The Examination and Cross-Examination of Children in Criminal Proceedings: A Review of the International Literature

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Executive Summary

Many countries have made developments with respect to the examination and cross-examination of child witnesses[1] in the criminal justice system that surpass those made by Canada. These developments have been made in response to the vulnerabilities of child witnesses documented in the literature and commitments to international covenants pertaining to child witnesses. In many cases, reforms in other countries have been championed and sustained by members of the judiciary alongside prominent academics and other interested members of the criminal justice system.

The developments in the seven countries reviewed in this paper, including Australia, New Zealand, England and Wales[2], the United States, South Africa, Israel and Norway, constitute a broad and representative range of the types of initiatives that warrant further consideration in Canada.

Key findings include the following five major developments:

The Opportunity for the Entirety of a Child's Evidence to be Video-recorded before Trial

- Since 1992, Western Australia has provided the opportunity for children to have all of their evidence (i.e., evidence-in-chief, cross-examination, and any needed re-examination) video-recorded before trial for use at trial in lieu of a child's in-court testimony. This is known as "full pre-recording" and can be distinguished from developments in countries like Canada in which only some of a child's evidence may be pre-recorded (e.g., a child's video-taped forensic interview that can be adopted at court as the child's evidence-in-chief). Between 2003 and 2013, six other Australian states and territories adopted full pre-recording.
- In 1999, England and Wales enacted a provision for full pre-recording as part of a package of several special measures for child and vulnerable witnesses. While this provision is not yet in force, recent developments in England indicate that this provision may be brought into force within the next year.
- Other countries (e.g., United States and New Zealand) have legislative provisions that explicitly or implicitly provide for the use of full pre-recording, but these are not currently used.

The Use of Intermediaries to Increase Communication between Children and the Court

- Since 1999, legislative provisions in England and Wales have enabled the use of intermediaries to assist child witnesses to communicate their evidence to the court. However, only since 2008 have Registered Intermediaries been used routinely. Intermediaries in England and Wales have the broadest roles including: assessing a child's communication needs; assisting at the forensic or police interview; preparing a written report

[1] Throughout this document, a "child" is defined as a person under the age of 18 years, unless otherwise specified and a "child witness" includes child complainants or alleged victim witnesses.

[2] England and Wales, although two distinct countries in the United Kingdom, are considered together as the relevant legislation discussed below pertains to both.

based on the assessment and providing this to the court before trial toward setting "ground rules" for the conduct of examinations; and assisting the child directly at trial by sitting with the child and intervening where miscommunication has happened or is likely to happen and rephrasing questions or repeating witnesses' answers to improve audibility or clarity of the responses.

- Since 1993, South Africa has used intermediaries during examinations and cross-examinations of child witnesses in criminal proceedings. Intermediaries in South Africa sit with a child in a separate room, take questions from counsel and the judge through headphones, and translate and deliver the questions to the child in developmentally-appropriate language.
- Since 1955 in Israel, the specialist child interrogators who interview and take all evidence from a child for use at trial may also assist the child with communication at trial in a manner similar to that performed by South African intermediaries.
- Western Australia, New South Wales, and a few states in the United States also provide for the use of communication assistants to assist child witnesses with their evidence but they are rarely used.

Prohibitions on Improper Questioning of Child Witnesses

- Over the past decade, several countries, including Australia, New Zealand and parts of the United States, have enacted specific legislation in an attempt to prevent improper questioning of child witnesses, particularly during cross-examination.
- In the United Kingdom, strong and extensive guidelines have been developed over the past few years for barristers and the judiciary pertaining to the questioning of child witnesses at court.

Specialist Examiners to Take Children's Evidence

- In Norway, police officers with specialized training conduct one video interview of a child, with input from counsel and a judge sitting in another room, to be used at court in lieu of the child attending to provide testimony. During this process, the specialist examiner conducts an investigative interview, then consults with counsel and the judge to obtain further direction on additional areas of investigation while the child takes a break, a further interview is held, and then there are further breaks and consultations held until all are satisfied that the case has been "clarified" as much as possible. The interview is transcribed and accompanies the video as the child's evidence at trial.
- Israel's child interrogators are often the only examiners of a child. As the child interrogators have the power to and do prevent most children from testifying in court (on the basis the child is likely to suffer trauma in testifying), the video-recorded interview conducted by the child interrogator is often the only evidence of the child provided at trial. The child interrogator may also take the stand to provide hearsay testimony and "reliability" findings regarding the child's evidence.

Representation for Child Witnesses at Court

- In the United States, a “guardian ad litem” may be appointed by the court as an additional support person who can assist children to exercise their statutory rights to special measures. They can make recommendations to the court regarding the child’s welfare and access all evaluations, records and reports regarding the child. There is also federal legislation that provides for attorneys for children, in addition to guardian ad litems, however, this appears not to be used.
- Norway provides for state-funded counsel and separate legal representation for alleged child and adult victims of certain sexual and violent offences.

> *Just because a change does not coincide with the way we have always done things does not mean that it should be rejected. We should be considering each individual child as the individual he or she is, at the age and with the levels of the maturity he or she has, alleging whatever form of crime he or she has been the victim. Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective.* (Lord Judge 2013, 9)

1. Introduction

The common law, adversarial, criminal justice system was not designed to accommodate children nor their particular vulnerabilities as participants within it. Since the late 1980s, many countries have attempted to meet the needs of child as well as other vulnerable witnesses in the criminal justice system through the introduction or amendment of legislation, as well as the development of specific policies and programs.

Over the past 15 years in Canada, legislation has been amended[3] to provide the opportunity for children to use testimonial aids, including screens, support persons, the use of closed-circuit television (CCTV), and publication bans, as well as alternatives to the oath at the beginning of testifying, changes to the rules on the competency requirements for child witnesses, and the appointment of counsel to cross-examine a child when the accused is self-represented (Bala 1999; Bala et al. 2011). However, children continue to experience numerous difficulties as witnesses within the criminal justice system, and particularly during cross-examination.

Other countries have made developments with respect to the examination and cross-examination of child witnesses beyond what Canada provides. These developments provide examples of further reform with respect to the participation of child witnesses in Canada's criminal justice system, particularly in light of its obligations under international covenants and the current literature.

1.1 Purpose of this Review

The objective of this review is to provide an overview of existing international research and any legislation regarding developments in the examination and cross-examination of children in criminal proceedings.

[3] Through amendments to the *Criminal Code* and *Canada Evidence Act* by Bill C-15, *An Act to Amend the Criminal Code of Canada and the Education Act, 1985),* in 1988 and Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)* in 2005.

2. Background

The developments in other countries have been made primarily in response to the literature pertaining to the vulnerabilities of children within the criminal justice system and in light of commitments to international covenants. An overview of the relevant literature, as well as Canada's obligations under international covenants is provided in this section.

2.1 Experiences of Child Witnesses in Criminal Proceedings

Over a decade ago, Sas (2002) highlighted numerous findings in the research literature regarding children's cognitive, language and memory development and the way in which vulnerabilities in children's development have not been taken into account in trials involving child witnesses in Canada. Since that time, a large body of literature has been published regarding the experiences of child witnesses within criminal proceedings, particularly regarding the impacts upon children of the delay in giving testimony and improper questioning during examination and cross-examination.

2.1.1 Impacts of Delay upon Child Witnesses

Despite attempts in many jurisdictions to reduce delays, children in many common law countries continue to wait at least several months, often more than a year, to attend trial (Plotnikoff and Woolfson 2009; Hayes et al. 2011; Hayes and Bunting 2013; Hanna et al. 2010)[4]. During the wait, many children experience one or more of the following symptoms which impacts on their mental health: significant worry and anxiety, sleep and appetite problems, decline in academic performance and attendance, depression, panic attacks and self-harm (Hayes and Bunting 2013; Hayes et al. 2011; Plotnikoff and Woolfson 2009; Hanna et al. 2010). Moreover, many children do not seek, or are advised against seeking, treatment before providing their evidence in court due to fears that their evidence may be contaminated through the therapeutic process (Branaman and Gottlieb 2013; Lyon and Saywitz 2006; Westcott and Page 2002; Muller 2000). Yet, failure to obtain treatment when needed can exacerbate children's mental health issues (Hanna et al. 2010; Westcott and Page 2001).[5]

The delay between an alleged crime and a child's opportunity to provide evidence regarding it also impacts greatly upon the quality of that evidence, particularly for young children (Henderson 2012a). For child witnesses in countries like Canada, where pre-trial opportunities to provide their evidence do not exist, delays in providing evidence pose significant difficulties for children's developing memories. These may include: a decline in ability to accurately recall information, a decline in the ability to distinguish between different occurrences of abuse, and an

[4] Plotnikoff and Woolfson (2009) undertook extensive research with 182 children regarding their experiences as witnesses in the criminal courts in England and Wales. Their report has been instrumental toward many of the reforms in that country.

[5] Some jurisdictions are better than others at recognizing this and implementing policies to ensure children obtain therapy when needed. For example, in England and Wales, the Crown Prosecution Service (2012) sets out in its manual the need for the best interests for the child to be paramount when deciding when and how pre-trial therapy is provided.

increase in vulnerability to improper questioning at trial (Hanna et al. 2010; Westcott and Page 2002; Muller 2000). For example, very young children may be able to give an accurate account of an incident within a few days or weeks of an alleged crime, but it is much more difficult for them to provide coherent testimony several months later (Shutte 2005).[6] Typical long delays coupled with inappropriate questioning of child witnesses is particularly problematic.

2.1.2 Impacts of Inappropriate Questioning upon Child Witnesses

In many countries, the opportunity exists for a child to have their direct evidence video-recorded during a forensic interview soon after a report of child abuse is made to the police and/or a child protection agency. A considerable amount of research has been invested over the past few decades in developing quality forensic interview protocols (Lamb et al. 2007, 2013; Lyon et al. 2009) and toward achieving the best evidence of children (Hanna et al. 2010; Lyon and Saywitz 2006; Powell 2013; Quas and Sumaroka 2011). It is widely known that to obtain the best evidence from children, interviewers need to, among other things, use a questioning style that leads to the most narrative detail through open-ended or specific, non-leading questions (Lyon et al. 2012; Scurich 2013; Powell 2013), use developmentally-appropriate language, reduce complexity by adjustments to vocabulary, sentence length and structure, attend to non-verbal communication and deliver questions in a systematic and logical sequence (Marchant 2013). Yet, this research appears to be disregarded in many countries, including Canada, during the cross-examination of children in criminal trials.

Due to historically-accepted norms of cross-examination within a traditional, adversarial criminal justice system, defence counsel almost exclusively use leading questions, complex vocabulary, two or more subordinate clauses, tag questions (e.g., "He didn't do it, did he?"), and double negatives with child witnesses (Hanna et al. 2012; Plotnikoff and Woolfson 2012).[7] Yet, leading questions asked of children tend to produce answers that are inaccurate (Spencer 2012b; Keane 2012), particularly when these are asked by counsel who children view as authority figures and believe to be knowledgeable about the alleged events (O'Neil and Zajac 2013b). Moreover, traditional cross-examination is a "highly unique conversational situation" for children whose knowledge of conversational rules is often not developed sufficiently such that they fail to understand when they are being misled (O'Neill and Zajac 2013b, 28). Children may simply agree to an answer they do not understand to end confusing and complex questioning (Spencer 2012b).

