

# BALANCING FAIRNESS TO VICTIMS, SOCIETY AND DEFENDANTS IN THE CROSS-EXAMINATION OF VULNERABLE WITNESSES: AN IMPOSSIBLE TRIANGULATION?

PHOEBE BOWDEN,\* TERESE HENNING†  
AND DAVID PLATER††

*Cross-examination is fundamental to the adversarial criminal trial. However, when children and witnesses with an intellectual disability are cross-examined, it can lead to unreliable evidence and further trauma to the victim. Various reforms in Australian jurisdictions, England and elsewhere have had only limited practical effect as they fail to address the underlying problems that arise from the adversarial system itself. While any changes must maintain a defendant's vital right to a fair trial, the current criminal trial may allow defendants an illegitimate advantage. Fairness to the defendant, victim and society can and must be balanced. In order to reduce any illegitimate advantage, direct cross-examination should be removed. Instead, cross-examination should be conducted in advance of trial by a suitable third party and video-recorded. A similar process is used in Norway. A wholesale transformation into an inquisitorial system is not required for the benefits of non-adversarial examination to be achieved.*

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\* Law (Hons), BJ (UniSA).

† BA (Tas), Dip Lib (TCAE), TTC (Ed Dept Tas), LLB (Hons) (Tas), MPhil (Crim) (Cantab); Senior Lecturer, Faculty of Law, University of Tasmania.

†† BA, LLB (Monash), LLM (ICSL), PhD (Tas); Lecturer, School of Law, Division of Business, University of South Australia; Honorary Research Fellow, Faculty of Law, University of Tasmania; Senior Legal Officer, Attorney-General's Department, South Australia.

The authors are grateful for the comments and suggestions kindly provided on earlier drafts by the Hon Chief Judge Geoffrey Muecke, Jonathan Polnay, Professor Martine Powell, Anthony Allen and Matthew Goode. Any views expressed in this article are those of the authors alone.

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## I INTRODUCTION

Cross-examination is a hallmark of the adversarial system. A defence lawyer, when cross-examining, aims to strengthen the defence's argument and discredit the witnesses' testimony.<sup>1</sup> However, when the witness is a child or person with an intellectual disability, cross-examination can jeopardise the chance of both the truth emerging and ensuring that justice is done. It is well-established that the cross-examination of children and persons with an intellectual disability can cause them to give unreliable evidence.<sup>2</sup> This may be because, for example, children have particular difficulties remembering what

<sup>1</sup> James Lindsay Glissan, *Cross-Examination Practice and Procedure: An Australian Perspective* (Butterworths, 2<sup>nd</sup> ed, 1991) 73–4.

<sup>2</sup> See generally Adrian Keane, 'Cross-Examination of Vulnerable Witnesses: Towards a Blueprint for Re-Professionalism' (2012) 16 *International Journal of Evidence and Proof* 175, 176–80.

happened a long time after the event;<sup>3</sup> may not realise they have misunderstood a question;<sup>4</sup> may not seek clarification of confusing, complex or ambiguous questions;<sup>5</sup> and may be prone to anxiety.<sup>6</sup> Similar problems can be experienced by witnesses who have an intellectual disability.<sup>7</sup>

The discussion in this article is confined to witnesses who are either children<sup>8</sup> or have an intellectual disability<sup>9</sup> and are capable of giving evidence in criminal proceedings.<sup>10</sup> Though there are other classes of vulnerable witnesses

<sup>3</sup> Judge Kevin Sleight, 'Managing Trials for Sexual Offences — A Western Australian Perspective' (Paper presented at the AIJA Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 7–9 September 2011) 17. Cf Australasian Institute of Judicial Administration ('AIJA'), *Bench Book for Children Giving Evidence in Australian Courts* (2012) 31.

<sup>4</sup> Emma Davies, Emily Henderson and Kirsten Hanna, 'Facilitating Children to Give Best Evidence: Are There Better Ways to Challenge Children's Testimony?' (2010) 34 *Criminal Law Journal* 347, 352.

<sup>5</sup> Rachel Zajac, Julien Gross and Harlene Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199, 207.

<sup>6</sup> AIJA, *Bench Book*, above n 3, 16; Judge Sleight, above n 3, 18.

<sup>7</sup> See generally Mark R Kebbell, Christopher Hatton and Shane D Johnson, 'Witnesses With Intellectual Disability in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23, 25–6, 31–3; Janine Benedet and Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50 *Osgoode Hall Law Journal* 1, 12–17.

<sup>8</sup> The definition of 'children' in the vulnerable witness context varies depending on jurisdiction and provision. For instance, in Victoria, it is a person under 18 years of age (*Evidence Act 2008* (Vic) s 41(4)), while in South Australia it is a person under 16 years of age (*Evidence Act 1929* (SA) s 4 (definition of 'vulnerable witness' para (a))). However, these definitional distinctions are not important for the general purpose of this article.

<sup>9</sup> The definition in the *Evidence Act 1977* (Qld) sch 3 of a 'person with an impairment of the mind' encapsulates the sense in which the terms 'intellectual disability', 'cognitive impairment' and 'intellectual impairment' are to be understood in this article:

a person with a disability that (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and (b) results in (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and (ii) the person needing support.

However, the authors acknowledge that no single term commands universal acceptance and a variety of terms can be used to describe this category of witness: see, eg, Glynis H Murphy and Isabel C H Clare, 'The Effect of Learning Disabilities on Witness Testimony' in Anthony Heaton-Armstrong et al (eds), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford University Press, 2006) 43, 44.

<sup>10</sup> This article does not cover witnesses deemed 'incompetent' to give evidence. Children and witnesses with an intellectual disability are required to demonstrate an understanding of the terms 'truth' and 'oath' to be considered competent to testify. This threshold has been criticised: see, eg, Nicholas Bala et al, 'The Competence of Children to Testify: Psychological

who may also be unfairly disadvantaged in the trial process, such as adult victims of sexual assault,<sup>11</sup> it is clear that particular problems arise in the cross-examination of children and persons with an intellectual disability. Although the existing literature usually deals either with children or persons with an intellectual disability, this article discusses them together due to the similar difficulties they face in giving evidence. This approach is consistent with how various Australian jurisdictions define ‘vulnerable witnesses’ to include both young children and those with an intellectual disability.<sup>12</sup> In Part II, the context to the issues raised in this article will be discussed. In Part III, the factors that may give rise to a reduced quality of evidence will be addressed. These factors include the nature of the adversarial system, defence counsel’s duty to represent their client vigorously, the phrasing and language of questions, and the delay between complaint and cross-examination. In Part IV, the concept and requirements of a fair trial will be analysed. This includes examining the right to a fair trial under both the common law and international human rights conventions. Whilst a defendant’s right to a fair trial is fundamental, the concept of a fair trial extends beyond the interests of the defendant to those of witnesses and society. It is contended that the current adversarial status quo provides defendants with an unfair advantage that may compromise society’s legitimate right to bring offenders to justice. Accordingly, the need for a wider view of fairness is also considered.

Measures suggested by commentators<sup>13</sup> or used in other jurisdictions are discussed and evaluated in Part V. Proposed reforms are examined in the wider context of both investigatory and trial procedures, as reforms to trials cannot be considered in isolation of other criminal justice processes. A range of measures have been adopted or proposed in various jurisdictions in recent years to improve the position of vulnerable witnesses and enable them to give better quality evidence, however, problems in cross-examination persist.

Research Informing Canadian Law Reform’ (2010) 18 *International Journal of Children’s Rights* 53.

<sup>11</sup> See New South Wales Law Reform Commission (‘NSWLRC’), *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003) 10 [2.2].

<sup>12</sup> See, eg, *Criminal Procedure Act 1986* (NSW) s 306M (definition of ‘vulnerable person’); *Evidence Act 1929* (SA) s 4 (definition of ‘vulnerable witness’); *Evidence Act 2008* (Vic) s 41(4).

<sup>13</sup> See, eg, J R Spencer, ‘Conclusions’ in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 171; David Caruso, “‘I Don’t Want to Play Follow the Leader’: Reforms for the Cross-Examination of Child Witnesses and the Reception and Treatment of their Evidence — Part 2’ (Paper presented at the AIJA Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 9 September 2011).

Many of these measures, although well-intentioned, have had limited practical effect because they fail to address the underlying problems that arise from the adversarial system itself.<sup>14</sup>

This article endorses the view that more fundamental reform is necessary.<sup>15</sup> Specifically, it argues that a regime should be implemented in all Australian jurisdictions for the questioning of children and witnesses with intellectual disability that entrusts this task to an independent interviewer with specialist qualifications in questioning such witnesses. The model advocated here is based on those in operation in Norway. In their important and wide ranging works on alternative models for eliciting evidence from children in criminal trials, Cossins,<sup>16</sup> and Hanna, Davies, Henderson, Crothers and Rotherham<sup>17</sup> have argued for the employment in Australia and New Zealand of specialist intermediaries to conduct the questioning of children at trial along the lines of models in place in a number of inquisitorial systems. However, Cossins' preferred approach does not involve delegating primary responsibility for both devising and conducting the questioning to the intermediary. Rather, she envisages the intermediary having a quasi-interpretive role, conducting the questioning on behalf of defence counsel using age appropriate language and pre-prepared questions, and ensuring that the questioning is devoid of many adversarial features that might detract from

<sup>14</sup> See, eg, in relation to children, Christine Eastwood and Wendy Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (Research Report, Queensland University of Technology, 2002) 32–4; David Caruso and Timothy Cross, 'The Case in Australia for Further Reform to the Cross-Examination and Court Management of Child Witnesses' (2012) 16 *International Journal of Evidence and Proof* 364.

<sup>15</sup> See also fundamental reform recommendations made by Caruso and Cross, above n 14, 394–7; Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 101–4; Annie Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia' (Report, National Child Sexual Assault Reform Committee, March 2010) 273–7 [4.119]–[4.136], 335 [6.87]–[6.89]; Annie Cossins, 'Cross-Examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context' in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 95, 107–11; Kirsten Hanna et al, 'Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy' (Report, Institute of Public Policy, AUT University, 2010) 176–7; Emily Henderson, 'Alternative Routes: Other Accusatorial Jurisdictions on the Slow Road to Best Evidence' in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 43.

<sup>16</sup> Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 275–7 [4.129]–[4.133], 332–5 [6.74]–[6.89].

<sup>17</sup> Hanna et al, above n 15, 11, 166–7.

the reliability of the testimony.<sup>18</sup> While Hanna, Davies, Henderson, Crothers and Rotherham view the development of a specialist interviewing service (in combination with prerecorded interview) as a ‘natural next goal’ for the New Zealand criminal justice system, they also regard it as an ‘ambitious’ one.<sup>19</sup>

It is the central argument of this article that the limitations of measures enacted to date to ameliorate the problems facing children and witnesses with intellectual disability in testifying justifies root and branch reform of a kind argued for by Cossins, and Hanna, Davies, Henderson, Crothers and Rotherham. However, this article adopts a slightly more strenuous stance than these reports, albeit while ‘standing on their shoulders’. It maintains that a model that departs as little as possible from those operating in countries like Norway should be implemented in Australia. Specialist questioners should have independent responsibility for conducting the examination of children and witnesses with intellectual disabilities, with counsel having the opportunity to request lines of and matters for questioning but taking no direct role in questioning or devising the precise questions to be asked. This model offers the greatest potential for delivering to children and witnesses with intellectual disabilities the possibility to participate effectively and equally in criminal trials.

Recent revelations about the extensive abuse of children and people with intellectual disabilities, by those entrusted with their care,<sup>20</sup> make it necessary to re-examine the barriers to obtaining justice faced by vulnerable witnesses and to reconsider the steps taken to date to ameliorate these problems. The tragic results of the entrenched failure of our criminal justice process to protect vulnerable people from abuse and bring their abusers to justice demonstrates that we have been too tentative in implementing measures to improve their situation, too wary of fundamental change, and that we have delayed too long in making recommended difficult reforms.

<sup>18</sup> Cossins, ‘Alternative Models for Prosecuting Child Sex Offences in Australia’, above n 15, 275–7 [4.129]–[4.133], 332–5 [6.74]–[6.89], 336 [6.91].

<sup>19</sup> Hanna et al, above n 15, 176.

<sup>20</sup> See, eg, Jason Gordon, ‘Sex Abuse Going On a Long Time: Inquiry Expects to Hear of Cover-ups’, *The Newcastle Herald* (Newcastle), 2 July 2013, 8; Phillip Coorey and Josephine Tovey, ‘Gillard Acts on Sex Abuse Claims’, *The Sydney Morning Herald* (Sydney), 13 November 2012, 1; Josh Gordon and Barney Zwartz, ‘Church Inquiry “Not Enough”: Parliament to Investigate Abuse — We’re Not Right For Job, Says MP’, *The Age* (Melbourne), 18 April 2012, 1; South Australia, Royal Commission, *Report of Independent Education Inquiry* (2012–13); Janine Dillon ‘Violence Against People with Cognitive Impairment’ (Report, Office of the Public Advocate, August 2010).

One of the major fetters on root and branch reform of the kind endorsed in this article has been concern that it would compromise defendants' right to a fair trial. While it is widely accepted that the rights and interests of victims might be balanced against the rights of defendants or suspects, as Roberts and Hunter state, '[t]he enduring difficulty lies in translating this truism into practice'.<sup>21</sup> Yet, as will be discussed, it is possible to improve the way testimony from children and complainants with an intellectual disability is taken and tested without compromising the defendant's right to a fair trial or ability to test the prosecution's case. Nevertheless, altering the traditional adversarial approach to cross-examination is required to achieve real change. This article will argue that removing the task of direct examination from defence and prosecution counsel and entrusting both examination-in-chief and cross-examination to a suitably qualified third-party in advance of trial will produce higher quality evidence, improve the trial process for victims and preserve the defendant's right to a fair trial by allowing the defence adequate opportunity to test the witness's account. Ultimately, in this way, the triangulation of interests in balancing fairness to defendants, victims and society in the cross-examination of young children and complainants with an intellectual disability can be achieved.

## II CONTEXT

### A Background

Due to their powerlessness, dependency or limited communication skills, children and people with intellectual disabilities are more likely than others to be the victims of sexual or physical abuse.<sup>22</sup> Successive reports from academics<sup>23</sup> and law reform agencies<sup>24</sup> have highlighted the need for improved

<sup>21</sup> Paul Roberts and Jill Hunter, 'The Human Rights Revolution in Criminal Evidence and Procedure' in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 1, 21.

