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South Australian Law Reform Institute

Review of Witness Competence in South Australia

Background Information & Consultation Questions

About SALRI

The South Australian Law Reform Institute (SALRI) is an independent non-partisan law reform body based at the Adelaide University Law School that conducts inquiries – also known as references – into areas of law. The areas of law are determined by the SALRI Advisory Board and may also be at the request of the South Australian Attorney-General or other parties. SALRI examines how the law works in South Australia and elsewhere (both in Australia and overseas), conducts multidisciplinary research and consults widely with the community, interested parties and experts. Based on the research and consultation conducted during a reference, SALRI then makes reasoned recommendations to the State Government, enabling the Government and Parliament to make informed decisions about any changes to relevant law and/or practice. SALRI's recommendations may be acted upon and accepted by the Government and Parliament. However, any decision on accepting a recommendation from SALRI is entirely an issue for the Government and/or Parliament.

When undertaking its work, SALRI has a number of objectives. These include identifying law reform options that would modernise the law, resolve identified issues with the law, consolidate areas of overlapping law, remove unnecessary laws, or, where desirable, adopt a legislative model from other States and Territories.[1]

Background

SALRI has been requested by the State Attorney-General, the Hon Vickie Chapman MP, to examine the present law in relation to witness competence under s 9 of the *Evidence Act 1929* (SA). SALRI was asked to consider the role and operation of current law and practice in South Australia, how competence should be defined and assessed and the distinction between sworn and unsworn evidence and its associated implications. As part of this review, an analysis of current law and practice in other jurisdictions regarding competence is required, to determine whether legislative and/or other reforms are appropriate.[2]

This reference follows the Criminal Justice Report released by the Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse in August 2017. There have been various concerns in relation to the apparent complexity and outdated nature of present law

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[1] This has particular application in relation to witness competence as the *Uniform Evidence Act* model in force in the ACT, the Commonwealth, NSW, Victoria, and the Northern Territory is different to the South Australian approach.

[2] SALRI acknowledges the valuable background research of Sarah Kapadia, Elaine Marinas, Bianca Tramaglino, Eleanor Cattrall, Simone Basso, Will Richards, Keagan Lee and Patrick O'Neill. SALRI is grateful for the contribution and input of Olga Pandos, Lilly Deluca, Isabel Brewer, Charlotte Wunderlitz, Rachel Win Tan, Lukas Price, Jemma Holt, the Hon David Bleby QC and the Hon Geoff Muecke to this reference.

and practice in South Australia and its particular implications for children and persons with a disability.[3] Recommendation 62 of the Royal Commission's Report proposed legislative reform for the assessment and determination of competence in the context of children.[4] The Report recommended legislative reforms to clarify the current law throughout Australia and provide that a child's competency should be assessed by asking a series of simple, non-theoretical questions.[5] In circumstances where a child [or any other witness] is unable to provide sworn evidence, a court should ask the child or other witness to promise to tell the truth prior to the witnesses' testimony. The Royal Commission had received evidence of various issues regarding competence testing, such as a lack of consistency in the types of questions being asked. Further, evidence presented to the Commission suggested that an ability to answer conceptual questions, such as those about the truth or a lie, is not an accurate reflection of the capacity to give cogent and accurate evidence.

Professor Martine Powell and her colleagues submitted a report to the Royal Commission involving a qualitative inquiry interviewing 14 judges, 11 defence counsel, 12 prosecutors and six witness assistant advisors on competence testing.[6] Results revealed a widely held belief that competence tests do not assess the child's accuracy to give reliable and truthful evidence and that '[m]any of the stakeholders perceived that whether a child passed the competence test and was able to give evidence under oath had little impact on a jury'.[7] Psychological findings establish that 'children from preschool years onward often show sophisticated understanding of the concepts of lying and truth-telling'[8] and that there is 'no correlation between age and honesty'.[9]

In November 2021, SALRI publicly released its major Report into the role and operation of Communication Partners (also called intermediaries) to assist parties with complex communication needs to provide their best quality evidence, both in and out of court. There is an intersection between the question of witness competence and the application of the CP role.

Law of Competence

The law of competence is a key premise of evidence law. It refers to the legal competence to give sworn and/or unsworn evidence and the capacity of an individual to function as a witness.[10]

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[3] For example, the Hon Geoff Muecke, former Chief Judge of the District Court of South Australia, has previously noted his concerns. Persons with a disability include those with an intellectual disability or a cognitive impairment.

[4] The Report recommended legislative reforms to clarify the current law throughout Australia. See *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) 85. However, this issue and underlying concern over present law and practice also arises to other classes of witnesses such as persons with a cognitive impairment or intellectual disability, Aboriginal witnesses and witnesses from non-English speaking migrant backgrounds. The particular problems confronting Aboriginal witnesses and accused are many and are well documented.

[5] Non-theoretical questions included questions about a child's age, school and family: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (2017) 85.

[6] Martine Powell et al, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (Report, Royal Commission into Institutional Responses to Child Sexual Assault, August 2016).

[7] Ibid 38. See also Sonja Brubacher et al, 'Children's Competence to Testify in Australian Courts: Implementing the Royal Commission Recommendation' (2019) 42(4) *University of New South Wales New Journal* 1386.

