Obtaining the best evidence from witnesses with complex communication needs.\textsuperscript{1}

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The topic of this paper, obtaining the best evidence from people with complex communication needs, is one that has occupied the attention of law and policy makers for a number of decades. Numerous reforms have been enacted to ameliorate the difficulties facing these people when testifying. Prominent amongst them have been “witness special measures”, which most commonly enable vulnerable witnesses to give their evidence via closed circuit television (CCTV) and/or by pre-recorded video statements, to be screened in court from the defendant and to have support persons with them while they are testifying.\textsuperscript{3} While they have achieved much those reforms have also revealed the seemingly intractable nature of the barriers witnesses with complex communication needs face in giving reliable and coherent accounts of their experiences.\textsuperscript{4}

The purpose of this paper is to consider three of the most significant measures\textsuperscript{5} for obtaining the best evidence from people with complex communication needs\textsuperscript{6} in

\textsuperscript{1} This paper reproduces significant parts of the already published paper: Terese Henning (2013) “Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – “plus ça change” or prospects new?” 37 (3) Crim LJ 155.
\textsuperscript{2} Director of the Tasmania Law Reform Institute, Law Faculty, University of Tasmania.
\textsuperscript{3} See, for example, Evidence (Children and Special Witnesses) Act 2001 (Tas), s 5; Evidence Act 1906 (WA), s 106H; Criminal Procedure Act 1986 (NSW), Pt 6, Div 1; Criminal Procedure Act 2009 (Vic), ss 366, 369; Evidence Act 1929 (SA), ss 13A-13D; Crimes Act 1914 (Cth), Pt 1AD; Evidence Act 1977 (Qd), ss 21A-21AZC. In some jurisdictions there are also restrictions on unrepresented defendants personally cross-examining specified witnesses.
\textsuperscript{5} There is extensive literature and research on these measures. For details of it see Bowden, P, Plater, D and Henning T (2014) “Balancing Fairness to Victims, Society and Defendants in the Cross-examination of Vulnerable Witnesses: An Impossible Triangulation?” 37 MULR 539.
\textsuperscript{6} The meaning of ‘person with a complex communication need’ adopted in this paper is the same as that encompassed by the term in the South Australian Statutes Amendment (Vulnerable Witnesses) Act 2015 and includes children and people with impairments that adversely affect their capacity to give a coherent account of their experiences or to respond rationally to questions: Part 2, s 4(2).
criminal trials. These measures are also relevant in the pre-trial context, during police interviews etc.

Further, all these measures should be available and apply equally to defendants, victims/complainants and witnesses. I refer to relevant legislation from across Australia but focus on South Australian legislation and the uniform Evidence Acts – the latter because it is now the dominant statutory evidence regime for Australia, even though not yet enacted in all States.

The critical measures for achieving access to justice for people with complex communication needs in the criminal trial context are:

- the use of advance directives to regulate the witness examination process;
- the video recording of these people’s testimony in the absence of the jury and
- the use of intermediaries/communicators to aid the communication of their testimony.

These measures work together, complementing and supporting each other in optimising the capacity of people with complex communication needs to participate in the justice process. They should therefore be viewed and applied as a unified package of measures for achieving equal access to justice for these people.

Any consideration of these measures is necessarily located within the human rights framework of Article 12 of the UN Convention on the Rights of the Child and Article 13 of the Convention on the Rights of Persons with Disabilities, which place an obligation on courts to create the optimum circumstances in which children and people with disabilities as witnesses are free to give their accounts of events. Also applicable are the right to a fair trial, the right to be treated with dignity and humanity, the right to equality before the law and the right not to be discriminated against.

**Framing the problem**

The need to provide special mechanisms to facilitate eliciting evidence from children and other witnesses with complex communication needs is often said to reside in concern about the harmful psychological impact of testifying upon these witnesses and the need to reduce the trauma for them of testifying in the orthodox way.

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8 For example, see to this effect Redlich JA in *Martin* [2013] VSCA 377 at [26].
While I agree that this is a major objective of the mechanisms dealt with here, an equally important function is to maximize the possibility of obtaining reliable and cogent evidence from witnesses with complex communication needs by promoting changes in the traditional adversarial trial modus operandi.

Unless this is understood to be perhaps the primary purpose of these mechanisms they may not be afforded appropriate value and significance. For example, the New Zealand Court of Appeal in *M v R & E v R* ([2011] NZCA 303 at [36]-[41]) stated that the “sole advantage” of pre-recording witnesses’ entire testimony is to reduce the stress which long delays can cause to witnesses, thereby hastening their recovery. It concluded that that benefit will rarely outweigh the disadvantages to the accused, the court and the witness. Accordingly, pre-recording will only be appropriate in extreme situations, such as where the witness is dying or going overseas, and only where it can be completed significantly in advance of trial. The reasons given by the court for rejecting pre-recording ignored the 20 years of experience in Western Australia (and the research on that regime and the commentary of practitioners working with that system) which shows that the problems with pre-recorded testimony identified by the court are illusory and can be refuted.

It is important to be aware of these resistant views because they fundamentally misapprehend the purpose of the special witness mechanisms, which is to overcome the persistent, seemingly intractable barriers people with complex communication needs face in giving reliable evidence and, in particular, withstanding the rigours of cross-examination.

