Drawing the Line Between Acceptable and Unacceptable Cross-examination of Child Sexual Assault Complainants: concerns about the application of s 41 *Evidence Act* 1995 (NSW & Cth) and s 41 *Evidence Act* 2008 (Vic)

Russell Boyd[*] and Anthony Hopkins[*]

Section 41 of the Evidence Act 1995 (NSW & Cth) and s 41 Evidence Act 2008 (Vic) now require judges to intervene to protect vulnerable witnesses, thereby reducing trauma, encouraging participation in the criminal justice system and ensuring that such witnesses have the opportunity to tell their story. Some of the most vulnerable witnesses are child sexual assault complainants. For them and for others, the provision is intended to set a new standard for cross-examination. However, a study of experienced prosecution and defence barristers from the Sydney metropolitan region suggests that the provision could fail to meet its objectives. While ever cross-examiners are required to take to their feet and pit their wits against child sexual assault complainants, the line between acceptable and unacceptable cross-examination will be difficult to draw.

Cross-examination is central to the adversarial system of justice. Yet cross-examination is traumatic for those who are subjected to it. This trauma is particularly evident and well documented in relation to child sexual assault complainants, though it may be occasioned wherever there is a significant power imbalance between the questioner and the witness. Arguably, a certain level of trauma is unavoidable – a necessary consequence of the testing of a witness's evidence at trial. However, consideration of the appropriate limits of permitted cross-examination is critical to reducing trauma, thereby ensuring that voices are not silenced and that the truth is not obfuscated.

Courts and legislatures have sought to draw a line between acceptable and unacceptable questioning in cross-examination in an attempt to curb what are now termed "improper questions". In New South Wales, these efforts have resulted in the enactment of a reinvigorated s 41 *Evidence Act 1995* (NSW). An identical section has been introduced in the

[*] LLB (Hons), Solicitor of the Supreme Court of NSW; a significant part of the paper is drawn from this author's honours thesis. Contact Anthony.Hopkins@canberra.edu.au for a full copy of the thesis detailing the study and its findings.
[*] Lecturer, University of Canberra; Barrister and Solicitor of the Supreme Court of the Northern Territory.

Evidence Act 1995 (Cth). Both took effect on 1 January 2009. The changes impose a duty on judges and magistrates to intervene to curb "improper questions", and broaden the applicable definition. To date there has been no formal evaluation of the effectiveness of these legislative amendments. Whilst the focus of this article is on the New South Wales and Commonwealth sections, the lessons drawn are relevant to the operation of s 41 *Evidence Act 2008* (Vic), despite differences in its drafting. The Victorian provision came into operation on 1 January 2010.

This paper presents the findings of a series of interviews with experienced defence and prosecution barristers with respect to the impact of a provision upon which the new s 41 *Evidence Act 1995* (NSW) was modelled, s 275A *Criminal Procedure* Act *1986* (NSW). Section 275A came into effect on 12 August 2005 with the legislative expectation that it would set a "new standard for the cross-examination of witnesses".[1] Although the study was of small scale, the principal finding was that s 275A made little if any difference to questions asked of child sexual assault complainants, a legislative failure that does not auger well for the operation of the new s 41 *Evidence Act 1995* (NSW & Cth) or s 41 *Evidence Act 2008* (Vic).

The findings indicate that drawing the line between acceptable and unacceptable cross-examination is not simply a matter of legislative definition or mandated powers of intervention – it is a question of perspective. The questions asked in cross-examination of a child witness may appear improper from the perspective of a child, a lay person or a person with specialised knowledge of child development and child behaviour. And yet, those same questions may be viewed as entirely proper from the perspective of legal participants, long trained in the adversarial process and cognisant of the centrality of cross-examination to the defendant's right to a fair trial. Ultimately it is the latter perspective that counts in court.

The challenge then, for those concerned to limit the trauma experienced by child sexual assault complainants through cross-examination and vulnerable witnesses generally, is to reconcile the competing perspectives. Consideration needs to be given to the extent to which this is ultimately achievable and the conditions under which progress can be made. In

[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005, 14900 (Bob Debus, Attorney General).

determining this, close attention must be paid to the role and responsibility of the defendant's lawyer in the adversarial system of trial.

CHILD SEXUAL ASSAULT: TRAUMA, TRUTH AND ATTRITION

The prevalence of child sexual assault is both disturbing and well documented. About one in four girls and one in eight boys are sexually abused in Australia.[2] Yet most offences are never reported.[3] Of those that are, the percentage that result in conviction is alarmingly low.[4] Statistics vary across studies and jurisdictions, yet they tell a similar story. Following a review of the empirical evidence, Eastwood, Kift and Grace conclude:

> If 100 children are sexually abused, it is likely that only about 10 of those children will actually report the abuse. Of those, only about 6 will reach committal proceedings in the lower courts, and only 2 or 3 will reach the higher courts. Of those, only about 1 or 2 cases will result in conviction.[5]

This high attrition rate is, no doubt, partly a consequence of the *nature* of child sexual assault cases. There are at least two relevant aspects: first, it is often the child's uncorroborated word against that of the adult perpetrator,[6] and second, grooming and consequent delayed reporting are more the rule than the exception.[7] With the prosecution required to prove its case beyond reasonable doubt, these factors unavoidably reduce the prospects of success. However, for at least the last decade, it has been widely recognised that the traumatising effect of participating

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[2] Eastwood C, Kift S and Grace R, "Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got it Wrong" (2006) 16 JJA 81 at 82; Eastwood C, "Child Sexual Abuse and the Criminal Justice System: What Educators Need to Know" (2003) 8(1) *Australia and New Zealand Journal of Law and Education* 109 at 112; James M, "Child Abuse and Neglect: Part 1 – Redefining the Issues", *Trends and Issues in Crime and Criminal Justice* No 146 (Australian Institute of Criminology, 2000) pp 1- 3.

[3] Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002) xi; Gelb K, *Recidivism of Sex Offenders Research Paper* (Victorian Sentencing Advisory Council, 2007) pp 3-7.

[4] Queensland Crime and Misconduct Commission, *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003) pp 58-59; Fitzgerald J, "The Attrition of Sexual Offences from the New South Wales Criminal Justice System", *Crime and Justice Bulletin* (No 92, NSW Bureau of Crime Statistics and Research, 2006); New South Wales Bureau of Crime Statistics and Research, *The Progress of Sexual Offences Through the NSW Criminal Justice System: 2004 – 2007* (2008).

[5] Eastwood, Kift and Grace, n 2 at 90; See, also, Cossins A, "Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question" (2006) 18 (2) *Current Issues in Criminal Justice* 318 at 318.

[6] Legislative Council Standing Committee on Law and Justice, n 3 at 10.