Not only does the traditional practice of cross-examination contravene the principles for obtaining accurate and complete reports from children, it intentionally exploits children's

[6] These consequences may also lead to unfairness to the accused who may not have an opportunity to effectively test a child's evidence after long delays (Yehia 2010).

[7] It must be noted that prosecutors are also employing inappropriate questioning techniques with child witnesses, albeit to a much lesser extent (Evans et al. 2009; Hanna et al. 2010, 2012; Zajac and Cannan 2009; Stolzenberg and Lyon 2014). However, as Raitt (2010, 741) notes, "[i]n the United Kingdom and other developed countries where child sexual abuse investigations are undertaken by specialist units, it is expected that police officers, social workers, health care workers, and prosecutors working in this field will complete training in forensic interviewing. In contrast, any person who is a qualified lawyer and entitled to practice is deemed equipped to conduct a cross-examination of a vulnerable witness".

developmental limits, manipulates, confuses, and traumatizes children, and fails to promote the truth (Plotnikoff and Woolfson 2010, 2012; Caruso and Cross 2012; O'Neill and Zajac 2013a, 2013b; Fogliati and Bussey 2013). Indeed, as Plotnikoff and Woolfson (2012) note, "[i]f used at the investigative interview, these same strategies would result in the case being thrown out" (38). The use of traditional, adversarial cross-examination was not developed to account for the vulnerabilities of children and its use with child witnesses is certainly not the "greatest legal engine ever invented for the discovery of truth" (Wigmore 1974, §1367, 32). Instead, the research literature shows that admissible evidence can become inconsistent, skewed or inaccurate *because* of the way in which cross-examination is used with children (Cossins 2012; Zajac and Hayne 2003, 2006; Spencer 2012b; Phillips and Walters 2013; Fogilati and Bussey 2013).

Indeed, many children, across all ages: (1) do not understand many questions posed by defence counsel but feel unable to tell the court they do not understand and will often answer the questions inaccurately (Plotnikoff and Woolfson 2009, 2012; Zajack and Cannan 2009; Hanna et al. 2010; Hayes and Bunting 2013; O'Neill and Zajac 2013b); and (2) report problems of complexity of questions and pace of questions as too difficult to follow (Plotnikoff and Woolfson 2009, 2012; Ellison 2002; Zajac et al. 2012; Zajac and Cannan 2009). [8]

Moreover, the behaviour of defence counsel when employing traditional cross-examination techniques may also be harmful to child witnesses. Many defence counsel still routinely accuse children of lying during cross-examination (Plotnikoff and Woolfson 2009; Hanna et al. 2010; Hayes et al. 2011; Hayes and Bunting 2013; Cashmore and Trimboli 2005), despite the lack of evidence that children have a greater propensity to lie than adults (Australasian Institute of Judicial Administration 2012). Many defence counsel also often behave in an aggressive or hostile manner that intimidates children (Caruso and Cross 2012; Cashmore and Trimboli 2005) and reduces them to tears (Hanna et al. 2010). Some have characterized the courtroom behaviour of defence counsel as abusive (Muller 2000), leading to secondary victimization (Simon 2006; Westcott and Page 2002) and/or akin to the behaviour of the offenders (Westcott and Page 2002). Accordingly, the cross-examination of child witnesses has been summarized as follows:

> Clothed in the garb of orthodoxy and tradition, cross-examination has often been little more than a legitimated form of bullying. Even where this has not been the case, evidence taking conventions and rules have often prevented children and witnesses with cognitive impairments from testifying either at all, or at least, reliably and coherently. This should never have been and should not continue to be the case, especially not in the name of the accused's right to a fair trial. It has cast a shadow upon the repute of the criminal justice process. It casts the same shadow upon the law and the legal profession. (Henning 2013, 174).

[8] There is often a greater focus on younger children (e.g., under eight years of age) as more vulnerable to suggestion during inappropriate questioning. However, research demonstrates that even children up to12 years of age may have difficulty in dating relatively recent events with landmarks such as major holidays (Lyon and Saywitz 2006), adolescents may not understand language that highly literate counsel take for granted (Davies et al. 2010), and some adolescents may also, like younger children, have a tendency to agree to suggestive questions posed by "authoritative" counsel as authority figures even when they are inaccurate (Cossins 2009).

As explored further below, other countries have attempted to ameliorate the impacts upon children of delays and inappropriate questioning. Indeed, it can be argued that countries have an imperative to do so in light of their commitments to international covenants.

2.2 Canada's Commitment to International Covenants

Canada ratified the *Convention on the Rights of the Child* ("Convention") on December 13, 1991. Under the Convention, Canada has agreed during criminal proceedings, among other things, to:

(1) ensure that "the best interests of the child shall be a primary consideration" [Article 3(1)];

(2) ensure that children have the opportunity to be heard "either directly, or through a representative or an appropriate body" [Article 12]; and

(3) "take all appropriate measures to promote physical and psychological recovery and social integration of child victims of: any form of neglect, exploitation, or abuse" in a way that "fosters the health, self-respect and dignity of the child" [Article 39].

Canada also ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* on September 14, 2005, in which it agreed to adopt several measures to protect the rights and interests of child victims of certain sexual offences in the criminal justice proceedings.

Since Canada's ratification of the Convention, there has been continued recognition internationally of the evidence of harm to children within criminal proceedings, including ongoing trauma long after the proceedings have ended, and the need for these proceedings to be become more accountable to the needs and best interests of children (Matthias and Zaal, 2011). Indeed, the United Nations' (2005) *Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime* ("UN Guidelines") were specifically developed in light of "contemporary knowledge and relevant international and regional norms, standards and principles" (2005, Annex I, 1).

Canada has taken a leadership role with respect to the development and implementation of the UN Guidelines. Canada co-sponsored the resolution calling for the development of the UN Guidelines and the UN resolution which led to the adoption of the Guidelines. Canada also provided funding for the development of the delivery of training and technical assistance in the implementation of the Guidelines including a set of model legislative provisions to implement the Guidelines, an Implementation Guide related to the Guidelines for policy makers and legal reform, and a training toolkit (United Nations Office on Drugs and Crime 2009a, 2009b).

As set out in the Introduction above, Canada has enacted several measures toward meeting the objectives of the UN Guidelines. However, developments in several countries provide examples of further reforms that could be made by Canada with respect to the following objectives of the UN Guidelines:

(1) "*trained professionals*" should be conducting examinations of children in a "sensitive, respectful and thorough manner" (Article 13);

(2) "[a]ll interactions…should be conducted in a child-sensitive manner in a *suitable environment* that accommodates the special needs of the child, according to his or her abilities, age, intellectual maturity and evolving capacity. They should also take place in a language that the child uses and *understands*" (Article 14);

(3) "[p]rofessionals should develop and implement measures to make it easier for children to testify or give evidence *to improve communication and understanding* at the pre-trial and trial stages" (Article 25);

(4) trials should "take place as soon as practical, unless delays are in the child's best interest. Investigation of crimes involving child victims and witnesses should also be expedited and there should be procedures, laws or court rules that *provide for cases involving child victims and witnesses to be expedited*" (Article 30);

(5) measures should be implemented including for the collection of evidence "to reduce…unnecessary contact with the justice process, such as through use of video recording" and "to ensure that child victims and witnesses are *questioned in a child-sensitive manner*" (Articles 31a and c); and

(6) "[a]dequate training, education and information should be made available to professionals, working with child victims and witnesses with a view to improving and sustaining specialized methods, approaches and attitudes in order to protect and deal effectively with child victims and witnesses" (emphasis added).

The major developments in seven countries that demonstrate heightened commitments to the UN Guidelines, the Convention, and other international covenants will be discussed below. [9]

[9] European Union nations have additional obligations beyond the Convention. See European Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82, 22.3.2001, p. 1–4). Moreover, a 2005 decision of the Court of Justice of the European Communities (Criminal Proceedings against Pupino, Case C-105/03 [2006] QB 83) that held Italy failed to meet its obligations under European Union law as the country did not have a mechanism by which to take the evidence of young children before trial has been cited as impetus for further change (Bar Council of England and Wales, 2005). The position of the Council of Europe is that in cases of crimes within the family, pre-trial video-recorded evidence should be taken as early as possible and not be repeated. See Council of Europe (1997, Section IV).

3. Major Developments in Other Countries

This section will explore the major developments in Australia, New Zealand, England and Wales, the United States, South Africa, and Israel whose criminal law systems are adversarial in nature, and Norway, whose criminal law system functions within a quasi-inquisitorial system with adversarial elements. While other countries not considered in this report have made noteworthy developments (e.g., France), the developments in the seven countries reviewed below constitute a broad and representative range of the types of exciting initiatives that are in place around the world.

For each of the countries reviewed in this section, the following elements will be included: the main development(s); pertinent legislation and in some cases, jurisprudence; significant history that influenced the development(s); and relevant best practice documents generated in response to the developments. A later section in this report reviews some of the implementation issues with respect to five major developments, including some advantages and disadvantages associated with each.

3.1 Australia

In Australia, the rules of evidence and criminal procedure applicable to child witnesses vary by state (i.e., Western Australia, South Australia, Queensland, New South Wales, Victoria, and Tasmania) and territory (i.e., Australia Capital Territory and Northern Territory). However, each of Australia's states and territories, has made at least one or more of the following significant developments:

(1) legislation that enables or mandates judges to intervene when improper questions are asked of witnesses during cross-examination;

(2) the opportunity to use "child communicators" during court proceedings; and

(3) full pre-recording of a child's evidence.

Given the similarities in some of the legislation across Australian jurisdictions, this section will review the first development in New South Wales, and the second and third developments in Western Australia. Comparisons with legislative provisions in other Australian jurisdictions will be noted as part of this review.

3.1.1 Disallowance of Improper Questions during Cross-Examination

New South Wales became the first jurisdiction in Australia to impose a positive duty on trial judges to control improper questioning during cross-examination, irrespective of any objections made by the party questioning (Cossins 2009). It was hoped that this legislation would increase judicial control of cross-examination above that already available through the common law (Australasian Institute of Judicial Administration 2012; Boyd and Hopkins 2010), and better protect witnesses who are most vulnerable, including children, from the effects of improper questioning (Cossins 2009; Boyd and Hopkins 2010).

Amendments were made to legislation in New South Wales, Tasmania, the Australian Capital Territory, and the Commonwealth (federal jurisdiction) to include an identical section regarding "improper questions" asked of witnesses that must be disallowed (Cossins 2009). Section 41 in each of the respective *Evidence Act*s[10] in these jurisdictions provides in part:

> (1) The court *must* disallow a question put to *a witness* in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a disallowable question):
> (a) is misleading or confusing; or
> (b) is *unduly* annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
> (emphasis added)

Section 25 of South Australia's *Evidence Act 1929* contains similar provisions. Section 41(2) in each of Victoria's *Evidence Act 2008* and the Northern Territory's *Evidence (National Uniform Legislation) Act*, provides there is a mandatory duty to disallow improper questions with respect to "vulnerable" witnesses, including child witnesses, only.