The barriers they face to participation properly in the trial process jeopardise one of the fundamental desiderata of the rule of law: the recognition of everyone as equal before the law and entitled to the equal protection of the law. They also, to paraphrase the Canadian Supreme Court in *DAI*, effectively immunize certain categories of offenders from criminal responsibility and further marginalize their already vulnerable victims.

Accordingly, before dealing with the complex communication special measures themselves this paper touches briefly on their raison d’être – the problems that they seek to ameliorate and that traditional questioning conventions of the adversarial trial create. It then examines those measures and ends by considering their human rights implications.

**Comprehension and Communication**

It has now been incontrovertibly established that the trial process exacerbates the particular comprehension and communication problems experienced by people

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9 Ibid.
10 [2012] SCC 5 at [67].
with complex communication needs when testifying. Consistently research has shown that they are frequently asked questions that sit well beyond their cognitive capacities and developmental levels. Questions are often complex, syntactically confusing, couched in arcane language or language that is too sophisticated for their cognitive levels, in conflict with their expectations and experience of social norms, often unclear, and sometimes nonsensical.

Further, it has been found that in responding to questions, unless explicitly and effectively encouraged to do so, witnesses with complex communication needs rarely seek clarification when confused and often attempt to answer questions that are ambiguous or that do not make any sense at all.


Even where questions appear to be clear, comprehension discrepancies between the questioner and the witness may produce a significant mismatch between what a questioner thinks s/he is asking and what the witness understands him/her to be asking – ditto with the witness’s answers.13

In addition, questioning can be abusive, hostile, repetitive and overly lengthy.14 Such questioning intimidates witnesses with complex communication needs “into silence, contradictions, or general emotional and cognitive disorganization ...”.15

Repeatedly studies have demonstrated that adversarial questioning conventions, particularly those of cross-examination, prevent people with complex communication needs from giving full, accurate and coherent accounts of their experiences.16 The result is that questioning strategies that are considered to be well designed to expose the unreliability of evidence, in fact, render it unreliable.17

As Zajac et al note in relation to children, “In fact, cross-examination has been described as a ‘how not to’ guide to asking children questions.”

Unfortunately, there is also evidence that cross-examiners deliberately exploit these witnesses’ developmental limitations and vulnerabilities to hamper their ability to recall and recount events. The Australian Law Reform Commission has characterized such practices as “clear examples of the legal abuse of children”.

While all these matters are now well understood, for a raft of reasons, courts often fail to intervene and impose standards of questioning on counsel that eliminate these problems. The primary reason for this appears to be fear of rendering the trial unfair for the accused.

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23 As noted by Ellis J of the District Court of New South Wales, “Traditionally, trial judges have been very careful about interrupting or restricting cross-examination. It is likely that this reluctance stems from concern about jeopardising a fair trial for the accused and/or concern regarding the approach to be taken by the Court of Criminal Appeal. The potential for mistake and the
There is also the view that judicial intervention might be exploited by the defence to garner sympathy from the jury on the basis that it is not being given a ‘fair run’.\(^{24}\)

In a slightly different but similar vein, intervention has been avoided as potentially casting the trial judge in the role of a partial advocate. More prosaically and somewhat regrettably, intervention has been frowned upon for interfering with the flow of questioning.\(^{25}\)

Further, non-intervention also reflects the orthodox view of the role of judges in the adversarial trial as involving minimal interference, respect for the autonomy of the consequential ordering of a new trial are all too real and no trial judge wants to make a mistake that may cause an accused and complainant to endure a re-trial. Anecdotally this seems to me to have caused trial judges to err on the side of caution, which means to err in favour of the accused and permit questionable cross-examination from time to time.” (His Hon Justice Roy Ellis (2005) “Judicial activism in child sexual assault cases”, paper delivered to the National Judicial College of Australia conference, *Children and the Courts*, 5 November 2005, Sydney at [35]).

So too Wood CJ at CL has said, “...proper control of the cross-examination of child witnesses, has not always been well managed by the judges, who very often have felt reluctant to interfere, particularly in the absence of an objection. This may well have arisen from lack of experience, or training, or even attention, on the part of trial judges to the inherent disadvantages of child witnesses.” (His Hon Justice James Wood CJ at CL (2004) “Child witnesses: the New South Wales experience” (paper presented at The Australian Institute of Judicial Administration conference, *Child Witnesses-Best Practice for Courts*, District Court of New South Wales, Parramatta, 30 July 2004 available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_wood_30072004](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_wood_30072004)).