[7] Cossins A, "Prosecuting Child Sexual Assault Cases: Are Vulnerable Witness Protections Enough?" 18(2) *Current Issues in Criminal Justice* 299 at 306; Brennan M and Brennan R, *Strange Language: Child Victims Under Cross-Examination* (3rd ed, NSW Centre for Teaching and Research in Literacy, Wagga Wagga, 1988,) p 89.

in the criminal justice system is itself a cause of high attrition.[8] Those who might report are put off by the expectation of trauma, and those who do report may discontinue due to the actual experience of it. Further, for those children whose cases do come to trial, it is recognised that the experience of trauma will, almost inevitably, have a detrimental impact on the quality of their evidence.[9] Leaving aside these silencing effects, the object of reducing trauma for child participants in the criminal justice system is an accepted end in itself.[10] It is hard to justify encouraging child sexual assault complainants into a system which itself causes further trauma and abuse.[11]

In response to these concerns, a raft of changes to court processes and procedures have been brought in across the country,[12] many modelled on the pioneering approach of Western Australia.[13] These include: reducing delay; pre-recording evidence; shielding the child from the accused by enabling them to testify from a remote location and prohibiting cross-examination by the accused in person; facilitating the involvement of a support person or child intermediary; and limiting the number of occasions that a child is required to give evidence and thereby be exposed to cross-examination.[14] This final objective has been achieved by prohibiting the questioning of child sexual assault complainants during committal proceedings,[15] and through recorded pre-trial hearings,[16] capable of being played at trial and re-trial in the event of successful appeal. By contrast, the *conduct* of cross-examination at trial has been left relatively untouched, despite its centrality to the court process for child sexual

[8] See, eg, Legislative Council Standing Committee on Law and Justice, n 3, p19; Explanatory Memorandum, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) p 2.
[9] Cashmore J and Trimboli L, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2005) p 62.
[10] *Convention on the Rights of the Child*, opened for signature 20 November 1989, ATS 1991(4), art 38 (entered into force 16 January 1991): "State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."
[11] See Eastwood C, "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System", *Trends and Issues in Crime and Criminal Justice* No. 250 (Australian Institute of Criminology, 2003) p 1.
[12] See generally, Cashmore J, "Child Witnesses: The Judicial Role" (2007) 8 TJR 281.
[13] For a history of child witness reforms in Western Australia, see generally, Jackson H, "Child Witnesses in the Western Australian Criminal Courts" (2003) 27 Crim LJ 199.
[14] See, eg, Richards K, "Child Complainants and the Court Process in Australia", *Trends and Issues in Crime and Criminal Justice* No. 380 (Australian Institute of Criminology, 2009); Cossins, n 7.
[15] See, eg, *Criminal Procedure Act 1986* (NSW) s 91(8).
[16] See, eg, *Evidence Act 1906* (WA), s 106K; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), Part 4, Division 4.2B.

assault complainants, and their persistent dissatisfaction with it.[17]

This paper is concerned with both the trauma occasioned by cross-examination and with the role and responsibility of the cross-examiner in the adversarial system. It seeks to provide an explanation for the failure of legislative attempts to constrain the cross-examiner.

CROSS-EXAMINATION – THE TRAUMA OF BEING CHALLENGED.

> He was really mean… yea he kept saying "you're lying, you're lying, I know this is lies". I felt pretty upset because I knew it was the truth. (NSW Child, 13yrs).[18]

Eastwood and Patton, in their oft-cited 2002 study, found that the experience of cross-examination was the "overwhelming area of concern for all children."[19] This finding has been supported in subsequent studies reporting the experiences of child complainants,[20] or juror perceptions of those children's experiences.[21]

In particular, child sexual assault complainants report that being accused of lying is the most significant cause of trauma experienced during cross-examination.[22] If it is accepted that being "believed" is central to the rehabilitation of survivors of child sexual assault, suggesting to such children that they are "making things up" may have damaging psychological effects.[23] Further, it can diminish their ability to testify clearly and fully, since children who have been sexually abused "often have poor self-esteem, blame themselves, feel guilty and ashamed of the abuse" such that accusations of lying can undermine their confidence and "fragment an already fragile self-image".[24]

The challenge to the veracity of a child's allegation of sexual assault – as a lie, or as the result

[17] Cossins A, "Is There a Case for the Legal Representation of Children in Sexual Assault Trials" 16(2) *Current Issues in Criminal Justice* 160 at 160.
[18] Eastwood C and Patton W, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (report to the Australian Criminology Research Council, 2002) pp 60-61.
[19] Eastwood and Patton , n 18, p 59.
[20] See, eg, Cashmore and Trimboli, n 9, p 50.
[21] Cashmore J and Trimboli L, "Child Sexual Assault Trials: a Survey of Juror Perceptions", *Crime and Justice Bulletin* No. 102 (NSW Bureau of Crime Statistics and Research, 2006).
[22] Eastwood, n 11, p 5; Cashmore and Trimboli, n 9, p 49.
[23] Eastwood, n 2 at 111.
[24] Davies E, Henderson E and Seymour FW, "In the interests of justice? The cross-examination of child complainants of sexual abuse in criminal proceedings" (1997) 4(2) *Psychiatry, Psychology and Law* 217 at 227.

of suggestion, fabrication or fantasy – may be made directly or in a variety of more subtle ways, all aimed at undermining the credibility of the child and their evidence.[25] The cross-examiner may seek to impeach the child witness by establishing a failure to recall specific details in relation to the alleged sexual assault, series of assaults[26] or sequences of events; by establishing inconsistencies in the child's testimony, or between the child's testimony and evidence previously given by them; or by seizing upon delayed disclosure.[27] Each of these approaches may be perceived as unfair by the child.

Irrespective of the content of questions asked in cross-examination, frequently it is the *form* of words used by the cross-examiner that troubles child witnesses. Lawyers often "ask questions with advanced vocabulary and/or legal terminology … or with complex syntax and sentence structures."[28] And they are noted for the frequent use of negatives, double negatives and multi-part questions.[29] The result is confusion. Such questions "diminish the capacity of children, adolescents and adults to understand what is being asked and reduce the accuracy of their responses".[30] These concerns are heightened because children have variable developmental levels and linguistic skills. In their evaluation of the western Sydney pilot specialist jurisdiction established in 2003, Cashmore and Trimboli rated defence lawyers "poorly in terms of adapting their questions to the child's use of terms and structures".[31] These findings were consistent with the views of a significant number of the 277 jurors sitting on the 25 trials as part of the same pilot.[32] Nearly a third of the jurors rated the child's understanding of the defence lawyer's questions as "poor", and overall only 15 commented that defence lawyers asked age-appropriate questions. However, 35 jurors, in just over half of the trials, made specific comments about the inappropriateness of the questions asked by defenders, describing

[25] See, eg, Davies, Henderson and Seymour, n 24 at 226; Cashmore and Trimboli, n 9, p 49; Taylor, S C, *Surviving the Legal System* (Coulomb Communications, Melbourne, 2004) pp 124-161.
[26] Cashmore and Trimboli, n 9, p 48.
[27] Legislative Council Standing Committee on Law and Justice, n 3, p 68; Davies, Henderson and Seymour, n 24 at 219.
[28] Kebbell M and Johnson S, "Lawyer's questioning: the effect of confusing questions on witness confidence and accuracy" (2000) 24(6) *Law and Human Behaviour* 629 at 630; See, also, Brennan and Brennan, n 7; Waterman A, Blades M and Spencer C, "How and Why Do Children Respond to Nonsensical Questions?" in Westcott HL, Davies GM and Bull RHC (eds), *Children's Testimony* (Wiley, 2002) pp 147-159; Cashmore and Trimboli, n 9, pp 46-47.
[29] Kebbell and Johnson, n 28.
[30] Cashmore and Trimboli, n 9, p 46; Kebbell and Johnson, n 28.
[31] Cashmore and Trimboli, n 9, p 47.
[32] Cashmore and Trimboli, n 21: 14 of the trials were within the specialist jurisdiction, 11 were in the comparison registry.

them as ambiguous, repetitive, confusing (sometimes intentionally) and too difficult for children of that age or mental ability.[33]

Compounding these problems is the use of *leading* questions – the *lingua franca* of the cross-examiner.[34] Essentially, a leading question is a question that directly or indirectly suggests a particular answer.[35] For example: *Your sister was in the next room, wasn't she? You could have called out to her, but you didn't, did you?*[36] Or: *You don't remember the details, do you?* Such questions do not give the child an opportunity to explain why he or she didn't call out, or why details were forgotten, they simply require an affirmative or negative response. Indeed, such questions demonstrate that the line between comment and question is difficult to draw. Typically, in cross-examination, the witness's story is "structured", "segmented", "organised", "interrupted" and ultimately "told" by, and in the words of, the cross-examiner.[37] It is unsurprising then to hear a child complain that their questioning was unfair because the lawyer "tried to put words in my mouth".[38]

Beyond complaints of developmentally inappropriate language and the form of the questions, is the manner and tone in which questions are asked, and the length of the ordeal. The way a cross-examiner goes about the process of challenging the child witness has the clear potential to impact on the experience of the child, and their capacity to tell their story.