The remaining Australian jurisdictions have adopted legislation that provides a discretionary provision regarding disallowing improper questions. The legislation in Western Australia, Queensland, and the Northern Territory state that a court *may*, rather than *must*, disallow improper questions (Cossins 2009).[11] However, even the mandatory provisions in the other Australian jurisdictions provide a judge with discretion in curtailing improper questions asked of a child (e.g., in considering whether the question is *unduly* annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive to require disallowance of it) (Henning 2013).

Further to the legislative amendments, in September 2010, the District Court of Western Australia (2010) issued a Circular to Practitioners, *Guidelines for Cross-Examination of Children and Persons Suffering a Mental Disability*. These guidelines, while not rules of the District Court, provide assistance to counsel regarding the appropriate approach to take during cross-examination of child witnesses and witnesses with mental disabilities (e.g., questions should be short and simple; legalese is to be avoided; a witness should be given an adequate opportunity to consider the question, formulate a response and then give an answer; and counsel should not mix topics or switch between topics).[12]

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[10] In Australia, there has been an attempt to simplify the rules of evidence across all jurisdictions, including the Commonwealth (federal jurisdiction), through uniform legislation. This includes maintaining the same numbered provisions in the legislation across all jurisdictions that have adopted the uniform legislation. See Australian Law Reform Commission (2005).

[11] *Evidence Act 1906* (WA) s.26 ; *Evidence Act 1977* (Qld) s. 21; *Evidence (National Uniform Legislation) Act* (NT) s. 41(1); *Evidence Act 2008* (Vic) s. 41(1).

[12] See also Sleight (2011) for his discussion of these guidelines in the context of trials for sexual offences.

3.1.2 Child Communicators

There are at least two states in Australia that have legislative provisions for the use of persons to assist children with communication in criminal court proceedings. First, Western Australia, under section 106F of its *Evidence Act 1906*, provides that the court may appoint a "communicator" for a child under 16 years of age to communicate and explain to the child questions put to her/him and to relay to the court evidence given by the child. However, in practice, the role of child communicators has been limited and tantamount to using an English interpreter (Jackson 2003). Moreover, child communicators are rarely used and there is little training or infrastructure in place to support their future use as a routine measure (Henning 2013).

Second, in New South Wales, section 275B of its *Criminal Procedure Act 1986* provides that a witness with a "communication difficulty", including a child, may use another person to assist her/him to communicating with the court, but only if the witness ordinarily receives daily assistance from that person. In 2003, it was recommended that South Australia follow the lead of Western Australia and adopt legislation to provide for the appointment of child communicators, for all child witnesses, to assist them when needed in court proceedings (Layton 2003). However, at this time, there have been no further reforms in South Australia or any other Australian jurisdiction regarding this measure.

3.1.3 Full Pre-recording: Western Australian Model

In 1992, Western Australia led the country in many significant reforms regarding the protection of child witnesses, including the enactment of legislation that provided the opportunity for full pre-recording of a child's evidence (Jackson 2003; Henning 2013). Support from the legal profession, the judiciary, and successive governments was instrumental to this development and has been critical to the ongoing use of this measure (Jackson 2003, 2012; Plotnikoff and Woolfson 2010).

Section 106I(b) of Western Australia's *Evidence Act 1906* provides that, upon application by a prosecutor, children under 16 years of age who witness sexual, prostitution or familial violence are eligible to fully pre-record their evidence at a special hearing before trial in lieu of attending trial to testify. Applications are usually made at the accused's arraignment and are rarely opposed (Jackson 2012; Hanna et al. 2010), although they have been rejected where the trial date can be scheduled sooner than a pre-recording hearing (Hanna et al. 2010).

Section 106K of the Act sets out the process for pre-recording a child's evidence, including any directions that may be made by a judge for other special measures to be used in conjunction with the pre-recording. Children normally attend court and have their examinations conducted through CCTV from another room (Hanna et al. 2010). In the room in which the child is examined, there are ordinarily screens which show the judge and counsel (but not the accused), and a court officer and support person is with the child throughout (Jackson 2012). The accused, the judge and counsel observe the child from the courtroom through CCTV. Juries later view the pre-recorded evidence on large screens in the court (Hanna et al. 2010).

Usually, a day before the pre-recording hearing, the child watches her/his forensic interview to refresh her/his memory (Henderson et al. 2012). At the pre-recording hearing, the examination-in-chief ordinarily follows the following process: the prosecutor asks some introductory questions, the child's forensic interview is screened, the child is asked to adopt the contents of the forensic interview, and the prosecutor may ask some supplemental questions (Jackson 2012; Hanna et al. 2010). Cross-examination and any re-examination follow the examination-in-chief, as it would at trial. Pre-recording hearings are expected to be completed within six months of the report to police (Henderson et al. 2012).

There are additional statutory provisions for the way in which the video is edited, stored before and presented at trial, and stored after trial in case of appeal or retrial, and offences for misuse (Jackson 2003; Jackson 2012). Most conflicts of admissibility of evidence are settled by consent and there are few concerns regarding the editing process (Hanna et al. 2010).

It is *possible* that children may need to be called for another examination after the pre-recording hearing, and the legislation provides for this exception (Jackson 2012). However, this appears to be an extremely rare situation. A senior Australian judge noted in 2012 that he was only aware of two applications for a further cross-examination after the completion of a full pre-recording hearing, and only one of those applications was successful (Jackson 2012, 81).

Fully pre-recording a child's evidence before trial has evolved as a well-accepted process in Western Australia that works well for all involved (Jackson 2012; Henning 2013). As a result of its success, six other Australian jurisdictions have followed Western Australia in adopting the measure of fully pre-recording a child's evidence before trial.[13] These include:

- Queensland in 2003 through insertion of section 21AK in its *Evidence Act 1977*. It became mandatory in 2006 (Henderson et al. 2012);
- the Northern Territory in 2004 through sections 21B(2)(b) of its *Evidence Act 1939*;
- Australian Capital Territory in 2008 through inclusion of section 40S in its *Evidence (Miscellaneous Provisions) Act 1991*;
- Victoria in 2009 by sections 369-370 of the *Criminal Procedure Act 2009*;
- South Australia in 2010 through inclusion of section 13 in its *Evidence Act 1929*; and
- Tasmania in 2013 through substitution of new section 6 in its *Evidence (Children and Special Witnesses) Act 2001*.

The Australasian Institute of Judicial Administration (2012) has published a very valuable resource, *Bench Book for Children Giving Evidence in Australian Courts*, which incorporates a discussion of pre-recording children's evidence across Australia, as well as other significant developments in Australia. While intended primarily for judicial officers who deal with child witnesses giving evidence in criminal proceedings, this resource is also useful for counsel and advocates in Australia, as well as other jurisdictions. The document collates both legal and psychological material regarding child witnesses on a number of issues into one comprehensive resource.

[13] However, pre-recording procedures vary somewhat across Australian jurisdictions and some of these provisions apply only to complainants of sexual offences (e.g., in Victoria and the Australian Capital Territory).

3.2 New Zealand

There have been three significant developments which have been considered and/or implemented in New Zealand over the past 25 years:

(1) specific legislative provisions restricting the use of "unacceptable" questions during the examination and cross-examination of children;

(2) the opportunity to pre-record children's entire testimony in lieu of their attendance at trial; and

(3) the possible use of intermediaries to provide "communication assistance" at court.

These three developments are discussed below.

Many of the changes made to New Zealand's legislation were initiated through the advocacy and recommendations of interdisciplinary groups of professionals including police, prosecutors, doctors, and mental health clinicians (e.g., the Geddis Committee) working together in the early 1980s (Henderson 2012b). The first significant measures for child witnesses were formalized in the *Evidence Amendment Act 1989*. This legislation introduced alternative methods of testifying for children aged 16 years and under where there was an alleged sexual offence. Special measures available to children included the possible use of intermediaries[14] and a provision for full pre-recording.[15] However, throughout the 1990s, it appears these two measures were unused (Henderson 2012b; Hanna et al. 2010).

The *Evidence Act 2006* replaced previous legislation. Alternative methods of testifying were expanded to all child complainants under 18 years of age related to any criminal offence (Hanna et al. 2010). The 2006 legislation introduced a provision for "unacceptable" questions posed to any witness, but removed the specific provisions that enabled full pre-recording and the use of intermediaries.

3.2.1 Disallowance of "Unacceptable" Questions

Section 85 of the *Evidence Act 2006*, was an attempt to provide legislative teeth to the inherent jurisdiction of a judge to intervene in the interests of justice and better protect certain witnesses, particularly children, from unfair examinations. Section 85 provides as follows:

> (1) In any proceeding, the Judge *may* disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
> (2) Without limiting the matters that the Judge *may* take into account for the purposes of subsection (1), the Judge *may* have regard to—
> (a) the age or maturity of the witness; and
> (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and

[14] Section 24E(4)
[15] Subsections 23Ea-e.

(c) the linguistic or cultural background or religious beliefs of the witness; and
(d) the nature of the proceeding; and
(e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding. (emphasis added)

However, as is the case in some Australian states, the provisions remain discretionary.

3.2.2 Opportunity for Full Pre-recording

The *Evidence Act 2006* removed the specific provision that had previously allowed a child's fully pre-recorded testimony to be admitted at trial. However, it was argued that the provisions of the new legislation, in particular, sections 103-107, were still drafted broadly enough to allow its use (Henderson 2012a). Indeed, several steps taken by the Ministry of Justice between 2010 and 2012 indicated that New Zealand was moving toward the implementation of full pre-recording.[16]

Accordingly, some applications to fully pre-record a child's entire evidence were made under the *Evidence Act 2006* commencing in December 2010 (Davies and Hanna 2013). Some of these applications were approved, and trials were completed on consent and conducted according to the government's 2011 *Operational Circular for Pre-recording Evidence* which set out operational processes for pre-recording evidence (Davies and Hanna 2013; Ministry of Justice NZ 2011b).

However, in June 2011, in its release of two controversial decisions, the New Zealand Court of Appeal held that while it was within the court's jurisdiction to allow a child's pre-recorded testimony to be admitted as the entirety of a child's evidence for trial, it should be restricted to rare circumstances (Davies and Hanna 2013). [17] No further full pre-recording hearings have been completed since that time (Davies and Hanna 2013).

3.2.3 Opportunity for Intermediaries

Sections 80 and 81 of the *Evidence Act 2006* allows for "communication assistance" to be provided to witnesses (and defendants) to enable them to "sufficiently understand questions put orally" and "adequately respond to them". It has been argued that this section effectively provides the opportunity for the use of intermediaries (Davies et al. 2011a).

