

Competence of Children to give evidence in Criminal Proceedings & Cross-Examination of Child Witnesses

Nerissa Keay
Advocacy Unit
Legal Aid NSW

I - When is a child competent to give evidence?

(a) Children as witnesses

Historically the evidence of children has been discounted as unreliable. Rules relating to the competence of a child to give evidence required a child to understand the nature and importance of the religious oath. At common law, a conviction based on the unsworn evidence of a child could not be sustained unless it was corroborated by independent evidence. Judges warned juries of the danger of accepting the evidence of a child. The quote below from Heydon's text *Evidence: Cases & Materials* (1984) illustrates the approach of the courts to the testimony of children.

First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.

Psychological research has shown that children's cognitive and recall skills have been undervalued. The ALRC stated in its report *Seen & Heard: Priority for Children in the Legal Process* -

Children including very young children, are able to remember and

retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful...

There is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings, or that children are more likely to lie than adults. Indeed research suggests that children may be actually more truthful than adults. Certainly the research on children's beliefs about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses. When children do lie to an adult, the adult is usually well able to discern this, particularly with younger children.¹

In fact there is less of a risk of children inventing their evidence, than failing to report a matter or falsely denying that an incident occurred.

In cases where children are physically assaulted or kidnapped their evidence is not usually needed to prove the offence. Children's evidence is central in cases where children are victims of sexual assault. In fact, prosecution for offences of this kind relies almost exclusively on the evidence of children. This research, and concerted efforts by governments to increase the rate of conviction in matters of child sexual abuse, underpins many legal developments which have enhanced the use of children's evidence in criminal trials.

(b) Competence to give evidence - Evidence Act 1995 (NSW)

Competence refers to the ability of a person to function as a witness. It should not be confused with credit or the value of a witness's evidence: see for example *RAG* [2006] NSWCCA 343 where the trial judge erroneously relied on issues relevant to credit to rule that the child was not competent to give evidence.²

The law of evidence presumes that everyone is competent (and compellable) to give evidence: s12(a). However a person may not be competent to give evidence because of their age, disability, mental illness or cognitive impairment. For example, toddlers and aged people with advanced dementia, chronically mentally ill people, or people with severe disabilities may not be competent to give evidence.

The test for competence is set out in s13 -

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
 - (a) the person does not have the capacity to understand a question

¹ ALRC *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84) [14.20] -[14.22].

² This case concerned a fifth trial where the complainant was aged 7 years and 2 months.

about the fact, or
(b) the person does not have the capacity to give an answer that can be understood to a question about the fact,
and that incapacity cannot be overcome.

Note. See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.³

This test replaced a test of an ability to give a rational reply, which applied prior to 1 January 2009.

The new test in s13 is similar to provisions in England. It was favoured by the ALRC as it:

focuses on the ability of the witness to comprehend and communicate. Such a test is flexible, clear and unambiguous. It increases the possibility that a witness' evidence is heard, requiring mainly that they understand and answer simple questions and communicate what happened. [4.57]

The English Court of Appeal has noted that the test is concerned with the 'degree of mutual comprehension of those questioning and those questioned.'⁴ That case concerned the evidence of an elderly woman suffering from dementia whose testimony had been recorded. The Court of Appeal said in relation to their statutory test of competence -

[45]...It should be noted that s53 does not, in terms, provide for 100% mutual comprehension of material exchanges giving rise to potential evidence. And, in our view, depending on the length and nature of the questioning and the complexity of the matter the subject of it, it may not always require 100%, or near 100%, mutual understanding between questioner and questioned as a precondition of competence.
...

[46] It is thus for the judge to determine the question of competence almost as a matter of feel, taking into account the effect of the potential witness's performance as a whole, whether there is a common and comprehensible thread in his or her response to the questions, however patchy - bearing always in mind that, if, on critical matters, the witness can be seen and heard to be intelligible, it is for the jury and no one else to determine matters of reliability and general cogency.

This demonstrates as indicated at the outset, that issues of competence differ from questions of credit and reliability. It also suggests that the test provides

³ These provisions relate to the use of interpreters (s30) and deaf or mute witnesses (s31).