> He [defence counsel] got me all stressed and confused. He was yelling at me. He was jumping up and down, banging his thing down at me. (QLD Child, 14 years).[39]

Aggression, sarcasm and condescension may all be employed. In their evaluation of the western Sydney pilot jurisdiction, Cashmore and Trimboli observed that half of the defence

[33] Cashmore and Trimboli, n 21, p 6.
[34] Leading questions are ordinarily permitted in cross-examination, but not in evidence in chief; see, eg, *Evidence Act 1995* (NSW) s42, s 37.
[35] See eg *Evidence Act 1995* (NSW) Dictionary, also included within the definition is a question that "assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked."
[36] Adapted from Taylor, n 25, p 166.
[37] Eades D, "Diana. Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications" (2008) 20 *Current Issues in Criminal Justice* 209 at 211-212.
[38] Cashmore and Trimboli, n 9, p 57, report of a 15 year old complainant.
[39] Eastwood and Patton, n 18, p 59.

lawyers adopted one or all of these approaches.[40] Similarly, lengthy periods of cross-examination and repetition in questioning have the capacity to weigh on the child, causing them to break down.[41]

Finally, a full understanding of the experience of child sexual assault complainants as witnesses requires an analysis of the relative power and position of the participants to the linguistic event of cross-examination.[42] It cannot be forgotten that the child is being challenged by an adult who is socially esteemed, learned, confident and comfortable with their role as cross-examiner. Moreover, this challenge takes place with the apparent tacit approval of the even more learned and esteemed trial judge. It is in this setting, before the eyes of yet more adult jurors sitting in judgement, that the child sexual assault complainant learns how the adversarial system seeks to discover the "truth".

CROSS-EXAMINATION – AT THE HEART OF THE ADVERSARIAL SYSTEM

"Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial".[43] Understanding the reason for this, and the purpose of cross-examination, is critical to efforts to humanise the experience of child sexual assault complainants and to the very definition of an improper question.[44] The content and form of questions, as well as the manner in which they are asked, is a function of the cross-examiner's purpose. To understand this purpose requires consideration of the role and responsibility of the defendant's lawyer at trial. Indeed, it requires consideration of the very nature and purpose of the adversarial trial itself.

Wigmore has argued that cross-examination is "the greatest legal engine ever invented for the discovery of truth"[45] But this is not borne out by the experience of child sexual assault

[40] Cashmore and Trimboli, n 9, p 49.
[41] Eastwood and Patton, n 18, p 60.
[42] Eades D, n 37, 211-212.
[43] *Lee v The Queen* (1998) 195 CLR 594 at 602 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ); *Osolin v The Queen* (1993) 86 CCC (3d) 481 (SCC) at 516 – 517.
[44] Hunter J, "Battling a Good Story: Cross-examining the Failure of the Law of Evidence" in Roberts P and Redmayne M (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (2007, Hart, Oxford) 262, p 266.
[45] Wigmore JH, *Evidence* (revised ed, 1974) vol 5, p 32.

complainants in the witness stand. Discovery of the truth is not the purpose of the cross-examiner, even if it may be the purpose of the trial.

Of the nature of the adversarial trial, Gleeson CJ has said:

> In our system of criminal justice, a trial is conducted as a *contest* between the prosecutor (almost always a representative or agency of the executive government) and the accused (almost always an individual citizen). In the case of a trial by jury for an indictable offence, the presiding judge takes no part in the investigation of the alleged crime, or in the framing of the charge or charges, or in the calling of the evidence. Where the accused is represented by counsel, the judge's interventions in the progress of the case are normally minimal (emphasis added). [46]

The adversarial system, as described, is said to "reflect values that respect both the autonomy of parties to the trial process and the impartiality of the judge and jury".[47] The judge's role is to hold the balance between contestants,[48] without entering the arena so as to show partisanship for either side. [49]

Of the purpose of the adversarial system of trial, Nicholas Cowdery QC, Director of Public Prosecutions in NSW, has argued:

> It is not directed to the ascertainment of truth, despite our pretences to the contrary, especially in criminal law. The attainment of justice becomes incidental to the immediate battle … In war the first casualty is the truth.[50]

Few are in a better position than he to know whether, as a matter of fact, truth emerges from the trial process. Though whether the truth does or does not emerge by design is a more vexed question. The Australian Law Reform Commission, in answer to its reference to review the laws of evidence and propose uniform evidence legislation to regulate the adversarial system of trial, argued that "a trial is not a 'search for the truth'". [51] In apparent contradiction, the Commission went on to argue that the trial does "involve a serious attempt to reach

[46] *Doggett v The Queen* (2001) 208 CLR 343 at 346 (Gleeson CJ).
[47] *Doggett v The Queen* (2001) 208 CLR 343 at 346 (Gleeson CJ).
[48] *Whitehorn v R* (1983) 152 CLR 657 at 682 (Dawson J).
[49] *Jones v National Coal Board* [1957] 2 QB 55 at 63-65, [1957]2 All ER 155 at 159 (Denning LJ); *Galea v Galea* (1990) 19 NSWLR 263 at 281-282 (Kirby A-CJ); *R v Esposito* (1998) 45 NSWLR 442 (Wood CJ with James and Adam JJ agreeing).
[50] Cowdrey N, "Justice in Pursuit of Lawyers" (speech delivered at St James Ethics Centre, Sydney, 26 August 1997) in Whitton E, *The Cartel* (Herwick, Sydney, 1998) p 92.
[51] Australian Law Reform Commission, *Evidence*, Report No 38 (1987) [3.32].

conclusions about what occurred in the past"[52] and that the "credibility of the trial system ultimately depends on performance" in the "fact-finding task of the courts".[53] One is left to wonder how the adversarial system can be said to perform if it is not seeking *true* facts, and how a distinction can then be drawn between the "fact-finding task" and "a search for the truth"?

By contrast there are judicial statements placing the search for truth centre stage in the adversarial system of trial: statements such as that made by Justice Stewart of the United States Supreme Court that "[t]he basic purpose of a trial is the determination of truth";[54] or by Vice-Chancellor Knight Bruce that "the discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice";[55] or by Evatt J in maintaining that the common law rules of evidence, now largely adopted in uniform evidence legislation, "represented the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth".[56] Implicit in these statements is the expectation that the truth will emerge from the robust engagement of the contestants.[57]

However, Vice-Chancellor Knight Bruce continued: "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."[58] The search for truth, then, is tempered by other values. Chief amongst these is the value placed on individual liberty, reflected in the presumption that a person is innocent until proved guilty beyond reasonable doubt and the principle that a finding of guilt should not be made without there having been a fair trial.

