‘I DON’T WANT TO PLAY FOLLOW THE LEADER’: REFORMS FOR THE CROSS-EXAMINATION OF CHILD WITNESSES AND THE RECEPTION AND TREATMENT OF THEIR EVIDENCE

PART 2

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Leading questions should not be permitted in cross-examining child complainants of sexual offending. Experts should be available to assist the presiding judge monitor and respond to the effect of examination on child complainants throughout the course of their testimony. Child complainants should be directed by the presiding judge to interrupt their questioning and alert the court to any difficulties they experience whilst giving evidence.

This is the second of two articles which argue for reform which adopts these proposals.

The first article explained the need for reform, which arises from the likely and actual failings of present reform to meet the difficulties attending the reception and treatment of child evidence. Those failings are the consequence of present reform not addressing the cause of the difficulties attending child examination and evidence, or introducing improvement to existing practice for the groups at which they were aimed: the child witness, counsel and the court. This article argues that the three reforms proposed above will be effective on these fronts where present reform is not and consequently bring about effective reform for the taking and treatment of child evidence. Implementation of each reform is further supported by analysis based on the fundamental purposes and aims of witness examination and the trial process, empirical psychological studies, effective use of expert evidence, practicality and cost effectiveness.

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I. INTRODUCTION

Leading questions should not be permitted in cross-examining child complainants of sexual offending. Experts should be available to assist the presiding judge monitor and respond to the effect of examination on child complainants throughout the course of their testimony. Child complainants should be directed by the presiding judge to interrupt their questioning and alert the court to any difficulties they experience whilst giving evidence.

This is the second of two articles which explain and argue for reform which adopts these proposals.

In the first article, I explained the difficulties with respect to the examination and evidence of children. I argued that recent legislative reforms in Australia designed to address these difficulties will have little or no effect because they do not address the reasons for or cause of the difficulties, nor do they introduce improvements to existing practice for the child witness, counsel or court. In this article, I explain why implementation of the proposals canvassed at the outset will succeed on both fronts where recent reforms have failed. They will effectively assist in remedying the actual difficulties in examining and taking evidence from children by directly addressing the reasons for them. Largely as a result of that, they will improve existing practice for the child witness, counsel and the court, and thereby introduce real and effective reform.

Part II argues that leading questions should not be permitted in the cross-examination of child complainants.

It is argued that to call a leading question a ‘question’ is a misnomer. What is actually meant by, and what actually is, a leading question is explained. It is argued that cross-examination and leading questions should not be seen as part and parcel. They are separate and distinct. On that basis, the way in which counsel generally use leading questions is considered so as to identify the purpose of such leading in cross-examination. It is argued, with reference to empirical studies, that leading questions and the purpose behind them are:

i. the primary mechanism and reason why cross-examination may have a deleterious effect on the child;

ii. unhelpful to the task of adducing the best evidence from the child;

iii. unhelpful and unnecessary to assessing the credit of the witness; and

iv. unhelpful in assisting the court to arrive at a correct decision.

Current legislation in certain Australian jurisdictions which permits the court to restrict leading questions is considered to be, largely, ineffective. This is primarily because it places power with the court rather than a responsibility with counsel. The argument is made for a presumptive prohibition of leading questions; the presumption capable of displacement, but the starting point being that leading questions are impermissible. It is argued that a presumptive prohibition of leading questions in the cross-examination of child complainants will directly address the difficulties surrounding their evidence and have immediate positive effect for the child and the court.

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1 See ‘I Don’t Want to Play Follow the Leader: Reforms for the Cross-Examination of Child Witnesses and the Reception and Treatment of their Evidence: Part 1’ (‘Article 1’), closing sentiments of Part III.A.
From the perspective of cross-examining counsel and the defence case, it is argued that the present ability to lead is:

i. potentially productive of unhelpful and unnecessarily aggressive questioning which does not astutely or advantageously develop the case for the defendant; and

ii. not necessary to the effective and proper cross-examination of a complainant so as to vigorously and fairly put the case on behalf of the defendant and do so in accordance with statutory and common law rules.

As a result, the proposed prohibition is argued to have no undue adverse effects for counsel. Indeed, potential positive effects for counsel and the conduct of the defence case are discussed.

It is argued that nothing will be lost to any affected party, namely the witness, counsel or court, by the presumptive prohibition of leading questions in the cross-examination of child complainants. The prohibition will directly address long-held concerns and implement positive change for all affected parties.

Part III argues that expert assistance should be available to help the presiding judge monitor and respond to the effect of examination, in chief and cross, on child complainants throughout the course of their testimony.

It builds on the proposal for prohibition of leading questions but is independent of it in that implementation of this proposal has merit regardless of whether leading questions are prohibited. Indeed in the absence of that reform to cross-examination this proposal has greater importance.

It is argued that a suitably qualified expert be present throughout the course of the child’s evidence. This expert would monitor and alert the presiding judge to conditions of and circumstances about the child, particularly those which may not be apparent to an untrained person, which should be taken into account by the court in assessing the status of the witness. The expert would also be able to offer advice as to any possible responses that may be warranted on the part of the court.

The arguments that have been made for greater admission of expert evidence in the context of sexual assault trials of children are considered. Their purpose and effect is distinguished from the present proposal, which is to have the expert as an aid to the presiding judge in guarding against undue distress being occasioned to the child and generally seeking to ensure their well-being throughout their exposure to examination. The prohibition on leading questions will have a significant positive improvement in this area. This proposal is an additional aid. The present proposal is further distinguished from other mechanisms which facilitate a court having assistance contemporaneous with a child’s evidence.

It is argued that this proposal directly addresses difficulties in protecting child complainants from undue hardship in the course of testifying because it assists the court to more quickly and accurately recognise the variety of factors and signals which may adversely affect the witness. It also provides a source of advice on how to react and best alleviate the hardship so as to protect the witness and maintain the integrity of the trial process. The proposal is shown to refine previous suggestions for contemporaneous expert assistance. It directly addresses the lacuna in the recent reforms and current law which empowers the court to intervene to protect a child witness but does not assist the court in determining why, when
or how to intervene (more accurately, the legislation prescribes when the court should intervene but it is an entirely different question as to whether that point has been reached – a question which would benefit from the knowledge of a trained person in child behaviour and psychology). As a result, this proposal will have positive effect for the child witness, counsel and the court.

The practical operation of the reform is explained to ensure that the expert is able to assist and advise the presiding judge in a manner that:

i. is as nonintrusive as possible to the usual course of proceedings;
ii. avoids elongated debate about whether the assistance of such an expert should be employed;
iii. avoids presumptions about or assessment of the particular child witness as a, or in, consequence of the expert’s assistance;
iv. ensures the presiding judge remains the final arbiter of any assessment of the status of the witness and the type and nature of any intervention;
v. ensures the jury do not draw any adverse or improper inferences from the presence or role of the expert; and therefore in sum,
v. reduces, as far as possible, the bases for appellate complaint arising from the assistance of the expert.

This proposal is not to undermine the role or ability of the court and counsel, particularly prosecuting counsel as the party calling the child witness, to monitor the witness under examination and respond to protect the child and serve the interests of justice. It acknowledges that they are not experts in the field of child psychology or physiology. As a result, they may not be aware of the array of indicators relevant to assessing the status of a child witness nor the appropriate responses. It also acknowledges the other tasks which court and counsel must concomitantly manage during the course of proceedings. On that basis, the expert will assist the court in discharging its functions in the interests of justice.

Part IV argues that child complainants should be directed by the presiding judge to alert the court to any difficulties they experience whilst giving evidence. This proposal supports and complements the proposal for an expert to assist the presiding judge. But, as indicated with respect to the proposal for expert assistance, this proposal has merit regardless of whether the other proposals advanced are accepted and greater importance in the absence of those reforms.

