

“Did you Not Say No?”
How Cross-Examination May Influence Child Witnesses’
Accuracy and the Viability of the ‘Intermediary’ Solution

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Introduction

Consider the case of the nine year old child, whose ability to recall a licence plate was challenged through defence counsel asking her:

“Did you just pick that up just because you talk – you plan your time to fill your space, the spacing off or riding your bike, or did anybody tell you you should read licence plates?”¹

The same child’s identification evidence was tested in the following way:

“Prior to seeing Mr. B in his front yard on that night – on that day – and the individual in the car, did you ever see Mr. B get into his car before that or get out of his car?”²

Consider also the case of a seven year old, asked during cross-examination:

“Now this happened on a Friday, was it not?”³

And finally the case of the fourteen year old, asked:

“I suggest to you that you picked the wrong person.”⁴

Regarding the first two questions, the likelihood of an accurate response is significantly diminished by the complexity of the language employed. With many parts requiring a response, the central ‘question’ is not clear. Even if able to respond,

¹ Actual court transcript extract. NW Perry and others “When Lawyers Question Children: Is Justice Served?” (1995) 19 Law & Hum.Behav. 609, at 609.

² Ibid.

³ Actual court transcript extract. M Brennan “The discourse of denial: Cross-examining child victim witnesses” (1995) 23 Journal of Pragmatics 71, at 88 (transcript, 7 years).

⁴ Actual court transcript extract. J Plotnikoff and R Woolfson “The Challenge of Questioning Children at Court” (speech to Middle Temple Hall, 21 February 2011).

a child may answer a 'sub-question' instead of the main question, leaving the questioner open to interpret and explain which part of the question was supposedly answered.

To accurately understand and answer the third question the respondent is required to undertake seven stages of reasoning to unravel its meaning. The linguistic processing capacity of a child is typically not sufficiently developed to allow him or her to adequately complete this unraveling exercise, particularly as the question contains a negative—a structure not properly understood by a child until he or she is at least nine years old.

In the case of the fourth question, the formulaic courtroom language employed and the structure of the question means that many a child witness will process it as a statement, not a question that he or she can refute if incorrect. In the case highlighted, the fourteen year old complainant's failure to refute the 'alternative hypothesis' posed by defence counsel led to the collapse of the prosecution case, which was centered on the complainant's identification evidence. The defendant was consequently acquitted.

The processing required to correctly understand, and respond to, typical cross-examination questions is beyond that which a child witness is likely able to undertake. The possibility that evidence elicited under cross-examination will consequently be inaccurate constitutes the present focal problem. The New Zealand Government's current review of how children give evidence raises allowing for the appointment of third party 'intermediaries', to assist with communication, as one possible solution.

What are intermediaries? What might their role at trial be? How will their involvement alter current trial procedures? And, finally, is this alteration tenable within the constraints of New Zealand's adversarial system? It is these critical questions that guide the present discussion. Their answers help shape the model of intermediary scheme that is ultimately proposed as being the most appropriate for New Zealand to introduce.

Chapter One

From Deprecation to Facilitation: the Development of the Law Relating to Child Witnesses

I The Traditional Approach to Child Witnesses' Evidence

“The court deprecates the calling of a child of this age...the jury could not attach any value to the evidence of a child of five: it is ridiculous to suppose that they could...”⁵

The above statement may invoke incredulity today. It exemplifies the traditional, sceptical approach to children's evidence: that a child's innate tendency to fantasise and distort rendered his or her account inherently unreliable, and worthy of little weight.⁶ Stringent evidentiary requirements, in force when this traditional attitude prevailed, greatly decreased the likelihood of a child being heard at trial:

The rule against hearsay meant that a child's account of events was inadmissible at trial unless that child testified.⁷ However, a child could only give evidence in court if the presiding judge deemed him or her competent to do so.⁸

⁵ *Wallwork* (1958) 42 Cr. App. R. 153, per Lord Goddard. This statement was made in the course of rejecting an application to allow a five year old child to give evidence.

⁶ M Ellen-Pipe and M Henaghan "Accommodating Children's Testimony: Legal reforms in New Zealand" (1996) 23 Crim.Just.& Behav. 377 at 379; W Ball "The law of evidence relating to child victims of sexual abuse" (1995) 3 Wai L Rev 63, at 63.

⁷ The common law exceptions to the rule against hearsay, such as where a statement was a 'spontaneous utterance' would have allowed some hearsay statements to be entered as evidence. However, as a general rule, in-court testimony was required.

⁸ Note that this was a modification of the common law approach to child witnesses. Common law required a child to be sworn in before his or her evidence could be heard. Section 13 of the Oaths and Declarations Act 1957 amended this, to allow a child under 12 to give evidence either sworn or unsworn. Unsworn evidence could only be heard providing the child made a promise to tell the truth (Oaths and Declarations Act 1957, s 13). However, neither oath nor promise could be taken in the absence of satisfaction of the test of competence. To satisfy competency, the child was required to

Children deemed competent were required to give evidence in the same manner as adults.⁹ Judges almost invariably directed juries that the evidence of a child was inherently suspect.¹⁰ This was a practice recommended as “prudent” by the Court of Appeal.¹¹ Through it, judicial instruction effectively ensured that little weight would be afforded to a child’s version of events.

II The Evidence Amendment Act 1989

The Evidence Amendment Act 1989¹² was designed to facilitate the presentation of children’s evidence, and remove the traditional scepticism towards its reliability.¹³ The common law competency requirement remained,¹⁴ however the Act introduced a range of alternative modes by which a child complainant¹⁵ could give evidence:¹⁶ via pre-recorded video interview; closed circuit television (CCTV); or from behind a screen.¹⁷ Where the trial was for an offence of a sexual nature, the prosecution was

demonstrate an adequate understanding of the difference between truth and falsehood and an appreciation of the duty to tell the truth, given the solemnity of the occasion (*R v Accused (CA245/90)* [1991] 2 NZLR 649).

⁹ That manner being from the witness box at the time of trial. Ellen-Pipe and Henaghan, above n 6, at 379.

¹⁰ *Ibid.*

¹¹ *R v Parker* [1968] NZLR 325 at 329.

¹² The Evidence Amendment Act 1989 inserted ss 23C – 23I into the Evidence Act 1908.

¹³ *R v S* [1993] 2 NZLR 142 at 144; Ball, above n 6.

¹⁴ Videotape evidence was only admissible provided competence was demonstrated at the start of the recording (Evidence (Video Taping of Child Complainants) Regulations 1990, SR 1990/164, regs 5(1) and 5(2); *R v AR & MR (CA302/05, 309/05)* 15 March 2006).

¹⁵ For the purposes of the provision of alternative modes to give evidence, a child was classified as being any person under the age of 17 years at the start of the proceedings (s 23C(b)(i) of the Evidence Act 1908).

¹⁶ The Evidence Amendment Act 1989 restricted the availability of alternative modes to child complainants where offences were of a sexual nature (Evidence Act 1908, s 23E). The New Zealand courts, however, extended eligibility for alternative modes to all classes of child witnesses (i.e. witnesses or complainants) irrespective of the nature of the crime (Ellen-Pipe and Henaghan, above n 6, at 380). See for example *R v M* [1996] 1 NZLR 54 (CA); *R v Moke and Lawrence* [1996] 1 NZLR 263 at 272.

¹⁷ Evidence Act 1908, s 23E(1).

required to apply for direction as to how a child complainant was to give evidence.¹⁸ Whether an alternative mode was used was at the judge's discretion.¹⁹

The Evidence Amendment Act 1989 legislated against the previously recommended standard practice of warning the jury about a child witness's reliability. It statutorily barred judges from instructing juries to scrutinise a child's evidence with particular care, or suggesting that children tended to distort or invent information.²⁰ In arguably a complete reversal of the common law approach, where alternative modes were used, the judge was required to instruct the jury *not* to draw any adverse conclusion from their use.²¹

III The Current Law Relating to Child Witnesses' Evidence

The Evidence Act 2006 and the Evidence Regulations 2007 together govern the way in which child witnesses give evidence in proceedings today. Designed to "facilitate the admission of relevant and reliable evidence",²² the legislation contains few restrictions on witness status.

¹⁸ Evidence Act 1908, s 23D(1).

¹⁹ Evidence Act 1908, s 23D(4) provided the only guidance. It required that a judge, in exercising this discretion, have "regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused". Consistency in decisions was not prevalent (Ellen-Pipe and Henaghan above n 6, at 380), and there was notable geographical variation between applications and orders (E Davies and FW Seymour "Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand" (1998) 5 *Psychiatry Psychol. & L.* 47, at 47).

²⁰ Evidence Act 1908, s 23H.

²¹ *Ibid.*

²² New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999), at 3.

The common law competency rules no longer exist. An assumption of eligibility to give evidence is now the starting point.²³ Where individual characteristics of a witness may invite concern as to reliability, the Act makes provision to mitigate their effects, rather than exclude a witness's evidence altogether.²⁴

Evidential rules governing the use of alternative modes of giving evidence are set out in ss 102A – 107 of the Act.²⁵ The objective of the Evidence Act 2006, to facilitate the admission of evidence,²⁶ is supported by a focus in the provisions which recognises a need to accommodate and assist *all* witnesses:²⁷

Section 103 extends statutory eligibility to give evidence in an alternative way to all witnesses in all proceedings.²⁸ The Judge may direct that a witness is to give evidence in the ordinary way or in an alternative way, on his or her own initiative, or on the application of either prosecution or defence.²⁹ Such an application is mandatory where the complainant is a child.³⁰ Under s 105, there are currently only three 'acceptable' deviations from the ordinary way of giving evidence available:³¹ in the

²³ *R v Tanner* [2007] NZCA 391 at [24]. See Evidence Act 2006, s 77(1)(a) which states that "in a civil or criminal proceeding any person is eligible to give evidence".

²⁴ See *R v Tanner*, above n 23 at [24] where the Court held "that if a young child is unable to give coherent evidence a Judge will still retain a discretion to exclude the testimony under s 8 of the Act (the general exclusion provision)".

²⁵ Despite s 5 of the Evidence Act 2006, pursuant to s 102A of the Evidence Act 2006 the Courts (Remote Participation) Act 2010 does not override the rules relating to the applications and/or directions for the use of alternative modes in giving evidence. See further Elisabeth McDonald and Yvette Tinsley "Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges" VUWLRP 2/2011. Available at SSRN: <http://ssrn.com/abstract=1885145>, at 6.

²⁶ New Zealand Law Commission, above n 22.

²⁷ Compare this with the 1989 Amendments which were predominantly focused on reducing the marginalisation traditionally experienced by 'victim witnesses' (complainants) only.

²⁸ See s 5 of the Evidence Act 2006 for the definition of "proceedings" that are governed by the Act.

²⁹ Evidence Act 2006, s 103(1).

³⁰ Evidence Act 2006, s 107(1). A child complainant is defined in s 4(1) of the Act as being any complainant under age 18 when the proceedings commence.

³¹ McDonald and Tinsley, above n 25, at 7; Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed., Brookers, Wellington, 2010), at EV105.01.

courtroom screened from the defendant;³² from an “appropriate place outside the courtroom”;³³ or “by a video record made before the hearing”.³⁴

Section 103(3) sets out a broad range of grounds upon which a mode direction may be made.³⁵ Section 103(4) requires that when directing whether evidence is to be given in the ordinary, or an alternative way, the Judge must have regard to “the need to ensure the fairness of the proceeding; the views of the witness; the need to minimise stress on the witness; and any other factor relevant to the just determination of the proceeding”. In a criminal proceeding, the need for “a fair trial”, and to “promote the recovery of the complainant” are additional compulsory considerations.³⁶

The prohibition against judges warning or directing the jury that a child’s age alone invokes the need for extra scrutiny of their evidence is extended under the current Act to apply to all criminal proceedings tried with a jury.³⁷ Additionally the Evidence Regulations 2007 detail special directions that may be given where a child witness is under six.³⁸

³² Evidence Act 2006, s 105(1)(a)(i)

³³ Evidence Act 2006, s 105(1)(a)(ii)

³⁴ Evidence Act 2006, s 105(1)(a)(iii).

³⁵ Evidence Act 2006, s 103(3).

³⁶ Evidence Act 2006, s 103(4). For a more detailed discussion of what must be considered under s 103, in the context of allowing for the use of alternative measures, refer below 4(IV)(B): Balancing the Interests of the Defendant with the Interests of Other Parties to Justify Appointment of an Intermediary: a Tenable Approach in New Zealand? at 4(IV)(B).

³⁷ Evidence Act 2006, s 125. Contrast with s 23H of the Evidence Act 1908, which prohibited judicial warnings or directions but was restricted in application only to sexual cases, see above n 20.

³⁸ Evidence Regulations 2007, SR 2001/204, reg 49. Elements of reg 49 are contentious: restricting its application to witnesses under six is somewhat “arbitrary” (Mahoney and others, above n 31 at EV125.04). Additionally, a lack of specificity of a direction made of the wording of regs 49(d) and (e) will conceivably limit that direction’s effectiveness. Beyond noting that reg 49 may likely be of limited utility where a child witness is concerned, further discussion on this point falls outside the present discussion.

This historical tracking of changes to whether and how a child's evidence may be heard demonstrates a shift in what is, in my assessment, the right direction. Features of evidence law today make it more likely that a child witness's account will be considered in trial proceedings than what was traditionally the case. Reform initiatives have, however, focused primarily on altering the way in which *direct* evidence may be given. Legislative change designed to facilitate the provision of evidence from child witnesses during cross-examination has been very limited.³⁹ The following chapter highlights residual concerns with the way in which the evidence of child witnesses is received, specifically in relation to cross-examination.

³⁹ Rachel Zajac and Harlene Hayne "I Don't Think That's What *Really* Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports" (2003) 9(3) *Journal of Experimental Psychology: Applied* 187, at 187; Kirsten Hanna and others, *Child witnesses in the New Zealand criminal courts: a review of practice and implications for policy* (Institute of Public Policy, Auckland University of Technology, 2010) at 8 (the AUT report was funded by the New Zealand Law Foundation, Ministry of Social Development and Ministry of Justice. It constitutes one of the key documents preceding the currently ongoing review of how the courts receive children's evidence, and can be seen to play a large part in informing the direction of the review).

Chapter Two

A Focus on Cross-Examination

This chapter focuses on the cross-examination of child witnesses. It discusses how and why the types of questions asked during a typical cross-examination may well prevent child witnesses from giving accurate evidence.

Often, particularly in cases where the child is the complainant, a child's account may be the prosecution's crucial, or even sole, evidence.⁴⁰ The case becomes one of "word against word".⁴¹ Cross-examination is a vital defence tool, used to challenge a child witness's evidence,⁴² and to assert that a child is fantasising, lying, or has been coached.⁴³ Recent research developments demonstrate that how cross-examination questions are typically structured or phrased may decrease a child's ability to give an accurate response.⁴⁴ The defence strategy may therefore be bolstered, not by a genuine change in testimony, or by demonstrating that a child has an unreliable memory, but rather by a child witness whose inaccuracy is a product of the way

⁴⁰ For example, in over two thirds of all reported child sexual abuse cases tried in US courts, verbal testimony provided the sole evidence, as there was no supporting physical evidence (Saskia Righarts "Reducing the Negative Effect of Cross-Examination Questioning on the Accuracy of Children's Reports" (PhD Thesis, University of Otago, 2007), at 42.

⁴¹ A Cossins "Prosecuting Child Sexual Assault Cases: Are vulnerable witness protections enough?" (2006) 18 CICJ 299, at 303.

⁴² Righarts, above n 40, at 42. Further discussion on the role and use of cross-examination is contained in chapter four of this dissertation, refer below 4(III)(A) and (B): Cross Examination in Theory, and Cross Examination in Practice.

⁴³ Considered to be the most common defence strategies where a child witness is a key witness. (Emily Henderson "Persuading and Controlling: The theory of cross-examination in relation to children" in HL Westcott, GM Davies and RHC Bull (eds) *Children's Testimony* (John Wiley & Sons Ltd., West Sussex, 2002) 279, at 288).

⁴⁴ For detailed discussion of this research refer below 2(I)(A): Developmentally Inappropriate Questions and how they may Influence Accuracy.

questions are put to him or her. The potential to “distort”⁴⁵ a witness’s responses in this way provides the impetus for arguing here that regulation of cross-examination is of pressing importance.

I Developmentally Inappropriate Questions and how they May Affect Accuracy

*A Developmentally Inappropriate Question Types*⁴⁶

My research into the types of questions that may distort accuracy was eye-opening. A range of language structures common in daily adult conversation often cannot be processed or understood by children. This section outlines question types that are ‘developmentally inappropriate’ insofar as they are likely to elicit an inaccurate response when posed to a child witness.

Leading Questions

“And he would sometimes come to your house, is that fair?”⁴⁷

In leading questions the answer sought is contained within the question.⁴⁸ Leading questions are often phrased as closed questions, requiring a single ‘yes’ or ‘no’

⁴⁵ JR Spencer and R Flin *The Evidence of Children: The Law and the Psychology* (2nd ed, Blackstone Press, Oxford, 1993), at 271.

⁴⁶ In the context of this dissertation “developmentally inappropriate” questions are questions which employ language and structures that are incompatible with a child witness’s cognitive and linguistic capability and thus decrease the likelihood that a child will be able to give an accurate response.

⁴⁷ Actual court transcript extract, Davies and Seymour, above n 19, at 50.

⁴⁸ Rachel Zajac, Julien Gross and Harlene Hayne "Asked and answered: questioning children in the courtroom" (2003) 10 *Psychiatry Psychol. & L.* 199, at 200.

response.⁴⁹ The risk of an inaccurate response results because this structure affords the questioner full control; a respondent can neither elaborate on, nor justify, their response.⁵⁰ Such questions have been described as “the most unreliable method for eliciting information from children”⁵¹ because children are particularly susceptible to being ‘led’ to offer the response signalled as appropriate, and agree with the questioner’s proposition regardless of its accuracy.⁵²

For this reason the courts will allow only a limited number of leading questions in a child witness’s evidential interview.⁵³ Persistent leading questions may result in the interview being held inadmissible.⁵⁴ The Court of Appeal recently held that leading questions were tolerable only where “employed solely to permit the child to provide clarification, correction or elucidation”.⁵⁵ Acknowledging that earlier authorities permitted leading questions where young children were concerned, the Court in *R v E*⁵⁶ noted that “[g]iven what is now known about the importance of using open-ended questions when interviewing children, these authorities should be treated with caution”.⁵⁷

⁴⁹ J Plotnikoff and R Woolfson *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings*. (2009) (Internet) <www.nspcc.org.uk/measuringup> accessed 07/05/2011, at 68.

⁵⁰ *Ibid.*

⁵¹ A Cossins “Cross-examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse?” (2009) 33 MULR 68, at 80.

⁵² *Ibid.*

⁵³ New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at [97].

⁵⁴ *Ibid.*

⁵⁵ *R v E (CA308/06)* [2008] NZCA 404, [2008] 3 NZLR 14 at [24].