> [E]very accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is a failure in any of these respects, and the appellant may thereby have lost a chance that was fairly open to him of being acquitted, there is, in the eyes of the law, a miscarriage of justice.[59]

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[52] Australian Law Reform Commission, n 51 at [3.32].
[53] Australian Law Reform Commission, n 51 at [3.46].
[54] *Tehan v Shott*, 382 US 406 at [15] (1966).
[55] *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-9, 63 ER 950 at 957.
[56] *R v War Pensions Entitlement Tribunal; ex parte Bott* (1933) 50 CLR 228 at 256.
[57] *Jones v National Coal Board* [1957] 2 QB 55 at 63-65, [1957]2 All ER 155 at 159 (Denning LJ).
[58] *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-9, 63 ER 950 at 957; Spigelman JJ, "The Truth Can Cost Too Much: The Principle of a fair Trial" (2004) 78 ALJ 29 at 29.
[59] *Mraz v The Queen* (1955) 93 CLR 493 at 514 (Fullagar J).

Whilst insistence on a fair trial can trump the truth,[60] it does not necessarily do so. Indeed, a primary objective of the insistence on a fair trial is the avoidance of wrongful conviction of the innocent.[61] Yet the principle of a fair trial has been authoritatively described as "[t]he central prescript of our criminal law",[62] indicating that adherence to the rules of evidence and trial procedure are the immediate curial aims. Truth is relegated to a secondary status: while desirable, it is not directly sought. In other words, its emergence is entrusted to the system. In so far as the trial is a search for the truth, it is a search that is strictly bounded by the rules of engagement,[63] and the "overriding common law requirement that the criminal trial be "fair"".[64]

Central to the principle of a fair trial is the defendant's lawyer: "[S]o far as serious offences are concerned, legal representation, where it is desired, is essential for a fair trial".[65] Indeed, the absence of a legal representative for the accused for a serious offence, such as child sexual assault, is itself a basis for a finding that there has been a miscarriage of justice.[66] And one of the central roles of the criminal defence lawyer is to cross-examine, competently, effectively and with the "maximum zeal permitted by law".[67] This is the defence lawyer's responsibility:

> A barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence, uninfluenced by the barrister's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the barrister or any other person, and always in accordance with the law…[68].

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[60] *R v Swaffield* (1997) 192 CLR 159 at 194 (Toohey, Gaudron and Gummow JJ).
[61] *Dietrich v The Queen* (1992) 177 CLR 292 at 372 (Gaudron J); Law Reform Commission, *Evidence,* Report No 38 (1987) [3.35]; though a miscarriage of justice can at law be said to occur even in the case of a guilty person being found guilty.
[62] *Jago v District Court (NSW)*(1989) 168 CLR 23 at 56 (Deane J); *McKinney v The Queen* (1991) 171 CLR 468 at 478; *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326, 330; Spigelman, n 58 at 30.
[63] Nagorka F, Stanton M and Wilson M, "Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice" (2005) 29 *MULR* 448 at 462.
[64] *Dietrich v The Queen* (1992) 177 CLR 292 at 327 (Deane J).
[65] *Dietrich v The Queen* (1992) 177 CLR 292 at 372.
[66] *Dietrich v The Queen* (1992) 177 CLR 292 at 311 (Mason CJ and Deane J), 337 (Deane J), 362 (Toohey J), 369-370 (Gaudron J).
[67] Luban D, "Twenty Theses on Adversarial Ethics" in Lavarch M and Stacy H (eds), *Beyond the Adversarial System* (Federation Press, Sydney, 1999) 134, p 140.
[68] New South Wales Bar Council, *The New South Wales Barristers' Rules* (consolidated in June 2008) Rule 16, http://www.nswbar.asn.au/docs/professional/rules/Rules_july2008.pdf viewed 16 December 2009.

Though the defence lawyer is bound by evidential, procedural and ethical rules[69] which may facilitate discovery of the truth, their purpose is not to uncover the truth. That is, unless the truth happens to coincide with their client's instructions. In this, their role differs from that of the prosecutor who, as a representative of the state, is required to "act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures".[70] The purpose of the criminal defence lawyer at trial is to *persuade*;[71] to persuade the jury that that there is insufficient evidence to be satisfied beyond a reasonable doubt of the defendant's guilt, and thereby win the case. In cross-examination, though they may be questioning the child, communicating with the child is not the focus of their linguistic engagement. The cross-examiner is, throughout, communicating with the jury.[72]

As a consequence of receiving instructions from the accused denying the charge, the defence lawyer *must* challenge the truthfulness of the complainant. This is explicitly required by the rule in *Browne v Dunn* (1893) 6 R 67. But it is not enough to simply challenge. In order to meet their ethical duty to advance their client's case, the challenge must be persuasive. The powers of the cross-examiner must be brought to bear to undermine the credibility of the complainant, and their evidence[73] – a task made more acute by the fact that very often the only evidence is the word of the child. The challenge must be made vigorously and with apparent conviction in the client's cause, persuading through the appearance of having been persuaded.[74] The content, form and manner of the challenge will be designed with persuasion in mind. Questioning will demonstrate a case theory, or story, which explains the "false" testimony of the complainant, and where necessary, suggests ulterior motives such as revenge

[69] See, eg, lawyers primary ethical duty to the court, *Giannarelli v Wraith* (1988) 165 CLR 543 at 555-6 (Mason CJ), at 586-7 (Brennan J); and the lawyers ethical duty to consider the morality of their actions, Mark S, *Competing Duties – Ethical Dilemmas In Practice* (Continuing Legal Education, Newcastle Law Society, 19 October 2009) http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches viewed 16 December 2009.

[70] *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J).

[71] Curthoys J and Kendall C, *Advocacy An Introduction* (LexisNexis Butterworths, Sydney, 2006) pp 2 & 136; Henderson E, "Persuading and Controlling: The Theory of Cross-examination in Relation to Children" in Westcott, Davies and Bull (eds), n 28, p 279.

[72] Curthoys and Kendall, n 71, p 7.

[73] Glissan J, *Cross-examination Practice and Procedure and Australian Perspective* (Legal Books, Sydney, 1995) p 84, though note that cross-examiners are exhorted to "obtain evidence favourable to [their] client" before undermining the evidence of the witness or the witness's credibility.

[74] Rigg B, "Cross-examining Complainants in Sexual Assault Proceedings" (Paper presented at Public Defender's Criminal Law Conference, Sydney, 8 March 2009) p 1; See also, Leonie Flannery, "A Defence Lawyer's Perspective" (2005) 28(1) *University of New South Wales Law Journal* 252 http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLJ/2005/13.html viewed 16 December 2009.

and attention seeking.[75] For this story to succeed "[d]rama and emotional appeal...are essential ingredients".[76] Cross-examiners are exhorted to use leading questions in the interests of their client, so as not to "lose control" of the witness's testimony.[77] Finally, the manner and tone adopted by the cross-examiner will be chosen for its impact on the jury.