[8] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 97 [4.8].

[9] Karen Schultz, 'The Need for Competence Tests: Queensland Judicial Perspectives on Non-Accused Child Witnesses in Criminal Proceedings, Part 1' (2003) 22 *University of Queensland Law Journal* 199.

[10] The distinction between 'competence' and 'capacity' must be noted. Whilst these terms are often used synonymously, in the context of health law, each term adopts a distinct definition. Capacity is defined as decision-making ability, indicating the individual is capable of understanding their decision options. Competence denotes the cognitive ability of an individual to undertake a specific task. For further information, see The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council, *A National Framework for Advance Care Directives* (September 2011) COAG Health Council,

Competence testing is designed to ensure relevant and probative evidence is admitted into court and safeguards a potential witness who may lack the capacity to function as a witness.[11] Historically, competence tests were introduced to address the perceived inherent unreliability of the testimony of children,[12] persons with a cognitive impairment or other witnesses treated as 'unreliable' such as Aboriginal and Torres Strait Islander witnesses.[13] The witness had to appreciate the solemn nature of an oath, the underlying religious aspects and the 'divine' consequences of failing to tell the truth.[14]

The concept of 'competence' was criticised, even in the 1800s, and has increasingly been adapted to contemporary views and understanding.[15] However, it retains (at least in South Australia) an element of the original religious undertones. For example, an understanding of the divine sanction attached to the breach of an oath may still form the basis of a court's competence assessment.[16] However, should this aspect bear any relevance today? The Australian Law Reform Commission ('ALRC') described the common law competence test as 'far from satisfactory', relying on an individual's 'moral and religious understanding'.[17] Further, '[a] person's understanding of moral matters as evidenced by his [or her] comprehension of the oath might bear very little relationship to his [or her] ability to comprehend questions and formulate rational responses'.[18] Following the amendments to the Uniform Evidence Law ('UEL'), the focus surrounding competence in the UEL jurisdictions has shifted away from religion, to the importance of understanding the legal sanctions attached to untruthful answers in evidence.[19]

Until the early 1990s, children were considered 'inherently unreliable' as witnesses.[20] Similar views of witnesses with an intellectual disability were also held.[21] However, it is now well-

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<http://www.coaghealthcouncil.gov.au/Publications/Reports/ArtMID/514/ArticleID/63/National-Framework-for-Advance-Care-Directives>. See also, Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 96.

[11] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 96.

[12] See, for example, *R v Williams* (1836) 7 C & P 320, *R v Collard* [1837] NSWSupC 1 (*The Australian*, 7 February 1837); *R v Nicholas* (1846) 2 Cox CC 136; 'An Extraordinary Acquittal', *Sydney Monitor*, 6 February 1837, 3. See *R v Roach* [1841] TASSupC 30 (*Launceston Advertiser*, 8 July 1841) for the almost farcical examination of a child by the trial judge who was deemed unfit to give evidence as she did not go to Church and was unable to explain the exact nature of an oath. The Attorney-General suggested that many jurors would also have found it difficult to have explained this.

[13] Aboriginal witnesses were deemed as 'incompetent' witnesses who were unable to swear an oath as they did not believe 'in a future state of reward and punishment': *R v Fitzpatrick and Colville* [1824] NSWSupC 3; [1824] NSWKR 2 (*Sydney Gazette*, 24 June 1824, 2). Indigenous witnesses lacked the necessary 'religion' in the eyes of British law to appear as witnesses in the colonial courts. See, for example, *R v Billy* [1840] NSWSupC 82 (*Sydney Herald*, 10 November 1840); 'The Blacks', *The Australian*, 21 September 1839, 2.

[14] See *R v Squires & McCourt* [1837] NSWSupC 79 (Sydney Herald, 6 November 1837).

[15] Nicholas Bala et al, 'The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform' (2010) 18 *International Journal of Children's Rights* 53.

[16] See, for example, *R v Muller* [2013] ACTCA 15. This case is illustrative of a competency inquiry of a witness under 10 years of age, based on an understanding of religion.

[17] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 98.

[18] Ibid 99.

[19] The UEA approach still presents difficulties. See Michael Harris and Gregor Urbas, 'Children's Unsworn Evidence: Historical Developments and Contemporary Issues' (2017) 40(4) *University of New South Wales Law Journal* 1392.

[20] ALRC, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [14.15]. See also *Hargan v The King* [1919] HCA 45; (1919) 27 CLR 13, 18 (Barton J).

[21] Janine Benedet and Isabel Grant, 'Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases' (2012) 50 *Osgoode Hall Law Journal* 1, 9.

established that both persons with an intellectual disability[22] and children are fully capable of providing honest, cogent and accurate testimony, especially if asked appropriate questions with the appropriate supports.[23] This accords with the views of many leading researchers. It was also a key premise of the SA *Disability Justice Plan*:

> Vulnerable witnesses are capable of providing comprehensive and reliable testimony but may come up against barriers due to misconceptions about their capability or credibility and because they are not able to access the support they may require to give evidence.[24]

The issues and implications associated with competence are not confined to the criminal law and have application elsewhere (such as in civil and family law). Five key questions are raised in this reference:

1. What should be the test or criteria to measure or assess competence?
2. How should competence be assessed?
3. Who should be responsible for the assessment of competence?
4. Where and when should competency be assessed?
5. What does competent to give evidence mean?