It is argued that the presiding judge direct, that is explain to, a child witness, especially when the child is a complainant, that they should feel no hesitation or reluctance to at any time indicate to the court that they feel uncomfortable, upset, or confused by virtue of the questions they are being asked, the situation that the courtroom presents for them or for any other reason. The child should be encouraged, and reminded, to so alert the court. The presiding judge should so direct the child at the commencement of their examination-in-chief and cross-examination. Additional directions may be given at the discretion of the court, but the direction would be appropriate each time the child resumes testifying, so as to ensure the child is appraised and reminded of their right to alert the court to any difficulties they are experiencing. The child may alert the court verbally or by raising a hand; any method sufficient to gain the attention of the presiding judge. The judge can then, with the benefit of assistance and advice from the expert if the second proposal discussed in Part III is adopted, determine whether and what kind of action should be taken.
It is argued that this proposal directly assists in protecting child complainants because it allows a child to expressly indicate to the court if, why and even how they are experiencing hardship or difficulty in testifying. It seeks to eradicate the guesswork for the court and limit the question for the court to whether to act and if so how. So as to ensure the positive effect that result will have for the child witness, counsel and the court, the operation and implementation of the proposal is considered with particular respect to:

i. the nature of the direction to be given;
ii. when the direction should be given;
iii. the nature of the way in which the child should alert the court to any difficulties; and
iv. instructions to the jury guarding against adverse or improper inferences from the directions to the child or their actions in consequence of that direction.

Before moving to Part II, it is important to indicate the scope for application of the three proposals and thereby the contribution of this article. It is also pertinent to briefly indicate the measures necessary to implement the proposals, so as to demonstrate their feasibility.

This article deals with each proposal in the context of Australian law and experience, however, analogy and reference to other jurisdictions is made. The difficulties each reform seeks to confront are shared by most, if not all, criminal justice systems in common law jurisdictions. The three proposals therefore have application to and importance for all such jurisdictions given the nature of the problems they seek to confront and the bases on which their effectiveness is argued.

As to feasibility, putting to one side the cost for the time of an expert witness pursuant to the second proposal, the cost of implementation of each of the proposals is negligible. Some education and training would assist in expediting the effective implementation of the proposals, and this is discussed below. Any educational requirements would not be detailed or complex. Lawyers know how to put non-leading questions, experts are readily available and judges are in the business of formulating and giving directions.

II. First Proposal – Presumption against Leading

Leading questions are synonymous with cross-examination. The ability to lead in cross is the fundamental difference between it and chief. Putting leading, and only leading, questions is the imperative of advocacy tuition in cross-examination. They are often seen as necessary to comply with other rules of evidence, for example, the rule in Browne v Dunn.

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2 See, eg, Parkin v Moon (1835) 7 C & P 408, 173 ER 181 and Dickinson v Shee (1801) 4 Esp 67, 170 ER 644.
3 See ss 37 and 42 of the uniform evidence law (on the UEA, see Article 1, n 1), see further Andrew Ligertwood and Gary Edmond, Australian Evidence: a Principled Approach to the Common Law and the Uniform Evidence Acts (LexisNexis Butterworths, NSW, 5th ed, 2010) 698. Such statutory enactments reflect the common law allowance of leading in cross-examination as opposed to the right to lead, see Mooney v James [1949] VLR 22, 28-9.
Arguing against the viability of leading questions is not an attack on cross-examination. It is not an argument that seeks to contest Wigmore’s view that cross-examination is ‘the greatest legal engine ever invented for the discovery of truth’, but to remember that that praise was for ‘effective’ cross-examination. For leading questions most often produce cross-examination of children which is ineffective, unhelpful and even counterproductive to the aims of the criminal trial and the well-being of the witness. My first proposal accepts the greatness of the engine. Its argument is against any notion that the ability to lead is the fuel which powers that engine. That is demonstrated by recognising that the purpose of cross-examination, which won Wigmore’s acclaim, and the purpose of leading are distinct, and often, at odds.

The rules of evidence are designed to facilitate the finding of fact in an adversarial trial. The English Court of Appeal stated it plainly: ‘[w]hat is wanted from the witness is answers to questions of fact’. The interrogation of a witness to ascertain fact (optimistically termed ‘truth’ by Wigmore) is the purpose of cross-examination: it is what cross-examination was designed to do. The evidential rules concerning cross-examination have the

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6 It is not to contest that ‘[c]onfrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial’: Lee v The Queen (1998) 195 CLR 594, 602 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ); also Osolin v The Queen (1993) 86 CCC (3d) 481 (SCC), 516-7.


8 Ibid. Wigmore observed that ‘effective’ cross-examination was the great contribution of the Anglo-American system to improve trial procedure and the absence of ‘effective’ cross-examination contributed to the failures of continental legal systems.

9 I place the aims of the criminal justice system ahead of the well-being of the witness because I do not want it to be thought that these reforms are simply aimed at protecting the child. That approach has a tendency to treat the child as a victim. The child is not a victim but a witness. The reforms suggested here are designed to promote the fact-finding mission. That mission will be assisted if witnesses are protected against undue adversity which negatively affects the quality of their evidence. It is in that context that the well-being of the witness should be of concern. See further below, Part II.

10 See Boyd and Hopkins, above n 5, 154: ‘Discovery of the truth is not the purpose of the cross-examiner, even if it may be the purpose of the trial’.


13 Nicholas Cowdrey AM QC, former NSW DPP, has characterised the adversarial criminal trial as a war in which truth is the first casualty; despite pretences to the contrary: see Nicholas Cowdrey, ‘Justice in Pursuit of Lawyers’ (Speech delivered at St James Ethics Centre, Sydney, 26 August 1997) published in Evan Whitton, The Cartel (Herwick, NSW, 1998) 92.
enablement and facilitation of the search for fact as their object.\textsuperscript{14} To ensure a witness is testifying to facts necessitates dispelling reasons to think their testimony fictitious. Hence cross-examination tests the accuracy and reliability of the witness’ recall as well as their credibility.\textsuperscript{15} Cross-examination is a safeguard against fiction being the basis on which decisions are made in the adversarial trial. Its purpose is to allow the cross-examiner to sift a witness’ testimony for fact, by catching reasons for fiction in a fine web of questions. Leading questions do not promote a search for fact. They allow facts, the cross-examiner urges should be found, to be asserted by the cross-examiner. Leading questions state, or at least suggest, the answer the cross-examiner wants. Leading questions are similarly defined by both law and psychology.\textsuperscript{16} In the Uniform Evidence Acts\textsuperscript{17} they are questions asked of a witness that:

\begin{itemize}
  \item[(a)] directly or indirectly suggests a particular answer to the question; or
  \item[(b)] assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.
\end{itemize}

These definitions mimic the common law acceptance of a leading question as one that either suggests the answers desired or suggests the existence of disputed facts.\textsuperscript{18} The first definition is the classic example of a leading question. The questions it is designed to catch are well known.\textsuperscript{19} As to the second type of leading question described, as Odgers notes, it is difficult to see how such a question can ever be allowed, except in the case of expert witnesses where it is legitimate for the existence of fact to be assumed in order to express an opinion.\textsuperscript{20} In respect of ordinary witnesses this second type of questioning is not only leading but improper and should always be disallowed.\textsuperscript{21} The point is that a leading question is not a question at all. It is a statement or suggestion, with an inquisitorial sentiment tacked to the end. He didn’t touch you, did he? Accurate punctuation, reflecting what counsel wishes the court to hear, would discard the comma for an ellipsis. He didn’t touch you…did he? You’re making this up…aren’t you?\textsuperscript{22} It is the statement which is to resonate; not the inquiry. Their purpose

\textsuperscript{14} See Libke v The Queen (2007) 230 CLR 559, 599.

\textsuperscript{15} See Ligertwood and Edmond, above n 3, 698; see also Marcus Stone, Cross-examination in Criminal Trials (Butterworths LexisNexis, London, 2\textsuperscript{nd} ed, 1995); Leo Hickey, ‘Presupposition under Cross-Examination’ (1993) 6 International Journal for the Semiotics of Law 89.


\textsuperscript{17} See n 3 above.

\textsuperscript{18} This is in effect the definition in Sir James Fitzjames Stephen, A Digest of the Law of Evidence (MacMillan & Co, 12\textsuperscript{th} ed, 1936) article 140.

\textsuperscript{19} See Australian Law Reform Commission, Evidence (Interim), ALRC Report No 26 (1985) Vol 1, [619].

\textsuperscript{20} See Stephen Odgers SC, Uniform Evidence Law (Lawbook Co, NSW, 9\textsuperscript{th} ed, 2010) 150.


\textsuperscript{22} See R v McDonell (1909) 2 Cr App R 322 where it was observed that questions put to a prisoner in cross-examination ought to be put in an interrogative form; commencing “Did you?” and not “You did”.
is not to weave a web of questions to entrap the facts, but to assert the facts for which one party contends in the face of the witness and for the ears of the court.23 So understood, leading questions actually oppose the ends of cross-examination which makes the latter so prized by the adversarial system. Against this use are arguments that leading questions are necessary to clearly state an opponent’s case; to confront a witness with what ‘the truth’ actually is;24 or to otherwise unsettle a witness so as distract them from their ruse and thereby extract truth from their web of fiction. But neither the way in which cross-examination is approached by counsel nor empirical psychological study of the effect of leading questions supports such fact-finding aims or outcomes in leading.

