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## CHILDREN'S UNSWORN EVIDENCE: HISTORICAL DEVELOPMENTS AND CONTEMPORARY ISSUES

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### I INTRODUCTION

The reception of children's evidence has long been a topic of contention, historically and in the modern legal world.<sup>1</sup> In cases of sexual assault where a child is the victim, this issue is of fundamental importance as there is often little or no physical evidence, and the child and the accused are the only witnesses. In Australia's fairly recent history, the 'accumulated wisdom' of judicial officers that children are prone to fantasy, suggestible and inherently unreliable has undoubtedly led to many perpetrators escaping conviction as the alleged victim was not deemed competent to give evidence, or the evidence was uncorroborated and there was nothing else to prove guilt beyond reasonable doubt.<sup>2</sup> However, views regarding the reliability of the evidence of children have significantly progressed in recent times. It is generally now accepted that the view that children are inherently unreliable or a morally incompetent class of witnesses is wrong.<sup>3</sup> This view follows contemporary psychological findings that '[c]hildren

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1 See, eg, Kate Warner, 'Child Witnesses: Evidentiary Reforms' in Julia Vernon (ed), *No 8: Children as Witnesses: Conference Proceedings* (Australian Institute of Criminology, 1988) 169.

2 See, eg, J D Heydon, *Evidence: Cases and Materials* (Butterworths, 2<sup>nd</sup> ed, 1984) 84:

Children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations.

This passage was not repeated in subsequent editions of this text: see, eg, J D Heydon, *Evidence: Cases and Materials* (Butterworths, 3<sup>rd</sup> ed, 1991) 101, 406–8 discussing children's evidence.

3 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, 222; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen*

from preschool years onward often show sophisticated understanding of the concepts of lying and truth-telling<sup>4</sup> and that there is ‘no correlation between age and honesty’.<sup>5</sup>

However, it has also been established that while children will generally understand that telling the truth is good and lying is bad, they may not understand more complex expressions such as ‘the obligation to tell the truth’.<sup>6</sup> That obligation has been described as something more than a promise: ‘It is an appreciation of the nature of the duty to tell the truth. It is a prerequisite for taking an oath or affirmation, which exposes the person to punishment for being untruthful.’<sup>7</sup>

Under the current Evidence Acts in Uniform Evidence Law (‘UEL’) jurisdictions,<sup>8</sup> the mechanism of unsworn evidence allows children to still give evidence when they do not understand that obligation.<sup>9</sup> The provisions related to unsworn evidence are identical in all UEL jurisdictions.<sup>10</sup> These provisions require an inquiry into the competence of child witnesses, involving several distinct tests of their level of understanding and ability to respond to questioning, the operation of which is described in Part II.

Part III will review the historical and contemporary application of competence testing to display the general difficulty judicial officers have experienced in applying varied versions of these tests for centuries. In more recent cases, that difficulty comes in the form of trial judges attempting to interpret the strict requirements for unsworn evidence, involving a two-step judicial inquiry into competence followed by an instruction as a statutory precondition to allowing unsworn evidence to be received. The consequence of the slightest misapplication of that section results in the evidence given by the child not being ‘according to law’,<sup>11</sup> meaning that a conviction must be set aside

*and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 304–5 [14.15]–[14.18]; John Spencer and Rhona Flin (eds), *The Evidence of Children: The Law and the Psychology* (Blackstone Press, 1<sup>st</sup> ed, 1990) ch 11.

- 4 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 97 [4.8] (‘ALRC Evidence Report 2005’); see also Victoria Talwar et al, ‘Children’s Conceptual Knowledge of Lying and its Relation to their Actual Behaviours: Implications for Court Competence Examinations’ (2002) 26 *Law and Human Behaviour* 395, 396.
- 5 Schultz, above n 3; see also New Zealand Law Commission, *Total Recall? The Reliability of Witness Testimony*, Miscellaneous Paper No 13 (1999) ch 4.
- 6 As discussed below, this constitutes a threshold test for witnesses to be able to give sworn evidence.
- 7 ALRC Evidence Report 2005, above n 4, 103 [4.38].
- 8 *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 2004* (Norfolk Island); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). Henceforth, only the Commonwealth Act is cited except where there is a reason to cite another UEL Act.
- 9 *Evidence Act 1995* (Cth) ss 13(4)–(5), 21(2). These provisions also apply to other witnesses who are not competent to give sworn evidence about a fact; however, in the majority of cases, these provisions are applied to children.
- 10 In non-UEL jurisdictions, similar provisions relating to unsworn evidence also exist: *Evidence Act 1977* (Qld) s 9B(3); *Evidence Act 1929* (SA) s 9; *Evidence Act 1906* (WA) s 106C (which refers specifically to children under 12 years of age).
- 11 The ‘not a trial according to law’ phrase was used in *R v Brooks* (1998) 44 NSWLR 121, 121 (Priestley JA), 125 (Grove J). Several later cases have considered similar issues: *R v JTB* [2003] NSWCCA 295; *R*

even if no substantial miscarriage of justice has actually occurred.<sup>12</sup> On its face, the consequence of such a practically inconsequential (yet easy to make) misapplication being considered so significant that it is 'contrary to law' seems unjustifiably inflexible.

Against this background, Part IV will go on to discuss several additional issues with competence tests to show that the inquiry into the competence of children now serves very little practical purpose. As advocates of the abolition of competence tests have argued in the past, the reliability of a child's evidence should not attach to some external event such as taking an oath.<sup>13</sup> Competence should only go towards the child's ability to give evidence, and it is for the jury to decide whether they believe that the child is telling the truth and the weight that should be given to the evidence. Following the decision in *R v GW* in 2016, where the High Court found that the UEL is neutral in its treatment of sworn and unsworn evidence and '[t]he assessment of the reliability of the evidence is for the trier of fact',<sup>14</sup> that argument is now even more compelling.

## II THE CURRENT LEGISLATIVE POSITION

It is first necessary to understand the current operation of competence tests. The starting position, found in section 12, is that every person is 'competent' to give evidence, including children, and every person 'who is competent to give evidence about a fact is compellable to give that evidence'.<sup>15</sup> Section 12 employs the words '[e]xcept as otherwise provided by this Act'. This indicates that the legislature intended to cover the field and that any common law rules regarding competence are abrogated.<sup>16</sup>

Section 21(1) provides that '[a] witness in a proceeding must take an oath, or make an affirmation, before giving evidence'. The sole exception to the application of section 21(1) is provided in section 21(2) and applies to 'a person who gives unsworn evidence under section 13'.<sup>17</sup> As a result, and contrary to the historical common law position discussed in Part III, sections 13 and 21 now

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v *RAG* [2006] NSWCCA 343; *R v Cooper* (2007) 214 FLR 92; *RJ v The Queen* (2010) 208 A Crim R 174; *SH v The Queen* (2012) 83 NSWLR 258. These cases are discussed in Part II.

12 In such a case, the court cannot apply the proviso in, eg, *Criminal Appeal Act 1912* (NSW) s 6; see also *R v WG* (2010) 199 A Crim R 218, 225 [35]–[36] (The Court); *SH v The Queen* (2012) 83 NSWLR 258, 267 [35] (Basten JA), 267 [36] (Blanch J), 267 [37] (Hall J) as to the effect of failure of a condition of competence as opposed to failure of a condition of admissibility. The former amounts to a miscarriage of justice, while the latter can ordinarily be waived.

13 See, eg, Wendy Ball, 'The Law of Evidence Relating to Child Victims of Sexual Abuse' (1995) 3 *Waikato Law Review* 63.

14 *R v GW* (2016) 258 CLR 108, 127 [43] (The Court).