The Current Law

South Australia

South Australia is one of the remaining Australian jurisdictions that has not adopted the UEL. Consequently, South Australian courts rely on the competence test set out in s 9 of the Evidence Act 1929 (SA), which outlines a two- stage test.

First, a person is presumed to be capable of giving sworn evidence unless the court determines the person 'does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence'.[25] It is important to note the Act remains silent as to how a judge should assess whether the person has a 'sufficient understanding'.

Second, where there is doubt about the competence of the witness, the court will ask questions to assess the witness' understanding. For the purposes of this reference, the term 'person' under s 9 *Evidence Act 1929* (SA), includes a child.[26]

In cases where the competence of a witness must be assessed, this means the witness has not met the initial threshold of a 'sufficient understanding' to give sworn evidence. In these circumstances, the judge proceeds to the second stage of the test, in which a person may be

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[22] See Mark Kebbell, Christopher Hatton and Shane Johnson, 'Witnesses with Intellectual Disability in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23,; Rebecca Milne and Ray Bull, 'Interviewing Witnesses with Learning Difficulties for Legal Purposes' (2001) 29 British Journal of Learning Disabilities 93, 96; Mark Kebbell and Chris Hatton, 'People with Mental Retardation as Witnesses in Court' (1999) 37 *Mental Retardation* 179.

[23] See Robyn Layton, 'The Child and the Trial' in Justice Tom Gray, Martin Hinton and David Caruso (eds*), Essays in Advocacy* (Barr Smith Press, 2012) 201; Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2012) 29–32; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 304–5 [14.15]–[14.18].

[24] Attorney-General's Department, *Disability Justice Plan 2014-2017* (SA), 9.

[25] *Evidence Act 1929* (SA) s 9(1).

[26] Ibid; *R v Meier* (1982) 30 SASR 126; *RJ v* R (2010) 208 A Crim R 174.

permitted to give unsworn evidence, provided the criteria in s 9(2) *Evidence Act 1929* (SA) are satisfied:

1. The witness understands the difference between the truth and a lie; and
2. Is informed of the importance in answering questions truthfully;[27] and
3. Has indicated they will tell the truth.[28]

It is inherent within these criteria that the person must understand: the difference between telling the truth in an everyday social context and the additional gravity and importance of telling the truth in a court context; and the implications of not doing so.[29]

If these criteria are met, the person will not be permitted to give sworn evidence. Rather, their evidence will be unsworn. In accordance with s 9(4) *Evidence Act 1929* (SA), if unsworn evidence is given in a criminal trial, the judge must, at the request of a party, warn the jury of the need for caution in determining whether to accept the evidence and the weight given to it.[30] In this way, sworn evidence is effectively regarded as 'superior' to unsworn evidence.

The effect of this legislative distinction between sworn and unsworn evidence imposes an unnecessary perception regarding the credibility and reliability of evidence. It also creates a system whereby a person must meet a higher, unspecified threshold ('a sufficient understanding'), in order to qualify for sworn evidence. If the person is unable to meet this threshold, they will be required to give a lesser standard of evidence.

Further problems are raised in that the failure by a judge to warn the jury of the need for caution in determining whether to accept unsworn evidence and the weight given to it, or to sufficiently inquire into a witness' capacity to give sworn evidence, is likely to result in a conviction being overturned.

In its initial consultation (and reiterated to SALRI in its Communication partner reference), SALRI has been told the test to give sworn evidence in South Australia is complex and one that is likely to trouble many adults, especially children and persons with a disability or cognitive impairment.

There are two additional factors to consider in approaching witness competence and the giving of sworn evidence in court – the role of the witness oath and affirmation and the interaction of the provisions in the landmark *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) ('VW Act').

First, the act of taking an oath or affirmation requires a capacity to understand the importance of providing truthful evidence and the legal implications of failing to do so. It also serves as a public ritual, intended 'to impress upon the minds of witnesses … the crucial importance of telling the truth in the witness-box by comparison with other, everyday occasions.'[31]

In 2016, SALRI's Report Witness Oaths and Affirmations, examined the continued utility of oaths and affirmations and questioned the retention of the traditional oath or affirmation and instead recommended this ritual should take the form of a 'solemn promise to tell the truth', without the need to recite a long passage.[32] It was noted the objectives of the oath/affirmation would be best achieved through a simple, accessible and understandable secular promise, which is capable of

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[27] *Evidence Act 1929* (SA) s 9(2); see *R v Starrett* (2002) 82 SASR 115.

[28] Ibid.

[29] *R v Starrett* (2002) 82 SASR 115.

[30] See *R v Lomman* (2014) 119 SASR 463.

[31] *R v Whittingham* (1988) 49 SASR 67, 69 (King CJ).