Leading questions simply describe the form of a question. Every leading question can be rephrased so as to be non-leading. Did he touch you? Are you making this up? No substance is lost with that alteration: the same question is being asked.25 So it is nonsensical to suggest leading questions are necessary for the proper and full presentation of the substance of a party’s case. More importantly, the very fact that it is the form of the question which is being toyed with rather than the substance of the question should give us cause to consider what the effect of that attention to form is aimed at achieving. It is quite simple, leading allows the cross-examiner to tell the court the story they want the court to accept (the story simply has to be punctuated with question marks). Advocacy tuition recognises that examination-in-chief is more difficult because in chief the answers matter; in cross they do not, because you can lead. Leading is a euphemism for story-telling. It permits ‘editorial’ comments to be put in the form of questions.26 That style generally means the witness cannot properly respond to the comment; comments that may be accorded undue weight by the jury given the status of the cross-examiner as an officer of the court.27 Leading questions avoid alternative choice based questioning that would actively involve the witness, and are aimed at eliciting consistent positive passive responses: ‘yeah’-saying.28 The effect of that is wholly repugnant to the fact-finding aims of the adversarial process: it is designed to make the search for fact from the witness irrelevant.29

23 There is ample scope for that to be done in addresses, see Randall v R [2002] 2 Cr App R 17, [10].

24 Prohibiting leading will not hinder compliance with Browne v Dunn. A party can put its case without leading. Every leading question can be rephrased as non-leading. Substance will not diminish but the level of aggression might. See also above n 5.

25 See Boyd and Hopkins, above n 5, 163.

26 The duty of the cross-examiner is to ask questions, not to inject ‘personal views and editorial comments into the questions’: R v Bouhsass (2002) 169 CCC (3d) 444, [12]. The duty is timeless, see R v Hardy (1794) 24 Howell State Trials 199 at 753-4; R v Ings (1820) 33 Howell State Trials 957, 999; Rees v Bailey Aluminiun Products Pty Ltd (2008) 21 VR 478, [80].

27 See R v Robinson (2001) 153 CCC (3d) 398, [45].

28 See Sandra J Harris, ‘Questions as a Mode of Control in Magistrates’ Courts’ (1984) 49 International Journal of Society and Language 5. Remembering, of course, that a question can be formulated so as to call for a ‘Yes’ or ‘No’ answer which makes no assumption of fact and without the slightest implication that ‘Yes’ rather than ‘No’ is the hoped for answer, see Saunders v R (1985) 15 A Crim R 115, 122.

In leading, the cross-examiner is not interrogating a witness for the benefit of the court but themselves communicating with the jury. The focus on communication with the court rather than with the witness produces lines of questioning which confuse and unsettle the witness, because questioning is not designed with their understanding or even participation in mind. The answers become immaterial, the result being:

an affirmative and a negative answer may be almost equally damaging, and a perfectly honest witness may give a bad impression because he cannot answer directly, but has to enter on an explanation.

If engaging the witness is not the focus, the court is not assisted. The importance of clear communication to encourage accurate witness memory retrieval has been shown in research focusing upon police interviewing techniques. Interviewing techniques used by investigators are often criticised as unfairly shaping witness testimony or adding information by means rendering it inadmissible. But, it is in the context of studies aimed at improving investigative interviewing and questioning techniques, together with witness training programs which have developed particularly in England, that it becomes apparent that:

whilst much attention has been paid to the research and improvement of pre-trial procedures, less has been afforded to investigating those optimum conditions required for witness accuracy within the courtroom process; and in particular, when witnesses are subject to cross-examination.

That demands redress given pre-trial research suggests ‘standard legal procedures such as those employed during cross-examination might not provide the maximal conditions in which accurate testimony can flourish’. Leading questions are a key reason for this. Research undertaken in the context of eyewitness evidence shows leading questions can be detrimental, and interfere with, eyewitness accuracy. Unsurprisingly, that same research demonstrated that confusing questions have a negative impact upon witness accuracy. As discussed in this

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31 Hence, why examination-in-chief is more difficult.
32 See generally Article 1.
36 See below, esp Part IV.
38 Ibid.
article and that which preceded it, leading questions are the main game in cross-examination, and often a source of confusion. That is because ‘an easy way of contaminating someone’s memory of an event (that is, introducing errors) is to ask them a leading question which suggests a false fact relating to the circumstances of the original incident’. Leading questions make the task of cross-examining children ‘like shooting rats in a barrel…it is easy to confuse them and make out they’re telling lies’. The interests of justice and the aims of the adversarial trial cannot be served if the form of questioning is designed to negatively affect a witness, rather than the substance of the questioning testing their recall.

The allowance of leading questions in cross-examination exposes an acceptance by the adversarial process that witnesses are best tested under unusual and stressful conditions. The Layton inquiry was told that:

Discrediting a child witness frequently involves confusing, intimidating and/or exhausting the child using a range of tactics. Some tactics precisely echo the dynamics of sexual abuse, such as the tactic of winning a child witness’ trust with gentle friendly questioning and then attacking and accusing the child.

Techniques with these ends are particularly counterproductive when testing the evidence of children because children are highly suggestible and susceptible to the influence of others and prone to fantasy: suggestions and fantasies that can be all the more strongly put through leading questions. That is, ‘children, especially younger children are vulnerable to leading questions in the course of interview or evidence’. This inclination to fantasy is not the product of childhood, but supplied and encouraged by the cross-examiner, for children have the ability to distinguish between fact and fantasy, and the danger of a child fabricating allegations without the encouragement of an older person is minimal. However, children are suggestible.

39 Article 1, esp Part III.A.


42 Mark Brennan and Roslin E Brennan, Strange Language: Child Victims under Cross-Examination (Charles Sturt University Press, Riverina, 2nd ed, 1988) 3.


44 Ibid 15.16 referring to the oft cited works referred to herein and in Article 1, esp Part II.


46 Ibid. See further, Coyle et al, above n 16, 146.
That such techniques are contrary to the fact-finding aims that supposedly support them is further evidenced by the fact that they are damaging a source of evidence that is, generally, reliable. As further noted by Fitzgerald P in *FAR*: 

> While children generally do not experience full cognitive development until about 14 years of age, children, even children of tender years, can give reliable evidence if questions are tailored to their cognitive development.

Studies show the evidence of children is generally reliable, with little evidence that children ‘make things up’ or supply falsehoods to conceal gaps in memory or knowledge. That reliability in recall is frustrated by leading aimed at contaminating memory. It comes to this: ‘[a] nervous or frightened child is not the best way to adduce reliable and full information on the allegations’. It is however a likely way in which juries will be misled as to the value of the witness’s testimony. In the search and discovery of what Wigmore would term the ‘truth’, we may take heed of Vice-Chancellor Knight Bruce’s warning that it may be ‘loved unwisely’ and pursued ‘too keenly’ if sought through leading questions, for psychological study shows the elicitation of truth by such means, and under the conditions leading creates, unlikely and unreasonable.

Leading allows an aggressive style and tone to be taken by the cross-examiner. It facilitates a view of cross-examination as emotionally traumatic legitimated bullying that ignores and sacrifices children’s rights and interests. Analysis of leading from a humanist stance should be resisted. That is not to express agreement with or rejection of the emotional toll cross-examination might take, but to approach the problem on the basis that emotional or personal hardship should not disrupt evidential practices which are otherwise sound in achieving the principal fact-finding aim of the trial process. If leading questions are the best means to elicit facts from a witness, so be it that they shed tears. As is plain, however, my argument is that leading questions do not facilitate, but frustrate, the fact-finding aim. Clearly the use of leading questions to harass or badger a witness will adversely affect the value of that witness’ evidence. The attack however need not be so explicit. Research has demonstrated that the changing of a single word in a proposition can affect subsequent

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47 See Article 1, esp Part II.


51 Layton QC, above n 43, 15.10. ‘A mind rudely assailed…naturally shuts itself against its assailant, and reluctantly communicates the truths that it possesses’: *Elliott v Boyles* 31 Pa 65, 66 (1857).

