

TAKING EVIDENCE FROM CHILDREN

Foreward

This paper has been modified from a judges' bench book, prepared by the Australian Institute of Judicial Administration, to assist judges in dealing with children as complainants or witnesses. The information provided is general in nature, and sections dealing with particular evidence or proceedings relevant only to the Australian context have been deleted.

Introduction

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

Assessing the Credibility of Children as Witnesses

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

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

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

¹¹¹ *JJB v The Queen* (2006) 161 A Crim R 187, 189.

Judicial Assumptions about Child Witnesses

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

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

¹¹² (2006) 161 A Crim R 185.

¹¹³ Spigelman CJ's comments were made in the context of the judgments of Deane J (at 101) and McHugh J (at 107-8) in *Longman v The Queen* (1989) 168 CLR 79.

required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in Longman reflect a similar legal tradition that treated children as unreliable witnesses. In the past both categories of witnesses required corroboration.¹¹⁴

Jurors may also reflect these widely held assumptions about children, as they may also do about sexual assault complainants. Such prejudices may be reinforced by the profession and the bench in the conduct of a criminal case.¹¹⁵

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

Demeanour

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

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

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

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

¹¹⁷ Cashmore and Trimboli, below n 126.

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

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

Additionally, it is important to note that appearance, behaviour and body language are all heavily culturally-determined

The Reliability of Children in Giving Evidence

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

Spencer and Flin have found that children's cognitive skills, particularly those relevant to giving evidence (e.g. perceiving and remembering people, places and events) may have been undervalued.¹³⁴ Indeed, there is no scientific basis for any presumption against a child's credibility as a witness. Children are often as accurate as adults at discriminating the origins of their memories.¹³⁵ Further, recent forensic research has highlighted the ubiquitous imperfections of adult testimony, showing that mature witnesses' memories can be fragile and susceptible to the distorting influences of suggestion and misinformation. 'In sum, the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated.'¹³⁶ This was recognised in a survey of Canadian judges reported by Bala and colleagues in 2005.¹³⁷

¹³² Ibid, [6.3.7].

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

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

¹³⁵ D. Lindsay and M. Johnson, 'Reality Monitoring and Suggestibility: Children's Ability to Discriminate among Memories from Different Sources', in Ceci, Toglia and Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987) 92

<http://memlab1.eng.yale.edu/PDFs/1987_Lindsay_Johnson_ChildrenSources.pdf> at 13 March 2009, 103-107.

¹³⁶ Spencer and Flin, above n 134, 287.

¹³⁷ A survey of Canadian judges in 2005 sought to ascertain how they assessed the credibility of child witnesses, and the accuracy of their assessments. Significantly, judges believed that in the context of the cases that are brought before them, children are less likely to lie than adults: Bala et al, above n 116, 1011, 1014-1015.

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

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

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

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

¹⁴⁰ S. J. Ceci and M. Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *Psychological Bulletin* 403

<http://psyencelab.com/library/documents/docs/Suggestibility%20of%20the%20Child%20Witness_A%20Historical%20Review%20&%20Synthesis.pdf> at 21 March 2009, 434.

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

Do Children Lie More or Less Than Adults?

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

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

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

¹⁴³ Ibid 188.

¹⁴⁴ Ibid 179.

¹⁴⁵ Oates, above n 141, 314-315.

¹⁴⁶ Dent and Flin, above n 138, 86.

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

The Difference between Errors of Commission and Errors of Omission

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

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

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

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

It is important for judicial officers to be aware of the capacities of children, and understand that the behaviours described in the foregoing are more likely to signify confusion and frustration rather than deception or lack of memory. Judicial officers must therefore be vigilant in this regard.

¹⁴⁷ Oates, above n 141, 315.

¹⁴⁸ Ibid .

¹⁴⁹ Bala et al, above n 116, 1017.

Cognitive Development

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

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

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

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

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

¹⁵¹ Sas, above n 106, 13.

¹⁵² Ibid 17.

¹⁵³ Ibid 18.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid, 21.

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

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

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

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

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

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

¹⁵⁷ *Ibid* 19.

¹⁵⁸ *Sas*, above n 106, 20.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* [2.7].

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

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

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

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

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

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

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

¹⁶³ Ibid.

Table 1 - Cognitive Skills Present in Children Relevant to Testimonial Competency¹⁶⁴

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

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

¹⁶⁴ Sas, above n 106, 26.

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

Factors Affecting Children's Memory

Research into children's memory has revealed the following:

- There is no universal rule concerning children's memory, particularly in the context of giving evidence. Children may give very detailed accounts of an event or they may provide a paucity of detail.
- Memory, whether that of children or adults, does not operate like a video recorder; it is a product of the subjective reality of the individual and the interaction of the individual with his or her environment, and accordingly may change over time.¹⁶⁷
- Subsequent events may impact positively or adversely upon the quality of memory. Depending on the nature of intervening events, memory may be diminished or strengthened¹⁶⁸ and the longer the gap between an event and its recall, the more likely the memory details will be lost.
- Children's ability to encode, store and retrieve information develops over time. From three years of age, children form detailed and enduring memories of events that happen to them, particularly events that are in some way distinctive and emotionally positive or negative.¹⁶⁹ Children older than three are also more able to engage in a conversation about such events with others, which may serve to reinforce their memories. In relation to negative memories, see: **Memory for Traumatic Events.**
- Children's recall depends on language development, conceptual development, memory, and emotional development and the context in which recall is undertaken. However, children generally lack the same memory retrieval strategies that are available to an adult. Preschoolers may rely on the prompting of adults in order to retrieve their memories, although as children

¹⁶⁵ J. Schuman, N. Bala and K. Lee, 'Developmentally Appropriate Questions for Child Witnesses' (1999) 25 *Queens Law Journal* 251, 258.

¹⁶⁶ Ibid.

¹⁶⁷ L. Baker-Ward and P. A. Ornstein, 'Cognitive Underpinnings of Children's Testimony', in Westcott, Davies and Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 22.

¹⁶⁸ Ibid 26.

¹⁶⁹ Ibid 60.

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

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

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

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

¹⁷² Ibid 58.

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

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

¹⁷⁵ Fivush and Schwarzmüller, above n 174, 573.

¹⁷⁶ Sas, above n 106, 15.

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

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

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

¹⁷⁷ Ibid, 40.

¹⁷⁸ M. Powell and D. Thomson, 'Children’s Memories for Repeated Events', in Westcott, Davies and Bull (eds.), *Children’s Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 72.

¹⁷⁹ Ibid 73.

¹⁸⁰ Ibid 74.

¹⁸¹ Saywitz, above n 170, 13.

¹⁸² G. Goodman, L. Rudy, B. L. Bottoms and C. Aman, 'Children’s Concerns and Memory: Issues of Ecological Validity in the Study of Children’s Eyewitness Testimony', in Fivush and Hudson (eds.), *Knowing and Remembering in Young Children* (Cambridge: Cambridge University Press, 1990) 249.

Memory for Traumatic Events

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

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

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

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

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

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

¹⁸⁴ Sas, above n 106, 36.

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

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

¹⁸⁷ Tucker, above n 150, 4.

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

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

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

Are Children Suggestible?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁹⁷ Gobbo et al., above n 195, 504.

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

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

²⁰⁰ Sas, above n 106, 44.

²⁰¹ Gobbo et al., above n 195, 512.

²⁰² Howe et al., above n 183, 764.

²⁰³ *Ibid* 127, 760.

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

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

Children's Use of Language

The Importance of Language in the Courtroom

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

Apparent Inconsistencies

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

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

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

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

²⁰⁶ Powell and Thomson, above n 178, 77.

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

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

Westcott has pointed out that:

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

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

²⁰⁸ Westcott, above n 139.

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

Children Differ in Their Language Development

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

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

The Environment of the Courtroom

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

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

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

²¹¹ *Ibid* 9.

²¹² Saywitz, above n 170, 5.

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

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

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

Factors Affecting Children's Language Skills

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

²¹⁴ Walker, above n 210, 48.

²¹⁵ Ibid 60.

²¹⁶ Ibid 69.

²¹⁷ Saywitz, above n 170, 8.

²¹⁸ Walker, above n 210, 10.

²¹⁹ Saywitz, above n 170, 15.

²²⁰ Walker, above n 210, 67.

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

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

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

Language and Age Groups

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

²²¹ See Walker, above n 210.

²²² Ibid 49.

²²³ Ibid 45.

²²⁴ Sas, above n 106, 29.

²²⁵ Ibid.

²²⁶ Derived from Walker, above n 210, 2-5.

(a) Pre-schoolers:

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

(b) Age 7-10:

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

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

(c) *Adolescents*

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

Special Vocabulary Problems of Children

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

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

Typical Examples of Questions That Cause Difficulty for Children

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

²²⁷ Walker, above n 210, 26-29.

²²⁸ Ibid 36.

²²⁹ Ibid 31.

²³⁰ Schuman et al., above n 165.

²³¹ J. Cashmore, *The Perceptions of Child Witnesses and Their Parents Concerning the Court Process: Results of the DPP Survey of Child Witnesses and Their Parents* (unpublished manuscript, 1993) 11.