15 *Evidence Act 1995* (Cth) s 12.

16 *McNeill v The Queen* (2008) 168 FCR 198, 209–10 [60]–[63] (The Court); see also *R v Ellis* (2003) 58 NSWLR 700.

17 *Evidence Act 1995* (Cth) s 21(2).

allow some witnesses (typically children) to give unsworn evidence, although only if the required steps have been strictly followed.<sup>18</sup>

### A The Steps for ‘Unsworn Evidence’

In UEL jurisdictions, there is no fixed age below which a child is presumed to be ‘incompetent’ to give evidence generally, nor incompetent to give sworn evidence. Instead, a preliminary examination into competence will be conducted by the trial judge if the issue is raised. If an issue of general competence is raised, the preliminary question of whether evidence of a child will be sworn or unsworn will also usually be addressed. This will occur during the *voir dire* without a jury present, unless there are orders by the court that the jury should be present.<sup>19</sup> As such, the jury will typically not be present during determination of a child’s capacity to give evidence. In order to determine competence, a two-step inquiry is made, followed by an instruction to the witness who is to give unsworn evidence. This is the only way evidence can be given unsworn.

### B The First Step: ‘General Competence’

The first step of the inquiry is found in section 13(1), examining whether a person can understand a question or answer a question about a fact.<sup>20</sup> This level of competence will be referred to as ‘general competence’. All persons are presumed competent to give evidence about a fact,<sup>21</sup> but if it is established that a child is ‘not [generally] competent to give evidence about a fact’ and that incapacity cannot be overcome<sup>22</sup> then the child cannot give evidence about that fact, whether sworn or unsworn<sup>23</sup> – the inquiry stops there.<sup>24</sup> However, very young children who can speak basic English have been established to be competent at this level.<sup>25</sup>

18 In *RJ v The Queen* (2010) 208 A Crim R 174, the NSW Court of Criminal Appeal held that if these steps are not strictly and sequentially adhered to in determining whether a child is capable of given sworn evidence before allowing the evidence to be given unsworn, then the evidence should not have been given due to s 21: at 184 [40]–[42] (Campbell JA), 189 [63] (Latham J), 189 [64] (Price J). This meant that the evidence was not admitted according to law and the resulting conviction was overturned.

19 *Evidence Act 1995* (Cth) s 189.

20 *Evidence Act 1995* (Cth) ss 13(1)(a)–(b).

21 *Evidence Act 1995* (Cth) s 13(6).

22 *Evidence Act 1995* (Cth) ss 13(1)–(2).

23 *Evidence Act 1995* (Cth) s 13. Note also that s 31 permits witnesses to overcome limitations in their ability to speak or hear adequately ‘in an appropriate way’. In all UEL Acts other than the Commonwealth Act, the section heading refers to ‘deaf or mute witnesses’.

24 *Evidence Act 1995* (Cth) s 13(2), which provides that incompetence in relation to a particular fact does not necessarily preclude the witness from being competent in relation to other facts.

25 See *R v A2 [No 4]* [2015] NSWSC 1306, where it was submitted that, although the ‘test in s 13(1) sets the bar fairly low’, a nine-year-old suffering an intellectual disability who was giving evidence in the case should not be considered generally competent. Johnson J disagreed and was satisfied that the child ‘has the capacity to understand a question about facts pertinent to the relatively narrow issues in the trial, so as to satisfy the undemanding test posed by s 13(1)(a) of the Act’: at [116], [126]. See also *R v GW* (2016) 258 CLR 108, where, although not an issue discussed in the case, a child who was six years old at trial and had spent most of her life being raised in China appears to have been found to be generally competent to give evidence through an interpreter: see *GW v The Queen* (2015) 306 FLR 104, 118–19 [67]–[71] (The Court). See also *R v MacPherson* [2006] 1 Cr App R 30, [27] (Forbes J).

### C The Second Step: 'Specific Competence'

The second inquiry, found in section 13(3), is whether a child is 'not competent to give sworn evidence about the fact'. This will occur when a child is generally competent, that is, able to understand and answer questions about a fact, but lacks the capacity to understand that he or she is under an obligation to give truthful evidence. As established, that 'obligation' refers to the condition of being morally or legally bound to give truthful evidence.<sup>26</sup> This will be referred to as 'specific competence'.

If a child *does* have specific competence and *does* have general competence, he or she will give sworn evidence. However, if the trial judge is 'affirmatively satisfied' that a child *does* have general competence but *does not* have specific competence, then the child does not have 'the requisite capacity' to give sworn evidence and will give unsworn evidence.<sup>27</sup> In deciding on this matter, neither the defence nor the prosecution carries the onus of proof under section 13.<sup>28</sup> The court must be satisfied on the balance of probabilities,<sup>29</sup> and may inform itself as it thinks fit, including through the use of expert evidence.<sup>30</sup>

### D The Instruction to the Witness

If it has been found that the child has general competence but not specific competence, the child will be able to give unsworn evidence. However, the judge must instruct the child on three matters:<sup>31</sup>

- that it is important to tell the truth; and
- that he or she may be asked questions that he or she does not know, or cannot remember the answer to, and that he or she should tell the court if this occurs; and
- that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

A child is not required to understand or even acknowledge these directions.<sup>32</sup>

26 *R v GW* (2016) 258 CLR 108, 122 [26] (The Court).

27 The word 'may' in s 13(5) has been interpreted as providing an alternative procedure for giving evidence, rather than conferring a judicial discretion as to whether evidence should be allowed to be given: see *SH v The Queen* (2012) 83 NSWLR 258, 260–1 [6]–[8] (Basten JA).

28 *RA v The Queen* (2007) 175 A Crim R 221, 224 [11] (McClellan CJ at CL); *RJ v The Queen* (2010) 208 A Crim R 174, 181 [24] (Campbell JA).

29 *Evidence Act 1995* (Cth) s 142(1).

30 *Evidence Act 1995* (Cth) s 13(8). See also s 189.

31 *Evidence Act 1995* (Cth) ss 13(5)(a)–(c). However, the section refers to a 'person' generally rather than a child.

32 *R v Muller* (2013) 7 ACTLR 296, 313 [41] (Dowsett J). This is in marked contrast to s 13 as originally enacted, which in paragraph (2)(c) required that the witness 'indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding'.

### III THE HISTORY OF COMPETENCE TESTING

This Part provides an historical analysis of competence testing which is essential to an understanding of the foundations and developments leading to the current UEL provisions in Part II. The purpose of analysing the history is to demonstrate the reasons for the introduction of competence tests and how they have evolved, as well as the ongoing difficulty judicial officers have experienced in applying competence tests over many years. The developments of competence testing have been divided into six stages starting from the traditional common law position in the United Kingdom in the 16<sup>th</sup> and 17<sup>th</sup> century through to cases applying the current UEL provisions relating to competence.<sup>33</sup>

Before doing so, it is necessary from the outset to realise that there were two traditionally discrete problems underlying the traditional common law position regarding unsworn evidence. The first was that, in order to give sworn evidence, witnesses had to be able to demonstrate a belief in God's divine vengeance.<sup>34</sup> This requirement applied also to children:<sup>35</sup>

no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequence of an oath ... their admissibility depends upon their sense and reason they entertain of the danger and impiety of falsehood ... but if they are found incompetent to take an oath, their testimony cannot be received.

The second issue was that children as well as women, who were victims of rape (especially in cases of incest), were generally seen as inherently unreliable and as not competent to give evidence. Children were therefore considered as not competent because of their age. They were simply incapable as witnesses. This second category appears to have formed the basis for unsworn evidence by a child witness.