[16] In late 2010, the Ministry of Justice, after investigating alternative pre-trial and trial processes for child witnesses, released an issues paper to guide further development of policy and potential reforms to the criminal justice system (Ministry of Justice 2010). Building on that report, in July 2011, the Cabinet Domestic Policy Committee released its recommendations for further legislative reform including a presumption of full pre-recording and an introduction of intermediaries to improve the questioning of children (New Zealand Domestic Policy Committee 2011; Henderson 2012a, 2012b). In 2011, the Ministry of Justice, in collaboration with the New Zealand Police, the Ministry of Social Development and Crown law, also published *National Guidelines for Agencies Working with Child Witnesses* (Ministry of Justice NZ 2011a). In 2012, the Ministry of Justice commissioned research toward proposed legislation incorporating the presumption in favour of fully pre-recording the evidence of children in criminal trials.

[17] *M.* v. *R.* (CA 335/2011) and *R.* v. *E.* (CA 339/2011). See also Henderson (2011) for her discussion of these cases.

In 2011, further to the then government's direction toward further reforms to special measures to specifically include the use of intermediaries, the New Zealand Law Foundation commissioned research to explore the benefits and risks of intermediary models at trial (Davies et al. 2011a). As part of this exploration, they conducted mock examinations using judges, prosecutors, defence counsel, adults playing child witnesses and accused, and forensic interviewers and speech-language therapists as intermediaries toward exploring three models of intermediary use at and recommended the development of an intermediary model through a multidisciplinary child witness working group (Davies et al. 2011a).

3.2.4 Recent Directions

With a change of government in 2013, there has been a simultaneous shift in direction relating to further reforms for child witnesses in criminal proceedings in New Zealand. In December 2013, the Minister of Justice provided an overview of the current government's intentions regarding proposed amendments to the *Evidence Act 2006*, including to rescind Cabinet's 2011 decisions to introduce a legislative presumption in favour of full pre-recording and implement the use of intermediaries (Collins 2013).[18] At the time of writing this paper, it is unclear whether these proposed amendments to the *Evidence Act 2006* will be passed and what specific best practice policies may result from the new government's recommendations.

3.3 South Africa

The main development in South Africa is the use of intermediaries at trial.

3.3.1 Intermediaries

For over 20 years, South Africa has used intermediaries to protect child witnesses and assist them to communicate during criminal proceedings in the magistrates' courts (Matthias and Zaal 2011). The introduction of intermediaries was based on the recognition of an aggressive advocacy culture in South Africa and the trauma that most children experience during criminal proceedings (Henderson 2012a).[19]

Section 170A(1) of the *Criminal Procedure Act 1977*, inserted in 1993, now provides for the use of intermediaries where attending criminal proceedings "would expose any witness under the age

[18] Interestingly, the New Zealand Law Commission confirmed in its 2013 review of the *Evidence Act 2006* that it continued to view the full pre-recording of children's evidence as having merit, particularly where fast-tracking a case was not possible, and that further consideration of pre-recording was required outside of its statutory review (New Zealand Law Commission 2013, 228-229).

[19] However, despite the use of intermediaries, children in South Africa lack many of the protections available routinely to child witnesses in other jurisdictions. For example, children are often subjected to multiple interviews by different people before trial (Hanna et al. 2010; Simon 2006), there are no special waiting areas and children are regularly threatened by accused persons and their families (Hanna et al. 2010), there is a significant lack of resources to afford other legislated protections (e.g., screens) (Hanna et al. 2010), children's evidence is still specifically subjected to a cautionary rule which directs the court to scrutinize children's testimony to ensure it can be relied upon (Shutte 2005; Henderson 2012a), and there are often very long delays before trial (Jonker and Swanson 2007; Simon 2006).

of eighteen years to undue mental stress or suffering if he testifies at such proceedings". Specific recommendations made by the South African Law Commission were a strong influence on this legislative amendment (Ellison 2002). In 2007, amendments were made to section 170A to extend eligibility for intermediaries to adult witnesses under "the mental age of eighteen years", and require magistrates presiding in criminal courts to give immediate reasons if they refused an application for a witness to be assisted by an intermediary (Matthias and Zaal 2011).[20]

South African courts have generally accepted that children who will be testifying about abusive acts will be exposed "to mental stress or suffering" if they testify in criminal proceedings (Hanna et al. 2010; Muller 2000) and that this trauma may be as severe as the trauma caused by the crime (Matthias and Zaal 2011). Nevertheless, there is frequent debate and regular opposition to prosecutors' applications for the use of intermediaries and whether a child's trauma is "undue" (Matthias and Zaal 2011; Shutte 2005; Simon 2006). The cost of expert evidence to support a finding of undue mental stress or suffering has discouraged prosecutors' applications for intermediaries (Matthias and Zaal 2011).

Intermediaries in South Africa serve two functions: (1) to protect the child against the aggression and hostility associated with cross-examination; and (2) to convey questions by counsel at trial to the child in a manner that is understandable to the child to enable a more accurate answer (Shutte 2005). They do not have any role before trial (Henderson 2012a).

Intermediaries typically sit with children in a separate room equipped with CCTV, although sometimes they are instead viewed through a one-way mirror, and almost always within the courthouse (Matthias and Zaal 2011; Hanna et al. 2010). The intermediary receives questions from counsel through headphones and translates the questions into language appropriate for the child. The child's response is then communicated directly to the counsel (Hanna et al. 2010; Davies et al. 2011a).

While intermediaries can shield a child from an inappropriate question and relay it in a more appropriate manner, they cannot change the fundamental meaning of a question (Shutte 2005). Magistrates still have the ability to ask questions directly of a child (Jonker and Swanzen 2007). However, this rarely occurs and the child typically only has contact with the intermediary (Davies et al. 2011a).

In practice in South Africa, intermediaries are used mainly in certain cases of sexual violence (i.e., usually rape and indecent assault) where the child is an alleged victim and between nine and 13 years of age (Hanna et al. 2010; Shutte 2005; Jonker and Swanzen 2007). However, the High Court has held that intermediaries should be available to all children testifying, not just to those under 14 years of age.[21]

[20] In *Director of Public Prosecutions, Transvaal* v. *Minister for Justice and Constitutional Development and Others* (2009), 7 B.C.L.R. 637 (CC), the Constitutional Court held that judges must consider appointing an intermediary and give reasons for any refusal to do so.

[21] See *State* v. *Mokoena and Phaswane*, [2008] H.C.S.A.1.

The ability to use intermediaries is reliant upon courts having the necessary facilities to support this measure. In 2009, only 14% of regional magistrate's courts centres had the necessary facilities for intermediaries and many of those had ongoing problems with damaged or defective equipment (Matthias and Zaal 2011).

Unlike in England and Wales, described below, where intermediaries are formally regulated, intermediaries in South Africa must only be deemed "competent" to be appointed. This generally means they have achieved a minimum amount of education in particular disciplines (e.g., a Master's Degree in social work with at least two years' experience) (Hanna et al. 2010; Henderson 2012a). There is a lack of consistent training, accreditation and support across the country and intermediaries are often in short supply (Matthias and Zaal 2011; Shutte 2005; Hanna et al. 2010).[22]

3.4 United Kingdom: England and Wales[23]

There have been three significant developments in the United Kingdom in the past 15 years:

(1) the opportunity for full pre-recording of children's evidence;

(2) the use of intermediaries to assist children with communication before and during examinations; and

(3) significant practice guidelines regarding the questioning of children during examination and cross-examinations.

Since the 1980s, there have been ongoing efforts toward reform regarding the treatment of child witnesses in the United Kingdom. These efforts have been spearheaded by high profile academics, members of the judiciary, researchers, and charitable organizations (Hanna et al. 2010). In 1989, the report of the Advisory Group on Video-Recorded Evidence, chaired by Judge Thomas Pigot, laid the foundation for significant legislative changes in the United Kingdom, including the introduction of intermediaries and the admissibility of children's pre-recorded video evidence (Pigot et al. 1989).

About a decade later, in 1999, the *Youth Justice and Criminal Evidence Act 1999* ("YJCEA") was enacted and included novel provisions regarding intermediaries and pre-recorded evidence in England and Wales. In 2004, the government announced a review of the way in which

[22] However, the South African government has committed to providing improved and increased training, education, monitoring and evaluation regarding victims of sexual offences, and further developments in these areas are anticipated by 2016. See Department of Justice and Constitutional Development (2012).

[23] The developments of England and Wales will be highlighted in this section. Developments in Northern Ireland have largely mirrored those initiated in England and Wales. See, for example, Department of Justice (2012) and Henderson (2012a). There are some differences between Scotland and the rest of the United Kingdom regarding special measures available to child witnesses. For example, amendments in 2004 to section 271A of Scotland's Criminal Procedure (Scotland) Act 1995, sections 271A provides for "taking evidence by a commissioner" which could potentially be used to obtain the entirety of a child's evidence before trial (Henderson 2012a). However, like the United States, these provisions appear to be rarely used (Henderson 2012a).

children were giving evidence in the criminal courts, including how special measures were working under the YJCEA and the feasibility of implementing full pre-recording (Office for Criminal Justice Reform 2007). Further recommendations, including increasing the availability of special measures to all children under the age of 18 years giving evidence in court, were incorporated into the *Coroners and Justice Act 2009* which amended the YJCEA (Hoyano 2010).

3.4.1 Opportunity for Full Pre-recording

Section 28 of the YJCEA provides for full pre-recording of a child's evidence before trial. However, this section has never been brought into force. Instead, children's forensic interviews, described as Achieving Best Evidence ("ABE") interviews and as guided by the Ministry of Justice, are videotaped and routinely used as a child's evidence-in-chief, followed by cross-examination at trial by CCTV[24] (Ministry of Justice UK 2011; Spencer 2012a).

There have been various reviews conducted in contemplation of implementing section 28. Plotnikoff and Woolfson (2009) in their research found that a diversity of professionals agreed notionally with full pre-recording. However, practical issues of developing effective guidance and procedures and obtaining timely disclosure from prosecutors and third parties were seen as key obstacles (Plotnikoff and Woolfson, 2009). Other suggestions have been to retain section 28 for use by certain vulnerable witnesses only, including very young children and those with a significant or terminal degenerative illness and those with mental incapacity (Hoyano 2007).

While initially sceptical of the implementation of section 28 (Hoyano 2007), in 2010, the Criminal Bar Association of England and Wales (as part of the Bar Council of England and Wales' submission to the European Commission strategy on the rights of children), confirmed that despite its special measures enacted to date, England and Wales needed to do much more to ensure "child-friendly justice" (Bar Council of England and Wales 2010). Moreover, there has been growing judicial support for implementation of section 28 because of the chronic delay in young witnesses giving evidence and in light of the documented harmful impacts of such delay upon children (Plotnikoff and Woolfson 2011, 2012; Hanna et al. 2010; Spencer 2012b; Lord Judge 2013).

In 2012, the Ministry of Justice indicated that it would implement section 28 if it could address satisfactorily the cost of implementing it (Spencer 2012b). Lord Judge, the Lord Chief Justice of England and Wales asserted during the last year that he would be "astonished" if full pre-recording was not implemented "within a few years" (Lord Judge 2013, 9). Indeed, a recent video released by the Ministry of Justice confirms it is piloting the use of full pre-recording in three jurisdictions in England and moving toward its future implementation.[25]

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[24] There have been some studies in the UK looking at the feasibility of providing video link opportunities for children outside of the court environment. See, for example, Applegate (2006) regarding a pilot in Exeter that found that a live-link from outside the courtroom building was an effective way to conduct examination and cross-examination of child witnesses.