⁴ *Sed v The Queen* [2004] 1 WLR 3218

a very low bar, as the complainant, who was 82 and suffering Alzhiemers disease, gave varying accounts in amongst rambling answers and bizarre remarks.

The law provides that a person may be competent to give evidence about some facts and not others: s13(2). Presumably if a child can give answers that can be understood to questions like "How many brothers and sisters do you have?" but not "Can you tell me what happened to you?" then they are unable to give evidence about a fact in issue in a trial.

The ALRC explains that this relates to differing capacities to draw inferences, or to comprehend concept such as time and dates. So for example, a child may not be competent to answer a question such as "What happened in January?" as a child does not comprehend what "January" refers to.

(c) Unsworn Evidence

Where issues of competence are raised, and a witness is found to be competent, there is then a question of whether a witness can give sworn testimony: s13(3). A witness may be sworn to give evidence if the witness has the capacity to understand the obligation to give truthful evidence.

A witness may give unsworn evidence if the Judge has determined that they do not have a capacity to understand the obligation to give truthful evidence and the procedural matters under s13(5) are attended to. A failure to establish this basis will mean that the provision in s21 (that all witnesses must take either an oath or an affirmation, unless giving unsworn evidence under s13) has been breached and any evidence obtained is not legitimately before the jury: RJ [2010] NSWCCA 263.

If a person gives unsworn evidence the Court tell witnesses certain things: s13(5). These are –

- (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
 - (a) that it is important to tell the truth, and
 - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and
 - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

Failure to comply with all of these requirements results in a mistrial: SH [2012] NSWCCA 79. The purpose of the section is clearly to limit the danger of vulnerable witnesses being confused or intimidated: SH at [12].

Interestingly, for witnesses who are not able to give sworn evidence, these

provisions contain complex concepts such as 'suggest' and 'pressure.'

ROIs with children invariably start with a lengthy and confusing exploration of the difference between truth and lies. And most of these reflect an inaccurate understanding of what constitutes lies.

The concept of lies is more complex than a false or inaccurate statement. A lie is a false statement made with deliberate intent to deceive or an intentional untruth and this is a concept which is more complex for young children to articulate.

Research suggests that children younger than 7 often have a good understanding of the difference between truth and lies, but yet cannot correctly answer abstract questions about such concepts.⁵

Since the amendments which commenced in 2009, it is not necessary for a child to understand the difference between the truth and lies, only that the witness understands the obligation to give truthful evidence. It is enough that the court conveys that it is important to tell the truth and it is not necessary that the witness is informed of the authority of the court or the consequences of not telling the truth.

It may simply be enough to say –

Tell us all that you can remember of what happened. Do not make anything up or leave anything out. This is very important.⁶

Significant guidance, including appropriate transcripts of suggested questions for Judges, is provided by the Australian Institute of Judicial Administration.

(d) Pre-recorded interviews as Evidence in Chief

Part 6 of the *Criminal Procedure Act* allows vulnerable people (children and people with cognitive impairment) to give evidence via a pre-recorded interview.

Without going through all of these provisions, s306Y provides that a vulnerable person must not give evidence by way of a pre-recorded interview if the Court is satisfied it is not in the interests of justice that the evidence be given in that way.

This provision is broad and may include issues relating to competence, as well as reliability and fairness to the accused.

In a recent trial in Wollongong, a 3 year old boy gave a confusing interview which suggested sexual offences by an older boy in the caravan park. At the end of the interview he was asked if he had told the truth or lies, and his

⁵ ALRC Uniform Evidence Law [4.35]

⁶ ALRC Uniform Evidence Law [4.45]

response was an emphatic "Lies!" This interview was rejected under s306Y, and the trial was adjourned for the young boy to be reinterviewed.

(e) Burden of proof and other procedural matters

Neither party bears an onus of establishing that a witness is competent or incompetent. It is for the court to determine on the balance of probabilities that a witness is competent: *RA* [2007] NSWCCA 251.

RA also considered the question of whether, in cases where the complainant's evidence is to be given by a pre-recorded ROI, the court needs to determine the issue of competence at the time of the interview or at the time of trial. The CCA expressed a tentative view that it was at the time of trial.