The techniques of advocacy are highly specialised, learned through years of experience. Though it may be an unpleasant task,[78] in child sexual assault cases defence lawyers are obliged to pit their wits, their learning and experience, against the child. The power disparity warrants the claim that "victory for the cross-examiner is too often the work of the trained curial assassin ambushing an easy target."[79] Or, the even less flattering characterisation of the task of the defendant's lawyer, that cross-examining children is "... like shooting rats in a barrel ... it is easy to confuse them and make out they're telling lies".[80] The central point is that employing all of the techniques of advocacy against a child is normative behaviour in the adversarial system of trial. We may recoil from comments of defence lawyers such as "if in the process of destroying the evidence it is necessary to destroy the child – then so be it",[81] yet it must be acknowledged that:

> This is not deviant or aberrant behaviour. It is what lawyers are expected to do. In other words, poor treatment of witnesses had more to do with adversarial norms and cultures of advocacy than with the strict letter of the law.[82]

Where are the interests of the child in all of this? Who is to protect them – and perhaps reassert the value of the truth? Some protection may be found in the ethical standards required of cross-examiners in professional rules.[83] However, ultimately the responsibility for drawing the line between acceptable and unacceptable cross-examination falls upon the trial judge,

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[75] Davies, Henderson and Seymour, n 24, 224; Westcott H and Page M, "Cross-examination, sexual abuse and child witness identity" (2002) 11 *Child Abuse Review* 137 at 145.
[76] Hunter, n 44, p 273; Curthoys and Kendall, n 71, pp 3-5.
[77] See, eg, Younger I, *The Art of Cross-Examination* (American Bar Association, Section of Litigation, Chicago, Monograph Series, No. 1, 1976), commandment three of his ten Commandments of Cross-examination is "use only leading questions"; Curthoys and Kendall, n 71, p 152.
[78] Flannery, n 74.
[79] Hunter, n 44, 271.
[80] Brennan and Brennan, n 7, p 3, quoting anonymous magistrate.
[81] Eastwood C, Patton W and Stacy H, "Child Sexual Abuse & the Criminal Justice System" *Trends and Issues in Crime and Criminal Justice* No. 99 (Australian Institute of Criminology, 1998) p 3.
[82] Hunter, n 44, p 265.
[83] See eg New South Wales Bar Council, n 69, Rule 35A replicating to some extent s 41 *Evidence Act 1995* (NSW).

with or without the insistence of the prosecutor; a protective role that Spigelman CJ has noted "is perfectly consistent with the requirements of a fair trial".[84] Indeed, it has been suggested that protecting the complainant witness is in fact "part of the concept of a fair trial – one that is fair to the complainant, the accused and the community".[85]

CROSS-EXAMINATION – AN EMERGING DEFINITION OF "IMPROPER"

Both "the dignity and wellbeing of witnesses" and "the public credibility and moral integrity of the criminal process are jeopardised" by unrestrained cross-examination.[86] These concerns are not new. At common law, restraints on the cross-examiner are imposed by long established and well settled evidentiary rules.[87] Such rules are said to be established, at least in part, to enable revelation of the truth.[88] They are an instance of the court's inherent power to control the conduct of proceedings.[89] As Heydon J elaborated in *Libke v The Queen* (2007) 230 CLR 559 the common law has laid down rules to prevent:[90]

- questions that are offensive, intimidating, harassing, badgering, belittling, bullying, abusive or sarcastic;
- questions taking the form of comments on the witness or their testimony, or that cut off a witness's answers;
- compound questions, or questions that are otherwise misleading and confusing, for example, because they may be lengthy, include difficult vocabulary or use the negative;
- argumentative questions and questions resting on controversial assumptions.

Further, there is clear power to control irrelevant, unnecessary or repetitive questions,[91] and even limit lengthy questioning where it serves no forensic purpose.[92] Indeed, where a witness

[84] *R v TA* (2003) 57 NSWLR 444 at [8].
[85] King MS, "Therapeutic Jurisprudence, Child Complainants and the Concept of A Fair Trial" (2008) 32 Crim LJ 303 at 306.
[86] Hunter, n 44, pp265-266.
[87] *Libke v The Queen* (2007) 230 CLR 559 at 597-598.
[88] *Libke v The Queen* (2007) 230 CLR 559 at 599.
[89] *Mooney v James* [1949] VLR 22 at 28; a power retained under uniform evidence legislation see eg *Evidence Act 1995* (NSW) s 11.
[90] *Libke v The Queen* (2007) 230 CLR 559 at 597-604.
[91] *R v Kelly; Ex parte Hoang van Duong* (1981) 28 SASR 271.

requires protection from suggestibility, even the leading question form, so prized by the cross-examiner, may be restricted.[93]

The list of disallowable questions and questioning approaches at common law appears comprehensive, though in need of consolidation. The content of the questions, their form and the manner and tone of the cross-examiner can all be subject to control. Seemingly, the power to disallow questions is there both to facilitate communication and protect the witness. And yet, dissatisfaction with the way this power has been used has led to legislative intervention.

The introduction of *Evidence Act 1995* (NSW & Cth), and in particular the enactment of s 41, meant the end of total reliance in those jurisdictions upon common law mechanisms to restrict improper questioning during cross-examination.[94] In its original form, s 41 added little to the existing common law definition of an improper question, or to the expectation on judicial officers to intervene. Effectively the court was given *discretion* to disallow questions that were deemed misleading or *unduly* annoying, harassing, intimidating, offensive, oppressive or repetitive. In addition, and arguably going beyond the common law, the section included a non-exhaustive list of characteristics of the witness to be taken into account by the court in determining whether a question was improper, such as their age, personality and education.[95] This can be seen as a direct exhortation to the judge or magistrate to consider the impropriety of questions from the perspective of the particular witness, rather than from the perspective of the hypothetical "normal" witness.[96] To ask, for example, is this question intimidating for *this* child?

In addition, section 42 *Evidence Act 1995* (NSW & Cth)[97] was enacted to permit judicial restriction of leading questions where "the facts concerned would be better ascertained if leading questions were not used".[98] Whilst s 42 is not the primary focus of this article, it is important to acknowledge that it, either alone or in conjunction with s 41, provides a

[92] *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (no 3)* (1990) 20 NSWLR 15 at 23.
[93] *Mooney v James* [1949] VLR 22 at 28; *Stack v State of Western Australia* (2004) 29 WAR 526; see, also, s 42 *Evidence Act 1995* (NSW & Cth) and *Evidence Act 2008* (Vic) discussed below.
[94] *Evidence Act 1995* (NSW & Cth) s 11 establishes that the general powers of the court to control the conduct of proceedings are not affected, except in so far as they may be inconsistent with the Act.
[95] *Evidence Act 1995* (NSW) s 41(2)(a).
[96] Australian Law Reform Commission. n 51, at [116].
[97] Now replicated in s 42 *Evidence Act 2008* (Vic).
[98] Section 42(3)*Evidence Act 1995* (NSW & Cth) and *Evidence Act 2008* (Vic).

mechanism for judicial intervention to facilitate communication and protect a witness. For example, where a child witness is particularly suggestible or incapable of understanding a question due to their age, s 42 enables the judge to intervene to disallow leading questions in cross-examination.[99]

Concerns over the failure of judicial officers to apply s 41 were noted within just two years of its introduction, with calls to ensure they were on their "guard" and "suitably experienced and trained in deciding when to intervene, and in the manner of that intervention."[100] Five years on, the NSW Legislative Council Standing Committee on Law and Justice was more damning:

> These provisions should have prevented the distressing experiences of child witnesses … but clearly they have often failed to do so.[101]

In 2003, Wood J commented that s 41 was "a power which is seldom invoked".[102] The following year he delivered a paper observing that the "careful exercise of this power, and proper control of the cross-examination of child witnesses, has not always been well-managed by judges who *very often* felt reluctant to interfere".[103] Late in 2004 the NSW Adult Sexual Assault Interagency Committee concluded that s 41 was 'under-utilised.' The Committee proposed that it be amended to place greater restrictions on the tone and manner of questions asked by the cross-examiner, along with including a more complete list of characteristics of the witness to be taken into account in judging the propriety of the question.[104]

Ultimately, in response to these mounting criticisms, the NSW Parliament inserted s 275A into the *Criminal Procedure Act 1986* (NSW), which took effect from 12 August 2005 in all criminal proceedings. Significantly, s 275A imposed a *duty*, rather than a discretion, on judicial officers to intervene and disallow improper questions, whether or not an objection was

[99] Section 42(2)(d) directs judicial attention to, amongst other things, "the witness's age".
[100] New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol 5, p 1087.
[101] Legislative Council Standing Committee on Law and Justice, n 3, p 79.
[102] Wood J, "Sexual Assault and the Admission of Evidence" (Paper presented at Practice Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), pp 30-31.
[103] Wood J, "Child Witnesses: The New South Wales Experience" (Paper presented at the Australian Institute of Judicial Administration: Child Witnesses – Best Practice for Courts, Parramatta, 30 July 2004), p 4.
[104] NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004) p 37.

raised by the prosecutor.[105] It expanded the definition of improper questions to include consideration of the manner and tone in which the question was asked, as well as whether the question had no basis other than a stereotype. Further, it extended the range of witness characteristics to be taken into account.

