that the jury understood (for example) that they were bound to accept that a study as long ago as 1993 found that children, even very young children, are able to remember and retrieve from their memory large amounts of information; or that there is no evidence that indicates that the honesty of children is less than that of adults.[459]

While a trial judge is permitted to make comments about how particular evidence may be approached by the jury, a judge cannot give what amounts to expert evidence:

> It is no part of the judge's task to put before the jury [a relevant expert's] learning without [that expert] having been called as witness.[460]

The Victorian Court of Appeal concluded that, where expert opinion evidence about the behaviour of children (which is admissible under ss79(2) and 108C of the Uniform Evidence Act) has not been adduced in a child sexual assault trial, "[i]t is not within the limits of the judicial function for the judge to attempt to fill the gap". Because the trial judge had entered "prohibited territory" with her directions regarding the evidence of children, the appeal was allowed.[461]

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457 See *CMG* [2011] VSCA 416 at [11], per Harper JA.
458 Ibid [12].
459 Ibid [14].
460 *D* [2008] EWCA Crim 2557; cited with approval in ibid [14].
461 *CMG* [2011] VSCA 416, [18] (Harper JA).

Similar remarks about children's evidence were also made by the trial judge in *KRI v R* [2012] VSCA 186. The difference with this case is that the remarks were not in the form of a direction of law (with *CMG* being distinguished) since the trial judge:

> did not enter the fray by, in effect, giving expert evidence about the outcomes of psychological research on children. Nor did she characterise her statements as directions of law.[462]

Because the trial judge referred to many of the matters set out in the English Crown Court Bench Book about children's evidence, followed by the words, "all decisions about the evidence are for you to make", "there was nothing in the actual content of her Honour's statements which would have led the jury to conclude they were binding on them".[463] Furthermore, many of her remarks were relevant to delayed complaint and the explicit requirement to direct the jury in accordance with s61(1)(b)(i), *Crimes Act* 1958 (Vic).

In essence, these cases show that when giving the jury information about children's reliability as witnesses, it is essential that the information be presented as a comment and "that the jury understand that they are not bound to follow that … comment, but are free to disregard the matter".[464]

However, the Victorian Court of Appeal in *CMG* and *KRI* considered that it *is* permissible to give the type of comments set out in *R v Barker* [2010] EWCA Crim 4 wherein the English Court of Appeal stated:

> 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. … In a 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.[465]

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462 *KRI v R* [2012] VSCA 186 [91] (Neave JA and King AJA).
463 Ibid [101].
464 Ibid.
465 *R v Barker* [2010] EWCA Crim 4, [40] (Lord Judge CJ, Hallett LJ and Macur J).

Although the Victorian Court of Appeal did not regard the *Barker* direction "as a template ", had the trial judge in *CMG* given a direction in these terms, "no complaint would have been made".[466] Similar comments found in the English Crown Court Bench Book may also be permissible according to the Victorian Court of Appeal in *KRI*.[467]

See also *RGM v R* [2012] NSWCCA 89 which referred to the comments given in *Barker* and discussed the differences between making a comment and a direction. Because *RGM* is not publically available, no analysis has been made of that case. Based on the headnote, the CCA held that "the discursive comments of the judge about children and their evidence generally … went beyond legitimate bounds", particularly since the jury was invited to ignore the defence submissions about the complainant's demeanour, with comments made the judge that he regarded the complainant as a reliable witness.

6.8 Jury Directions

6.8.1 Corroboration warnings

All states and territories have abolished the common law rule that juries should be warned about the dangers of convicting an accused on the basis of the uncorroborated evidence of a child in sexual assault trials.[468] However, in all jurisdictions – at least until recently – it did not prevent the courts from giving warnings to the jury about the dangers of convicting in certain circumstances. The legislation also has not prevented trial judges from commenting on the credibility of complainants in the usual way in their summing-up to the jury.

In Uniform Evidence Acts jurisdictions (NSW, Victoria, Tasmania, the NT and the ACT), judges cannot do any of the following:

- warn or suggest to the jury that children as a class are unreliable witnesses (s165A(1)(a));

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466 *CMG* [2011] VSCA 416 at [11], per Harper JA (with whom Ashley and Weinberg JJA agreed).