However s61 *Evidence Act* provides –

- (1) This Part does not enable the use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of subsection 13(1).

This provision supports the view that recorded evidence could not be used as evidence in chief where the evidence does not support a view that the child was competent at the time of the interview. If a child became competent at a later time, the child could give evidence in the usual course, or be reinterviewed.

Section 13(8) provides that the court considering issues under s13 may inform itself as it thinks fit, which includes receiving evidence from a person with specialised knowledge, such as a psychologist.

(f) Other measures to assist child witnesses

As indicated, Courts will usually be inclined to assist young children to give evidence in criminal trials. In addition there are many legislative reforms which improve the opportunity for children to give evidence. These include (and are not limited to):

- i. Abolition of warnings relating to the unreliability of evidence of children: s165A *Evidence Act 1995*.
- ii. CCTV or Remote Witness Rooms: Part 6 *Criminal Procedure Act 1986*
- iii. Closed court – A court is to be closed during the evidence of victims of sexual assault – s 291 *Criminal Procedure Act 1986*
- iv. Presence of support persons is provided for in s306ZK *Criminal Procedure Act 1986*
- v. The Sexual Assault Communications Privilege - Part 5 Division 2 *Criminal Procedure Act 1986*

- vi. Restrictions of evidence of prior sexual experience – s293 *Criminal Procedure Act 1986*
- vii. The use of previous testimony in retrials and subsequent trials – Part 5 Divisions 3 & 4 *Criminal Procedure Act 1986*
- viii. Restriction of self-represented accused questioning complainants in sexual assault matters:
- ix. Practice Directions giving priority to trials involving children and sexual assault matters: Practice Note 5 – Management of Prescribed Sexual Offence Proceedings and Practice Note 6 – Sexual Assault Case List.

II - How do you effectively cross-examine a child?

Cases where very young children and other vulnerable witnesses give evidence create a number of difficulties for the cross-examiner. If there is a pre-recorded interview where a child discloses an offence in minimal detail, the ability of a cross-examiner to dispute this assertion is extremely difficult.

(a) Evidence Act

The most important provision to note is section 41. Crown Prosecutors and Judges may strictly enforce this provision where witnesses have limited cognitive development.

41 Improper questions

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a *disallowable question*):
 - (a) is misleading or confusing, or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
 - (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
- (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
 - (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender,

- language background and skills, level of maturity and understanding and personality, and
- (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
 - (c) the context in which the question is put, including:
 - (i) the nature of the proceeding, and
 - (ii) in a criminal proceeding – the nature of the offence to which the proceeding relates, and
 - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question merely because:
- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question

(b) Judicial Guidance

The Australia Institute of Judicial Administration's Bench Book for *Children Giving Evidence in Australian Courts* (Updated 2012) is a very useful resource.

It summarises psychological research on the abilities of children to give evidence which can assist preparation.

A child's ability to recall an event will depend on language development, conceptual development, memory, emotional development and the context in which the child is asked to recall. A child's ability to encode, sort and retrieve information develops over time. From the age of about three children form detailed and enduring memories, particularly of events which is emotionally distinctive (either positively or negatively).

A child's ability to retrieve memories develops over time. The impact of stress may increase or decrease the ability to recall.

Young children will have difficulties with time estimates, frequency of events and chronological order.

Research confirms that children are more suggestible than adults. This includes a tendency to agree to leading questions and sensitivity to negative

feedback which may cause a child to change his or her responses to please a questioner. Children often assume adults have a much greater knowledge than they do. If a child is asked the same question a second time, the child may assume that their answer was wrong the first time.

Children have a shorter attention span than adults.

The following is a helpful summary of child comprehension:

(a) Pre-schoolers:

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

(b) Age 7-10:

- Use and interpret language very literally. An example is that a child may consider 'touching' involves a hand, so touching by a mouth or penis is not included.
- May have problems with adult concepts.
- May have problems with complex questions and in considering the future from the perspective of the past (for example, 'was Uncle John supposed to take you to the movies that day?').
- Have difficulties with passives, the difference between 'ask' and 'tell'

and pronoun usage.