Section 275A of the *Criminal Procedure Act 1986* provided (emphasis added):

> Improper questions
>
> (1) In any criminal proceedings, 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 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 sexist, racist, cultural or ethnic stereotype.
>
> (2) Without limiting the matters that 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, including age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality, and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

In clarification of the existing common law and statutory position, the section also provided that a question was not disallowable merely because it "challenges the truthfulness of the witness"[106] or required the witness to "discuss a subject that could be considered distasteful or private."[107] Further, if the court failed to disallow a question, in circumstances where that question was improper, this had no effect on the admissibility of evidence given in response.[108]

[105] *Criminal Procedure Act 1986* (NSW) s 275A(5).
[106] *Criminal Procedure Act 1986* (NSW) s 275A(3)(a).
[107] *Criminal Procedure Act 1986* (NSW) s 275A(3)(b).
[108] *Criminal Procedure Act 1986* (NSW) s 275A(5).

The legislative intent was clear: Section 275A was enacted to set a "new standard for the cross-examination of witnesses".[109] In conjunction with other amendments to the Act, s 275A was designed to prevent revictimsation, encourage reporting, reduce attrition rates and enable child complainants to "give the best evidence they can."[110]

In December of 2005, the Australian Law Reform Commission, together with the New South Wales and Victorian Law Reform Commissions, released a review of the *Evidence Act 1995* (NSW and Cth), concluding that "the use of s 41 to control improper questions during cross-examination is patchy and inconsistent."[111] The Australian and NSW Commissions recommended that s 41 be amended "to adopt the terms of s 275A of the *Criminal Procedure Act 1986* (NSW)".[112] Ultimately, on 1 January 2009,[113] a reinvigorated s 41 came into effect in both the Commonwealth and New South Wales Evidence Acts. At the same time, s 275A was repealed. Aside from a slight expansion of the definition of an improper question and the inclusion of a requirement that the court take into account the context in which the question is asked,[114] s 41 is largely identical to s 275A.

Whilst accepting the need for further legislative intervention, the Victorian Law Reform Commission took a different view. It recommended imposing a mandatory requirement on judicial officers to intervene *only* where a witness is categorised as "vulnerable".

> "The VLC is convinced that a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention."[115]

This approach requires an initial characterisation of vulnerability, directing attention to the particular characteristics of the witness to enable this determination, including in all cases where a witness is under the age of 18.[116] If the witness is classified as vulnerable, intervention to limit improper questions becomes mandatory. In effect, the judicial officer accepts a higher

[109] New South Wales, n 1.
[110] New South Wales, n 1.
[111] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) [5.91].
[112] Australian Law Reform Commission, n 111, Recommendation 5-2.
[113] *Evidence Amendment Act 2007* (NSW) sch 2.3[1].
[114] *Evidence Act 1995* (NSW & Cth) s 41(2)(c).
[115] Australian Law Reform Commission, n 111, [5.123].
[116] *Evidence Act 2008* (Vic) s 41(4).

duty of vigilance; they are called to be on their guard in specific circumstances rather than for all witnesses.

What is common to all three jurisdictions is the fact that judicial intervention is predicated on a determination being made that a question or "sequence of questions"[117] is improper. The definition of an improper question has remained uniform, in terms almost identical with those found in s 275A, although in Victoria, attention is not explicitly directed to the witness's vulnerabilities in the assessment of the propriety of questions themselves.[118] That being the case, the question must be asked: did s 275A "set a new standard for the cross-examination of witnesses" and in particular child complainants of sexual assault? And if not, what does this tell us about the potential failure of its successor, the new s 41 *Evidence Act 1995* (NSW & Cth) and s 41 *Evidence Act 2008* (Vic)?

CROSS-EXAMINATION – HAS LEGISLATIVE CHANGE LED TO CHANGED PRACTICE?

In order to investigate whether s 275A set a new standard for the cross-examination of child sexual assault complainants, a series of email interviews with experienced defence and prosecution barristers from the Sydney metropolitan area were conducted. The primary purpose was to determine whether there had been any change in the frequency of judicial intervention and prosecutorial objections to prevent improper questions during cross-examination after the enactment of s 275A in August 2005. In addition, the interviews sought to determine whether defence barristers had altered their practice of cross-examination after the enactment of that same section.

Six lawyers with lengthy experience in child sexual assault cases, both before and after the commencement of s 275A, were recruited: two prosecutors from the Officer of the Director of Public Prosecutions, together with four defence barristers, two from the NSW Public Defenders Office, and two from the private bar. Because of the small sample size, no claim is made that the views of the participant lawyers are statistically representative of the views all those who questioned child sexual assault complainants at trial in New South Wales during the relevant period.

[117] *Evidence Act 2008* (Vic) s 41(3).
[118] See *Evidence Act 2008* (Vic) s 41(4).

However, each participant had between 10 and 30 years post-qualification experience and collectively the group had almost 130 years. Accordingly, the extent of their experience with child sexual assault cases meant that participants were in a unique position to provide insight into the nature of cross-examination and the operation of s 275A. Participants were instructed to base their responses *only* on their own personal observations of criminal proceedings in child sexual assault cases in New South Wales.

Participants were asked to comment on whether they observed an increase, decrease or no change at all in the rate of judicial intervention to control cross-examination since the introduction of s275A. Responses varied little. Five out of six said there had been no change whatsoever in the frequency of judicial intervention to control cross-examination, either at the request of the prosecutor or of the court's own motion. One prosecutor said that there had been a slight increase after the commencement of s 275A, but that this had "tapered off". Overall, all practitioners felt there had been no lasting change.

Perceptions of whether the practise of cross-examination had altered since the commencement of s 275A were more varied. Defence counsel unanimously and unequivocally asserted no change to their own overall style and approach to cross-examining children since the introduction of s 275A. All four also said that s 275A has not impacted on the way they prepare for cross-examination of child sexual assault complainants.

By contrast, the two prosecutors perceived at least some change in the conduct of cross-examination since the commencement of s 275A. This does not indicate a conflict with the views of defence counsel who participated in the study. Defence counsel were reporting on their own practice of cross-examination, whereas, the two prosecutors were reporting on the cross-examination approach of a significantly larger group of defence lawyers, of varying levels of experience. One prosecutor stated that:

> The defence barristers I have seen cross-examine children are now clearly conscious of trying to limit confusing questions and appear fair in the manner that they cross-examine a child.

The prosecutor continued to specifically note positive changes in defence counsels' use of appropriate language in relation to the developmental levels of children they cross-examine. For example:

> [T]he positive changes were in the use of language. In my view the language was generally appropriate although prosecuting cases in the Western Suburbs meant that many of the children alleging offences were from very disadvantaged backgrounds and developmental levels were very low.