467 See *KRI v R* [2012] VSCA 186 at [96]-[98], per Neave JA and King AJA.

468 *Evidence Act 1995* (Cth), s 164; *Evidence Act 2008* (Vic), s 164; *Evidence Act 1906* (WA) s 106D; *Evidence Act 1995* (NSW) s 164; *Evidence Act 1929* (SA) s 12A (where the child has given sworn evidence); *Criminal Code 1899* (Qld) s 632; *Evidence Act 2011* (ACT), s 164; *Evidence (National Uniform Legislation Act) 2013* (NT), s 164; *Evidence Act 2001* (Tas), s 164.

- warn or suggest to the jury that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults (s165A(1)(b));
- give a warning or suggestion to the jury about the unreliability of a child's evidence solely on account of the child's age (s165A(1)(c));
- warn the jury of the danger of convicting on the uncorroborated evidence of a child (s165A(1)(d)).

Judges may still inform the jury about the unreliability of a particular child's evidence, at the request of a party if the court is satisfied there are circumstances, other than solely the age of the child, which affect the child's reliability and warrant the giving of a warning (s165A(2)).

Western Australia and South Australia have enacted similar provisions[469] although these provisions are not as detailed as s 165A of the Uniform Evidence Acts.

6.8.2 *Longman*

In *Longman v The Queen*,[470] the High Court held that the statutes abolished the legal notion that there were general classes of witnesses whose evidence is unreliable, such as children and adult complainants (usually women) in sexual assault cases.[471] However, the court also decided that a trial judge should warn the jury about the dangers of convicting on the uncorroborated evidence of a complainant in sexual assault cases if the particular circumstances of the case required it. Determining how the warning is to be applied in individual cases has not been easy in some circumstances.[472]

The High Court has made it clear that where such a direction is to be given, the judge must do more than comment on the evidence.[473] It must be a warning of the dangers of convicting, pointing out to the jury matters that derive from past forensic experience of the court rather than common knowledge. In *Crampton v The Queen*,[474] Justice Kirby said that the warning must be unmistakable and firm and it must be

469 *Evidence Act* 1906 (WA), s 9C; Evidence *Act 1929* (SA), s 12A.
470 *Longman v The Queen* (1989) 168 CLR 79.
471 *Longman v The Queen* (1989) 168 CLR 79, 86-88.
472 See for discussion: *Tully v The Queen* (2006) 81 ALJR 391, [179] (Crennan J).
473 *Longman v The Queen* (1989) 168 CLR 79; *Crampton v The Queen* (2000) 206 CLR 161, 208 (Kirby J).
474 *Crampton v The Queen* (2000) 206 CLR 161.

related to the evidence and derived from forensic experience. He distinguished between, on the one hand, comment which may simply remind the jury of matters frequently within common experience which they may ordinarily be taken to know but might have forgotten or overlooked and, on the other hand, warnings which derive from the special experience of the law and the specific difficulties faced by an accused.[475] The warning must convey the authority of the court and not simply repeat the submissions of counsel.[476]

Longman v The Queen[477] is not authority for giving a warning in every case of sexual assault. The warning is only to be given where there is a specific aspect of the evidence that causes concern that there may be a potential miscarriage of justice. A significant delay between the alleged offences and the making of a complaint may deprive the accused of the opportunity of investigating the allegations and of uncovering possible evidence that cast doubt on them.[478] This might therefore warrant a *Longman* direction. In *Longman v The Queen*[479], the delay was twenty years. Justices Brennan, Dawson and Toohey stated:

> The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.[480]

In *Tully v The Queen*,[481] the High Court said:

(a) Delay between alleged offences and the complaint, the complainant's youth, or the fact that the evidence is the uncorroborated evidence of a complainant in a sexual assault case is not in itself enough to require a *Longman* warning.[482]
(b) It must also be demonstrated that the accused has suffered some forensic disadvantage arising out of the delay that is palpable and obvious to an experienced judge, but which a jury may fail to appreciate.[483]