\(^{25}\) So in *R v Burl Lars* (1994) 73 A Crim R 91 at 126) the court held, “the decision whether or not to intervene must always be taken by the trial judge with due regard to the undesirability of an interruption to the flow of cross-examination and above all and especially in a jury trial with regard to the undesirability of interventions which may give the appearance that the judge has descended into the arena and aligned himself with one or other of the combatants ...”
parties and intrusion into the examination of witnesses only to the extent that the rules of evidence and procedure strictly require.\textsuperscript{26}

It has also been observed that, (and this represents one of the biggest and most intransigent obstacles to intervention by both judges and counsel) the conventions of cross-examination are so entrenched in and intrinsic to the adversarial trial and to conceptions of what fairness to defendants’ demands, that they actually prevent trial judges and counsel from recognizing or rejecting questioning that is unfair to people with complex communication needs.\textsuperscript{27}

Yet there is also judicial support for increased intervention in cross-examination, though perhaps some perplexity about just how it is to be achieved.\textsuperscript{28}

\textbf{Control of cross-examination}

In all Australian jurisdictions, both legislation and the common law empower courts to control inappropriate cross-examination.\textsuperscript{29} In South Australia,\textsuperscript{30} and most uniform \textit{Evidence Act} jurisdictions,\textsuperscript{31} the relevant legislation imposes a duty on the court to intervene to disallow improper questioning as statutorily defined.\textsuperscript{32}

Nevertheless, there remains an inescapable discretionary element in these provisions,\textsuperscript{33} as a result of the necessity for judgment to be made on what is improper questioning in any given case.

\textsuperscript{26} \textit{Doggett v The Queen} (2001) 208 CLR 343 per Gleeson CJ at 346; \textit{Whitehorn v The Queen} (1983) 152 CLR 657 per Dawson J at 682; \textit{Libke} [2007] HCA 30 per Hayne J delivering the majority judgment at [85].


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

\textsuperscript{30} \textit{Evidence Act 1929} (SA), s 25(3).

\textsuperscript{31} The exceptions are s 41 of the Norfolk Island and Victoria Acts, where courts ‘may’ disallow a question.

\textsuperscript{32} See Uniform \textit{Evidence Acts} A s 41.

Research suggests that, despite their mandatory nature, these provisions will not be adequate to displace courts’ traditional reluctance to intervene in the cross-examination of people with complex communication needs.\(^{34}\)

Further, these provisions do not lend themselves easily to use during trials.\(^{35}\) For example, in judging whether a question offends a relevant provision, the court may be required to take into account the person’s age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding, personality and any mental, intellectual or physical disability to which the person is, or appears to be, subject.\(^{36}\) This can only be done if the trial judge has some background information about the person.\(^{37}\) The judge must then also fully comprehend the implications of that information for the questioning of the person. This requires trial judges to be finely tuned to what amounts to inappropriate questioning for different groups of people so that they can identify the type of questions that are likely to be misleading or confusing etc within the meaning of the applicable section. This demands a high level of expertise, experience and awareness that trial judges who do not encounter people with complex communication needs on a regular basis may not have the opportunity to acquire. While assistance is provided by bench books\(^ {38}\) in various jurisdictions,

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\(^{35}\) The difficulties associated with s 41 may explain why it has been invoked to exclude questioning in relatively few significant cases: \(R v TA\) (2003) 57 NSWLR 444; 139 A Crim R 30 and National Auto Glass Supplies (Australia) Pty Limited \(v\) Nielsen & Moller Autoglass (NSW) Pty Limited \(v\) Nielsen (No 5) [2001] FCA 569 being exceptions that prove the rule.

\(^{36}\) See for example s 25(4) Evidence Act 1929 (SA) and similarly s 41(2) UEA.


which, based on the research outlined earlier, list the kinds of questions to disallow, the question remains how that information is practicably to be marshaled and applied during the course of trials.

Moreover, as noted by Boyd and Hopkins,³⁹ lawyers’ and judges’ perceptions of proper questioning derive from long accepted adversarial tactics. These perceptions and the conventions that drive them are often in direct conflict with research findings concerning the type of questioning that is particularly inimical to eliciting reliable evidence from children and witnesses with cognitive impairments.⁴⁰ This suggests that the logic of cross-examination itself dictates against the effective use of provisions like s 41 Uniform Evidence Acts and s 25(3) of the South Australian Evidence Act to control cross-examination.⁴¹

**Out of Court Measures**

Because the trial itself is probably the least optimal setting for controlling cross-examination, extra curial opportunities need to be exploited to do so. Enter pre-trial directions hearings; the pre-trial recording of the entirety of witnesses’ testimony and the provision of communication assistance for witnesses with complex communication needs.

**Setting ground rules**

Good practice guidance⁴² in a number of jurisdictions tells us that the pre-trial setting of ground rules with counsel for questioning of people with complex communication needs is crucial to restraining improper questioning and

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⁴⁰ See research referenced in ns 9-19 above.

⁴¹ On this point see, Davies, Henderson and Hanna 2010 (n 37) at 354-355.

maximizing proper questioning. Doing this can also obviate the need to intervene during a trial or in some instances, to hold a voir dire. The vehicle used for doing this is a compulsory pre-trial directions hearing. In each case where testimony is to be taken from a witness with complex communication needs a directions hearing should be held to determine the person’s communication capacities and needs and how questioning should be conducted.

There are a number of statutory and regulatory provisions, which together give courts quite broad powers to give advance directions about the conduct of cases and the admissibility of evidence, which might be brought into play for this purpose. Further, they may rely on their inherent jurisdiction to control their own proceedings. Prof Wendy Lacey describes this jurisdiction as “the ability of superior courts to prevent an abuse of process and to develop rules that regulate and protect its procedures and process.” She further states that, “It has long been accepted that a court’s inherent powers may be invoked by a court to ensure the integrity, efficiency and fairness of its process, and in a manner that protects, among other things, due process and the provision of a fair trial.”