[32] South Australian Law Reform Institute, *Witness Oaths and Affirmations* (Final Report, February 2016) 27, Recommendations 3–4 ('*Witness Oaths and Affirmations*').

being readily translatable in words and concept.[33] SALRI concluded that 'there should be prescribed a single form of non-religious affirmation or promise' and this 'should be in the form of a solemn promise to tell the truth'.

This approach is observed in the Northern Territory, which requires a simple promise to tell the truth.[34] In adopting this approach, the intent was to transform the oath into an 'immediately understandable' form, especially for Aboriginal and Torres Strait Islander peoples and persons who are culturally and linguistically diverse.[35]

The gravity of giving evidence in court is further emphasised through the legal consequences accompanying untruthful evidence, namely, perjury.[36] In 2016, SALRI's consultation revealed widespread (though not universal) support for a warning to be given to the witness explaining the legal implications of giving false or untruthful evidence and an acknowledgement of understanding.[37] The utility of this approach should be further explored. Particularly, the language and scope of any warning would have to be carefully crafted to ensure it is accessible and understandable to all witnesses. It has been suggested that a warning explained concisely and in plain English could serve to promote the solemnity of giving truthful evidence.[38] However, a mandated warning to all witnesses may serve as an unnecessary and inappropriate distraction, such as for children or witnesses with intellectual disability.

Second, the *VW Act* was introduced following publication of the *Disability Justice Plan* – which sought to implement safeguards to promote access to justice and inclusivity for vulnerable persons engaged in SA's legal system. A number of special measures were introduced to achieve this, including access to a Communication Partner and the use of pre-trial ground rules hearings.

The *VW Act* largely left witness competence intact and did not materially amend the operation of s 9 of the *Evidence Act*. There is a notable interaction between witness competence and the provisions of the *VW Act*. Specifically, the role and operation of special measures to assist a vulnerable person in their communications with the court, undertaking a competence assessment and giving evidence. For example, the *VW Act* facilitated special arrangements to protect a vulnerable witness when giving evidence. These arrangements included the presence of a support person, permitting alternative means to give evidence (for example, a communication device) or allowing the person to take regular breaks.[39] The relevance and utility of the *VW Act* provisions in the context of competence assessment is clear. There is a need to adapt competence assessment processes to the particular vulnerable person. This serves two key purposes. First, it dispels the outdated assumptions of unreliability and incompetence due to the presence of a cognitive impairment. Secondly, it promotes access to justice, inclusivity and autonomy, by recognising the capacity of the vulnerable person to function as a witness, with appropriate supports.

The intersection of the *VW Act* and witness competence is far from clear, notably in if or how witness competence is to be approached in the now routine use of an initial comprehensive account from a vulnerable witness serving as that witness's examination in chief at trial and the use of pre-trial cross-examination.

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[33] Ibid [67]. SALRI received various views as part of the Oath and Affirmations reference as to the retention of the traditional oath and affirmation which are set out in the 2016 Report.

[34] *Oaths, Affidavits and Declarations Act 2010* (NT) s 6(b), sch 1. A number of parties in SALRI Communication Partner reference, especially working with children, the disability sector or Aboriginal communities, favoured a simple secular promise to tell the truth, consistent with the NT model.

[35] Explanatory Statement, *Oaths, Affidavits and Declarations Act 2010* (NT) 1.

[36] *Criminal Law Consolidation Act 1935* (SA) s 242.

[37] *Witness Oaths and Affirmations* (n 32) 29 [74].

[38] Ibid [75]–[77]; Former Attorney-General John Rau also supported this approach.

[39] *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) s 9.

Uniform Evidence Law

The competency test set out in s 13 of the *Evidence Act 1995* (Cth) ('UEL') incorporates changes arising from the ALRC's 2005 inquiry into evidence law. These changes provided a more flexible approach for children and persons with an intellectual disability or cognitive impairment. A general competence test, premised on comprehension and communication skills, serves to safeguard vulnerable witnesses.[40] The law moves away from the previous religious connotations attached to the abstract concepts of the 'truth', a 'lie' and divine sanctions. Rather, an assessment of competence requires that a person has the capacity to understand questions about facts or answer questions relating to a specific fact in dispute.[41] Contrary to both the common law and the present law in South Australia, the UEL is neutral in its treatment of sworn and unsworn evidence.[42] Most notably, unsworn evidence is not characterised as 'inferior' to sworn evidence.[43]

In cases where the competence of a witness is raised, a court may rely on 'relevant specialised knowledge' of a qualified expert.[44] The UEL provides a procedure for giving unsworn evidence, which instructs a trial judge to inform the witness that:

1. It is important to tell the truth; and
2. The witness may be asked questions which they cannot answer or do not remember. If this arises, the witness should inform the court; and
3. The witness may be asked questions based on the truth of statements made in the question. The witness should not agree with statements the witness believes to be untrue.[45]

The UEL still presents difficulties.[46] For example, the failure of the trial judge to adhere to the procedure will be very likely to render the evidence of the relevant party inadmissible.[47]

The process of competence assessment is effectively reversed under the *UEL*. The second stage of the competence test is provided under s 13(3) *UEL* – when a person who is competent to give evidence, but is not competent to give sworn evidence about a fact. In order to give sworn evidence, the person must have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

There is a significant difference between s 9 *Evidence Act 1929* (SA) and ss 12 and 13 *UEL*. The South Australian law incorporates an express legislative presumption of competence to give sworn evidence. This is not present under the *UEL*. Rather, the law provides that every person is competent to give any evidence (not sworn evidence). The *UEL* re-conceptualises the assessment of competence as one of capacity – whereby the potential witness must have the capacity to understand a question about a fact and provide a coherent answer. This enforces a lower threshold and frames a very different question from that posed in the South Australian law. As a result, the *UEL* allows a much wider range of competence to give evidence, whether sworn or unsworn.