Table 2 – Language to Be Avoided in Questioning Child Witnesses

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

Children with Special Needs

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

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

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

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

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

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

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

The disability may also affect social factors, such as:

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

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

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

These factors will add further complexity to the trial process.

Children and the Court Process

Walker has described the court process in this way:

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

²⁴⁹ Walker, above n 210, 84.

Specific Difficulties in the Courtroom

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

Table 1 - Cognitive Skills Present in Children Relevant to Testimonial

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

²⁵⁰ Saywitz, above n 170, 14.

²⁵¹ Oates, above n 141, 320, citing J. Cashmore, 'Problems and Solutions in Lawyer-Child Communication' (1991) 15 *Criminal Law Journal* 193.

²⁵² Sas, above n 106, 24.

²⁵³ Schuman et al., above n 165, 278.

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

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

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

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

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

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

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

Table 3 - Expectations of Child Witnesses and the Developmental Skills Involved²⁶⁰

²⁵⁴ Tucker, above n 150, 2.

²⁵⁵ K. Saywitz and R. Nathanson, 'Children's Testimony and Their Perceptions of Stress in and out of the Courtroom' (1993) 17 *International Journal of Child Abuse and Neglect* 613.

²⁵⁶ Sas, above n 106, vi.

²⁵⁷ Ibid 8, citing A. G. Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 *Law and Human Behavior* 59.

²⁵⁸ Sas, above n 106, 8; G. B. Melton, 'Children's Competency to Testify' (1981) 5 *Law and Human Behavior* 73.

²⁵⁹ Sas, above n 106, 8.

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

Difficulties of Cross-Examination for Children

Two separate studies conducted by Zajac and colleagues raise serious issues about the appropriateness of cross-examination in order to test the accuracy of evidence of children aged between 5 and 13.²⁶¹ A study of court transcripts of the evidence of children in this age bracket in sexual abuse cases and controlled studies done in respect of children aged 5 to 6 years, demonstrated that the use of closed questions simulating cross-examination and usual cross-examination techniques resulted in 75% of the children studied changing at least one aspect of their evidence.²⁶² In the controlled studies, which involved a true situation, closed questions, and a younger age group, 85% changed at least one aspect of their statement.²⁶³

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

²⁶⁰ Ibid 12.

²⁶¹ Zajac et al, below n 285; Zajac and Hayne, above n 141.

²⁶² Zajac et al, below n 285, 206.

²⁶³ Zajac and Hayne, above n 141, 193.

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

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

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

²⁶⁴ Ibid, 141.

²⁶⁵ Manley, above n 97, 21.

²⁶⁶ See, e.g., K. W. Alexander, I. Cordón, R. Edelstein, S. Ghetti, G. S. Goodman, D. P. H. Jones, J. A. Quas, A. D. Redlich and J. Haugaard, 'Childhood Sexual Assault Victims: Long-Term Outcomes after Testifying in Criminal Court' (2005) 70 *Monograph of the Society for Research in Child Development* 1; A. Cossins "Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?" (2009) 33 *Melbourne University Law Review* 68.

²⁶⁷ B. L. Bottoms and G. S. Goodman, 'International Perspectives on Children's Testimony: An Introduction to the Issues' (1996) 23 *Criminal Justice and Behavior* 260.

²⁶⁸ Manley, above n 97, 1-6.

²⁶⁹ E. Matthews and K. Saywitz, 'Child Victim Witness Manual' (1992) 12 *California Center for Judicial Education and Research Journal* 5.

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

The Australian Law Reform Commission has recognised these difficulties:

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

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

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

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

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

²⁷⁴ Eastwood and Patton, above n 79.

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

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

Leading or Closed Questions

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

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

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

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

Suggestive Questioning

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

Repeating Questions

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

Age Inappropriate Questions

See for discussion:

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

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

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

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

²⁷⁶ Saywitz, above n 170, 9-10.

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

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

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

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

Do Not Understand the Question

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

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

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

1. Negative rhetorical
 - Example: 'Now you had a bruise, did you not, near one of your breasts, do you remember this?' It is easier to answer 'yes' to such a question than to interpret the different phrases of the question in the context of the whole so as to understand to what one would say 'no'.
2. Multi-faceted questions
 - Example: 'Well, did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?'

²⁷⁹ Westcott and Page, above n 273.

²⁸⁰ Ibid 143-148.

²⁸¹ Zajac et al., below n 285.

²⁸² M. Brennan and R. Brennan, *Strange Language: Child Victim Witnesses under Cross Examination* (Wagga Wagga: CSU Literacy Studies Network, 1988).

- Example: ‘You told the police officer you were kicked on the shin, did you not, and you had a bruise, do you remember that?’
3. Being asked about the implications of actions or inactions
 - Example ‘Why didn’t you...’.
 - This may suggest to the child witness that they are somehow guilty and responsible.
 4. Lack of connection between the parts of the question
 5. Juxtaposition of topics of unequal significance, or unrelated topics, which can confuse the witness
 - Example:
 - Q: On that occasion when Mum went to... being that night that Mum went to Youth Group, you were at Clareville?
 - A: I have made a mistake there, it wasn’t Clareville, it was West Hampton.
 - Q: It should be West Hampton. You did not see the defendant at any time when he put his penis in your bottom, did you?
 - Q: That was after he had stripped you?
 - A: Yes.
 - Q: And you had your legs together?
 - A: Yes.
 - Q: And then you said he tried to put his finger in your vagina. Did he put his finger on your vagina or in your vagina?
 - A: In my vagina.
 - Q: Inside, you felt it inside did you?
 - A: (no verbal answer).
 - Q: Did he do anything else to you?
 - A: No.
 - Q: Do you know Frank Murphy?
 6. Demanding precise recollection of seemingly obscure facts.

7. Focussing on trivial inconsistencies and presenting them as indicators of unreliability and lack of truthfulness
8. Repeating the witness' answer so as to maintain control of the interaction
9. Intimidating the child by tone of voice, speech rate, emphasis, eye contact, physical gesture and facial expressions
10. Multiple questions within a question:
 - Example: 'When was the last time he did this to you before the time we have been speaking of? We have been speaking of one in February obviously, when was the last time he interfered with you before that?'
11. Questioning a witness over prior statements and controlling what is referred to and the order in which it is referred to
12. Passive voice – which can be used to detach people from their actions or as a mechanism of blame
 - Example: 'The door was then closed behind the person. Is that what you are saying?'
13. Embedding – including a series of qualifying phrases within a sentence
 - Example: 'Taking you back to the time when you were living in Sydney when you first met Fred, at that time and throughout the period that Fred was living with your family, he used to work as a baker, didn't he?'
14. Backward referencing
 - Example: 'So you told us that you don't remember, do you remember saying that a moment ago?'
15. Nominalisation
 - Example: 'Now just stop there. Did you tell the police what is in the statement about the matter of touching boobs?'
16. Unmarked question - i.e. there is no indication that a response is required

- Example 'I put it to you you're telling a lie.'
17. Tagging - Adding a question at the end of a statement
 - The listener has not received a cue from the start that an answer to a question will be required.
 - Example: 'I mean if something happens today, and something happens tomorrow, you're not going to say they're a year apart, are you?'
 18. Negative tagging – Adding a negative construction at the end of a sentence
 - Example: 'He took you on a picnic to the park by the river, did he not?'²⁸³
 - Contrast the above with 'Did he take you on a picnic to the park by the river?'
 19. Lawyerese – negatives, double negatives, multiple parts, difficult vocabulary, complex syntax
 20. Interruptions when the child is answering a question
 21. Persistent questioning

Young children (to age 10) find persistent questioning very demoralising when they have previously indicated that they do not know the answer. They tend to assume that if the same question is repeated, the original answer must have been incorrect. Therefore, young children who are repeatedly asked the same questions may change their answers.²⁸⁴ A reason for this may be that children are more likely to be deferential to what they perceive to be the adult's beliefs.
 22. Rapid fire questioning
 - This may lead to a child eventually offering a random response to stop the questioning, and the response may therefore be unreliable.
 23. Jumping quickly from one topic to another

²⁸³ Brennan, above n 207, 88.

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

Analysis of Court Transcripts in New Zealand

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

Children in the courtroom tend to rely on everyday conversational conventions, where the prevailing atmosphere is likely to be one of politeness, acceptance, and sincerity. As a result, they may expect a degree of sincerity that is not present during cross-examination.

Even if children become aware of this conflict between their expectations and reality, they are likely to find it confusing and difficult to deal with, especially when the apparent sincerity of a defence lawyer may not remain constant within the testifying period.

The unique structure of the cross-examination interview may hinder a child's ability to provide reliable and valid testimony. Contrary to interactions outside the courtroom, where adults readily provide a framework for children's recollection, children's narratives in the legal setting are far less supported.

During cross-examination, the defence lawyer asks questions in such a way as to structure and control the information to be recounted.