#### A Common Law Origins: 16<sup>th</sup> and 17<sup>th</sup> Century

Oral evidence from witnesses began to appear in the 16<sup>th</sup> century, when witnesses were 'recognised as the ordinary accompaniment of a jury trial'.<sup>36</sup> The competence of witnesses was based on the rules developed for canon law, which rejected testimony from males under 14, females under 12, Jews, heretics and pagans as inherently incompetent. The rejection extended to a list of other people, including those with disabilities, slaves, criminals and excommunicated

33 Section 13 was amended by the *Evidence Amendment Act 2008* (Cth) sch 1 cl 3 and the *Evidence Amendment Act 2007* (NSW) sch 1 cl 3, with effect from 1 January 2009. These amendments are henceforth referred to as the '2009 amendments'. A similar change was made by the *Evidence Amendment Act 2010* (Tas) s 6, with effect from 1 January 2011. All other UEL legislation was introduced with the changes to s 13 already incorporated.

34 *Maden v Catanach* (1861) 7 H & N 360; 158 ER 512, concerning a woman's testimony.

35 *R v Brasier* (1779) 1 Leach 199, 200; 168 ER 202, 202–3; see also *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15, referring at 31 to belief in God and 'future rewards and punishments in the other world'. The latter case is also reported as *Omichund v Barker* (1744) Willes 538; 125 ER 1310.

36 William Holdsworth, *A History of English Law* (Methuen & Co Ltd, 3<sup>rd</sup> ed, 1944) vol IX, 178. Perjury was made a statutory offence in Britain as early as 1563: *The Perjury Statute of 1563*, 5 Eliz 1, c 9.

people, although the common law developed its own rules and did not follow canon law exactly.<sup>37</sup>

Originally, a child under seven was considered incapable of giving evidence because a child of that age did not have the mental capacity to understand the nature of an oath, nor could he or she be criminally responsible. However, there were exceptions to this by the 16<sup>th</sup> century for certain crimes such as 'rape, buggery, witchcraft and such crimes which are practiced on children'.<sup>38</sup> Holdsworth suggests that for such cases, evidence without an oath may be admissible if the child was 'intelligent'.<sup>39</sup> As such, while oral evidence had always been given under an oath, there was early recognition that, at least for children, it depended on the capacity of the individual.<sup>40</sup>

### **B Common Law in Australia: 18<sup>th</sup> and 19<sup>th</sup> Century**

This common law position was accepted into the new colony in New South Wales ('NSW'), although there were varying approaches to the need for corroborating evidence. As early as 1789, in the first conviction for rape in the NSW Court of Criminal Jurisdiction, an eight-year-old girl was called to give evidence against a man accused of raping her.<sup>41</sup> After asking the child her age and what she understood would happen if she told an untruth (to which she had answered '[g]o to the Devil'), whether she could say her catechism, and after she repeated the Lord's Prayer, the witness was duly sworn and gave evidence of the rape.<sup>42</sup> Although there was no direct corroborating evidence, the accused was found guilty.

In order for children to give sworn evidence on oath, children had to be able to demonstrate a belief in God's divine vengeance.<sup>43</sup> By the 19<sup>th</sup> century, the oath was always used, to remind the witness of the eternal punishment they would receive for lying. Even adults who refused to swear an oath based on Christian beliefs for religious reasons or who were found unable to understand the significance of the oath were not able to give evidence.<sup>44</sup>

The history of receiving evidence from a child, in both sexual assault and other crimes in NSW appears to have been anything but consistent. What was a sufficient understanding for a child to take an oath depended on the particular judge's discretion. In *R v Drake*, in the Supreme Court of NSW in 1833, Burton J

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37 Holdsworth, *HEL Vol IX*, above n 36, 187. Disabilities were listed as being blind, deaf or dumb. Felons were branded with the convict taint on their palms, hence the ritual of holding up the hand whilst swearing an oath to demonstrate that they were not disqualified to give evidence.

38 Ibid 188.

39 Ibid.

40 Ibid 189.

41 *R v Wright* [1789] NSWSupC 4.

42 Ibid.

43 *R v Brasier* (1779) 1 Leach 199; 168 ER 202; *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15.

44 See Jon White, 'Infidels, Idiots, Madmen and Children – The Evolution of the Acceptance of Unsworn Evidence of Children' (Paper presented at the Crown Prosecutors' Conference, 8 July 2016) <[https://www.dpp.act.gov.au/\\_data/assets/pdf\\_file/0004/898942/Prosecutors-Conference-Speech.pdf](https://www.dpp.act.gov.au/_data/assets/pdf_file/0004/898942/Prosecutors-Conference-Speech.pdf)>.

found that a boy's evidence on oath about a robbery was admissible and the jury found three of the accused guilty:<sup>45</sup>

His Honor took great pains to ascertain from him if he knew the nature of an oath. The boy replied, I say my prayers at night; I do not know my catechism; I do not know the meaning of an oath; I think God would punish me if I told an untruth; bad people go to hell; where good people go I do not know; God is said to be in the sky; I cannot read or write, but I can say my A, B, C; I think God would punish me if I swear wrong. His Honor told the Jury that he thought the boy had sufficient understanding to take the oath ...

However, four years after *Drake*, in *R v Collard*,<sup>46</sup> the same judge, Burton J, refused to allow the evidence of a 14-year-old girl against a man on trial for his life in an allegation of sexual assault. The distinction between the two cases appears in her answers. She had replied to Burton J's questions whether she attended church or any place of worship or ever said her prayers with 'no' and replied that she had never been taught some prayers or her catechism. Burton J directed the jury to find the accused not guilty.

A child's response to a judge's questions was thus significant. For example, Dowling J in 1830 in *R v Martin*, allowed a seven-year-old girl to give evidence because she 'said she knew her prayers and that she believed naughty people who told lies would go to hell'.<sup>47</sup> In 1835, in *R v Bowles*,<sup>48</sup> Dowling J also allowed a 10-year-old girl to give evidence against a man accused of stabbing his wife to death. Her capacity was dealt with shortly, with the judge noting that she gave satisfactory answers to questions about her knowledge of the responsibility of an oath, her religious and moral education. However, she was one of many witnesses, leading to the accused being found guilty by the jury.

These cases are consistent with the generally accepted common law position not to allow any witness to give evidence if the person did not have a belief in God and consequences for lying in the next life,<sup>49</sup> whether for assault or other crimes.<sup>50</sup> If the child demonstrated a sufficient understanding and knowledge of the responsibility of an oath, the child's competence seemed to be assumed, regardless of age, so a seven-year-old girl was held to be competent to give evidence in one case but a 14-year-old girl was not in another.

### C Promises and Affirmations in Lieu of Taking an Oath: 19<sup>th</sup> and 20<sup>th</sup> Century

The legislative history of the provisions allowing for 'promises' to be given in the form of an affirmation in Britain, which was enacted in NSW, has an

45 *R v Drake* [1833] NSWSupC 108.

46 *R v Collard* [1837] NSWSupC 1.

47 *R v Martin* [1830] NSWSupC 33, referencing Justice Dowling's record of the case in his notebook. The accused, also known as 'Jack the Drummer', was hanged immediately after the trial.

48 *R v Bowles* [1835] NSWSupC 7. The accused, Phineas Bowles, was sentenced to death after the jury found him guilty of the murder of his wife after retiring for only 'a few minutes'.

49 *Maden v Catanach* (1861) 7 H & N 360, 366–7; 158 ER 512, 515 (Pollock CB).