Both Acts require similar considerations concerning competence to give sworn evidence, but at different stages of the inquiry. The process of that inquiry requires some explanation of the more serious nature of the obligation and, under the present South Australian law, of the difference between an oath and an affirmation. These are abstract concepts and distinctions which are

[40] *Evidence Act 1995* (NSW) s 13; *Evidence Act 2008* (Vic) s 13; *Evidence Act 2001* (Tas) s 13; *Evidence Act 2011* (ACT) s 13; *Evidence (National Uniform Legislation) Act 2011* (NT) s 13.

[41] *Evidence Act 1995* (Cth) s 13(1).

[42] Dyson Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017) 5.

[43] *R v GW* (2016) 258 CLR 108.

[44] *Evidence Act 1995* (Cth) s 13(8).

[45] Ibid s 13(5).

[46] See Michael Harris and Gregor Urbas, 'Children's Unsworn Evidence: Historical Developments and Contemporary Issues' (2017) 40(4) *University of New South Wales Law Journal* 1392.

[47] Ibid 1405-1414. See also Dyson Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017 5; SH v R (2012) 83 NSWLR 258.

beyond the understanding of many persons who are unquestionably competent witnesses for the purposes of the South Australian Act. This in turn raises questions about whether the present system of oaths and affirmations should be maintained.

The Operation of the Competence Test

The inquiry to assess competence raises a number of issues. Most notably, it is within the court's discretion to determine competence, in the absence of an established framework, providing necessary direction. The implications of failing to adequately assess or examine competence has major consequences.

The concepts of truth and a lie are abstract and can be difficult, especially for a child or person with an intellectual disability to explain. The further distinction between sworn and unsworn evidence in South Australia is complex and problematic, arguably relying upon outdated assumptions regarding the reliability of different forms of testimony. It is dubious whether sworn evidence should be regarded as superior and more reliable than unsworn evidence. The present law may be outdated in retaining these aspects, and arguably other aspects such as the appropriateness of an oath containing religious connotations.[48]

The practical application of s 9 *Evidence Act 1929* (SA) is determined on a case by case basis. Although the requirements under s 9(2) *Evidence Act 1929* (SA) are not instructive, the section provides for some flexibility, by allowing the court to determine the most appropriate course of action to establish competence. Over time, case law has provided some instruction, aiding a court in its approach to satisfy the requirements. For example, in explaining the importance of telling the truth, a judge may refer to specific legal sanctions likely to be imposed if the witness is untruthful, such as perjury.[49]

There are still various legal and practical issues arising from present law and practice. Is the distinction between sworn and unsworn evidence logical?[50] Should the focus be on a witness's capacity? What questions should be used to effectively determine competence that the vulnerable witness can also understand? Who should conduct such questioning? Is a judicial officer or the lawyers in the case necessarily well placed or trained to carry out this task? Who should carry out this role? What are the implications on competence for a vulnerable witness who provides their evidence via a video recorded interview taken under the 2015 *VW Act* to a specially trained investigative interviewer? How should s 9 of the *Evidence Act 1929* apply to such interviews?[51] Does competence need to be re-assessed at the trial, which may take place many months later?

Present law and practice regarding competence in South Australia has particular implications for witnesses such as children and persons with a disability or cognitive impairment.

Child Witnesses

The age of a witness is no basis to rebut the presumption under s 9(1) of the *Evidence Act 1929* (SA). However, in the context of child witnesses, it is common practice to conduct an inquiry to

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[48] See, in this context, SALRI's previous work that recommended abolishing the religious aspect of swearing an oath to a simple but solemn promise to tell the truth. See further *Witness Oaths and Affirmations,* above n 32.

[49] *R v Pascoe* (2004) 90 SASR 505; see *Criminal Law Consolidation Act 1935* (SA) s 242. Perjury incurs a penalty of seven years imprisonment.

[50] One study found most judicial officers regard the distinction between unsworn evidence and sworn evidence as unnecessary. Karen Schultz, 'The Need for Competence Tests: Queensland Judicial Perspectives on Non-Accused Child Witnesses in Criminal Proceedings, Part 1' (2003) 22 *University of Queensland Law Journal* 199.

[51] In addition, the interaction between witness competence under s 9 *Evidence Act 1929* (SA) and the regime under the *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA) for the taking and use of an initial comprehensive video recorded interview between a vulnerable party and trained investigator as a substitute for the vulnerable party's examination in chief at trial is complex. It is less than clear as to how s 9 applies, if at all, to such interviews. The application of s 9 to pre-trail cross-examination is also unclear.

assess competence.[52] The present South Australian competence test may operate to exclude the testimony of a child witness, especially where they are capable of providing an accurate account. Given the common law test distinguishes between the probative value of sworn and unsworn evidence, witnesses giving unsworn evidence will be treated as a less reliable witness.