Structural cues that children rely on, such as those that signal a change in conversation topic, are seldom present during the cross-examination process.²⁸⁶

Good Practices for Questioning Children

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

²⁸⁵ R. Zajac, J. Gross and H. Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199

<http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_zajac-questioning_children_in_the_courtroom.html> at 21 March 2009.

²⁸⁶ *Ibid*, 200.

1. Phrase questions positively rather than negatively.
 - For example: 'Do you remember his name?' as opposed to, 'You don't remember his name, do you?'
2. Use an active voice rather than a passive voice.
 - For example: 'You said the red car hit the blue car?', rather than 'You said the blue car was hit by the red car?'
 - A child is likely to interpret the latter as meaning that the blue car inflicted the resulting damage on the red car.
3. Separate questions on separate topics.
 - Do not mix topics, or switch back and forth between topics.
4. Children's conceptualisation of time, frequency and ordering of events is gradually acquired.
 - It is therefore necessary to provide concrete anchor points, using times or events that are relevant to the child.²⁸⁷
5. It may be helpful to use the child's words to describe people, actions and objects.
 - For example: 'Did this happen after you came home from school?'
6. Avoid 'front loading' questions that use a number of qualifying phrases before asking the crucial part of the question.
 - Example of what not to ask: 'On the evening in question, before you went to the shop, and after you returned from school, while no one else was home but you, did your mother hit you?'
 - Instead: 'Did your mother hit you after school that day?'; 'Was this before or after you went to the shop?'; 'Was anyone else at home when your mother hit you?'
 - The key is to keep each sentence separate and simple.
7. Use the child's vocabulary where possible.

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

- Example: ‘What games did you play at play-time?’
 - NOT: ‘What did you do at recess?’
8. Use signposting.
 - Example: ‘I want to ask you some questions about your father.’
 9. Discuss events in logical sequence.
 - Example: Do not ask questions that require the child to turn their mind from afternoon to morning.
 10. Ask questions with the child’s point of view in mind.
 - Example: ‘Did Daddy come into your room?’
 - NOT: ‘Did the accused/my client come into the room?’
 11. Include only one query in each question.
 12. Avoid questions that may be taken too literally.
 - Example: A question about how many times a child was touched may illicit a response regarding the number of actual touches, as opposed to the number of occasions that the touching occurred.

Additional Resource

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

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

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

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

³²⁸ See, e.g., Yeats, above n 315.

³²⁹ *R v Stevenson* [2000] WASCA 301, [27].

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

The Body Language of the Judicial Officer

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

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

Treat the Child with Care

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

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

³³⁰ Eastwood and Patton, above n 79, 114.

³³¹ Cashmore and Trimboli, above n 126, 10.

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

Examination-in-Chief

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

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

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

Cross-examination

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

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

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

the other hand, unfair cross-examination can actually increase the possibility that unreliable evidence is admitted³³⁴ or an unfair view of vulnerable witnesses is gained by the jury or the court.

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

In addition, all Australian jurisdictions have provisions setting out a court's general power in relation to improper questions³³⁷. Witnesses – whether they have an interest in the outcome of the case or not – are there to assist the court by giving evidence as to matters relevant to the proceedings. As Viscount Sankey L.C. observed in the context of cross-examination, witnesses are entitled to 'courtesy and consideration.'³³⁸

It may help the orderly conduct of the trial if the judicial officer indicates from the outset that he/she has a positive duty to act to disallow improper or inappropriate questions³³⁹ and will do so as necessary, and to state that the judicial officer expects counsel to carefully consider the questions asked.

³³⁴ See Cossins, above n 98.

³³⁵ Cashmore and Trimboli, above n 126.

³³⁶ *GPI Leisure Corp. Ltd v Herdsman Investments Pty Ltd (No. 3)* (1990) 20 NSWLR 18, 22-3; *R v Kelly; Ex parte Hoang van Duong* (1981) 28 SASR 271, 273.

³³⁷ NSW: *Evidence Act 1995* ss 41(1)(b), 103; *Criminal Procedure Act 1986* s 275A; Vic: *Crimes (Criminal Trials) Act 1999* s 18; *Evidence Act 1958* ss 37, 38-42; Qld: *Evidence Act 1977* ss 20-21; Tas: *Evidence Act 2001* ss 41(1)(b), 103; SA: *Evidence Act 1929* ss 22-25; WA: *Evidence Act 1906* ss 25-27; NT: *Evidence Act 1939* ss 13-17; Commonwealth: *Crimes Act 1914* s 15YE. See also the statement of the English Bar Council set out in S. L. Phipson, *Phipson on Evidence* (London: Sweet & Maxwell, 14th ed, 1990), [12]-[16]: The ethical position in Australia is similar.

³³⁸ *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 360.

³³⁹ See, for example, *Evidence Act 1995* (NSW), s 41.

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

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

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

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

Particular Procedures for Children Giving Evidence

Introduction

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

Preparing a Child Witness for the Court Appearance

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

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

Competency Testing

General Principles

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

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

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

³⁴³ Ibid 246.

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

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

Procedure

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

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

³⁴⁴ Ibid 250-251.

³⁴⁵ Ibid 251.

³⁴⁶ *Grindrod v The Queen* [1999] WASCA 44.

³⁴⁷ *R v Garvey* [1987] 2 Qd R 623; *R v RAG* [2006] NSWCCA 343, [46].

³⁴⁸ *R v RAG* [2006] NSWCCA 343, [37]-[38].

³⁴⁹ *R v RAG* [2006] NSWCCA 343, [42].

³⁵⁰ A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Development Day, Adelaide, 2009 .

³⁵¹ Heydon, above n 291, [11035].

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

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

Unsworn Evidence

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

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

³⁵⁴ *R v RAG* [2006] NSWCCA 343, [26]-[27].

³⁵⁵ [2000] WASCA 301.

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

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

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

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

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

Closed Circuit Television

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

Interviews of Children by Police

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁶⁵ *Ibid*, [2.37]-[2.86].

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

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

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

See, further:

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

[s/spring2014-0414-book-review-handbook-questioning-children-linguistic-perspective-third-edition.html](#)

Other Trial Issues: Expert Evidence and Summing-Up

EXPERT EVIDENCE AT TRIAL

Introduction: The Common Law

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

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

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

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

369 *C v The Queen* (1993) 70 A Crim R 378.
370 [1993] SASC 4095 at [29].
371 *C v The Queen* (1993) 70 A Crim R 378, 384.

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

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

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

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

³⁷² Blackwell, above n 128, 7.

³⁷³ *R v Aymes* (2004) 21 CRNZ 523.

³⁷⁴ *Ibid.*, 551.

³⁷⁵ New Zealand Law Commission, *Evidence Code and Commentary* (Rep. 55, Vol. 2) (Wellington: Author, 1999) 67.

³⁷⁶ Cossins (2008), above n 1,155.

³⁷⁷ *Ibid.*

The Common Law and General Principles

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

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

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

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

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

³⁷⁸ *Farrell v The Queen* (1998) 155 ALR 652.

³⁷⁹ *Farrell v The Queen* (1998) 155 ALR 652, 661.

³⁸⁰ *R v ATJ* (Unreported, Supreme Court of the Northern Territory, Riley J, 26 April 2005); see also *R v Joyce* [2005] NTSC 21.

³⁸¹ *R v ATJ* (Unreported, Supreme Court of the Northern Territory, Riley J, 26 April 2005), [31].

³⁸² *Ibid*, [33]-[34].

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

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

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

³⁸³ Ibid, 41.

³⁸⁴ *J v The Queen* (1994) 75 A Crim R 522; see also *R v Johnson* (1994) 75 A Crim R 522.

³⁸⁵ *R v C* (1993) 60 SASR 467.

³⁸⁶ *R v Lavallee* (1990) 55 CCC (3d) 97.

³⁸⁷ *J v The Queen* (1994) 75 A Crim R 522.

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

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

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

The common law's focus on complainant credibility arises because of the context in which child sexual abuse typically occurs, namely, the absence of corroborating evidence and the nature of the trial as 'word against word'.

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

This reasoning constitutes the basis upon which three Law Reform Commission Inquiries³⁹⁴ have concluded that expert opinion evidence about child development

³⁸⁸ *R v Johnson* (1994) 75 A Crim R 522.

³⁸⁹ *Ibid.*

³⁹⁰ *R v Tait* [1992] 2 NZLR 666.

³⁹¹ *R v Johnson* (1994) 75 A Crim R 522.

³⁹² Ceci and Friedman, above n 130.

³⁹³ Quas et al., above n 2, 425-426, 456.

³⁹⁴ See Australian Law Reform Commission, above n 248; New South Wales Parliament Legislative Council-Standing Committee on Law and Justice, *Report 22: Report on Child Sexual Assault Prosecutions (Parliamentary Paper No. 208)* (2002); Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)*, (2005)

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

³⁹⁵ <<http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>> at 18 March 2009; New South Wales Law Reform Commission, above n 38; Victorian Law Reform Commission (2003; 2004), above n 31. *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2013*.

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

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

Appendix
**Suggested “Script” for Use in Special Hearings with
Children or Cognitively Impaired Witnesses⁵⁰⁴**

JUDGE: Hello (name of witness), can you hear me?