The power to hold pre-trial directions hearings for the purpose of facilitating the taking of evidence from people with complex communications needs in accordance with the reforms to be instituted by the South Australian Statutes Amendment (Vulnerable Witnesses) Act 2015 (Vulnerable Witnesses Act SA) would appear to be implicit in those reforms and at least supported by provisions like s 72 of the Supreme Court Act 1929 (SA) and s 285A of the Criminal Law Consolidation Act 1935 (SA).

Foremost among the statutory provisions in the uniform Evidence Acts that empower courts to make rules for the holding of directions hearings are s 192A and 193(2). Section 193 gives courts covered by the uniform Acts the power to "make rules to enable its effective operation." Similarly, a Bill currently before the NSW Parliament that will implement special measures for taking evidence from children and witnesses with special communication needs also makes provision for rules of court to be made and for the Chief Justice to issue Practice Directions with respect to the matters covered by the Bill which would include the holding of pre-trial directions hearings.

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44 Wendy Lacey, [2003] "Inherent jurisdiction, judicial power and implied guarantees under chapter III of the Constitution", 31 (1) Fed LR 57

45 Re Z (1996) 134 FLR 40 per Nicholson CJ and Frederico J

46 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill 2015 (NSW), cls 93 & 94.
More specifically, in Tasmania, legislation mandates the holding of a preliminary hearing in any case involving the making of orders in respect of taking evidence from children and other ‘special witnesses’. The same legislation enables rules of court to be made with respect to the preliminary hearing, which clearly enables the court to prescribe the kinds of matters to be covered in the preliminary hearing.

One of the most comprehensive sets of pre-trial directives that has been developed is that created for courts in England and Wales by the Judicial College as an extensive checklist of matters that should be settled at different stages of the court process in cases involving children.

The same checklist might be applied to people with complex communication needs in all Australian jurisdictions.

In the pre-trial stage that checklist covers:
- obtaining information about the development/health/concentration span of the witness;
- determining whether the witness is likely to recognise a problematic question or tell the questioner that (s)he has not understood;
- giving directions to counsel at so called ‘ground rules discussions’ about:
  - Adapting questions to the witness’s developmental level, enabling this witness’s ‘best evidence’ to be obtained;
  - Asking short, simple questions (one idea at a time);
  - Following a logical sequence;
  - Speaking slowly, pausing and allowing the witness enough time to process questions (which for younger children, is indicated to be almost twice as much time);
  - Allowing a full opportunity to answer;
  - Avoiding particular question types that may produce unreliable answers. For example, ‘Tag’ questions such as, ‘He didn’t touch you, did he?’ are particularly problematic for cognitively immature witnesses and should be put more directly - ‘Did Jim touch you?’ and if the answer is ‘yes’: ‘How did Jim touch you?’
  - Avoiding allegations of misconduct without reasonable grounds. Being accused of lying, particularly if repeated, may cause a child or witness with a mental impairment to give inaccurate answers or to agree simply to bring questioning to an end;
  - Not asking children to demonstrate intimate touching on their body, but instead using a body diagram;

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49 This checklist can be found at [http://www.judiciary.gov.uk/publications-and-reports/guidance/2012/jc-bench-checklist-young-wit-cases](http://www.judiciary.gov.uk/publications-and-reports/guidance/2012/jc-bench-checklist-young-wit-cases)
Prescribing how the witness is to be questioned about matters arising from third party disclosure;

Determining how the defence case is to be put. For witnesses with immature levels of cognitive development, it may be appropriate to inform the jury of evidence believed to undermine the witness’s credibility, without necessarily addressing the matter in detailed cross-examination.\textsuperscript{50}

The experience in the United Kingdom is that ground rules hearings are the key to the successful operation of the other witness special measures – pre-recording and appropriate use of communication assistants.\textsuperscript{51} Cross-examining counsel are required to submit their proposed questions for approval at a ground rules hearing and to certify that they have read the relevant protocol applying to the witness special measures as well as the toolkit on the Advocates’ Gateway.\textsuperscript{52} This has meant that questions are phrased appropriately and focus only on the issues required to be addressed in cross-examination. The result has been that pre-determined cross-examinations are much shorter than those conducted in the traditional manner, usually lasting no longer than 20 minutes.\textsuperscript{53}

**Expert assistance**

Control of questioning can only realistically be achieved if the court understands exactly what are the comprehension and communication levels and needs of particular witnesses including defendants. To this end expert advice might be obtained from someone who has relevant experience of the particular witness or relevant training in the comprehension and communication capacities of witnesses with complex communication needs either generally or in particular respects for particular cohorts.

Section 192A of the uniform evidence legislation and s 285A of the *Criminal Law Consolidation Act 1935* (SA) allow courts to give advance rulings about the admissibility and use of evidence and other questions of law affecting the conduct of

\textsuperscript{50} For details see *R v Barker* [2010] EWCA Crim 4 at [42].


\textsuperscript{52} See below at p 26.

trials. These provisions might be deployed to obtain expert assistance about how the evidence of people with complex communication needs is to be adduced.

In three Australian jurisdictions, South Australia, Western Australia and New South Wales, there is statutory provision for people with complex communication needs to be assisted in testifying by a communication assistant.