The appropriateness of the present competence test is questionable (a theme that was often relayed to SALRI in its recent Communication Partner reference consultation). The law currently allows unsworn evidence to be given if the witness understands the difference between the truth and a lie. This is especially problematic in the case of a child witness, as an understanding of truth is influenced by cultural background, moral and religious values and developmental factors.[53] A child's inability to accurately explain the distinction between the truth and a lie does not necessarily render them incapable of giving sworn evidence.[54] However, the common law test arguably encourages inappropriate questions about the truth and a lie.[55] This creates a difficult threshold for sworn evidence. For example, in a 2012 case, a seven-year- old victim of sexual abuse was found to be incapable of giving sworn evidence.[56] The judge was satisfied the child knew the importance of telling the truth when placing their hand on the Bible. However, the child could not properly articulate why it was more important to tell the truth when under oath. This was sufficient to render the child 'incompetent'.

The Child Abuse Royal Commission recommended reform of the competence test in the context of children. Their position was consistent with Latham J's conclusion in the 2006 case of *R v RAG* which held, in assessing competence, the court should rely on simple language, avoiding abstract or complex questions.[57] Latham J endorsed the recommendation provided by Professor Judy Cashmore:

> Assessing a child or young person's understanding of the difference between the truth and a lie can only be reliably undertaken by posing simple questions, preferably after putting the child at ease by a series of questions concerning their age, schooling and favourite pastimes. Simple questions assume that the language within the question is as simple and direct as possible. Phrases including "regarding" or "concerning" should be avoided, along with phrases which suggest agreement, or include the use of the negative, for example, "it's true isn't it?" or "is that not true?" Hypothetical questions, questions involving abstract concepts, multi- faceted questions (questions incorporating more than one proposition), legal jargon and passive speech should also be avoided.[58]

Professor Cashmore deemed a competence test based on the understanding between the truth and a lie as reasonable. Children understand the concepts of the truth, a lie and a promise.[59] Professor Cashmore highlighted that children at the age of four or five are able to 'recognise deliberately false statements as lies but tend to be over-inclusive and more stringent than older children and adults because they tend to include guesses and exaggerations as lies'.[60] In light of this, Professor Cashmore (a view expressed by other researchers) advocated for simple language to be used during questioning and emphasised the importance of avoiding abstract, complex or philosophical-based questions. She noted the task of answering abstract questions is also a

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[52] *R v P* [2004] SASC 323.

[53] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 102.

[54] Ibid 103.

[55] Ibid.

[56] *R v French* (2012) 114 SASR 287.

[57] *R v RAG* [2006] NSWCCA 343.

[58] *R v RAG* [2006] NSWCCA 343 [26].

[59] Judy Cashmore, *Child Witnesses: The Judicial Role* (March 2008) Sexual Assault Trials Handbook <https://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/cashmore-child_witnesses the_judicial_role.html#d5e10511>.

[60] Ibid.

difficult task for adults to undertake.[61] Appropriate measures should also be adopted to alleviate practical difficulties for children, such as the unfamiliar environment of a courtroom.[62]

The Child Abuse Royal Commission recommended the implementation of intermediaries (known as Communication Partners in South Australia) and ground rules hearings, to enhance the skills of relevant parties to a case in dealing with vulnerable witnesses.[63] In November 2021, SALRI released its latest report examining the role and operation of Communication Partners, both in and out of court, in South Australia.[64] The Report highlighted the utility and value of a Communication Partner as a conduit to facilitate effective communication between a vulnerable person and a court (and outside court). In exercising their functions, the Communication Partner will be in a position to assist the court in identifying appropriate questioning to determine competence, ensuring adversarial practice is adapted to the particular vulnerable person. The Report also noted the comments of parties from the UK such as Judge Patricia Lees and Professors Jonathan Doak and Penny Cooper that in practice the use of a Communication Partner can overcome many of the problems associated with witness competence.

The current law in South Australia arguably provides an outdated and unfair assessment of a child's capability and capacity to give cogent evidence.

Witnesses with a Disability or Cognitive Impairment[65]

The competence test also arguably disadvantages witnesses with an intellectual disability or cognitive impairment. For the purposes of this reference, the term 'cognitive impairment' is used, in accordance with the definition in s 4(1) of the *Evidence Act 1929* (SA) (though SALRI accepts that there is no universal preferred term or definition). Cognitive impairment includes:

1. A developmental disability – for example, intellectual disabilities and Down syndrome;
2. An acquired disability following an illness or injury – for example, dementia, an acquired brain injury or a neurological disorder; and
3. A mental illness.[66]

The present South Australian competence test may operate to exclude the testimony of a witness with a cognitive impairment. As noted above, due to the distinction between the probative value of sworn and unsworn evidence, witnesses giving unsworn evidence will be treated as a less reliable witness. The applicability of the competence test to other vulnerable witnesses was raised by the ALRC, who emphasised it is 'important that any test of competence be appropriate for broad application and not be an unfair hindrance to any potential witness'.[67]

The *Disability Justice Plan* sought to challenge the now firmly outdated assumption that disability denoted unreliability and improve access to justice for vulnerable accused, witnesses and victims (including children). The *Disability Justice Plan* led to a number of measures to negate this assumption and provide practical supports for vulnerable witnesses (including accused) in giving

[61] Ibid.