50 See, eg, *R v McGee* [1839] NSWSupC 25, where the evidence of the daughter of the accused, who was about seven years old and who had been present when the accused killed his wife with a spade, was not accepted as she never said her prayers and did not know what telling a lie was.

historical basis going back to 1833.<sup>51</sup> Affirmations were originally designed to enable Quakers and Moravians to give evidence without taking an oath because an oath was contrary to their view on God's word.<sup>52</sup> The following cases describe the developments of 'promise-making' in lieu of taking an oath and display early judicial difficulty in applying that exception before the concept of unsworn evidence applied to children.

In NSW, section 13 in the *Oaths Act 1900* (NSW) allowed for an affirmation to be taken as a substitute for an oath. That section was a re-enactment of section 3 of the *Evidence Further Amendment Act 1876* (NSW).<sup>53</sup> An early Australian case dealing with this type of evidence was the case of *R v Lewis* in 1887, involving a Pacific Islander who said he belonged to a Christian church but who had no concept of 'a future state', presumably of rewards and punishments in the afterlife, and was held not competent at common law but was allowed to give evidence under affirmation.<sup>54</sup> In his reasoning, Faucett J disagreed that a person incompetent for want of intelligence was included in section 13. The section was to meet the situation of evidence from atheists or persons without religious belief.<sup>55</sup> Manning J also commented that promises could not be made under that section 'by children or persons incompetent from want of understanding' and where an oath could not have been taken because of want of understanding that same objection would apply.<sup>56</sup>

This decision followed the general proposition that affirmations were designed to allow a person who 'had a conscientious objection to taking an oath to affirm'.<sup>57</sup> That is, they were not created with the intention of allowing children's testimony for lack of understanding of oath (or lack of intelligence) to be given, but rather were developed in the context of meeting the difficulty of hearing evidence from adults who were considered competent but who did not hold a belief in a religious being.<sup>58</sup>

Five years after *R v Lewis*,<sup>59</sup> Faucett and Windeyer JJ found in *R v Peters* that evidence had been properly taken from a child aged about seven who was intelligent but had no understanding of an oath.<sup>60</sup> Faucett J found that the child had sufficient intelligence so the two cases could be distinguished. Windeyer J

51 *Quakers and Moravians Act 1833*, 3 & 4 Wm 4, c 49.

52 See also *Clarke v Bradlaugh* (1881) 7 QBD 38, 58–9 (Lush LJ), cited in *Cheers v Porter* (1931) 46 CLR 521, 528 (Dixon J).

53 The effect of s 13 of the *Oaths Act 1900* (NSW) was described as follows in *Cheers v Porter* (1931) 46 CLR 521, 525–6 (Dixon J):

whenever a person called as a witness, whether in a civil or criminal proceeding, objects to take an oath or is reasonably objected to as incompetent to take an oath or appears to the Court or justice incompetent to take an oath, he may, in lieu of such oath, make a declaration. By the form of declaration which is prescribed, he solemnly declares that the evidence about to be given by him shall be the truth, the whole truth and nothing but the truth.

54 *R v Lewis* (1877) Knox (NSW) 8.

55 *Ibid* 10 (Faucett J), quoted in *Cheers v Porter* (1931) 46 CLR 521, 526 (Dixon J).

56 *R v Lewis* (1877) Knox 8, 11 (Manning J), quoted in *Cheers v Porter* (1931) 46 CLR 521, 526 (Dixon J).

57 *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125, s 20.

58 William Holdsworth, *A History of English Law* (Methuen & Co Ltd, 1<sup>st</sup> ed, 1956) vol VII, 139.

59 (1877) Knox (NSW) 8.

60 *R v Peters* (1882) 3 LR (NSW) 455.

noted that there were two grounds for rejecting a child's evidence: the first being defective intelligence; and the second, absence of religious belief. As she was competent as to intelligence the judge at first instance was right to then allow her to make a promise, as her age alone was immaterial to her competence.<sup>61</sup>

Later in NSW (still prior to the enactment of the UEL), statutory mechanisms specifically designed to allow children to give evidence started to emerge. Section 70(1) of the *Justices Act 1902* (NSW) provided that every witness would have the usual oath administered before giving evidence. However, section 131 of the *Child Welfare Act 1939* (NSW), and subsequently section 306 of the *Community Welfare Act 1982* (NSW),<sup>62</sup> provided that a child may give evidence not on oath if he or she was of sufficient intelligence and understood the duty to speak the truth. The evidence also required corroboration for there to be a conviction. Section 13(1)(i) of the *Oaths Act 1900* (NSW) also continued to allow a person to make a declaration instead of taking an oath. This provision was considered in 1931 in *Cheers v Porter*,<sup>63</sup> in which the High Court heard an appeal from a conviction for larceny when the only evidence had been given by a nine-year-old boy, Robert Pead. The magistrate had found Robert to be an 'exceptionally intelligent child and thoroughly to understand the obligation of speaking the truth' but he did not understand the meaning of an oath so he made a declaration under section 13(1)(i) of the *Oaths Act 1900* (NSW). No objection was taken at the time.<sup>64</sup> Robert made an affirmation as set out in schedule 6 to the Act.

A majority of the High Court found that the evidence was properly received and was admissible and the judgement of the Supreme Court was affirmed.<sup>65</sup> In coming to that decision, Evatt J referred to the absurdity of the decision in *Maden v Catanach*,<sup>66</sup> where a witness who did not believe in a God was rejected as a witness (even though Mrs Maden's evidence about her lack of belief in a God or future state of rewards or punishment was, itself, given under oath). Evatt J stated that there was 'no doubt' that that decision was in part responsible for a change in the English law allowing for evidence where the person was objected to as incompetent to take an oath.<sup>67</sup> Evatt J relied on the decision in *R v Peters*<sup>68</sup> as establishing the correct law in NSW. This 'historical inquiry into the previous NSW decisions and enactments' supported Evatt J's reliance on section 13 of the *Oaths Act 1900* (NSW). Rather than rejecting evidence on religious grounds, Evatt J considered that the proper safeguard is paying attention to the weight and cogency of the child's evidence.<sup>69</sup>

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61 Ibid 459.

62 *Crimes Act 1900* (NSW) s 418(1) as originally enacted also provided for the same lower standard for admitting a child's evidence in respect of certain crimes such as sexual offences.

63 (1931) 46 CLR 521.

64 Ibid 525 (Dixon J).

65 Ibid. The majority was constituted by Gavan Duffy CJ, Starke and Evatt JJ, Dixon and McTiernan JJ dissented.

66 (1861) 7 H & N 360, 366–7; 158 ER 512, 515 (Pollock CB).

67 *Cheers v Porter* (1931) 46 CLR 521, 538 (Evatt J).

68 (1882) 3 LR (NSW) 455.

69 *Cheers v Porter* (1931) 46 CLR 521, 544 (Evatt J).

In regard to the age at which an inquiry into competence was required, this appears at common law to have been deemed to be 'necessary' for children below the age of 14 years.<sup>70</sup> However, it was considered that a child of 10 would normally have sufficient intelligence.<sup>71</sup> Additionally, even if a child successfully demonstrated his or her understanding of the Bible and Almighty God, allowing the child to give sworn evidence, the evidence still required a warning to the jury not to convict on the child's uncorroborated evidence without careful examination. If this warning did not occur, the verdict would be quashed as amounting to a miscarriage of justice.<sup>72</sup>

#### D Unsworn Evidence: 20<sup>th</sup> and 21<sup>st</sup> Century

Much earlier than *Cheers v Porter*,<sup>73</sup> in 1885, the United Kingdom had enacted its first provisions allowing children to give 'unsworn evidence' in cases of rape, found in section 4 of the *Criminal Law Amendment Act 1885*.<sup>74</sup> This section can be seen as the origin of the 'specific competence' test to give unsworn evidence. Originally, it was only applicable to cases of sexual assault against young girls. It provided that the evidence of a witness of 'tender years' could be received if the child:

- did not understand the oath; but
- possessed sufficient intelligence to justify the reception of the evidence; and
- understood the duty to speak the truth.