The people who provide communication assistance are differently designated in enabling legislation in different jurisdictions. In the South Australian legislation, the terms used are ‘communication partner’ and ‘communication assistance’; in Western Australia, they are called ‘communicators’. In the new New South Wales Bill the term ‘children’s champion’ is used for those who provide communication assistance to children. The Bill also uses the term ‘intermediaries’, which is the designation adopted in the United Kingdom regime. I use the term communication assistant because it seems to me to encompass all designations.

**Role**

Communication assistants also have a range of different roles in different jurisdictions. One primary function that they should perform in all jurisdictions is that of providing pre-trial advice to courts and counsel about the cognitive and communication capacities of witnesses and the types and styles of questioning that will optimize their ability to give reliable accounts.

So deployed, experts perform an advisory function. Such advice may be provided at preliminary directions hearings to help set the ground rules for the type and style of permissible questioning as well as during the actual questioning process. The latter is facilitated by pre-recording that enables it to be subsequently edited out before the recording goes to the jury.

In the New South Wales Bill and under Western Australian legislation the function of the intermediary is to communicate and explain to the witness the questions put to them, and to explain to the court the evidence given by the witness. Deployed in

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54 Section 192A UEA was enacted to overcome the High Court decision in *TKWJ* (2002) 212 CLR 124; [2002] HCA 46.
55 Evidence Act 1906 (WA), s 106F and Criminal Procedure Act 1986 (NSW), s 306ZK; Statutes Amendment (Vulnerable Witnesses) Act 2015 ss 8 & 12 which will amend the Evidence Act 1929 (SA) by amending s 13A (special arrangements for vulnerable witnesses) and inserting s 14A (entitlement to communication assistance) into it.
56 Youth Justice Criminal Evidence Act 1999 (UK), s29.
57 Evidence Act 1906 (WA), s 106F(2); Criminal Procedure Act 1986 (NSW), s 306ZK(3)(b) (children and witnesses with cognitive impairments may have a support person with them when they testify who may act as an interpreter and assist them to give evidence); Criminal Procedure Act 1986 (NSW), s 275B (any
this way, they serve a quasi translator function.

Under the South Australian legislation the role of communication partners is broadly defined as “providing assistance to witnesses with complex communication needs”. The form, extent and nature of that assistance is not confined narrowly by the legislation to the role of translator, which means that the precise nature of the communication assistance provided can be determined on a case by case basis to meet the needs of witnesses with complex communication needs and the exigencies of the particular case.

In some jurisdictions, like the United Kingdom, communication assistants may, in addition to serving a translator function, monitor questioning and alert the judge to any questions that are inappropriate to the cognitive and comprehension levels of witnesses.

**Who**

Under the South Australian legislative regime ‘communication partners’ are defined as being people who are approved by the Minister for the purpose of providing communication assistance under the Act. There is no explicit requirement for specialist expertise or training though this is probably implicit in the definition and may be provided for in any event by Regulations. Additionally communication assistance may be provided by anyone approved by the court independently of Ministerial approval. Again, there is no explicit requirement that approval be limited to people with particular expertise. This means that the assistance provided can be determined on a case-by-case basis.

Under the Western Australian regime the court may appoint a person whom it considers suitable and competent to act as a communicator for the person requiring assistance. So here, as with the South Australian regime, there is a broad discretion in the court as to whom it may appoint as a communicator, similarly opening the

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58 Youth Justice and Criminal Evidence Act 1999 (UK), s 29.
59 Emma Davies, Kirsten Hanna, Emily Henderson and Linda Hand, Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models (Institute of Public Policy, AUT University, 2011) p 12.
60 Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA), s 5 amending s 4 of the Evidence Act 1929 (SA).
61 Statutes Amendment (Vulnerable Witnesses) Act 2015 (SA), s 7 which inserts s 12AB into the Evidence Act 1929 (SA); s 9 SA(VW)Act amending s 13A EA and s 12 SA(VW)Act inserting s 14A into the EA.
way for communication assistance to be tailored to the needs of the case at hand. There is again no explicit requirement for particular expertise.

In contrast under the New South Wales Bill, ‘children’s champions’ will be appointed by Victims Services in the NSW Department of Justice and must have a tertiary qualification in Psychology, Social Work, Speech Pathology or Occupational Therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).62

This is in marked contrast with the current New South Wales provision, which simply gives vulnerable witnesses (including defendants) a right to have with them a support person of their own choosing who can act as an interpreter and assist them in giving evidence.

In the United Kingdom, all intermediaries undergo a comprehensive training program before being placed on a national register.63 Intermediaries are usually assigned to witnesses on the basis of their area of specialisation. For example, they may have experience in dealing with people with Down syndrome or autism.64

**Evaluation**

Where they are being utilised it appears that communication assistance regimes are generally well regarded.65 However, in some jurisdictions where they are legislated for it appears that they are not actually being utilized to any great extent. This is apparently the case in West Australia.66 It is not known to what extent the existing New South Wales provisions are actually used to facilitate communication by people with complex communication needs but there is no evidence that their use is widespread. In fact, information provided to support people by the New South Wales Department of Justice states that they must not speak during the hearing or help witnesses to answer questions.67 This suggests that there may be a

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62 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill 2015 (NSW) cl 89.
67 See, for example, Victims Services, Department of Attorney-General and Justice, *Information for Court Support People*,

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misconception abroad that support people must always have a purely passive role in proceedings as emotional props to witnesses. It further suggests that courts do not currently utilise these provisions to assist witnesses to comprehend questions and communicate their answers.