[62] Ibid.

[63] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (2017) 85. See, for example, in South Australia, the *Statutes Amendment (Vulnerable Witnesses) Act 2015* and the South Australian *Disability Justice Plan*.

[64] South Australian Law Reform Institute, *Providing a Voice to the Vulnerable: A Study of Communication Assistance in South Australia* (Final Report, September 2021).

[65] For the purposes of this factsheet, the impact of fluctuating capacity on an individual's competence will not be addressed. However, this is an important area which will be further explored in due course.

[66] *Evidence Act 1929* (SA) s 4(1).

[67] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 105.

evidence.[68] This is now confirmed in legislation[69] and was reinforced in SALRI's Communication Partners Report. It is imperative that access to the right supports enabling a vulnerable witness, accused or victim to participate in court proceedings must be provided.

It is well documented that the courtroom environment worsens comprehension and communication impairments. Studies have reinforced the need for an investigator or advocate to adapt questioning styles to cater for the witness' impairment.[70] In the context of intellectual disabilities, there is a growing body of evidence which identifies best practice questioning techniques to elicit reliable information from a witness with an intellectual disability.[71] These techniques utilise open-ended questions, allowing the witness to complete an answer without interruption and building a rapport.[72] The erudite Terese Henning, former Director of the Tasmania Law Reform Institute highlighted several issues associated with questioning techniques. She noted questions often 'sit beyond their intellectual capacities and developmental levels' and are 'complex, syntactically confusing, and couched in arcane language'.[73]

Consequently, a vulnerable witness will be intimidated 'into silence, contradictions, or general emotional and cognitive disorganisation'.[74]

The need for practical measures is evident, to enable a vulnerable witness to give evidence in the best way possible, with appropriate supports. The reliability of a vulnerable witness' evidence should not be impugned on the basis that their evidence is delivered differently, or through alternative techniques to alleviate their communication and comprehension difficulties. This was reinforced in consultation for the ALRC's report – 'a person should not be excluded from giving evidence because they need to use an alternative means of communication'.[75]

An Alternative Model: United Kingdom

The United Kingdom ('UK') has adopted a general competence test based on comprehension of questions and the ability to answer a question intelligibly.[76] The general rule presumes that all persons, regardless of their age, are competent to function as a witness.[77] A witness will be deemed incompetent if they are unable to understand questions put to them and give answers which can be understood.[78] The competence test is concerned with 'the degree of mutual comprehension of those questioning and of the person being questioned'.[79] In determining whether a witness is able to meet these requirements, the court must consider whether special

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[68] Attorney-General's Department, *Disability Justice Plan 2014-2017* (SA), 8-9.

[69] *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

[70] See Peter Bowles and Stefanie Sharman, 'A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities' (2014) 21(2) *Psychiatry, Psychology and Law* 205; Terese Henning, 'Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?' (2013) 37 *Criminal Law Journal* 155; *R v Lubemba* [2015] 1 WLR 1579, 1587.

[71] Peter Bowles and Stefanie Sharman, 'A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities' (2014) 21(2) *Psychiatry, Psychology and Law* 205, 206; Ray Bull, 'The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice' (2010) 15(1) *Legal and Criminological Psychology* 5. This evidence has also been reaffirmed in Professor Martine Powell's studies.

[72] Peter Bowles and Stefanie Sharman, 'A Review of the Impact of Different Types of Leading Interview Questions on Child and Adult Witnesses with Intellectual Disabilities' (2014) 21(2) *Psychiatry, Psychology and Law* 205, 206.

[73] Terese Henning, 'Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?' (2013) 37 *Criminal Law Journal* 155, 158.

[74] Ibid.

[75] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 112.

[76] *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 53.

[77] Ibid s 53(1).

[78] Ibid s 53(3).

[79] *Sed v The Queen* [2004] 1 WLR 3218, [50].

measures can be used to allow the witness to give evidence – such as an intermediary.[80] It is the role of the court to assess and determine competency '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 the reliability and general cogency'.[81] In the UK, it is now routine for children aged as young as three or four years[82] and persons with a major cognitive impairment to testify.

The question of competence should not be seen in isolation. The UK's intermediary scheme supports a vulnerable witness to give evidence. The registered intermediary acts as a conduit for communication between relevant legal representatives, the police and the witness.[83] Ideally, the intermediary should have the requisite qualifications to identify the most appropriate avenues for communication, in light of the witness' specific vulnerability.[84] The effect of the intermediary is to overcome barriers associated with impaired communication and/or comprehension skills.