<sup>22</sup> In relation to children, see David Finkelhor and Jennifer Dzuiba-Leatherman, 'Victimisation of Children' (1994) 49 *American Psychiatry* 173–83. In relation to persons with an intellectual disability, see Karen Hughes et al, 'Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' (2012) 379 *Lancet* 1621; Amanda Mahoney and Alan Poling, 'Sexual Abuse Prevention for People with Severe Developmental Disabilities' (2011) 23 *Journal of Developmental and Physical Disabilities* 369, 372; Moira Carmody, 'Invisible Victims: Sexual Assault of People with an Intellectual Disability' (1991) 17 *Journal of Intellectual and Development Disability* 229.

<sup>23</sup> See, eg, David Caruso, "'I Don't Want to Play Follow the Leader": Three Proposals for Reform of the Cross-Examination of Child Witnesses' [2011] *Journal of Commonwealth Criminal Law*

measures to assist vulnerable persons in giving evidence, whether to investigators or in court. While some measures have been implemented, law reform agencies,<sup>25</sup> governments<sup>26</sup> and academics<sup>27</sup> continue to assert that more can, and should, be done to improve the position of vulnerable witnesses.

Until the early 1990s, children were considered ‘inherently unreliable’ as witnesses.<sup>28</sup> Similar views of witnesses with intellectual disabilities were also held.<sup>29</sup> However, it is now well-established that both persons with an intellectual disability and children are capable of giving cogent and accurate testimony.<sup>30</sup> Prohibitions on judicial warnings in relation to the reliability of children’s evidence in general now reflect this,<sup>31</sup> although judges are still able to warn

254; Cossins, ‘Evidentiary Safeguard or an Opportunity to Confuse’, above n 15. This academic attention has been longstanding: see, eg, Mark Brennan and Roslin E Brennan, *Strange Language — Child Victims under Cross Examination* (Riverina Murray Institute of Higher Education, 2<sup>nd</sup> ed, 1988); D Kelly Weisberg, ‘Sexual Abuse of Children: Recent Developments in the Law of Evidence’ (1984) 5(4) *Children’s Legal Rights Journal* 2.

<sup>24</sup> See generally NSWLRC, *Questioning of Complainants Report*, above n 11; Victorian Law Reform Commission (‘VLRC’), *Sexual Offences Final Report*, Report No 78 (2004); Robyn Layton, ‘Our Best Investment: A State Plan to Protect and Advance the Interests of Children’ (Child Protection Review, Government of South Australia, 2003); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (2000).

<sup>25</sup> See, eg, Social Inclusion Board, ‘Strong Voices: A Blueprint to Enhance Life and Claim the Rights of People with Disability in South Australia (2012–2020)’ (Report, Government of South Australia, 2011) 54 (recommendation 19); Australian Law Reform Commission (‘ALRC’) and NSWLRC, *Family Violence — A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) vol 2, 1232 [26.184], 1267 [27.144].

<sup>26</sup> See, eg, announcement by Deputy Premier and Attorney-General of South Australia: John Rau, ‘Improving the Justice System for Vulnerable Witnesses’ (News Release, 29 November 2011).

<sup>27</sup> See, eg, Caruso, ‘I Don’t Want to Play Follow the Leader: Three Proposals for Reform’, above n 23; Cossins, ‘Evidentiary Safeguard or an Opportunity to Confuse?’ above n 15; Davies, Henderson and Hanna, above n 4.

<sup>28</sup> ALRC and NSWLRC, *Family Violence Report*, above n 25, vol 2, 1311 [28.11]; ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [14.15]. See also *Hargan v The King* (1919) 27 CLR 13, 18 (Barton J).

<sup>29</sup> See Benedet and Grant, above n 7, 9.

<sup>30</sup> In relation to children, see Robyn Layton, ‘The Child and the Trial’ in Justice Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 201; AIJA, *Bench Book*, above n 3, 29–32. In relation to persons with an intellectual disability, see Kebbell, Hatton and Johnson, above n 7; Rebecca Milne and Ray Bull, ‘Interviewing Witnesses with Learning Difficulties for Legal Purposes’ (2001) 29 *British Journal of Learning Disabilities* 93, 96; Mark Kebbell and Chris Hatton, ‘People with Mental Retardation as Witnesses in Court’ (1999) 37 *Mental Retardation* 179.

<sup>31</sup> See, eg, *Evidence Act 1929* (SA) s 12A; s 165A of the Uniform Evidence Act (‘UEA’). The UEA is implemented as: *Evidence Act 1995* (Cth); *Evidence Act 2004* (Norfolk Island); *Evidence Act*

about the potential unreliability of those with a mental health issue.<sup>32</sup> Over the last twenty years, reforms and special measures to assist vulnerable witnesses have been implemented in all Australian,<sup>33</sup> and many overseas,<sup>34</sup> jurisdictions. However, many of these reforms have had limited practical effect and major problems remain.

Stephen Pallaras QC, the former South Australian Director of Public Prosecutions, commented upon the major difficulties that typically arise in the prosecution of cases involving young children or complainants with an intellectual disability:

A problem that cries out for inventive solutions is how better to facilitate the complaints of sexual abuse made by children and, in particular, children with disabilities. ... [A] prosecutor looks to the witnesses to provide a coherent account of the allegations, for unless that can be done no court can properly convict an accused. In the absence of a coherent account the prospects of obtaining a conviction could never be adjudged to be reasonable. However the very thing that a child complainant, disabled or not struggles to do is to give a coherent account.<sup>35</sup>

Pallaras's comments were in the aftermath of a highly publicised South Australian case in 2011, when his office withdrew charges against a school bus driver accused of the indecent assault of child passengers with an intellectual disability.<sup>36</sup> It was reported that the reason for this decision was 'because communication difficulties mean[t] the disabled victims [were] seen as unreliable witnesses who would not cope with cross-examination.'<sup>37</sup>

Pallaras subsequently argued that the only solution to the problems in the cross-examination of complainants generally in sexual assault trials is a

1995 (NSW); *Evidence (National Uniform Legislation) Act* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). The *Evidence Act 1995* (Cth) applies in the ACT.

<sup>32</sup> See UEA s 165(1)(c).

<sup>33</sup> See Cossins, 'Cross-Examining the Child Complainant', above n 15, 95–6. For example, South Australian reforms include *Evidence Act 1929* (SA) s 13A.

<sup>34</sup> See, eg, *Criminal Procedure Act 1977* (South Africa) s 170A; *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, ss 27–9.

<sup>35</sup> Office of the Director of Public Prosecutions (SA), *Annual Report 2010–11* (2011) 2.

<sup>36</sup> Candice Keller, 'Child Sex Case Dropped', *The Advertiser* (Adelaide), 21 December 2011, 7; ABC News, 'Charges Against Alleged Sex Abuser Likely to be Dropped', *PM*, 7 December 2011 (Nance Haxton) <<http://www.abc.net.au/pm/content/2011/s3385879.htm>>.

<sup>37</sup> ABC News, 'Charges Against Alleged Sex Abuser Likely to be Dropped', above n 36. See also ABC News, 'Radio Current Affairs Documentary: Disabilities', *PM*, 11 January 2012 (Nance Haxton) <<http://www.abc.net.au/pm/content/2012/s3405854.htm>>.

fundamental shift away from the common law adversarial system. He asserted that the adversarial model ‘is ill-equipped to deal with cases involving allegations of sexual assault particularly for children’.<sup>38</sup> Pallaras claimed that ‘[s]o long as we look at the adversarial trial model as the only method by which we can deal with these cases, [he does not] see a solution’.<sup>39</sup>

The significance of Pallaras’s comments extends beyond South Australia. They serve to illustrate both the problems that are often confronted by children and witnesses with an intellectual disability in cross-examination and the inevitable difficulties that arise in devising an acceptable system that will alleviate these problems. This article considers some of these problems and whether more reliable methods for adducing and testing the evidence of children and complainants with an intellectual disability can be found without undermining a defendant’s vital right to a fair trial and ability to test the prosecution’s case.

### B Current Australian Measures

In common with most other Australian jurisdictions, South Australian courts have a wide discretion to use a range of measures to assist vulnerable witnesses in giving evidence.<sup>40</sup> However, it appears that, in practice, courts tend to use only those measures specifically listed in the *Evidence Act 1929* (SA) (such as permitting a companion to sit in court with the witness or using a CCTV link for live testimony).<sup>41</sup> Some ‘out of court statements’ of vulnerable witnesses may also be admitted as evidence of the truth of their contents without the witness being called through s 34CA.<sup>42</sup> However, this provision is currently under review owing to its problematic wording and operation, and has been the subject of varied interpretation and judicial calls for legislative reconsideration.<sup>43</sup>

<sup>38</sup> ABC News, ‘Charges Against Alleged Sex Abuser Likely to be Dropped’, above n 36.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Evidence Act 1929* (SA) ss 13, 13A. The two sections allow for the same measures, although s 13A applies specifically to ‘vulnerable witnesses’ as defined in the Act.

<sup>41</sup> *Ibid* ss 13(2)(a), (e), 13A(2)(a), (e). See, eg, *R v T, AM* [2014] SADC 31 (26 February 2014) [27] (Beazley DCJ); *R v H, R C* [2012] SADC 182 (17 December 2012) [26] (Beazley DCJ); *R v C, S* [2011] SADC 194 (21 December 2011) [23] (Tilmouth DCJ).

<sup>42</sup> *Evidence Act 1929* (SA) s 34CA. This provision applies to those with a mental impairment and children under 12: sub-s (5).

<sup>43</sup> David Caruso, “I Don’t Want to Play Follow the Leader”: Reforms for the Cross-Examination of Child Witnesses and the Reception and Treatment of Their Evidence — Part 1’ (Paper presented at the AIJA Criminal Justice in Australia and New Zealand — Issues and Challeng-

In all Australian jurisdictions, both legislation and the common law empower courts to control inappropriate cross-examination.<sup>44</sup> In South Australia,<sup>45</sup> and most uniform Evidence Act jurisdictions,<sup>46</sup> the relevant legislation imposes a *duty* on the court to intervene to disallow improper questioning as statutorily defined.<sup>47</sup> In Victoria, the duty only applies in the context of vulnerable witnesses.<sup>48</sup> Nevertheless, there remains an inescapable discretionary element in these provisions,<sup>49</sup> as a result of the necessity for judgment to be made on what is improper questioning in any given case. Further, research suggests that, despite their mandatory nature, these provisions will not be adequate to displace courts' traditional reluctance to intervene in the cross-examination of vulnerable witnesses.<sup>50</sup> Justice Sleight provides insight into this reluctance. His Honour suggests:

es for Judicial Administration Conference, Sydney, 9 September 2011) 23–4; *H, SA v Police* (2013) 116 SASR 547, 557 [53] (Kelly J), 588 [190] (Nicholson J); *R v Byerley* (2010) 107 SASR 517, 524 [18] (Doyle CJ); *R v J, JA* (2009) 105 SASR 563, 575 [59] (Duggan J), 593 [154] (Nyland J), 598 [180] (White J).

<sup>44</sup> *Crimes Act 1914* (Cth) s 15YE; *Evidence Act 1977* (Qld) s 21; *Evidence Act 1929* (SA) ss 22–5; *Evidence Act 1906* (WA) ss 25–6; UEA ss 26, 29, 41, 42, 192A, 193. See also *Libke v The Queen* (2007) 230 CLR 559, 597–604 (Heydon J).

<sup>45</sup> *Evidence Act 1929* (SA) s 25(3).

<sup>46</sup> The exceptions are s 41 of the Norfolk Island and Victoria Acts, where courts 'may' disallow a question.

<sup>47</sup> See UEA s 41.

<sup>48</sup> *Evidence Act 2008* (Vic) s 41(2).

<sup>49</sup> Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 270 [4.106]; Terese Henning, 'Control of Cross-Examination — A Snowflake's Chance in Hell?' (2006) 30 *Criminal Law Journal* 133, 137.

<sup>50</sup> In relation to children, see Russell Boyd and Anthony Hopkins, 'Cross-Examination of Child Sexual Assault Complainants: Concerns About the Application of s 41 of the *Evidence Act*' (2010) 34 *Criminal Law Journal* 149; Judy Cashmore and Lily Trimboli, 'An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot' (Research Report, New South Wales Bureau of Crime Statistics and Research, 2005) 51–6; Judge Roy Ellis, 'Judicial Activism in Child Sexual Assault Cases' (Paper presented at the National Judicial College of Australia Children and the Courts Conference, Sydney, 5 November 2005) [35]; Justice James Wood, 'Child Witnesses: The New South Wales Experience' (Paper presented at Child Witnesses — Best Practice for Courts Conference, AIJA, District Court of NSW, Parramatta, 30 July 2004) 4. In relation to persons with an intellectual disability, see Caitriona M E O'Kelly et al, 'Judicial Intervention in Court Cases Involving Witnesses With and Without Learning Difficulties' (2003) 8 *Legal and Criminological Psychology* 229, 237–8.

If a Judge frequently interrupts cross-examination then the process can become disjointed, confrontational between the Judge and counsel and often add to the trauma of the complainant giving evidence.<sup>51</sup>

Henderson additionally suggests that despite judges having the power to control and limit cross-examination, albeit restricted by the requirements of fairness, they may not recognise problems when they arise.<sup>52</sup> Judges may also be reluctant to intervene in defence cross-examination for fear of jeopardising the defendant's right to a fair trial and because they are conscious of the risks of an appeal if the accused is convicted.<sup>53</sup> The discretionary elements of the current regime limit the ability of the implemented measures to systematically improve outcomes for child witnesses and those with an intellectual disability. Any proposed reforms must operate to negate this difficulty inherent in the adversarial system.

### III COMPLICATIONS ARISING FROM CROSS-EXAMINATION

The cross-examination of children and intellectually disabled witnesses can result in inconsistent and inaccurate evidence,<sup>54</sup> as well as cause further trauma to victims.<sup>55</sup> This is due to the nature of cross-examination, the tactics often used by counsel, the language and phrasing of questions, and the delay between the initial complaint and trial. Despite the traditional preference for, and reliance on, witnesses to give evidence through live oral testimony in an adversarial system,<sup>56</sup> this does not necessarily result in the 'best' evidence being received when the witness is a child or has an intellectual disability.