52 See Article 1, n 54.

53 *Pearse v Pearse* (1846) 1 De G & Sm 12, 28-9, [1846] 63 ER 950.

54 See Wheatcroft and Woods, above n 37, 192.

responses.\textsuperscript{56} So, whilst the substance of the question is the same, for a witness unfamiliar with and made anxious by court surroundings,\textsuperscript{57} there may be a substantial difference in the effect of asking: ‘Are you sure?’ as compared with ‘You’re lying…[aren’t you?]’.\textsuperscript{58} That is exacerbated for a witness who is a complainant and all the more for a child complainant, who is more likely to be influenced and reactive to aggression, or even heavy-handedness, by adults (especially adults in the garb of counsel\textsuperscript{59}). The ‘style’, what I am terming the form, of leading questions is more likely to be ‘firm’ than ‘friendly’ and studies have shown that re-questioning with a firm approach is more likely to result in interviewees altering initial responses.\textsuperscript{60} That is, the form of questioning alone affected the responder. The likelihood of the interviewee altering their responses so as to accord with their questioner was increased when the questioner manipulated the information and the interviewee believed the questioner to be a person in authority.\textsuperscript{61} That finding is of direct relevance for the effect that leading questions will have on a child taking questions from an officer of the court.

As Heydon J observes in \textit{Cross}, the way in which a witness responds to examination-in-chief is often more informative about that witness’ reliability than that witness’ reaction to cross-examination. This is attributable to the witness actually being asked questions and invited to provide answers through the non-leading style that informs examination-in-chief. Assessments of credibility are also assisted by a non-leading style, for ‘a witness’s answers to non-leading questions reflect credibility well in that they are that witness’s answers, not the answers of a legal adviser’.\textsuperscript{62} Studies confirm this experience. A recent psychological study examined the effect of non-directive and directive leading questioning styles on witness accuracy and confidence.\textsuperscript{63} Whilst both styles were leading in that the questions suggested an answer, the directive style replicated the leading typical of counsel, in that questions were drawn from court transcripts, took the form: “The young woman who answered the door had long hair, didn’t she?” and thereby prompted the answer desired whilst discouraging negative responses; unlike the non-directive style which was an alternative choice based form of questioning.\textsuperscript{64} Witness accuracy was at its greatest when the non-leading (non-directive) style was employed with the leading (directive) style having ‘detrimental effects on accuracy’.\textsuperscript{65} The study further examined the effect of witness preparation, given the growth


\textsuperscript{57} See Layton QC, above n 43, 15.10.

\textsuperscript{58} See above n 22.

\textsuperscript{59} See Layton QC, above n 43, 15.10.


\textsuperscript{63} Wheatcroft and Woods, above n 37.

\textsuperscript{64} Ibid 197. See also above n 28 and accompanying text.

\textsuperscript{65} Ibid 203.
of witness preparation services in the UK,\textsuperscript{66} in counteracting the effect of leading. The findings are important to assessing whether pre-trial measures (and even at-trial reforms\textsuperscript{67}) can usefully assist in improving the reception of child evidence if current trial practices continue. The study found:

where directive leading questions are incorporated into cross-examination procedure, and where such question types are permissible, a witness’s overall accuracy will be reduced regardless of the type of preparation the witness receives.

The study further found that far from cross-examination breaking-down the confident veneer of an untruthful witness to expose their unreliability,\textsuperscript{68} confidence accorded positively with witness accuracy and reliability: ‘the greater confidence a witness expresses to any given response (answer), then the more accurate those answers should be’.\textsuperscript{69} The extent of the problem propounded by leading is revealed when the results of studies on the actual effect of questioning on witness accuracy are contrasted with studies about jury perceptions of witnesses asked leading as opposed to non-leading questions. In one such jury study, 86 per cent of jurors believed the witness answering non-leading questions but only 73 per cent believed the witness when the questions were put in leading form.\textsuperscript{70} The combination of the psychological analysis is that leading reduces the ability of the witness to give accurate evidence and lessens the juror’s willingness to accept that evidence. That would be entirely appropriate if it was not leading alone which was producing the result. Leading frustrates the task of both the witness and the juror because the psychoanalysis equally shows that non-leading questioning produces more accurate testimony which, appropriately, is more readily accepted. Leading is the reason for the dichotomy. As mentioned before, the mere form of the question should not produce a marked change in acceptance: a difference in questioning strategy and structure certainly should, but not a mere change in the way the question is asked. Leading sabotages the fact-finding task as a result of its psychological effect, which is not to reveal but inhibit the elicitation and acceptance of fact.

A number of studies demonstrate that leading questions contradict the discovery of truth for which cross-examination is praised because they support ‘the idea that leading styles of questioning employed by lawyers can be detrimental to a witness’s ability to express what he or she believes to be true’.\textsuperscript{71} If, as the ALRC concludes, the trial involves ‘a serious attempt to reach conclusions about what occurred in the past’,\textsuperscript{72} and the ‘credibility of the

\textsuperscript{66} Ibid 188. See further below, Part IV.

\textsuperscript{67} Proposals 2 and 3 herein are less important than 1, as the need for 2 and 3 largely arises from the existence of 1: see Article 1, Part II.

\textsuperscript{68} Wheatcroft and Woods, above n 37, 204; cf, Hickey, above n 15.

\textsuperscript{69} Ibid 205.


\textsuperscript{71} See Wheatcroft and Woods, above n 37, 193 and the studies there cited at note 31.

\textsuperscript{72} See Australian Law Reform Commission, Evidence, ALRC Report No 38 (1987) [32].
trial system ultimately depends on performance...[in the]...fact-finding task of the courts’, that system cannot tolerate techniques which are in and of themselves proven to reduce a witness’ ability to recall the past.

As discussed in the first article, it is for the trial judge to ensure cross-examination is conducted appropriately and in accordance with the principles and rules of the common law so as to ensure a fair trial. Protecting a complainant against improper cross-examination is ‘part of the concept of a fair trial – one that is fair to the complainant, the accused and the community’. Legislation which permits the presiding judge to restrict leading questions was clearly enacted with child witnesses in mind, the age of the witness being an express consideration for the court in determining whether to disallow the leading question under the provisions. However, such legislation fails to realise that an adversarial system will disincline judges to intervene in the carefully prepared, strategic, cross-examinations of counsel, particularly where they are questioning an accused on behalf of the accused. It must also be noted that the power to restrict leading is not supplied by statute, nor exclusively now confined to statute, for the common law power of the trial judge to control cross-examination always extended to restricting leading questions in appropriate cases. Those cases often arise in the civil context where, for example, multiple parties are involved and a witness shows partisanship towards the party against whom that witness is called. Unrestricted cross-examination, at least where only leading is concerned, is the norm in

73 Ibid [46].
74 See Part III.A.
77 See s 42 of the uniform evidence law, see also Mooney v James [1949] VLR 22, 28; Stack v Western Australia (2004) 29 WAR 526.
78 See Boyd and Hopkins, above n 5, 158.
82 Section 42 of the uniform Acts, ‘does not limit the court's power to control leading questions’: s 42(4); see ALRC 26, above n 19, [632] and ALRC 38, above n 72, [115] and [116].
83 See above n 77 and Article 1, Part III.A.
84 See Kirk v Industrial Relations Commission (2010) 239 CLR 531, 586-7 (Heydon J); Cheers v El Davo Pty Ltd (in liq) [2000] FCA 144; Peabody Donation Fund (Governors) v Sir Lindsay Parkinson [1983] CLY 1660.
criminal cases, particularly in cross-examining the accuser. In the knowledge that the power has always been there, it can be clearly seen that giving additional power to the judge has failed to have impact. The role of the trial judge in an adversarial trial conducted by opposing counsel is one reason for this. Another follows from the psychological studies discussed above, and is that the power to restrict leading questions begins from a faulty premise that leading questions assist the fact-finding task. Rather than aiding the discovery of fact, a leading style often obfuscates and confuses that goal. Yet, legislation permits judicial restriction of leading questions when ‘the facts concerned would be better ascertained if leading questions were not used’. The irony being studies show that in general the facts concerned will always be better ascertained if leading questions are not used. The legislation and the common law take the wrong starting point. If power is to be given to the judge it should be to allow a cross-examiner to lead. That is, there should be good reason why leading is necessary rather than the other way around. The starting point should be to change the attitudes and approach of counsel. That change must be given effect in law because the law permits their use and it is the duty of defence counsel, who in the context that is the focus of this article will be the cross-examiner, to cross-examine with the ‘maximum zeal permitted by law’. That is their ethical duty once instructed that the complaints of the child are denied by their client. It is not the absence of legal mechanisms or powers to control cross-examination that is problematic, but the extent to which the court’s powers of supervision are limited and, more importantly, an expectation and acceptance that cross-examination is best calculated to impugn a witness’ testimony by the use of leading questions: ‘use only leading questions’ is a commandment of cross-examination.