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475 *Crampton v The Queen* (2000) 206 CLR 161, 208-209.
476 *R v BWT* (2002) 55 NSWLR 251, 273-275.
477 *Longman v The Queen* (1989) 168 CLR 79.
478 *Longman v The Queen* (1989) 168 CLR 79, 91; *Crampton v The Queen (*2000) 206 CLR 161, [55] (Gaudron, Gummow and Callinan JJ).
479 *Longman v The Queen* (1989) 168 CLR 79.
480 *Longman v The Queen* (1989) 168 CLR 79, 91.
481 *Tully v The Queen* (2006) 81 ALJR 391.
482 *Tully v The Queen* (2006) 81 ALJR 391, [185] (Crennan J); [151] (Heydon J agreeing).

(c) The shorter the delay, the more difficult it is to demonstrate a forensic disadvantage.[484]

(d) Further, an explicable delay – for example, where an accused has made threats against a complainant – is different from a delay that is not.[485]

In 2008, in *FGC v The State of Western Australia*,[486] Acting Justice Wheeler (with whom Acting Justice of Appeal Murray agreed)[487] stated:

> In my respectful view, the principal thrust of the authorities discussed above is that a warning may be required only if there is something in the facts of the case (in addition to the complainant's age) which suggests that a complainant's age at the time of the offences has impaired his or her ability to recall relevant matters accurately. So far as the observations of Deane and McHugh JJ in *Longman ar*e concerned, I would respectfully agree with the conclusions of Spigelman CJ in *JJB v The Queen* (2006) 161 A Crim R 187.[488]

Legislation on *Longman*

Legislation has been introduced in a number of jurisdictions concerning the need for a *Longman* direction to be given to juries.

Victoria:

A *Longman* warning is no longer given in Victoria in proceedings that commence after 1 December 2006. Instead, a judge must inform the jury of the nature of the forensic disadvantage suffered by the accused, and instruct them to take that into account, but only if on the application of the accused the judge is satisfied that the accused has suffered a significant forensic disadvantage because of the consequences of the delay in complaint. The judge must not warn or suggest to the jury in any way that it is dangerous or unsafe to convict the accused on the basis of delay. See: ***Crimes Act 1958* (Vic)**; Judicial College of Victoria, ***Victorian Criminal Charge Book***.

The Tasmanian Law Reform Institute has questioned whether the Victorian reform will 'actually achieve its legislative intent and displace the requirement to give a

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483 *Tully v The Queen* (2006) 81 ALJR 391, [182] (Crennan J).
484 *Tully v The Queen* (2006) 81 ALJR 391, [181].
485 *Tully v The Queen* (2006) 81 ALJR 391, [179].
486 [2008] WASCA 47.
487 *FGC v The State of Western Australia* [2008] WASCA 47, 142-143 (Murray AJA).
488 *FGC v The State of Western Australia* [2008] WASCA 47, 68 (Wheeler JA).

Longman warning', in particular because it does not prohibit the use of the words 'dangerous or unsafe to convict' (the wording of the *Longman* warning).[489] It is unclear how s 61(1)(b)(iii) operates in conjunction with s 165B of the *Evidence Act* 2008.

For a discussion of the similarities and differences between s 61, *Crimes Act* 1958 (Vic) and s 165B, *Evidence Act* 2008 (Vic), see *Greensill v The Queen* [2012] VSCA 306, [41] (Redlich, Osborn and Priest JJA).

New South Wales, Victoria, Tasmania, the NT and the ACT:

Section 165B of the Uniform Evidence Acts is an attempt to ameliorate the *Longman* warning so that the issue of delay is confined to its impact on the accused in terms of causing him or her a forensic disadvantage, rather than the credibility of the complainant. However, the apparent reformative nature of s165B is undermined by the retention of the power of trial judges to give other warnings under sub-section (5)[490], which includes common law warnings, such as *Longman*. This indicates that the reform may have little effect in practice since the power to give a *Longman* warning has not been removed. In addition, a s 165B warning is dependent on an application by a party, unlike the *Longman* warning[491] although the judge need not give such a warning 'if there are good reasons for not doing so' (s 165B(3)).

The relationship between the common law *Longman* warning and s 165B has been considered in two judge-alone trials in the ACT.