<sup>51</sup> Judge Sleight, above n 3, 20.

<sup>52</sup> Henderson, 'Alternative Routes', above n 15, 59.

<sup>53</sup> ALRC, NSWLRC and VLRC, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report 112, VLRC Final Report (2005) 149 [5.97].

<sup>54</sup> In relation to children, see Cossins, 'Evidentiary Safeguard or an Opportunity to Confuse?' above n 15, 71, 90–1; Davies, Henderson and Hanna, above n 4; Zajac, Gross and Hayne, above n 5, 201. In relation to persons with an intellectual disability, see Benedet and Grant, above n 7, 14–15, 18–26; Kebell, Hatton and Johnson, above n 7, 25–6.

<sup>55</sup> In relation to children, see Eastwood and Patton, above n 14, 30; Cossins, 'Evidentiary Safeguard or an Opportunity to Confuse?' above n 15, 69. In relation to persons with an intellectual disability, see Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice' (Paper No 10, Law and Justice Foundation of New South Wales, March 2009) 8.

<sup>56</sup> *Butera v DPP (Vic)* (1987) 164 CLR 180, 189 (Mason CJ, Brennan and Deane JJ); Louise Ellison, 'The Protection of Vulnerable Witnesses in Court: An Anglo-Dutch Comparison' (1999) 3 *International Journal of Evidence & Proof* 29, 34.

### A Discrediting the Witness

Cross-examination continues to command great support in an adversarial legal process system. As Justice Rosenberg observes, '[c]ross-examination is the distinguishing feature of our adversary system'.<sup>57</sup> It is undertaken to adduce evidence in favour of the defendant, undermine examination-in-chief and attack the witness's credibility.<sup>58</sup> Further, it has been described as a 'powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story'.<sup>59</sup>

However, in recent years, the traditional faith in cross-examination as the best means for the discovery of the truth has been increasingly doubted. Eastwood and Patton argue that the true purpose of cross-examination has very little, if anything, to do with accuracy or truth. Rather, they contend the purpose of cross-examination 'is more a process of manipulating the witness through suggestive questioning, avoiding unfavourable disclosures, and obtaining jury sympathy'.<sup>60</sup> They conclude that '[c]ross-examination techniques are specifically designed to damage the effectiveness of the testimony and mute the voice of the complainant'.<sup>61</sup> Birch similarly doubts the value of cross-examination and argues that a skilled cross-examiner merely serves 'to make an honest witness appear at best confused and at worst a liar'.<sup>62</sup>

This criticism has proved especially applicable in respect of children<sup>63</sup> and complainants with an intellectual disability.<sup>64</sup> Assessments about the credibil-

<sup>57</sup> Marc Rosenberg, 'The Contribution of Chief Justice Lamer to the Development of the Law of Hearsay' (2000) 5 *Canadian Criminal Law Review* 115, 119.

<sup>58</sup> See Richard Du Cann, *The Art of the Advocate* (Penguin Books, 1980) 95; Glissan, above n 1, 73–4; Colin Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 11<sup>th</sup> ed, 2007) 336.

<sup>59</sup> *Wakeley v The Queen* (1990) 93 ALR 79, 86 (Mason CJ, Brennan, Deane, Toohey and McHugh JJ), quoting *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 359 (Viscount Sankey LC). See also *Ex parte Elsee* (1830) Mont 69, 70–2 n (a), citing *Ex parte Lloyd* (Unreported, Lord Eldon, 5 November 1822); John Henry Wigmore, *Evidence in Trials at Common Law* (Little, Brown, revised ed, 1974) vol 5, 32 [1367].

<sup>60</sup> Eastwood and Patton, above n 14, 4–5.

<sup>61</sup> *Ibid* 5.

<sup>62</sup> Diane J Birch, 'The Criminal Justice Act 1988 — Documentary Evidence' (Pt 2) [1989] *Criminal Law Review* 15, 17.

<sup>63</sup> See, eg, ALRC, *Seen and Heard*, above n 28, [14.110]–[14.111]; Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 255 [4.42]; Louise Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 21 *Legal Studies* 353, 353–4.

<sup>64</sup> See, eg, Ellison, 'The Mosaic Art?', above n 63, 353–4, 361–2; Benedet and Grant, above n 7, 15–16.

ity of a witness's statement are central in an adversarial trial. In trials for alleged offences of sexual or physical abuse, where the principal evidence is usually the complainant's account of events weighed against that of the accused, assessments regarding credibility are often the deciding factor. In the case of a vulnerable complainant, an acquittal may well not be based on disbelieving the complainant's account, but rather finding that the high standard of proof in a criminal case has not been satisfied.<sup>65</sup>

The testimony of children is often discredited for factors relating to their development, confidence or intellect, as opposed to the reliability of their account.<sup>66</sup> This allows cross-examiners to easily characterise a child witness as 'the aggressor', 'unchildlike', 'less than innocent', confused or unreliable.<sup>67</sup> The discrediting of complainants' testimony because of unavoidable developmental or cognitive factors undermines the values and concepts that underpin the criminal justice system.

Further, when cross-examining, a defence lawyer is in a position of control and power and can readily confuse, intimidate, manipulate and even bully children and witnesses with intellectual disabilities.<sup>68</sup> Cross-examining a child has been likened to 'shooting rats in a barrel ... it's easy to confuse them and make out they're telling lies'.<sup>69</sup> As stated by the Australian Law Reform Commission in their *Seen and Heard Report*, '[t]he contest between lawyer and child is an inherently unequal one'.<sup>70</sup> In addition, Spencer has observed the consequences of intimidation in numerous trials; for example, he notes that

sometimes [children] cannot be cross-examined because they are scared out of their wits and unable to communicate at all: like a little girl in a case I once

<sup>65</sup> See, eg, *Douglass v The Queen* (2012) 290 ALR 699, 711–12 [48] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>66</sup> In relation to children, see Helen L Westcott and Marcus Page, 'Cross-Examination, Sexual Abuse and Child Witness Identity' (2002) 11 *Child Abuse Review* 137, 140–3. Given the similarities in vulnerability found in witnesses with an intellectual disability, it is likely that similar problems will arise: see Ellison, 'The Mosaic Art?', above n 63, 353–4.

<sup>67</sup> Westcott and Page, above n 66, 143–6.

<sup>68</sup> See generally Ellison, 'The Mosaic Art?', above n 63, 360–2; Keane, 'Cross-Examination of Vulnerable Witnesses' above n 2, 176–9.

<sup>69</sup> Brennan and Brennan, above n 23, 3.

<sup>70</sup> ALRC, *Seen and Heard*, above n 28, [14.111].

watched at Snaresbrook Crown Court, who got up from her chair as soon as cross-examination started and just ran away.<sup>71</sup>

When children become anxious, the accuracy of their testimony typically diminishes due to difficulties in recalling memories.<sup>72</sup> Even when questioned by professional and non-aggressive defence and prosecution lawyers, children often do not understand the questions posed to them.<sup>73</sup> This is exacerbated by such witnesses being unlikely to seek clarification when they do not understand questions.<sup>74</sup> Further, children and persons with intellectual disabilities may acquiesce to statements they do not actually agree with.<sup>75</sup>

Nevertheless, because it is a defence lawyer's professional duty to advance their client's case, discrediting a witness in this way may be perceived as a legitimate tactic to achieve this end.<sup>76</sup> Indeed, in their 1998 study of the experiences of child complainants in sexual assault proceedings in Queensland, Eastwood, Patton and Stacy suggest the existence of a culture amongst defence counsel which considers that 'if in the process of destroying the evidence it is necessary to destroy the child, then so be it'.<sup>77</sup> Similarly damning findings are reported elsewhere.<sup>78</sup>

<sup>71</sup> J R Spencer, 'Introduction' in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 1.

<sup>72</sup> L Henry et al, 'Perceived Credibility and Eyewitness Testimony of Children with Intellectual Disabilities' (2011) 55 *Journal of Intellectual Disability Research* 385, 386.

<sup>73</sup> See Mark Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71, 73; Brennan and Brennan, above n 23. Cf Murphy and Clare, above n 9, 51 [3.28], who suggest that adjusting the style of questions during cross-examination can minimise these problems in relation to persons with an intellectual disability.

<sup>74</sup> In relation to children, see Zajac, Gross and Hayne, above n 5, 199–200. In relation to persons with an intellectual disability, see Benedet and Grant, above n 7, 15.

<sup>75</sup> In relation to children, see Zajac, Gross and Hayne, above n 5, 200; Rachel Zajac, Sarah O'Neill and Harlene Hayne 'Disorder in the Courtroom? Child Witnesses under Cross-Examination' (2012) 32 *Development Review* 181, 186. In relation to persons with an intellectual disability, see Murphy and Clare, above n 9, 50–1 [3.25]–[3.26]; Kebbell, Hatton and Johnson, above n 7, 29, 32; Benedet and Grant, above n 7, 15.

<sup>76</sup> Glissan, above n 1, 74–5; Du Cann, above n 58, 95.

<sup>77</sup> Christine Eastwood, Wendy Patton and Helen Stacy, 'Child Sexual Abuse and the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice Series Paper No 99, Australian Institute of Criminology, December 1998) 3.

<sup>78</sup> In relation to children, see, eg, Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 250–5 [4.14]–[4.41]; Layton, 'Our Best Investment' above n 24, 15.13–15.14; Emma Davies, Emily Henderson and Fred W Seymour, 'In the Interests of Justice? The Cross Examination of Child Complainants of Sexual Abuse in Criminal Pro-

### B Duty of Counsel

When considering the problems arising from the cross-examination of vulnerable witnesses, the professional duty of defence lawyers is often overlooked. Defence lawyers have a duty to ensure that their client's case is presented 'fully and properly' and 'fearlessly and with vigour and determination'.<sup>79</sup> This duty is supported by professional guidelines.<sup>80</sup> Further, in accordance with the rule in *Browne v Dunn*, the duty of the defence includes a requirement to put all relevant propositions and imputations, which will be relied on later, to the complainant.<sup>81</sup> Accordingly, any discussion of proposed measures to adduce improved evidence from children and people with intellectual disabilities must also include consideration of defence lawyers' professional duties to represent their client's case vigorously and to put all relevant propositions to a witness.

The duties of a defence lawyer are qualified by rules of conduct which state that a lawyer must not ask a question that would 'mislead' or 'confuse' a witness, or one that would be 'oppressive', 'harassing' or 'humiliating' for the witness.<sup>82</sup> These are examples of the wider paramount duty of all lawyers to the administration of justice as an officer of the court.<sup>83</sup> The application of these rules can be highly subjective and it may be difficult for a defence lawyer to represent a client with 'vigour and determination'<sup>84</sup> without confusing a child witness or one who has an intellectual disability. This problem is compounded by the fact that cross-examination, including the demeanour

ceedings' (1997) 4 *Psychiatry, Psychology and Law* 217; ALRC, *Seen and Heard*, above n 28, [14.111].

<sup>79</sup> *Lewis v Judge Ogden* (1984) 153 CLR 682, 689 (Mason, Murphy, Wilson, Brennan and Dawson JJ).

<sup>80</sup> See, eg, Australian Bar Association, *Barristers' Conduct Rules* (27 November 2010) r 37; Bar Standards Board, *Code of Conduct of the Bar of England and Wales* (8<sup>th</sup> ed, 31 October 2004) r 303(a).

<sup>81</sup> (1894) 6 R 67, 70–1 (Lord Halsbury). See also Du Cann, above n 58, 107; Glissan, above n 1, 81.

<sup>82</sup> Law Council of Australia, *Australian Solicitors' Conduct Rules* (June 2011) r 21.8.

<sup>83</sup> See, eg, *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid); *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ); Chief Justice Marilyn Warren, 'The Duty Owed to the Court — Sometimes Forgotten' (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009).

<sup>84</sup> *Lewis v Judge Ogden* (1984) 153 CLR 682, 689 (Mason, Murphy, Wilson, Brennan and Dawson JJ).

and the language used by the examiner, remains the least regulated element of the adversarial criminal trial.<sup>85</sup>

The rule in *Browne v Dunn* requires all relevant propositions that will later be relied on to be put to a witness.<sup>86</sup> However, it is established that children and persons with intellectual disabilities are likely to become confused and either change their version of events or acquiesce in a contradictory account when challenged. Challenging a vulnerable witness's testimony in accordance with *Browne v Dunn* and suggesting an alternative version of facts may not advance the pursuit of truth.<sup>87</sup>

### C Language and Phrasing of Questions

Unnecessarily complex cross-examination questions may also impede vulnerable witnesses' comprehension. Closed questions, which elicit a simple 'yes' or 'no' answer from witnesses, have been shown to be the most frequently used but to elicit the least reliable evidence.<sup>88</sup> One study found that children aged from five to eight years attempted to answer 75 per cent of nonsensical closed questions (eg, 'Is a box louder than a knee?') but only a small proportion of nonsensical open questions (eg, 'What do bricks eat?').<sup>89</sup> Closed questions can be rephrased as non-leading or open questions, which are less confusing and obtain more accurate responses.<sup>90</sup>

Similarly, leading questions, which are questions that 'directly or indirectly sugges[t] a particular answer to a question',<sup>91</sup> also obtain inaccurate respons-

<sup>85</sup> Cossins, 'Evidentiary Safeguard or an Opportunity to Confuse?', above n 15, 70.

<sup>86</sup> (1894) 6 R 67, 70–1 (Lord Halsbury).

<sup>87</sup> See, eg, *R v Edwards* [2011] EWCA Crim 3028 (16 November 2011).

<sup>88</sup> In relation to children, see, eg, Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 260–1 [4.64]–[4.65]; Cossins, 'Evidentiary Safeguard or an Opportunity to Confuse?', above n 15, 78–82; Davies, Henderson and Hanna, above n 4, 353; Westcott and Page, above n 66, 142; Zajac, Gross and Hayne, above n 5, 200–1. In relation to persons with an intellectual disability, see Kebbell and Hatton, above n 30, 179–87; Kebbell, Hatton and Johnson, above n 7, 25; Mark R Kebbell et al, 'People with Learning Difficulties as Witnesses in Court: What Questions Should Lawyers Ask?' (2001) 29 *British Journal of Learning Disabilities* 98, 99–100; Benedet and Grant, above n 7, 13–15. See generally Keane, 'Cross-Examination of Vulnerable Witnesses', above n 2, 177–8.