The evidence required corroboration in order for conviction to occur, and the child was liable for perjury even if the evidence was admitted under that section. In 1985, the substance of this section was introduced into section 33 of the *Oaths Act 1900* (NSW), whereby a child under 12 years old could make a declaration rather than take an oath where a court considered that the child was not competent to take the oath but was 'of sufficient intelligence to justify the reception of evidence from the child'.<sup>75</sup> The witness was required to 'promise to tell the truth at all times in this court'.<sup>76</sup> The wording of section 33 was then altered in 1990, so that where a child was considered by the court to be 'not competent to take an oath' the evidence could nonetheless be received if the declaration was made and the court told the child that it was important to tell the truth, but the evidence could not be received if the court was satisfied that the

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70 *R v Lal Khan* (1981) 73 Cr App R 191 (Kilner Brown J).

71 *R v Meier* (1982) 30 SASR 126, 129 (King CJ).

72 *Hargan v The King* (1919) 27 CLR 13. This case involved the uncorroborated evidence of a complainant aged 14 and a half years. The jury verdict of guilty was quashed and a verdict of acquittal was entered.

73 (1931) 46 CLR 521.

74 48 & 49 Vict 1, c 69.

75 *Oaths (Children) Amendment Act 1985* (NSW), inserting *Oaths Act 1900* (NSW) s 33.

76 *Oaths (Children) Amendment Act 1985* (NSW) sch 10.

child did not ‘understand the difference between the truth and a lie’ or was ‘not able to respond rationally to questions’.<sup>77</sup>

Although the combined operation of the *Oaths Act 1900* (NSW) and the *Community Welfare Act 1982* (NSW) allowed affirmations to be used to similar effect as the unsworn evidence provisions in the United Kingdom, in NSW the development of the term ‘unsworn evidence’ occurred in a different context. The statutory developments came out of the right given to the accused to give evidence unsworn from the dock.<sup>78</sup> At the time that the ‘dock statement’ was introduced, this was necessary as the accused could not give sworn evidence.<sup>79</sup> Unsworn evidence allowed the accused to avoid committing perjury and also to avoid cross-examination. Unsworn evidence could thus be seen as a compromise of ‘conservatism combined with concession’<sup>80</sup> because it allowed for another avenue of admitting evidence of probative value without offending two fundamental legal principles: the religious sanctity of oath-taking, and procedural justice, namely, the criminal burden of proof.

However, the widely accepted belief among judicial officers that allegations of sexual offence are ‘very easy to fabricate, but extremely difficult to refute’<sup>81</sup> still largely persisted. As such, when several Australian jurisdictions (noting that NSW was not one of them until the UEL legislation was introduced) followed the United Kingdom and started to introduce statutory mechanisms to extend the utility of unsworn evidence to children,<sup>82</sup> it was justified on the basis that it was very restricted. Unsworn evidence required corroboration, judicial testing of a child’s intelligence or understanding of the difference between truth and falsehood and ability to give rational replies as well as often a general common law warning given to the jury.<sup>83</sup> The downside of this approach was later realised as cases started to appear before the court where two or more children, who had both given unsworn evidence, would try to corroborate each other but the court could not accept the evidence for want of corroboration.<sup>84</sup> Law reform initiatives led to the abandonment of the requirement for corroborating evidence in order to convict upon unsworn evidence.<sup>85</sup>

77 *Oaths (Children) Amendment Act 1990* (NSW) sch 1 cl 1, amending *Oaths Act 1900* (NSW) s 33. This set of tests for competence of child witnesses was then substantially adopted in section 13 of the first UEL legislation: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW). It was in these Acts that the term ‘unsworn evidence’ was introduced for witnesses including children who lacked competence to give sworn evidence on oath or affirmation, but still passed the statutory requirements for general competence to give evidence.

78 This right has been abolished in all Australian jurisdictions, see, eg, the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW).

79 Law Reform Commission, *Evidence*, Report No 26 (1985) xl–xli [13] (*Interim Evidence Report 1985*). The Law Reform Commission was later renamed to the Australian Law Reform Commission in 1996.

80 William Holdsworth, *A History of English Law* (Methuen & Co Ltd, 1965) vol XV, 201.

81 *R v Henry* (1969) 53 Cr App R 150, 153 (Salmon LJ); Annie Cossins, ‘Time Out for *Longman*: Myths, Science and the Common Law’ (2010) 34 *Melbourne University Law Review* 69.

82 See, eg, *Evidence Act 1971* (ACT) s 64(3), later repealed by *Evidence (Amendment) Act 1993* (ACT) s 6; *Evidence Act 1929* (SA) ss 9(4)(a)–(b).

83 White, above n 44, 3–4, citing to *R v Dossi* (1919) 13 Cr App R 158.

84 *DPP v Hester* [1973] AC 296; J D Heydon, ‘Current Trends in Evidence’ (1977) 8 *Sydney Law Review* 305, 315.

85 Heydon, ‘Current Trends’, above n 84, 314–19.

The Australian Capital Territory ('ACT') was originally governed by the laws of the Commonwealth and NSW, including the latter's *Oaths Act 1900* (NSW).<sup>86</sup> However, the ACT introduced provisions of its own permitting a young child under 14 to give unsworn evidence, which originally required a mandatory corroboration, in 1971.<sup>87</sup> This corroboration requirement was subsequently abolished by statute in 1993.<sup>88</sup> The statutory abolition of mandatory warnings given to uncorroborated evidence that occurred in the ACT also occurred in other Australian jurisdictions, including those under the UEL Acts.<sup>89</sup>

However, in *Longman v The Queen*,<sup>90</sup> several Justices in the High Court expressed concern about the uncertainty of accepting uncorroborated evidence from a witness who was a child at the time of a sexual assault that occurred 20 years earlier. This was despite the repeal of the statutory requirement to give a warning. The majority considered that it remained a matter for the trial judge's discretion and, in light of the long time lapse, found that a warning regarding delay and raising credibility issues should have been given.<sup>91</sup>

Through all this, the distinction between sworn and unsworn evidence remained, as did the essential components of competence tests to give unsworn evidence as first established in 1885 in the United Kingdom. The sole justification for the continued distinction was that unsworn 'evidence' was considered to be less reliable than sworn evidence. This idea is still reflected in the mandatory warning requirement in section 9(4) of the *Evidence Act 1929* (SA) as well as the common law judicial discretionary warnings that are typically given in relation to the uncorroborated evidence of children.<sup>92</sup> Following the authority of *R v GW* discussed below in Part III(G),<sup>93</sup> that historical justification is no longer supported. The High Court strongly held the view that there is to be no distinction in the way that sworn and unsworn evidence is treated.

An additional fundamental flaw that assists in explaining the ongoing issues regarding competence testing is most conveniently addressed at this point in

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86 *Seat of Government Surrender Act 1909* (NSW); *Seat of Government Acceptance Act 1909* (Cth) s 6; *Seat of Government (Administration) Act 1910* (Cth) s 4.

87 *Evidence Act 1971* (ACT) s 64.

88 *Evidence (Amendment) Act 1993* (ACT) s 6. The ACT later applied the Commonwealth rules of evidence under the *Evidence Act 1995* (Cth). The ACT then enacted its own UEL legislation independently in 2011: *Evidence Act 2011* (ACT).