It may be thought this reform will rob the cross-examiner of a vital and long-established tool to advance their client’s case. Heydon J notes in Cross that

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85 Cf, Stack v Western Australia (2004) 29 WAR 526 where cross-examination of an Aboriginal witness was not permitted but criticised as an error on appeal.


87 Section 42(3) of the uniform evidence Acts.


89 David Luban, ‘Twenty Theses on Adversarial Ethics’ in Michael Lavarch and Helen Stacy (eds), Beyond the Adversarial System (1999) 134, 140.


91 See Wakeley v R (1990) 93 ALR 79, 86.


93 See above n 4. See also Irving Younger, The Art of Cross-Examination (American Bar Association Monograph Series No 1, 1976), commandment three of his 10 Commandments on cross-examination is ‘use only leading questions’.
Leading questions simply describe the form of questioning. Non-leading questions can adequately be employed to satisfy evidential rules. Explicit leading, quite contrary to compelling truth, has been demonstrated to disregard and even adversely affect the search for truth. It is also difficult to see how explicit leading could compel truth from a witness. As the extract above implies, the truth being expressed is that believed or put by the cross-examiner, rather than inquiry into the truth believed by the witness. The added implication is that the witness is compelled to accept that truth by the explicit and express way in which it is put. Leading questions put in that way are likely to evoke agreement on the part of the witness, as per what has been said above, but not because the witness agrees that to be the actual position but because leading makes the witness less sure of the actual position. Leading questions advance the defence case through a technique which involves subterfuge and psychologically deleterious effects on a witness’ recall.

Reform which sees the starting point, as a displacable presumption, in cross-examination being against the use of leading questions may well benefit the cross-examiner in furthering the aims of the court process and thus upholding the practitioner’s primary duty. But the main benefit may derive from the fact that leading can often promote bad habits. It can encourage aggression rather than engagement with a witness. Young lawyers tend to aggression, that is, in cross-examination they want to pick fights with a witness wherever they can. The ability to lead promotes an aggressive and confrontational style. It lays waste to another fundamental tenet of cross-examination: don’t do it if you don’t have to.

In my experience of observing cross-examination, from mock trials involving students to silks cross-examining in complex civil and criminal litigation, the more inexperienced the cross-examiner, the more likely an aggressive approach which focuses less on discussing with the witness the issues in the case and more on attacking their credibility, reliability, motive and reason for giving evidence. The most effective cross-examinations I have seen usually involved little leading, if any. Their effect came from the structure and ‘cornering’ the questioning led to. But, there must be questioning to do that: assertions by counsel remain just that. Presumptively prohibiting leading may allow us to produce better lawyers for the very reason that examination-in-chief is more difficult: one has to be more strategic and think harder when questions as opposed to statements must be devised. Nothing will be lost. Every leading question is a non-leading question in a different form. Counsel do not need leading questions in order to put the case fairly on behalf of the client nor to comply

94 Heydon, above n 62, 482 [17165].

95 I will not expand on the rebutting of the presumption, other than to say the onus would be on the party seeking to cross-examine and particular circumstances would have to be shown, given the negative use and effect of leading discussed here. I do not use the trendy terminology of ‘special circumstances’. A discretion to allow leading in the court is sufficient; additional adjectives need not fetter a discretion when the basis for that discretion is clearly known. The point is that blanket prohibitions are rarely useful or desirable, cf Cossins, above n 55, 99-100.

96 Giannarelli v Wraith (1988) 165 CLR 543 at 555-556 (Mason CJ), 586-587 (Brennan J); see also Australian Solicitors’ Conduct Rules (Law Council of Australia, 2011) rule 3.

97 Cf. Wheatcroft and Woods, above n 37, 194.

98 The first and general rule of Mr Morley QC, see above n 4, 149.
with common law and statutory rules aimed at ensuring a fair trial. Leading questions, to the contrary, have a tendency to disrupt these goals. Non-leading questions will serve these purposes whilst also reducing instances of confrontation, confusion and intimidation sometimes felt by child witnesses. A focus on, and starting point of, non-leading questions will ensure counsel, particularly younger counsel, do not inadvertently harass and confuse witnesses.

Nothing I have said should be taken to suggest that cross-examination is simply an exercise in leading a witness. Cross-examination that amounts to ‘a speech thrown into the form of questions’ is impermissible as is the use of leading questions to ‘put testimony in the mouth of a witness’. Counsel employ a range of questioning techniques during cross-examination. Those techniques are to be commended when they are aimed at the search for fact with which the trial system is concerned and for which the power of cross-examination to support that is praised. Moreover, non-leading questions may upset one witness, whilst another may respond perfectly well to leading questions. Each case must be assessed, just as each witness. Further still, leading questions are by no means the only tactic that might derail or upset a child nor is it solely responsible for that outcome. The trial alone will do that. Children within a criminal trial have to cope with the significant anxiety associated with giving a detailed account of their experience, which has already provoked anxiety. Elevated anxiety can interfere with concentration, making it harder to access memory and can impair motivation for the event to be recalled. Natural avoidance and dissociative methods for managing that stress can result in the child responding to any form of questioning in a manner that appears indecisive or indifferent and therefore adverse to their credit and reliability. Recognition and management of, and response to, the natural anxiety a witness in a criminal trial will experience regardless of the cross-examination techniques to which the witness is subjected are addressed in my second and third proposals. The focus here has been on one technique that a cross-examiner may employ: that of leading. It compounds and exacerbates the anxiety a witness, particularly a child retelling incidents of sexual abuse, will ordinarily and unavoidably experience in a criminal trial. Leading is the primary technique employed in cross-examination. For the reasons just discussed, it should not be.

My proposal allows for a presumptive starting point, capable of displacement to permit a discretion and thereby facilitate a case-by-case approach. It changes the starting


100 See Lever & Co v Goodwin Bros [1887] WN 107 (CA); Kizlyk v Canadian Pacific Railway (1943) 41 Man R 33.

101 ‘Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness’: *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346, 359.

102 See Layton QC, above n 43, 15.13.

103 Ibid and the submissions there cited.

104 See above note 95.
point for the person with the greatest control over the techniques to be employed in cross-examination, namely, the cross-examiner. Starting with a presumption that leading will not assist the objects of the adversarial trial does no more than require leading questions to be rephrased as non-leading. This will undo the negative effects which arise from the form of leading questions alone, without disturbing the substance of those (so-called) questions being put. Those negatives are easily erased by starting from the point that leading will not be permitted. The questions can all still be put. Non-leading will simply reduce the aggression of cross-examination which is likely to reduce a witness being unduly affected by the manner in which they are questioned, as well as ensuring that the witness is the focus for the court: it is the witness who is speaking to the court and being searched for fact, with the cross-examiner being a facilitator and tester of that account rather than substituting their own version for it. What is really, and only, being changed is the style of questioning and the form it may take. It is an easy change: counsel know how to examine a witness without leading. As has been shown, the deleterious and negative effects of leading questions are attributable to the form that questioning takes. The solution is therefore easy: avoid that form of questioning. In that way 'the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained'.