In contrast, to the apparent under utilisation of the West Australian and existing New South Wales regimes, in England and Wales, the intermediary special measure has been described as,

“extremely useful in advising those at court how best to communicate with the witness, ensuring that the witness understands questions and that their answers are understood.” 68

Reliance on an intermediary clearly has advantages over relying solely on counsel to phrase questions appropriately or on the judge to disallow inappropriate questions. Neither may have the degree of knowledge about the particular witness that an intermediary has and that may be critical to ensuring that questions are framed appropriately. Reliance on an intermediary therefore may reduce the intensity of the trial judge’s role in gauging and being alert to questions that are inappropriate for the particular witness. Additionally a particular advantage of intermediary schemes is that, unlike a simple witness supporter or a traditional interpreter, an intermediary can help the court by identifying communication problems during questioning and, with the court’s permission, help to resolve them.69

There is evidence that use of intermediaries, particularly when coupled with the pre-recording of evidence can increase effective case management and the early disposal of cases resulting in cost savings. Specifically, they facilitate an accurate early assessment of the viability of prosecutions and not guilty pleas with consequent fiscal benefits from reduction in court time.70

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However, there are flaws in the operation of different expert communicator special measures including their under-utilisation, an over-reliance by judges on intermediaries to control questioning of witnesses and consequent entrenchment of their own non-interventionist approach, deficits in intermediaries’ intervention, failure by counsel to adhere to questioning protocols stipulated by intermediaries, and the persistence of adversarial questioning techniques that seem to be beyond the power of intermediaries to influence.  

Nevertheless, overall, the evidence to date is that where properly resourced and where they allow adequate interventionist scope, intermediary schemes offer significant potential for facilitating the reception of evidence of witnesses with complex communication needs. But therein, of course, lies the rub – the provision of adequate resourcing and allowing intermediaries to play an adequately interventionist role. The Western Australian situation demonstrates that it is not enough to make statutory provision for intermediaries. The necessary infrastructure (a sufficient number of trained intermediaries and the availability of training programs) is essential to the success of this measure.

Additionally, the judiciary and legal practitioners must be prepared to accord intermediaries a meaningful interventionist role, which they support and promote. They should neither strangle that role by overly confining it nor abrogate their own responsibility to ensure appropriate questioning by delegating that responsibility in its entirety to the intermediary. This means that the success of these schemes essentially depends upon their becoming part of the legal culture in the way that has been achieved in Western Australia for other alternative evidence-taking arrangements.

**Video Recording of Testimony Taken in the Absence of the Jury**

The deficiencies in communication assistants’ intervention in questioning appear to reflect traditional concerns about interfering in cross-examination, particularly in front of juries. Pre-trial recording of the entirety of witnesses’ testimony can play a

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valuable role in ameliorating this problem and in supporting the interventionist role of communication assistants. In fact, the deficits in intervention observed in the United Kingdom model might be partly attributable to the slow up-take of pre-recording in that jurisdiction. Until this year, only the examination-in-chief of witnesses was pre-recorded in the United Kingdom. This, of course, is of no assistance in controlling cross-examination. A pilot for the pre-recording of the entirety of witnesses’ testimony has been running this year in three court centres. Accordingly, it is not yet known what effect this may have on intermediary or judicial intervention in inappropriate cross-examination as it is occurring.

All Australian jurisdictions except New South Wales have enacted legislation enabling the totality of specified witnesses evidence to be elicited pre-trial in the absence of the jury, video-recorded and subsequently replayed to the jury at trial. New South Wales is about to come on board in this regard but in a limited way only. There is a Bill before the NSW Parliament that will establish a three-year pilot project in two NSW District Courts for the pre-recording of the entirety of some witnesses’ evidence.

Pre-recording is of particular value in taking evidence from people with complex communication needs because it opens the way for increased judicial intervention in the questioning process as it is occurring. This is because agreed editing out of such intervention (and any inappropriate questioning) circumvents the problems associated with it noted earlier. For this reason as well, pre-recording promotes discussion and agreement about the questioning process as that questioning occurs and in this way also facilitates the application of s 41 Uniform Evidence Legislation and s 25(3) Evidence Act 1929 (SA).

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76 Statutes Amendment (Vulnerable Witnesses) Act 2015 which inserts s 12AB into Evidence Act 1929 (SA) and see also s 13A of the same Act; the Evidence Act 1977 (Qld) ss 21A, 21AI-21AO; Criminal Procedure Act 2009 (Vic) s 368; Evidence Act 1906 (WA) s 106HB; Evidence (Miscellaneous Provisions) Act 1991 (ACT) div 4.2B; Evidence Act 1939 (NT) s 21E; Evidence (Children and Special Witnesses) Act 2001 (Tas), ss 6 and 6A.

77 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill 2015 [NSW], cls 84-87.
Any anxiety about the affect of pre-recorded evidence on jurors’ perceptions of complainants’ and defendants’ credibility may be allayed by an Australian Institute of Criminology study which found no systematic affect on juror perceptions from the mode in which the evidence was presented – via CCTV, by face to face testimony or by pre-recorded video tape.  