However, neither clearly indicated that the changes observed were a result of s 275A. Indeed, one prosecutor was adamant that the section played only a limited role in bringing this change about:

> I really don't think it had too much of an effect. [I]n my view the subtle change has been more in response to CCTV and to the community realisation of the trauma that victims/witnesses endure in the trial process.
> …
> In my view the language has also changed it [sic] being more temperate than what it was say 10, 15 years ago but I still maintain that it was not only referrable to 275A.

The view that the practice of cross-examination had changed significantly over the past two decades found resonance with a number of those surveyed. Participants pointed to a wider and more gradual cultural change due to a confluence of factors, rather than a recent change directly linked to the enactment of s 275A:

> Compared to 15 or 20 years ago there is a massive change in the way cross examination is approached. It would be a brave cross-examiner who aggressively cross examined a child in front of a jury … In truth those hard nosed cross examinations are a thing of the past …

Ultimately, the fact that defence lawyers noticed no change at all, following the enactment of s 275A, and the two prosecutors were equivocal about the small change that they had observed, suggests that s 275A had little if any impact on the way in which defence barristers conduct cross-examination.

Caution must be exercised in drawing conclusions from these responses, given that they represent the perceptions of only six practitioners, albeit with extensive experience of

conducting or observing the cross-examination of child sexual assault complainants. However, with no reported change in the frequency of judicial intervention and little if any reported change in conduct of cross-examination, the clear indication is that s 275A failed to achieve the purpose for which it was enacted. Far from setting a new standard in cross-examination, s 275A did not provide any additional protection for child sexual assault complainants from the trauma of being questioned by the defendant's lawyer. This failure demands explanation. With s 275A now largely replicated in s 41 *Evidence Act 1995* (NSW & Cth) and, to a large extent, in s 41 *Evidence Act 2008* (Vic), there is the potential for a similar failure on a broader scale.

IMPROPER CROSS-EXAMINATION - A QUESTION OF PERSPECTIVE

An explanation for the failure of the legislature to achieve its purpose is apparent from the responses of the prosecution and defence barristers in the study. In their view, improper questions, as understood in terms of the definition in s 275A, were not generally being asked before the enactment of that section, therefore, no increase in the frequency of intervention by the trial judge could be expected after its enactment. From their perspective, s 275A was largely unnecessary, and its limited impact entirely predictable.

Defence barristers in the study indicated a strong belief that the way they conducted cross-examination of child sexual assault complainants before s 275A commenced was nothing short of appropriate. One defence barrister said:

> My overall style before the changes was not intimidatory in any way, but aimed to achieve the desired effect of well prepared questioning. I have always tried not to be confusing to child witnesses (although this has become better with experience).

Another expressed the belief that if defence counsel is seen to be unfair, bullying, aggressive or in any way discourteous to a child witness, then they can alienate the jury, thereby failing to serve their client. The self-perception of defence barristers in the study was to some extent vindicated by prosecutors. One prosecutor was most supportive of the defence barristers:

> My experience was that the defence barristers I had dealings with always conducted their cross examination in a generally appropriate manner. On some occasions there was a

> tendency for defence counsel to ask questions that clearly confused the child. My view was that this was not always by design.

This directly complemented the view of one defence barrister:

> Please don't perpetuate the myth that there is a 'school' of improper questioning. There isn't. Improper questions are rare and usually arise because a question is poorly framed…

The prevailing explanation for why s 275A had no impact on the cross-examination of child sexual assault complainants was that the section only prevented *unfair* cross-examination. Defence barristers and prosecutors alike cited this idea:

> [B]ecause of the protections contained within the requirement that the question be 'unduly' annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive before it is disallowable … Much of that which the section prohibits is impermissible at common law.[119]

> [I]t confirms that bad and irrelevant cross-examination cannot occur. Any defence barrister … who cross examines properly … would not have an issue with the section.[120]

> I am personally of the view that none of the types of questioning which s.275A / s.41 prohibits advances the case of an accused person …[121]

On the view of these practitioners, there has been no change in questioning approach because no change was necessary: improper questions were not and are not generally being asked. This position apparently contradicts the empirical research on the traumatic experience of child sexual assault complainants and the view taken by the Australian, New South Wales and Victorian Law Reform Commissions. Necessarily, this indicates a discord between a trial-centred and child-centred interpretation of improper questioning. The responses demonstrate that lawyers in the study, and almost certainly the judges before whom they appeared, were operating with a trial-centred interpretation of improper questioning: an interpretation controlled by the principle of fair trial, understood in the context of the roles and responsibilities of lawyers and judges within the system. Broadly speaking, on a trial-centred interpretation, if a question is required in order to robustly challenge a witness it will not be improper, regardless of its traumatic effect. Accordingly, the conflict between the wellbeing of

[119] Defence barrister.
[120] Prosecutor.
[121] Defence barrister.

the child and the dictates of the principle of fair trial is to some extent intractable. One defence barrister eloquently expressed this sentiment:

> Many child sexual assault complainants are real victims of horrific crimes … Anyone who has compassion could not help [but] be pained by the prospect of causing distress to a child sexual assault complainant who is a real victim, or even to a child witness who is so dysfunctional that s/he has resorted or been pressured into making a false complaint.
>
> This does make me uncomfortable, but is outweighed by my belief in the centrality of a civilised society of the rule of law and the entitlement of a person accused of crime to defend such charges. Child sexual assault complainants must be able to be challenged.

Support for a trial-centred interpretation of s 275A can be drawn from consideration of its drafting. For example, the section allows for a questions to be harassing, intimidating, offensive, oppressive, humiliating or repetitive, provided it is not *unduly* so.[122] The question is not, does the child experience the question as, for example, oppressive or humiliating, but is this level of oppression and humiliation *due* – due by the rules and norms of the adversarial trial. Further, in direct acknowledgement of the purpose of the cross-examiner, the section expressly permits challenges to the "truthfulness of the witness or the consistency and accuracy of any statements" made by them.[123] Indeed, it must be acknowledged that trauma may well result where a child is asked questions which demonstrate they are in fact lying. It is apparent, then, that s 275A is drafted such that the likelihood that a question will produce trauma for the child does not, of itself, demonstrate its impropriety.

But there is a competing interpretation of an improper question: a child-centred interpretation relating more directly to the experience of the child than to the dictates of the adversarial trial.

With respect to misleading and confusing questions, a child-centred interpretation is clearly intelligible: if a question is, *in fact*, misleading or confusing for the child, then it should be disallowed.[124] Whether a question is or is not confusing cannot be answered by reference to the adversarial system of trial. It is a question best answered by those with knowledge of child development and linguistic competence, or for that matter, by the child him or herself. Disallowing a question that is misleading or confusing does not require the balancing of the

[122] *Criminal Procedure Act 1986* (NSW) s 275A(1)(b).
[123] *Criminal Procedure Act 1986* (NSW) s 275A(3)(a).
[124] *Criminal Procedure Act 1986* (NSW) s 275A(1)(a).

child's interests against those of the accused in securing a fair trial. Instead, it requires only judicial appreciation of the fact of the child's confusion. Intervention in these circumstances does little to effect the *substance* of what is being asked – counsel can simply reword a question or ask a series of less linguistically complex questions directed at achieving the same result.