⁵⁶ *R v E (CA308/06)* [2008] NZCA 404, [2008] 3 NZLR 14.

⁵⁷ *Ibid.*, at [25]. This brings the law with regards to leading questions in evidential interviews more or less into line with the prohibition of leading questions during direct examination or re-examination of witnesses generally. See s 89 of the Evidence Act 2006.

Tagged Questions

“Now this happened on a Friday, was it not?”⁵⁸

“Now you had a bruise, did you not?”⁵⁹

Tagged questions are opened as statements. The question is ‘tagged’ on at the end, and framed in a way that encourages agreement.⁶⁰ To most adults this type of question is unremarkable. A respondent must, however, undertake seven stages of reasoning to unravel the meaning of a tagged question and respond to it accurately. Children, because of their incomplete linguistic development, have particular difficulty with this unraveling task.⁶¹ Agreement with the questioner does not necessarily mean that the child witness agrees with the opening statement—instead it may be that the child does not have the cognitive ability required to “dissect” the question and disagree with it.⁶² Additionally, children commonly see statements from a “more powerful” questioner as unquestionable ‘facts’.⁶³ The child witness is therefore drawn into agreeing with the questioner—doing so shows cooperation; doing otherwise requires the child to contest a statement that he or she likely views as irrefutable.⁶⁴ For these reasons tagged questions have been described as the “most suggestive type of leading question”.⁶⁵

⁵⁸ Actual court transcript extract. M Brennan "The discourse of denial: Cross-examining child victim witnesses" (1995) 23 *Journal of Pragmatics* 71, at 88 (transcript, 7 years).

⁵⁹ Actual court transcript extract. Brennan, above n 58, at 88 (transcript, 12 years).

⁶⁰ Cossins, above n 51, at 78; Brennan, above n 58, at 87.

⁶¹ Plotnikoff and Woolfson, above n 49, at 10; J Plotnikoff and R Woolfson "Cross-examining children - testing not trickery" [2010] *Arch. Rev.* 7, at 7.

⁶² Cossins above n 51, at 80.

⁶³ Plotnikoff and Woolfson "Cross-examining children", above n 61, at 7; Righarts, above n 40, at 16-17.

⁶⁴ J Plotnikoff and R Woolfson "The Challenge of Questioning Children at Court" (speech to Middle Temple Hall, 21 February 2011).

⁶⁵ *Ibid.*

Questions Containing Double Negatives

“And do you remember another occasion, your father, or your step father asked if you were playing sport, *did you not say no?*”⁶⁶

Double negatives have been described by cross-examiners as employed to “make sure that the witness makes mistakes”.⁶⁷ This tactic is likely to succeed: children stereotypically do not the cognitive ‘strategies’ required to process and respond to negatives in place until at they are at least nine years old.⁶⁸ This response difficulty is further compounded with double negatives, where two forms of negation are used in one clause, and therefore cancel each other out.⁶⁹ In one study assessing the impact of complex versus simple questions on accuracy,⁷⁰ child participants were found to respond accurately to only 40 per cent of questions, where questions employed double negatives.⁷¹ When the same information was sought through asking ‘simplified’ questions (without double negatives)⁷² the same participants’ response accuracy rate increased to 83 per cent.⁷³

⁶⁶ Actual court transcript extract. Brennan, above n 58, at 88 (transcript, 13 years), (emphasis added).

⁶⁷ Henderson, above n 43, at 287.

⁶⁸ Plotnikoff and Woolfson “Cross-examining children”, above n 61, at 7.

⁶⁹ Righarts, above n 40, at 44.

⁷⁰ NW Perry and others “When Lawyers Question Children: Is Justice Served?” (1995) 19 Law & Hum.Behav. 609. Perry and colleagues assessed the impact of complex question forms versus simple questions on the accuracy of responses given by kindergarten aged children, 10 year olds, 15 year olds and college students. Thirty students viewed a videotaped event and were then asked questions on it. Half the questions were asked in ‘complex’ form, including using negatives and double negatives; half asked for the same information but in ‘simplified’ form.

⁷¹ Ibid, at 616.

⁷² An example of a question including a double negative was “Would you not say Katie did not have a red sweatshirt?”. The same question rephrased in ‘simplified’ form was asked as: “Would you say that Katie had on a red sweatshirt?” (Ibid, at 616).

⁷³ Perry and others, above n 70.

Multi-Faceted Questions

“Well I know, I understand what you say you have been talking to her today, but you see what I am asking you is this, that statement suggests that you said those things which you now say are wrong to the police. Did you say it to the police or did you not?”⁷⁴

In multi-faceted questions, an expression phrased as one question contains multiple propositions.⁷⁵ The ‘central question’ is not clear.⁷⁶ Even if able to respond, a child may answer a sub-question, instead of the main question, leaving the questioner open to ‘explain’ to the fact finder which part of the question was supposedly answered.⁷⁷ Accurate interpretation cannot be guaranteed; where an ambiguous response affords the opportunity to interpret the witness’s response in more than one way, the cross-examiner will likely invite the fact finder to construe it in the way best fitting his or her case.

Unmarked Questions

“I put it to you that you’re telling a lie”⁷⁸

“I suggest to you that you picked the wrong person”⁷⁹

Unmarked questions are expressions in which neither words nor intonation indicate that a response is required.⁸⁰ To a child, the idea that these phrases are questions that can be refuted can be extraordinary.⁸¹ Consequently they may be ‘put to’ the witness, left unrefuted, or misunderstood, and result in inaccuracy that can alter the trial

⁷⁴ Actual court transcript extract. Brennan, above n 58, at 76 (transcript; 9 years).

⁷⁵ Brennan, above n 58, at 76.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Actual court transcript. Ibid, at 86 (transcript, 8 years)

⁷⁹ Actual court transcript. Plotnikoff and Woolfson, above n 64 (transcript, 14 years).

⁸⁰ Brennan, above n 58, at 86.

⁸¹ J Cashmore and L Trimboli *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, Sydney, 2005), at 43; Brennan, above n 58, at 86.

outcome. In one case a 14 year old witness was asked “I suggest to you that you picked the wrong person”.⁸² Unaware that this was a question, the witness did not contradict defence counsel. The prosecution case hinged on the identification evidence; when the witness did not contradict the ‘alternative’ hypothesis posed by way of this ‘unmarked question’, the defendant was acquitted.⁸³

Misunderstanding and Compliance

Where a question is confusing, as in the case of multi-faceted or double negative questions, inaccurate responses may stem from misunderstanding. A child’s failure to understand, coupled with their lack of awareness of that comprehension deficit⁸⁴ means that he or she is unlikely to seek clarification.⁸⁵ The response given may be assumed accurate by questioner, child respondent, and fact finder, yet may be in fact wholly inaccurate.

Even if the child appreciates that he or she does not understand a question, clarification will not always be sought.⁸⁶ Particularly in the case of leading, tagged, and inappropriately complex questions, ‘compliance’ presents a major problem for accuracy.⁸⁷ Compliance describes where a respondent ‘complies’ with the questioner’s request for a response, and seeks to give *some* answer, irrespective of whether or not the question was understood.⁸⁸ Where the structure of the question

⁸² Plotnikoff and Woolfson, above n 64.

⁸³ Ibid.

⁸⁴ EM Markman "Realizing that you don't understand: Elementary school children's awareness of inconsistencies" (1979) 50 Child Development 643.

⁸⁵ Zajac, Gross and Hayne, above n 48.

⁸⁶ Plotnikoff and Woolfson “Cross-examining children”, above n 61, at 7.

⁸⁷ AH Waterman, M Blades and C Spencer “Do children try to answer nonsensical questions?” (2000) 18 British Journal of Developmental Psychology 211.

⁸⁸ Zajac, Gross and Hayne, above n 48.

cues a particular answer as ‘correct’ or desired (as in the case of leading and tagged questions), the child is likely to give that answer irrespective of its accuracy.⁸⁹ The best illustration of compliance is where children have been observed to attempt to answer completely incomprehensible questions.⁹⁰ The effects of compliance are not mitigated even where the child is instructed that he or she may tell the questioner when a question is not understood.⁹¹

B Developmentally Inappropriate Question Types in Cross-Examination

The aspects of questioning described above have been found to be common in a typical cross-examination. Research identifies a “clear mismatch between courtroom language and the language capabilities of the children being questioned”.⁹² In fact the cross-examination of a child witness has been described as “a virtual how *not* to guide to investigative interviewing”.⁹³ In their recent analysis of 32 transcripts of direct and cross-examination of child witnesses,⁹⁴ Hanna and colleagues found that questions asked during cross-examination were more likely to match the types of questions found to elicit inaccurate evidence: cross-examining defence lawyers asked a higher proportion of leading and closed questions than prosecution lawyers, and asked fewer open questions.⁹⁵ Defence lawyers were also noted to have used a greater number of

⁸⁹ Ibid.

⁹⁰ For example, in her analysis of courtroom transcripts, Zajac found examples of grammatically confusing or incomprehensible questions that were asked during a child’s cross-examination that the child attempted to answer. Two examples are: “So neither of your brothers weren’t there?” and “Did she ate something?” (Rachel Zajac “The effect of cross-examination on the reliability and credibility of children’s testimony” (PhD Thesis, University of Otago, 2001). See also Waterman, Blades and Spencer, above n 87. As part of this study of compliance, 5–8 year old children were asked nonsense questions such as “is a box louder than your knee?” and “is a jumper louder than a tree?”. Children were found to attempt to answer nonsense questions provided that the structure of the question allowed for a simple ‘yes’ or ‘no’ response.

⁹¹ Plotnikoff and Woolfson, above n 49.

⁹² Zajac, Gross and Hayne, above n 48, at 207.

⁹³ Henderson, above n 43, at 279 .

⁹⁴ Aged between 9 and 17 years old.

⁹⁵ Hanna and others, above n 39, at 65.

double negatives, difficult concepts, and complex vocabulary and phrases, than their prosecution counterparts.⁹⁶

Each type of inappropriate question described above is independently problematic, as each increases the likelihood of an inaccurate answer. When employed in combination, inaccuracy in responses has been found to be almost guaranteed. In a study designed to assess the effect of cross-examination questions on the accuracy of children's responses,⁹⁷ 46 five and six year old children were questioned on a staged event⁹⁸ in a manner designed to replicate firstly direct examination, and later typical cross-examination.⁹⁹ Responses given during 'direct examination' were largely accurate.¹⁰⁰ When challenged under 'cross-examination' (which included being asked leading, closed, and complex questions) 85 per cent of children altered responses from those given during the evidential interview.¹⁰¹ One third altered *all* of their original answers. Of most concern was the finding that changes were made under 'cross-examination' irrespective of the accuracy of the response given during direct examination; many changes made were *away* from accuracy and thus many responses given under cross-examination were inaccurate.¹⁰² This supports the inference that answers given and alterations made under cross-examination may be a product of the

⁹⁶ Ibid, at 71. This supports earlier findings from court transcript analyses in which the majority of questions asked during cross-examination were noted to be leading questions, and complex questions were found to be "far more common during cross-examination than during any other type of forensic questioning" (Hanna and others, above n 39, at 58; Zajac, Gross and Hayne, above n 48).

⁹⁷ Zajac and Hayne, above n 39.

⁹⁸ Meaning the experimenters had the advantage of knowing whether answers given were accurate or inaccurate—an advantage available in experimentally designed studies but absent during trial proceedings.

⁹⁹ Question style and type was derived from analysis of court transcripts carried out by Zajac, Gross and Hayne, above n 48, and information from teachers and parents as to how children are generally challenged in daily interaction (Zajac and Hayne, above n 39).

¹⁰⁰ For example, in the nine and ten year old age group, 78 per cent of participants were found to have a complete and accurate recall during direct examination (Zajac and Hayne, above n 39, at 191 Zajac, above n 90).

¹⁰¹ This interview used mostly open questions and prompts, for example: "can you tell me anything else" and ceased when the child stated that they had nothing more to say.

¹⁰² Zajac and Hayne, above n 39, at 193.

way in which questions challenging original testimony are phrased and structured, rather than to correct earlier inaccurate statements. It demonstrates that children can be talked ‘out of the truth’ merely by the questioner manipulating the structure and style of the questions put to them.

II Lawyers’ Attitudes to Cross-Examination of Child Witnesses

Despite extensive empirical investigation, some legal professionals do not accept that unsafe questioning of child witnesses occurs.¹⁰³ Those denying that it happens may argue that inappropriate questioning heightens the risk of alienating the jury, and barristers therefore avoid it.¹⁰⁴

In response, and in an attempt to pre-empt and curb similar objections to any claimed need to regulate cross-examination, I suggest that the extent to which fear of an adverse jury reaction acts in a self-regulatory manner, to curb barristers asking inappropriate questions, may be given undue weight by some members of the profession. As the empirical findings discussed above¹⁰⁵ illustrate, inappropriate questions are not limited to those which are asked in a tone that is, for example, incredulous, sarcastic or threatening. Asking leading, tagged, or multi-faceted questions whilst adopting a gentle, “impeccably polite”¹⁰⁶ approach, will likely result

¹⁰³ See NSW Law and Justice Standing Committee *Report on Child Sexual Assault Prosecutions* (R22, 2002), at 71 in which it was stated that there were opposing views as to the extent to which counsel employed aggressive tactics in cross-examining children.

¹⁰⁴ Henderson, above n 43, at 287. For example, one respondent in a survey of English and New Zealand barristers’ attitudes to cross-examination stated that: “You [a cross-examining barrister] are terrified of upsetting the child because of what the jury would think, never mind the effect on the child.” (Henderson, above n 43, at 287).

¹⁰⁵ Refer above 2(I): Developmentally Inappropriate Question Types.

¹⁰⁶ Adopting the words of one New Zealand barrister in the Henderson study who stated: “The best cross-examination...is the impeccably polite approach...they’re subtly harsh” (Henderson, above n 43, at 289).

in just as many inaccurate responses as aggressive questioning,¹⁰⁷ whilst not raising jury sympathy for the child.

Acknowledging the need to alter one's cross-examination questions to make them developmentally appropriate will not, however, necessarily be sufficient to remove the risk of distorting accuracy. A recent survey of English and New Zealand barristers suggests that unfettered cross-examination may be problematic because of practitioners' ignorance as to age-appropriate questioning types and styles.¹⁰⁸ Many of the survey respondents appreciated a need to modify language when questioning children,¹⁰⁹ but their knowledge of what constituted 'age-appropriate' questioning was limited: most believed the requirement was satisfied by "keeping sentences short and words simple".¹¹⁰ This demonstrates a gap between practitioners' knowledge and the wide range of questioning types and tactics that have been found to produce inaccurate responses.¹¹¹

III Regulation of Cross-Examination to Date

Past evidence law reforms¹¹² have included attempts to regulate cross-examination. It is my assessment, however, that the initiatives enacted cannot provide the level of regulation required to address the issues surrounding cross-examination raised by the research discussed above.

¹⁰⁷ Cossins, above n 41, at 42.

¹⁰⁸ Henderson, above n 43, at 280.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Refer above 2(I): Developmentally Inappropriate Question Types.

¹¹² Namely the enactment of the Evidence Amendment Act 1989 and Evidence Act 2006.

One initiative was the prohibition of personal cross-examination: The Evidence Act 2006 prohibits a defendant from personally cross-examining a child witness in a sexual or domestic violence case.¹¹³ Whilst the bar on personal cross-examination may, in line with the rationale underpinning its introduction,¹¹⁴ decrease stress associated with testifying,¹¹⁵ it does not mitigate the problems associated with the question structure and vocabulary employed in the typical cross-examination.¹¹⁶

Secondly, ss 103 and 105 of the Evidence Act 2006 allow for the use of alternative modes during both cross-examination and direct examination.¹¹⁷ The Court has ruled that where direct evidence is by way of video record, “cross-examination should also take place with the witness outside the courtroom”.¹¹⁸ The use of alternative modes can theoretically extend to include allowing a pre-recorded videotape of a child’s evidence (both direct evidence and cross-examination) to be admitted as his or her entire evidence at trial.¹¹⁹

¹¹³ Evidence Act 2006, s 95. This prohibition was first introduced via s 23F of the Evidence Act 1908, which prohibited a defendant from personally cross-examining a child complainant only and only in cases of a sexual nature.

¹¹⁴ New Zealand Law Commission, above n 22, at [414].

¹¹⁵ JR Spencer and D Glaser “Sentencing, children’s evidence and children’s trauma” [1990] Crim.L.R. 371, at 378.

¹¹⁶ In fact an experienced cross-examiner (a category into which a defendant is unlikely to fall) is arguably more likely to use the language and phrasing found to be problematic than a self-represented defendant, thus possibly exacerbating the problem.

¹¹⁷ Section 103(1) of the Evidence Act 2006 states that “the Judge may...direct that a witness is to give evidence in chief and *be cross-examined* in the ordinary way or in an alternative way...” (emphasis added); additionally, s 107(1) of the Evidence Act 2006 requires “application for direction about the way in which the [child] complainant is to give evidence in chief and *be cross-examined*” (emphasis added). See also *M v R (CA335/2011)* [2011] NZCA 303, at [11] where the Court of Appeal held that “the phrase ‘the evidence of a witness’ in [s 105(1)] includes evidence given in cross-examination...[the] ‘alternative way of giving evidence’ applies not only to the witness’s examination in chief but also to the time when the witness is being cross-examined or re-examined”.

¹¹⁸ *R v Faatafa* HC Auckland CRI-2009-004-8563, 7 May 2010, at [20].

¹¹⁹ See *M v R (CA335/2011)*, above n 117, at [28] where the Court of Appeal was “satisfied that the courts do have jurisdiction to make pre-trial cross-examination orders under the Evidence Act”. Contrast Mahoney and others, above n 31, at EV103.02 for argument that pre-trial cross-examination is not provided for under the strict wording of the Act. In light of the Court of Appeal’s unreserved ruling in *M v R (CA335/2011)* this argument appears now to be redundant.

The availability of pre-recording a child's entire evidence has recently received increased attention. In June 2011 the Ministry of Justice, attempting to increase pre-trial cross-examination, issued a memorandum outlining a process to be followed for the pre-recording of a child's entire evidence.¹²⁰ Later that month, however, in *M v R (CA335/2011)*,¹²¹ an order directing that a complainant's cross-examination be given at trial by way of pre-recorded video was quashed in the Court of Appeal. The Court outlined that, in its view, substantial and broadly applicable disadvantages for both defendant and witness would result from a direction for pre-trial cross-examination, and ruled that it would "require a compelling case...[and] rare circumstances" before such a direction would be made.¹²² Thus, it seems that despite pre-recorded cross-examination being available under ss 103 and 105 of the Evidence Act, admission of such evidence is presently unlikely. The success of any Government initiatives intended to increase pre-recording of cross-examination may well be limited by a judicial reluctance to approve applications for it.¹²³

In any case, whether cross-examination is carried out at trial in the ordinary way, using an alternative mode, or recorded pre-trial it will still be carried out using the

¹²⁰ Ministry of Justice *National guidelines for agencies working with child witnesses* (2011).

¹²¹ *M v R (CA335/2011)*, above n 117.