Western Australia has had experience with pre-recorded testimony since 1992 when s 1061(b) of the Evidence Act 1906 (WA) was enacted. A raft of advantages have been identified for these provisions including improvements in the quality of testimony because it is given closer in time to the events in question; earlier release of witnesses from the stress of testifying; enabling the defence to prepare the rest of its case knowing exactly what are the strengths and weaknesses of the primary prosecution witness and on that basis as well, encouraging early pleas; and enabling the prosecution to amend indictments and adjust its opening address. Research on the Western Australian procedure has also shown that it is working well, is well accepted and has been taken up well.

Pre-recording of evidence is also now being conducted in Tasmania and even though it is a very recent development, it has been embraced quite enthusiastically

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78 Taylor N and Joudo J (2005) *The Impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision making: an experimental study*, the Australian Institute of Criminology, Canberra.
by the prosecutors who have used this process to date. They are particularly impressed with the way it enables them to capture in a timely manner the evidence of vulnerable witnesses and witnesses whose memories may be prone to deteriorate over time. This means that they can then manage subsequent trials including trial dates more flexibly unburdened by the need to enable these witnesses to exit the trial process as early as possible.

**Human Rights Implications**

In the context of the present discussion the right of primary concern is the right to a fair trial. But this right sits within a broader human rights framework comprising the right to be free from cruel, inhuman or degrading treatment, the right of all persons to be equal before the courts, the right not to be discriminated against the right to dignified treatment, the right to be protected from degrading treatment, the right to security of the person, the right to life and the right to privacy.

Once defendant centric conceptions of the right to a fair trial now recognise a triangulation of fair trial rights comprising the rights of the accused, the victim, and the rather more amorphous rights of the community. The rights of victims and community interests in fair trials are violated where participants in the criminal trial process cannot be heard and if cases cannot proceed to court because of a perceived inability to adduce evidence in a manner that could achieve a reasonable prospect of conviction. Where victims are concerned, international human rights

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86 Article 14 of the *International Convention on Civil and Political Rights*.
87 Article 7 of the *International Convention on Civil and Political Rights*.
88 Article 14 *International Convention on Civil and Political Rights*.
89 Article 26 of the *International Convention on Civil and Political Rights*.
90 Preamble and Article 10 of the *International Convention on Civil and Political Rights*.
91 Article 7 of the *International Convention on Civil and Political Rights*.
93 Article 6 of the *International Convention on Civil and Political Rights*.
jurisprudence tells us that States and domestic courts have an obligation to up-hold victims’ rights by redressing defects in existing laws and procedure.  

So what are the human rights implications of giving pre-trial directions about the questioning of witnesses with complex communication needs? Clearly this process will place restrictions on the latitude that has traditionally been granted all parties in their cross-examination of witnesses. Care would therefore be required to ensure that such restrictions do not go beyond what is necessary to ensure that the witness is able to communicate his or her account coherently and is not cross-examined in a manner that distorts his or her testimony or deprives him or her of the opportunity to give a reliable account of events. If no more than this is done, the right to a fair trial will not be imperiled. Cross-examination that produces misleading testimony or so bamboozles a witness that he or she cannot recall an event accurately or mistakenly agrees to something which is not true does not advance the right to a fair trial. No participant in the trial process has a legitimate interest in producing such consequences. Instead all trial participants share a legitimate interest in fair treatment and accurate fact finding. Therefore control of cross-examination that is conducive of these ends, in fact, accords with fair trial precepts.

Extra-curially Ellis J has endorsed this approach:

“...it should be borne in mind that there is a considerable imbalance between professional lawyers and child witnesses. It is a very moot point whether the presently accepted defence questioning styles and methods, effectively test the efficacy of evidence. Arguably, it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony.”

His Honour therefore argues that procedural fairness for all witnesses (including the accused) is difficult, if not impossible to achieve without judicial activism and that judicial activism should begin with effective case management.

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96 X & Y v Netherlands (1985) 8 EHRR 235; X v The Netherlands (1985) 8 EHRR 235 at 241, para. 27
97 Wakeley v The Queen (1990) 64 ALJR 321 at 325.
Restraint in cross-examination does not in any event preclude the defence from putting its case to the witness and testing the credibility of the witness’s account. On this point the English Court of Appeal stated in *R v Barker*,

... it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant’s case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child’s credibility. Aspects of evidence which undermine or are believed to undermine the child’s credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.101

What of the recording of testimony in the absence of the jury? The New Zealand Court of Criminal Appeal has expressed grave reservations about this process. In human rights terms the Court’s major concerns centred on the accused losing opportunities to tailor his or her cross-examination in response to juror reactions to the witness, problems that might arise from the non-disclosure of the Crown case until after the pre-recording had occurred and the need for the accused to display his or her hand before the formal trial has begun.102

The concern about loss of opportunity to tailor questions in response to juror reactions is strange.103 The purpose of cross-examination is to test the reliability of evidence. As Emily Henderson notes,

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101 [2010] EWCA (Crim) 4 at [42].
“That counsel might tailor the examination to audience reaction suggests that it is acceptable to cross-examine not on what is objectively questionable about the evidence but as a kind of theatrical performance to attract sympathy. Either a question raises a valid concern or it should not be put. Alternatively, if a valid question is not put (because counsel fears audience reaction or otherwise), counsel is remiss. Counsel can explain the reasons for unsympathetic questions in submissions.”