[25] See http://www.youtube.com/watch?v=aTSWq__sAZk&feature=youtu.be published April 28, 2014 and accessed May 3, 2014. See also http://www.justice.gov.uk/downloads/legal-aid/fee-schemes/agfs/graduated-fees-s28-pilot.pdf.

3.4.2 Registered Intermediaries

One measure that has been implemented successfully in the United Kingdom is the use of intermediaries. Despite legislative provision for their use since 1999 (through section 29 of the YJCEA), it was not until 2008 that their use was finally implemented across England and Wales (Office for Criminal Justice Reform 2007).[26]

Intermediary practice and procedure is governed by the Ministry of Justice, as set out in *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2012). There is a formalized process for recruitment, training and regulation of intermediaries (Brammer and Cooper 2011). The Intermediaries Registration Board oversees registration and standards for intermediaries (Ministry of Justice 2011). Most Registered Intermediaries are qualified speech and language therapists, but they may be drawn from a variety of other relevant disciplines including psychology, social work and occupational therapy (Brammer and Cooper 2011). They must pass two written tests and a practical role-play scenario assessed by a retired judge to qualify for designation (Hanna et al. 2010). The expectation is that Registered Intermediaries will be used, but occasionally non-registered intermediaries will be considered for use when a Registered Intermediary is not available (Ministry of Justice UK 2011).[27]

There are four main roles an intermediary may adopt in England and Wales to assist children with their evidence, including:

(1) assessment of a witness's communication needs;

(2) assistance at the ABE or police interview;

(3) preparation of a written report based on the assessment; and

(4) assistance at trial (Hanna et al. 2010; Ministry of Justice 2012).

Ideally, intermediaries will have the opportunity to function in each of these four roles with a child witness but they may assist at any stage (Ministry of Justice 2012).

The assessments conducted by the intermediaries are very specialized and cover the witness's communication abilities and needs, including regarding developmental age and language competence, intelligence, relevant medical conditions and required communication aids, as well as consider issues such as the child's understanding of time, attention span, and need for comfort objects (Hanna et al. 2010). During the ABE or police interview, intermediaries provide mostly a monitoring role and can assist the child to communicate her or his answers, by interpreting non-verbal communication, and by intervening as needed to rephrase questions and identify when the child needs a break (Hanna et al. 2010; Henderson 2012a).

The written report has been identified as the most important of the intermediary's roles (Hanna et al. 2010; Ministry of Justice 2011). This report is based on the intermediary's assessment of the

[26] See Ministry of Justice UK (2011). In 2004, it was first introduced as the Witness Intermediary Scheme and piloted in eight areas across the country to identify good practice, test procedures, and develop resources.
[27] Non-registered intermediaries are available for vulnerable defendants (Ministry of Justice 2012).

child, as well as other relevant information if available (e.g., observation of the ABE interview, school reports) (Ministry of Justice 2012). The report is critical to the pre-trial "ground rules" hearings, at which intermediaries discuss with the judge and counsel how to best accommodate the witness based on the assessment of the child's needs (e.g., how question should be phrased to maximize the quality of evidence, how to signal to court that the witness needs a break or has not understood a question) (Ministry of Justice UK 2011, 2012).[28]

At trial, intermediaries have been viewed as relatively passive translators (Caruso and Cross 2012). Intermediaries sit or stand beside the child as they give evidence in court or through CCTV (Hanna et al. 2010). They intervene most often where miscommunication happens or is likely to happen and to rephrase questions or repeat witnesses' answers to improve the audibility or clarity (Ministry of Justice UK 2011). In 2010, there were about 100 referrals for intermediaries per month (Hanna et al. 2010). Most of these related to young children (aged seven years and under), and children with disabilities that inhibit communication (Hanna et al. 2010).

3.4.3 Regulation of Improper Questions

Through their roles in criminal proceedings, intermediaries have illuminated problems with the ways in which children are questioned and assisted legal counsel to reconsider their questioning practices (Hanna et al. 2010). Two other key influences toward the development of protocols for questioning child witnesses in the United Kingdom include: (1) significant research conducted by Plotnikoff and Woolfson (2009) that documented the experiences of child witnesses and some of the continued problems in criminal proceedings despite the use of special measures; and (2) the egregious way in which a four-year old girl was cross-examined at trial in 2009 as described in the appeal case of *R.* v. *Barker*[29](Spencer 2012b). The outrage of the public and members of the criminal justice system after *Barker* fuelled the police, the judiciary and key academics to work together toward further changes (Spencer 2012a; 2012b). As a result, significant conferences were held,[30]and several key publications were developed regarding the questioning of vulnerable witnesses.

In 2009, the Advocacy Training Council, the body responsible for overseeing standards of advocacy training for members of the Bar of England and Wales, established a Working Group toward ensuring that "all advocates…were equipped to handle and question vulnerable people in Court, in a manner which was appropriate, sensitive and effective" (Advocacy Training Council 2011, 2). Their report in 2011, *Raising the Bar: The Handling of Vulnerable Witnesses, Victims*

[28] Ground rules hearings are governed by Part 29 of the *Criminal Procedure Rules* and the Application for a Special Measures Direction form. See http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-pr-form-part29-application-for-special-measures.pdf and Ministry of Justice (2012). Plotnikoff and Woolfson (2010) report that ground rules hearings may only be occurring in less than half of the trials in which intermediaries are used.
[29] [2010] E.W.C.A. Crim. 4. In *Barker*, the Court of Appeal upheld the conviction of a man who raped a three and a half year old girl.
[30] Conferences included two seminars in 2010 funded by the Nuffield Foundation and National Society for the Prevention of Cruelty to Children (NSPCC) with senior members of the judiciary, counsel and senior government officials to review and discuss any progress since Plotnikoff and Woolfson's (2009) report, *Measuring Up?*. See Plotnikoff and Woolfson (2010) and Plotnikoff and Woolfson (2011).

and Defendants in Court, urged greater education and training, including specialist accreditation for counsel working with vulnerable witnesses, including children.

In 2012, the Advocacy Training Council began hosting the Advocate's Gateway, an on-line site which provides free access to evidence-based and practical guidance on vulnerable witnesses and defendants who may have communication needs. The Advocate's Gateway has published several "toolkits" to guide counsels' examination of children. Its recent publication, *Planning to Question a Child or Young Person*, is a critical best practice guideline which brings together relevant research and policy (Advocate's Gateway 2013).

Specific documents for judges were also developed after *Barker*. In 2010, the Judicial Studies Board published *Fairness in Courts and Tribunals – A Summary of the Equal Treatment Bench Book*, in which it allocates a chapter to review how counsel and judges must act to ensure the best evidence of children through proper questioning. In 2012, the Judiciary of England and Wales published the *Judicial College Bench Checklist: Young Witness Cases*, which guides judges' directions to counsel at "ground rules" hearings to preventively thwart improper questions and encourages the use of judicial orders to address the manner in which children are questioned at trial (Plotnikoff and Woolfson 2012).

Since 1992, the Ministry of Justice (formerly as the Home Office), has also published a guide regarding obtaining children's evidence in the criminal courts. Its 2011 publication, *Achieving Best Evidence: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* is recognized as a leading, comprehensive detailed guide for forensic interviewers (police and social workers), judges and criminal lawyers (Brammer and Cooper 2011). While the Ministry notes that this document "does not constitute a legally enforceable code of conduct", it also warns that "significant departures from the good practice advocated in it may have to be justified in the courts" (Ministry of Justice 2011, 3; Brammer and Cooper 2011).

Accordingly, while England and Wales have not yet codified the need for judges to intervene more often and more effectively to prevent the improper questioning of children at court, strong policy and best practice guidelines constitute significant incentives to counsel to consider more carefully the way they examine and cross-examine children and to judges to ensure this occurs.

3.5 United States

In the United States, there have been several developments incorporated into federal and state legislation that, on their face, appear promising. These include:

(1) the appointment of a "guardian ad litem" to advocate in a child's best interests and for the use of special measures;

(2) the use of intermediaries;

(3) legislative prohibitions on improper questioning of children in criminal proceedings; and

(4) the opportunity for full pre-recording of a child's evidence.

However, these measures appear to be adopted infrequently in the prosecution of child abuse cases.

A full discussion of the range of these measures and the way in which these are implemented within federal and state criminal proceedings is well beyond the scope of this report. However, a general overview of each of the above developments, with some examples from particular states, will be provided below. As state and federal jurisprudence and amendments to legislation continue to inform these developments, the reader is cautioned to review current legislation and jurisprudence in addition to the information provided below.

3.5.1 Guardian Ad Litems

Guardian ad litems ("GAL"s) may be appointed by the court to represent a child in criminal proceedings under federal legislation. Title 18 of the *United States Code* §3509(h)(1) provides that "[t]he court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child". Several states also provide for GALs in their statutes and have developed their own laws and procedures regarding the appointment of GALS.[31]

The type and extent of training GALs receive and the way they function in the courts varies by state (Hall and Sales 2008). However, they generally function as additional support persons who can assist children to exercise their statutory rights to special measures within the criminal justice system[32] (Raeder 2009; Hall and Sales 2008). GALs may attend all of the depositions, hearings and trial proceedings in which a child participates (Raeder 2009). They may also make recommendations to the court regarding the child's welfare, and access all evaluations, records and reports regarding the child (Raeder 2009). In some cases, GALs function as the child's support person at trial, although this is generally a secondary aspect of their role (McAuliff et al. 2013).

GALs operate from a "best interests" perspective rather than a "rights-based" or "stated interest" perspective as would a regular "attorney" in the United States (Raeder 2009; Hall and Sales 2008). They do not function fully as a lawyer would for a child (e.g., they cannot provide legal advice to children, argue on the child's behalf, object, or initiate an appeal). Interestingly, however, when GALS are used, in almost all cases they are lawyers (Raeder 2009). Moreover, in some states (e.g., Iowa) they *must* be lawyers (Hall and Sales 2008).

There have been some advocacy efforts, including by the American Bar Association, for the provision of attorneys to provide full representation to children within criminal proceedings (Raeder 2009). Although there is federal legislation that provides for attorneys in addition to GALs (i.e., Title 18, §3509(b) of the *United States Code*), there is a dearth of literature regarding the use of attorneys for child witnesses apart from their roles as GALs.

[31] See, for example, Fla. Stat. Ann. Tit. V, §39.820-39.8298 (Guardians Ad Litem and Guardian Advocates), N.H. Rev. Stat. Ann. Tit. LXII, §632A:6 and Rules of the Superior Court of the State of New Hampshire, R. 93-A.
[32] GALs are also available in certain other proceedings, for example, family law matters, in some states.