¹²² *Ibid* at [41]. See [29]–[41] for the Court's reasons.

¹²³ For further discussion on pre-trial cross-examination and the utility of increasing its use see McDonald and Tinsley, above n 25. The Ministry's June 2011 national guidelines were produced despite two pending appeals to the Court of Appeal on the jurisdictional basis for pre-recording. From the wording of the associated Cabinet paper it appears that Cabinet considered it possible that these appeals would result in the High Courts' directions for pre-trial cross-examination being upheld (see Cabinet Domestic Policy Committee Minutes "Child Witnesses in the Criminal Courts: Proposed Reforms" (6 July 2011) DOM Min (11) 10/1, at 19 para [5]). This is interesting as it suggests some disconnection between the Court and Governments' views on the use of alternative modes, with the Government appearing to consider that the Judiciary is more inclined to favour the child witness's interests than it, in practice, perhaps does. Chapter four of this dissertation discusses the need to consider more than just the witness's interests in deciding which alternative modes are appropriate, in the context of intermediaries.

question types found to be forensically unsafe.¹²⁴ The fact that cross-examination may be carried out in an alternative way does not decrease the problematic components of cross-examination that are the focus of this dissertation.

Section 85 Evidence Act 2006

The legislature has evidently made some attempt to regulate questions asked during cross-examination: under s 85(1) of the Evidence Act 2006, a judge may disallow any question that he or she considers is “improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness to understand”.¹²⁵ This is, in principle, a positive step and the extent to which this provision has been used has been described as “encouraging”.¹²⁶ In an analysis of court transcripts from 16 trials, judges were found to have intervened 38 times in 10 of those trials.¹²⁷ Reasons for intervention included to require the rephrasing of questions that were too complex for the child to understand, or involved complex concepts.¹²⁸

¹²⁴ The use of leading questions, for example, will still produce inaccuracies whether cross-examination takes place in court or during the course of a pre-recorded hearing. Rachel Zajac and Harlene Hayne "Cross-Examination: Impact on Testimony" in A Jamieson (ed) *Wiley Encyclopedia of Forensic Science* (John Wiley & Sons, Ltd, 2009) 656.

¹²⁵ Evidence Act 2006, s 85(1). This is a wider power than that afforded under the Evidence Amendment Act 1989, see s 23F(5) of the Evidence Act 1908.

¹²⁶ Hanna and others, above n 39, at 91.

¹²⁷ Ibid.

¹²⁸ Ibid. For example, in one exchange cited in the study, the judge intervened during cross-examination to require that the following question be rephrased “in a less confusing manner”: “[D]o you remember the day you said that the later sexual violation occurred?”. In a separate exchange, defence counsel asked a series of questions including “[w]hat is your comment if he will testify that he didn’t give you the baby to hold?” and “[s]o I put it to you that no one forced you to pick up the baby or hold the baby. Can you comment on that?”. The judge disallowed these on the grounds that they were too complex (ibid, at 89-90).

The extent of judicial intervention found by Hanna and colleagues¹²⁹ demonstrates that judicial curbing of inappropriate questioning of a child witness has increased since a similar 1998 study.¹³⁰ Hanna notes, however, that within the trials analysed there were “many, many more complex questions which were *not* disallowed by the judge”.¹³¹ This provides grounds to suggest that the power to disallow certain questions does not provide a ‘fail safe’ method of ensuring that cross-examination is forensically safe. The utility of s 85(1) is argued here to be insurmountably limited because judges do not possess the level of specialised knowledge required to appreciate where questions are likely to produce inaccuracies if put to a child witness.

In recommending s 85, the Law Commission sought to grant judges considerable flexibility, thus refrained from strictly defining what constituted an unacceptable question.¹³² The vague description of questions that may be disallowed likely in fact limits the extent that judges will be in a position to intervene: the Law Commission intended that judges would use “common sense... [and] wisdom” to determine what constituted an unacceptable question¹³³ yet, whilst recognising an aggressive, intimidating, or “needlessly repetitive”¹³⁴ questioning style may be an exercise of common sense, understanding a child witness’s linguistic capabilities takes more than intuition.¹³⁵ This is particularly true with older children: the need to simplify language for young children may be obvious, but less so for a high school student, yet research

¹²⁹ Hanna and others, above n 39.

¹³⁰ Davies and Seymour, above n 19. Davies and Seymour noted that, across a total of 26 cross-examination transcripts analysed, judges intervened on only six occasions, and “none of the trial judges...intervened to protect the child complainants on the basis of inappropriate questioning: poor sentence structure; inappropriate sequencing of questions; irrelevant or misleading content of questions” (at 59).

¹³¹ Hanna, above n 39, at 91.

¹³² New Zealand Law Commission, above n 22, at 104.

¹³³ *Ibid*, at 3.

¹³⁴ Evidence Act 2006, s 85.

¹³⁵ J Cashmore “Child Witnesses: The Judicial Role” (2007) 8 JR 281, at 294.

into language development demonstrates that 15-17 year olds may struggle to understand commonly used words, such as “assume” and “although”.¹³⁶ Consequently, specialised knowledge on language development and communication is required to recognise cross-examination questions that are, for example, “misleading” or “too complicated for the [child] witness to understand”.¹³⁷

An Australian court observation study of judicial intervention provides evidence to suggest that judges do not generally possess this requisite specialised knowledge.¹³⁸ Across observed child sexual assault trials, judicial intervention during cross-examination was found not to correlate with instances where trained observers noted that intervention would be appropriate, as questions asked were likely to produce inaccuracies.¹³⁹ Judicial intervention did not increase for younger versus older child witnesses,¹⁴⁰ nor did it increase where observers, with linguistic training, noted the linguistic style adopted by defence counsel to be more difficult.¹⁴¹ This suggests that many judges may not be adequately sensitised to the difficulties that child witnesses have with the style of cross-examination adopted,¹⁴² and are thus ill-equipped to intervene effectively.¹⁴³

¹³⁶ K Perera *Children's Writing and Reading: Analysing Classroom Language* (Basil Blackwell Ltd., Oxford, 1984); Hanna and others, above n 39, at 77.

¹³⁷ Evidence Act 2006, s 85.

¹³⁸ Cashmore and Trimboli, above n 81.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*; Cashmore, above n 135, at 286. This suggests that the judges under observation considered that younger children had language skills equal to that of older children and were therefore likely to experience the same comprehension difficulties as older children. The inaccuracy of this conclusion finds support in empirical investigation into the matter (see for example Rachel Zajac and Harlene Hayne "The negative effect of cross-examination style questioning on children's accuracy: older children are not immune" (2006) 20 *Applied Cognitive Psychology* 3).

¹⁴¹ Cashmore and Trimboli, above n 81; Cashmore, above n 135, at 286.

¹⁴² Cashmore, above n 135 at 286.

¹⁴³ It is acknowledged that the Cashmore and Trimoboli study (Cashmore and Trimboli, above n 81) analysed judicial intervention in Australia. An equivalent study has not been undertaken in New Zealand to date. However, the most similar study, reported in Hanna and others (above n 39) noted that the extent of judicial intervention did not correlate with the number of complex questions asked during cross-examination (see above n 39, at 91). This provides grounds upon which Cashmore's

Based on the above argument, it is my assessment that the power afforded by s 85 is insufficient to ensure that judges will adequately restrict the types of questions put to children to only those which are developmentally appropriate. To distinguish between cross-examination that is “improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand”¹⁴⁴ and cross-examination that is permissible, is to identify a very fine dividing line. Failure to recognise when this line has been crossed during cross-examination may likely be driven by a lack of specialist knowledge required to make such a decision.¹⁴⁵

IV Summary

Question types and structures commonly employed to cross-examine child witnesses have been found to increase the likelihood of inaccurate responses. Previous reform initiatives do not mitigate this concern, partly because barristers and judges have insufficient understanding of forensically unsafe questioning. Consequently it is now appropriate and necessary to consider introducing initiatives to decrease the extent that accuracy may be distorted through question structure. The following chapters focus on introducing an initiative argued to be the next logical step—the use of ‘intermediaries’—and how such an initiative may fit into New Zealand’s adversarial

conclusion (noted above, see text accompanying n 142) could be apply to the New Zealand Judiciary also.

¹⁴⁴ Evidence Act 2006, s 85(1).

¹⁴⁵ Note that some argue that the effectiveness of a statutory power to disallow certain questions is limited because requiring judges to intervene conflicts with the adversarial judge’s role of ‘detached and neutral umpire’ (see, for example, L Ellison “The mosaic art?:" (2001) 21 Legal Studies 353, at 366). As the truly passive judge is likely more theoretical than practical, I have focused here on judges’ likely insufficient understanding of inappropriate or problematic questioning as providing a more widely applicable reason for section 85’s inadequacy.

system.

Chapter Three

Enter the Intermediary¹⁴⁶

Chapter two set out the central problem driving this dissertation: the structure and phrasing of typical cross-examination questions often requires linguistic and cognitive processing beyond that which children have the developmental capacity to carry out. Inaccuracies and inconsistencies may consequently be the direct result of how questions posed to a child witness are structured.

This chapter focuses on one possible solution: expanding the existing range of alternative ways of giving evidence to include use of a neutral ‘intermediary’—a ‘go-between’ to improve communication between child witnesses and the court.¹⁴⁷ It outlines the present Government’s focus on introducing intermediaries where child witnesses are concerned, and addresses two key questions: is it necessary to consider using intermediaries during trials in New Zealand? If so, what should the scope of the intermediary’s role be?¹⁴⁸

¹⁴⁶ Title borrowed from L Ellison “The Mosaic Art?: Cross-examination and the vulnerable witness.” (2001) 21 *Legal Studies* 353, at 362.

¹⁴⁷ J Plotnikoff and R Woolfson "The 'Go-Between': An Evaluation of the Intermediary Pathfinder Projects" (2007) (Internet) <http://www.lexiconlimited.co.uk/PDF%20files/Intermediaries_study_report.pdf> accessed 12/07/2011. Note that this is not to suggest that intermediaries be made available only to child witnesses, however it is outside the scope of this dissertation to explore the benefits and objections associated with the use of intermediaries for witnesses other than child witnesses. For the use of intermediaries with intellectually or physically disabled witnesses see, for example, BM O'Mahony "The emerging role of the Registered Intermediary with the vulnerable witness and offender: facilitating communication with the police and members of the judiciary" (2010) 38 *British Journal of Learning Disabilities* 232; and J Plotnikoff and R Woolfson "Making best use of the intermediary special measure at trial" (2008) 2 *Crim.L.R.* 91.

¹⁴⁸ Note that this chapter deals solely with whether and how intermediaries may provide an optimal solution to the problem. Whether or not it is feasible and appropriate, from a legal theory perspective, to utilise intermediaries in New Zealand is the principal focus of chapter four.

I Intermediaries Generally and in New Zealand Law

In general terms an intermediary is a person with specialist knowledge and skill, involved in assisting communication whilst a child witness is giving evidence.¹⁴⁹ The exact scope of an intermediary's role varies as a function of the statute permitting his or her appointment. Intermediaries can be classified into two broad types: those afforded the narrow role of being a 'translator' only, and those given the capacity to phrase and/or rephrase communication between the Court and witnesses.

The Evidence Act 1908¹⁵⁰ allowed for the appointment of an intermediary with a narrow 'translator' role. Under s 23E(4), where a child complainant was to give evidence from out of court or from behind a screen, the judge could direct that questions be put to the witness through an approved person.¹⁵¹ In interpreting the characteristics of this intermediary the court in *R v Accused*¹⁵² stated that:¹⁵³

The intermediary is [to] responsibly and fairly put...the questions as asked...If it seems that the child does not understand the question...it will be for counsel to rephrase it or approach the matter from another angle.

The role of the intermediary as provided under the 1908 Act was effectively that of a 'megaphone'; his or her purpose was restricted to removing practical complications that may have arisen where evidence was given from out of the Court's sight, or earshot.

¹⁴⁹ In some jurisdictions, such as England, intermediaries are used in both investigative interviews and trials. This discussion is focused solely upon the use of intermediaries during trial proceedings only.

¹⁵⁰ As amended by the Evidence Amendment Act 1989

¹⁵¹ Evidence Act 1908, s 23E(4). This provision was triggered only when evidence was being given in an alternative way and only where the alleged offence was sexual in nature.

¹⁵² *R v Accused* HC Wellington T 91/92, 5 March 1993, Neazor J.

¹⁵³ *Ibid*, at 5 (emphasis added).

In 1996 the Law Commission recommended extending the role of intermediaries to that of “rephras[ing] questions to assist witness comprehension”.¹⁵⁴ This recommendation received wide governmental and community support.¹⁵⁵ Despite this, the Commission did not recommend its inclusion in later draft legislation;¹⁵⁶ in fact the concept of an intermediary was abolished altogether—there is no equivalent provision to s 23E(4) in the Evidence Act 2006.¹⁵⁷ Justifying this position, the Law Commission cited divided views amongst the legal profession and the existence of negative literature out of the United States of America.¹⁵⁸

The current review of court processes for child witnesses shows a revived Government interest in intermediaries. In February 2011 the Ministry of Justice published *Alternative pre-trial and trial processes for child witnesses in New Zealand*,¹⁵⁹ which sought discussion on proposed possible solutions to problems associated with how child witnesses give evidence. One proposal was the re-

¹⁵⁴ New Zealand Law Commission, above n 53, at 44-46. See also s 11 of the draft legislation provided in New Zealand Law Commission, above n 53, at 66.

¹⁵⁵ Some submitters described the intermediary provisions as “the best in the paper”. New Zealand Law Commission, above n 22, at 100-101

¹⁵⁶ New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 Vol 2, 1999).

¹⁵⁷ The Act does provide for “communication assistance” on application by any party or at the judge’s initiative (s 80(4) Evidence Act 2006), however assistance available under this provision is limited to providing a translation service where a witness’s command of English prevents him or her from offering evidence (see the narrow definition of communication assistance in s 4 of the Evidence Act 2006).

¹⁵⁸ New Zealand Law Commission, above n 22, at 100-101. The Law Commission cited three articles as supporting claims that the use of intermediaries was problematic (see New Zealand Law Commission, above n 22, at 100). Having read these three articles it is my assessment that they neither supported this claim at the time of the Commission’s report, nor are they relevant to any current assessment of the viability of intermediaries in the current context: all three are about “facilitated communication”, a specific type communication assistance to assist persons with physical or intellectual disabilities to communicate. It is focused primarily on remedying problems associated with expressive disorders (for example where the witness has severe difficulty speaking). Evaluation of such a system is not relevant where the current focus is on assisting child witnesses to understand questions posed to them to help ensure that the information elicited by the question is accurate.

¹⁵⁹ *Alternative pre-trial and trial processes for child witnesses in New Zealand’s criminal justice system* (Ministry of Justice, Wellington, 2010).

introduction of intermediaries.¹⁶⁰ In July 2011 Cabinet approved a package of child witness law reforms, one of which is to make intermediaries available to assist during the questioning of child complainants.¹⁶¹ The Ministry is currently considering the exact nature of the model of intermediary scheme that should be introduced. For this reason, the present discussion, as to whether there is a need for intermediaries, the most appropriate role to be afforded to them, and any possible objections to their use,¹⁶² is timely.

II Is it Appropriate for New Zealand to Look to Introducing Intermediaries as a Solution to Inappropriate Questioning?

A The Common Sense Approach

It is likely that there will be opposition to claims that there is a need for legislative provision for intermediaries. Information on the benefits of intermediaries where witnesses are children is unlikely to have removed the ‘divided views’ on intermediaries of the 1990s.¹⁶³ Addressing whether appointment of an interpreter¹⁶⁴ during cross-examination of a child witness is appropriate, jurist Henry Wigmore stated:¹⁶⁵

¹⁶⁰ Ibid, at [102]–[113].

¹⁶¹ Cabinet Domestic Policy Committee Minutes, above n 123. Note that this information was not made publically available until early October 2011.

¹⁶² Discussion of which is the central focus of chapter four.

¹⁶³ See the New Zealand Law Commission, above n 22, at 100-101. Refer above 3(I): Intermediaries Generally and in New Zealand Law.

¹⁶⁴ In this context ‘interpretation’ referred to a third party whose role it was to explain to the court the testimony of a child whose idiosyncrasies, including communication in gesture or whisper only, make it difficult for the trier of fact to understand their testimony (NW Perry and LS Wrightsman *The child witness: legal issues and dilemmas* (Sage Publications Inc., California, 1991), at 171).

¹⁶⁵ Cited *ibid*.

The conditions under which [interpretation] is to be resorted to are the simple dictates of common sense... Interpretation is proper to be resorted to whenever a necessity exists, but not till then.

Arguably the same approach should apply when deciding whether statutory provision permitting the appointment of intermediaries for child witnesses is necessary. Logically such a measure should be introduced only where existing or less disruptive measures do not suffice. In the following section the effectiveness of two possible alternative ‘solutions’ is discussed: educating barristers on developmentally appropriate questioning and relying on juries to consider the influence of inappropriate questioning on a witness’s responses when assessing witness credibility. The purpose of this discussion is to demonstrate that the next logical step in addressing the problematic components of cross-examination is to explore the viability of using intermediaries.

B The Inadequacy of Training as a Complete Solution.

As discussed in chapter two, the prevalence of inappropriate questioning in part stems from the fact that lawyers and judges have inadequate knowledge to consistently recognise where question structure may distort accuracy.¹⁶⁶ One view is that trained intermediaries are not required, as inappropriate questioning can be removed by educating lawyers in appropriate communication.¹⁶⁷

¹⁶⁶ Refer above 2(II): Lawyers’ Attitudes to Cross-Examination; and Section 85 Evidence Act 2006.

¹⁶⁷ This view was expressed during the United Kingdom Witness Intermediary Scheme (WIS) pilot conducted 2005 – 2006 (see Plotnikoff and Woolfson, above n 147 at 66-67); and in submissions to the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (Officer of the Director of Public Prosecutions (ACT) and Australian Federal Police *Responding to Sexual Assault: the Challenge of Change* (2005)).

The extent to which an education scheme could curb developmentally inappropriate questioning is limited, most simply from a practical perspective. Specialist experience and skill, outside that possessed by the average judge or barrister, is required to assess the communicative competence of a child witness and identify questions that may elicit inaccurate responses. Some suggest that the intermediary's skills could be passed on to barristers through educational material alone.¹⁶⁸ However information on the language devices and questioning styles that may produce inaccuracies is constantly being updated as research develops. Any published list of 'problem question' categories is "non-exhaustive".¹⁶⁹ The compilation of a 'closed list' would therefore be an inadequate educative tool. Similarly, the training involved to acquire and maintain the required knowledge and skills is continuous. To provide one example, the English intermediary scheme pilot¹⁷⁰ ranked speech and language therapists (SALT) as most appropriately qualified to be appointed as intermediaries. Grounds for this included the fact that the SALT degree comprises a four year course of study of language development, followed by ongoing training and supervision once in practice.¹⁷¹ As part of the current English intermediary scheme, registered intermediaries are required to keep skills updated by serving a minimum of 144 hours acting as an intermediary¹⁷² and attend training and conferences annually.¹⁷³ The collapse of an intermediary scheme in East London, South Africa, provides another example of the extent of training required to achieve adequate competency: despite

¹⁶⁸ See generally Plotnikoff and Woolfson, above n 147, at 65–66.