A UK intermediary can also take part in ground rules hearings ('GRH'), which serve to promote effective case management and protect vulnerable witnesses. In 2013, the importance of GRHs were recognised in the Criminal Practice Direction (UK) 'as a key step in planning the proper questioning of a vulnerable witness or defendant'.[85] The Child Abuse Royal Commission also recommended the introduction of GRHs in Australia, with the use of intermediaries as a special measure.[86] The use of pre-trial ground rules hearings is the subject of an ongoing pilot program at the District Court and their use will be supported and extended by the Statutes Amendment (Child Sexual Abuse) Bill 2021 now before State Parliament. SALRI's recent Communication Partner Report also supported the use and value of pre-trial ground rules hearings, notably in cases where a Communication Partner is to be used.

Both the intermediary scheme and GRHs have advantages and disadvantages. However, each mechanism exists to alleviate the difficulties experienced by vulnerable witnesses and promotes their participation in criminal proceedings. The UK has implemented a wide range of special measures, which promote fairness to the vulnerable witness and the defendant.[87]

SALRI notes the powerful underlying comments of the English Court of Appeal:

> It is now generally accepted if justice is to be done to vulnerable witnesses and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way around.[88]

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[80] *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, ss 53(3) & 29.

[81] *Sed v The Queen* [2004] 1 WLR 3218, [46].

[82] See *R v Barker* [2010] ECCA Crim n 1958. This is a major departure from the traditional approach. In *R v Wallwork* [1958] 42 Cr App R 153, Lord Goddard CJ 'deprecated' the calling of a child of five as a witness, saying that it was 'ridiculous' to suppose a jury would attach any value to it.

[83] Crown Prosecution Service, *Special Measures* (19 September 2019) Crown Prosecution Service <https://www.cps.gov.uk/legal-guidance/special-measures>.

[84] The Crown Prosecution Service noted the negative and discriminatory connotations attached to the term 'vulnerable' to describe a witness. Consequently, Prosecutors attempt to avoid the term, to remove the stigma attached to vulnerability – a term which denotes weakness, incompetence, unreliability and more: Crown Prosecution Service, *Special Measures* (19 September 2019) Crown Prosecution Service <https://www.cps.gov.uk/legal-guidance/special-measures>.

[85] Penny Cooper, Paula Backen and Ruth Marchant, 'Getting to Grips with Ground Rules Hearings: A Checklist for Judges, Advocates and Intermediaries to Promote the Fair Treatment of Vulnerable People in Court' (2015) 6 *Criminal Law Review* 420.

[86] *Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Executive Summary and Parts I and II* (2017) 85.

[87] The use of pre-recorded cross-examinations reduces the risk of re-traumatisation of a witness and also promotes a productive and effective line of questioning: see Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses' (2015) 2 *Criminal Law Review* 107. The recorded cross-examination is admitted as the witness' main evidence and is often recorded in the absence of the defendant: *Youth Justice and Criminal Evidence Act 1999* (UK) c 23, s 28(2).

[88] *R v Lubemba* [2015] 1 WLR 1579, 1587 (emphasis added).

Consultation Questions

Competence Definition and Assessment

1. How should competence be defined?
2. Assessment of competence:
   a. When and where should competence be assessed?
   b. Who should assess competence?
   c. How should competence be assessed? What criteria should be used to assess competence?

3. Should the competence test under s 9 of the *Evidence Act 1929* (SA) be amended to remove references to the 'truth' and a 'lie'?

4. How should competence apply in relation to a video recorded account provided to an investigative interviewer that is used at the subsequent trial and how should competence be approached at that trial?

Competence and Capacity

5. How would you describe your perception of the distinction between competence and capacity?

6. Should the law re-frame competence to a question of capacity to give evidence? If so, how should capacity be defined?
7. How should the law account for fluctuating capacity?

Utility of the Oath

8. Should the oath and affirmation in their current form be replaced? If so, please see below for two alternative options:
   a. **Option One:** The following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

      [Name of the person being addressed], you are about to make a very important promise to tell the truth to this court/tribunal. If you make this promise and if you then tell the court/tribunal something which you know is not true, you will be committing a serious criminal offence. Do you understand that? Do you promise to tell the truth to this court/tribunal?

   b. **Option Two:** The following public ritual be prescribed for all courts and tribunals in South Australia where sworn evidence is required to be given:

      [Name of the person being addressed], you are about to make a very important promise to this court/tribunal. The court/tribunal relies on you to tell the truth. If you make this promise you must tell the truth. Do you understand that? Do you promise that you will tell the truth, the whole truth and nothing but the truth to this court/tribunal?

9. Are there other models or any further considerations regarding language and scope in the context of vulnerable witnesses – namely children or those with a cognitive impairment?

Sworn/Unsworn Evidence

10. Should a distinction between sworn and unsworn evidence be retained?

11. Is a mandatory warning about the absence of sworn evidence necessary?
    a. Does a mandatory warning undermine the role or purpose of a jury?
    b. Is a mandatory warning at odds with modern understandings of the evidence of children or persons with a cognitive impairment?

12. Should the *Uniform Evidence Law* or UK approach or some other approach to witness competence be adopted in South Australia?

Incidental

13. Should the definition of a 'vulnerable witness' in the *Evidence Act 1929* (SA) be extended to include Aboriginal witnesses?

20 December 2021