Can you see me?

My name is Judge and I am in charge here today. You can call me Judge if you want to say something to me.

Are you comfortable on that seat? Do you have a drink (and/or any other requirement)?

In the room with you is Mr/Ms (tipstaff/associate) or (first name). His/her job is to help me at your end because you are in a different room to me.

Also in the room with you is (support person) who is there to be with you while you give your evidence.

In the court room with me are some other people even though you cannot see them. You have probably met one of them before - the prosecutor, Mr/Ms

I will ask the prosecutor to stand in front of the camera. Can you see him/her now? He/she will ask you questions soon.

There is another lawyer who will ask you questions later, Mr/Ms

I will ask him/her to stand. Can you see him/her now?

⁵⁰⁴ This script has been primarily developed for child witnesses and should be adapted as necessary for older children and for cognitively impaired witnesses, whether adult or children.

(To witness), you have come to court today to

- tell what happened to you
- give evidence / answer questions about....
- tell what you know about

[name of the accused] [your father / uncle etc.]

First I want to ask you a few questions.

Then I want to talk to you about the rules here in court.

How old are you?

When is your birthday?

Do you have any brothers or sisters?

Tell me about them. How old are they?

What year are you in at school?

Do you have a favourite subject at school?

Tell me about that.

Are there any things you find hard at school?

Tell me about that.

Tell me what you do at play time and lunchtime?

What does the word “rules” mean?

Explain: rules are orders or instructions that help us to understand what we are allowed to do and what we are not allowed to do.

Does your teacher have rules in your classroom?

What are some of those rules?

Do you play any sport? Tell me about that.

What are some of the rules in that sport?

Tell me what you like doing when you are not at school?

Do you have any pets? Tell me about them.

Now I want to talk to you about being in court.

Do you remember that we just talked about some rules in the classroom / in sport? If the child says no, remind them of the rules they talked about.

Well, in court there are some rules as well.

A very important rule is that you tell the truth when you answer questions.

Do you know what it is called if you do not tell the truth?

Is telling the truth different to telling a lie?

Explain that to me? / Is telling the truth the right or wrong thing to do?

Is telling a lie the right or wrong thing to do? / Tell me why it is the right/wrong thing to do?

Now I am going to tell you something that is true, and something that is a lie. I want you to tell me whether what I said is true or a lie.

E.g. 'A horse is in your room with you now.'

Is that true or a lie?

(Affirm the response if correct: 'Yes, it would be a lie to say that a horse is in your room with you now.')

E.g. '(support person) is sitting in your room with you now.'

Is that true or a lie?

(Affirm the response if correct: 'Yes, it is true to say that (support person) is sitting in your room with you now.')

Do you think it is important to tell the truth here in court?

(Affirm the response if correct: 'Yes, it's very important to tell the truth here.')

Do you know what makes it important to tell the truth *here*?

(If yes, 'Can you tell me more about that?')

What might happen to you if you told lies in court?

It's always important to tell the truth. But it's even more important in court than anywhere else. Did you know that?

So, do you understand that it is very important that you tell the truth *here*?

Do you understand that it is very important that you do not tell lies *here*?

Will you tell the truth here in court?

Do you promise not to tell lies in court?

Now I want to talk to you about some other rules in court.

I will try to make sure the questions you are asked by the lawyers are not too hard.

If you do not know the answer, that is fine / o.k. / all right.

Just say 'I don't know'.

So what will you say if you do not know the answer? *(Affirm the response if correct, or provide the correct answer: Just say 'I don't know'.)*

If you do not remember/forget the answer, that is fine / o.k. / all right.

Just say 'I don't remember'.

So what will you say if you do not remember the answer?

(Affirm the response if correct, or provide the correct answer: Just say 'I don't remember'.)

If you do not understand the question/if you do not know what the question means, that is fine / o.k. / all right.

Just say 'I don't understand / I don't know what that means.'

So what will you say if you do not understand / do not know what that means?

(Affirm the response if correct, or provide the correct answer: Just say 'I don't understand / don't know what that means'.)

THEN

Version for younger children:

The lawyers might say things and ask you if those things are true.

They might also say things and ask you if those things are not true.

If you think what is said is true, you should say it is true.

So what will you say if you think something is true?

(Affirm the response if correct, or provide the correct answer: Just say, 'That's true'.)

If you think what is said is *not* true, you should say it is not true.

You don't have to agree just because the lawyer said it.

So what will you say if you think something is *not* true?

(Affirm the response if correct, or provide the correct answer: Just say, 'That's not true'.)

OR

Version for older children or cognitively impaired adults:

You may be asked questions that suggest things that are true or untrue.

You should agree when you believe what is being suggested is true.

You should *not* agree when you believe what is being suggested is *not* true.

Is that clear?

For example, if you were asked: 'You barrack for Essendon, is that right?' you would agree if that suggestion is true and you would disagree if that suggestion is not true.

It is important to not feel pressured to agree with what is being suggested to you if you believe it is untrue.

All witnesses:

Also, you might get tired, or need to go to the toilet.

If you do, it's o.k. to say 'Can we stop for a while?' You can say that to me or to(support person) in the room with you.

As we go along, I will try to help you to remember these rules.

Will you do your best to answer the questions?

Will you tell the truth in your answers?

Is there anything you would like to ask me about the court rules?

Is there anything else you would like to ask me?

If witness is going to be declared competent:

Soon, I am going to ask you to say again that you will tell the truth. That will be done using the Bible. There is a Bible on the table in front of you. You will see another member of my staff on screen and you will say the words after him/her. *(If appropriate)* There is a sheet on the table in front of you to help you follow the words you are to say. Are you o.k. with using the Bible?

(Or an affirmation is taken.)

*(Witness is not sworn/affirmed until the **RED** tape is begun, after the Judge's introductory remarks.)*

Cognitive Development and Communication

Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process, Report No. 84*, (1997)

<<http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html>>
at 14 March 2009.

N. Bala, K. Ramakrishnan, R. Lindsay and K. Lee, 'Judicial Assessment of the Credibility of Child Witnesses' (2005) 42 *Alberta Law Review* 995.

C. J. Brainerd and P. A. Ornstein, 'Children's Memory for Witnessed Events: The Developmental Backdrop', in J. Doris (ed.), *The Suggestibility of Children's Recollections* (Washington, D.C.: American Psychological Association, 1991) 10.

C. J. Brainerd and V. F. Reyna, *The Science of False Memory* (New York: Oxford University Press, 2005).

M. Bruck, L. Melnyk and S. J. Ceci, 'External and Internal Sources of Variation in the Creation of False Reports in Children' (1997) 9 *Learning and Individual Differences* 289.

K. Bussey, K. Lee and E. J. Grimbeek, 'Lies and Secrets: Implications for Children's Reporting of Sexual Abuse', in B. Goodman and B. Bottoms (eds.), *Child Victims, Child Witnesses: Understanding and Improving Testimony* (New York: Guilford, 1993) 147.

J. Cashmore and L. Trimboli, 'Child Sexual Assault Trials: A Survey of Juror Perceptions' (2006) 102 *Crime and Justice Bulletin* 1

<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB102.pdf/\\$file/CJB102.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB102.pdf/$file/CJB102.pdf)> at 21 March 2009.

S. J. Ceci and M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, D.C.: American Psychological Association, 1995).

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

S. J. Ceci, M. B. Powell and G. Principe, 'An Update on the Scientific Status of Children's Memory and Testimony', in D. L. Faigman, D. H. Kaye, M. J. Saks and J. Sanders (eds.), *Modern Scientific Evidence: The Law and Science of Expert Testimony* (St. Paul: West Group, 2nd ed, 2002).

P. Cooke and P. Standen, 'Abuse and Disabled Children: Hidden Needs' (2002) 11 *Child Abuse Review* 1.

A. Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

A. Cossins, 'Recovered Memories of Child Sexual Abuse: The Science and the Ideology', in J. Breckenridge and L. Laing (eds.), *Challenging Silence: Innovative Responses for Sexual and Domestic Violence* (St Leonards: Allen & Unwin, 1999)
<<http://www.aic.gov.au/conferences/paedophilia/cossins.pdf>> at 21 March 2009.

M. Farrar and G. Goodman, 'Developmental Changes in Event Memory' (1992) 73 *Child Developments* 173.

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

G. S. Goodman, 'Commentary: On Stress and Accuracy in Research on Children's Testimony', in J. Doris (ed.), *The Suggestibility of Children's Recollections* (Washington, D.C.: American Psychological Association, 1991) 77.

G. S. Goodman, C. Aman and J. Hirschman, 'Child Sexual and Physical Abuse: Children's Testimony', in S. J. Ceci, M. P. Toglia and D. F. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987) 1.

Judicial Commission of New South Wales Website, (2009)
<<http://www.judcom.nsw.gov.au/>> at 21 March 2009.

L. Kelly, 'Remembering the Point: A Feminist Perspective On Children's Evidence', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 361.