<sup>89</sup> Amanda H Waterman, Mark Blades and Christopher Spencer, 'Do Children Try to Answer Nonsensical Questions?' (2000) 18 *British Journal of Developmental Psychology* 211, 222.

<sup>90</sup> Caruso, 'I Don't Want to Play Follow the Leader — Part 2', above n 13, 8; Adrian Keane, 'Towards a Principled Approach to the Cross-Examination of Vulnerable Witnesses' [2012] *Criminal Law Review* 407, 417.

<sup>91</sup> *Evidence Act 1995* (Cth) s 3 (definition of 'leading question').

es.<sup>92</sup> Confusing questions, such as questions containing double negatives,<sup>93</sup> are also regularly used in the cross-examination of children and complainants with intellectual disabilities.<sup>94</sup>

When questioned in a supportive and non-intimidating manner, children have been shown to make fewer mistakes due to reduced anxiety.<sup>95</sup> Further, Kebbell, Hatton and Johnson state that the ‘accuracy and completeness’ of testimony from witnesses with an intellectual disability ‘can be significantly improved if suitable questioning strategies are adopted.’<sup>96</sup> The persistence of questioning techniques known to be unreliable supports the contention that traditional cross-examination is not a reliable mechanism for testing the evidence of either children or persons with an intellectual disability. The problem is exacerbated by judicial failure to intervene in inappropriate cross-examination.<sup>97</sup>

#### D Delay

In addition to the nature of cross-examination itself, the delay between the alleged offence and testifying at trial places the complainant in a disadvantageous position as delay, stress and anxiety all diminish memory.<sup>98</sup> In cases where the vulnerable witness is also the complainant, delay in testifying may also hinder their recovery.<sup>99</sup> The delays that occur are commonly due to the process of gathering evidence, prosecutorial disclosure and setting trial dates.<sup>100</sup> This has been shown to be a major problem for vulnerable witnesses

<sup>92</sup> In relation to children, see Caruso, ‘I Don’t Want to Play Follow the Leader — Part 2’, above n 13, 2. In relation to persons with an intellectual disability, see Benedet and Grant, above n 7, 15; Kebbell et al, above n 88, 99. See also Nancy Perry et al, ‘When Lawyers Question Children: Is Justice Served?’ (1995) 19 *Law and Human Behaviour* 609.

<sup>93</sup> For example, ‘Now, when you did that you did not say that it was something that you did not like?’: Kebbell et al, above n 88, 100.

<sup>94</sup> In relation to children, see, eg, Judy Cashmore, *The Evidence of Children* (Judicial Commission of New South Wales, 1995) 33–6; Cashmore and Trimboli, above n 50, 46. In relation to persons with an intellectual disability, see also Kebbell, Hatton and Johnson, above n 7, 25.

<sup>95</sup> See Westcott and Page, above n 66, 143.

<sup>96</sup> Kebbell, Hatton and Johnson, above n 7, 24.

<sup>97</sup> In relation to children, see Zajac, O’Neill and Hayne, above n 75, 196. In relation to witnesses with an intellectual disability, see O’Kelly et al, above n 50, 229–40.

<sup>98</sup> Henderson, ‘Alternative Routes’ above n 15, 44.

<sup>99</sup> See generally Home Office (UK), ‘Report of the Advisory Group on Video Evidence’ (Report No 8979, 1989) 15 [2.10].

<sup>100</sup> Jason Payne, ‘Criminal Trial Delays in Australia: Trial Listing Outcomes’ (Research and Public Policy Series Paper No 74, Australian Institute of Criminology, 2007) 30, 42–4, 46.

in England, New Zealand, the United States and South Africa.<sup>101</sup> There is clearly benefit, then, in taking and testing the complainant's evidence as soon as practicable after prosecutorial disclosure.

### E Conclusion

In the adversarial system, testing a witness's evidence by cross-examination is 'the primary evidentiary safeguard'.<sup>102</sup> Conversely, it is clear that due to the adversarial method of testing evidence and the strategies commonly used, evidence elicited in cross-examination may not be accurate and complete when the complainant is a child or has an intellectual disability. These problems are exacerbated by lengthy delays between the initial complaint and testifying at trial. There is a need for change. But in considering any changes it is vital that the innocent are not wrongfully convicted and that the fairness of the trial is not compromised.

## IV RIGHT TO A FAIR TRIAL

### A Fairness beyond the Accused

Any measure that aims to both reduce the trauma experienced by complainants and improve the accuracy of their evidence must not undermine the defendant's fundamental right to a fair trial.<sup>103</sup> The right to a fair trial is a bundle of rights which, under human rights instruments, includes the right '[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.<sup>104</sup> As explained below, the right to cross-examine witnesses is also a component of the right to a fair trial at common law. The right to a fair trial is both a fundamental common law right<sup>105</sup> and an

<sup>101</sup> Henderson, 'Alternative Routes', above n 15, 44–5.

<sup>102</sup> Ellison, 'The Protection of Vulnerable Witnesses in Court', above n 56, 35.

<sup>103</sup> See generally *Dietrich v The Queen* (1992) 177 CLR 292; J J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29.

<sup>104</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(e) ('ICCPR'). This is replicated in the ACT and Victoria which are the only two jurisdictions to have enacted human rights legislation: *Human Rights Act 2004* (ACT) s 22(2)(g); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 25(2)(g)–(h).

<sup>105</sup> See, eg, *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518, 541–2 (Isaacs J); *McKinney v The Queen* (1991) 171 CLR 468, 478 (Mason CJ, Deane, Gaudron and McHugh JJ); *Dietrich v The Queen* (1992) 177 CLR 292, 334–5 (Deane J); *Jago v District Court of New*

internationally recognised human right.<sup>106</sup> International conventions and international jurisprudence are particularly relevant in those Australian jurisdictions that have not enacted human rights instruments.<sup>107</sup> These instruments may influence judicial discretion, the development of the common law, and the interpretation of statutes via various well-established common law interpretive principles.<sup>108</sup> So, for example in *Dietrich v The Queen*, members of the High Court had regard to international human rights treaties and jurisprudence in considering the attributes of a fair trial.<sup>109</sup> In the criminal justice context, the right to a fair trial has been conceived as a defendant-centric right; as primarily, if not exclusively, focussed on ensuring fairness to the defendant.<sup>110</sup> Nevertheless, Australian courts have acknowledged that the right to a fair trial extends beyond the rights of the accused to include the interests of the community and the protection of witnesses.<sup>111</sup> This approach is consistent with the conceptualisation of the right to a fair trial in European and United Kingdom human rights jurisprudence as a ‘triangulation of interests.’ A clear articulation of this approach is that of Lord Steyn in *Attorney General’s Reference (No 3 of 1999)*:

There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.<sup>112</sup>

*South Wales* (1989) 168 CLR 23, 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J); Spigelman, above n 103, 36–7.

<sup>106</sup> ICCPR art 14.

<sup>107</sup> Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 9. See also Terese Henning and Jill Hunter, ‘Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?’ in Paul Roberts and Jill Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Hart Publishing, 2012) 347, 349–50.

<sup>108</sup> Wendy Lacey, ‘Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere’ (2004) 5 *Melbourne Journal of International Law* 108, 109.

<sup>109</sup> (1992) 177 CLR 292, 300, 304–7 (Mason CJ and McHugh J), 334 (Deane J), 351 (Toohey J), 373 (Gaudron J).

<sup>110</sup> See, eg, *R v Ngo* (2003) 57 NSWLR 55, 69 [108] (Stein JA, Sully and Levine JJ).

<sup>111</sup> *Barton v The Queen* (1980) 147 CLR 75, 101 (Gibbs ACJ and Mason J), quoted in *Dietrich v The Queen* (1992) 177 CLR 292, 335 (Deane J); *Jago v District Court of New South Wales* (1989) 168 CLR 23, 33 (Mason CJ), 49–50, 54 (Brennan J); *R v Lodhi* (2006) 199 FLR 250, 263–4 [54]–[57] (Whealy J); *Ragg v Magistrates Court of Victoria* (2008) 18 VR 300, 319 [77] (Bell J); *R v Wilkie* (2005) 193 FLR 291, 305 [54] (Howie J).

<sup>112</sup> [2001] 2 AC 91, 118. For a similar statement in an Australian context, see Justice J Badgery-Parker, ‘The Criminal Process in Transition: Balancing Principle and Pragmatism’ (Pt 1) (1995) 4 *Journal of Judicial Administration* 171, 172.

While this principle has found expression in a number of Australian cases,<sup>113</sup> it is yet to be regularly or consistently applied and its implications are yet to be widely realised.

The triangulation conception of fair trial rights has been endorsed by the House of Lords and the Privy Council, which have accepted that whilst it is ‘axiomatic’<sup>114</sup> under the *European Convention on Human Rights*<sup>115</sup> that a defendant enjoys a ‘fundamental and absolute right’<sup>116</sup> to a fair trial, the notion and content of a fair trial extends beyond the interests of the accused to encompass the ‘triangulation’ of interests identified by Lord Steyn.<sup>117</sup> Similarly, the European Court of Human Rights has observed:

In appropriate cases, principles of fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of persons are at stake ...<sup>118</sup>

‘Despite the [apparent] inherent tensions between these interests’, as the Irish Law Commission observes, ‘the underlying goal is the same — that the guilty are convicted and the innocent acquitted’.<sup>119</sup>

Both Australian and overseas courts view fairness in criminal trials as ‘a constantly evolving concept’ which changes not only from century to century but from decade to decade and according to whichever social and legal values prevail.<sup>120</sup> This evolutionary capacity, together with the conception of fair trials as involving a triangulation of interests, enables reassessment of how the defendant’s fair trial right to cross-examine witnesses might be implemented to overcome unfairness to witnesses often inherent in traditional modes of

<sup>113</sup> See, eg, *Ragg v Magistrates Court of Victoria* (2008) 18 VR 300, 319 [77] (Bell J); *R v Lodhi* (2006) 199 FLR 250, 263–4 [56] (Whealy J).

<sup>114</sup> *R v Horseferry Road Magistrates’ Court; Ex parte Bennett* [1994] 1 AC 42, 68 (Lord Oliver).

<sup>115</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by Protocol No 14 to the *Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 6.

<sup>116</sup> *Brown v Stott* [2001] 2 WLR 817, 851 (Lord Hope). See also *R v Forbes* [2001] 1 AC 473, 487.

<sup>117</sup> *R v A (No 2)* [2002] 1 AC 45, 65 [38] (Lord Steyn). See also *R v H* [2004] 2 AC 134, 146 [12] (Lord Bingham for Lords Bingham, Woolf CJ, Hope, Walker and Carswell).

<sup>118</sup> *PS v Germany* (2003) 36 EHRR 61, [22].

<sup>119</sup> Ireland Law Reform Commission, *Report: Prosecution Appeals and Pre-Trial Hearings*, Report No LRC 81-2006 (2006) 5 [1.03]. See also Gans et al, above n 107, 511.

<sup>120</sup> *R v H* [2004] 2 AC 134, 145–6 [11] (Lord Bingham for Lords Bingham, Woolf CJ, Hope, Walker and Carswell). See also *Dietrich v The Queen* (1992) 177 CLR 292, 328 (Deane J); *State v Donoghue* [1976] IR 325, 350 (O’Higgins CJ); Roberts and Hunter, above n 21, 20.

cross-examination. Encouragement in this endeavour can be obtained from the words of Lord Chief Justice Judge on the need for reform in relation to vulnerable witnesses: ‘One of the great advantages of the common law system ... is that it is a flexible system, capable of steady adaptation to the needs of contemporary society’.<sup>121</sup>

### B *The Role of Cross-Examination in a Fair Trial*

At common law it is accepted that the right to cross-examination is an essential part of the adversarial criminal trial, rather than a right that needs express authority.<sup>122</sup> In *Browne v Dunn*, Lord Halsbury said, ‘[t]o my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given’.<sup>123</sup> Similarly, Wigmore remarked that cross-examination ‘is beyond any doubt the greatest legal engine ever invented for the discovery of truth’.<sup>124</sup> Indeed, as Wigmore indicates, cross-examination is regarded as one of the most important evidentiary safeguards of the adversarial system<sup>125</sup> and as an entrenched right of a defendant. However, it is often forgotten that even Wigmore, immediately after his famous words, recognised the need for cross-examination to be controlled given its potential to distort the truth.<sup>126</sup> Wigmore observed, ‘[a] lawyer can do anything with a cross-examination ... He may, it is true, do more than he ought to do ... [he] may make the truth appear like falsehood’.<sup>127</sup>

This is particularly true for children and witnesses with intellectual disabilities. As discussed in detail in Part III above, for vulnerable witnesses, traditional cross-examination may not expose unreliability so much as produce it. A defendant’s ‘right’ to cross-examination should not justify using

<sup>121</sup> Lord Judge, ‘Vulnerable Witnesses in the Administration of Criminal Justice’ (Speech delivered at the 17<sup>th</sup> Australian Institute of Judicial Administration Oration in Judicial Administration, Sydney, 7 September 2011).

<sup>122</sup> Judge Sleight, above n 3, 16–17. Cf Eastwood and Patton, above n 14, 127, who argue that the right to cross-examination is not a ‘fundamental right’ but instead ‘an incident of the obligation of the court to ensure a fair trial’.

<sup>123</sup> [1894] 6 R 67, 76. See further such Australian cases as *Dayman v Simpson* [1935] SASR 320, 321 (Napier J); *Bulstrode v Trimble* [1970] VR 840, 846–7 (Newton J).

<sup>124</sup> Wigmore, above n 59, 32 [1367].

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.* See also Frank E Vandervort, ‘A Search for the Truth or Trial by Ordeal: When Prosecutors Cross-Examine Adolescents How Should Courts Respond?’ (2010) 16 *Widener Law Review* 335, 335.

methods and techniques known to confuse or mislead vulnerable witnesses, especially where this may lead to inaccurate evidence being adduced at trial.