¹⁶⁹ L Ellison *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, Oxford, 2002), at 95.

¹⁷⁰ This was a two year pilot scheme, carried out in six pathfinder areas across England and Wales, prior to the complete national roll out of the intermediary scheme. The pilot is discussed in more detail as part of discussion on the use of intermediaries in the English context generally. Refer below 3(III)B: The Intermediary System in England and Wales.

¹⁷¹ Hanna and others, above n 39, at 130.

¹⁷² *Registered Intermediary Procedural Guidance Manual* (Ministry of Justice, 2011). Acting in an intermediary role is defined as "face-to-face contact with the witness" thus excludes time preparing reports, attending pre-trial meetings and training.

¹⁷³ *Ibid.*

initial success, the system effectively collapsed as none of the individuals working as intermediaries were willing to accept re-appointment after their first few cases.¹⁷⁴ Despite 80 per cent of the intermediaries receiving formal training in the form of short workshops, or in the case of one, a four day course,¹⁷⁵ retired intermediaries unanimously agreed that “inadequate training...significantly undermine[d] the level of service rendered”.¹⁷⁶ Poor initial, and a lack of follow up training contributed significantly to their reluctance to continue.¹⁷⁷ Leaving aside the lack of relevant foundation knowledge, the time commitment required to reach the skill level needed to be a competent intermediary has been considered unreasonable for many legal practitioners to undertake.¹⁷⁸ This has led some to suggest that proponents for education as a complete solution have “underestimated the complexity of the task that they have set”.¹⁷⁹ This assessment appears to have some evidential basis in the above two case studies.¹⁸⁰

C The Role of the Jury

The underlying assumption of the jury system is that “jurors are able to judge and evaluate the evidence, and...make rational decisions based on the information

¹⁷⁴ Felicity Coughlan and Renette Jarman "Can the intermediary system work for child victims of sexual abuse?" (2002) 86(5) *Families in Society* 541.

¹⁷⁵ *Ibid.*, at 543. I note this time frame and structure of training as it is arguably similar to the type of training that legal counsel could reasonably expect and be expected to commit to, thus I consider its inadequacy in this case to be significant.

¹⁷⁶ Coughlan and Jarman, above n 174, at 545.

¹⁷⁷ *Ibid.*

¹⁷⁸ Hanna and others, above n 39, at 292.

¹⁷⁹ *Ibid.*, at 189.

¹⁸⁰ This is not to say that efforts to educate barristers would be entirely futile or should not be considered. Rather, it is my assessment that instigation of an education or training scheme would be most useful if designed to work alongside solutions targeted more directly towards reducing inappropriate questioning.

presented in court".¹⁸¹ One possible argument is that the jury is in the best position to firstly, recognise where developmentally inappropriate questions are asked, and secondly, ignore any resulting inconsistencies in the witness's testimony. However research into how juries form judgements suggests that this view places inordinate faith in the jury: whilst there is evidence to suggest that jurors can detect where questioning is 'unfair',¹⁸² more is required of a jury if they are to adequately safeguard against the problematic effects of inappropriate questioning. Jurors must firstly be able to detect where a question is problematic, in the sense that its structure may elicit an inaccurate response. Further they must act to adjust any instinctive response to the 'revelation' of inconsistencies, to gauge whether these are genuine changes to a previously inaccurate response, or the result of the child being 'talked into' an answer through being asked an inappropriately phrased question.

As has been discussed, in many instances specialist knowledge and training is required to pick up on the more subtle problematic or developmentally inappropriate language devices.¹⁸³ Judges and barristers cannot detect every question which may result in inaccuracy.¹⁸⁴ It is therefore arguably implausible to suggest that a juror, whose experience with witness questioning is far less than that of a trial judge, could identify an inappropriate question asked in the heat of cross-examination. Sometimes juries *may* be at an advantage from a perception perspective as they comprise the experience and common sense of twelve ordinary citizens.¹⁸⁵ It is my assessment,

¹⁸¹ G Goodman and A Melinder "Child witness research and forensic interviews of young children: a review" (2003) 12 Legal and Criminological Psychology 1, at 5

¹⁸² Cashmore and Trimboli, above n 81.

¹⁸³ Perera, above n 136; Hanna and others, above n 39, at 77. Refer also above 2(III): Section 85 Evidence Act 2006.

¹⁸⁴ As discussed in detail in chapter two, refer above 2(II): Lawyers Attitudes to the Cross-Examination of Child Witnesses; and Regulation of Cross-Examination to Date.

¹⁸⁵ Spencer and Flin, above n 45 at 283.

however, that this ‘twelve heads are better than one’ rationale cannot apply in the case of identifying developmentally inappropriate questions: the exercise requires more than common sense,¹⁸⁶ and the experience needed to competently identify whether questions are appropriate or not is more specialised than that which the average ordinary citizen would bring to the deliberation table.

D Conclusion

Neither relying on a jury’s assessment of reliability nor instigating training of the legal community offers an adequate stand-alone solution to the problems associated with inappropriate cross-examination questions. Applying Wigmore’s ‘common sense’ approach,¹⁸⁷ I suggest that considering the introduction of intermediaries is therefore now logical and appropriate.

III Assuming Provisions Allowing for their Use are to be Enacted, what is the most Appropriate Scope to Afford to Intermediaries?

Seeking submissions in response to its proposal to introduce intermediaries, the Ministry of Justice asked “[i]f intermediaries were to be introduced, what...should be the extent of their role?”¹⁸⁸ The key question here is what type of intermediary is more appropriate, of the two broad types generally used? Once answered, the validity of objections to intermediaries can be placed in context and assessed. Addressing this question, I will argue that intermediaries must be afforded scope to rephrase

¹⁸⁶ Refer 2(III): above Regulation of Cross-Examination to Date.

¹⁸⁷ Refer above 3(II)(A): The Common Sense Approach.

¹⁸⁸ Ministry of Justice, above n 159, at [31].

communications, and demonstrate how the rephrasing model is used in England,¹⁸⁹ South Africa and Norway.

A A Restricted Role: Intermediaries Acting as ‘Translators’

Of the two types of intermediary used, the ‘translator’ intermediary is the more restricted. This intermediary may only repeat communication between the court and witness, verbatim. He or she operates solely to assist where the witness cannot be heard or communicates via unfamiliar idiosyncratic mannerisms.¹⁹⁰ It is this narrowly defined translator type of intermediary that was permitted under s 23E(4) of the Evidence Amendment Act 1989.¹⁹¹

Intermediaries in America

In America the use of intermediaries has been judicially approved only where they are restricted to acting in this narrow translator capacity.¹⁹² The fundamental consideration for any American court, in deciding whether to permit testimony via an alternative mode, is whether such permission would violate the defendant’s

¹⁸⁹ The Youth Justice and Criminal Evidence Act 1999 provides for the use of intermediaries in both England and Wales. For ease, the reader is directed to understand that further references to the “English” scheme cover both England and Wales.

¹⁹⁰ LC Hoyano "Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses" [2000] 1 Crim.L.R. 250, at 272; LC Hoyano "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] 1 Crim.L.R. 948 at 964-965.

¹⁹¹ This type of intermediary will be hereafter referred to as the ‘translator’ intermediary.

¹⁹² Hoyano "Variations on a Theme by Pigot", above n 190, at 272; Hoyano “Striking a Balance”, above n 190, at 964-965.

Constitutional right to confrontation.¹⁹³ The Confrontation Clause of the Sixth Amendment of the Constitution states that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him”.¹⁹⁴ The fundamental importance placed on this right has led intermediaries to be used only where characteristics of a child witness’s mannerisms or speech (volume or clarity) prevent the Court from understanding his or her testimony unassisted.¹⁹⁵ In *US v. Romey*,¹⁹⁶ for example, the child complainant was permitted to testify by whispering to her mother, who repeated the responses verbatim to the Court. This “third party whisper technique” was permitted after the witness refused to answer questions directly related to the alleged abuse. The defendant appealed, claiming this ‘whisper technique’ was unconstitutional as “portions of the child-victim's testimony were heard only by her mother. To this extent, her testimony was not physically before appellant or...the court”.¹⁹⁷ Refusing the appeal, the Court held that the use of the complainant’s mother as an intermediary was permissible as the “whisper technique” was a necessity, evidenced by the child’s inability to respond *at all* without it.¹⁹⁸

As highlighted in *US v Romey*,¹⁹⁹ before a child witness will be permitted to testify via an intermediary, the court must consider that he or she would be “unavailable to testify” if required to do so in the ordinary way. This high threshold test does not align with the factors to be considered in making alternative mode directions under

¹⁹³ See for example *Coy v Iowa* 487 U.S 1012 (1988); *Maryland v Craig* 497 U.S. 836 (1990); at 3166; *US v Romey* M.J. 180, 32 Fed. R. Evid. Serv. 1315, Certiorari denied 112 S.Ct. 337 (U.S. Court of Military Appeals, 1991).

¹⁹⁴ The Constitution of the United States, Amendment 6.

¹⁹⁵ Hoyano “Variations on a Theme by Pigot”, above n 190, at 272.

¹⁹⁶ *US v Romey*, above n 193.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

New Zealand's Evidence Act 2006.²⁰⁰ Furthermore, the defendant's right to cross-examination in New Zealand²⁰¹ has been distinguished from the American Constitutional right to confrontation.²⁰² The American justifications behind taking a restrictive approach to the use of, or scope afforded to intermediaries, do not, therefore, apply directly in New Zealand.²⁰³

Given that New Zealand does not share America's need for keeping the role of intermediaries narrow, I regard it futile to consider re-introducing provisions permitting only the use of limited 'translator' intermediaries. The narrow scope afforded to their role prevents such intermediaries from intervening during cross-examination to prevent questions, which employ structures likely to impede accuracy, being asked. As such they would be of limited, if any, assistance in resolving the problems associated with inappropriate questioning under present focus. To provide a workable solution to this concern, an alternative type of intermediary must instead be considered.²⁰⁴

²⁰⁰ As set out in the Evidence Act 2006, ss 103(4) and 107(3). Discussed further in chapter four, refer below 4(IV)(B): Balancing the Defendant's Interests with the Interests of Other Parties.

²⁰¹ Codified in New Zealand in the New Zealand Bill of Rights Act 1990, section 25(f).

²⁰² For discussion on the right to cross-examination in New Zealand refer below 4(IV)(B): The Defendant's Right to a Fair Trial and the Right to Cross-Examination in New Zealand.

²⁰³ The defendant's right to cross-examination is discussed in greater detail, in the context of its validity as an objection to the use of intermediaries in general, in chapter four.

²⁰⁴ Some suggest that this restricted 'translator' type of intermediary may still be useful as the 'buffer' provided by a neutral third party may reduce the stress associated with testifying (See for example Hanna and others, above n 39, at 164) However this secondary consequence is not the issue under focus in this dissertation. The focus here is solely on the way in which cross-examination can be problematic from an *accuracy* perspective. The extent to which protecting the witness from stress can be given weight in directing that evidence be given in an alternative way raises a distinct set of issues outside the scope of this discussion.

B Intermediaries Afforded an Active Role in Phrasing Communications

The second broad type of intermediary is afforded a much more active role in wording questions put to a child witness. I consider that this ‘active intermediary’ has greater potential to provide an adequate solution: affording a third party intermediary, trained to assess cognitive and language development in children, the capacity to assist with question structure and phrasing would likely decrease the risk of miscommunication and increase response accuracy.²⁰⁵

Within this second category of ‘active’ intermediary, two sub-types operate in overseas jurisdictions. The first (the ‘rephrasing intermediary’) works contemporaneously with counsel and the court in an advisory capacity, helping to rephrase questions first asked by counsel. Variants of the ‘rephrasing’ intermediary are used in South Africa and England. The second sub-type (the ‘specialist examiner’), currently used in Norway, runs child witness examination largely independently, albeit with breaks to consult defence and prosecution counsel.

The Intermediary System in England

Statutory provision for intermediaries in England was enacted within the Youth Justice and Criminal Evidence Act 1999 (YJCEA).²⁰⁶ One of eight Special Measures statutorily available,²⁰⁷ the Court may appoint an intermediary²⁰⁸ to assist with

²⁰⁵ Hanna and others, above n 39, at 164.

²⁰⁶ Following completion of a two year pilot in six ‘pathfinder areas’, the intermediary package was rolled out nationwide in 2007 (Plotnikoff and Woolfson, above n 147; LC Hoyano "The Child Witness Review: Much Ado About Too Little" [2007] 1 Crim. L.R. 849, at 849).

²⁰⁷ The other seven measures available under the Youth Justice and Criminal Evidence Act 1999 (YJCEA) are the use of screens (s 23); the use of live video link for cross-examination at trial (s 24);

improving the quality of eligible witness's evidence.²⁰⁹ Appointment is permitted where the Court considers that it would "maximise the quality of evidence given by the witness".²¹⁰

The English Intermediary's Role

Section 29(2) of the YJCEA affords the intermediary an active explanatory function, permitting him or her to "explain" questions or answers given during examination "so far as necessary to enable them to be understood" by the witness or the questioner. On this statutory definition alone, the role of the intermediary appears exceptionally wide, and lacks clarity.²¹¹ Its parameters are however further delineated within an Intermediary Procedural Guidance Manual (the Guidance Manual).²¹² The Guidance Manual, in combination with qualitative interviews,²¹³ annual registered intermediary survey results²¹⁴ and reports on the operation of the intermediary scheme,²¹⁵ provide a greater understanding of how intermediaries typically operate in England:

clearing the public gallery for a child's testimony in sexual offence cases (s 25); removal of wigs and gowns (s 26); video interviews as examination-in-chief (s 27); video-taped pre-trial cross-examination (s 28); and communication aids (s 30). Of these eight measures, six had been utilised for some time prior to the YJCEA's enactment, only the provisions allowing the Court to appoint an intermediary and direct that cross-examination be video-taped pre-trial were novel measures introduced through the 1999 Act (Hoyano, above n 206, at 849).

²⁰⁸ Defined as "an interpreter or other person approved by the court" under YJCEA, s 29(1).

²⁰⁹ YJCEA, s 29(1). Note that witnesses under 17 are automatically eligible to be considered a direction that an intermediary be appointed (YJCEA, s 16(1)).

²¹⁰ YJCEA, s 19(2). "Quality" is defined as comprising of "completeness, coherence and accuracy" where "coherence" refers to "a witness's ability to give answers which address the questions put to the witness and can be understood both individually and collectively." (YJCEA, s 16(5)).

²¹¹ This led some commentators to view the utility of the intermediary with considerable scepticism immediately following the enactment of the YJCEA 1999, see Hoyano "Variations on a Theme by Pigot", above n 190, at 27; see also Ellison, above n 146, at 365-366.

²¹² The most recent version is *Registered Intermediary Procedural Guidance Manual*, above n 172.

²¹³ See for example interview with Emily Phibbs, Registered Intermediary, (Penny Cooper, lawinapod podcast from City University London, 16 February 2010) (Internet) <www.city.ac.uk> accessed 06/08/2011; and interview with Donna Ravening, Speech and Language Therapist and Registered Intermediary, (Penny Cooper, lawinapod podcast from City University London, n.d.) (Internet) <www.city.ac.uk> accessed 06/08/2011.

²¹⁴ See for example Penny Cooper "Tell Me What's Happening: Registered Intermediary Survey 2009" (2009) (Internet) <<http://www.city.ac.uk/>>, accessed 08/08/2011; and Penny Cooper "Tell Me What's

Prior to trial the intermediary meets with the child witness and prepares a report for the court.²¹⁶ This provides information on, for example, the witness's communication style; and "possible approaches to questioning which would assist the witness to give best evidence".²¹⁷ Reports are expected to be distributed to parties before trial commences. Ideally, at trial, barristers use the information provided in the intermediary's pre-trial report to adapt their questions, in line with the intermediary's assessment of what constitutes developmentally appropriate questioning, for that particular child witness. If adaptation is adequate, the intermediary does not intervene at all.²¹⁸ Typically, if a problematic or inappropriate question *is* asked, the intermediary "flags" that question to the judge, who then requires the advocate to rephrase it.²¹⁹ In some instances the intermediary will rephrase the question him or herself,²²⁰ sometimes at the request of questioning counsel, or the judge if counsel cannot or will not rephrase adequately.²²¹ Where the intermediary does rephrase, the Guidance Manual requires that he or she "[does] not alter the precise nature or thrust of questions in the first instance but...offer[s] an alternative form if required to facilitate understanding."²²² At all times the judge retains responsibility for monitoring the questions asked and permitting any alternative phrasing suggested by

Happening: Registered Intermediary Survey 2010" (2010) (Internet) <<http://www.city.ac.uk/>>, accessed 08/08/2011.

²¹⁵ See for example Plotnikoff and Woolfson, above n 61.

²¹⁶ *Registered Intermediary Procedural Guidance Manual*, above n 172, s 3.9.11.

²¹⁷ *Ibid*; Plotnikoff and Woolfson, above n 83.

²¹⁸ Plotnikoff and Woolfson, above n 83.

²¹⁹ Plotnikoff and Woolfson, above n 147, at 94.

²²⁰ *Ibid*.

²²¹ Interview with Donna Ravening, above n 213.

²²² *Registered Intermediary Procedural Guidance Manual*, above n 172, s 3.11.3.

the intermediary.²²³ The following two transcript excerpts exemplify how an intermediary may assist in re-phrasing a question considered inappropriate:²²⁴

Barrister: “One time, the once, a different time from the second incident?”

Intermediary: “How many times have you been to B’s house?”

Barrister: “It was about 1pm. What was the weather condition? Was it sunny, rainy, foggy, what was the situation, what was it like?”

Intermediary: “What was the weather like?”

The intermediary must communicate the witness’s answers “as given”, prohibiting him or her from “alter[ing] the witness’s answers for the purpose of...protecting them.”²²⁵ If the answer is irrelevant or illogical, the Court decides whether to ask the intermediary for clarification, or require that the question be rephrased.²²⁶

The role of each intermediary is suggested to be agreed upon during a pre-trial ‘ground rules’ hearing.²²⁷ The Guidance Manual recommends that these hearings discuss how the intermediary will act during the trial, including how “lack of understanding on the part of the witness and factors which are hindering effective communication” will be signaled.²²⁸

The role of the English intermediary can be conceptualised as that of a ‘last resort’: having provided case-specific information on inappropriate questioning in the pre-trial report, the questioning of the child witness remains primarily in trial counsel’s control. Intermediary involvement is triggered when counsel does not adhere to this

²²³ Plotnikoff and Woolfson, above n 83.

²²⁴ Plotnikoff and Woolfson, above n 147, at 94.

²²⁵ *Registered Intermediary Procedural Guidance Manual*, above n 172, s 3.11.3.