M. King and J. Yuille, 'Suggestibility and the Child Witness', in S. J. Ceci, M. P. Toglia and D. F. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987) 24.

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

D. S. Lindsay, M. K. Johnson and P. Kwon, 'Developmental Changes in Memory Source Monitoring' (1991) 52 *Journal of Experimental Child Psychology* 297.

R. Manley, 'Management of Child Witnesses: Practical Problems Judges Should Know About', paper presented at the District Court Judges Conference (Perth, September 2002).

E. Matthews and K. Saywitz, *Child Victim Witnesses* (California: Centre for Judicial Education and Research, 1992).

New South Wales Bureau of Crime Statistics and Research Website, (1999)
<http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_index>
> at 21 March 2009.

K. Oates, 'Children as Witnesses' (1990) 64 *Australian Law Journal* 129.

K. Oates, 'The Reliability of the Child as a Witness', in J. Vernon (ed.), *AIC Conference Proceedings No. 8: Children as witnesses-proceedings of a conference held 3-5 May 1988*, <<http://www.aic.gov.au/publications/proceedings/08/oates.pdf>> at 21 March 2009.

R. K. Oates, 'Problems and Prejudices for the Sexually Abused Child' (2007) 81 *Australian Law Journal* 313

<http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_oates-problems_and_prejudices_for_sexual_abused_child.html> at 20 March 2000.

M. Pipe, M. Lamb, Y. Orbach and A. Cederborg, 'Child Sexual Abuse: Disclosure, Denial, Delay' (New Jersey: Lawrence Erlbaum, 2007).

D. Poole and T. White, 'Two Years Later: Effects of Questions Repetition and Retention Interval on the Eyewitness Testimony of Children and Adults' (1993) 29 *Developmental Psychology* 844.

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

M. B. Powell, K. P. Roberts, S. J. Ceci and H. Hembrooke, 'The Effects of Repeated Experience on Children's Suggestibility' (1999) 35 *Developmental Psychology* 1462.

M. B. Powell and D. M. Thomson, 'Children's Memory of an Occurrence of a Repeated Event: Effects of Age, Repetition, and Retention Interval across Three Question Types' (1996) 67 *Child Development* 1988.

J. A. Quas, J. Qin, J. M. Schaaf and G. S. Goodman, 'Individual Differences in Children's and Adults' Suggestibility and False Event Memory' (1997) 9 *Learning and Individual Differences* 359.

J. A. Quas, W. C. Thompson, K. Alison and C. Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behavior* 425.

K. Roberts and M. Lamb, 'Children's Responses When Interviewers Distort Details During Investigative Interviews' (1999) 4 *Legal and Criminological Psychology* 23.

E. Ruegg, 'Enhancing the Completeness of the Narrative Accounts in Children with Learning Disabilities to Increase Witness Credibility in Cases of Abuse and Neglect' (Education Resources Information Center, 2002).

L. Sas, 'The Interaction between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency' (2002) <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/index.html> at 6 March 2009.

K. Saywitz, G. Goodman, E. Nicholas and S. Moan, 'Children's Memories of Physical Examinations Involving Genital Touch: Implications for Reports of Child Sexual Abuse' (1991) 59 *Journal of Consulting and Clinical Psychology* 682.

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

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

A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Seminar on Child Witnesses (Darwin, 2007).

A. R. Warren and D. F. Marsil, 'Why Children's Suggestibility Remains a Serious Concern' (2002) 65 *Law and Contemporary Problems* 127 <[http://www.law.duke.edu/shell/cite.pl?65+Law+&+Contemp.+Probs.+127+\(Winter+2002\)](http://www.law.duke.edu/shell/cite.pl?65+Law+&+Contemp.+Probs.+127+(Winter+2002))> at 21 March 2009.

H. M. Wellman and C. N. Johnson, 'Understanding Mental Processes: A Developmental Study of "Remember" and "Forget"' (1979) 50 *Child Development* 79.

H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002).

H. Westcott and D. Jones, 'The Abuse of Disabled Children' (1999) 40 *Journal of Child Psychology and Psychiatry* 497.

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

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

References

- 1 *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures*, 2nd ed. (Criminal Justice System, 2007)
<http://www.cps.gov.uk/Publications/docs/Achieving_Best_Evidence_FINA_L.pdf> at 12 March 2009
- 2 S. Agnew and M. B. Powell, 'The Effect of Intellectual Disability on Children's Recall of an Event across Different Question Types' (2004) 28 *Law and Human Behavior* 273.
- 3 K. W. Alexander, I. Cordón, R. Edelstein, S. Ghetti, G. S. Goodman, D. P. H. Jones, J. A. Quas, A. D. Redlich and J. Haugaard, 'Childhood Sexual Assault Victims: Long-Term Outcomes after Testifying in Criminal Court' (2005) 70 *Monograph of the Society for Research in Child Development* 1.
- 4 G. Andrews, B. Gould and J. Corry, 'Child Sexual Abuse Revisited' (2002) 176 *Medical Journal of Australia* 458.
- 5 Australian Bureau of Statistics, (2009) <www.abs.gov.au> at 14 March 2009
- 6 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians*, (2006) <www.abs.gov.au> at 25 March 2009
- 7 Australian Law Reform Commission, *Executive Summary: Uniform Evidence Law, Report 102*, (2005)
<<http://portsea.austlii.edu.au/au/other/alrc/publications/reports/102/04>> at 20 May 2009
- 8 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process, Report No. 84*, (1997)
<<http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html>> at 14 March 2009
- 9 Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)*, (2005)
<<http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>> at 18 March 2009
- 10 L. Babb, 'What Does S 41 of the Evidence Act Mean to You as a Judicial Officer?' (2009)
<http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/babb-s41_evidence_act.html> at 20 May 2009
- 11 L. Baker-Ward and P. A. Ornstein, 'Cognitive Underpinnings of Children's Testimony', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 22
- 12 N. Bala, K. Ramakrishnan, R. Lindsay and K. Lee, 'Judicial Assessment of the Credibility of Child Witnesses' (2005) 42 *Alberta Law Review* 995.
- 13 S. Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand', paper presented at the Children and the Courts Conference (National Judicial College of Australia, Sydney, 5 November 2005)
- 14 S. Boney-McCoy and D. Finkelhor, 'Psychosocial Sequelae of Violent Victimization in a National Youth Sample' (1995) 63 *Journal of Consulting and Clinical Psychology* 726.
- 15 B. L. Bottoms and G. S. Goodman, 'International Perspectives on Children's Testimony: An Introduction to the Issues' (1996) 23 *Criminal Justice and Behavior* 260.

- 16 B. L. Bottoms and G. S. Goodman, 'Perceptions of Children's Credibility in Sexual Assault Cases' (1994) 24 *Journal of Applied Social Psychology* 702.
- 17 M. Brennan, 'The Battle for Credibility-Themes in the Cross Examination of Child Victim Witnesses' (1994) 7 *International Journal for the Semiotics of Law* 51.
- 18 M. Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71.
- 19 M. Brennan and R. Brennan, *Strange Language: Child Victim Witnesses under Cross Examination* (Wagga Wagga: CSU Literacy Studies Network, 1988).
- 20 M. Bruck, S. Ceci and H. Hembrooke, 'The Nature of Children's True and False Narratives' (2002) 22 *Developmental Review* 520.
- 21 J. Cashmore, 'Child Witnesses: The Judicial Role' (2007) 8 *Judicial Review* 281
<http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_cashmore-child_witnesses-the_judicial_role.html> at 21 March 2009
- 22 J. Cashmore, 'Innovative Procedures for Child Witnesses', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 213
- 23 J. Cashmore, *The Perceptions of Child Witnesses and Their Parents Concerning the Court Process: Results of the DPP Survey of Child Witnesses and Their Parents* (unpublished manuscript, 1993).
- 24 J. Cashmore, 'Problems and Solutions in Lawyer-Child Communication' (1991) 15 *Criminal Law Journal* 193.
- 25 J. Cashmore and K. Bussey, 'Judicial Perceptions of Child Witness Competence' (1996) 20 *Law and Human Behavior* 313.
- 26 J. Cashmore and L. Trimboli, 'Child Sexual Assault Trials: A Survey of Juror Perceptions' (2006) 102 *Crime and Justice Bulletin* 1
<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB102.pdf/\\$file/CJB102.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB102.pdf/$file/CJB102.pdf)> at 21 March 2009
- 27 S. Ceci, A. Crossman, M. Scullin, L. Gilstrap and M. Huffman, 'Children's Suggestibility Research: Implications for Courtroom and the Forensic Interview', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 117
- 28 S. J. Ceci and M. Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Washington, D.C.: American Psychological Association, 1995).
- 29 S. J. Ceci and M. Bruck, 'Suggestibility of the Child Witness: A Historical Review and Synthesis' (1993) 113 *Psychological Bulletin* 403
<http://psyencelab.com/library/documents/docs/Suggestibility%20of%20the%20Child%20Witness_A%20Historical%20Review%20&%20Synthesis.pdf> at 21 March 2009
- 30 S. J. Ceci and R. D. Friedman, 'Suggestibility of Children: Scientific Research and Legal Implications' (2000) 86 *Cornell Law Review* 33.
- 31 P. Cooke and P. Standen, 'Abuse and Disabled Children: Hidden Needs' (2002) 11 *Child Abuse Review* 1.
- 32 I. M. Córdón, M.-E. Pipe, L. Sayfan, A. Melinder and G. S. Goodman, 'Memory for Traumatic Experiences in Early Childhood' (2004) 24 *Developmental Review* 101.
- 33 A. Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