3.5.2 Intermediaries

There is also a lack of literature regarding the use of intermediaries for child witnesses in the United States despite that at least a few states have included their use as a possible aid for children in criminal proceedings (Henderson 2012a). On the rare occasion where the use of intermediaries has been mentioned, it appears they have functioned only to help nervous or quiet children to speak aloud and the intermediary then delivered their answers in a more audible manner to the court (Henderson 2012a). Accordingly, intermediary use in the United States has been described as the "megaphone model", whereby intermediaries act as interpreters and merely relay the questions and answers verbatim in a louder and more comprehensible manner (Henderson 2012a).

3.5.3 Disallowance of Inappropriate Questions

The *Federal Rules of Evidence* (i.e., Rule 611) and most state rules of evidence empower judges to stop confusing, irrelevant, misleading, ambiguous and unintelligible questions of any witness (Hall and Sales 2008; Phillips and Walters 2013). Many states have also amended legislation to include specific provisions regarding questions asked of children (Hall and Sales 2008). For example, since 2007, section 90.612 of Florida's *Evidence Code*, regarding the questioning of witnesses, specifically mandates judges to take special care to protect witnesses under 14 years of age, "from questions that are in a form that cannot reasonably be understood by a person of the age and understanding of the witness, and shall take special care to restrict the unnecessary repetition of questions". Since 2011, by amendment to Article 38.074, section 3 of Texas's *Code of Criminal Procedure* provides, "the court shall…ensure that questions asked of the child are stated in language appropriate to the child's age; explain to the child that the child has the right to have the court notified if the child is unable to understand any question and to have a question restated in a form that the child does understand" and "prevent intimidation or harassment of the child by any party and, for that purpose, rephrase as appropriate any question asked of the child".

Moreover, it has been recommended by the National District Attorneys Association that prosecutors bring pre-trial motions to set ground rules regarding attorney conduct in cases where there are child witnesses (Phillips and Walters 2013). Motions may be made to regulate the following conduct: age-appropriate language during questioning; avoidance of complex sentences and words; defence attorneys' use of non-leading questions; prevention of intimidating behaviour or questions; use of silent objections; and tone of voice used during questioning (Phillips and Walters 2013). It is unclear how effective these measures have been in curtailing the improper questioning of children.

3.5.4 Opportunities for Full Pre-recording

Federal legislation and the legislation of many states provides for the full pre-recording of a child's evidence (Henderson 2012a). There is significant variation across the states regarding the criteria for application for full pre-recording or complete "video depositions" of the evidence, including regarding the types offences alleged against and the ages of children.[33] Although fully

[33] See National District Attorneys Association (2010).

pre-recorded evidence was used in lieu of live testimony at trial with some frequency during the 1970s and 1980s, currently, it is rarely used (Marsil et al. 2002; Henderson 2012a). In most cases prosecuted in the United States, children testify at court (Hamill et al. 2001; Hall and Sales 2008; Sawicki 2009).

One of the main reasons the legislation appears not to be used to pre-record a child's entire testimony is the necessity of the court finding through a separate hearing, usually requiring expert evidence, that there is "good cause shown" for this measure or a child will likely be "unavailable" to testify at the time of trial (Hall and Sales 2008; Henderson 2012a).[34] These hearings are often referred to as "harm hearings" (Henderson 2012a). Moreover, most legislation provides that there must be an additional finding at the time of trial that the child is still unavailable for the measure to be used (Hall and Sales 2008; Henderson 2012a).

In 2013, the National District Attorneys Association published a guidebook, *A Courtroom for All: Creating Child- and Adolescent-fair Courtrooms* (Phillips and Walters 2013) to help practitioners understand court from the perspectives of children and adolescents and understand the various supports or measures that exist to assist children in criminal proceedings and child protection cases. Notably, there is *no* discussion in this resource of the use of GALs, attorneys for children, intermediaries or the full pre-recording of children's evidence before trial.[35]

3.6 Israel

Israel was the first country with a common law criminal justice system to reform procedures for child witnesses during criminal proceedings in 1955 (Hanna et al. 2010). Its longstanding concerns regarding the harms to children through their involvement in trials, and in particular, during cross-examination, have influenced its reforms (Henderson 2012a). The main

[34]The range of the legislation regarding pre-recording a child's evidence is demonstrated in the following three examples. Federally, where there is an alleged offence against a child under the age of 18, a successful application for a full videotaped "deposition" requires a finding by the court that the child will be unable to testify because of fear or a mental or other infirmity, "there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court", or "[c]onduct by defendant or defense counsel causes the child to be unable to continue testifying" [18 U.S.C. §3509 (2012)]. In Colorado, where there is an alleged offence of sexual or physical abuse against a child under the age of 15, the finding of unavailability must be based on, but not limited to "recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations re based on specific behavioral indicators exhibited by the child" [Colo. Rev. Stat. Ann §18-3-413 (2010)]. In Kansas, where the alleged victim of the crime is under the age of 13, the "state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify" [Kan. Stat. Ann §22-3434 (2012)].

[35] Any discussion of the current situation in the United States regarding its (lack of) measures to protect child witnesses must also make brief reference to the Supreme Court's 2004 decision in *Crawford* v. *Washington*, 541 U.S. 36. In *Crawford*, Justice Scalia forcefully reiterated the defendant's right to confront his accuser at trial, as guaranteed under the Constitution's Sixth Amendment, and set rigid parameters on the use of "testimonial" hearsay.[35] While the chilling effect seemingly caused by this judgment may have further dissuaded prosecutors from making applications to use the above special measures and attempting further reform, prosecutors in the United States also believe jurors want to see the child in court and seem generally unwilling to consider special measures (Lyon and Dente 2012; Henderson 2012a).

development in Israel includes the use of specialist "child interrogators" to interview and take all evidence from a child for use at trial.

3.6.1 Child Interrogators

Under the *Rules of Evidence Revision Law (Protection of Children) 5715-1955* ("POC Law"),[36] children under 14 years old who are witnesses to certain sexual, physical and neglect offences must be examined by a child interrogator. Since 2008, child defendants under the age of 12 must also be interviewed by child interrogators (Hanna et al. 2010). The Minister of Justice appoints child interrogators with the approval of a multi-disciplinary committee under section 3 of the POC Law.

In practice, child interrogators are directed to interview a child within 72 hours of the report of the offence (Hanna et al. 2010). The interview itself can occur in a variety of locations, including a school or the child interrogator's office (Hanna et al. 2010). Ordinarily, there is only one interview, which since 1998 has been conducted using the National Institute of Child Health and Development (NICHD) forensic interviewing protocol (Hanna et al. 2010) and must be video-recorded (Henderson 2012a). During the interview, child interrogators also assess the child's "reliability" and forward their report regarding this along with the video-recorded interview to police (who forward to the prosecutor) (Hanna et al. 2010).

Child interrogators have significant powers under section 2 of the POC Law including responsibility for determining whether or not a child will testify in court. They can refuse to allow a child to testify if the child is likely to suffer trauma in testifying, or a delay between the reporting of the offence and testifying makes it likely that testifying would re-traumatize the child (Hanna et al. 2010; Henderson 2012a). While child interrogators may consult with a child regarding her/his preference to testify, most children do not testify in court (Henderson 2012a).

Where a decision is made for the child to testify at trial, the child interrogators have additional potential roles including: they may be appointed to provide communication assistance (as an intermediary) during questioning; during cross-examination they can take questions by earphone and relay these to the child, with rephrasing as needed; and they may ask the court to discontinue the trial if they are concerned that it is causing emotional harm to child (Henderson 2012a; Hanna et al. 2010).

Under section 10 of the POC Law, if a child's involvement at trial is discontinued, the defendant or the prosecutor may request and a judge may order the child interrogator to re-interview the child and ask supplementary questions (Henderson 2012a; Hanna et al. 2010). However, the child interrogator has the power to decide whether to do so and if so, the nature of the questions to be asked, all in the interests of protecting the child from psychological harm (Henderson 2012a; Hanna et al. 2010).

In the event the child does not testify at all, the child interrogator provides the child's evidence in court (i.e., recounts the child's disclosures as hearsay and provides an assessment of the child's

[36] Citations to this legislation are accurate to January 15, 2014, as translated by Aryeh Greenfield – A.G. Publications, Haifa: Israel.

credibility) (Hanna et al. 2010). However, under section 11 of the POC Law, the court may not convict on the basis of the uncorroborated evidence of the child, including that provided by the child interrogator (Hanna et al. 2010). As an accused has little opportunity in this process to test a child's evidence, and sometimes only through challenging the interrogator's assessment of the child's credibility or requesting specific questions be asked of the child during another interview (Hanna et al. 2010; Henderson 2012a), it has been suggested that Israel's corroboration requirement under section 11 exists to balance the rights of the accused (Henderson 2012a).

3.7 Norway

There are two significant developments in Norway:

(1) a specialist interviewer examines children under the age of 16 have to obtain their entire evidence before trial; and

(2) state-funded counsel and separate legal representation is available to children who are alleged victims of sexual assault and certain violent offences.

While the Norwegian criminal justice system prefers oral evidence and examination like other adversarial systems, there is no aggressive, adversarial cross-examination component (Mykelbust 2012; Hanna et al. 2010). Other elements of this system include a more informal court process, judges have increased powers to admit evidence, there is no pre-trial investigating judge like other inquisitorial systems, trials are held before the public, the trial retains the two-party nature of the adversarial proceeding, and it embraces the rights of defendants to know and challenge the evidence fully (Davies et al. 2010; Mykelbust 2012). The focus of the Norwegian system is discovering the truth and as set out in section 294 of the *Criminal Procedure Act*, ensuring that "the case is fully clarified" (Mykelbust 2012; Hanna et al. 2010).

3.7.1 Specialist Examiners

Generally, where an alleged sexual or violent offence has been committed against a child under the age of 16 years,[37] the child's evidence is taken and recorded before trial through one investigative interview under judicial supervision, known as a Field Investigative Interview of Children (FIIC) (Mykelbust 2012). There is a presumption under section 298 of the *Criminal Procedure Act* that the video-recorded FIIC will be admitted as a child's full evidence at trial, barring an exceptional circumstance, and children will not give live testimony at court. Section 239 of the *Criminal Procedure Act* sets out how children are to be examined outside of the trial process through the FIIC.

Police officers with specialized training in forensic interviewing examine the children (Hanna et al. 2010). Since 1913, Norway has been a leader in conducting forensic interviews and has put

[37] The upper age limit for children having their evidence taken by a specialist interviewer was raised from 14 to 16 years in 2008 (Mykelbust 2012).

great effort into continually improving its interviewing practices (Mykelbust 2012).[38] In 1998, significant amendments were enacted to the *Criminal Procedure Act* regarding the required specialization of police officers and the manner in which interviews are conducted (Mykelbust 2012).

Interviews usually are conducted in specially-designed video interview rooms with the judge and counsel situated in another room observing by CCTV (Hanna et al. 2010; Mykelbust 2012). The general process includes the following: the specialist police officer conducts a general investigative interview; the child has a break while the officer consults with counsel and the judge to obtain direction on additional topics or where there are contradictions requiring further investigation; the officer further interviews the child; and further breaks and consultations with judge and counsel continue until all are satisfied that the case has been "clarified" as much as possible (Mykelbust 2012; Hanna et al. 2010). The interview is transcribed and accompanies the video as evidence at trial.[39] Controversially, the child is not informed that the interview is being observed (Hanna et al. 2010).