In *R v Forsti* [2010] ACTSC 85 at [42], Gray J was of the view, that in light of the introduction of s165B, "I consider that I can take into account the *Longman* warning and the qualification that s 165B(4) adds without denying the force of the warning". Section 165B(4) states:

> It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or

489 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint, Issues Paper No. 8* (June 2005) 22-23.

490 A. Cossins (2010) "Time Out for *Longman*: Myths, Science and the Common Law" *Melbourne University Law Review*, 34: 63-94.

491 Ibid. Note that s 165B in the Victorian *Evidence Act* 2008 states 'on application by the accused'. Note also the Victorian version of s 165B does not contain sub-section (7).

> unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

In *The Queen v DF* [2010] ACTSC 31, at [254] Penfold J considered whether s165B had abrogated the *Longman* warning:

> It is not clear to me that the *Longman* direction, or warning … is in its terms a warning to the jury that it would be dangerous to convict "solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay" (s 165B(4)), but for present purposes I do not need to reach a conclusion on that matter. … I propose to consider both s 165B and the *Longman* warning before reaching my conclusions on the charges in this case.

As a result of an application by the accused for a warning under s165B, Penfold J, as the trier of fact, took into account the forensic disadvantage suffered by the accused as the result of the complainant's delayed complaint. In addition, His Honour noted:

> the terms of the *Longman* warning. In this context, the *Longman* warning would be that, to the extent that C's evidence could not be adequately tested after the passage of so many years, it would be *dangerous to convict* on her evidence alone unless, scrutinising her evidence with great care, considering the circumstances relevant to its evaluation and paying heed to this warning, I am satisfied of its truth and accuracy.[492]

W v R [2014] NSWCCA 110 is another case on the relationship between the *Longman* warning and s 165B in which Bathurst CJ (Hoeben CJ at CL and Bellew J agreeing) stated ([128]-[129]) that:

> The appellant also submitted that s 165B(4) of the *Evidence Act* was only engaged in the event an application for a direction was made under s 165B(2). He submitted that in the present case an application for a *Longman* warning was not made under s 165B(2) and the effect of s 9(1) of the *Evidence Act* was to require the common law direction to be given. … I do not agree. Section 9(1) applies when the *Evidence Act* does not provide, either expressly or by necessary implication, to the contrary. In the present case s 165B(4) has expressly prohibited a *Longman* warning.

In *PT v R* [2011] VSCA 43, the trial judge refused to give a warning about the forensic disadvantage suffered by the accused as a result of the complainant's delay in complaint, as per s61(1A), *Crimes Act* 1958 (Vic), on the grounds that the

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492 *The Queen v DF* [2010] ACTSC 31, [267]; emphasis in original.

disadvantage was not significant. Section 61(1A) is in similar terms to s165B of the *Evidence Act* 2008 (Vic).

In considering whether the trial judge ought to have given the warning, the Victorian Court of Appeal noted that the accused carries the onus of satisfying the court that the forensic disadvantage suffered is significant, that it has arisen as a result of the delay in complaint, not in some other way, and that the disadvantage is not speculative or hypothetical. As well, the "particular risks of prejudice must be identifiable" as a result of the significant forensic disadvantage.[493] In looking at the supposed forensic disadvantages in the present case, the Court of Appeal considered that none "ha[d] any substance" and were not significant. What is required is:

> some demonstration of the obstacles confronting the defence as a result of the delay. That, in turn, may call for some evidence … of the attempts made to overcome the difficulties identified.[494]

More recently, in *Jarrett v R* [2014] NSWCCA 140, Basten JA (with Hulme and Campbell JJ agreeing) set out the broad considerations for trial judges to take into account when deciding whether or not to give such a warning after the defendant appealed against the trial judge's failure to provide a direction under s 165B ([59]-[64]):

> the operation of s 165B should not become encrusted with judicial exegesis of the kind surrounding the "*Longman* direction", which led to its enactment. Suffice it to say, there are a number of broad considerations which bear upon its application. … First, the proper focus of the section is on the disadvantage to the accused; it does not reflect any degree of prejudgment of the reliability of a complainant's evidence with respect to a sexual offence, aspects of which underlay certain observations in *Longman*. …
>
> Secondly, the concept of delay is relative and judgmental. Where both complainant and law enforcement authorities have acted with all reasonable expedition, it is not usually apt to describe any lapse of time as involving "delay". Delay is suggestive of hesitation or indecision of the complainant or inefficiency on the part of authorities. That is not to say it involves blameworthy conduct: quite significant lapses of time may be reasonable in the context of a child who is the victim of sexual assault. Whether that which is not unreasonable constitutes "delay" for the purposes of s 165B will depend upon particular circumstances.