- 34 A. Cossins, *Masculinities, Sexualities and Child Sexual Abuse* (London: Kluwer Law International, 2000).
- 35 A. Cossins, 'The National Child Sexual Assault Reform Committee', paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference convened by the Australian Institute of Criminology (Adelaide, 1-2 May 2003) <<http://www.aic.gov.au/conferences/2003-abuse/cossins.pdf>> 12 May 2009
- 36 A. Cossins, J. Goodman-Delahunty and K. O'Brien, 'Uncertainty and Misconceptions About Child Sexual Abuse: Implications for the Criminal Justice System' (in press, 2009) *Psychiatry, Psychology and Law*.
- 37 County Court of Victoria, *Practice Note PNCR 2-2010*, (15 May 2012) <[http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/\\$file/PNCR_2-2008_Sex_Offences_List.pdf](http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_2-2008_Sex_Offences_List.pdf)> at 25 March 2009
- 38 E. Crawford and R. Bull, "'Teenagers' Difficulties with Key Words Regarding the Criminal Court Process' (2006) 12 *Psychology, Crime and Law* 653.
- 39 Crime and Misconduct Commission (Queensland), *Seeking Justice: An Inquiry into the Handling of Sexual Offences by the Criminal Justice System* (Brisbane: Crime and Misconduct Commission, 2003).
- 40 A. Cunningham and L. Baker, *Little Eyes, Little Ears: How Violence against a Mother Shapes Children as They Grow*, (2007) <http://www.lfcc.on.ca/little_eyes_little_ears.pdf> at 6 March 2009
- 41 G. M. Davies and H. L. Westcott, 'Investigative Interviewing with Children: Progress and Pitfalls', in A. Heaton-Armstrong, E. Shepherd, G. Gudjonsson and D. Walchover (eds.), *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford: Oxford University Press, 2006) 153
- 42 H. Dent and R. Flin (eds.), *Children as Witnesses* (Chichester: John Wiley & Sons, 1992).
- 43 G. Downes, 'Oral Evidence in Arbitration' (2003) *Speech to the London Court of International Arbitration's Asia-Pacific Users' Council Symposium in Sydney* <<http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/pdf/oral.pdf>> at 13 March 2009
- 44 M. P. Dunne, D. M. Purdie, M. D. Cook, F. M. Boyle and J. M. Najman, 'Is Child Sexual Abuse Declining? Evidence from a Population-Based Survey of Men and Women in Australia' (2003) 27 *Child Abuse & Neglect* 141.
- 45 C. Eastwood, S. Kift and R. Grace, 'Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got It Wrong' (2006) 16 *Journal of Judicial Administration* 81.
- 46 C. Eastwood and W. Patton, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2002) *Criminology Research Council* <<http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf>> at 6 March 2009.
- 47 C. Eastwood, W. Patton and H. Stacy, 'Surviving Child Sexual Abuse and the Criminal Justice System', paper presented at the Children and Crime: Victims and Offenders Conference (Brisbane, 17-18 June 1999)
- 48 J. Edwards, 'Medical Examinations of Sexual Assault Victims: Forensic Use and Relevance' (2003) 15 *Judicial Officers' Bulletin* 65 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_edwards-medical_examinations_of_sexual_assault_victims.html> at 22 March 2009
- 49 M. L. Eisen, G. S. Goodman, J. Qin and S. L. Davis, 'Memory and Suggestibility in Maltreated Children: New Research Relevant to Evaluating Allegations of Abuse', in S. Lynn and K. McConkey (eds.), *Truth in Memory* vol. 67, (New York: Guilford Press, 1998) 163

- 50 P. Ekman, M. O'Sullivan and M. G. Frank, 'A Few Can Catch a Liar' (1999) 10
Psychological Science 263.
- 51 D. M. Elliott and J. Briere, 'Forensic Sexual Abuse Evaluations of Older
Children: Disclosures and Symptomatology' (1994) *Behavioral Sciences and
the Law* 261.
- 52 R. 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)
<[http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_ellis-
judicial_activism.html](http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_ellis-judicial_activism.html)> at 21 March 2009
- 53 D. M. Fergusson, L. J. Horwood and M. T. Lynskey, 'Childhood Sexual Abuse
and Psychiatric Disorder in Young Adulthood: II. Psychiatric Outcomes of
Childhood Sexual Abuse' (1996) 35 *Journal of American Academy of Child &
Adolescent Psychiatry* 1365.
- 54 D. Finkelhor, G. Hotaling, I. A. Lewis and C. Smith, 'Sexual Abuse in a National
Survey of Adult Men and Women: Prevalence, Characteristics, and Risk
Factors' (1990) 14 *Child Abuse & Neglect* 19.
- 55 K. Fitzgerald and A. Tucker, 'Child Development Issues Presentation Paper',
paper presented at the Child Witness Workshop 8-9 February 2007)
- 56 R. Fivush, 'The Development of Autobiographical Memory', in H. L. Westcott,
G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of
Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 56
- 57 R. Fivush and J. Hudson (eds.), *Knowing and Remembering in Young
Children* (Cambridge: Cambridge University Press, 1990).
- 58 R. Fivush, J. M. Sales, A. Goldberg, L. Bahrick and J. Parker, 'Weathering the
Storm: Children's Long-Term Recall of Hurricane Andrew' (2004) 12 *Memory*
104.
- 59 R. Fivush and A. Schwarzmuller, 'Say It Once Again: Effects of Repeated
Questions on Children's Event Recall' (1995) 8 *Journal of Traumatic Stress*
555.
- 60 J. Fleming, P. Mullen, B. Sibthorpe and G. Bammer, 'The Long-Term Impact of
Childhood Sexual Abuse in Australian Women' (1999) 23 *Child Abuse &
Neglect* 145.
- 61 J. M. Fleming, 'Prevalence of Childhood Sexual Abuse in a Community Sample
of Australian Women' (1997) 166 *Medical Journal of Australia* 65.
- 62 S. Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd ed.
(The Australasian Institute of Judicial Administration Incorporated, 2008)
<[http://www.ajja.org.au/index.php?option=com_content&task=view&id=436
&Itemid=165](http://www.ajja.org.au/index.php?option=com_content&task=view&id=436&Itemid=165)> at 14 March 2009
- 63 C. Gobbo, C. Mega and M.-E. Pipe, 'Does the Nature of the Experience
Influence Suggestibility? A Study of Children's Event Memory' (2002) 81
Journal of Experimental Child Psychology 502.
- 64 G. Goodman, L. Rudy, B. L. Bottoms and C. Aman, 'Children's Concerns and
Memory: Issues of Ecological Validity in the Study of Children's Eyewitness
Testimony', in R. Fivush and J. A. Hudson (eds.), *Knowing and Remembering
in Young Children* (Cambridge: Cambridge University Press, 1990) 249
- 65 G. S. Goodman, J. M. Golding, V. S. Helgeson, M. M. Haith and J. Michelli,
'When a Child Takes the Stand: Jurors' Perceptions of Children's Eyewitness
Testimony' (1987) 11 *Law and Human Behavior* 27.
- 66 G. S. Goodman and A. Melinder, 'Child Witness Research and Forensic
Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological
Psychology* 1.