In recognition of the need to expedite children's participation in the criminal justice process to minimize stress and delay in treatment and other associated harms, the FIIC must be, and generally is, held within 14 days of the report to police concerning the allegations (Hanna et al. 2010). In some cases, a specific defendant has not yet been named and in this case a lawyer is assigned to attend the FIIC to represent the defendant's interests (Mykelbust 2012). There are provisions for a child to be re-interviewed according to the same protocol as set out above, however, this rarely occurs (Mykelbust 2012). Despite that only defence counsel, and not the defendant, are entitled to attend the FIIC, Norway has been found to be in accordance with the European *Convention for the Protection of Human Rights and Fundamental Freedoms*[40] and case law of the European Court[41] regarding the defendant's opportunity to examine the witness (Mykelbust 2012).

3.7.2 State-funded Legal Representation

Subsections 107a through 107d of the *Criminal Procedure Act* provide for state-funded counsel and separate legal representation for "aggrieved" persons, alleged victims of sexual assault and certain violent offences, including children. These provisions have been in force since 1981 (Hanna et al. 2010). Counsel provide several roles including: supporting and guiding the child; being notified of and having the right to be present during all stages of the criminal process

[38] Since 2012, research has been undertaken to compare FIIC examinations at "Statens Barnehus" (comparable to Canada's child advocacy centres) and special interview suites at police stations, courts and child welfare agencies toward further improving the quality of the examinations (Mykelbust 2012).
[39] Children under the age of six years may be placed "under observation" where they are examined by experts in child psychology or psychiatry, instead of or before a FIIC (Bakketeig, 2008). These observations are also recorded for use at trial and may be observed by the specialist police officer but not a judge or counsel.
[40] Article 6(3)(d) provides that, everyone charged with a criminal offence has the right… "to examine or have examined witnesses against him".
[41] See *S.N.* v. *Sweden*, [2002] Crim. L. R. 831, 39 EHRR 1 in which the European Court of Human Rights held that defendant's rights were not violated by proper questions asked by a specialist examiner.

including at the FIIC along with the prosecutor and defence counsel; objecting to questions; and putting further questions to witnesses at examinations (Mykelbust 2012; Hanna et al. 2010).

Counsel is appointed by the court unless a particular counsel desired by the child can be appointed without delay. There have been some concerns that due to the general inexperience of the lawyers assigned by the state, legal representation is not as effective as it could be (Hanna et al. 2010).

4. Discussion: Implementation Issues Related to the Major Developments

The five main developments in the seven countries described above include:

(1) the opportunity for children to have their evidence fully pre-recorded to eliminate their need to attend trial;

(2) legislation or strong policy guidelines that disallow inappropriate questions asked of children during examination and/or cross-examination;

(3) the use of intermediaries to assist children with communication in the court;

(4) the use of specialist examiners to take children's evidence outside of the court; and

(5) the provision of legal or quasi-legal representatives to child witnesses to ensure their access to special measures.

Some issues surrounding implementation of these developments are discussed below, including key advantages and disadvantages of each.

4.1 Full Pre-Recording

Several benefits have been identified in the literature with respect to the measure of fully pre-recording children's evidence for use at trial. These are based on procedural assumptions related to the use of full pre-recording, including that all evidence will be taken at an early stage, usually within a few weeks of the report to police, and following a high-quality forensic interview.

First, and most importantly for children, with the use of full pre-recording, there is less delay between the child's disclosure and need to provide evidence to assist in the criminal proceedings. As children suffer significant stress waiting to testify, this reduction in delay alleviates some of that stress (Henderson 2011, 2012a; Hanna et al. 2010; Jackson 2012; Davies and Hanna 2013). Once children have provided their evidence, they will not need to provide further evidence and can move on with their lives (Cossins 2012; Jackson 2012; Hanna et al. 2010; Henderson 2011). This enables children to proceed with any therapy and treatment needs in a timely way without concerns that their evidence may be contaminated through engagement in these processes (Corns 2001, 2004). Supportive family members (who may also need to give evidence) can also focus sooner on the needs of the child without concerns for contamination of evidence (Jackson 2012).

Second, in the interests of the administration of justice, full pre-recording increases the opportunity to collect the best evidence by providing a more contemporaneous recording of it (Corns 2001; Spencer 2011). The accuracy and completeness of a child's evidence is more likely to be captured at an earlier stage when memories, and especially peripheral details, are fresher (Hanna et al. 2010; Australian Law Reform Commission 2010; Henderson 2011, 2012a; Carr 2007). The demeanour of the child closer to the time of the alleged offence(s) may also be captured and later observed by a jury (Corns 2001; Carr 2007; Davies and Hanna 2013). Moreover, because the cross-examination can occur much sooner, an accused is afforded a much

better opportunity to test a child's best evidence without concern that a delay of several months or years might hamper this ability (Spencer 2011).

Third, the confirmation of best evidence at an early stage often assists in the disposition of cases (Cossins 2012; Hoyano 2007; Australian Law Reform Commission 2010). Early pre-trial decisions may be made to amend or withdraw charges (Henderson 2011; Hanna et al. 2010; Davies and Hanna 2013). The accused may be more inclined to plead after viewing the evidence (Layton 2003). Indeed, when there is no pre-recorded testimony, a prosecutor's ability to negotiate a plea may weaken with time due to the diminished memory of a child (Carr 2007).

Fourth, there are several practical benefits that impact the effective running of the courts. Video-recorded evidence can be edited such that it contains only admissible content and juries can watch the evidence without interruption (Henderson 2011). Juries do not have to leave during arguments regarding admissibility and their in-court time is reduced (Jackson 2012; Davies and Hanna 2013). The edited evidence may also prevent mistrials as jurors will be prevented from hearing possibly prejudicial statements already removed (Henderson 2011; Hanna et al. 2010; Jackson 2012). The edited tapes can be used again by the jury during deliberations (Cashmore and Trimboli 2006; Davies and Hanna 2013) or at retrials or appeals (Jackson 2012; Davies and Hanna 2013). Scheduling time in court is easier and more reliable as usually only a day is needed for scheduling a hearing to pre-record a child's evidence and then a shorter trial can also be scheduled (Henderson 2011; Australian Law Reform Commission 2010; Carr 2007; Davies and Hanna 2013).

Finally, judges in Western Australia have identified some additional benefits in practice of the use of pre-recorded evidence. These include:

(1) when a child's evidence is fully pre-recorded there is a reduced likelihood of media attention and feuding in families where intrafamilial abuse has occurred (Jackson 2012); and

(2) full pre-recording allows additional time for children to process their experiences between the time of giving evidence and the outcome of the trial (Jackson 2012).

However, several potential difficulties with the implementation of full pre-recording have also been identified. First, in order for full pre-recording to work effectively, the video-recording of the evidence must be done as soon as possible. Accordingly, late or incomplete disclosure can hamper the usefulness of this measure (Davies and Hanna 2013; Spencer 2012a). However, this concern is seen as a logistical one that can be greatly overcome by ensuring the appropriate policies are in place (Davies and Hanna 2013). Moreover, the adaptation by Western Australia to facilitate regular timely disclosure, through judicial orders forcing the state to comply with prompt disclosure, provides a useful example of how this issue can be overcome (Davies et al. 2011b; Sleight 2011; Henderson 2011; Hoyano 2007). In practice, it has been argued that there are many more cases where disclosure is not an issue such that to preclude the implementation of pre-recording for some complex cases is not warranted (Spencer 2012a). Moreover, even if the delay between a forensic interview and the cross-examination is a few weeks due to administrative and procedural issues, this would constitute less time than waiting for a trial, and be less stressful for the child waiting for that trial (Spencer 2012b). If full pre-recording was

made a presumptive, rather than a mandatory, measure, this would also provide a judge with discretion to reject its use in cases that may be unsuitable (Henderson et al. 2012).

Second, several concerns have been raised related to the video-recorded nature of the evidence versus live testimony (Australian Law Reform Commission 2010). The quality of the video recording, including editing, must be high to maintain its benefit (Burrows and Powell 2014; Cossins 2012). While a forensic interview admitted as a child's evidence-in-chief in Canada may also be subject to concerns such as faulty technology and poor sound, these problems will be exacerbated when the video-recording is longer, containing the entirety of a child's evidence (Plotnikoff and Woolfson 2009; Cashmore and Trimboli 2006). Practical measures may need to be implemented to increase the ability of the jury to maintain concentration when watching a longer video-recording (Davies and Hanna 2013).

Moreover, jurors' reactions to or biases regarding children's pre-recorded versus live evidence must also be considered (Henderson 2011). Some have worried that fully pre-recorded evidence will dilute the effect of the testimony or the credibility of the child witness (Henderson 2011; Davies and Hanna 2013). However, studies undertaken to explore the impact of pre-recorded evidence upon juries have found no significant pattern regarding the mode of presentation (e.g., live testimony, CCTV or video-recording) on jurors' perception of guilt of the accused (Taylor and Joudo 2005), or little negative reaction to its use (Cashmore and Trimboli 2006; Cossins 2012). Some defence counsel have suggested the use of fully pre-recorded evidence has benefitted defendants by reducing the impact of live testimony and enabling them to be more prepared for the trial (Henderson 2011). Directions by judges to juries to refrain from drawing negative inferences from the use of pre-recording and that children may present differently on video rather than live in court can help to overcome biases and juror reactions (Hanna et al. 2010; Carr 2007).

Third, some possible concerns for the rights of the accused have been raised including that the accused's involvement in the full pre-recording of evidence may force the defendant to "show his or her hand early" (Henning 2013, 173). This concern was also raised by the New Zealand Court of Appeal in the 2011 decisions discussed above, that held despite having jurisdiction to do so, it would not allow the full pre-recording of a child's evidence. Spencer (2012a) argues that this concern would not be relevant to most cases because in alleged child abuse cases there are only a few main arguments available to the defence, and in England and Wales, there is a statutory duty on the accused to disclose the nature of their defence in serious child abuse cases.

Other concerns regarding the measure of full pre-recording that may impact more on the accused include: (1) with multiple witnesses, there can be more pressure on defence counsel if there are no or limited breaks between cross-examinations of the witnesses (Davies and Hanna 2013); (2) defence counsel cannot observe the jury's response when they are questioning the witness (Davies and Hanna 2013; Henning 2013); (3) defence counsel may, like judges and Crown attorneys, need to spend more time on the matter given their need to review with the jury the playback of the entirety of the pre-recorded video evidence in which they were previously involved as questioners and observers (Jackson 2012); and (4) perhaps most concerning, the possibility that the accused may not have a full opportunity to test the evidence if forced to cross-

examine a child without the discovery process completed (Australian Law Reform Commission 2010) or if a new issue arises after the cross-examination (Davies et al. 2011). However, Western Australia provides a model for addressing this concern, by providing opportunities for further examination or cross-examination as an option (Davies and Hanna 2013; Cossins 2012; Carr 2007).[42]

Of course, the costs and accessibility of taking the entirety of a child's evidence by video-recording requires a strong commitment to this measure. Investment in staff training, technology and the infrastructure to support it is significant. However, as Jackson (2012) asserts, if this investment, and in particular in technology, can contribute to other purposes within the courts (e.g., to obtain evidence from witnesses in civil and other matters, or show jurors evidence of other pre-recorded interviews with suspects or searches), this can increase the potency of its development.