This proposition finds support in the *Convention on the Rights of the Child*<sup>128</sup> and the *Convention on the Rights of Persons with Disabilities*.<sup>129</sup> The former provides that the child's best interests must be a primary consideration of courts during legal proceedings.<sup>130</sup> The latter stipulates that a person with a disability who is a witness in legal proceedings must be appropriately accommodated in order to facilitate effective and equal participation.<sup>131</sup> Further, the United Nations' *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime* aims to ensure that measures are developed and implemented to make it easier for children to testify.<sup>132</sup>

Additionally, despite the rhetoric concerning the importance of cross-examination and its status as a bastion of the defendant's right to a fair trial, evidence that has not been cross-examined is still admissible in court. This is particularly possible through one of the many common law and statutory exceptions to the hearsay rule.<sup>133</sup> In recent times, recognition that the defendant's 'right' to cross-examination can and should be qualified in certain circumstances<sup>134</sup> has led to the modification overseas of defendants' right to cross-examine vulnerable witnesses. These developments have been accompanied by changes in courts' views of the central importance of cross-examination to defendants' right to a fair trial.<sup>135</sup> The approach of the European Court of Human Rights has been to consider whether the proceedings in

<sup>128</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>129</sup> Opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>130</sup> *Convention on the Rights of the Child* art 3(1). See also arts 12, 39.

<sup>131</sup> *Convention on the Rights of Persons with Disabilities* art 13(1).

<sup>132</sup> *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime*, ESC Res 2005/20 (22 July 2005) [30]–[31], [40]–[42].

<sup>133</sup> See, eg, the exception to the hearsay rule for first-hand hearsay in criminal trials enacted in s 65 of the UEA, which enables the admission of prior representations made by people who are not available to testify and therefore unable to be cross-examined.

<sup>134</sup> See, eg, Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 273 [4.122]; Christine Eastwood, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice Series Paper No 250, Australian Institute of Criminology, May 2003) 4; Eastwood and Patton, above n 14, 30–1.

<sup>135</sup> See, eg, *R v Barker* [2010] EWCA Crim 4 (21 January 2010) [42] (Lord Judge CJ for Lord Judge CJ, Hallett LJ and Macur J); *R v Edwards* [2011] EWCA Crim 3028 (16 November 2011); *R v Watts* [2010] EWCA Crim 1824 (23 July 2010) [17] (Mackay J for Lord CJ, Raftery J and Mackay J).

their entirety are fair, rather than how particular evidence is tested.<sup>136</sup> This approach accords with the trend noted earlier in both Australian and overseas determinations of fair trial issues to balance the interests of defendants, witnesses and the community.

Another change that has occurred in England, that has implications for the centrality of cross-examination to fair trials, is the relaxation of the rule in *Browne v Dunn* insofar as it applies to vulnerable complainants. In *R v Edwards*, for example, the Court of Appeal upheld the trial judge's decision to direct defence counsel not to put the defence case to the young complainant, in particular not to challenge her recollection of events.<sup>137</sup> The trial judge's direction was as follows:

Whilst cross-examination of witnesses is commonly and properly robust, in the case of a very young child it isn't. I shall say to you that you must ask such questions to which you want actual answers, but I will say to the jury that the nature of the defence in this case has been set out in writing, [in a defence case statement] and you are neither required, nor should you, put that to the witness.<sup>138</sup>

In order to maintain the fairness of the trial, the jury was informed of the judge's direction and the need to make allowances for it.<sup>139</sup> The Court of Appeal found that the conduct of the trial had been 'astute, balanced, measured and fair and nothing in it gives us any cause to doubt the safety of the conviction'.<sup>140</sup> *R v Edwards* illustrates that qualification of the defendant's right to cross-examine can be appropriate and that a criminal trial can still be fair when traditional adversarial procedures are modified.

Again we see in these cases recognition that the concept and content of a fair trial involves multiple interests. Importantly, we also see acceptance that cross-examination as traditionally practised can be modified in the interests of vulnerable witnesses without undermining defendants' fair trial rights.

<sup>136</sup> See, eg, *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23, [142]–[143]. See generally Keane, 'Towards a Principled Approach', above n 90, 417–9.

<sup>137</sup> [2011] EWCA Crim 3028 (16 November 2011) [28] (Rafferty LJ for Rafferty LJ, MacDuff J and Judge Jacobs).

<sup>138</sup> *Ibid* [7].

<sup>139</sup> *Ibid* [6]–[7].

<sup>140</sup> *Ibid* [30].

## V MEASURES IMPLEMENTED TO FACILITATE THE RECEPTION OF VULNERABLE WITNESSES' TESTIMONY

A broad range of measures have been enacted in Australia and overseas to facilitate the reception of vulnerable witnesses' testimony and to improve cross-examination.<sup>141</sup> They include limitations on the defendant's right to cross-examine complainants in person in particular cases; the development of best practice guidelines; training for the legal profession; screening witnesses from the defendant; allowing vulnerable witnesses to give evidence out of court via CCTV; permitting them to have a support person with them when testifying; admitting at trial a pre-trial audio-visual recording of part or all of their testimony; and establishment of intermediary programs. While these measures have improved the situation for vulnerable witnesses in very many respects, underlying problems remain, as will be discussed below.

This has therefore prompted the question of whether a solution might not lie in more fundamental change. Specifically, it has stimulated interest in systems similar to those used in inquisitorial systems like Norway, where independent experts conduct the entire examination of vulnerable witnesses. Consideration of reforms enacted to date, and of the research conducted and the recommendations made, has led to the conclusion in this article that if the best possible evidence is to be elicited from children and witnesses with intellectual disabilities, properly trained independent interviewers should conduct video-recorded investigative interviews and evidential examinations of these witnesses before a judicial officer. Those video recordings should then be admitted at trial and constitute the entire testimony of these witnesses.

There is existing precedent in Australia for trained interviewers to conduct recorded interviews of vulnerable witnesses. In New South Wales, for example, Joint Investigative Response Teams — teams of people from NSW Family & Community Services, NSW Police and NSW Health — perform this task. The recorded interviews are admitted at trial as the witnesses' examination-in-chief.<sup>142</sup> However, this process does not obviate the need for the witness to

<sup>141</sup> There are a range of other measures which may improve other aspects of the criminal justice process for vulnerable complainants. For example, victim case management workers may reduce trauma and better identify the nuances of particular disabilities. Likewise, more guilty pleas and less stress could be achieved through creating alternative punishments or a system based on principles of restorative justice. Further, methods used in investigative interviews and examination-in-chief could be improved to enhance the accuracy and cogency of the testimony elicited from a child or intellectually disabled person, which in turn could result in more successful prosecutions. However, such suggestions are beyond the scope of this article, as they do not directly impact on cross-examination.

<sup>142</sup> See *Criminal Procedure Act 1986* (NSW) ss 306R, 306U.

undergo cross-examination in the usual way subsequently at trial. It therefore does not deal with the problem of inappropriate cross-examination. The following sections will consider some of the mechanisms currently deployed in Australia. Discussion of the use of CCTV and screens is omitted because these measures are not directed at modifying the nature or quality of cross-examination.

#### A Best Practice Guidelines

Best practice guidelines have been developed in some Australian jurisdictions, to provide appropriate guidance during the questioning of vulnerable witnesses.<sup>143</sup> Such guidelines have the potential to help ensure questions are asked in an appropriate style and format that avoids the problematic questioning conventions outlined above. Additionally, they provide advice and a standard to assist judges to better monitor cross-examination. For example, the Western Australian *Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability* stipulate that questions should be 'simple' and witnesses should not be accused of 'lying'.<sup>144</sup>

However, these measures are only likely to have a limited effect.<sup>145</sup> While such guidelines may provide some assistance in how to rephrase questions,<sup>146</sup> the examples given are not particularly comprehensive. Lord Judge CJ observed in *R v Barker* that, 'it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness'.<sup>147</sup> Yet advocates who are steeped in the conventions and culture of traditional cross-examination may, in fact, find it quite hard to adjust their questioning techniques. Judges also may find

<sup>143</sup> See, eg, District Court of Western Australia, *Circular to Practitioners CRIM 2010/1: Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability* (8 September 2010) <[http://www.districtcourt.wa.gov.au/\\_files/Circular%20to%20Practitioners%202010-1.doc](http://www.districtcourt.wa.gov.au/_files/Circular%20to%20Practitioners%202010-1.doc)>; Department of the Attorney-General (WA), *Equality Before the Law: Bench Book* (November 2009) 4.4.6–4.4.10 [4.4.3.3.2]–[4.4.3.3.5], 5.5.6–5.5.11 [5.5.5]–[5.5.6] <[http://www.supremecourt.wa.gov.au/\\_files/equality\\_before\\_the\\_law\\_benchbook.pdf](http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf)>; Judicial Commission of New South Wales, *Equality Before the Law: Bench Book* (June 2006) 5407–11 [5.4.3.5]–[5.4.3.7], 6307–11 [6.3.4]–[6.3.5] <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf>>; AIJA, *Bench Book*, above n 3, 92–3 [4.7.3], 95–6 [4.9].

<sup>144</sup> District Court of Western Australia, above n 143, 1 [2.2], 2 [2.8].

<sup>145</sup> Spencer, 'Conclusions', above n 13, 189.

<sup>146</sup> See, eg, Judicial Commission of New South Wales, above n 143, 5407–11 [5.4.3.5]–[5.4.3.7].

<sup>147</sup> [2010] EWCA Crim 4 (21 January 2010) [42] (Lord Judge CJ for Lord Judge CJ, Hallett LJ and Macur J).

it difficult to remember to ensure adherence to appropriate questioning styles, particularly if they have limited experience of child witnesses or witnesses with an intellectual disability.

While guidelines do serve an educational function and set a benchmark for proper practice, entrenched adversarial culture dilutes their value in practice.<sup>148</sup> This is emphasised by the fact that reports of intimidation and confusion remain constant throughout Australia,<sup>149</sup> despite many jurisdictions having rules that impose a duty on courts to disallow annoying, harassing or otherwise inappropriate questions.<sup>150</sup> As noted earlier, the evidence to date is that legislatively imposed mandates have made and will probably make few inroads on abusive or inappropriate cross-examination, due to the reluctance of judges to exercise their discretion to intervene.<sup>151</sup> Accordingly, the potential for non-statutory guidelines to do so would appear slim. Henderson observes that common law restrictions and statutory prohibitions regarding vulnerable witnesses are ‘frequently deliberately ignore[d]’ by advocates.<sup>152</sup> Eastwood and Patton similarly refer to ‘a core of defence lawyers [who] simply refuse to be controlled’.<sup>153</sup> Such research suggests that, at the very least, without appropriate education and training it is impractical to require lawyers and judges to be aware of the appropriate way to question children and witnesses with an intellectual disability and that, therefore, professional guidelines should be supported by appropriate training. Yet, this research also suggests, as is argued below, that education and training may ultimately prove ineffective to dislodge what is a systemically located problem.

<sup>148</sup> Spencer, ‘Conclusions’, above n 13, 189.

<sup>149</sup> See, eg, Cossins, ‘Alternative Models for Prosecuting Child Sex Offences in Australia’, above n 15, 255 [4.42]; ALRC, *Seen and Heard*, above n 28, [14.111].

<sup>150</sup> *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 1906* (WA) s 26. See also *Australian Solicitors’ Conduct Rules*, above n 82, r 21.2.3.

<sup>151</sup> For examples relating to children, see Cossins, ‘Alternative Models for Prosecuting Child Sex Offences in Australia’, above n 15, 268 [4.98]–[4.100]; NSWLRC, *Questioning of Complainants Report*, above n 11, [3.51]–[3.57]. For examples relating to persons with an intellectual disability, see O’Kelly et al, above n 50, 237; ALRC, NSWLRC and VLRC, *Uniform Evidence Law*, above n 53, 146 [5.83]. See further, in relation to vulnerable witnesses generally, Boyd and Hopkins, above n 50.

<sup>152</sup> Henderson, ‘Alternative Routes’, above n 15, 57.

<sup>153</sup> Eastwood and Patton, above n 14, 126.

### B *Training and Education for Advocates and the Judiciary*

It has been established that the judiciary are just as likely to intervene during the questioning of a member of the general population as they are during the questioning of an adult with an intellectual disability.<sup>154</sup> This, in combination with the research discussed above concerning the use of guidelines, suggests the need for improved and regularly reinforced education and training for advocates and the judiciary.<sup>155</sup>

Of course, knowledge gained from intermittent or even undergraduate training may not be readily retained. It was suggested in England that some lawyers could be trained to be specialised ‘young witness practitioners.’<sup>156</sup> This would clearly overcome the problem of knowledge attrition. However, the idea of accredited child examiners gained little support from the legal profession. Rather, general education on cross-examination was favoured.<sup>157</sup>

Accordingly, it has been argued that education and training can have limited impact because the problem of inappropriate cross-examination is systemic. It resides in the very fabric of the adversarial process, which promotes and entrenches particular questioning conventions, prevents their identification by the legal profession as unfair and, consequently, impedes their abandonment.<sup>158</sup> It has been suggested that, ‘[t]he culture of the Bar and philosophy of accusatorial advocacy are fundamentally opposed to making many of the necessary changes.’<sup>159</sup> For example, because it is defence lawyers’ aim during cross-examination to advance their clients’ interests,<sup>160</sup> they may necessarily feel compelled to exploit witnesses’ vulnerabilities in cross-examination.<sup>161</sup> In this environment, education and training, while necessary, may nevertheless be insufficient to achieve fundamental change.

<sup>154</sup> O’Kelly et al, above n 50, 229, 237.

<sup>155</sup> Martine B Powell, ‘Improving the Reliability of Child Witness Testimony in Court: The Importance of Focusing on Questioning Techniques’ (2005) 17 *Current Issues in Criminal Justice* 137, 141; Lord Judge, above n 121, 12, Boyd and Hopkins, above n 50, 164–5.

<sup>156</sup> Joyce Plotnikoff and Richard Woolfson, “Kicking and Screaming” — The Slow Road to Best Evidence’ in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 37.

<sup>157</sup> Ibid.

<sup>158</sup> See, eg, Boyd and Hopkins, above n 50, 162–4.

<sup>159</sup> Henderson, ‘Alternative Routes’, above n 15, 57.

<sup>160</sup> Glissan, above n 1, 74; Du Cann, above n 58, 95.