The Court also expressed disquiet about the cost implications of the process and its impact on trial efficiency. The considerable experience of pre-recording in Western Australia does not appear to substantiate the Court of Appeal’s concerns in this regard.

The problem of the defence being required to cross-examine the main prosecution witness before the formal trial has begun or in doing so disclosing its hand in advance of the trial proper is unlikely to be a major issue with victims of abuse. As Emily Henderson explains, “[In] the vast majority of these cases defences are almost invariably restricted to a few well-known arguments. There will be cases where the defence is unanticipated, but that pre-recording is not a universal panacea is no reason to dismiss pre-recording.”

Requirements of disclosure of the prosecution case to enable the accused to be fully prepared mean that the timing of preliminary hearings must be organized to enable this to occur. Western Australia seems to have adapted in this regard and the matter can be statutorily regulated as has occurred with the NSW Bill.

Finally what is the scope for using intermediaries/interpreters in a confrontational setting where there is a need and a right to achieve effective cross-examination? In this regard a primary issue is whether the use of an intermediary prevents the defence from fully bringing to bear the forensic techniques of the advocate. This is

106 The New Zealand Court of Appeal expressed concern about this in M v R [2011] NZCA 303 at [34].
109 Also a matter of concern to the New Zealand Court of Appeal in M v R in relation to early pre-trial recording of evidence, at [35].
also an issue that arises in relation to restrictions the court might impose on the way cross-examination may be conducted.

The answer obviously is that both measures clearly truncate the use that can be made of the full panoply of cross-examination techniques. But the rationale for doing so is that the usual practices of cross-examination are likely to involve a violation of all principles of best practice for obtaining reliable accounts from witnesses with complex communication needs. The use of communication assistants probably provides a greater insurance against unsuitable questioning than relying solely on counsel or the trial judge to ensure that questions are appropriately framed. Their particular expertise is not in this area. Their specialist knowledge is rather of the traditional model of cross-examination.

The use of communication assistants also presents practical problems of ensuring that any ‘translation’ of questions and answers actually conforms to the questions asked and the answers given. Counsel can, of course, ensure that any rephrased questions are accurate. However, the accuracy of rephrased answers may be less easy to gauge. For this reason, in Ireland intermediaries’ intervention is limited to the asking of questions not answering them. The New Zealand Law Commission also recommended this approach. The intermediary should also be able to explain and translate for the benefit of the court any idiosyncrasies in the witness’s communication – for example if the witness’s nodding of the head means ‘No’ rather than ‘Yes’.

To accord with principles of procedural fairness the use of intermediaries should be restricted to facilitation of communication. Their participation must not involve altering the substance of questions or testimony, prompting or commenting on the evidence except to explain its meaning or to indicate how a question might be better phrased.

The conclusion of this cursory analysis of the fair trial implications of the measures considered here is that the fair trial is not compromised because the forensic techniques of the advocate (in particular in relation to cross-examination) have to


111 Section 14 of the Criminal Evidence Act 1992 (Ireland).
be adapted to enable witnesses with complex communication needs to give the best evidence of which they are capable.\textsuperscript{113}

To quote myself from an earlier paper:

Clothed in the garb of orthodoxy and tradition, cross-examination has often been little more than a legitimated form of bullying.\textsuperscript{114} Even where this has not been the case, evidence taking conventions and rules have often prevented people with complex communication needs 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 fair trial rights. 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. The discussion in this article suggests that courts have at their disposal the means to alter that modus operandi via special witness measures statutory provisions that might be deployed to this end. Practical matters do not appear to impose insurmountable impediments and fair trial considerations can be accommodated.

All that is necessary then is the will and the courage to use resourcefully the tools that are to hand to break the bonds of the procedural and questioning conventions that have excluded many witnesses with complex communication needs from the protection of the law.\textsuperscript{115}

**Useful resources and sites**

The United Kingdom has been developing resources for practitioners who act in cases involving children and witnesses with cognitive impairments with great enthusiasm in the last two years. They can be accessed at the Advocates’ Gateway website (http://www.theadvocatesgateway.org/) which contains toolkits on a number of topics including:

- Case management in cases involving vulnerable witnesses

\textsuperscript{113} This conclusion is an adaptation of a point made in relation to witness competence by the English Court of Appeal in *R v Barker* [2010] EWCA Crim 4 at [42].


\textsuperscript{115} Terese Henning (2013) “Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments – “plus ça change” or prospects new?” 37 (3) *Crim LJ* 155 at 174
• Ground rules hearings
• General principles from research re vulnerable witnesses
• Planning to question vulnerable witnesses and witnesses with specific impairments
• The effective participation of young defendants.

We also have a number of useful resources and web sites in Australia including:

• *Equality Before the Law Bench Book (WA)*
• Judicial Commission of New South Wales *Equality Before the Law Bench Book*, Sydney
• Australian Institute of Judicial Administration Incorporated *Bench Book for Children Giving Evidence in Australian Courts*, Melbourne
• Judicial College of Victoria: [www.judicial.vic.edu.au](http://www.judicial.vic.edu.au)