Finally, it has been argued that the adoption of the measure of full pre-recording must proceed within a system in which children are being questioned appropriately (Spencer 2012b). Indeed, the adoption of any new measure in the absence of an improvement to the way in which children are questioned is contrary to the administration of justice and evidence that has existed for several years. This will be explored in the following section.

4.2 Disallowance of Inappropriate Questions

By common law and/or legislative provision, judges are entitled or compelled to intervene when the questioning of any witness diverts from a truth-seeking outcome (Plotnikoff and Woolfson 2010). Several countries, as described above, have attempted to specifically empower judges to prevent improper questions asked of child witnesses through their legislation (e.g., Australia, New Zealand and the United States) and/or strong policy directives (e.g., England and Wales) in recognition of the vulnerability of these witnesses to specific types and forms of questioning.

While some judges are intervening more often since the implementation of stronger legislation (Hanna et al. 2010, 2012), many judges continually fail to intervene as needed (Layton 2003; Cashmore and Trimboli 2005; Plotnikoff and Woolfson 2010, 2012; Caruso and Cross 2012; Boyd and Hopkins 2010) and particularly, during inappropriate cross-examinations of children (Keane 2012; Cossins 2012; Hanna et al. 2010).

Some judges recognize that they should be intervening with greater frequency to protect vulnerable witnesses but feel that in doing so, criminal proceedings can become too disjointed and that confrontations between counsel and the judge during an intervention only increases trauma of the witnesses (Sleight 2011). Judges have also expressed concerns that they are reluctant to be viewed as "interventionist" (Caruso and Cross 2012). They feel the need to limit the number of interruptions or times they can send out the jury during proceedings, to prevent claims of excessive interference or bias against one party, which could possibly be grounds for a

[42] It could be traumatizing for a child who anticipated her/his testimony was complete and is trying to move on from the event to have to undergo further questioning. However, as Jackson (2012) asserts, in Western Australia, the jurisdiction with over 20 years of practical experience in this area, this has rarely happened.

mistrial or appeal (Keane 2012; Henderson 2012a; Boyd and Hopkins 2010; Caruso and Cross 2012; Plotnikoff and Woolfson 2010; Muller and Van Der Merwe 2005; Raitt 2010).[43]

In other cases, judges, along with prosecutors and defence counsel, simply fail to recognize what may be improper questioning of a child (Jackson 2012).[44] Indeed, in order for a judge to recognize when to intervene, and how to do it, a high degree of skill and specific awareness of witnesses' developmental and other needs is required (Henning 2013; Powell 2013). Unless judges have specialized training and experience, including in child development so they may better recognize also when a child is stressed, confused or answering questions they do not understand, it may be unreasonable to expect they can do this effectively (Cossins 2012). Consequently, some have argued that additional training, specialization or accreditation could assist judges, and counsel, to more readily act on their common law or legislated duties, particularly if it was compulsory before participating in cases where child abuse has been alleged (Powell 2013; Spencer 2012b; Keane 2012; Boyd and Hopkins 2010; Sas 2002).

Certainly, training programs should help to increase counsel and judges' understanding of many relevant considerations when questioning children in criminal proceedings. As set out above, there are some excellent guidebooks that have been developed toward this purpose.[45] However, even if judges and lawyers could be sufficiently trained in implementing best practices for questioning children,[46] the adherence to traditional cross-examination techniques developed to be used with adults remains problematic (Plotnikoff and Woolfson 2012; Henderson 2012a).[47] Moreover, "the agenda of the cross-examiner is not just about questioning but about the philosophy of advocacy. The idea that lawyers can be educated out of their questioning practices ignores the fact that practice is based upon a theory of cross-examination where the explicit purpose is to elicit evidence favourable to the defence and actively to discredit the witness" (Davies et al. 2010, 354). An examination of the purpose of cross-examination and how it is used with children and other vulnerable witnesses is needed, as the result of its use often has very little, if anything at all, to do with ensuring evidence is truthful (Spencer 2012b, 181).[48] Within this context, the discussion now turns to a consideration of the way in which other court-sanctioned interveners may assist children during questioning.

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[43] Of course, as set out above, an advantage of fully pre-recording children's evidence in the absence of a jury is that judicial interventions and arguments regarding admissibility can be edited out.

[44] Given the lack of information provided to law students and litigators about the needs of child witnesses, this is not surprising. For example, a sometimes required trial advocacy text used in Canadian law schools sets out as a basic rule that all questions posed during cross-examination *should* be leading. See Lubet (2000, 89).

[45] Australian Institute of Judicial Administration (2012) described above is an excellent example.

[46] In their 2003 evaluation of a child sexual assault specialist court in New South Wales, Cashmore and Trimboli (2005) found that the training provided to judges and lawyers involved in the pilot did not increase the standards of cross-examination.

[47] Henderson 2012a argues that much poor practice exists despite numerous courses and articles available to practitioners and there has been little effect on the behaviour of counsel and judges in the courts.

[48] Several countries have already started to modify the traditional cross-examination process to respond to the need of child witnesses where benefits to alleged victims and the community outweighs any perceived detriment to the accused (e.g., to prevent a self-represented accused from cross-examining the alleged victim or witness directly) and further modifications can be made toward this purpose. See Cossins (2009) and Plotnikoff and Woolfson (2012).

4.3 Intermediaries

As has been illustrated above, the ways in which intermediaries may be used in criminal proceedings varies by country. Those intermediaries who function more than "megaphones" or mere translators appear to assist greatly with the questioning of child witnesses. Skilled intermediaries can tailor questions to children's abilities much better than can judges and counsel (Caruso and Cross 2012; Krähenbül 2011). Their involvement also reduces the need for trial judges to identify improper questions (Caruso and Cross 2012).

However, intermediaries sometimes find it hard to intervene and slow down questioning when needed (Keane 2012). Indeed, as part of their specified duties at court in England and Wales, intermediaries are specifically prohibited from interrupting counsel, "unless there is an urgent need to seek clarification or to indicate that the witness has not understood something" and they may not "unnecessarily impede or obstruct the pace and flow of court proceedings" (Ministry of Justice 2012, 28).

As more intermediaries are used in the courts and their roles have become more familiar to all involved in the criminal justice system, the initial debate about using them has subsided (Brammer and Cooper 2011; Lord Judge 2011; Plotnikoff and Woolfson 2012). There is general agreement among the judiciary, counsel, police and academics that the use of skilled intermediaries has led to significant improvements in the completeness and quality of children's evidence and increased access to justice for children, particularly younger children and those with disabilities (Hanna et al. 2010; Plotnikoff and Woolfson 2012; Davies et al. 2011a; Jonker and Swanson 2007; Coughlin and Jarman 2002; Shutte 2005). Even very young children (i.e., two to five year olds) can be assisted to provide evidence with the use of qualified intermediaries (Marchant 2013). When used during the measure of pre-recording, intermediaries can request breaks for children as often as needed and inconvenience less people within the court (Davies et al. 2011a).

Intermediaries are regarded as highly professional and neutral (Davies et al. 2010) and their use has not been seen to affect the rights of defendants to fair trials (Matthias and Zaal 2011) [49] or impede the work of counsel or judges (Hanna et al. 2010; Plotnikoff and Woolfson 2012; Lord Judge 2011). Indeed, Hanna et al. (2010) note that every professional with whom they spoke about the effectiveness of intermediaries in England and Wales described working with intermediaries "as educative, if not 'revelatory'" (138).

Finally, one interesting finding in favour of the accused for the use of intermediaries is that their use may reduce "vicarious cross-examination", whereby any negative stigma associated with the questions asked by defence counsel through the intermediary attaches to the intermediary and not to the defence counsel or accused (Davies et al. 2011a, 2011b; Carusso and Cross 2012).

[49] Although it is possible the accused may feel that his/her ability to challenge a witness is weakened by the use of intermediaries in the court and on that basis might try to appeal or change counsel (Caruso and Cross 2012; Davies et al. 2011a). Sufficient training, policies and infrastructure regarding the use of intermediaries, for example, as that developed and implemented in England and Wales, may assist with this as well as other issues (Davies et al. 2011a).

4.4 Specialist Examiners

Specialist examiners provide a much greater opportunity for the appropriate questioning of children than do intermediaries. They take the lead in questioning children, under judicial and/or counsel supervision, rather than just assisting counsel with their examinations (Hanna et al. 2010). Moreover, their use has been perceived as warranted within the current system "because practitioners' and judges' decisions about proper questioning are likely to be driven by principles of adversarialism and traditional notions of what is necessary to achieve a fair trial for the accused rather than by psychological and linguistic imperatives relating to educing reliable evidence from children and witnesses with cognitive impairments" (Henning 2013, 164).

The use of specialist examiners could lead to cost savings through efficiencies with police, counsel and court time (Keane 2012) but may also create more costs in the short-term if additional infrastructure is required to support their use (Hanna et al. 2010). For example, it has been suggested that a combination of full pre-recording, as it exists in Western Australia, coupled with the use of a specialist examiner to conduct all questioning as modelled in Norway, provides the best route for further reform (Hanna et al. 2010). Options for integrating such a system could include creating a branch of special examiners alongside the infrastructure that exists for foreign language interpreters within the courts, including swearing them in as officers of the court as they do with other interpreters, and having a qualified roster of specialist child examiners contracted to the Ministry (Hanna et al. 2010).

4.5 Legal and Quasi-Legal Representatives

GALs in the United States provide a useful role for children but it may be argued that if the prosecutors were performing their full duties in cases where they are used, there would be little need for them. The possibility of legal counsel for child witnesses, as a potential opportunity in the United States and as realized in Norway, seems a better mechanism for ensuring children are heard in criminal proceedings as required under Article 12 of the Convention. Provided such counsel are appropriately skilled, they could also help protect children from inappropriate cross-examination at court or during a pre-recording hearing.

5. Conclusion

A large body of literature has been published regarding the vulnerabilities of child witnesses within criminal proceedings, including the detrimental impacts upon children of the delay in giving testimony and improper questioning of them during examinations and cross-examinations. Accordingly, many countries have attempted to respond to the literature through the development of specific measures that account for these vulnerabilities. In doing so, they have also strengthened their commitment to international conventions, including adherence to objectives set out in the UN Guidelines pertaining to child victims and witnesses of crime.

This paper has examined the way in which the countries of Australia, New Zealand, England and Wales, the United States, South Africa, Israel and Norway have made reforms in their criminal justice systems in light of the literature and international covenants. The collective developments of full pre-recording, use of intermediaries, prohibitions on improper questioning,

use of specialist examiners, and representation of children in criminal proceedings made in these countries provide promising examples of further reform for consideration in Canada's criminal justice system.

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