²²⁶ *Ibid* s 3.11.3. Hoyano “Striking a Balance”, above n 190, at 965.

²²⁷ *Registered Intermediary Procedural Guidance Manual*, above n 172, ss 3.6.16; 3.10.5-3.10.7.

²²⁸ *Ibid*, s 3.10.6.

information. In this way the extent of the intermediary's involvement and interjection throughout questioning is more minimal than the statutory scheme first suggests. The possibility for minimal involvement is aptly summed up by one intermediary, who observed that: "The ideal situation is where the defence follows ground rules discussed beforehand, questions are developmentally appropriate and I don't have to say anything."²²⁹

The Intermediary System in South Africa

South Africa has utilised intermediaries to assist in communication between court and child witnesses since 1993, making it the first nation to do so.²³⁰ The Criminal Procedures Act 51 1977 (CPA) allows the court to "appoint a competent person as an intermediary in order to enable [a witness] to give his or her evidence".²³¹ Eligibility is triggered when it "appears to the court" that to testify in the ordinary way would expose a child witness²³² to "undue mental stress or suffering".²³³

The South African Intermediary's Role

Whilst still classified as 'rephrasing' intermediaries, South African intermediaries fulfil a notably different role from the English intermediary. Once an intermediary is appointed, *all* questions asked during examination, cross-examination or re-

²²⁹ Quoted in Plotnikoff and Woolfson "Cross-examining children", above n 61, at 8.

²³⁰ CR Matthias and FN Zaal "Intermediaries for Child Witnesses: Old Problems, New Solutions and Judicial Differences in South Africa" (2011) 19 International Journal of Children's Rights 251; Coughlan and Jarman, above n 174.

²³¹ Section 170A of the Criminal Procedure Act 51 1977 (SA) ('the CPA').

²³² Defined as a person under the age of 18 years per CPA, s 170A(1).

²³³ CPA, s. 170A(1).

examination must be asked through that intermediary.²³⁴ The witness and intermediary are located outside the courtroom, but observed by the Court and trial parties.²³⁵ When a question is asked during examination or cross-examination, the intermediary hears it through earphones and relays it to the witness.²³⁶

The wide scope afforded to the role of the South African intermediary, as it is statutorily defined, allows him or her to “convey the general purport of any question” to the witness.²³⁷ In practice, this has been judicially interpreted to allow the intermediary to rephrase the question and ask it “using language and form appropriate to the witness’s...development”, providing the meaning remains unaltered.²³⁸ The Court can challenge the rephrasing of any question and require that it be rephrased differently or asked in its original form.²³⁹ The Court hears the witness’s responses directly.²⁴⁰

Compared with the ‘last resort’ English intermediary, the South African intermediary appears to have a much more ‘front line’ role. Rather than being available primarily in an advisory role, intermediaries in South Africa are afforded much greater control over the examination process generally.

²³⁴ CPA, s. 170A(2)(a).

²³⁵ CPA, s. 170A(3). One-way glass or a CCTV link and audio speakers is generally used to facilitate this observation (Matthias and Zaal, above n 230, at 252).

²³⁶ Matthias and Zaal, above n 230, at 252.

²³⁷ CPA, Section 170A(2)(b).

²³⁸ *Klink v Regional Court Magistrate NO and Ors* [1996] (1) SACR 434, at 402.

²³⁹ *Stefaans* [1999] (1) SACR 182.

²⁴⁰ Matthias and Zaal, above n 230, at 252.

Intermediaries as Specialist Cross-Examiners: the Norwegian System

The extent to which control is removed from trial counsel in South Africa pales in comparison to the extent to which intermediaries control witness examination in Norway, where intermediaries act as ‘specialist’ examiners and cross-examiners. A child’s entire evidence is taken during a video-recorded interview conducted pre-trial by a specially trained interviewer.²⁴¹ The judge and both prosecution and defence lawyers observe the interview through a one-way mirror or video-link.²⁴² The interviewer first conducts the interview according to his or her “professional judgement”²⁴³ and, when he or she considers it complete, consults with counsel and the judge. Counsel may suggest further topics, or contradictions in the evidence that they want challenged or investigated. This ‘back and forth’ process continues until all parties are satisfied with the issues addressed.²⁴⁴

In researching for this dissertation, I initially disregarded the Norwegian experience. It was, in my assessment, irrelevant in any discussion assessing the viability of intermediaries in New Zealand, due largely to the fundamental differences between New Zealand’s adversarial system and Norway’s inquisitorial one. In Norway the trial is led by judges who have a positive duty to “discover the truth and ensure the case is fully clarified”.²⁴⁵ The Norwegian judge has the power to determine how

²⁴¹ T Myklebust and GE Oxburgh "Reviewing the Case (Post-interview)" in ME Lamb and others (eds) *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2nd ed, Wiley-Blackwell, West-Sussex, 2011) 165, at 169.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

witnesses are examined and by whom, and to adjourn proceedings for further investigation.²⁴⁶

This is starkly different from the New Zealand system in which the presentation of evidence, including witness examination, is controlled by the trial parties or their representatives.

These differences between the roles ascribed to trial counsel and judges in Norway versus New Zealand, means that, in my opinion, an intermediary scheme based on the Norwegian variant is impractical, and likely incompatible with the fundamental underpinnings of our adversarial system. The Ministry of Justice does not, however, appear to share this view. Apparent attention to the use of intermediaries in Norway within the current child witness law review elevates its importance and necessitates its inclusion in the present discussion.

Replacing cross-examination by counsel with ‘specialist cross-examination’ was raised as a possibility by one contributor in the AUT *Child Witnesses* report²⁴⁷ who suggested that affording the responsibility of cross-examination to specially trained, independent intermediaries was a possibility.²⁴⁸

The Ministry of Justice appears to have noted this as worthy of further consideration: from the information regarding the Ministry’s current progress on introduction of an

²⁴⁶ Ibid.

²⁴⁷ Hanna and others, above n 39.

²⁴⁸ Ibid, at 190.

intermediary scheme available,²⁴⁹ a system using intermediaries to “*undertake* the cross-examination...of children”, a concept very similar to the Norwegian experience, is apparently being considered as viable.²⁵⁰ Because of this, discussion of the Norwegian system in the current context is important.

IV Summary

The type of intermediary considered most likely to mitigate the extent that cross-examination question structure may distort accuracy is the ‘active’ intermediary, afforded the capacity to phrase or rephrase questions. Three variants of ‘active’ intermediary are currently in operation overseas. Between the English, South African, and Norwegian systems the extent of alteration to orthodox cross-examination varies. The following chapter focuses on how this alteration may conceivably spurn objections to intermediaries, and uses these objections to shape recommendations for the most appropriate model of intermediary system for New Zealand.

²⁴⁹ The information available on Ministry’s current progress or plans in this area is limited. In researching for this dissertation I have had to rely primarily upon media reports and Minister of Justice Simon Power’s published statements on the matter. See for example Simon Power, Minister of Justice “Speech to University of Canterbury Workshop” (University of Canterbury Workshop, University of Canterbury, Christchurch, 19 April 2011).

²⁵⁰ Simon Power, above n 249. Power stated in this speech that, as part of his desire to “drive [reform] from the outside” and “[t]o make progress in the area of alternative pre-trial and trial processes for child victims” he “asked the Ministry of Justice to examine introducing trained experts to undertake the cross-examination and re-examination of children”.

Chapter Four

Assessing the Compatibility of an Intermediary Scheme with the Rights of the Defendant

The defendant's right to cross-examination is fundamental, both in its own right²⁵¹ and as one of a group of rights which together afford the defendant his or her absolute right to a fair trial.²⁵² The intermediary can be described as a 'filter', through which cross-examination questions must pass.²⁵³ This 'filtration' process adds another dimension to cross-examination and alters its orthodox form.²⁵⁴ Predictably, the introduction of intermediaries will generate concern as to how this alteration may affect defendants' rights. Similar objections have been raised in South Africa,²⁵⁵ and formed the basis of early criticisms of the English intermediary scheme.²⁵⁶ In New Zealand, opposition to alternative modes of giving evidence are often based on argument that deviation from orthodox cross-examination infringes upon defendants' rights,²⁵⁷ thus the overseas trend is likely to continue here. Given the primacy afforded to the rights of the defendant to due process and a fair trial under the

²⁵¹ *R v L* [1994] 2 NZLR 54, at 62.

²⁵² *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [76], refer below 4(II): The Defendant's Right to a Fair Trial and the Right to Cross-Examination in New Zealand for discussion on the right to cross-examination as a "constituent right".

²⁵³ J Doak "Child witnesses: do special measures directions prejudice the accused's right to a fair hearing?" (2005) 9 E. & P. 291, at 294.

²⁵⁴ i.e. "orally in a courtroom in the presence of the Judge or, if there is a jury, the Judge and jury; and the parties to the proceeding and their counsel; in court at trial" as per the definition of the ordinary way of giving evidence, see Evidence Act 2006, s 83.

²⁵⁵ *Klink v Regional Court Magistrate NO and Ors* [1996] (1) SACR 434 discussed below, see 4(IV)(A): Justifying the Appointment of an Intermediary: the South African Approach; *Stefaans* [1999] (1) SACR 182.

²⁵⁶ See for example Doak, above n 253; Hoyano "Striking a Balance", above n 190.

²⁵⁷ *R v M (CA590/2009)*, above n 266; *M v R (CA335/2011)*, above n 117 provide two recent examples. It would be a shorter list to list those cases which do *not* make some reference to defence counsel submitting that requiring that evidence be given in the ordinary way is necessary to preserve the defendant's trial rights.

adversarial system, assessment must move beyond the practical. This chapter considers whether the intermediary is compatible with defendants' rights, critical if any intermediary scheme is to be viable New Zealand.

I 'Defendants' Rights' Objections: the Difficulty of Analysis

Those who suggest that the use of intermediaries violates defendants' rights do not detail specifically how such rights may be conceivably undermined.²⁵⁸ To assess the validity of possible objections to the use of intermediaries, I have constructed two objections which could likely form the basis of two 'defendant's rights' based objections:

- the 'fair trial' objection
- the expression of the right of cross-examination (the 'control' objection).

The first objection is based on the relationship between cross-examination and the defendant's right to a fair trial. As the right to cross-examination is considered to contribute to the defendant's right to a fair trial, does the use of intermediaries so alter the defendant's right to cross-examination that overall trial fairness is untenably undermined?

The second objection relates to interference with cross-examination design. The key question is whether any perceived encroachment on the defence's ability to control cross-examination can be justified by the fact that intermediary appointment can protect interests of parties other than the defendant.

²⁵⁸ C Eastwood and W Patton *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Queensland University of Technology, Brisbane, 2002), at 127.

In the final section, I suggest that whilst any limitations on the rights of the defendant are unlikely to prevent an intermediary scheme from being introduced, they may help shape the intermediary model that is most appropriate for New Zealand.

II The Defendant's Right to a Fair Trial and the Right to Cross-Examination in New Zealand.

Section 25(a) of the New Zealand Bill of Rights Act 1990 (NZBORA) affords the defendant the right to a fair trial.²⁵⁹ The right is absolute.²⁶⁰ Failure to uphold it constitutes a miscarriage of justice.²⁶¹ It is made up of a number of “constituent” rights, including the right to cross-examination.²⁶² The right to cross-examination, codified in NZBORA, s 25(f) provides that every defendant has “the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence...”²⁶³

The right to cross-examination is not unfettered. Previous reforms to New Zealand’s evidence law have altered the cross-examination procedure from its traditional form. Provisions barring personal cross-examination have been declared not incompatible

²⁵⁹ New Zealand Bill of Rights Act 1990 (NZBORA), s 25(a) affords the defendant the right to “a fair and public hearing in an independent and impartial court”.

²⁶⁰ *R v Condon* above n 252, at [77]; *R v L* above n 251, at 61.

²⁶¹ *R v Condon* above n 252. See also *Brown v Stott* [2001] 2 WLR 817 (PC), at 693 where Lord Bingham commented that “there is nothing to suggest that the fairness of the trial itself may be qualified, compromised or restricted in any way, whatever the circumstances and whatever the public interest in convicting the offender. If the trial as a whole is judged to be unfair, a conviction cannot stand.”

²⁶² *R v Condon*, above n 252, at [76].

²⁶³ NZBORA, s 25(f) provides that “everyone who is charged with an offence, has, in relation to the determination of the charge the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence...”

with the fair trial principle,²⁶⁴ as have provisions permitting witnesses to give evidence screened from the defendant,²⁶⁵ via CCTV,²⁶⁶ via video-link from outside New Zealand,²⁶⁷ and via pre-recorded video evidence.²⁶⁸ This demonstrates that, unlike the right to a fair trial, the right to cross-examination is not absolute; nor is its form immutable,²⁶⁹ and that, unlike the right of confrontation, the right to cross-examination does not afford the defendant the right to be physically present during cross-examination.²⁷⁰

III The First Objection: Do Intermediaries Undermine the Right to a Fair Trial?

A Cross-Examination in Theory: the ‘Core’ Right Protected by Cross-Examination

In light of the reforms discussed, the defendant’s right to cross-examination has been described as “shrinking”.²⁷¹ It can be considered only to guarantee the defendant the right to challenge a witness’s initial evidence, for the purpose of exposing inconsistencies or inaccuracies in that evidence. The New Zealand Court of Appeal in *R v L*²⁷² held that:²⁷³

²⁶⁴ *R v L*, above n 251.

²⁶⁵ *Mussa v R* [2010] NZCA 123.

²⁶⁶ *R v M (CA590/2009)* [2009] NZCA 455.

²⁶⁷ *R v Simi* [2008] NZCA 515.

²⁶⁸ *R v Willeman* [2008] NZAR 644.

²⁶⁹ *R v L*, above n 251, at 61.

²⁷⁰ See *R v L* above n 251, at 62 where the Court citing *R v Cole* [1990] 2 All ER 108 at 115, held that the Bill of Rights guarantee of cross-examination did not “elevate...the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself”.

²⁷¹ Ian Dennis "The Right to Confront Witnesses: Meanings, Myths and Human Rights" (2010) 4 *Crim.L.R* 255, at 256.

²⁷² *R v L*, above n 251.

²⁷³ *Ibid*, at 63-64.

If the testimony appears to be inherently reliable and there is nothing in any other evidence or in the surrounding circumstances casting any doubt on its trustworthiness the Court may properly conclude...that cross-examination would not have made any relevant difference.

In essence, this suggests that the New Zealand courts recognise that the core purpose of cross-examination is to allow one party the right to challenge the direct evidence of opposing witnesses, for the purposes of assessing reliability and accuracy.

Construing the ‘core right’ protected by cross-examination in this way is consistent with overseas jurisprudence. The European Court of Human Rights (ECHR), and the British Courts appear to have construed the equivalent European Convention on Human Rights right to cross-examination²⁷⁴ as affording the defendant the ‘core’ right to challenge a witness, with the circumstances and content of that challenge being “relegated to the periphery”:²⁷⁵ in *Doorson v The Netherlands*²⁷⁶ the ECHR “impliedly accepted” that the defendant’s Convention right to cross-examination guarantees the defendant the right to examine witnesses, but does not require that this examination be carried out in any particular manner.²⁷⁷ The House of Lords, deciding *Regina v A*,²⁷⁸ stated that “Article 6[(3)(d)] does not give the accused the right to put whatever questions he chooses to the witness”.²⁷⁹ The approach of the European Courts to the

²⁷⁴ Article 6(3)(d) of the European Convention on Human Rights affords the defendant the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

²⁷⁵ Hoyano, “Striking a Balance”, above n 190, at 957.

²⁷⁶ *Doorson v Netherlands* (1996) 22 EHRR 330 (ECHR).

²⁷⁷ Hoyano, “Striking a Balance”, above n 190, at 955. The Court in *Doorson* held that a requirement of witness anonymity did not violate the defendant’s Article 6(3)(d) right as defence counsel was “put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity” and the trial Court was able to draw conclusions as to their reliability (*Doorson v Netherlands*, above n 276, at [73]).

²⁷⁸ *Regina v A* [2001] UKHL 25.

²⁷⁹ *Ibid*, at [90].

Convention right to cross-examination has been persuasive in influencing the New Zealand Courts' approach to the right under s 25(f) NZBORA.²⁸⁰

Conceptualising the 'core' right protected by cross-examination in this way can assist in defining whether deviation from the traditional cross-examination procedure is permissible, or whether such deviation constitutes a breach of the defendant's overall right to a fair trial: restricting cross-examination can be argued as upholding the fair trial principle as long as any alteration from the ordinary procedure does not prevent the defendant from ensuring that the evidence of opposing witnesses is accurate.

B Cross-Examination in Practice: Does Cross-Examination Work to Expose Inaccuracies?

The next key question therefore is whether the way in which child witnesses are currently cross-examined affords this accuracy-seeking capacity? If cross-examination operates, in practice, as an effective accuracy-testing device, and, if the use of intermediaries impinges on its ability to do so then, in my assessment, the viability of an intermediary scheme is considerably undermined.

There are however substantial grounds to argue that the way children are cross-examined *frustrates* rather than facilitates the accuracy-testing purpose which cross-examination is proposed to fulfil. Encapsulating the theoretical view of cross-examination, Wigmore's oft-cited adage describes cross-examination as "beyond any

²⁸⁰ See *R v L*, above n 251, at 63, where Court noted that the Convention rights "paralleled" the NZBORA, and considered that the ECHR's approach to the right to cross-examination gave "every reason" to support an identical approach to ss 25(a) and 25(f) of the NZBORA.

doubt the greatest legal engine ever invented for the discovery of truth”.²⁸¹ Contrast this with the frank words of one barrister, outlining his view of the relationship between cross-examination and eliciting accurate evidence:²⁸²

[If] I am defending a bloke I want to make life difficult for [the prosecution’s] witnesses...I am not there to find the truth, no-one’s there to find the truth.

Similarly, a New Zealand barrister recently described cross-examination as being an exercise in “sheer manipulation” of the witness.²⁸³ Other sentiments expressed include cross-examination being regarded as “spin-doctoring”,²⁸⁴ a cross-examiner describing himself as a “salesman”,²⁸⁵ and a child witness available for cross-examination being considered a tool to “construct a presentation”.²⁸⁶ New Zealand barristers have also noted cross-examination tactics, used to “make sure that the witness makes mistakes”, as “valid technique[s]”.²⁸⁷ This is perhaps not surprising given that advocacy manuals advise cross-examiners to employ techniques to obtain testimony that best fits their case, rather than that which is most accurate.²⁸⁸ Eichelbaum’s *Mauet* (1989), written for New Zealand advocates, advises barristers to question in a way that will “have a significant impact in obtaining the answers [they] want.”²⁸⁹ Recommended tactics include limiting the witness’s ability to “tell the Judge and jury what actually

²⁸¹ J.H. Wigmore, *Evidence in Trials at Common Law* (JH Chadbourn rev.) (Boston, Little Brown, 1974), Vol. 5, para. 1367.

²⁸² Cossins above, n 51, at 80.

²⁸³ Henderson, above n 43, at 283.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*, at 282.