89 *Evidence Act 1995* (Cth) ss 164, 165A(1)(d); *Evidence Act 2011* (ACT) ss 164, 165A(1)(d); *Evidence Act 1995* (NSW) ss 164, 165A(1)(d); *Evidence (National Uniform Legislation) Act 2011* (NT) ss 164, 165A; *Criminal Code 1899* (Qld) s 632(2); *Evidence Act 1929* (SA) s 12A; *Criminal Code Act 1924* (Tas) sch 1 s 136; *Evidence Act 2008* (Vic) s 164; *Evidence Act 1906* (WA) s 50.

90 (1989) 168 CLR 79.

91 *Ibid* 90–1 (Brennan, Dawson and Toohey JJ); but see *Evidence Act 1995* (Cth) s 165B.

92 In *R v BWT* (2002) 54 NSWLR 241, Wood CJ at CL provided a list of common law directions which are relevant in sexual assault trials: at 250 [32]. The list included:

- the *Murray* direction: *R v Murray* (1987) 11 NSWLR 12;
- the *Longman* direction: *Longman v The Queen* (1989) 168 CLR 79;
- the *Crofts* direction: *Crofts v The Queen* (1996) 186 CLR 427;
- the *KRM* direction: *KRM v The Queen* (2001) 206 CLR 221;
- the *Gipp* warning: *Gipp v The Queen* (1998) 194 CLR 106; and
- the *BRS* direction: *BRS v The Queen* (1997) 191 CLR 275.

93 (2016) 258 CLR 108.

history (before the enactment of the UEL). That issue is that neither of the new statutory ways of giving evidence outside taking an oath (affirmations and unsworn evidence) were originally designed in Australia specifically with children in mind. As a result, through the process of various statutory enactments and amendments, judicial interpretation of those changes, as well as progressive changes in societal views regarding children, Christianity and the sanctity of the oath, the two distinct grounds of inadmissibility (children as potentially incapable witnesses and children's inability to understand the religious significance of the oath) amalgamated. The original historical justification during the 17<sup>th</sup>, 18<sup>th</sup> and even 19<sup>th</sup> century for competence testing was based solely on Christian beliefs. That issue was distinct from the inherent unreliability of children. This is clear because testing religious understanding also applied to adults.<sup>94</sup> In a way, this position was more understandable. However, as has been noted by Dicey, the policy of 'conservatism combined with concession' has its defects.<sup>95</sup> This provides some insight into why judicial officers have struggled to apply the UEL competence test on children properly, despite various amendments, because they were developed on policy of compromise, and were never truly appropriate for children.

### E Cases Applying the Original UEL Section 13 Competence Test: 20<sup>th</sup> and 21<sup>st</sup> Century

Prior to the 2009 amendments,<sup>96</sup> the competence test was applied slightly differently to its current operation.<sup>97</sup> As discussed above, the 'unsworn evidence' terminology in the UEL had previously only applied to evidence given by the accused. Nonetheless, it was introduced as a new way to clarify the ambiguous combined operation of several Acts in NSW and particularly to overcome the traditional common law formulations, particularly the undesirability of testing moral and religious understanding.<sup>98</sup> However, an analysis of these cases demonstrates that once the task of competence testing was no longer to assess religious understanding, judges experienced increased difficulty in applying the new test and often unjust outcomes continued to occur.

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94 See *R v Lewis* (1877) Knox (NSW) 8, 10 (Fawcett J); *R v Peters* (1882) 3 LR (NSW) 455, 458–9 (Fawcett J); see also *Cheers v Porter* (1931) 46 CLR 521, 542–3 (Evatt J); cf *Maden v Catanach* (1861) 7 H & N 360, 366–7; 158 ER 512, 515 (Pollock CB). See also the discussion in Part III(C) of this article.

95 Holdsworth, *HEL Vol XV*, above n 80, 201–2.

96 *Evidence Amendment Act 2008* (Cth); *Evidence Amendment Act 2007* (NSW). Both amending Acts commenced on 1 January 2009 and are therefore referred to as 'the 2009 amendments'.

97 Before the amendments, *Evidence Act 1995* (Cth) s 13(1) provided the same threshold issue as under the current formulation: whether a person was capable of understanding the obligation to tell the truth. If the Court was affirmatively satisfied that the person did not possess that capacity, under the former operation, they could still give evidence subject to s 13(2), which provided that:

- 'the court [is] satisfied that the person understands the difference between a truth and a lie': s 13(2)(a);
- 'the court [tells] the person the importance of telling the truth': s 13(2)(b); and
- 'the person [indicates] appropriately that he or she will not tell lies in the proceeding': s 13(2)(c).

*ALRC Evidence Report 2005*, above n 4, 100 [4.23].

98 *Interim Evidence Report 1985*, above n 79, 129 [243].

An early NSW case dealing with the issue of competence tests that developed the precedent followed in future cases under the UEL was the 1998 case of *R v Brooks*.<sup>99</sup> In that case, the appellant had been convicted with a six-year sentence for sexual offences against a girl under the age of 10 at the time (11 years old by the time of the proceedings). He appealed on the grounds that the girl's evidence was wrongfully admitted due to failure to comply with section 13. At the pre-trial hearing, after conducting his inquiry into the child's competence, the trial judge said: 'I must say I think if all going on eleven year olds were as clear as this one then my job would be easier in these questions. ... I do not have any doubts as to the competence of the complainant C to give evidence'.<sup>100</sup> However, the child did not take an oath or affirmation, thereby giving unsworn evidence. The Court of Criminal Appeal unanimously upheld the appeal argument that the unsworn evidence of the child complainant was not given properly as the section 13 inquiry was not specifically satisfied, resulting in a retrial being ordered. Confusingly however, Sperling J and Grove J disagreed on exactly which part of the inquiry had not been satisfied. Sperling J assumed the trial judge referred to specific competence to give unsworn evidence in his statement that *he did* 'not have any doubts as to the competency of the complainant'.<sup>101</sup> On that basis, Sperling J considered that the trial judge had started with the assumption that the child was not competent to give sworn evidence due to her age. His Honour stated that there was no warrant for that assumption, making it 'unfounded' and 'not justified'.<sup>102</sup>

Grove J's judgment, generally the more often cited judgment in subsequent cases, assumes that the trial judge was referring to general competence to give evidence in his statement. On that basis, the issue was that, as the trial judge had stated, there were no doubts as to the competence of the witness. In fact, 'there was simply no evidence to establish that she was incapable of understanding the obligation and therefore was not a person for whom the special provision in s 13(2) was available', and so the evidence should have been sworn.<sup>103</sup>

The most interesting part of Grove J's judgement was that he conceded that 'it is obvious that the jury was convinced of the truth of what C had to say'.<sup>104</sup> This indicates no procedural injustice actually occurred. Nonetheless, his Honour still came to the finding that the jury acted upon an evidential basis which should not have been available to them, the consequence being that the trial was 'not held according to law' which must result in the conviction being set aside.<sup>105</sup> Priestly JA agreed with Grove J, only adding the authority of *Bulejck v The Queen*<sup>106</sup> in support of the finding that evidence not given under oath,

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99 (1998) 44 NSWLR 121.