III. SECOND PROPOSAL – CONTEMPORANEOUS EXPERT ASSISTANCE

In FAR, Fitzgerald P concluded that ‘[t]he ability of children to give reliable evidence depends on complex interactions between life experiences and age-related factors such as recognition, recall, and articulateness’. His Honour arrived at that conclusion after studying the published opinions of a number of experts with respect to the reliability of children’s evidence. He studied that material because, ‘[n]eedless to say, I am unqualified to form or express an expert opinion on the reliability of children’s evidence, either generally or in particular cases, or on limitations or qualifications to that reliability’. In endeavouring to ensure the child witness is not unduly adversely affected by cross-examination, the problem is that judges, and counsel, have no particular training or expertise to adjudge or determine what effect cross-examination is having on the child, and therefore the evidence. There is a stark difference between the law defining certain questions or techniques of cross-examination as improper, and actually determining when particular lines of inquiry or techniques are having an improper or adverse effect on a witness. The court approaches what constitutes an improper question or technique against the background of training in, familiarity with, and adherence to the adversarial process and the centrality of vigorous cross-examination to uphold the defendant’s right to a fair trial. The conclusions that follow from that approach may be very different from the lines of questioning or cross-examination

105 Cf, Wheatcroft and Woods, above n 37, 193.

106 Ibid 194.


108 Ibid.


110 See Article 1, Part III.A.

111 See Boyd and Hopkins, above n 5, 150.
techniques that a person with specialised knowledge of, for example, child psychological development and behaviour would recognise and identify as having an adverse effect on the child and their ability to recall information, or otherwise properly and confidently explain themselves. As can be seen from the discussion in respect of the first proposal, these two differing perspectives cannot be divorced because the psychological impact that the psychology-trained specialists would detect have a real and marked influence on the ability of a child to provide reliable, credible and complete evidence to the court.

The need for greater education of the judiciary, and bar, as to the special difficulties experienced by children when giving evidence, and in particular the effect of cross-examination, has been widely studied, reported on and accepted as important to improving the reception of child evidence by courts and the experience of child witnesses in courts. Arguments have also been widely made for greater acceptance of expert evidence in sexual assault trials of children, so that the court is informed of the psychological and behavioural science concerning the effect of cross-examination and the court room experience on the child. These views not only reflect the sentiments in FAR about the limited expertise of the court, but a desire to have a consistent approach to the evidence of children. It was noted, following the consultation phase of the Layton report, that:

practices varied considerably as to the approach to cross-examination taken by Counsel and or permitted by a Judge. In the end, much depended on the sensitivity of the Judge to the effect of the process of cross-examination on the child as to whether an inappropriate approach was permitted to continue. Much emphasis has therefore been placed on education and admission of expert evidence. The proposals concerning these topics are directly aimed at a problem causative of the difficulties with child evidence, namely, the limits on the court’s ability to recognise and therefore respond to practices which are negatively affecting the witness, or indeed circumstances adversely affecting the witness’ ability to give useful evidence. However, they both involve middlemen. Proposals concerning education require, presumably experts, to provide a formal or informal education program to the judiciary and legal profession. It must be acknowledged that there is a limit to precisely how much information and knowledge can be presented and retained through such programs, given the object of the program is not the student’s (the judge or lawyer’s) primary field, familiar topic or main concern in discharging their legal office. Proposals concerning expert evidence have generally been framed, as indicated above, in terms of whether suitable experts should be permitted to give ‘expert’ evidence. This may extend to evidence concerning those topics where youth may affect the reliability of recall on points of date, time or distance, and why those difficulties with spatial and time concepts should not necessarily colour any assessment of the child’s reliability or credibility concerning the details of an incident or happening. Section 23G of the New

112 The Layton report’s recommendation was one for education and understanding, see Layton QC, above n 43, 15.13-15.15.

113 Cf, Coyle et al, above n 16, on the different but related subject of expert evidence to rebut allegations of sexual abuse against children.

114 Layton QC, above n 43, 15.14; see also Zhou, above n 80, 311-2.

115 See Article 1 on the failure of present and recent reforms address the actual problems.

Zealand Evidence Act 1908 permits such evidence to be led. This debate, however, is really aimed at a different problem, namely, whether the court should have the benefit of expert psychological evidence in determining why there might be a reasonable possibility to doubt allegations made by the child or their evidence on any particular topic,117 or whether these matters are within common knowledge or otherwise matters of fact to be decided by the court’s observation and assessment of the witness directly.118 The first school of thought has prevailed in some jurisdictions with legislative amendment of the uniform evidence law to permit greater reception of expert evidence on the reliability119 and credibility120 of child witnesses. These provisions and reforms permit the conventional use of expert evidence as testimonial evidence that follows that of the child121 and is used to assess the weight to afford the child’s evidence. Its utility is in determining the substantive issues at trial.122 That does not address the problem of monitoring, reacting to and protecting the child during the course of their evidence, so as to elicit from the child the best possible evidence by ensuring the evidence is taken in circumstances which support reliability and credibility. To the extent that such expert evidence directly appraises the particular child’s evidence,123 it is a commentary on it. Having experts testify after the child (even as a commentary on the child’s testimony124) does not go towards promoting the best evidence from the child witness him or herself; evidence which is key when the child is the complainant.125 It will be of no value to the court in actually determining at the time the child is giving evidence whether any difficulties are affecting the child, so as to provide the court the opportunity to take action to remedy those difficulties and thus improve the quality, and thereby value, of the evidence. It may well simply produce further unhelpful critiques by which to second guess the motives or reasons as to why a child testified as they did.

The problem to be confronted is to determine whether the child in, and whilst, giving evidence is experiencing any difficulties which may improperly affect that evidence. My proposal is to use the expert in a way which permits contemporaneous action to be taken by having that expert act as an independent assistant to the court throughout and whilst the child

117 See generally Coyle et al, above n 16.


119 Section 79.

120 Section 108C. The situation elsewhere remains uncertain if not directly opposed to the concept of adducing expert evidence to assist the triers of fact to evaluate the truth of the complainants evidence: Coyle et al, above n 16, 150.

121 See Layton QC, above n 43, Recommendation 98.

122 See Coyle et al, above n 16, 150.

123 Sections 79(2)(b) and 108C(2)(b) of the uniform law permit general expert evidence; it need not be tailored to a critique of the particular child.

124 Permitted pursuant to Evidence Act 1908 (NZ) s 23G(2).

125 Proposals that suggest an intermediary analyse all questions before they are asked, starts from a significant point of interference with the cross-examination that is impractical and should be one of last resort, cf Cossins, above n 55, 101–4.
is giving evidence. That applies even if the evidence is pre-recorded because, putting aside the issues arising in respect of pre-recorded testimony, that testimony is still elicited by the usual processes of examination.\footnote{Cf Coyle et al, above n 16, 152-3.} The reform here suggested would permit a person with appropriate training and expertise to monitor the condition of the child whilst giving evidence and any circumstances about the child, which may not be apparent to an untrained person, but which should be taken into account in assessing the status of the witness for the purpose of determining whether they are in a position to provide useful evidence. Monitoring the child’s condition recognises that other factors than the questions being put may affect the child.\footnote{Cf Cossins, above n 55, 101-4 whose fifth proposal appears limited to the effect of questions.} That expert could also offer advice as to the appropriate response that may be warranted given the status of the child and the particular difficulty faced. It would offer an answer to the heavy and unsatisfactory reliance on lawyers to face these questions.\footnote{Layton QC, above n 39, 15.14, with the extract provided in Article 1, see text accompanying n 40.}

Studies support the view that one reason for the continued use of improper questioning by lawyers and the failure of legislative reform placing a duty on the court to disallow such questioning\footnote{See Article 1, Part III.A.} is simply that counsel are not aware nor perceive that their questions are improper.\footnote{\[^{130}\text{[T]hose responsible for asking the questions, objecting to them or disallowing them were unaware of the level of confusion and trauma being experienced by children in the witness stand’: Boyd and Hopkins, above n 5, 164.}\] } This stems back to the adversarial-centric notions of propriety with which they are familiar and by which they are guided, but:

\begin{quote}
Whether a question is or is not confusing cannot be answered by reference to the adversarial system of trial. It is a question best answered by those with knowledge of child development and linguistic competence, or for that matter, by the child in question.\footnote{Ibid 163. The child is also in a ‘rather good’ position to assist, see below Part IV.}
\end{quote}

That is further supported by the fact that an adversarial approach to the effect of questioning may conclude a destructive and psychologically deleterious line of questioning, as well as nervousness or evasiveness on the part of the witness, is simply producing the nervous reactions it would in anyone who was not fairing well in response to questioning. But, as the Layton reported noted, a child may exhibit signs which might cast doubt on the credibility or reliability of an adult, but which for the child actually indicate a need to intervene to protect the child from a situation in which their resolve is being tested rather than their evidence:

\begin{quote}
Children within a criminal trial have to cope with the significant anxiety associated with giving a detailed account of their experience, which has already provoked anxiety. Elevated anxiety can interfere with concentration, making it harder to access memory and can impair motivation for the event to be recalled. A common coping mechanism for managing anxiety is avoidance or dissociation which, if it occurs in the context of a criminal trial, can result in the child being viewed as indecisive or indifferent, thus diminishing their credibility.\footnote{Layton QC, above n 39, 15.13, citing Submission 169 from Action for Children SA.}
\end{quote}
The assistance of experts would ensure those with appropriate training are making decisions about whether a child’s condition is adversely affecting their ability to give evidence. It would mean a certain consistency of approach, for experts engaged in this task would likely have similar qualifications and training (there would not be the risk of a judge having missed one of the training sessions) and constitute a fairly small pool.\(^{133}\)