²⁸⁶ *Ibid.*, at 287.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*, at 285.

²⁸⁹ T Eichelbaum (ed) *Mauet’s Fundamentals of Trial Technique* (New Zealand ed., Oxford University Press, Auckland, 1989), at 209.

happened”,²⁹⁰ and asking suggestive questions to “le[a]d [children] to alter their direct testimony”.²⁹¹

Even when trial counsel does not set out to manipulate a child witness’s responses during cross-examination, the exercise can still produce inaccurate testimony.²⁹² As noted earlier, barristers may be unaware that certain styles of questioning can influence a child witness to give a particular response. That tagged questions take seven stages of reasoning to understand,²⁹³ or that children may not recognise statements such as “I put it to you that...” as questions,²⁹⁴ provide two examples.²⁹⁵ The ability of the fact finder to obtain a complete, reliable account of the facts can be seen to be impaired rather than facilitated through the cross-examination process, even where obscuring an accurate account of events was not the cross-examiner’s intention.

These “instructive insights”²⁹⁶ into the way in which lawyers perceive and use cross-examination support an argument that, in practice, cross-examination does not consistently expose lies and demonstrate genuine inconsistencies in testimony, and therefore does not fulfill its theoretical purpose.²⁹⁷ Instead, as it is currently

²⁹⁰ Ibid at 216.

²⁹¹ J Myers *Child Witness Law and Practice* (Wiley, New York, 1987), at 204.

²⁹² Henderson, above n 43, at 280-281.

²⁹³ Plotnikoff and Woolfson “Cross-examining children”, above n 61, at 7. Refer above 2(I)(A): Tagged Questions.

²⁹⁴ Cashmore and Trimboli, above n 81, at 43. Refer above 2(I)(A): Unmarked Questions.

²⁹⁵ See Sarah Krähenbühl (unpublished), cited in Plotnikoff and Woolfson, above n 83, for evidence of the divergence in knowledge between intermediaries and barristers: groups of intermediaries and barristers were asked to comment on the transcript of an interview and cross-examination of a 6 year old child. Intermediaries were more likely to identify questions phrased as statements as leading, and while intermediaries correctly identified tag questions as likely to lead the witness, none of the advocates highlighted tag questions as being problematic for accuracy.

²⁹⁶ Cossins above n 51, at 80.

²⁹⁷ Cashmore, above n 51.

conducted, cross-examination may “obfuscate communication with child witnesses”²⁹⁸ and may, in some circumstances, be described as a procedure for “manufacturing inaccuracies”²⁹⁹ rather than a technique to assist the fact finder in obtaining an accurate account of events.

I do not include the above to pass moral or ethical judgment on the use of tactics designed to mislead or control a witness during cross-examination.³⁰⁰ Rather I include it to bolster an argument that the idea that cross-examination contributes to the defendant’s right to a fair trial, by ensuring that a witness’s overall testimony can be challenged to expose inaccuracies in the witness’s account, is unsubstantiated in the context of the cross-examination of child witnesses. If, under the current state of affairs, cross-examination can distort the witness’s account, then claiming that the intermediary measure, designed to *reverse* this effect, will frustrate the rationale upon which the defendant’s right to cross-examine is based, is illogical. Instead, appointment of intermediaries to assist with communication is tenable as their use likely facilitates, rather than impedes, the purpose for which the right to cross-examination is said to exist, in so far as it relates to the overarching right to a fair trial.

²⁹⁸ Perry and others, above n 70, at 625.

²⁹⁹ Cossins above, n 51, at 103.

³⁰⁰ I recognise that many, particularly those who subscribe to a ‘zealous advocacy’ or ‘fearless advocacy’ model of lawyering, may consider that questions designed to manipulate or control the witness are perfectly legitimate from a strategic viewpoint. Counsel’s ability to control cross-examination is discussed further in chapter four, refer below 4(IV)(B): The Second Objection: the Control Objection.

IV The Second Objection: The Control Objection.

One contributor to the AUT *Child Witnesses* report³⁰¹ proposed that, so long as the purpose behind cross-examination remained met:³⁰²

Cross-examination counsel might be fully replaced by specialist examination...[as,] if the purpose of cross-examination is met by another, better method there is nothing to suggest [the current method] might not be replaced.

Similarly, the Ministry in its 2010 issues paper³⁰³ suggested that:³⁰⁴

The defendant's right to 'confrontation' should not be affected by the use of intermediaries, as the defence's ability to cross-examine remains (but the way cross-examination is conducted is changed).

If whether or not altering the way in which cross-examination may be conducted infringes upon the defendant's right to a fair trial generally, was the only component of the right to cross-examination requiring consideration, those comments may have some legitimacy. However the defendant's right to cross-examination exists as a right in and of itself. One of its components affords defence the ability to control how cross-examination is carried out. The Court of Appeal in *R v Thomson*³⁰⁵ acknowledged this, stating:³⁰⁶

³⁰¹ Hanna and others, above n 39.

³⁰² Ibid, at 189-190.

³⁰³ *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system*, above n 159.

³⁰⁴ Ibid, at [108].

³⁰⁵ *R v Thomson* [2006] 2 NZLR 577.

³⁰⁶ Ibid, at 586.

There are many ways to cross-examine, and one of counsel's responsibilities is to select the approach that will be most effective with the particular jury...[there are] many options open to counsel, who must be accorded wide discretion.

Control over cross-examination is closely linked to the fundamental adversarial principle of party autonomy, which requires that decisions relating to the design and presentation of cross-examination fall solely to the parties, or their representatives.³⁰⁷ An intermediary removes some of the control over cross-examination from defence counsel. Conceivably, therefore, as against the Ministry's suggestion, changing the way cross-examination is conducted, by introducing an intermediary, may form precisely the basis of an objection to introducing intermediaries.

Given the importance of cross-examination and party autonomy within the adversarial trial framework, restricting any component of defendants' rights arbitrarily is inappropriate.³⁰⁸ That there is a 'precedent' for making reforms that alter the way in which the right to cross-examination may be expressed, does not in itself justify allowing a further alteration to the cross-examination process without due consideration of whether any consequent restrictions on the defendant's right to cross-examination can be justified.

A Justifying the Appointment of an Intermediary: the South African approach

³⁰⁷ Ellison, above n 146, at 366

³⁰⁸ See *R v Dagg* [1962] NZLR 817, at 820 where the Court of Appeal stated that "an accused person has a fundamental right to have the evidence against him given in Court and there to be subject to cross-examination. That right is not lightly to be taken away..."; see also *Van Mechelen v Netherlands* [1997] 25 EHRR 647, at [58]-[60] (ECHR) in which the Court, interpreting the defendant's rights under the ECHR, held that "the primacy of a fair administration of justice" meant that "any measures restricting the rights of the defence must be strictly necessary".

In *Klink v Regional Court Magistrate*,³⁰⁹ the leading South African case on the compatibility of the use of an intermediary with the defendant's right to cross-examination, the Court was required to decide whether the impact that an intermediary could have on defence counsel's ability to design and control cross-examination violated the defendant's constitutional right to cross-examination.³¹⁰

The Court deciding *Klink*, per Melunsky J, acknowledged that the use of an intermediary could alter the level of control that defence counsel had over cross-examination's delivery.³¹¹ The Judge held that the defendant's right to cross-examination was not unfettered, and that "the [South African] Constitutional principle of proportionality required the court to take into account the interests of the child witness...orthodox trial procedures must be modified to meet witnesses special needs".³¹² Applying this "proportionality" approach, Justice Melunsky balanced the rights of the defendant against the need to: reduce the trauma and stress suffered by children as a result of "forceful cross-examination"; ensure that the witness understood and could properly answer the question posed; and to further the "truth seeking function of the trial".³¹³ On balance, the Court held that, as the use of the intermediary acted to further these interests of parties other than the defendant, restricting how the defendant could conduct cross-examination was justified.

³⁰⁹ *Klink v Regional Court Magistrate* (1996) 3 L.R.C. 666 (Supreme Court, South-Eastern Cape Local Division).

³¹⁰ Section 35(i) of the Constitution of the Republic of South Africa, 1996 provides that "Every accused person has a right to a fair trial, which includes the right...to adduce and challenge evidence...".

³¹¹ Hoyano "Striking a Balance", above n 190, at 967-968 citing *Klink v Regional Court Magistrate*, above n 309, at 677.

³¹² Hoyano "Striking a Balance", above n 190, at 967-968 citing *Klink v. Regional Court Magistrate* above n 309, at 678.

³¹³ Hoyano "Striking a Balance", above n 190, at 967-968 citing *Klink v. Regional Court Magistrate* above n 309, at 678-679.

Klink appears to be the only case cross-jurisdictionally which discusses the ‘defendant’s rights’ based objections in any depth. Thus, whilst it is a South African case and therefore falls outside those normally considered persuasive in the context of New Zealand law, it provides a useful starting point for the present discussion. The following section considers whether the ‘interest balancing’ approach adopted in *Klink* is applicable in New Zealand, and, if so, whether affording a witness the opportunity to be asked questions so that he or she can respond to them accurately, constitutes a legitimate interest for the Court to weigh into any ‘interest balancing’ approach.

B Balancing the Defendant’s Interests with the Interests of Other Parties to Justify Appointment of an Intermediary: a tenable approach in New Zealand?

Opposing adoption of the South African Court’s justification for appointing an intermediary, it could be argued that its approach was a necessity, driven by a constitutional requirement that “a child's best interests [be of] *paramount importance* in *every* matter concerning the child”.³¹⁴ The absence of any equivalent requirement in trial proceedings in New Zealand provides grounds to argue that the South African approach should not apply here. However as early as 1989 the Court of Appeal was prepared to use the inherent jurisdiction of a court to control its own procedure to modify the way in which the court received evidence, “so as to protect child witnesses”.³¹⁵ The Court justified this approach stating that “[t]he interests of justice

³¹⁴ Constitution of the Republic of South Africa, s 28 (emphasis added).

³¹⁵ *R v Accused (T 4/88)* [1989] 1 NZLR 660, at 668.

simply demand[ed] it”.³¹⁶ This self-imposed requirement to consider the interests of witnesses and the overall interests of justice has now been cemented within the Evidence Act 2006: section 6 provides that the Act’s overall purpose is to help secure the “just determination of proceedings”. Subsections 6(a)-(f) clarify how this “just determination” is to be achieved. Factors listed include the recognition of the importance of the NZBORA rights (which of course include the defendant’s right to cross-examination)³¹⁷ as well as promotion of “fairness to parties and witnesses”.³¹⁸

The rules governing alternative modes of giving evidence are set out in ss 102–107 of the Evidence Act 2006. Section 103(4), sets out the multi-faceted factors that the Judge must consider when directing whether evidence is to be given in the ordinary, or an alternative way.³¹⁹ That section provides:

- (4) In giving directions under subsection (1), the Judge must have regard to—
 - (a) the need to ensure—
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
 - (b) the views of the witness and—
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.

³¹⁶ Ibid.

³¹⁷ Evidence Act 2006, s 6(b).

³¹⁸ Evidence Act 2006, s 6(c).

³¹⁹ The factors pertaining to alternative mode directions in the case of child complainants are set out in s 107. However, as noted in *M v R (CA335/2011)* [2011] NZCA 303 at [30] “s 107(4) is effectively in the same terms as s 103(4)” and thus attention can be safely confined to s 103(4) only without excluding any relevant factors related to the way in which children, whether they are complainants or ‘non-victim’ witnesses, are directed to give evidence.

On its face s 103(4) does not expressly require that both the interests of the defendant and those of other interested parties, including witnesses, be considered when deciding how a witness is to give evidence. However, the section refers to both “fairness of the proceedings” and “a fair trial” as two separate factors which the judge must balance³²⁰ in deciding whether to make an alternative mode direction. This separation suggests a difference between the considerations falling under each.³²¹ In interpreting what is required under ss 103(4)(a)(i) and 103(4)(a)(ii) the Courts have incorporated the interests of both witness and defendant: whilst a “fair trial” relates to the rights of the accused,³²² in determining what must be considered in relation to “fairness of the proceeding”, the Court of Appeal in *R v Simi*³²³ held that it “can properly include the need to be fair to a complainant”.³²⁴ The web of interests was widened further in *R v Kahui*³²⁵ to mean “fairness on all its bearings”, which included accounting for the interests of the complainant and also the wider community.³²⁶ This position was later cited with approval by the Court of Appeal in *R v M (CA590/2009)*,³²⁷ where it was held that “fairness of the trial includes fairness to *all parties*”.³²⁸

³²⁰ *M v R (CA335/2011)* [2011] NZCA 303, at [32].

³²¹ Alison Cleland "Hearing and understanding? Child witnesses and the Evidence Act" [2008] NZLJ 425, at 426.

³²² There is limited judicial comment on this: Section 23D of the Evidence Act 1908 specifically referred to the need to ensure a “fair trial for the accused”, thus consideration of a “fair trial” in rulings under that statute impliedly referred to the defendant’s rights. This general implication appears to have been carried through into cases under the Evidence Act 2006, in which a “fair trial” is referred to as affording the defendant their rights in this respect.

³²³ *R v Simi*, above n 267.

³²⁴ *Ibid*, at [28].

³²⁵ *R v Kahui* HC Auckland CRI-2006-057-1135, 12 October 2007, Williams J.

³²⁶ *Ibid*, at [15].

³²⁷ *R v M (CA590/2009)*, above n 266.

³²⁸ *Ibid*, at [40] (emphasis added). See also *R v Check* [2009] NZCA 548, at [77].

C Recognising Promotion of Accuracy as an Interest Requiring Consideration

Neither s 6 nor s 103(4) specify what interests must be accounted for in order to achieve “fairness”. The focus of this dissertation has been on the intermediary’s ability to assist with increasing the accuracy of a witness’s responses during cross-examination. The critical question here is whether ensuring that the witness can understand the questions posed during cross-examination, and therefore respond accurately, can constitute an interest that the Court is willing to factor into the balancing process?

I initially doubted whether existing case law would demonstrate the courts recognising an interest in accuracy or in affording the witness the ability to respond accurately. Within cases considering whether an alternative mode is required, the focus of argument and judicial comment is often on the need to protect the witness from stress or embarrassment associated with testifying in the ordinary way.³²⁹ Given this, it would have been easier to justify the use of intermediaries by giving primacy to arguments that intermediaries may reduce the level of stress that the cross-examination process places on the witness. However my central argument throughout this dissertation has been that the primary need for introducing an intermediary scheme is to decrease the extent to which the structure of questions can influence the accuracy of child witnesses’ responses. To resort to other, arguably secondary, advantages of intermediaries in order to justify their use as against ‘defendants’ rights’ objections would therefore be illogical in the present context, and would, I believe, undermine the entire exercise.

³²⁹ See for example *R v M (CA590/2009)*, above n 266; *R v Faatafa*, above n 118; *R v Simi*, above n 267; *R v E (CA308/06)*, above n 55; *R v Lewis* [1991] 1 NZLR 409; and *R v M* [1997] NZFLR 920.

The case law focus on reducing stress is in part attributable to the fact that the “need to minimise stress on the witness” is an express mandatory consideration under s 103(4)(b),³³⁰ and was the sole factor against which the judge was required to weigh the accused’s right to a fair trial under the equivalent section of the Evidence Act 1908.³³¹ However a closer look at this case law reveals a line of comment that suggests that the courts’ concern in minimising stress is not merely for the sake of protecting the witness from the adverse psychological effects which may result from giving evidence. Some courts go further—the interest being served by allowing the defendant to give evidence in a manner that reduces stress and anxiety is that of eliciting the witness’s ‘best evidence’:³³² The Court in *R v M (CA590/2009)*,³³³ for example, adopting an earlier statement of the High Court, held ensuring that “witnesses [are] able to give evidence in a manner which best presents the issues in a trial to a jury or a judge” as a legitimate interest to consider in directing that a witness give evidence in an alternative way.³³⁴ In a similar vein, Justice Allan in *R v L*³³⁵ grounded a direction that three witnesses give evidence from outside the courtroom on his opinion that “it would not be fair to the witnesses in this case to subject them to [the ordinary way of giving evidence]...[as] they would not give of their best”.³³⁶

³³⁰ Evidence Act 2006, s 103(4)(b)(i).

³³¹ Section 24D of the Evidence Act 1908, as amended by the Evidence Amendment Act 1908, provided that “[i]n considering what directions (if any) to give under section 23E of this Act [which set out the range of alternative modes available], the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused”.

³³² I use the term ‘best evidence’ here to refer to the best account that the witness can give, rather than ‘best evidence’ in its strict evidentiary sense.

³³³ *R v M (CA590/2009)* above, n 266.

³³⁴ *Ibid.*, at [40].

³³⁵ *R v L* HC Auckland CRI-2009-404-2878, 21 March 2011, Allan J.

³³⁶ *Ibid.*, at [79].

D Possible Grounds for Directing that an Intermediary be Appointed

Section 103(3) provides the grounds upon which a mode direction may be given. These grounds must be considered alongside the s 103(4) factors.³³⁷ Whilst s 103(3) does not expressly state furthering the interests of the witness as grounds upon which a direction may be made, s 103(3)(j) provides that a direction may be made on “any other ground likely to promote the purpose of the Act”. As discussed earlier, promoting fairness to witnesses is one of the Act’s purpose section. Conceivably therefore s 103(3)(j) impliedly incorporates promoting the witness’s interests as a valid ground for directing that evidence be given using an intermediary, or in fact any other alternative mode provided for under the Act.³³⁸

E Conclusion

Intermediaries in South Africa have been held justifiable on the grounds that restricting the defendant’s control over cross-examination may be balanced against the fact that the intermediary acts to promote valid interests of other interested parties. Adopting a similar approach in New Zealand finds some support within existing legislative provisions and case law. Though the use of an intermediary may be perceived to affect the defendant’s ability to control cross-examination, under some circumstances this may be justified by balancing the restriction on the defendant’s

³³⁷ Mahoney and others, above n 31, at EV103.08.

³³⁸ See *R v L*, above n 335, in which Allan J accepted that a requirement that the witness give evidence in the ordinary way would result in overall unfairness to the witness. The Judge directed that evidence be given in an alternative way, namely from outside the courtroom via CCTV, stating that “[t]he Court is required in s 103(3)(j) to have regard to any ground likely to promote the purposes of the Act. Section 6(c) stipulates that a purpose of the Act is to promote fairness to parties and witnesses. In my opinion it would not be fair to the witnesses in this case to subject them to...being in the same room as those against whom they were giving their evidence” (at [79]).

rights against the interests of other parties, including the witness. There is some suggestion that, when making a mode direction, the New Zealand courts would be willing to hold that ‘the best evidence of which the witness is capable’ constitutes a valid interest that may be considered as going to “fairness of the proceedings”. There is scope to suggest that any decrease in the control afforded to the defence, by directing that an intermediary be appointed, could be justified under the ‘interest balancing’ approach.