- 67 G. S. Goodman, E. P. Taub, D. P. H. Jones, P. England, L. K. Port, L. Rudy, L. Prado, J. E. B. Myers and G. B. Melton, 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims' (1992) 57 *Monographs of the Society for Research in Child Development* i.
- 68 G. H. Gudjonsson, 'A New Scale of Interrogative Suggestibility' (1984) 5 *Personality and Individual Differences* 303.
- 69 G. H. Gudjonsson, 'A Parallel Form of the Gudjonsson Suggestibility Scale' (1987) 26 *British Journal of Clinical Psychology* 215.
- 70 J. L. Hamblen and M. Levine, 'The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses' (1997) 21 *Law and Psychology Review* 139.
- 71 J. Hatzistergos, *Criminal Procedure Amendment (Sexual Offence Evidence) Bill (Assented on 06/07/2004 - Act No 50 of 2004), Second Reading Speech*, (Parliament of New South Wales, Legislative Council, 4 September 2004) <<http://www.parliament.nsw.gov.au/prod/PARLMENT/NSWBills.nsf/1d4800a7a88cc2abca256e9800121f01/b3d73685d2b99d2fca256e930020eb9d!OpenDocument>> at 18 March 2009
- 72 E. Henderson, 'Persuading and Controlling: The Theory of Cross-examination in Relation to Children', in H. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (West Sussex: Wiley, 2002) 279
- 73 J. Henry, 'System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure' (1997) 12 *Journal of Interpersonal Violence* 499.
- 74 J. D. Heydon, *Cross on Evidence* 7th ed., (Sydney: LexisNexis Butterworths, 2004).
- 75 Home Office Communication Directorate, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, Including Children* (London: Home Office Communication Directorate, 2002).
- 76 Home Office in conjunction with Department of Health, *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (London: HMSO, 1992).
- 77 M. L. Howe, D. Cicchetti and S. L. Toth, 'Children's Basic Memory Processes, Stress, and Maltreatment' (2006) 18 *Development and Psychopathology* 759.
- 78 K. Hughes, H. Stephens, A. Difranco, L. Manning, N. van der Toorn, C. North and M. Taylor, *The Health Impacts on Adult Women of Childhood Sexual Violence before the Age of Twelve Years* (Ipswich: MIMS & Associates, 1998).
- 79 C. F. Johnson, 'Child Sexual Abuse' (2004) 364 *The Lancet* 462.
- 80 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, (Sydney: Judicial Commission of New South Wales, 2008) <<http://www.judcom.nsw.gov.au/publications/benchbks/criminal>> at 16 March 2009
- 81 Judicial Commission of New South Wales, *Equality before the Law Bench Book*, (Sydney: Judicial Commission of New South Wales, 2006) <<http://www.judcom.nsw.gov.au/benchbks/equality/index.php>> at 13 March 2009
- 82 M. S. King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129.
- 83 M. D. Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 4 *Judicial Review* 189.
- 84 M. Lamb, Y. Orbach, K. Sternberg, P. Esplin and I. Hershkowitz, 'The Effects of Forensic Interview Practices on the Quality of Information Provided by Alleged Victims of Child Abuse', in H. L. Westcott, G. M. Davies and R. Bull (eds.),

- Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 131
- 85 Law Reform Commission of Western Australia, *Aboriginal Customary Laws, Project No. 94, Final Report: The Interaction of WA Law with Aboriginal Law and Culture*, (September 2006) <<http://www.lrc.justice.wa.gov.au/094-FR.html>> at 14 March 2009
- 86 A. Ligertwood, *Australian Evidence* 4th ed., (Chatswood: LexisNexis Butterworths, 2004).
- 87 D. Lindsay and M. Johnson, 'Reality Monitoring and Suggestibility: Children's Ability to Discriminate among Memories from Different Sources', in S. J. Ceci, M. P. Toglia and D. F. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer-Verlag, 1987) 92
<http://memlab1.eng.yale.edu/PDFs/1987_Lindsay_Johnson_ChildrenSources.pdf> at 13 March 2009.
- 88 K. London, M. Bruck, S. J. Ceci and D. W. Shuman, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 11 *Psychology, Public Policy, and Law* 194.
- 89 T. D. Lyon, 'Child Witnesses and the Oath', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 245
<<http://works.bepress.com/cgi/viewcontent.cgi?article=1040&context=thomaslyon>> at 21 March 2009.
- 90 T. D. Lyon, 'New Wave in Children's Suggestibility Research: A Critique' (1999) 84 *Cornell Law Review* 1004.
- 91 K. Makin, 'School Days for Judges' (2002) 26 *Canadian Lawyer* 30.
- 92 R. Manley, 'Management of Child Witnesses: Practical Problems Judges Should Know About', paper presented at the District Court Judges Conference (Perth, September 2002)
- 93 S. Mann, A. Vrij and R. Bull, 'Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies' (2004) 89 *Journal of Applied Psychology* 137.
- 94 E. Matthews and K. Saywitz, 'Child Victim Witness Manual' (1992) 12 *California Center for Judicial Education and Research Journal* 5.
- 95 R. J. McNally, *Remembering Trauma* (Cambridge: Belknap Press, 2003).
- 96 G. B. Melton, 'Children's Competency to Testify' (1981) 5 *Law and Human Behavior* 73.
- 97 K. A. Merritt, P. A. Ornstein and B. Spicker, 'Children's Memory for a Salient Medical Procedure: Implications for Testimony' (1994) 94 *Pediatrics* 17.
- 98 T. L. Messman-Moore and P. J. Long, 'The Role of Childhood Sexual Abuse Sequelae in the Sexual Revictimization of Women: An Empirical Review and Theoretical Reformulation' (2003) 23 *Clinical Psychology Review* 537.
- 99 T. Murachver, M. E. Pipe, R. Gordon, J. L. Owens and R. Fivush, 'Do, Show and Tell: Children's Event Memories Acquired through Direct Experience, Observation, and Stories' (1996) 67 *Child Development*, 3029.
- 100 National Society for the Prevention of Cruelty to Children, *A Case for Balance: Demonstrating Good Practice When Children Are Witnesses (Video, 45 Minutes)* (London: National Society for the Prevention of Cruelty to Children, 1997; Reprinted 2003).
- 101 E. C. Nelson, A. C. Heath, P. A. Madden, M. L. Cooper, S. H. Dinwiddie, K. K. Bucholz, A. Glowinski, T. McLaughlin, M. P. Dunne, D. J. Statham and N. G. Martin, 'Association between Self-Reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results from a Twin Study' (2002) 59 *Archives of General Psychiatry* 139.

- 102 D. A. Neumann, B. M. Houskamp, V. E. Pollock and J. Briere, 'The Long-Term Sequelae of Childhood Sexual Abuse in Women: A Meta-Analytic Review' (1996) 1 *Child Maltreatment* 6.
- 103 New South Wales Law Reform Commission, *Report 80: People with an Intellectual Disability and the Criminal Justice System*, (1996) <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>> at 6 March 2009
- 104 New South Wales Parliament Legislative Council-Standing Committee on Law and Justice, *Report 22: Report on Child Sexual Assault Prosecutions (Parliamentary Paper No. 208)* (2002).
- 105 New Zealand Law Commission, *Evidence Code and Commentary (Rep. 55, Vol. 2)* (Wellington: Author, 1999).
- 106 NSW Health-Education Centre against Violence, *Nothing but the Truth: Court Preparation for Adult and Child Witnesses in Sexual Assault Criminal Proceedings* (The Education Centre Against Violence, 2002).
- 107 R. K. Oates, 'Problems and Prejudices for the Sexually Abused Child' (2007) 81 *Australian Law Journal* 313 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_oates-problems_and_prejudices_for_sexual_abused_child.html> at 20 March 2009
- 108 Office of Crime Statistics and Research, *Crime and Justice in South Australia 2006-Offences Reported to Police, the Victims and Alleged Perpetrators: A Statistical Report*, (Office of Crime Statistics and Research, South Australian Attorney-General's Department: Adelaide, 2007) <http://www.ocsar.sa.gov.au/docs/crime_justice/OFF_REPORT2006.pdf> at 13 March 2009
- 109 E. O. Paolucci, M. L. Genuis and C. Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135 *Journal of Psychology* 17.
- 110 D. P. Peters (ed.), *The Child Witness: Cognitive and Social Issues* (Deventer: Kluwer, 1989).
- 111 D. P. Peters, 'The Influence of Stress and Arousal on the Child Witness', in J. Doris (ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (Washington, D.C.: American Psychological Association, 1991) 60
- 112 C. Peterson and M. Grant, 'Forced-Choice: Are Forensic Interviewers Asking the Right Questions?' (2001) 33 *Canadian Journal of Behavioural Science* 118.
- 113 K. Pezdek, K. Finger and D. Hodge, 'Planting False Childhood Memories: The Role of Event Plausibility' (1997) 8 *Psychological Science* 437.
- 114 K. Pezdek and T. Hinz, 'The Construction of False Events in Memory', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 99
- 115 S. L. Phipson, *Phipson on Evidence* (London: Sweet & Maxwell, 14th ed, 1990).
- 116 M. Pipe, M. Lamb, Y. Orbach and A. Cederborg, *Child Sexual Abuse: Disclosure, Denial, Delay* (New Jersey: Lawrence Erlbaum, 2007).
- 117 D. A. Poole and D. S. Lindsay, 'Interviewing Preschoolers: Effects of Non-Suggestive Techniques, Parental Coaching, and Leading Questions on Reports of Non-Experienced Events' (1995) 60 *Journal of Experimental Child Psychology* 129.
- 118 D. A. Poole and L. T. White, 'Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults', in M. S. Zaragoza, J. R. Graham, G. C. N. Hall, R. Hirschman and Y. S. Ben-Porath (eds.), *Memory and Testimony in the Child Witness* (Thousand Oaks: Sage, 1995) 24