With respect to trauma, however, a child-centred interpretation can be a starting point only. As argued above, a degree of trauma is clearly accepted in the drafting of s 275A, in that judicial officers are required to discriminate between, for example, due and undue oppression and humiliation. Indeed, there is nothing in the drafting of s 275A to support a presumption that a question is improper if it is likely to produce trauma. Accordingly, a child-centred interpretation requires, at most, close and continued attention being paid to the experience of the particular child in the witness stand, and a commitment by the trial judge to ensure that the least possible trauma is occasioned. Arguably this is exactly the intended effect of the alternate drafting of s 41 *Evidence Act* 2008 (Vic), requiring as it does the initial determination of vulnerability as a precondition of closer judicial scrutiny.[125] In relation to s 275A, support for a child-centred interpretation can be drawn from the requirement that the court take into account the witness's "age, education, ethnic and cultural background, language background and skills, level of maturity and understanding and personality" in the determination of whether a question should be disallowed as improper.[126]

However, the existence of a tenable child-centred interpretation of improper questioning can make little difference whilst legal participants to a trial operate with a trial-centred interpretation. Accepting for a moment the correctness of a more child-centred interpretation, the responses of defence and prosecution barristers in the study may simply indicate a failure to *perceive* that improper questions were being asked before the enactment of s 275A and continued to be asked after its enactment. In other words, those responsible for asking the questions, objecting to them or disallowing them were unaware of the level of confusion and trauma being experienced by children in the witness stand.

[125] Australian Law Reform Commission, n 111, [5.123].
[126] *Criminal Procedure Act 1986* (NSW) s 275A(2)(a).

Such a failure to perceive is explicable on the basis that legal participants to a trial have lived, breathed and absorbed the norms of the adversarial system. Their roles have been defined by it, and they are so long practised in the arena that their lens has become the adversarial lens, to the virtual exclusion of other perspectives.[127] Arguably, for the legal participants, the trial-centred interpretation of an improper question is all there is; it is the basis for any decision to ask, object or intervene.

The tension between trial-centred and child-centred interpretations of improper questions is difficult to reconcile. It is a tension that reflects the complicated balancing of competing interests and perspectives that must necessarily take place in a child sexual assault trial. As should be clear, s 275A, now replicated in s 41 *Evidence Act 1995* (NSW & Cth) and to a significant extent in s 41 *Evidence Act 2008* (Vic) permits competing interpretations. What is apparent from this discussion, from the views of those who sought better protection for vulnerable witnesses, and from the views of lawyers in the study, is that the location of the line to be drawn between acceptable and unacceptable questioning in cross-examination is unclear and strongly contested.

CONCLUSION

Is there a way forward for the protection of children? In so far as the explanation for the limited impact of s 275A lies with the failure of legal participants to perceive fully the psychological impact of cross-examination, progress can be made. Perceptions can change.[128] Indeed, according to barristers participating in the study, change *has* occurred over the past two decades, though not as a result of s 275A. From their perspective, consciousness has arisen of the need to limit confusing questions and conduct cross-examination in a way that is fair to the child. Yet for advocates of reform, this change has not gone far enough. Tellingly, none of the barristers involved in the study had undertaken any formal training with respect to the operation of s 275A. Whilst the Judicial Commission of New South Wales conducted two seminars for judicial officers specifically in relation to the operation of s 275A,[129] it is not known whether any of the judges before whom the barristers appeared attended. It should be

[127] See generally, Easteal P, *Less Than Equal* (Butterworths, Sydney, 2001) Ch 1.
[128] Easteal, n 127, Ch 12.
[129] Advice from the Judicial Commission of New South Wales.

acknowledged that, to the extent that education can successfully bring about a reconciliation of trial-centred and child-centred interpretations of what amounts to an improper question, it will need to principally target judicial officers and prosecutors.[130] It is these legal participants, rather than defence lawyers, whose role at trial, at least in part, is to protect the child witness.

It is not the purpose of this article to suggest the content of further education. However, to impact the adversarial lens, such education will need to be robust, challenging and comprehensive. Consideration should be given to linking this education to specialist accreditation required before legal participants can take their place in a child sexual assault trial.[131] On a cautionary note, to promote a conversation to reconcile competing perspectives, it may be insufficient to simply further expose practitioners to the perspectives of children, child psychology and linguistic development. Educators and reformers need to appreciate the roles of legal participants and the balancing acts that take place within the adversarial system of trial.

Even with comprehensive legal education and specialist accreditation, the adversarial battle lines remain set, not least by the prospect of appeal. It must be recognised that a failure to intervene to protect the complainant witness is unlikely to result in appeal as an acquittal cannot be challenged,[132] even where it may be the product of improper cross-examination. This can be contrasted with the situation where a judge intervenes to restrict or control questioning by the defendant's lawyer. If the defendant is then convicted, the intervention may well be subject to appeal if it can be maintained that the questioning of the complainant was in fact proper, or that the intervention demonstrated partisanship for the prosecution in the eyes of the jury. Whilst there is appellate authority indicating that the adoption of a more proactive role by trial judges will be condoned, [133] arguably the spectre of appeal results in a systemic bias towards non-intervention in relation to questions asked in cross-examination.[134]

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[130] Cf, Cashmore and Trimboli, n 9 at 61-64, where the authors conclude that a lack of specialist training for judges and prosecutors limited the effectiveness of the NSW child sexual assault specialist jurisdiction pilot.
[131] See, generally, Cossins, n 5 for a discussion of the merits of a specialist jurisdiction.
[132] See, eg, *Crimes (Appeal and Review) Act 2001* (NSW) s108, though under s 107 exceptions exist for appeal against acquittal by a jury where the jury has been directed to acquit, or where the accused is acquitted by a judge sitting in the absence of a jury.
[133] See, eg, *R v TA* (2003) 57 NSWLR 444.
[134] Ellis J, "Judicial Activism in Child Sexual Assault Cases" (Paper presented at National Judicial College of Australia Children and the Courts Conference, Sydney, November 2005), in Australian Law Reform Commission, n 112, [5.111].

According to Hunter, concerns over the appearance of partisanship may be addressed through pre-recording of evidence.[135] Following such a pre-trial procedure, interchanges between legal participants can be edited out before the evidence adduced is played to the jury at trial. Thus, challenges to, and rulings on, the propriety of questions asked in cross-examination can be made without the potential that the judge will be seen, in the eyes of the jury, to be supporting the prosecution. Appeals from such rulings can squarely focus on the content and form of questions, and the manner of the cross-examiner, facilitating a solid conversation to reconcile competing claims on the definition of an improper question. Moreover, the pre-trial hearing of evidence offers the potential for prosecutors to lodge interlocutory appeals against judicial refusals to disallow questions,[136] enabling the Director of Public Prosecutions to take a more proactive role in defining the line between acceptable and unacceptable cross-examination. This is so because the limitations on appeals against acquittal do not apply to appeals heard before the conclusion of a trial.

It is clear that the mere enactment of s 41 *Evidence Act 1995* (NSW & Cth) and s 41 *Evidence Act 2008* (Vic) is unlikely to be sufficient to produce the change desired by law reform bodies and those who advocate for stronger protections for child sexual assault complainants. Only time will tell whether these sections, in combination with other reforms, education and the gradual shift to a more child-centred approach, will reduce trauma to an acceptable level and prevent the obfuscation of the truth. Optimism must be tempered by an acknowledgement that limits on reform are imposed by the very nature of the adversarial system. While ever the method adopted for the discovery of truth and protection of the innocent is adversarial, that is, while defence lawyers take to their feet with the objective of challenging the child sexual assault complainant, a significant level of trauma is unavoidable. Ultimately then, should reform efforts fail, serious consideration will need to be given to the appropriateness of a less-adversarial model of discovering the truth; a model that does not pit the defence lawyer against the child sexual assault complainant and yet does not compromise the protection provided to the innocent accused.[137]

[135] Hunter, n 44, p 288.
[136] See, eg, *Criminal Appeals Act 1912* (NSW) s 5F.
[137] See, especially, Cossins, n 5 at 330-334; *R v D* [2002] QCA 445, Jerrard JA at [46].