V Using the ‘Defendant’s Rights’ Objections to Guide the Selection of the Most Appropriate Variant of Intermediary Scheme for New Zealand

Though unlikely to undermine the viability of an intermediary scheme altogether, the existence of, and importance placed on, the rights of the defendant, including the right to cross-examination and the defendant’s ability to control its presentation, can guide which of the three variants of ‘active’ intermediary, discussed in chapter three, is most appropriate for New Zealand. As noted in chapter three, the Norwegian, South African, and English intermediary schemes all utilise a variant of ‘active’ intermediary. Between these schemes the extent of control afforded to the intermediary, and consequently removed from the defence, differs significantly.

The ECHR held that, on balance, because legitimate witness interests were served by altering the ordinary way of giving evidence such an alteration was justified. Nevertheless, it ruled that:³³⁹

Any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.

In my opinion this logic aligns with the purpose of an interest balancing approach generally: the defendant's rights remain of fundamental importance in the adversarial system. The mere fact that these rights *can* be restricted, in order to further legitimate interests of the witness or other parties, should not open the way to allow the introduction of any measure that meets these other interests, irrespective of the extent to which the defendant's rights are restricted under the elected measure.

The Norwegian intermediary model³⁴⁰ removes from the defence any ability to control not just style and structure of questions but the overall tone employed, the emphasis placed on words and aspects of questioning, and the ability to be flexible and work around the answers given and issues raised during cross-examination. Whilst the right to challenge the evidence remains where cross-examining barristers are replaced by specialist cross-examiners, this measure pulls too far in the direction of the witness's interests. It fails to allow for the defendant to exercise his or her right to control cross-examination, albeit within the constraints set to account for the interests of the witness in a particular case.

³³⁹ *Van Mechelen and Others v The Netherlands*, above, n 308, at [59]. *Van Mechelen* concerned whether altering the way in which a witness was permitted to testify violated the defendant's European Convention Article 6 rights. The Court held that that promoting the witness's interest in anonymity justified *some* alteration from the normal cross-examination procedure but nevertheless ruled that the measure adopted to screen the witness's identity was an untenable restriction on the rights of the defendant. The Court held that the measure adopted went further than was required to serve the witness's interest in anonymity.

³⁴⁰ In which the intermediary effectively acts independently as a specialist examiner and cross-examiner. Detailed in chapter three, refer above 3(III)(B): Intermediaries as Specialist Cross-Examiners: the Norwegian System.

The South African model³⁴¹ affords the defendant more control, as defence counsel can participate contemporaneously in the cross-examination process, and the Court may require that the intermediary pose any question in a particular manner.³⁴² However control is still abrogated: every question must be put through an intermediary. This filtration process can be perceived to risk distortion of the nuance, tone, and emphasis desired by the defence in designing any particular cross-examination. Furthermore, all knowledge as to the types of questions that may be permitted and/or are likely to be objected to remains primarily with the intermediary. From my perspective this vests the ultimate control and power over the cross-examination process with the intermediary: cross-examining counsel is, in theory, directing the questioning, but in practice is effectively required to enter into a ‘guessing game’, putting questions to the witness and then having to wait for the intermediary to ask verbatim, or rephrase.

Compared to the South African model, the English intermediary model operates with a different set of dynamics and is the least invasive: the ‘last resort’ role of the intermediary means that for the most part control over cross-examination remains vested in trial counsel. Some encroachment can be seen in the recommendations by the intermediary as to the style and structure of questions that may be asked. However, unlike the South African regime, defence counsel receives information on the types of questions that will likely be required to be rephrased if asked in the intermediary’s report delivered prior to trial. The defence is thus placed in a position where it is possible to design a cross-examination strategy around the restrictions. At

³⁴¹ Detailed in chapter three, refer above 3(III)(B) The Intermediary System in South Africa.

³⁴² Ellison, above n 27, at 128-130.

trial, control over the nuance, tone, emphasis, style, and structure of question (within earlier set limits) is vested primarily in defence counsel. That control is diminished only where the questions do not fit within the pre-trial specified limits as to the types of questions that may be asked. When that happens the intermediary may intervene, and suggest that counsel be required to rephrase (again reverting control back to the cross-examiner) and only if the cross-examiner struggles to do so is the intermediary likely to have an active role in the way in which a question is asked of the child.

Immediately after the enactment of s 29 of the YJCEA (the intermediary provisions), the wide role and amount of control that appeared to be afforded to the intermediary under the plain wording of that enabling section was the source of critical comment.³⁴³ It is, in my opinion, significant that this line of criticism appears to have been short lived.³⁴⁴ Its disappearance correlates with the further clarification of the role through the ‘pathfinder’ pilot scheme³⁴⁵ and publication of the Guidance Manual.³⁴⁶ One prominent commentator, for example, expressly retracted her earlier “scepticism” of s 29 (namely that it afforded the intermediary a role that was too wide in scope and inadequately defined) in light of the way in which the intermediary scheme was operating in practice.³⁴⁷ In the case of another commentator, his early criticism of the English scheme was based on a presumption that “where the use of an intermediary is directed, a third party, rather than defence counsel, will relay the questions from the

³⁴³ See for example Doak above n 253, at 294; Hoyano “Striking a Balance”, above n 190, at 964-967; Hoyano “Variations on a theme by Pigot”, above n 190, at 271-272.

³⁴⁴ See Laura Hoyano’s early commentary on s 29 YJCEA: Hoyano “Striking a Balance”, above n 190, at 964-967 and Hoyano “Variations on a Theme by Pigot” above n 190 at 271-272, as compared with her later commentary in Hoyano “The child witness review”, above n 206.

³⁴⁵ Conducted 2005-2006. See generally Plotnikoff and Woolfson, above n 147.

³⁴⁶ Published in draft form for consultation in 2002 (per *ibid*); first officially published 2005 (*Intermediary Procedural Guidance Manual* (Criminal Justice System, London, 2005); latest revision 2011(*Registered Intermediary Procedural Guidance Manual*, above n 172).

³⁴⁷ Hoyano, “The Child Witness Review”, above n 206, at 862.

advocate to the witness”.³⁴⁸ This description in fact better describes the operation of intermediaries in South Africa; it is not a correct interpretation of the way in which English intermediaries operate in practice. Now that the English intermediary can be seen to act in a ‘last resort’ capacity, there appears to be general acceptance that intermediaries can be used without untenably encroaching upon the defendant’s trial rights.

VI Learning from the English Intermediary Scheme: Recommendations for New Zealand.

The balance struck between all parties involved in the criminal trial undoubtedly contributes to the positive reaction to the use of intermediaries in England. Feedback from English prosecution lawyers, judges, and defence lawyers alike suggests that the scheme is working to ensure that the intermediary facilitates good communication, as was intended by the enactment of the scheme. Defence barristers involved in trials in which an intermediary was appointed described the intermediary “particularly helpful”, and “assist[ing] [only] to facilitate good communication”. One defence barrister reflected that:³⁴⁹

The intermediary was particularly helpful and came across as truly independent. I was happy for the intermediary to indicate if [child witness] did not understand a question or if there was a misunderstanding. I would have had a different view if I had thought the intermediary was protecting the witness – I would have sent the jury out in order to discuss this with the judge. We had discussed this at our pre-court meeting but the intermediary did not come anywhere near that.

³⁴⁸ Doak, above n 253, at 294.

³⁴⁹ Plotnikoff and Woolfson, above n 167.

Judges too expressed positive impressions of the utility of English intermediaries, describing them as “invaluable...a help to both the advocates out of court and in court” with “timely and appropriate” assistance and interjections.³⁵⁰ One judge summed up his impression of the role of the intermediary, stating that:³⁵¹

The intermediary by his or her training can assist counsel to phrase their questions appropriately or simply and if counsel cannot do this and the witness fails to understand/misunderstands the question, then the intermediary can put the question in a way that is understood. In this trial the intermediary did that several times, each time achieving an answer where counsel had failed. That revealed that it is difficult for counsel to comprehend or effect the right approach to a witness of this nature and intellect.

The main criticisms of the English scheme in its current form stem from the fact that provisions set out in the Guidance Manual do not have binding status. At a recent conference two main criticisms were raised: first that, despite the Guidance Manual requiring them, ground rules meetings were held in only one third of all cases in which an intermediary was appointed.³⁵² The second area of concern was raised out of cases in which the intermediary report was not delivered to trial parties until the trial was underway, and because of this all were denied that advantages of the information it contained.³⁵³ Given the importance of both pre-trial meetings and the intermediary report in allowing counsel to retain primary control over cross-examination, New Zealand would do well to learn from the English experience, and ensure that key components of any intermediary scheme’s operation are enacted in binding form. As appears to be common practice where alternative modes are concerned, it may be best that the core of the intermediary role be placed within the current Evidence Act. How

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid, at 99.

³⁵³ Ibid, at 100.

the intermediary will operate, the scope of his or her role, and other requirements such as the requirement for pre-trial meetings and an intermediary report be the subject of regulations. In this way important components of the intermediary process would be binding, but the promulgation of regulations would allow for easier amendment of the details of operation of intermediaries to incorporate area-specific research as it is developed.

VII Summary

The primacy afforded to the rights of the defendant under the New Zealand system is unlikely to constitute a significant barrier to the introduction of an intermediary scheme in New Zealand. Some variants of the ‘rephrasing’ intermediary may conceivably restrict defence counsels’ ability to control cross-examination beyond that which is necessary to account for legitimate witness interests. It is my assessment that, of the three ‘rephrasing’ schemes, the English scheme comes closest to the appropriate approach to the balancing exercise. The focus of the restriction of control over cross-examination is on limiting how questions put to a child witness may be structured. It encroaches no further, leaving decisions as to emphasis, nuance and tone to the cross-examiner. In this way control is restricted, but only so far as is necessary to promote questioning that affords the witness the best possible opportunity to give an accurate response. New Zealand would do well to look closely at the English scheme as one which has the best potential to provide a solution to developmentally inappropriate questioning during cross-examination, without threatening the fundamental rights of the defendant and the way in which these rights may be expressed at trial.

Conclusion

Consider again the cases of the child witnesses outlined in the introductory chapter of this dissertation. Suppose the questions posed to those children were required to be rephrased to remove the developmentally inappropriate language and structures. They might look something like this:

“Why did you read the licence plate?”³⁵⁴

“Did you see Mr. B get out of that car on the day that you say he attacked you?”

“Did you see Mr. B get into that car on the day that you say he attacked you?”³⁵⁵

“What day of the week did this happen?”³⁵⁶

“Could you have picked the wrong person?”³⁵⁷

The change in the wording that constitutes the key part of each question is minor. The general purport of the questions remains the same, and, most importantly for the present purposes, the likelihood that the child witnesses’ responses will be the most accurate responses that they are capable of providing is increased. Yet requiring this seemingly innocuous change necessarily spurns questions on the role and protection of some of the fundamental procedures, rights, and interests within New Zealand’s adversarial trial context.

³⁵⁴ Contrast with “Did you just pick that up just because you talk – you plan your time to fill you space, the spacing off or riding your bike, or did anybody tell you you should read licence plates?”

³⁵⁵ Contrast with “Prior to seeing Mr. B in his front yard on that night – on that day – and the individual in the car, did you ever see Mr. B get into his car before that or get out of his car?”

³⁵⁶ Contrast with “Now this happened on a Friday, was it not?”

³⁵⁷ Contrast with “I suggest to you that you picked the wrong person.”

Chapters one and two demonstrated that though it is now more likely that a child witness will be heard at trial than what was traditionally the case, the structure and vocabulary employed in questions typically used in cross-examination may well distort the accuracy of a child witness's responses.

Chapter three introduced the use of 'intermediaries' as a possible way of reducing inappropriate questioning. It recommended that allowing for appointment of an intermediary with the capacity to play an active role in how questions are phrased, to ensure questioning is carried out in a manner that aligns with a child witness's communication capabilities, will likely decrease problematic questioning and consequently increase accuracy. Three variants of this 'active' intermediary, as it operates in England, South Africa and Norway, were discussed. From a strictly practical perspective, all three could be seen to offer a solution to the central issue driving this discussion.

Introducing provisions to permit the appointment of a rephrasing intermediary were chosen, for this dissertation, as one solution requiring close scrutiny because of their being considered as part of a currently ongoing review of how New Zealand courts receive child witnesses' evidence. It seems likely that some variant of intermediary will be added to existing alternative modes of giving evidence within the Evidence Act 2006. Of concern is that the reviewers appear to have given only cursory regard to how the use of intermediaries may impact upon a defendant's minimum rights to a fair trial, and to challenge the accuracy of opposing witnesses' evidence, or how those rights are expressed during the course of witness examination.

Whilst an intermediary scheme does not in itself appear to be incompatible with ensuring that the defendant is afforded his or her minimum trial rights, of critical concern is that adding a third party into the cross-examination process may be perceived to impact upon defence counsel's ability to control his or her cross-examination. Chapter four discussed how, in line with the New Zealand courts' current approach to defendants' rights and the use of alternative modes of giving evidence generally, abrogation of control is likely to be tolerable in so far as this can be seen to further a legitimate witness or community interests in promoting conditions favourable to accurate testimony. This balancing approach, however, requires that control is removed only to the extent absolutely necessary. Failure to consider this 'control objection' appears to have resulted in the current review suggesting that intermediaries may be able to be employed as 'specialist cross-examiners'. This approach, chapter four concluded, goes beyond that which is required to address the concerns generated by the way in which cross-examination questions are typically put to child witnesses.

In contrast, the variant of intermediary operating in England provides a model of intermediary scheme which strikes, in my assessment, a more appropriate balance between the interests of defendants and those of witnesses and the community generally.

Under the English intermediary scheme the cross-examiner largely retains control over his or her cross-examination. As discussed in chapters three and four the English intermediary acts in a 'last resort' capacity, rephrasing questions only upon request

where the cross-examiner cannot do so adequately. Vesting control with the cross-examiner in this way is made possible by the provision of the intermediary's pre-trial report which sets out types and structures of questions that should be avoided based on the intermediary's assessment of the particular witness, and gives trial counsel "advance knowledge" of how to question a witness.³⁵⁸ In this way counsel is able to share the specialist knowledge of the intermediary in a way that is more compatible with the practical restraints placed the average litigator's ability to acquire the same knowledge through training or other methods. It is perhaps largely for this reason that a recent report found that "...every professional with whom we spoke described working with intermediaries as educative, if not 'revelatory'."³⁵⁹

This dissertation considers a small but necessary set of issues that must be considered in the context of assessing the viability of the intermediary initiative which, by its nature, affects how key components of the criminal trial are conducted. How intermediaries will be recruited, trained and monitored in New Zealand is not clear, and will need to be well thought out to ensure that any introduced scheme works effectively. What is clear however is that the change enacted by the appointment of an intermediary need not be as dramatic a change to the status quo as may be first considered, and the experience of using an intermediary can be a positive one for all parties involved in the trial.

To ensure this, any intermediary scheme must be carefully considered in the context in which it is to operate. It is my assessment that an effective and workable scheme

³⁵⁸ As described by one English barrister interviewed on the effectiveness of the appointment of an intermediary. Plotnikoff and Woolfson, above n 167.

³⁵⁹ Hanna and others, above n 39, at 138. This was also the conclusion of the intermediary evaluation: Plotnikoff and Woolfson, above n 167; see also Plotnikoff and Woolfson "Cross-examining children", above n 215, at 8.

will be one which approaches any alteration to the cross-examination process with an incremental approach, under which changes are introduced on the basis of necessity and because they constitute the next logical step. Though primarily designed to further valid witness interests, the intermediary scheme does not operate in a vacuum. A workable scheme will likely only result providing that those designing it consider the legitimate expectations of the defendant, and his or her representatives, in tandem with the needs of the witness. An intermediary scheme is likely viable, but there is no place yet for leaps and bounds, or for a complete overhaul of the system where overseas experience suggests a less drastic alternative may well suffice.

One can but hope that those driving New Zealand's current child witness law review will consider this in deciding the design of intermediary model to be implemented here.

Appendix I

Child Witness Law Review – Recent Update

On 5th October 2011, after this dissertation was substantially completed, further details of the process of the review into how child witnesses give evidence were released.³⁶⁰

The documents made publically available at this time, and the discussion sparked by their contents, highlight a number of important points for the present discussion.

Firstly, some variant of intermediary is certain to be included within legislation to be introduced into Parliament early in 2012. What was previously an option raised as possible is now almost certain to be included in future legislation, in some form.

A working group has been set up to decide on the intermediary model to be used. At the time of the October announcement, details of experiments carried out earlier this year, which trialed different models of intermediary role, were released.³⁶¹ These experiments trialed three models: in the first the intermediary was briefed by both prosecution and defence counsel, and then went on, independently, to ask all questions in one block.³⁶² In the second model the intermediary translated each and every question one by one at the time counsel asked them³⁶³ (seemingly similar to the South African model). Under the third model the intermediary asked questions in

³⁶⁰ Simon Power “Alternative court processes for child witnesses” (press release, 5 October 2011).

³⁶¹ Simon Collins, “Trial favours change in child witness tactics” *The New Zealand Herald* (New Zealand, 5 October 2011) at A6.

³⁶² *Ibid.*

³⁶³ *Ibid.*

“topic blocks”. Defence and prosecution counsel were able to require that further questions be asked after each block. This was the “preferred” model.³⁶⁴

From this information it appears that the focus of those developing an intermediary model is currently geared towards recommending a model that removes much control from trial counsel and places it with a ‘specialist’ questioner. For this reason the discussion in chapters three and four of this dissertation as to how far the orthodox cross-examination model may be altered before the rights of defendants’ will likely be untenably restricted is highly relevant, and perhaps could not come soon enough.

Finally, comment sparked by the announcement of these developments has already focused around how the use of intermediaries may impact upon defendants’ rights. One defence lawyer noted that the use of an intermediary risked threatening the rights of the accused, and stated that:³⁶⁵

An intermediary, asking the questions on behalf of a lawyer, my concern is that the control of the hands of the lawyer and the structure of what is being asked may not get to the heart of what actually needs to be challenged.

There is some early suggestion, therefore, that the objections predicted and assessed, in chapter four of this dissertation will be of further importance at a later date, when the intermediary provision is substantively debated and discussed.

³⁶⁴ Ibid.

³⁶⁵ National Radio Morning Report “Cabinet Approves Child Witness Reforms” (October 6, 2011) (Internet) <<http://www.radionz.co.nz/national/programmes/morningreport/audio/2499598/cabinet-approves-child-witness-reforms>> accessed 09/10/2011.

Appendix II

Legislation: Selected Sections

A Selected Sections: New Zealand Legislation

Evidence Act 1908

Rules in cases involving child complainants

23C Application of sections 23D to 23I

Sections 23D to 23I of this Act apply to every case where—

- (a) A person is charged with—
 - (i) Any offence against any of the provisions of sections 128 to 142A of the Crimes Act 1961; or
 - (ia) Any offence against section 144A of the Crimes Act 1961; or
 - (ii) Any other offence against the person of a sexual nature; or
 - (iii) Being a party to the commission of any offence referred to in subparagraph (i) or subparagraph (ia) or subparagraph (ii) of this paragraph; or
 - (iv) Conspiring with any person to commit any such offence; and
- (b) Either—
 - (i) The complainant has not, at the commencement of the proceedings, attained the age of 17 years; or
 - (ii) The complainant is of or over the age of 17 years and is mentally handicapped.