- 119 S. Porter, M. Woodworth and B. A. R., 'Truth, Lies and Videotape: An Investigation of the Ability of Federal Parole Officers to Detect Deception' (2000) 24 *Law and Human Behavior* 643.
- 120 M. Powell, 'Improving the Reliability of Child Witness Testimony in Court: The Importance of Focussing on Questioning Techniques', paper presented at the The Australian Institute of Judicial Administration: Child Witnesses-Best Practice for Courts Conference (District Court of New South Wales, Parramatta, 30 July 2004)
<<http://www.aija.org.au/ChildWitnessSem04/Powell.pdf>> at 21 March 2009
- 121 M. Powell and D. Thomson, 'Children's Memories for Repeated Events', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 72
- 122 M. B. Powell, 'Pride: The Essential Elements of a Forensic Interview with an Aboriginal Person' (2000) 35 *Australian Psychologist* 186.
- 123 J. Quas, A. Redich, G. Goodman, S. Ghetti and K. Alexander, 'Long Term Consequences on Child Abuse Victims of Testifying in Criminal Court: Mental Health Revictimization and Delinquency' (1999) *Biennial Conference of the Society for Research in Child Development* Albuquerque NM.
- 124 J. A. Quas, W. C. Thompson, K. Alison and C. Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behavior* 425.
- 125 Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (Toowong: Criminal Justice Commission, 1996).
- 126 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Report No 55, Part 2)*, (Brisbane: Queensland Law Reform Commission, December 2000)
<<http://www.qlrc.qld.gov.au/reports/r55pt2a.pdf>> at 14 March 2009
- 127 M. Rayner, 'Management of Child Witnesses - Practical Solutions for Judges', paper presented at the NSW Local Courts Annual Conference (Brighton-Le-Sands, 4 July 2003)
- 128 L. Re, 'Oral Evidence V. Written Evidence: The Myth of the "Impressive Witness"' (1983) 57 *Australian Law Journal* 679.
- 129 H. S. Resnick, D. G. Kilpatrick, B. S. Dansky, B. E. Saunders and C. L. Best, 'Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women' (1993) 61 *Journal of Consulting and Clinical Psychology* 984.
- 130 T. A. Roesler, 'Reactions to Disclosure of Childhood Sexual Abuse: The Effect on Adult Symptoms' (1994) 182 *Journal of Nervous and Mental Disease* 618.
- 131 E. Ruegg, *Enhancing the Completeness of the Narrative Accounts in Children with Learning Disabilities to Increase Witness Credibility in Cases of Abuse and Neglect* (Education Resources Information Center, 2002).
- 132 N. Sachs-Ericsson, K. Kendall-Tackett and A. Hernandez, 'Childhood Abuse, Chronic Pain, and Depression in the National Comorbidity Survey' (2007) 31 *Child Abuse & Neglect* 531.
- 133 L. Sas, 'The Interaction between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency' (2002)
<http://www.justice.gc.ca/eng/pi/rs/rep-rap/2002/rr02_6/index.html> at 6 March 2009
- 134 L. D. Sas and A. H. Cunningham, *Tipping the Balance to Tell the Secret: The Public Discovery of Child Sexual Abuse* (London, Ontario, Canada: London Family Court Clinic, 1995).

- 135 K. Saywitz and L. Camparo, 'Interviewing Child Witnesses: A Developmental Perspective' (1998) 22 *Child Abuse & Neglect* 825.
- 136 K. Saywitz and R. Nathanson, 'Children's Testimony and Their Perceptions of Stress in and out of the Courtroom' (1993) 17 *International Journal of Child Abuse and Neglect* 613.
- 137 K. J. Saywitz, 'Developmental Underpinnings of Children's Testimony', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 8
- 138 K. J. Saywitz and T. D. Lyon, 'Coming to Grips with Children's Suggestibility', in M. Eisen, J. Quas and G. Goodman (eds.), *Memory and Suggestibility in the Forensic Interview* (Hillsdale: Erlbaum, 2002) 85
<<http://works.bepress.com/cgi/viewcontent.cgi?article=1044&context=thomaslyon>> 18 March 2009.
- 139 J. Schuman, N. Bala and K. Lee, 'Developmentally Appropriate Questions for Child Witnesses' (1999) 25 *Queens Law Journal* 251.
- 140 B. M. Schwartz-Kenney and G. S. Goodman, 'Children's Memory of a Naturalistic Event Following Misinformation' (1999) 3 *Applied Developmental Science* 34.
- 141 R. Selman, M. Schorin, C. Stone and E. Phelps, 'A Naturalistic Study of Children's Social Understanding' (1983) 19 *Developmental Psychology* 82.
- 142 T. Sharon and J. D. Woolley, 'Do Monsters Dream? Young Children's Understanding of the Fantasy/Reality Distinction' (2004) 22 *British Journal of Developmental Psychology* 293.
- 143 N. A. Slicner and S. R. Hanson, 'Guidelines for Videotape Interviews in Child Sexual Abuse Cases' (1989) 7 *American Journal of Forensic Psychology* 61.
- 144 L. Smolak and S. K. Murnen, 'A Meta-Analytic Examination of the Relationship between Child Sexual Abuse and Eating Disorders' (2002) 31 *International Journal of Eating Disorders* 136.
- 145 J. R. Spencer and R. H. Flin (eds.), *The Evidence of Children: The Law and the Psychology* (London: Blackstone Press, 1990).
- 146 J. J. Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 *Australian Law Journal* 29.
- 147 Supreme Court of Queensland, *Equal Treatment Benchbook*, (Brisbane: Supreme Court of Queensland Library, 2005)
<http://www.ajja.org.au/index.php?option=com_content&task=view&id=258&Itemid=110> at 6 March 2009
- 148 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint, Issues Paper No. 8* (June 2005).
- 149 M. Taylor, 'The Role of Creative Control and Culture in Children's Fantasy/Reality Judgments' (1997) 68 *Child Development* 1015.
- 150 L. Terr, 'What Happens to Early Memories of Trauma? A Study of Twenty Children under Age Five at the Time of Documented Traumatic Events' (1988) 27 *Journal of Amer Academy of Child & Adolescent Psychiatry* 96.
- 151 W. C. Thompson, K. A. Clarke-Stewart and S. J. Lepore, 'What Did the Janitor Do? Suggestive Interviewing and the Accuracy of Children's Accounts' (1997) 21 *Law and Human Behavior* 405.
- 152 A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Development Day (Adelaide, 2009)
- 153 A. Tucker, 'Emotional and Psychological Influences on Children's Ability to Give Evidence', paper presented at the Judicial Seminar on Child Witnesses Conference (Darwin, 2007)

- 154 Victorian Law Reform Commission, *Sexual Offences: Final Report*, (2004) <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+++Sexual+Offences++Final+Report>> at 6 March 2009
- 155 Victorian Law Reform Commission, *Sexual Offences: Interim Report*, (2003) <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Sexual+Offences/LAWREFORM+++Sexual+Offences++Interim+Report>> at 6 March 2009
- 156 A. Vrij, 'Deception in Children: A Literature Review and Implications for Children's Testimony', in H. L. Westcott, G. M. Davies and R. Bull (eds.), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (Chichester: Wiley, 2002) 175
- 157 A. G. Walker, *Handbook on Questioning Children: A Linguistic Perspective* 2nd ed., (Washington, D.C.: ABA Center on Children and the Law, American Bar Association, 1999).
- 158 A. G. Walker, 'Questioning Young Children in Court: A Linguistic Case Study' (1993) 17 *Law and Human Behavior* 59.
- 159 A. H. Waterman, M. Blades and C. Spencer, 'Do Children Try to Answer Nonsensical Questions?' (2000) 18 *British Journal of Developmental Psychology* 211.
- 160 H. Westcott and D. Jones, 'The Abuse of Disabled Children' (1999) 40 *Journal of Child Psychology and Psychiatry* 497.
- 161 H. Westcott and M. Page, 'Cross-Examination, Sexual Abuse and Child Witness Identity' (2002) 11 *Child Abuse Review* 137.
- 162 H. L. Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going?' (2006) 18 *Child and Family Law Quarterly* 175.
- 163 D. Whitcomb, D. K. Runyan, E. Devos and W. M. Hunter, *Final Report: Child Victim and Witness Research and Development Program* (US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C., 1991).
- 164 C. White and K. Parker, 'Challenges in Preparing Child Witnesses to Give Evidence in Court', paper presented at the Child Witnesses: Best Practice for Courts Conference (Parramatta, 30 July 2004)
- 165 C. P. Widom and A. Ames, 'Criminal Consequences of Childhood Sexual Victimization' (1994) 18 *Child Abuse & Neglect* 303.
- 166 Wood J., 'Child Witnesses: The New South Wales Experience', paper presented at the Child Witnesses-Best Practice for Courts Conference (Parramatta,
- 167 Wood J., 'Sexual Assault and the Admission of Evidence', paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference (Sydney, 12-14 February 2003)
- 168 J. D. Woolley, 'Thinking About Fantasy: Are Children Fundamentally Different Thinkers and Believers from Adults?' (1997) 68 *Child Development* 991.
- 169 M. Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective', paper presented at the Children As Witnesses Workshop (Melbourne, 2003)
- 170 R. Zajac, J. Gross and H. Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199 <http://www.judcom.nsw.gov.au/benchbks/sexual_assault/abstract_zajac-questioning_children_in_the_courtroom.html> at 21 March 2009
- 171 R. Zajac and H. Hayne, 'I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports' (2003) 9 *Journal of Experimental Psychology: Applied* 187.

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