- May be easily confused by complex negation.
- Ability to organise matters in an adult style narrative is problematic.
- Do not have the skills to deal with irony, sarcasm and insincerity.
- May still believe that generally adults speak the truth.
- May not understand difficult words and complex syntax.

(c) Adolescents

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

Research on the impact of cross examination of children suggests that it negatively affects the accuracy of the evidence of children.

The contest between lawyer and child is an inherently unequal one. Child witnesses are often taken advantage of because they can be easily confused and intimidated, because they are unable to match the skills of an experienced lawyer or because, unlike the lawyer, they are in a hostile, alien environment.

Many children do not understand a high proportion of questions asked in cross examination. Strategies used by defence counsel have been found to be 'stress inducing, developmentally inappropriate, suggestive and evidentially unsafe.'⁸

Below is a list of types of questions which are difficult for children -

1. Negative rhetorical

Example: 'Now you had a bruise, did you not, near one of your breasts, do you remember this?' It is easier to answer 'yes' to such a question than to interpret the different phrases of the question in the context of the whole so as to understand to what one would say 'no'.

⁷ Australian Institute of Judicial Administration Bench Book for Children Giving Evidence in Australian Courts 2009 pages 50-51.

⁸ Judicial Commission Equality before the Law Benchbook at 6.3.5

2. Multi-faceted questions

Example: 'Well, did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?'

Example: 'You told the police officer you were kicked on the shin, did you not, and you had a bruise, do you remember that?'

3. Being asked about the implications of actions or inactions

Example 'Why didn't you...'

This may suggest to the child witness that they are somehow guilty and responsible.

4. Lack of connection between the parts of the question

5. Juxtaposition of topics of unequal significance, or unrelated topics, which can confuse the witness

Example:

Q: On that occasion when Mum went to... being that night that Mum went to Youth Group, you were at Clareville?

A: I have made a mistake there, it wasn't Clareville, it was West Hampton.

Q: It should be West Hampton. You did not see the defendant at any time when he put his penis in your bottom, did you?

Q: That was after he had stripped you?

A: Yes.

Q: And you had your legs together?

A: Yes.

Q: And then you said he tried to put his finger in your vagina. Did he put his finger on your vagina or in your vagina?

A: In my vagina.

Q: Inside, you felt it inside did you?

A: (no verbal answer).

Q: Did he do anything else to you?

A: No.

Q: Do you know Frank Murphy?

6. Demanding precise recollection of seemingly obscure facts.

7. Focussing on trivial inconsistencies and presenting them as indicators of unreliability and lack of truthfulness

8. Repeating the witness' answer so as to maintain control of the interaction

9. Intimidating the child by tone of voice, speech rate, emphasis, eye

contact, physical gesture and facial expressions

10. Multiple questions within a question:

Example: 'When was the last time he did this to you before the time we have been speaking of? We have been speaking of one in February obviously, when was the last time he interfered with you before that?'

11. Questioning a witness over prior statements and controlling what is referred to and the order in which it is referred to

12. Passive voice - which can be used to detach people from their actions or as a mechanism of blame

Example: 'The door was then closed behind the person. Is that what you are saying?'

13. Embedding - including a series of qualifying phrases within a sentence

Example: 'Taking you back to the time when you were living in Sydney when you first met Fred, at that time and throughout the period that Fred was living with your family, he used to work as a baker, didn't he?'

14. Backward referencing

Example: 'So you told us that you don't remember, do you remember saying that a moment ago?'

15. Nominalisation

Example: 'Now just stop there. Did you tell the police what is in the statement about the matter of touching boobs?'

16. Unmarked question - i.e. there is no indication that a response is required

Example 'I put it to you you're telling a lie.'

17. Tagging - Adding a question at the end of a statement

The listener has not received a cue from the start that an answer to a question will be required.

Example: 'I mean if something happens today, and something happens tomorrow, you're not going to say they're a year apart, are you?'

18. Negative tagging - Adding a negative construction at the end of a sentence

Example: 'He took you on a picnic to the park by the river, did he not?'

Contrast the above with 'Did he take you on a picnic to the park by the river?'