<sup>161</sup> ALRC, *Seen and Heard*, above n 28, [14.111].

### C Prerecorded Evidence

In all Australian jurisdictions except the Commonwealth, there is provision for particular witnesses' evidence to be given and recorded in pre-trial proceedings in the absence of the jury and then replayed at trial.<sup>162</sup> In the Australian Capital Territory, Northern Territory, Tasmania, and Victoria, this facility is only available in trials for prescribed offences.<sup>163</sup> Additionally, Victoria makes a distinction between vulnerable witnesses generally, and those who are complainants:<sup>164</sup> for vulnerable *complainants* in sexual assault trials, all prerecorded evidence is admissible; for vulnerable witnesses generally, only prerecorded evidence-in-chief is admissible but is available in serious offence, as well as sexual assault, trials. Similarly, in New South Wales, the evidence taken is confined to use as all or part of the witnesses' evidence-in-chief.<sup>165</sup>

The Western Australian prerecording model (in operation since 1992 in relation to children)<sup>166</sup> is now firmly embedded in the State's criminal justice process. Defence and prosecution counsel, as well as the judiciary, agree that it has improved the process in a number of important ways.<sup>167</sup> The benefits identified from prerecording the entirety of vulnerable witnesses' testimony include: maximising the quality of the witness's account by capturing it at the earliest opportunity;<sup>168</sup> relieving witnesses from the stress of testifying in a traditional court environment;<sup>169</sup> potentially encouraging early pleas;<sup>170</sup> and amendment of indictments because of enhanced assessment by the parties of

<sup>162</sup> *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence Act* (NT) s 21B; *Evidence Act 1977* (Qld) ss 21A, 21AI–21AO; *Evidence Act 1929* (SA) s 13A(2)(b); *Evidence (Children and Special Witnesses) Act 2001* (Tas), ss 6, 6A; *Criminal Procedure Act 2009* (Vic) pt 8.2 div 5, pt 8.2 div 6; *Evidence Act 1906* (WA) ss 106I, 106RA.

<sup>163</sup> *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B (sexual offences); *Evidence Act* (NT) s 21B(1) (sexual or serious violence offences); *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 6 ('prescribed proceedings'); *Criminal Procedure Act 2009* (Vic) s 369 (sexual offences).

<sup>164</sup> Compare *Criminal Procedure Act 2009* (Vic) pt 8.2 div 6 with pt 8.2 div 5.

<sup>165</sup> *Criminal Procedure Act 1986* (NSW) s 306U.

<sup>166</sup> See *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) item 8.

<sup>167</sup> Hanna et al, above n 15, 150–1; Judge Sleight, above n 3, 9–14. But for problems with the use of prerecorded evidence, see Kelly Richards, 'Child Complainants and the Court Process in Australia' (Trends and Issues in Crime and Criminal Justice, Paper No 380, Australian Institute of Criminology, July 2009) 5.

<sup>168</sup> Davies, Henderson and Hanna, above n 4, 350.

<sup>169</sup> ALRC, *Seen and Heard*, above n 28, [14.46].

<sup>170</sup> See Hanna et al, above n 15, 151.

the evidence.<sup>171</sup> Additionally, prerecording witnesses' testimony offers the potential to encourage greater judicial intervention in cross-examination. This is because the recordings can be edited in order to remove any offending questioning as well as the judicial intervention itself, thus eliminating possible juror perceptions of judicial bias as a result of the intervention.<sup>172</sup>

In contrast to Western Australia, the extent to which the opportunity to prerecord vulnerable witnesses' testimony is utilised in other Australian jurisdictions varies and may depend on the degree to which the process is supported by prosecutorial agencies. Accordingly, several criminal justice agencies have reported that prerecording of testimony is frequently used and regarded as working well — particularly in sexual offences trials in remote communities, where it is seen as having increased the reporting rates of offences against Indigenous women.<sup>173</sup> In contrast, in New South Wales, the Director of Public Prosecutions ('DPP'), as recently as 2010, has expressed opposition to the routine use of prerecorded evidence, arguing that it would add another step in the trial process and possibly cause further delay.<sup>174</sup> This view ignores the long history of satisfaction with the operation of the scheme in Western Australia and the varied nature of its benefits, including for complainants. It evidences an administrative-centred focus rather than a witness-centred approach to the process. It must also be remembered that because there is no provision in New South Wales for the entirety of witnesses' testimony to be prerecorded, the New South Wales DPP's opposition is not based on experience of a full prerecording model.

In South Australia, prerecorded evidence is admissible under the general discretion conferred on the court by s 13A(2)(b) of the *Evidence Act 1929* (SA).<sup>175</sup> Additionally, video records of initial interviews with police or specialists are not expressly admissible under the *Evidence Act 1929* (SA), but s 34CA has been used to that effect.<sup>176</sup> Recent amendments<sup>177</sup> to the *Evidence*

<sup>171</sup> Davies, Henderson and Hanna, above n 4, 351; Judge Sleight, above n 3, 13.

<sup>172</sup> This has been identified as a reason for judicial reluctance to intervene in cross-examination. For a more detailed analysis, see Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments — "Plus Ça Change" or Prospects New?' (2013) 37 *Criminal Law Journal* 155, 159.

<sup>173</sup> See ALRC, *Family Violence Report*, above n 25, 1229–30 [26.172]–[26.174].

<sup>174</sup> *Ibid* 1230 [26.176].

<sup>175</sup> See also *Summary Procedure Act 1921* (SA) s 104.

<sup>176</sup> There is confusion surrounding the use of this provision for this purpose. A literal reading of s 34CA allows for prerecorded evidence to be admitted, and indeed it has been in a number of cases, often without defence objection: see, eg, *H, SA v Police* (2013) 116 SASR 547, 551 [14]–[16], 557 [53] (Kelly J); *R v J, AP* [2013] SASFC 121 (14 November 2013) [10], [12]

*Act 1929* (SA) allow out-of-court statements to be admitted as truth of their contents without the witness being available for cross-examination if the witness does not testify due to fear and it is in the interests of justice to do so.<sup>178</sup> Fear is given a broad definition.<sup>179</sup> While the section is yet to be used, a very similar provision in England has been held not to contravene a defendant's right to a fair trial, even if it constitutes the sole or dominant evidence at trial.<sup>180</sup> If it is fair to remove direct cross-examination when the witness is fearful, it should also be fair to remove direct cross-examination when the complainant is a young child or intellectually disabled person. This is further supported by models in operation in such countries as Norway, discussed below, where there is no direct questioning of vulnerable witnesses by either prosecution or defence counsel.

The New South Wales regime that permits pre-trial prerecorded statements to be used only for the purpose of evidence-in-chief clearly can have no impact upon how cross-examination is conducted. Further, they cannot ameliorate problems associated with delay in testifying. Nevertheless, it is acknowledged that these provisions may improve the overall position of children and witnesses with intellectual disabilities by maximising the cogency and quality of their examination-in-chief. New South Wales, Victoria, Western Australia, Tasmania and the Commonwealth all allow audio-visual records of police (or other investigating officials) interviews with a child or intellectually disabled person to be used as admissible evidence, either in addition to, or in place of, examination-in-chief.<sup>181</sup> Such videos are now

(Kelly J); *R v Douglass* (2012) 290 ALR 699, 704–5 [17]–[18] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *R v Byerley* (*Question of Law Reserved No 1 of 2010*) (2010) 107 SASR 517; *R v J, JA* (2009) 105 SASR 563, 574–5 [47]–[55] (Duggan J). However, this was not the apparent intention of the provision. The South Australian Attorney-General in late 2011 foreshadowed new legislation to provide for the mandated taking and use of prerecorded interviews with children and witnesses with an intellectual disability in criminal cases involving sexual or violent offence: see Rau, above n 26. However, at April 2014, no Bill has been introduced to State Parliament.

<sup>177</sup> *Statutes Amendment (Serious and Organised Crime) Act 2012* (SA) s 41.

<sup>178</sup> *Evidence Act 1929* (SA) s 34KA(2)(e), (4).

<sup>179</sup> *Ibid* s 34KA(3), which specifies that 'fear is to be widely construed and includes, for example, fear of the death or injury of another person or of financial loss'.

<sup>180</sup> See *R v Sellick* [2005] 1 WLR 3257.

<sup>181</sup> *Crimes Act 1914* (Cth) s 15YM; *Criminal Procedure Act 1986* (NSW) ss 306R, 306U; *Criminal Procedure Act 2009* (Vic) s 367 with *Criminal Procedure Regulations 2009* (Vic) reg 5; *Evidence Act 1906* (WA) s 106H(2c). It should be noted that *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5(1) only applies to children.

regularly, if not invariably, used as evidence in these jurisdictions.<sup>182</sup> One benefit of admitting the record of an investigative interview is that the interview is taken at a time when the events are fresher in a witness's mind, even more so than at a pre-trial recording. Further, the evidence is often received in a more free-flowing narrative and logical sequence,<sup>183</sup> which is known to enhance the quality and accuracy of a child's testimony.<sup>184</sup>

However, a disadvantage of admitting a police interview as evidence is that editing will often be required as not everything said in an interview will be admissible.<sup>185</sup> The objectives of an investigative interview and evidential examination are distinct. It may be impractical to restrict investigators in the questions they ask so as to conform to the rules of admissibility.

There are other difficulties with prerecorded evidence more generally. In other countries where prerecording is permitted by legislation,<sup>186</sup> it has been suggested that it is not widely used due to the resistance or ignorance of practitioners.<sup>187</sup> There are also potential logistical factors such as court costs and resources, and the availability of judges and counsel.<sup>188</sup> Conflict with hearsay rules and an emphasis on the adversarial process have also been offered as reasons for the failure to successfully and uniformly adopt prerecorded evidence in some countries.<sup>189</sup>

Prerecording the entirety of witnesses' evidence may have varied practical results. It can sometimes ameliorate problems associated with stress and

<sup>182</sup> See, eg, Eastwood and Patton, above n 14, 18–22. A study of the different regimes for the introduction and use of prerecorded evidence is beyond the scope of this article.

<sup>183</sup> Julianne Read and Martine Powell, 'Investigative Interviewing of Child Sex Offender Suspects: Strategies to Assist the Application of a Narrative Framework' (2011) 8 *Journal of Investigative Psychology and Offender Profiling* 163, 164.

<sup>184</sup> *Ibid* 163–5.

<sup>185</sup> See AIJA, *Bench Book*, above n 3, 100 [5.3].

<sup>186</sup> See *Evidence Act 2006* (NZ) s 105(1)(iii); *Criminal Procedure (Scotland) Act 1995* (UK) c 46, ss 271A, 271I; *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 28. In the United States, 38 of the 50 states have provisions to prerecord evidence: see Henderson, 'Alternative Routes', above n 15, 51, citing Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2010) 652.

<sup>187</sup> Henderson, 'Alternative Routes' above n 15, 48–50.

<sup>188</sup> Ministry of Justice (NZ), 'Alternative Pre-Trial and Trial Processes for Child Witnesses in New Zealand's Criminal Justice System' (Issues Paper, 2011) 23 [78]; *M v R* [2012] 2 NZLR 485, [36a]–[36b]; ALRC and NSWLRC, *Family Violence Report*, above n 25, 1231 [26.178] n 246.

<sup>189</sup> See Henderson, 'Alternative Routes', above n 15, 49, 51–2, discussing the United States.

delay,<sup>190</sup> but this benefit is not guaranteed. Complainants may still be required to testify at trial when new issues arise or new evidence becomes available, although this appears to happen rarely in practice.<sup>191</sup> Further, prerecording may not remove the problem of developmentally inappropriate questioning and confusing language. Whether it will do so depends greatly upon the commitment of the judiciary to utilising the process to control cross-examination. Although the absence of the jury should encourage this to occur,<sup>192</sup> it may not always do so in practice. If judges adhere to the non-interventionist stance traditionally maintained in the trial proper,<sup>193</sup> then the process may offer little scope to alleviate the problems of inappropriate cross-examination.

#### D *Intermediaries in Adversarial Systems*

The role of a court-appointed intermediary is to reduce miscommunication and stress, and increase the comprehension of vulnerable witnesses.<sup>194</sup> Intermediary schemes take a variety of forms.

##### 1 *The English Model*

In 1989, the *Pigot Report* recommended the use of a specialist interlocutor to relay questions to child witnesses.<sup>195</sup> A scheme of this kind was rolled out nationally in 2008.<sup>196</sup> In her most recent survey, Cooper notes that as of 23 April 2012, there were 144 registered intermediaries on the register, and between September 2010 to August 2011, 1245 referrals to the service were accepted.<sup>197</sup>

<sup>190</sup> Hal Jackson, 'Children's Evidence in Legal Proceedings — The Position in Western Australia' in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 75, 81.

<sup>191</sup> Henderson, 'Alternative Routes', above n 15, 47.

<sup>192</sup> See Henning, 'Obtaining the Best Evidence', above n 172.

<sup>193</sup> See, eg, Eastwood and Patton, above n 14, 126; Henning, 'Control of Cross-Examination', above n 49.

<sup>194</sup> See Joyce Plotnikoff and Richard Woolfson, 'The "Go-Between": Evaluation of Intermediary Pathfinder Projects' (Research Summary, Ministry of Justice (UK), 2007) 1; Davies, Henderson and Hanna, above n 4, 357.

<sup>195</sup> Home Office (UK), 'Report of the Advisory Group on Video Evidence', above n 99, 24, 70.

<sup>196</sup> *Youth Justice and Criminal Evidence Act 1999* (UK), c 23, s 29. See Plotnikoff and Woolfson, 'Kicking and Screaming', above n 156, 31.

<sup>197</sup> Penny Cooper, 'Tell Me What's Happening 3: Registered Intermediary Survey 2011' (City University London, 2012) 4.

The intermediaries perform a variety of functions including translation and communication functions pre-trial and at trial, the preparation of reports for the courts about witnesses' comprehension and communication capacities, appropriate styles of questioning and special facilities that they might need.<sup>198</sup> The intermediary may sit with the witness in court and indicate to the court any questions that require rephrasing.<sup>199</sup> Intermediaries undergo a training program before being placed on a national register.<sup>200</sup> Intermediaries are usually assigned to witnesses by the court on the basis of their area of specialisation.<sup>201</sup> For example, they may have experience in dealing with people with down syndrome or autism.