The reforms made by the *Statutes Amendment (Evidence and Procedure) Act 2008* (SA) (‘the EPA’)\(^{134}\) provide for the use of expert evidence in a similar manner to that suggested here, that is, for the court to have the benefit of expert evidence in determining procedures it should adopt, rather than expert evidence being confined to substantive issues arising in the trial. EPA reforms permit expert evidence on the subject of ‘special arrangements’ the court might make.\(^{135}\) The reform was described as wider than that recommended by the Layton report,\(^{136}\) but it is clearly narrower in relating only to arrangements the court might make rather than the nature of the evidence being received from the child. Reference to expert evidence to determine what, if any, special arrangements should be made acknowledges the limits of the court’s expertise and the need for assistance from psychological experts to determine appropriate arrangements.\(^{137}\) That evidence indirectly assists the adjudication of the issues for the fact-finding tribunal, by providing for how the trial will be conducted and the case presented to the tribunal. This indirect assistance is vital to promoting rectitude in the adjudication of the substantive issues by ensuring the evidence which informs that adjudication is elicited under conditions most likely to promote its quality.\(^{138}\) The use of expert evidence in this way accords with what I suggest in that the expert assists in determining how the trial should proceed, particularly, how a witness should be treated and what steps should be taken to protect them and thereby (help) ensure they are, to put it this way, in a ‘good condition’ to give evidence. My proposal is a further, and logical, extension of using expert evidence to determine the appropriate arrangements under which the witness should give evidence. If we are using expert evidence to determine what arrangements to make, surely we can (and should for the reasons discussed earlier) further utilise experts to determine if they are working.

Western Australia might be seen to have led the way with its approach to child evidence. Section 106F (and s 106R) of the *Evidence Act 1929* (WA) allows for appointment of a child communicator to assist as an interpreter for a child in appropriate circumstances. Similar provisions exist in South Africa\(^ {140}\) and the United Kingdom.\(^ {141}\) The Layton report

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\(^{133}\) As with experts who provide reports concerning mental impairment relevant to criminal proceedings.

\(^{134}\) See Article 1.

\(^{135}\) See *Evidence Act 1929* (SA) ss 13(3) and 13A(9).

\(^{136}\) See Layton QC, above n 39, Recommendation 98 aimed at allowing expert evidence to be received on the behaviour, demeanour and patterns of child evidence.

\(^{137}\) Even with respect to *Evidence Act 1929* (SA) s 13A, where the orders for special arrangements must be made, this is limited by the overriding resource consideration of whether the facilities are indeed available.

\(^{138}\) As indicated in *FAR* [1996] 2 Qd R 49; (1995) 80 A Crim R 358.

\(^{139}\) See above Part II.

\(^{140}\) See *Criminal Procedure Act 1977* (RSA) s 170A.
recommended s 106F be implemented and extended in South Australia. I will say something further about this in the context of my third proposal. Presently I note support for these provisions, for they facilitate the understanding of the child and thereby the adducing of more reliable evidence. The protection of the child and the elicitation of best evidence are not separate considerations: to have one is to have, or at the very least support, the other. Nonetheless, communicators, like interpreters, are always used out of necessity rather than desire. Something is always lost in translation or reinterpretation by a communicator. Proposals recommending reform in NSW (and recent calls for similar reform in SA) in accordance with the WA and South African provisions seem to establish the communicator as an intermediary who assumes both the role of the communicator and expert assisting the court on the cognitive and psychological difficulties the child might be facing. Those roles are separate and should be seen as such because they involve differing degrees of interference and direct communication with the witness. My proposal to have an expert assist the court is a step preliminary to a communicator. It leaves the child to take and answer questions, but subject to greater scrutiny of their condition. If the expert thinks the court should intervene, and the court agrees, the appointment of a communicator may well be the appropriate response (although, hopefully, one of last resort). The expert could assist on this question. The first step should be one of supervision, rather than direct intervention by way of a go-between communicator, to preserve the principle of orality and the advantage of direct communication with the witness.

It will of course be argued that having such an expert opens additional grounds of appeal to a convicted defendant.

First, any suggestion that expert assistance on the subject of the propriety of the examination on the child’s status somehow conflicts with a fair trial for the defendant has no merit. Preventing questioning which confuses a child or otherwise adversely impacts them ‘does not require the balancing of the child’s interests against those of the accused in securing a fair trial…it requires only judicial appreciation of the fact of the child’s confusion’. That is what the expert does; assist the court to appreciate the child’s condition. Improvements in monitoring and reacting to child witnesses so as to elicit testimony from them under the best conditions possible do not detract but promote the objects of a fair trial.

141 See Youth Justice and Criminal Evidence Act 1999 (UK), s 29 provides for a special measures direction permitting the examination of the witness to be conducted through an interpreter or other person approved by the court. The intermediary is to communicate and explain to the witness questions put to the witness, and to communicate and explain to the court the answers given by the witness.

142 Layton QC, above n 39, Recommendation 104.


144 See Zhou, above n 80, 313.

145 As in the case of Evidence Act 1929 (SA) ss 13(3) and 13A(9), where the expert might recommend the witness have a friend accompany them, in accordance with ss 13(2)(e) or 13A(2)(e) respectively.

146 Cf Cossins, above n 55, 101-4 whose proposal requires all questions must first go through an intermediary.

147 Boyd and Hopkins, above n 5, 163.
Second, whilst this reform may see a judge take advice from an expert and potentially interfere with a cross-examination as a result, it must be remembered that the judge is gaining no additional power; all that is being changed is the information on which the judge acts. That is, if a judge is advised by the expert to intervene, the judge, under the present rules and duties of common law and statute, should likely have intervened of their own motion. If that intervention is inappropriate, it can be the subject of appeal. But the expert’s assistance does not make the intervention appealable; the intervention itself does that, if it is not appropriate. The expert simply offers advice as to when intervention is appropriate, but the decision remains that of the judge, as it does at present. If anything, the assistance of the expert should lessen, not increase, inappropriate intervention by a trial court and commend to an appeal court that the presiding judge had the benefit of expert help in determining whether intervention was warranted.

Third, that the judge should have the benefit of assistance from the expert in monitoring the child accords with the studies discussed earlier and in the previous article and is fundamentally based on recognition and acceptance of the fact that the skills and knowledge required to monitor the child witness are not wholly within the expertise of the judge nor should there be any expectation to the contrary. The judge’s training is in the law. The majority of controls the judge exerts over proceedings (adjournments, rulings on points of law, interposing witnesses, discretionary exclusions, formulating directions) are based on legal principle and to be determined on the basis of experience in the law and its practice. Different skills are needed to monitor children. Whether control is to be exercised over a child’s course of evidence often arises from a consideration of the psychological effect a particular situation or event is having on the child. To accept that a judge would benefit from assistance in monitoring and reacting to a child’s evidence is not to open the floodgate with respect to other topics on which judges might need assistance because the responsibilities of the judge in the main, plainly, rely on legal expertise and experience. The child witness presents an anomaly where expert help is needed because whilst the controls available to the judge are powers at law, questions of whether to exercise the powers and in what way are not answered by legal training or experience. The anomaly further supports the need for the expert assistance to be contemporaneous with the testimony because the concern is the elicitation of the evidence rather than the interpretation of the evidence. An adult witness’ needs no special consideration in actually being examined because expert assistance is not required to facilitate that testimony but is needed to scrutinise and analyse its meaning and effect. The reform here proposed simply acknowledges the time and place at which the court needs the expert’s assistance having regard to the subject with which the court actually needs help.