493 *PT v R* [2011] VSCA 43 at [24], per Maxwell P, Buchanan and Weinberg JJA; citing the ALRC, NSWLRC and VLRC, *Uniform Evidence Law*, at [18.22].

494 *PT v R* [2011] VSCA 43 at [38], per Maxwell P, Buchanan and Weinberg JJA.

> Thirdly, although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or … may provide a good reason for a judge not to give a direction, pursuant to … s 165B(3). In the present case, the complainant alleged that the applicant had said to her, "this is our little secret and if you tell anyone I'll kill myself" … . It is doubtful whether such a manipulative threat of self-harm … is any less deplorable than a threat of harm to the victim. If the trial judge had been satisfied that such a threat had been made (and it appeared to be corroborated by the … applicant's admission to Richmond Clinic … [for] being suicidal) that would have provided a good reason [for not giving the direction].
>
> Fourthly, if the accused is put on notice of the complaint, any failure to make inquiry or investigation thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction. …
>
> In short, the assertion that the trial judge should have been satisfied that the applicant had suffered a significant forensic disadvantage as a consequence of delay, has not been made good. Even if it had been, there were good reasons why the trial judge would not have erred in declining to give a direction in the terms sought.

South Australia:

See: ***Evidence Act 1929* (SA) s 34CB**.

6.8.3 The *Kilby* and *Crofts* warnings

The High Court in *Kilby v The Queen*[495] held that the jury could take into account a complainant's failure to complain at the earliest reasonable opportunity when assessing the complainant's credibility.[496]

In order to ameliorate this common law approach to delay, legislation has been enacted in all but one Australian jurisdiction requiring a trial judge to warn juries that:

- "absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false";
- "there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault".[497]

Despite these legislative changes, in *Crofts v The Queen*,[498] the High Court approved the approach taken by earlier authorities that, where there has been a significant delay in a complaint about sexual offences being made, the jury should be directed that the delay could be taken into account in assessing the complainant's credibility.[499]

It construed the legislation as not precluding such a direction in individual cases where the circumstances warranted it in order to promote a fair trial. As with *Longman* warnings, it is purported to be based not on the characteristics of a particular class of witness, but on the facts of a particular case.

These days, the premise on which the *Crofts* direction is based "reflects discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants".[500] Absent any evidence of delay being instrumental in the making of a false complaint, "the giving of a *Crofts* warning is … misleading and unfairly

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495 *Kilby v The Queen* (1973) 129 CLR 560.
496 *Kilby v The Queen* (1973) 129 CLR 560.
497 This is the wording from s 294, *Criminal Procedure Act* 1986 (NSW). Analogous provisions in other jurisdictions were modelled on the former s 405B, *Crimes Act* 1900 (NSW) (enacted in 1981) and this provision has since been re-enacted as s 294, *Criminal Procedure* Act 1986 (NSW).
498 *Crofts v The Queen* (1996) 186 CLR 527.
499 *Crofts v The Queen* (1996) 186 CLR 527.
500 Australian Law Reform Commission, above n 394, 635.

disadvantageous to the complainant".[501] The only effect the warning can have is to "reinstate the traditional stereotypical views that sexual assault complainants are unreliable and prone to fabrication" and to negate the "protective effects" of a s61-type direction.[502]

Legislation on *Crofts* and *Kilby*

Legislation has been introduced in all jurisdictions in response to *Kilby* and *Crofts*:

ACT:

- ***Evidence (Miscellaneous Provisions) Act*** 1991 (ACT), s71.