The scheme has attracted judicial support<sup>202</sup> but has produced mixed results in practice. The benefits of the English intermediary scheme include better monitoring of counsel's manner, the provision of assistance in the identification of developmentally inappropriate questioning, identification and implementation of measures to facilitate the giving of evidence.<sup>203</sup> However, inappropriate questioning continues to occur<sup>204</sup> with consequent stress and confusion for vulnerable witnesses. Appropriate procedures and measures are not followed in approximately half of the instances where an intermediary is used.<sup>205</sup> In her 2009 survey, Cooper suggested that 'intermediaries need to be very assertive to get judges and advocates to adopt best practice'.<sup>206</sup> Getting others to adopt best practice remains a difficulty: in 2011, the majority of intermediaries who responded to Cooper's survey said that the

<sup>198</sup> See Davies, Henderson and Hanna, above n 4, 357.

<sup>199</sup> Ibid.

<sup>200</sup> Plotnikoff and Woolfson, 'Kicking and Screaming', above n 156, 31.

<sup>201</sup> Victims and Witnesses Unit, 'The Registered Intermediary Procedural Guidance Manual', (Ministry of Justice (UK), 2012) 9–11 [1.23].

<sup>202</sup> See, eg, *R v Barker* [2010] EWCA Crim 4 (21 January 2010) [24] (Lord Judge CJ for Lord Judge CJ, Hallett LJ and Macur J); *R v Watts* [2010] EWCA Crim 1824 (23 July 2010) [17] (Mackay J for Lord Judge CJ, Rafferty and Mackay JJ).

<sup>203</sup> See generally Davies, Henderson and Hanna, above n 4, 357–8; Plotnikoff and Woolfson, 'The "Go-Between"', above n 194, 5–6.

<sup>204</sup> See Davies, Henderson and Hanna, above n 4, 357–8.

<sup>205</sup> See Cooper, 'Registered Intermediary Survey 2011', above n 197, 6–7; Penny Cooper, 'Tell Me What's Happening 2: Registered Intermediary Survey 2010' (City University London, 2011) 7–8; Penny Cooper, 'Tell Me What's Happening: Registered Intermediary Survey 2009' (City University London, 2009) 4.

<sup>206</sup> Cooper, 'Registered Intermediary Survey 2009', above n 205, 7.

'ground rules' agreed to before the hearing were breached in most or all of their trials.<sup>207</sup>

## 2 *The South African Model*

In contrast to the English intermediary scheme, the South African model affords intermediaries a more limited interpretive function. Usually, intermediaries sit in another room with the witness, and listen to questions from the prosecution and the defence (who are in the courtroom), through an ear-piece before explaining them to witnesses.<sup>208</sup> The court can observe the child, but the child cannot see or hear what is happening in the court.<sup>209</sup> By translating or adapting questions, intermediaries reduce mistakes due to miscommunication.<sup>210</sup> The scheme has been praised as an effective means of improving children's testimony.<sup>211</sup> Moreover, even though the intermediary rephrases questions, this is not considered to undermine the fairness of the trial.<sup>212</sup> Versions of the scheme have been adopted in Namibia and Zimbabwe.<sup>213</sup>

Initially there were difficulties in achieving consistent implementation of the scheme and, in particular, in determining who qualified for the assistance of an intermediary.<sup>214</sup> As a result, the law was amended to allow persons aged under 18 years and witnesses under the 'mental age of 18 years' to use an intermediary.<sup>215</sup> Further, courts are now required to give reasons for refusing to allow the use of intermediaries.<sup>216</sup> However, the South African system still struggles on a practical level with problems arising from delays between the initial complaint and trials, a lack of electronic equipment to support the

<sup>207</sup> Cooper, 'Registered Intermediary Survey 2011', above n 197, 13.

<sup>208</sup> See *Criminal Procedure Act 1977* (South Africa) s 170A. See also Carmel R Matthias and F Noel Zaal, 'Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa' (2011) 19 *International Journal of Children's Rights* 251, 252.

<sup>209</sup> Matthias and Zaal, above n 208, 252.

<sup>210</sup> *Ibid.*

<sup>211</sup> See Henderson, 'Alternative Routes', above n 15, 68.

<sup>212</sup> *DPP (Transvaal) v Minister of Justice and Constitutional Development* [2009] 4 SA 222. See also Davies, Henderson and Hanna, above n 4, 356; Matthias and Zaal, above n 208, 258, 267.

<sup>213</sup> Tendai Marowa-Wilkerson, 'A Comparative Analysis of the Intermediary Systems in South Africa, Namibia, Zimbabwe and Ethiopia' (LLM Thesis, Rhodes University, 2011) 73–107, 125–8.

<sup>214</sup> Matthias and Zaal, above n 208, 256–7.

<sup>215</sup> *Criminal Procedure Act 1977* (South Africa) s 170A(1); Matthias and Zaal, above n 208, 256.

<sup>216</sup> *Criminal Procedure Act 1977* (South Africa) s 170A(7).

scheme, insufficient available training and unattractive work conditions, which make recruitment difficult.<sup>217</sup>

### 3 *Within Australia*

Intermediaries have not been popular amongst Australian legislatures, with only two jurisdictions having intermediary-esque provisions. Western Australia has a provision allowing persons to act as a 'communicator' for child witnesses,<sup>218</sup> which may allow for the involvement of a person similar to an intermediary. However, the section is yet to be subject to any judicial consideration by superior courts, suggesting it may be rarely used.<sup>219</sup> In New South Wales, there is also statutory provision for vulnerable persons to be assisted in giving evidence by a support person.<sup>220</sup> As in Western Australia, it is not known to what extent this facility is used. However, there appears to be a view abroad that this provision relates to a person whose function is to provide nothing more than emotional support to the vulnerable witness, and does not extend to assisting the witnesses' comprehension and communication of evidence.<sup>221</sup> This limited view may mean that the full potential of the relevant provisions is not exploited. Yet quite clearly their wording allows for much greater assisted communication than mere emotional support. In this respect, the New South Wales provision can be contrasted with the South Australian equivalent which explicitly precludes a person from 'interfer[ing] in the proceedings'.<sup>222</sup>

Noting the overseas experience, barriers to the greater implementation of intermediary schemes in Australia could include the difficulty in ensuring the availability of intermediaries in remote and regional locations, the financial implications of doing so, and problems in appointing and training sufficient

<sup>217</sup> Matthias and Zaal, above n 208, 252.

<sup>218</sup> *Evidence Act 1906* (WA) s 106F.

<sup>219</sup> In *Bourne v Elliss* [2001] WASCA 290 (27 September 2001) [6]–[7], Malcolm CJ expressed his regret that the section had not been utilised in that case due to the difficulty experienced by a child witness in giving evidence.

<sup>220</sup> *Criminal Procedure Act 1986* (NSW) s 306ZK. See also s 275B, which allows for any witness to be assisted in communicating with the court if they usually require assistance in communicating on a daily basis.

<sup>221</sup> This approach is suggested by Department of Attorney-General and Justice, New South Wales Government, 'Information for Court Support People' (9 October 2013) <[http://www.victimsservices.lawlink.nsw.gov.au/vss/VS\\_courtsupportpeopleinfo.html](http://www.victimsservices.lawlink.nsw.gov.au/vss/VS_courtsupportpeopleinfo.html)>. See also Henning, 'Obtaining the Best Evidence', above n 172, 165.

<sup>222</sup> *Evidence Act 1929* (SA) s 12, which applies to children under 12 years of age.

numbers of intermediaries to ensure equal access to them.<sup>223</sup> Research has shown that intermediary schemes can improve the effective participation of children and witnesses with intellectual disabilities in the criminal justice process.<sup>224</sup> Nevertheless, these schemes are not without problems and unless they are applied with sufficient rigour and understanding of their intent, they may not eliminate the problems of traditional cross-examination. Research on the English scheme in particular shows that where intermediaries are too tentative in fulfilling their interventionist task or where courts do not adequately support and enforce their role in this regard with counsel, inappropriate, unfair and misleading cross-examination will continue unabated.<sup>225</sup>

The reason for the non-utilisation of the intermediary-esque schemes legislated for in Western Australia and New South Wales is unclear. However, Judge Jackson notes that there is no recognised training course for ‘communicators’ in Western Australia.<sup>226</sup> This shows that it is not enough to legislate for such schemes. Unless they are adequately resourced and provision is made for the necessary infrastructure, they simply cannot operate. The discussion in this section suggests that the strengthening of intermediary schemes may be necessary if they are to achieve their full potential. Specifically, what may be required is devolution of full responsibility for questioning to the intermediary and the removal of counsel from the process of direct questioning. This possibility is considered below.

### E *The Inquisitorial Approach*

The adoption of some of the features of an inquisitorial system has been suggested as a solution to the problems that arise in the cross-examination of

<sup>223</sup> See Henning, ‘Obtaining the Best Evidence’, above n 172, 170–1.

<sup>224</sup> See, eg, Bar Council of England and Wales, Submission to the European Commission, *Communication on the Rights of the Child 2011–2014*, September 2010, 3; Hanna et al, above n 15, 186–7; Brendan M O’Mahony, ‘The Emerging Role of the Registered Intermediary with the Vulnerable Witness and Offender: Facilitating Communication with the Police and Members of the Judiciary’ (2009) 38 *British Journal of Learning Disabilities* 232; Emma Davies et al, ‘Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models’ (Institute of Public Policy, AUT University, 2011) 23–6.

<sup>225</sup> For an evaluation of the English intermediary scheme, see the surveys of intermediaries by Cooper, above nn 197, 205.

<sup>226</sup> Judge Hal Jackson, ‘Child Witnesses in the Western Australian Criminal Courts’ (Paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Australian Institute of Criminology, Adelaide, 1–2 May 2003) 8–9.

vulnerable witnesses.<sup>227</sup> These approaches may help to alleviate some of the problems experienced by vulnerable witnesses which are so entrenched in the adversarial system. The mechanisms adopted for vulnerable witnesses in inquisitorial countries vary across jurisdictions. However, the approach that appears to offer most benefits for vulnerable witnesses is that used in Norway, which will be discussed in detail further below. Norway is also of particular interest as it has more in common with the adversarial system than some other fully inquisitorial jurisdictions.<sup>228</sup>

Inquisitorial systems are based on the concept of inquiry rather than contest.<sup>229</sup> The focus of inquisitorial systems is on extensive pre-trial investigation and evidence gathering processes, which are subject to extensive oversight from judicial officers as an evidential safeguard.<sup>230</sup> This process rarely requires victims to testify at trial or to be cross-examined directly by defence counsel and yet it is considered to be fair to the defendant.<sup>231</sup> The inquisitorial system aims to discover the truth through investigation. This is fundamentally distinct from the adversarial process, which is based on the assumption that the truth will best emerge from a partisan contest between two evenly matched competing sides<sup>232</sup> (although this premise is often doubted in practice).<sup>233</sup>

<sup>227</sup> See, eg, Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 331–2 [6.72]–[6.74], 356–8 [6.183]–[6.186].

<sup>228</sup> Hanna et al, above n 15, 164.

<sup>229</sup> Gans et al, above n 107, 510–11.

<sup>230</sup> Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 312–13 [6.3]–[6.8]; Ellison, 'The Protection of Vulnerable Witnesses in Court', above n 56, 40.

<sup>231</sup> See Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 313 [6.10]–[6.11]; Davies, Henderson and Hanna, above n 4, 358.

<sup>232</sup> See, eg, James J Tomkovicz, *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution* (Greenwood Press, 2002) 48; Brian A Grosman, 'The Role of the Prosecutor: New Adaptations in the Adversarial Concept of Criminal Justice' (1968) 11 *Canadian Bar Journal* 580, 580; *Commissioner of Federal Police v Propend Finance Ltd* (1997) 188 CLR 501, 588 (Kirby J), quoting *Regional Municipality of Ottawa-Carleton v Consumers' Gas Co Ltd* (1990) 74 DLR (4<sup>th</sup>) 742, 748 (O'Leary J).

<sup>233</sup> See, eg, Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031, 1032–4; Justice D A Ipp, 'Reforms to the Adversarial Process in Civil Litigation' (Pt 1) (1995) 69 *Australian Law Journal* 705, 713–15; Mirjan Damaška, 'Presentation of Evidence and Factfinding Precision' (1975) 123 *University of Pennsylvania Law Review* 1083, 1093–5; Cosmas Moisidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology, 2008) 239.

Some commentators support a move beyond traditional adversarial cross-examination to ensure fairness for all parties in the criminal justice process.<sup>234</sup> However, any call for a wholesale transformation to an inquisitorial process faces formidable obstacles. For example, the current South Australian Attorney-General, John Rau, noted that ‘it would be a very large step indeed to introduce an inquisitorial court process for determination of criminal matters’ and that such a development would give rise to ‘a huge number of philosophical and practical issues’.<sup>235</sup> It has been argued that a ‘change to an inquisitorial system, even if it could be shown to be desirable, would be so fundamental in its effect upon institutions that had taken centuries to build as to be impossible on political and practical grounds’.<sup>236</sup> Indeed, for Sir Anthony Mason, the adoption of an inquisitorial system would be an ‘extraordinary act of faith’:

It would be contrary to our traditions and culture, it would generate massive opposition, and it would call for expertise that we do not presently possess and at the end of the day we would have a new system without a demonstrated certainty that it would be superior to our own.<sup>237</sup>

It has been suggested that increasingly the common law legal system is adopting ‘non-adversarial’ elements.<sup>238</sup> This trend is most evident in the civil jurisdiction,<sup>239</sup> but is also evident in such developments as comprehensive pre-trial criminal case management<sup>240</sup> and the advent of therapeutic justice

<sup>234</sup> See, eg, Cossins, ‘Alternative Models for Prosecuting Child Sex Offences in Australia’, above n 15, 305–10 [5.120]–[5.132], 368–71 [6.230]–[6.252]; Spencer, ‘Conclusions’, above n 13, 193–9; Henderson, ‘Alternative Routes’, above n 15, 74.

<sup>235</sup> ABC News, ‘Current Affairs Documentary: Disability’, *PM: The Full Story*, 11 January 2012 (John Rau) <<http://www.abc.net.au/pm/content/2012/s3405854.htm>>.