Fourth, the practical operation of the reform will ensure its efficiency, which in turn minimises the scope for appealable errors to arise from it. The expert could act in much the same manner as an associate to the judge; that is effectively their role, to assist the judge. The expert could therefore be positioned at the bench. The expert could communicate with the judge then in a manner of similar unobtrusiveness to an associate. Should the expert have particular concern, a note could be passed to the judge and, if the judge was so minded, the jury excused or the point simply taken with counsel or the child directly. The expert could be court appointed, given the small pool to which I earlier referred, or agreed between the parties. In either event, the expert can be regarded as an independent officer of the court:

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148 Of generic functioning and firmness.
there to assist the court, not any party. The role and purpose of the expert could obviously be explained to the jury at the outset, in summary and as often as required. The jury, as on countless other topics, could be directed as to the reason for the expert and warned against any adverse inference against the defendant – or the child. To reduce debate and build this in as customary practice, the presumption should be that an expert will assist during the evidence of a child. The studies suggest that children often experience difficulty in the course of giving evidence it would not therefore seem out of touch with actual experience to make the presence of an expert a starting point. That could of course be waived by the prosecution (with the court’s accession) or contested by the defence as a rebuttable presumption. The cost of the expert would be borne by the prosecution.

Any reform paves the way for curial agitation. Proper implementation and use of this reform will be of benefit to all affected parties, will address long-experienced difficulties and the reasons for them and will be a positive improvement to existing practice. Improper use of this reform (however so) will result in appealable error. That is entirely appropriate and unremarkable: it is certainly no basis to resist a reform which implemented and used properly would have beneficial effects.

Anyone who feels their credibility and reliability is successfully being impugned is likely to become flustered and upset. The trial judge must decide whether the child is becoming upset for that reason, or because defence counsel is being unnecessarily abusive, or because they have been giving evidence for too long, or because they cannot understand the question; and the list continues. The combination of my first and second proposals is an effort to first minimise the extent to which the child witness will be treated in an unhelpful and counterproductive manner and second to assist the judge in determining whether to intervene; not by simply giving them powers to do so, powers which they already have, but information and assistance from trained persons.

IV. THIRD PROPOSAL – EMPOWERING THE WITNESS

My final proposal is that the judge inform the child to alert the court to any difficulty or distress they are experiencing. It must be acknowledged that this is already the practice of many judges presented with a child witness, and indeed often supported by counsel who will suggest to the child that they should indicate if they do not understand a question. This proposal is in many respects a formalisation of what presently happens informally. There is a necessity and advantage to that for reasons of consistency and the promotion of good practice.

Whether by legislation or amendment to the rules of court, the presiding judge should direct, that is explain to, a child witness, especially when the child is a complainant, that they should feel no hesitation or reluctance to at any time indicate to the court that they feel uncomfortable, upset, or confused by virtue of the questions they are being asked, the situation that the courtroom presents for them or for any other reason. The child should be encouraged, and reminded, to so alert the court. The presiding judge should so direct the child at the commencement of their examination-in-chief and cross-examination. Additional directions may be given at the discretion of the court, but the direction would be appropriate each time the child resumes testifying, so as to ensure the child is appraised and reminded of their right to alert the court to any difficulties they are experiencing. The child may alert the court verbally or by raising a hand; any method sufficient to gain the attention of the presiding judge. The judge can then, with the benefit of assistance and advice from the
expert if the second proposal discussed in Part III is adopted, determine whether and what kind of action should be taken. It may be dealt with by directing the question to be rephrased, it may require the jury being taken out so as to more fully consider the status of the child, an adjournment may be appropriate or, it may be that the child simply needs to be reminded that they are obliged to answer questions. As with the second proposal, the jury should be instructed regarding any adverse inferences against the defendant, or child, as a result of the directions to the child.

The purpose of formalising directions to ensure a child knows they can say if they feel uncomfortable or are experiencing difficulties is based on the studies showing, and judicial acknowledgement of, a child’s greater reluctance to indicate uncertainty and submissive tendency in the face of questioning by advocates in the court environment. It acknowledges that the best person to alert the court to any difficulty a child witness is facing, and perhaps even make a suggestion as to what would help alleviate that difficulty, is the child. Emphasis on explaining to the child that the court is grateful to know of anything which is troubling or preventing the child from being able to comprehend what is asked of them or communicate what they wish to say, will assist to instil confidence in the child that likely reduces the need for the court to turn to communicators or other intermediaries. Any issue the child does raise, as with the second proposal, falls to the judge for final determination of what, if anything, is to be done. Alerting and reminding the child of this right is simply, as is the expert assistance, a mechanism to help the officers of the court realise if there is a need to act. That assistance, on this proposal, can be garnered from the best place: the source.

That the child witness should be so directed by the judge is a logical extension of the informal advice given by those representing them (most likely witness support officers in the prosecutor’s office) and the more formalised witness-training courses which are gaining momentum and endorsement from the courts of England and Wales. These programs ‘identify standard tactics used by lawyers during the course of cross-examination and...provide witnesses with practical advice on how best to approach the interaction’. Witnesses are trained with respect to ‘the basic rationale of cross-examination (i.e. to discredit opposing testimony) and directed to listen carefully to questions, to request clarification where appropriate and never to answer a question they do not understand’. Underlying this advice and preparation is knowledge and acceptance that common courtroom questioning techniques can cause confusion and militate against the provision of complete and accurate testimony in legal proceedings. That environment, the former NSW DPP remarked, requires witnesses to be prepared as soldiers for a battle. Putting aside dramatic overtones, what the growth and approval of witness training shows for present purposes is the formal need for all witnesses to keep steadily in mind the need for their proactivity in the face of questioning which causes them difficulties. The problem and that need is epitomised for children. If witnesses are being trained to this effect outside the courtroom, it is fair and reasonable that they have the benefit of advice and reminders to that effect in the courtroom. As Jacqueline Wheatcroft and Sarah Woods suggest:


150 Wheatcroft and Woods, above n 37, 188.

151 Ibid. My emphasis.

152 Cowdrey AM QC, above n 13.
It is of utmost importance therefore that the equilibrium between testing witness veracity and obtaining accurate reports from the witness is maintained. Accordingly, the pre-trial process needs to ensure that witnesses are aware of what is expected of them in the courtroom, i.e. that they be given information about the procedure, be offered the opportunity to ask questions, and be placed at ease.\textsuperscript{153}

Adult witnesses will often ask the cross-examiner to rephrase a question that is not understood. A child will be far more reluctant to question the question. In the end, we do not need a study to tell us that a young child, allegedly the victim of a sexual assault, with the psychological and related impact that entails for their self-esteem and confidence, will be reluctant to admit they do not understand what is being put to them by, at best, an inquisitive and, at worst, an aggressive, adult in the middle of a room filled with other adults scribbling on paper and looking to the child for an answer. The courtroom will always present a formidable and upsetting environment for the child:\textsuperscript{154} the very nature of the topic the room is convened to discuss does that without more. It is not eradication but minimisation of that negative experience for the witness which must always be the aim. This is not because we want to protect the witness but because we want the best evidence from them. It is quite simply, the ticking bomb dilemma. This third reform is another mechanism to minimise the difficulty of the experience and therefore elicit evidence in what experts in the field suggest the best possible conditions. This reform directly addresses the problem of the child feeling helpless, confused and isolated in examination: empower them; tell them that there is nothing to be ashamed of nor is there any problem in them alerting the court to the fact that they are having difficulty. That information is of assistance to the court and the examiner, if evidence of the best quality and value is to be elicited.

For these reasons the third proposal has four features which commend it: it is practical, easy, cheap and effective.

\textbf{V. CONCLUSION}

Nothing I have said should be taken to undermine the importance and usefulness of ongoing education, because a call to the bar or appointment as a judge does not necessarily take with it an understanding of or empathy with child witnesses. Similarly, additional resources to lessen the impact of the courtroom experience for a child will assist.\textsuperscript{155} Most importantly, and with particular regard to the discussion about the reliability of child witnesses in making the case for my first proposal, I do not suggest that the criminal justice system should somehow be more trusting of child witnesses.\textsuperscript{156} Cross-examination of and scepticism regarding accusations are fundamental to the adversarial process and the best method we have for finding ‘truth’. The proposals here are offered with a view to ensuring we go about the task in the optimum way, and ultimately, that the aims of the methods we employ actually accord with the goals of the criminal justice system which have received praise and accolades, rather than being aimed at some ulterior purpose which is in fact contrary to those trusted goals of criminal justice.

\textsuperscript{153} Wheatcroft and Woods, above n 37, 194.

\textsuperscript{154} See Zhou, above n 80, 310.

\textsuperscript{155} And are needed even on present reforms, see Evidence Act 1929 (SA) ss 13A-13D.

\textsuperscript{156} For the dangers of so doing see Coyle et al, above n 16, 140-1.