100 Ibid 124 (Grove J).

101 Ibid 127.

102 Ibid.

103 Ibid 126 (Grove J).

104 Ibid 125.

105 Ibid.

106 (1996) 185 CLR 375, 408 ('*Bulejck*').

affirmation or some lawful alternative, is ‘non-evidence’.<sup>107</sup> When ‘non-evidence’ is admitted, the trial is not conducted according to law.<sup>108</sup>

A few years later, in the 2003 case of *R v JTB*,<sup>109</sup> after the Crown Prosecutor mentioned to the judge that he would not be asking for the complainant to be sworn as she was only eight years old, a very short competence test was undertaken which involved just two questions.<sup>110</sup> The child proceeded to give unsworn evidence. Grove J was once again required to consider the application of section 13. He considered that the only evidence before the trial judge was the age of the complainant and the fact that she indicated that she understood the obligation to tell the truth. On that, Grove J followed his own authority of *R v Brooks* and the verdict was quashed for a re-trial.<sup>111</sup> Grove J, as he had previously stated in identical words in *R v Brooks*, said that ‘the appeal may be regarded as highly technical, but if the consequence has been that a trial was not held according to law, it must result in the conviction being set aside’.<sup>112</sup>

Hulme J agreed with Grove J that following the authority of *R v Brooks* was the correct course as the court had previously made it clear that any defects that occur in the inquiry are of a fundamental nature.<sup>113</sup> However, his Honour noted that:<sup>114</sup>

Certainly there is nothing to suggest [that giving sworn evidence] would have [made the slightest difference to what she said], and there is no conceivable ground for thinking that had she made an oath or taken an affirmation or had the steps envisaged by s13 been taken, the jury’s verdict would have been any different.

His Honour also stated that there was much in favour of the view that no substantial miscarriage of justice had occurred, and that he did not believe he would have reached the same conclusion *de novo*.<sup>115</sup> Greg James J agreed with the orders proposed and noted that no other section in the *Evidence Act 1995* (NSW) provided that evidence can be adduced in another way.<sup>116</sup>

Three years later in 2006, in the case of *R v RAG*,<sup>117</sup> the court dealt with an appeal on the grounds that the pre-trial decision that a seven-year-old child complainant should give unsworn evidence was incorrect. In that case, the trial

107 *R v Brooks* (1998) 44 NSWLR 121, 122. This reading of *Bulejck* (1996) 185 CLR 375 is open to some criticism as the case involved the unsworn evidence of a criminal defendant rather than a child witness. McHugh and Gummow JJ remarked at 407 that: ‘The unsworn statement of an accused person is part of the trial. The jury may take it into account although it is neither evidence nor testimony’ (citations omitted).

108 *R v Brooks* (1998) 44 NSWLR 121, 122 (Priestly JA).

109 [2003] NSWCCA 295.

110 *Ibid* [5] (Grove J). The judge asked: ‘there is a gentleman about to stand up who wants to ask you a number of questions. You understand that?’, as well as ‘[a]nd you understand that you are here to respond to his questions truthfully?’ with the child answering ‘Yes’ to both questions: at [5].

111 *Ibid* [15].

112 *Ibid* [12].

113 The defects were of such a fundamental nature that the Court could not apply the proviso in *Criminal Appeal Act 1912* (NSW) s 6; *R v JTB* [2003] NSWCCA 295, [22].

114 *R v JTB* [2003] NSWCCA 295, [20].

115 *Ibid* [23].

116 *Ibid* [24]–[26].

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

judge and the Crown Prosecutor, over the course of four previous trials (some of which were aborted), questioned the complainant on the meaning of a truth and the repercussions of telling lies. At the fifth trial, the Crown Prosecutor submitted that 'there is no need to revisit the issue as to whether the child should give sworn or unsworn evidence because this trial is proceeding before your Honour'. The trial judge responded that since his last ruling on the child's capacity, 'it has become clear from the evidence of the child that her evidence in one respect had been tainted by the intervention of the mother' and proceeded to question the child on the meaning of truths and the possibility of her mother, or her dreams, influencing her evidence.<sup>118</sup> Due to this, Latham J considered that the inquiry 'went to the possibility of contamination of the complainant's evidence and hence, only to questions of credit'.<sup>119</sup> As the trial judge relied on irrelevant matters in reaching his decision, the error was established and the appeal was allowed. Latham J concluded her judgement:<sup>120</sup>

The fact that the complainant may be required to undergo a further trial is indeed regrettable, given the history of the matter. However, the trial judge so misconceived his function under s 13 that the decision cannot be allowed to stand.

In 2007, in the ACT case of *R v Cooper*,<sup>121</sup> an eight-year-old child gave evidence about an assault that he had witnessed aurally. Higgins CJ engaged in a lengthy discussion of the 'inherent difficulties in a child not yet 10 years of giving evidence' before coming to the decision that the child could not give unsworn evidence.<sup>122</sup> Higgins CJ's focus on the age of 10 is interesting because it continues the typical and historical position of assuming incompetence below the age of criminal responsibility. Higgins CJ generally stated that '[e]vidence received without the sanction of an oath or affirmation is ... of lesser weight and credibility than sworn evidence'.<sup>123</sup> In deciding on the specific issue whether unsworn evidence should be given in that case, Higgins CJ stated that once lack of capacity to give sworn evidence is established, the question of giving unsworn evidence requires consideration of 'the fairness to the accused in allowing it' and for a 'child, under the age of 10, there is, in my view, also a question of the interests of the child'.<sup>124</sup> Additionally, he considered that the then existing statutory requirement of instructing the witness that it is important to tell the truth was 'not a mere ritual'. It required that a judge be satisfied that a witness accepts and understands that obligation. Higgins CJ was not satisfied that the child 'had a sufficient understanding of that concept'.<sup>125</sup> His Honour also considered that there remained a discretionary judicial role as to whether the evidence should be

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118 Ibid [17]–[20], [29]–[30] (Latham J).

119 Ibid [53] (McClellan CJ at CL and Johnson J agreeing: at [1]–[2]).

120 Ibid [58].

121 (2007) 214 FLR 92.

122 Ibid 99 [42] referring to *Criminal Code 2002* (ACT) s 25, and a child's lack of criminal responsibility if aged under 10 years; see also Gregor Urbas, 'The Age of Criminal Responsibility' (Trends & Issues in Crime and Criminal Justice Series No 181, Australian Institute of Criminology, November 2000).

123 *R v Cooper* (2007) 214 FLR 92, 101 [55] (Higgins CJ). The trial was held when the *Evidence Act 1995* (Cth) applied to courts in the ACT.

124 *R v Cooper* (2007) 214 FLR 92, 102 [62].

125 Ibid 102 [63].

accepted and although he declined to make a determination on that, he stated that ‘I am far from persuaded it should be in the circumstances of this case, where the custodial parent has a different interest’.<sup>126</sup>

These cases clearly demonstrate the complex issues, often identified by the justices themselves, in the operation of section 13 prior to the 2009 amendments.

### F Cases Applying the Current Section 13 Competence Test: 21<sup>st</sup> Century

Following the recommendations of the ALRC, section 13 of the UEL legislation was amended.<sup>127</sup> As discussed earlier, the provision no longer makes reference to understanding the difference between truth and lies, but rather framed its test of specific competence (to give unsworn evidence) in terms of capacity to understand questions and to give answers about facts.<sup>128</sup> However, the following cases, applying the current statutory formulation, demonstrate that the new formulation has not improved judicial compliance with the section.