Note that s 76C of the *Evidence Act* (now repealed) abolished the common law rule that complaint evidence in a sexual offence matter was admissible for the purpose of supporting the complainant's credit (by showing the complainant's consistency). The common law is not revived by the repeal of s 76C (see Legislation Act, s 86).

New South Wales:

- *Criminal Procedure* Act 1986 (NSW), s 294(2).

See generally: 'Summing Up' in the Judicial Commission of New South Wales, ***Criminal Trial Courts Bench Book*** and **Delay**.[503]

Northern Territory:

- *Sexual Offences (Evidence and Procedure) Act* (NT), s4(5)(b).

Queensland:

- *Criminal Law (Sexual Offences) Act* 1978 (Qld),s4A(4).

South Australia:

- *Evidence Act* 1929 (SA), s34M. This provision has abolished the *Kilby* and *Crofts* warnings.

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501 Ibid, 636.
502 Ibid.
503 H. Donnelly, 'Delay and the credibility of complainants in sexual assault proceedings' (2007) 19(3) *Judicial Officers' Bulletin* 17.

Tasmania:

- *Criminal Code Act* 1924 (Tas), s371A.

Victoria:

- ***Crimes Act 1958* (Vic)**.
- Judicial College of Victoria, ***Victorian Criminal Charge Book***.

Western Australia:

- ***Evidence Act 1906* (WA)**.

Appendix
Suggested "Script" for Use in Special Hearings with Children or Cognitively Impaired Witnesses[504]

JUDGE: Hello (name of witness), can you hear me?

Can you see me?

My name is Judge …… and I am in charge here today. You can call me Judge if you want to say something to me.

Are you comfortable on that seat? Do you have a drink (and/or any other requirement)?

In the room with you is Mr/Ms ……. (tipstaff/associate) or (first name). His/her job is to help me at your end because you are in a different room to me.

Also in the room with you is ……. (support person) who is there to be with you while you give your evidence.

In the court room with me are some other people even though you cannot see them. You have probably met one of them before - the prosecutor, Mr/Ms ……

I will ask the prosecutor to stand in front of the camera. Can you see him/her now? He/she will ask you questions soon.

There is another lawyer who will ask you questions later, Mr/Ms …….

I will ask him/her to stand. Can you see him/her now?

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504 This script has been primarily developed for child witnesses and should be adapted as necessary for older children and for cognitively impaired witnesses, whether adult or children.

(To witness) ....., you have come to court today to

- tell what happened to you
- give evidence / answer questions about....
- tell what you know about ....

[name of the accused] [your father / uncle etc.]

First I want to ask you a few questions.

Then I want to talk to you about the rules here in court.

How old are you?
When is your birthday?

Do you have any brothers or sisters?
Tell me about them. How old are they?

What year are you in at school?

Do you have a favourite subject at school?
Tell me about that.

Are there any things you find hard at school?
Tell me about that.

Tell me what you do at play time and lunchtime?

What does the word “rules” mean?
Explain: rules are orders or instructions that help us to understand what we are allowed to do and what we are not allowed to do.

Does your teacher have rules in your classroom?
What are some of those rules?

Do you play any sport? Tell me about that.
What are some of the rules in that sport?

Tell me what you like doing when you are not at school?

Do you have any pets? Tell me about them.

Now I want to talk to you about being in court.

Do you remember that we just talked about some rules in the classroom / in sport? If the child says no, remind them of the rules they talked about.

Well, in court there are some rules as well.

A very important rule is that you tell the truth when you answer questions.

Do you know what it is called if you do not tell the truth?

Is telling the truth different to telling a lie?
Explain that to me? / Is telling the truth the right or wrong thing to do? Is telling a lie the right or wrong thing to do? / Tell me why it is the right/wrong thing to do?

Now I am going to tell you something that is true, and something that is a lie. I want you to tell me whether what I said is true or a lie.

E.g. 'A horse is in your room with you now.'
Is that true or a lie?
(*Affirm the response if correct: 'Yes, it would be a lie to say that a horse is in your room with you now.'*)

E.g. '(support person) is sitting in your room with you now.'
Is that true or a lie?
(*Affirm the response if correct: 'Yes, it is true to say that (support person) is sitting in your room with you now.)*

Do you think it is important to tell the truth here in court?
(*Affirm the response if correct: 'Yes, it's very important to tell the truth here.'*)

Do you know what makes it important to tell the truth *here*?
(*If yes*, 'Can you tell me more about that?')