19. Lawyerese - negatives, double negatives, multiple parts, difficult vocabulary, complex syntax

20. Interruptions when the child is answering a question

21. Persistent questioning

Young children (to age 10) find persistent questioning very demoralising when they have previously indicated that they do not know the answer. They tend to assume that if the same question is repeated, the original answer must have been incorrect. Therefore, young children who are repeatedly asked the same questions may change their answers. A reason for this may be that children are more likely to be deferential to what they perceive to be the adult's beliefs.

22. Rapid fire questioning

This may lead to a child eventually offering a random response to stop the questioning, and the response may therefore be unreliable.

23. Jumping quickly from one topic to another⁹

(c) Practical Considerations for Defence Counsel

It will be really difficult to cross-examine a child who has limited comprehension of complex issues. The cross-examiner is usually faced with hostility from a Court which is endeavouring to assist a child witness and sympathy from many parts of the courtroom which may naturally be felt towards a young witness.

One advantage is, however, the ability to go and watch the recorded interview prior to trial. It is a significant advantage to view a witness's testimony in preparation for trial, which we don't have in other matters.

It is important to consider the admissibility of questions asked in the ROI. Like ERISPs these interviews can be edited. Questions that cannot be asked in examination in chief are not admissible. Sometimes there may be little left in an edited ROI.

It is important to consider what is known about children's evidence when preparing cross-examination. Obviously questions need to be kept really simple and age appropriate. It is not effective to confuse or tire a child witness and such questions are likely to be rejected.

It is important to bear in mind that children will have a limited attention span. It may be good practice to suggest breaks before moving onto a new topic or if a child appears distracted or disengaged.

Where questions must be asked to meet the test in *Brown v Dunn*, these need to be carefully formulated. You may need to discuss this with the Prosecutor. It may be impossible to do this without using negatives, but it is obviously best to do this as simply as possible. Eg You have told us about Johnny touching you. Are you making this up?

⁹ Australian Institute of Judicial Administration Bench Book for Children Giving Evidence in Australian Courts 2009 p73-76.

Crown Prosecutors are usually very cautious about conferencing child witnesses and preparation will usually only involve replaying the recorded interview to the child. Without having given evidence in chief, children are often cross-examined 'cold' or without the gentler, affirming experience of examination in chief. This may work to the advantage of defence counsel.

The AIJA makes these observations as to best practice:

3.6 Good Practices for Questioning Children

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

1. Phrase questions positively rather than negatively.

For example: 'Do you remember his name?' as opposed to, 'You don't remember his name, do you?'

2. Use an active voice rather than a passive voice.

For example: 'You said the red car hit the blue car?', rather than 'You said the blue car was hit by the red car?'

A child is likely to interpret the latter as meaning that the blue car inflicted the resulting damage on the red car.

3. Separate questions on separate topics.

Do not mix topics, or switch back and forth between topics.

4. Children's conceptualisation of time, frequency and ordering of events is gradually acquired.

It is therefore necessary to provide concrete anchor points, using times or events that are relevant to the child.

5. It may be helpful to use the child's words to describe people, actions and objects.

For example: 'Did this happen after you came home from school?'

6. Avoid 'front loading' questions that use a number of qualifying phrases before asking the crucial part of the question.

Example of what not to ask: 'On the evening in question, before you went to the shop, and after you returned from school, while no one else was home but you, did your mother hit you?'

Instead: 'Did your mother hit you after school that day?'; 'Was this before or after you went to the shop?'; 'Was anyone else at home when your mother hit you?'

The key is to keep each sentence separate and simple.

7. Use the child's vocabulary where possible.

Example: 'What games did you play at play-time?'

NOT: 'What did you do at recess?'

8. Use signposting.

Example: 'I want to ask you some questions about your father.'

9. Discuss events in logical sequence.

Example: Do not ask questions that require the child to turn their mind from afternoon to morning.

10. Ask questions with the child's point of view in mind.

Example: 'Did Daddy come into your room?'

NOT: 'Did the accused/my client come into the room?'

11. Include only one query in each question.

12. Avoid questions that may be taken too literally.

Example: A question about how many times a child was touched may illicit a response regarding the number of actual touches, as opposed to the number of occasions that the touching occurred.¹⁰

¹⁰ Australian Institute of Judicial Administration Bench Book for Children Giving Evidence in Australian Courts 2009 pages 77-78.

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