23D Directions as to mode by which complainant's evidence is to be given

- (1) Where, in any case to which this section applies, the accused is committed for trial, the prosecutor shall, before the trial, apply to a Judge of the Court by or before which the indictment is to be tried for directions under section 23E of this Act as to the mode by which the complainant's evidence is to be given at the trial.
- (2) The Judge shall hear and determine the application in chambers, and shall give each party an opportunity to be heard in respect of the application.
- (3) The Judge may call for and receive any reports from any persons whom the Judge considers to be qualified to advise on the effect on the complainant of giving evidence in person in the ordinary way or in any particular mode described in section 23E of this Act.
- (4) In considering what directions (if any) to give under section 23E of this Act, the Judge shall have regard to the need to minimise stress on the complainant while at the same time ensuring a fair trial for the accused.

23E Modes in which complainant's evidence may be given

- (1) On an application under section 23D of this Act, the Judge may give any of the following directions in respect of the mode in which the complainant's evidence is to be given at the trial:

- (a) Where a videotape of the complainant's evidence was shown at the preliminary hearing, a direction that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2) of this section:
 - (b) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that the complainant shall give his or her evidence outside the courtroom but within the Court precincts, the evidence being transmitted to the courtroom by means of closed circuit television:
 - (c) A direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, a screen, or one-way glass, be so placed in relation to the complainant that—
 - (i) The complainant cannot see the accused; but
 - (ii) The Judge, the jury, and counsel for the accused can see the complainant:
 - (d) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that, while the complainant is giving evidence or is being examined in respect of his or her evidence, the complainant be placed behind a wall or partition, constructed in such a manner and of such materials as to enable those in the courtroom to see the complainant while preventing the complainant from seeing them, the evidence of the complainant being given through an appropriate audio link:
 - (e) Where the Judge is satisfied that the necessary facilities and equipment are available, a direction that—
 - (i) The complainant give his or her evidence at a location outside the Court precincts; and
 - (ii) That those present while the complainant is giving evidence include the Judge, the accused, counsel, and such other persons as the Judge thinks fit; and
 - (iii) That the giving of evidence by the complainant be recorded on videotape, and that the complainant's evidence be admitted in the form of that videotape, with such excisions (if any) as the Judge may order under subsection (2) of this section.
- (2) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall view the videotape before it is shown, and may order excised from the videotape any matters that, if the complainant's evidence were to be given in person in the ordinary way, would be excluded either—
- (a) In accordance with any rule of law relating to the admissibility of evidence; or
 - (b) Pursuant to any discretion of a Judge to order the exclusion of any evidence.
- (3) Where a videotape of the complainant's evidence is to be shown at the trial, the Judge shall give such directions under this section as the Judge may think fit relating to the manner in which any cross-examination or re-examination of the complainant is to be conducted.
- (4) Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1) of this section, the Judge may direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant.
- (5) Where the complainant is to give his or her evidence at a location outside the Court precincts, the Judge may also give any directions under paragraph (c) or paragraph (d) of subsection (1) of this section that the Judge thinks fit.
- (6) Where a direction is given under this section, the evidence of the complainant shall be given substantially in accordance with the terms of the direction; but no such evidence shall be challenged in any proceedings on the ground of any failure to observe strictly all the terms of the direction.

23F Cross-examination and questioning of accused

- (1) Notwithstanding section 354 of the Crimes Act 1961, but subject to the succeeding provisions of this section, the accused shall not be entitled in any case to which this section applies to cross-examine the complainant.
- (2) Nothing in subsection (1) of this section nor any direction given under section 23E of this Act shall affect the right of counsel for the accused to cross-examine the complainant.
- (3) Where the accused is not represented by counsel, the accused may put questions to the complainant (whether by means of an appropriate audio link or otherwise as the Judge may direct) by stating the questions to a person, approved by the Judge, who shall repeat the questions to the complainant.
- (4) No direction given under section 23E of this Act shall affect the right of the Judge to question the complainant.
- (5) Where the complainant is being cross-examined by counsel for the accused, or any questions are being put to the complainant by the accused, the Judge may disallow any question put to the complainant that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing.

23H Directions to jury

Where a case to which this section applies is tried before a jury, the following provisions shall apply in respect of the Judge's directions to the jury:

- (a) Where the evidence of the complainant is given in any particular mode described in section 23E of this Act, the Judge shall advise the jury that the law makes special provision for the giving of evidence by child complainants in such cases, and that the jury is not to draw any adverse inference against the accused from the mode in which the complainant's evidence is given:
- (b) The Judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the Judge would not have given such a warning had the complainant been of full age:
- (c) The Judge shall not instruct the jury on the need to scrutinise the evidence of young children generally with special care nor suggest to the jury that young children generally have tendencies to invention or distortion:
- (d) Nothing in paragraph (b) or paragraph (c) of this section shall limit the discretion of the Judge to comment on—
 - (i) Specific matters raised in any evidence during the trial; or
 - (ii) Matters, whether of a general or specific nature, included in the evidence of any expert witness to whom section 23G of this Act applies.

Evidence Act 2006

Part 1 Preliminary Provisions

General

5 Application

- (1) If there is an inconsistency between the provisions of this Act and any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.
- (2) Despite subsection (1), if there is any inconsistency between rules of court made under any enactment with the concurrence of 2 or more members of the Rules Committee and this Act, the provisions of this Act prevail.
- (3) This Act applies to all proceedings commenced before, on, or after the commencement of this [section] except—
 - (a) the continuation of a hearing that commenced before the commencement of this [section]; and
 - (b) any appeal from, or review of, a determination made at a hearing of that kind.

Purpose, principles, and matters of general application

6 Purpose

The purpose of this Act is to help secure the just determination of proceedings by—

- (a) providing for facts to be established by the application of logical rules; and
- (b) providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act 1990; and
- (c) promoting fairness to parties and witnesses; and
- (d) protecting rights of confidentiality and other important public interests; and
- (e) avoiding unjustifiable expense and delay; and
- (f) enhancing access to the law of evidence.

7 Fundamental principle that relevant evidence admissible

- (1) All relevant evidence is admissible in a proceeding except evidence that is—
 - (a) inadmissible under this Act or any other Act; or
 - (b) excluded under this Act or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

Part 3
Trial Process

Subpart 1—Eligibility and compellability

71 Eligibility and compellability generally

- (1) In a civil or criminal proceeding,—
- (a) any person is eligible to give evidence; and
 - (b) a person who is eligible to give evidence is compellable to give that evidence.
- (2) Subsection (1) is subject to sections 72 to 75.

Subpart 4 – Questioning of Witnesses

83 Ordinary way of giving evidence

- (1) The ordinary way for a witness to give evidence is,—
- (a) in a criminal or civil proceeding, orally in a courtroom in the presence of—
 - (i) the Judge or, if there is a jury, the Judge and jury; and
 - (ii) the parties to the proceeding and their counsel; and
 - (iii) any member of the public who wishes to be present, unless excluded by order of the Judge; or
 - (b) in a criminal proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if both the prosecution and the defendant consent to the giving of evidence in this form; or
 - (c) in a civil proceeding, in an affidavit filed in the court or by reading a written statement in a courtroom, if—
 - (i) rules of court permit or require the giving of evidence in this form; or
 - (ii) both parties consent to the giving of evidence in this form.
- (2) An affidavit or a written statement referred to in subsection (1)(b) or (c) may be given in evidence only if it—
- (a) is the personal statement of the deponent or maker; and
 - (b) does not contain a statement that is otherwise inadmissible under this Act.

84 Examination of witnesses

- (1) Unless this Act or any other enactment provides otherwise, or the Judge directs to the contrary, in any proceeding—
- (a) a witness first gives evidence in chief; and
 - (b) after giving evidence in chief, the witness may be cross-examined by all parties, other than the party calling the witness, who wish to do so; and

- (c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.
- (2) If a witness gives evidence in an affidavit or by reading a written statement in a courtroom, it is to be treated for the purposes of this Act as evidence given in chief.

85 Unacceptable questions

- (1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.
- (2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—
 - (a) the age or maturity of the witness; and
 - (b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and
 - (c) the linguistic or cultural background or religious beliefs of the witness; and
 - (d) the nature of the proceeding; and
 - (e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

89 Leading questions in examination in chief and re-examination

- (1) In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless—
 - (a) the question relates to introductory or undisputed matters; or
 - (b) the question is put with the consent of all other parties; or
 - (c) the Judge, in exercise of the Judge's discretion, allows the question.
- (2) Subsection (1) does not prevent a Judge, if permitted by rules of court, from allowing a written statement or report of a witness to be tendered or treated as the evidence in chief of that person.

95 Restrictions on cross-examination by parties in person

- (1) A defendant in a criminal proceeding that is a sexual case or a proceeding concerning domestic violence or harassment is not entitled to personally cross-examine—
 - (a) a complainant;
 - (b) a child (other than a complainant) who is a witness, unless the Judge gives permission.
- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge's own initiative, order that a party to the proceeding must not personally cross-examine the witness.
- (3) An order under subsection (2) may be made on 1 or more of the following grounds:
 - (a) the age or maturity of the witness;
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness;
 - (c) the linguistic or cultural background or religious beliefs of the witness;
 - (d) the nature of the proceeding;
 - (e) the relationship of the witness to the unrepresented party;

- (f) any other grounds likely to promote the purpose of the Act.
- (4) When considering whether or not to make an order under subsection (2), the Judge must have regard to—
- (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
 - (b) the need to minimise the stress on the complainant or witness; and
 - (c) any other factor that is relevant to the just determination of the proceeding.
- (5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by—
- (a) a lawyer engaged by the defendant; or
 - (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.
- (6) In respect of each such question, the Judge may—
- (a) allow the question to be put to the witness; or
 - (b) require the question to be put to the witness in a form rephrased by the Judge; or
 - (c) refuse to allow the question to be put to the witness.
- (7) Subsection (1) overrides section 354 of the Crimes Act 1961.

Subpart 5—Alternative ways of giving evidence

102 Application

Sections 103 to 106 (which provide for alternative ways of giving evidence) are subject to the following provisions (which deal with specific situations):

- (a) section 107 (which relates to child complainants);
- (b) sections 108 and 109 (which relate to undercover police officers);
- (c) sections 110 to 119 (which relate to anonymous witnesses).

[102A Relationship of Courts (Remote Participation) Act 2010 to sections 103 to 106

Nothing in the Courts (Remote Participation) Act 2010 affects or limits the ability of—

- (a) a party to apply under section 103(1) for evidence to be given in an alternative way; or
- (b) a Judge to make directions under that subsection.

General

103 Directions about alternative ways of giving evidence

- (1) In any proceeding, the Judge may, either on the application of a party or on the Judge's own initiative, direct that a witness is to give evidence in chief and be cross-examined in the ordinary way or in an alternative way as provided in section 105.

- (2) An application for directions under subsection (1) must be made to the Judge as early as practicable before the proceeding is to be heard, or at any later time permitted by the court.
- (3) A direction under subsection (1) that a witness is to give evidence in an alternative way, may be made on the grounds of—
- (a) the age or maturity of the witness:
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
 - (c) the trauma suffered by the witness:
 - (d) the witness's fear of intimidation:
 - (e) the linguistic or cultural background or religious beliefs of the witness:
 - (f) the nature of the proceeding:
 - (g) the nature of the evidence that the witness is expected to give:
 - (h) the relationship of the witness to any party to the proceeding:
 - (i) the absence or likely absence of the witness from New Zealand:
 - (j) any other ground likely to promote the purpose of the Act.
- (4) In giving directions under subsection (1), the Judge must have regard to—
- (a) the need to ensure—
 - (i) the fairness of the proceeding; and
 - (ii) in a criminal proceeding, that there is a fair trial; and
 - (b) the views of the witness and—
 - (i) the need to minimise the stress on the witness; and
 - (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.

104 Chambers hearing before directions for alternative ways of giving evidence

If an application for directions is made under section 103, before giving any directions about the way in which a witness is to give evidence in chief and be cross-examined, the Judge—

- (a) must give each party an opportunity to be heard in chambers; and
- (b) may call for and receive a report, from any person considered by the Judge to be qualified to advise, on the effect on the witness of giving evidence in the ordinary way or any alternative way.

105 Alternative ways of giving evidence

- (1) A Judge may direct, under section 103, that the evidence of a witness is to be given in an alternative way so that—
- (a) the witness gives evidence—
 - (i) while in the courtroom but unable to see the defendant or some other specified person; or
 - (ii) from an appropriate place outside the courtroom, either in New Zealand or elsewhere; or
 - (iii) by a video record made before the hearing of the proceeding:

- (b) any appropriate practical and technical means may be used to enable the Judge, the jury (if any), and any lawyers to see and hear the witness giving evidence, in accordance with any regulations made under section 201:
 - (c) in a criminal proceeding, the defendant is able to see and hear the witness, except where the Judge directs otherwise:
 - (d) in a proceeding in which a witness anonymity order has been made, effect is given to the terms of that order.
- (2) If a video record of the witness's evidence is to be shown at the hearing of the proceeding, the Judge must give directions under section 103 as to the manner in which cross-examination and re-examination of the witness is to be conducted.
 - (3) The Judge may admit evidence that is given substantially in accordance with the terms of a direction under section 103, despite a failure to observe strictly all of those terms.

Directions about child complainants' evidence

107 Directions about way child complainants are to give evidence

- (1) In a criminal proceeding in which there is a child complainant, the prosecution must apply to the court in which the case will be tried for directions about the way in which the complainant is to give evidence in chief and be cross-examined.
- (2) An application for directions under subsection (1) must be made to the court as early as practicable before the case is to be tried, or at any later time permitted by the court.
- (3) When an application is made for directions under subsection (1), before giving any directions about the way in which the complainant is to give evidence in chief and be cross-examined, the Judge—
 - (a) must give each party an opportunity to be heard in chambers; and
 - (b) may call for and receive a report, from any persons considered by the Judge to be qualified to advise, on the effect on the complainant of giving evidence in the ordinary way or any alternative way.
- (4) When considering an application under subsection (1), the Judge must have regard to—
 - (a) the need to ensure—
 - (i) the fairness of the proceeding; and
 - (ii) that there is a fair trial; and
 - (b) the views of the complainant and—
 - (i) the need to minimise the stress on the complainant; and
 - (ii) the need to promote the recovery of the complainant from the alleged offence; and
 - (c) any other factor that is relevant to the just determination of the proceeding.

Subpart 6 – Corroboration, judicial directions, and judicial warnings

125 Judicial directions about children’s evidence

- (1) In a criminal proceeding tried with a jury in which the complainant is a child at the time when the proceeding commences, the Judge must not give any warning to the jury about the absence of corroboration of the evidence of the complainant if the Judge would not have given that kind of a warning had the complainant been an adult.
- (2) In a proceeding tried with a jury in which a witness is a child, the Judge must not, unless expert evidence is given in that proceeding supporting the giving of the following direction or the making of the following comment:
 - (a) instruct the jury that there is a need to scrutinise the evidence of children generally with special care; or
 - (b) suggest to the jury that children generally have tendencies to invent or distort.
- (3) This section does not affect any other power of the Judge to warn or inform the jury about children’s evidence exercised in accordance with the requirements of regulations made under section 201.

Evidence Regulations 2007

Part 2

Warning or informing jury about very young children's evidence

49 Warning or informing jury about very young children's evidence

If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

- (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would:
- (b) this does not mean that a child witness is any more or less reliable than an adult witness:
- (c) one difference is that very young children typically say very little without some help to focus on the events in question:
- (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults:
- (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

New Zealand Bill of Rights Act 1990

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:
- (b) The right to be tried without undue delay:
- (c) The right to be presumed innocent until proved guilty according to law:
- (d) The right not to be compelled to be a witness or to confess guilt:
- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

B Selected Sections: English Legislation

Youth Justice and Criminal Evidence Act 1999

Part II Giving of evidence or information for the purposes of criminal proceedings

Chapter I Special Measures Directions in case of vulnerable and intimidated witnesses

Preliminary

- 16 Witnesses eligible for assistance on grounds of age or incapacity.**(1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section—
- (a) if under the age of 17 at the time of the hearing; or
 - (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2).
- (2) The circumstances falling within this subsection are—
- (a) that the witness—
 - (i) suffers from mental disorder within the meaning of the **M1**Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
 - (b) that the witness has a physical disability or is suffering from a physical disorder.
- (3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 19(2) in relation to the witness.
- (4) In determining whether a witness falls within subsection (1)(b) the court must consider any views expressed by the witness.
- (5) In this Chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

Special Measures Directions

- 19 Special measures direction relating to eligible witness.**
- (1) This section applies where in any criminal proceedings—
- (a) a party to the proceedings makes an application for the court to give a direction under this section in relation to a witness in the proceedings other than the accused, or
 - (b) the court of its own motion raises the issue whether such a direction should be given.
- (2) Where the court determines that the witness is eligible for assistance by virtue of section 16 or 17, the court must then—

- (a) determine whether any of the special measures available in relation to the witness (or any combination of them) would, in its opinion, be likely to improve the quality of evidence given by the witness; and
 - (b) if so—
 - (i) determine which of those measures (or combination of them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
 - (ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.
- (3) In determining for the purposes of this Chapter whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
- (a) any views expressed by the witness; and
 - (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.
- (4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.
- (5) In this Chapter “special measures direction” means a direction under this section.
- (6) Nothing in this Chapter is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)—
- (a) in relation to a witness who is not an eligible witness, or
 - (b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

Special Measures

29 Examination of witness through intermediary.

- (1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this section (“an intermediary”).
- (2) The function of an intermediary is to communicate—
 - (a) to the witness, questions put to the witness, and
 - (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- (3) Any examination of the witness in pursuance of subsection (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—
 - (a) the judge or justices (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and
 - (b) (except in the case of a video recorded examination) the jury (if there is one) are able to see and hear the examination of the witness.

- (4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.
- (5) A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.
- (6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence in chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 27 if the interview was conducted through an intermediary and—
 - (a) that person complied with subsection (5) before the interview began, and
 - (b) the court's approval for the purposes of this section is given before the direction is given.
- (7) Section 1 of the Perjury Act 1911 (perjury) shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

C Selected Sections: South African Legislation

Criminal Procedure Act 1977 (Act 51 of 1977)

Chapter 22

Conduct of Proceedings

170A Evidence through Intermediaries

- (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.
- (2)
- (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
- (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.
- (3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place-
 - (a) which is informally arranged to set that witness at ease;
 - (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and
 - (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.
- (4)
- (a) The Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.
- (b) An intermediary who is not in the full-time employment of the State shall be paid such travelling and subsistence and other allowances in respect of the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.
- (5)
- (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection

- (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.
- (b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-
- (i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;
 - (ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and
 - (iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.
- (6)
- (a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that subsection.
- (b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection-
- (i) the trial court; or
 - (ii) the court considering an appeal or review, has not delivered judgment.

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