What might happen to you if you told lies in court?

It's always important to tell the truth. But it's even more important in court than anywhere else. Did you know that?

So, do you understand that it is very important that you tell the truth here?

Do you understand that it is very important that you do not tell lies here?

Will you tell the truth here in court?

Do you promise not to tell lies in court?

Now I want to talk to you about some other rules in court.

I will try to make sure the questions you are asked by the lawyers are not too hard.

If you do not know the answer, that is fine / o.k. / all right.
Just say 'I don't know'.
So what will you say if you do not know the answer? (*Affirm the response if correct, or provide the correct answer:* Just say 'I don't know'.)

If you do not remember/forget the answer, that is fine / o.k. / all right.
Just say 'I don't remember'.
So what will you say if you do not remember the answer?

(*Affirm the response if correct, or provide the correct answer:* Just say 'I don't remember'.)

If you do not understand the question/if you do not know what the question means, that is fine / o.k. / all right.
Just say 'I don't understand / I don't know what that means.'

So what will you say if you do not understand / do not know what that means?
(*Affirm the response if correct, or provide the correct answer:* Just say 'I don't understand / don't know what that means'.)

THEN

Version for younger children:

The lawyers might say things and ask you if those things are true.
They might also say things and ask you if those things are not true.

If you think what is said is true, you should say it is true.

So what will you say if you think something is true?
(*Affirm the response if correct, or provide the correct answer:* Just say, 'That's true.')

If you think what is said is *not* true, you should say it is not true.
You don't have to agree just because the lawyer said it.

So what will you say if you think something is *not* true?
(*Affirm the response if correct, or provide the correct answer:* Just say, 'That's not true.')

OR

Version for older children or cognitively impaired adults:

You may be asked questions that suggest things that are true or untrue.

You should agree when you believe what is being suggested is true.

You should *not* agree when you believe what is being suggested is *not* true.
Is that clear?

For example, if you were asked: 'You barrack for Essendon, is that right?' you would agree if that suggestion is true and you would disagree if that suggestion is not true.

It is important to not feel pressured to agree with what is being suggested to you if you believe it is untrue.

All witnesses:

Also, you might get tired, or need to go to the toilet.
If you do, it's o.k. to say 'Can we stop for a while?' You can say that to me or to .....(support person) in the room with you.

As we go along, I will try to help you to remember these rules.

Will you do your best to answer the questions?

Will you tell the truth in your answers?

Is there anything you would like to ask me about the court rules?

Is there anything else you would like to ask me?

If witness is going to be declared competent:

Soon, I am going to ask you to say again that you will tell the truth. That will be done using the Bible. There is a Bible on the table in front of you. You will see another member of my staff on screen and you will say the words after him/her. *(If appropriate)* There is a sheet on the table in front of you to help you follow the words you are to say. Are you o.k with using the Bible?
(Or an affirmation is taken.)

(Witness is <u>not</u> sworn/affirmed until the RED tape is begun, after the Judge's introductory remarks.)

[**Note:** A judicial officer must be satisfied that the witness is aware of a right to exemption from giving evidence under s 400 of the *Crimes Act 1958* (Vic) if the witness is a child (but not a step child, or presumably, a de facto spouse's child[505]) of the accused.]

If the Crimes Act 1958 (Vic) s 400 applies:
You are here to answer questions about your father (for e.g.).

If you do not want to answer questions about your father, you can ask me to allow you not to do so. However, it is up to me as the Judge to decide if you should answer the questions.

Has anyone told you about this before?

Do you want to ask my permission to not answer questions about your father?

Once competency and s.400 is dealt with:
Thank you for telling me about yourself and understanding the rules here in court.

Are there any questions you want to ask me?

---

505 *R v RGP* [2006] VSCA 259.

We are now about ready for (the prosecutor) to start asking you questions. Do you want to take a break before he/she begins?

[Judge announces (brief) ruling as to whether witness will give sworn or unsworn evidence.]

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