<sup>236</sup> Francis Bennion, ‘The New Prosecution Arrangements: The Crown Prosecution Service’ [1986] *Criminal Law Review* 3, 6 n 15, citing United Kingdom, *Report of the Royal Commission on Criminal Procedure*, Cm 8092 (1981) [1.8].

<sup>237</sup> Sir Anthony Mason, ‘The Future of the Adversarial Justice’ (Speech delivered at the 5<sup>th</sup> AIJA Oration, Brisbane, 1993) <<http://www.aija.org.au/online/docs/mason.doc>>.

<sup>238</sup> ALRC, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) [5.1].

<sup>239</sup> See, eg, Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006) 4–10.

<sup>240</sup> See Justices P Johnson and M F Latham, ‘Criminal Trial Case Management: Why Bother?’ (Paper presented at the AIJA Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 9 September 2011).

models and specialised ‘problem solving’ criminal courts.<sup>241</sup> Nevertheless, the view remains that the common law criminal trial is ‘the purest expression of the adversary system’.<sup>242</sup> Australian criminal trials will not readily be transformed into an inquisitorial process. This does not mean, however, that it cannot be improved. Accordingly, it is suggested that there is one aspect of the Norwegian system that might be introduced in Australia for the benefit of vulnerable witnesses without disturbing the essential characteristics of the adversarial trial — the use of trained interviewers to elicit the entirety of the testimony of vulnerable witnesses.

Section 239 of the *Criminal Procedure Act* (Norway) sets out the procedure for the examination of vulnerable witnesses in ‘cases of sexual felonies or misdemeanours’ or ‘other criminal matters when the interests of the witness so indicate’.<sup>243</sup> The vulnerable witness is either assisted by a ‘well-qualified person’ in the examination, or the examination is conducted by the ‘well-qualified person subject to the judge’s control’.<sup>244</sup> ‘Well-qualified’ persons are trained in best practice procedures for eliciting complete and accurate evidence.<sup>245</sup> The interview is linked by video to the judge, prosecution and defence lawyers in another room.<sup>246</sup> After the interviewer takes a comprehensive account of the events, the judge, prosecution and defence counsel, who watch via CCTV link, have the opportunity to ask the interviewer to put further questions on their behalf to the witness.<sup>247</sup> They do not devise the precise questions to be asked or put questions directly to the witness. This process is repeated until all the parties are satisfied that sufficient evidence has been taken and adequately scrutinised. The video of the interview can then be accepted in court as the totality of the evidence, with no need for the child to

<sup>241</sup> See, eg, Bruce J Winick, ‘Therapeutic Jurisprudence and Problem Solving Courts’ (2002) 30 *Ford Urban Law Review* 1055, 1060–1; Arie Frieberg, ‘Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms’ (2011) 8 *European Journal of Criminology* 82.

<sup>242</sup> Martin Blackmore, ‘Equality of Arms in an Adversary System’ (Paper presented at the International Association of Prosecutors Annual Conference, Cape Town, 4 September 2000) <<http://www.odpp.nsw.gov.au/speeches/Final%20paper%20Capetown.htm>>.

<sup>243</sup> Translation approved by Norwegian Ministry of Justice and the Police, Legislation Department (2006).

<sup>244</sup> *Criminal Procedure Act* (Norway) s 239.

<sup>245</sup> Trond Myklebust, ‘The Position in Norway’ in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing, 2012) 147, 158.

<sup>246</sup> *Ibid* 157.

<sup>247</sup> *Ibid* 158.

attend or be cross-examined.<sup>248</sup> A complainant is usually referred for treatment and support following the interview.<sup>249</sup> In contrast to programs that utilise intermediaries as quasi-interpreters or that give them an interventionist role to ensure the appropriateness of questions asked, trained interviewers in Norway have the principal responsibility for eliciting evidence from vulnerable witnesses, rather than ultimate control remaining in the hands of counsel. Further, in part due to the interview being overseen by judge, prosecution and defence, this mode of questioning does not appear to have given rise to any internal conflict in the interviewer's role in eliciting sufficient evidence for both the defence and prosecution.<sup>250</sup> As Hanna, Davies, Henderson, Crothers and Rotherham note, in this way, 'Norway retains the essential two-party nature of the adversarial proceeding'.<sup>251</sup> Moreover, because the aim is to elicit as much accurate and reliable evidence as possible from the witness and to do so in a way that avoids the problems generated by traditional cross-examination, there is no need for interviewers to assume differing stances or roles (pro-prosecution or pro-defence) during questioning. This may assist in avoiding any potentially negative implications for witnesses, were such a change in role to occur.

The process used in Norway must 'be carried out no later than two weeks after the criminal offence has been reported to the police, unless special reasons indicate that the examination ... should be carried out later'.<sup>252</sup> After the initial interview, it is very rare for a child to be re-interviewed.<sup>253</sup> This obviates the need for events to be recounted to multiple people over many months as may occur in Australia. Because of the immediacy and lack of repetition of this process, it is more likely to elicit accurate testimony, which will in turn help prosecutors and the defence to make appropriate decisions about the case. The process also promotes faster recovery for complainants because of the early conclusion of their involvement in the trial. Additionally, it prevents the defence from attempting to exploit a witness's vulnerability in order to advance the defence case.

This system for the cross-examination of vulnerable witnesses could potentially be introduced in an adversarial system. In order for this process to be

<sup>248</sup> Ibid.

<sup>249</sup> Ibid 164–5.

<sup>250</sup> Hanna et al, above n 15, 163–4.

<sup>251</sup> Ibid.

<sup>252</sup> *Criminal Procedure Act* (Norway) s 239.

<sup>253</sup> Myklebust, above n 245, 157–8.

implemented in Australia, it must satisfy the legitimate goals that cross-examination is designed to achieve. This means that it must provide adequate opportunity for the defendant to challenge the content and credibility of prosecution witnesses' testimony. In this regard, the Norwegian process allows extensive questioning to occur at the behest of either party. It is for this reason that the European Court of Human Rights has ruled that a similar Swedish procedure does not violate a defendant's right to examine a witness and is consistent with a fair trial. In *SN v Sweden*,<sup>254</sup> the European Court of Human Rights held that there had been no breach of the *European Convention on Human Rights* which provides that a defendant has a right to 'examine or have examined witnesses against him'.<sup>255</sup> That case involved a sexual assault on a 10-year-old boy. The boy was interviewed twice by police and his recorded interviews were played at trial. Defence counsel had been permitted to test the complainant's evidence by putting questions to him through the interviewing police officer. It was held that this procedure provided the defence with adequate opportunity to comment on the boy's credibility and to challenge his account. The trial was found to be fair.<sup>256</sup> The European Court of Human Rights highlighted the 'special features' of trials involving sexual offences and noted that

in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.<sup>257</sup>

The Constitutional Court of South Africa has similarly accepted that putting questions indirectly to a witness is consistent with a fair trial.<sup>258</sup> The process in Norway has the additional advantage that confusion, inconsistency and loss of memory are likely to be reduced by taking one comprehensive account soon after the initial complaint is made rather than by requiring

<sup>254</sup> *SN v Sweden* (2004) 39 EHRR 13.

<sup>255</sup> *European Convention of Human Rights* art 6(3)(d).

<sup>256</sup> *SN v Sweden* (2002) 39 EHRR 13, [52].

<sup>257</sup> *Ibid* [47].

<sup>258</sup> See *DPP (Transvaal) v Minister of Justice and Constitutional Development and Others* [2009] 4 SA 222, 267 [116] (Ngcobo J).

possibly repeated accounts to be made to different people on different occasions.<sup>259</sup>

A similar recommendation has featured in Cossins' work on different possible models for prosecuting child sex offences in Australia. Cossins flagged four options of this type:

- (i) ... the use of a court-appointed intermediary to assess cross-examination questions to ensure that they are not improper and are able to be understood by the child complainant with regard to her/his age and cognitive development;
- (ii) the communication of pre-prepared questions by the defence via a court-appointed and trained intermediary who would then put the questions to the child in age-appropriate language. ...;
- (iii) right of appearance of a complainant's legal representative who would have the right to vet and to object to improper and age-inappropriate questions; or
- (iv) placing control of the conduct of cross-examination in the trial judge using the Family Court Children's Cases Pilot Project as a model.<sup>260</sup>

None of these options, however, recommend removing counsel from the questioning process to the extent evident in the Norwegian process. Rather, Cossins envisages the intermediary's role as more closely aligned to models that assign them a predominantly interpretive function.

One potential barrier to the implementation in an adversarial system of a Norwegian-esque process is the investigation-based structure of the inquisitorial system in which it is essentially grounded. In the adversarial system, the contents of an investigative interview may not be admissible at trial, and a separate evidential interview may be required. In contrast to adversarial systems, the system in Norway, for example, does not draw any distinction between investigative and evidential interviews; there is just one forensic investigative interview for vulnerable witnesses. This problem might be overcome by retaining the initial investigative interview and then conducting the evidential examination shortly thereafter. This would accord with processes for prerecording evidence currently in operation in Western Australia.

<sup>259</sup> See, eg, Debera Ann Poole and Lawrence T White, 'Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults' in Maria Zaragoza et al (eds), *Memory and Testimony in the Child Witness* (Sage Publications, 1995) 24, 41–3.

<sup>260</sup> See Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', above n 15, 332 [6.74]. Option (i) was the preferred option of the Committee in this report: see recommendation 4.5.

As with prerecorded evidence, there are obvious logistical obstacles to implementing a process for conducting early evidential interviews with intermediaries. These include problems associated with the subsequent discovery of fresh evidence, the availability of adequate training for specialist interviewers, and the defendants' possible lack of opportunity to instruct or obtain legal representation prior to the interview. In Australia, lawyers from the Legal Services Commission or Public Defenders Service could be specially trained and made available to represent the interests of defendants at evidential interviews. Indeed, in some cases in Norway, a state-appointed lawyer represents the interests of the accused during the interview.<sup>261</sup> Implementation in Australian jurisdictions of an expert interviewing process akin to that used in Norway could resolve those problems in cross-examination that appear to be resistant to other mechanisms currently deployed to aid the reception of reliable evidence vulnerable witnesses. In particular, it offers the potential to strengthen current intermediary schemes and pre-trial recording processes.

## VI RECOMMENDATIONS

The process of interviewing used in Norway would be likely to improve the quality of evidence and the trial process for a child or complainant with an intellectual disability. Although measures such as greater adherence to best practice guidelines, enhanced training, English-style intermediaries and the prerecording of evidence can be very useful, they do not appear to be sufficient to eliminate the underlying problems associated with cross-examining vulnerable witnesses in an adversarial system. Instead, removing direct questions and accusations from both the prosecution and defence lawyers and entrusting that role to an independent, trained, Norwegian-style interviewer has the potential to ensure fairness for all parties. In order to elicit more accurate testimony, reduce the trauma associated with testifying and, most importantly, not compromise fairness to defendants, this article advocates and supports recommendations that examination-in-chief and cross-examination of children and witnesses with intellectual disabilities should be replaced by separate evidential and investigative interviews conducted by expert interviewers who have received specialist training:

- *Evidential Interview* — As soon as practicable, after the prosecution has completed disclosure of its case, a video-recorded evidential interview with

<sup>261</sup> Hanna et al, above n 15, 163.

a child witness or complainant with an intellectual disability should take place. This should be conducted by an interviewer with specialist knowledge of the comprehension and communication difficulties of children and witnesses with intellectual disabilities. The evidential interview should replace the examination-in-chief and cross-examination of these witnesses at trial. The defendant and prosecution should be able to submit questions to the interviewer as occurs in Norway. The option for further examination in the event that new material evidence emerges must remain a possibility but should be avoided and occur only exceptionally.

- *Investigative Interview* — An initial investigative interview with a properly trained interviewer should take place as soon as possible after the alleged offence. This interview should be recorded and it is essential that recordings show the witness's face, full expression and demeanour. The option should exist for parts or even the entirety of the investigative interview to be played at trial in addition to the evidential interview. The investigative interviewer should be qualified to identify aspects of complainants' vulnerability that may affect their capacity to comprehend questions and communicate answers. The interviewer should also be able to recommend the use of special measures to assist these witnesses in giving their evidence. This would allow subtleties of youth or intellectual disability to be identified and addressed. This role would overlap with some of the duties of the English intermediary described above.

## VII CONCLUSION

The testing and challenging of the testimony of a witness in cross-examination is regarded as an integral aspect of the adversarial criminal trial. However, cross-examination can lead to inaccurate and unreliable evidence when the complainant is a child or person with an intellectual disability. This is because the nature of cross-examination, the adversarial tactics used, the language and phrasing of questions, and the delay between complaint and examination inevitably combine to reduce the ability of these witnesses to give reliable and cogent evidence. Little can be done to improve the quality of evidence adduced from vulnerable complainants while traditional adversarial cross-examination continues. Current practice may grant the defence an unfair advantage that could undermine the community's faith in the criminal justice process. Empirical studies, law reform reports, judicial commentary and recent case law all support the need for change.

It is not simple but it is, nevertheless, possible in the cross-examination of vulnerable witnesses to balance the triangulation of interests of defendant,

witness and society and to ensure a fair trial for all. The greater use of pre-recorded testimony, further education and training for judges and lawyers, greater adherence to best practice guidelines, and the use of English style intermediaries may not operate as silver bullets in the solution of the problems identified in this article, but they can contribute to that solution. Nevertheless, in order to obtain the best evidence from, and significantly improve the process of testifying for, vulnerable witnesses, something more is needed. Defence lawyers should not be allowed to directly cross-examine either children or witnesses with intellectual disabilities. Rather, a process involving a recorded investigative and a recorded evidential interview (which would include any questions to be put by either the prosecution or defence) through an independent, qualified questioner, similar to the Norwegian system, should be introduced.

It is essential that the testing of the evidence of children and complainants with intellectual disabilities be reformed to ensure their full and fair participation in the trial process. This would not deny fair trials to defendants or involve a wholesale transition to an inquisitorial system. Current adversarial cross-examination promotes unjust outcomes and gives an illegitimate advantage to defendants. It therefore denies justice to, and endorses inequality before the law for, children and people with intellectual disabilities. There are many difficulties vulnerable witnesses must face in the criminal justice process, but unfair and discriminatory cross-examination need not be one of them.