In the 2010 case of *RJ v The Queen*,<sup>129</sup> the child complainant was seven years old at the time of the four offences of sexual assault against her. She was close to nine years old by the time of the trial. In a pre-trial ruling, the trial judge was instructed by the Crown Prosecution of the presumption of competence under section 12 and the necessity of conducting a section 13 inquiry into competence. The trial judge then questioned the Crown Prosecutor about his perceptions of her intelligence. The trial judge stated: ‘I take the view that because of her age, it’s not appropriate for her to give sworn evidence but subject to the things that are in sub-s (5) that she would be competent to give unsworn evidence’.<sup>130</sup> The NSW Criminal Court of Appeal held that the section 13 inquiry had not been properly conducted as the trial judge failed to directly assess section 13(3) whether the child had the capacity to understand that in giving evidence, she was under an obligation to tell the truth.<sup>131</sup> In his judgement, Campbell JA relied on the authority of *R v Brooks*, stating that in that 1998 case:<sup>132</sup>

failure to comply with the requirements of s 13 before receiving unsworn evidence was the reason why the conviction was set aside, this Court should now follow *R v Brooks* unless persuaded it was wrong. Not only am I not persuaded it is wrong, in my view it was correctly decided.

Campbell JA did not consider the 2009 amendments to affect the authority of *R v Brooks* because s 21 remained the same and only permitted the sole exception of giving unsworn evidence under s 13 and ‘s 21 *Evidence Act* is in adamant terms. When it has not been complied with, the conviction cannot stand.’<sup>133</sup>

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126 Ibid 102 [64].

127 ALRC *Evidence Report 2005*, above n 4, 107–8 [4.58]–[4.60].

128 See Part II of this article. The UEL legislation enacted after 2005 incorporate the new version of s 13: *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2008* (Vic).

129 (2010) 208 A Crim R 174.

130 Ibid 177 [7] (Campbell JA).

131 Ibid 184 [41]–[42] (Campbell JA). Latham and Price JJ agreed with Campbell JA: at 189 [63]–[64].

132 Ibid 183 [37].

133 Ibid 185 [49].

In 2012, in *SH v The Queen*,<sup>134</sup> the appellant appealed against his conviction for sexual intercourse with a girl aged under 10 years.<sup>135</sup> Again, the conviction was set aside as the section 13 inquiry was not conducted properly, resulting in 'the trial not [being] conducted according to law'.<sup>136</sup> However in this case the issue was that there was a 'failure to comply strictly with the terms of the sub-s (5)' instructions, which the court considered to be 'a condition of competence'.<sup>137</sup> Specifically, the trial judge failed to instruct the witness that she should feel no pressure to agree with statements that she believed to be untrue as required under section 13(5)(c).<sup>138</sup> Despite the fact that the trial judge conducted a general examination of the child's competence and that the Crown Prosecutor had also questioned the child including asking: 'Do you understand that you shouldn't feel under any pressure because we are grown-ups in funny clothes to agree with us if we're not right?' which elicited a positive reply,<sup>139</sup> the lack of exact compliance with the required instruction meant that the trial had not been conducted according to law. This was notwithstanding the Court of Criminal Appeal's view that 'it is difficult to conclude that there was any substantial miscarriage of justice resulting from that omission'.<sup>140</sup>

Two years later in *MK v The Queen*,<sup>141</sup> that precedent was followed and a similar outcome occurred. In that 2014 case, the trial judge noted that 'the authorities say age alone is not sufficient, because every age – a person is assumed to be competent. So I must actually have some other method assessing her ... I might just ask things like, "Do you understand what obligation to give truthful evidence is?"'<sup>142</sup> The trial judge then watched 10 minutes of an electronic recording of the child witness being questioned by police and conducted an inquiry involving over 70 questions of competence posed to the child listed in the appeal judgment. Nonetheless, the Court of Appeal once again found that the trial judge failed to strictly comply with the provisions of section 13(5)(c) as her Honour failed to tell the child directly that he should agree with questions that are true. She only instructed him regarding questions that are not true.<sup>143</sup> As a result '[b]ecause the trial was not conducted according to law, the convictions must be quashed. The proviso cannot be invoked by the Crown. The appropriate order for this Court is to order a new trial'.<sup>144</sup>

In these recent cases, the trial judge has conducted extensive questioning into competence, attempted to phrase questions in a way that a child is able to understand, and demonstrated a clear concern for complying strictly with section 13. Additionally, particularly in *MK v The Queen* where the primary issue was

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134 (2012) 83 NSWLR 258.

135 Ibid 259 [1] (Basten JA).

136 Ibid 267 [35] (Basten JA). Blanch and Hall JJ agreed with Basten JA: at 267 [36]–[37].

137 Ibid 263 [19] (Basten JA).

138 Ibid 267 [33]–[34] (Basten JA).

139 Ibid 265–6 [27]–[30] (Basten JA).

140 Ibid 267 [34] (Basten JA).

141 [2014] NSWCCA 274.

142 Ibid [41] (Hoeben CJ at CL). Fullerton and Hamill JJ agreed with Hoeben CJ at CL: at [134]–[135].

143 Ibid [72] (Hoeben CJ at CL).

144 Ibid [132] (Hoeben CJ at CL).

that the child was being questioned about facts that occurred several years earlier, that problem is exacerbated because the decision was again set aside and a re-trial ordered. Moreover, the Court of Criminal Appeal's insistence on strict adherence to the sequential mode of reasoning required under section 13 seems entirely contrary to the common understanding that questions and instructions should be phrased in a way that the particular child will understand.

### G R v GW

The High Court case of *R v GW* is the most recent case dealing with the issue of children and unsworn evidence and the weight that should be given to that type of evidence.<sup>145</sup> It is the only High Court appeal dealing primarily with this issue.

The facts are that GW is the father of two girls, R and H. During the period of 29 March 2012 to 2 April 2012, GW allegedly committed acts of indecency upon or in the presence of R and acts of indecency upon or in the presence of H. At that time, GW had sole custody of the children due to a domestic incident that occurred on 29 March resulting in GW obtaining an interim domestic violence order against M, the children's mother.<sup>146</sup> R was five years old and H was three years old. After the allegations were made, the children's conversations with the police were recorded. Those recordings became the children's evidence in chief under *Evidence (Miscellaneous Provisions) Act 1991 (ACT)*.<sup>147</sup>

At the pre-trial hearing Burns J ruled that R's evidence would be given unsworn and R was subsequently cross examined. In reaching this decision, Burns J said:<sup>148</sup>

Gentlemen, despite the fact that the witness has indicated that she understands that – at least understands the difference between the truth and what is not the truth, and says that she understands that she has an obligation to tell the truth today, I think that it is probably better to proceed under subsection (5). At the present time, because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence ...

At the call-over presided by Murrell CJ, both parties then agreed to be bound by the ruling of Burns J.

The trial was held before Penfold J in the ACT Supreme Court. During the trial, on 24 March, defence counsel challenged Burns J's pre-trial ruling that the evidence be given unsworn, arguing that Burns J incorrectly applied section 13 as his Honour was required to make a positive finding that the witness is *not competent to give sworn evidence* but instead found that he was *not satisfied that the child was competent to give sworn evidence*. On that basis, the defence argued that Burns J came to the incorrect finding so the evidence was not admitted in accordance with the pre-trial statutory precondition, having the effect

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145 *R v GW* (2016) 258 CLR 108 (The Court).

146 *GW v The Queen* (2015) 306 FLR 104, 109 [17] (The Court).

147 *R v GW* (2016) 258 CLR 108, 114 [1], 115 [8] (The Court)..

148 *R v GJ [No 1]* [2014] ACTSC 108, [3]. The pre-trial hearing is not reported separately. Mr Gill, counsel for GJ, indicated that he did not wish to be heard: at [4]. The name shift from GJ to GW in the appeals is not explained: see, eg, *GW v The Queen* [2014] ACTCA 54.

that the evidence was inadmissible. Penfold J did not uphold the objection, in later written reasons stating that the objection itself may have substance but did not intend to indicate any view on that matter.<sup>149</sup> Her Honour also later refused the defence's submission that a section 165 judicial warning be given to the jury regarding the fact that the evidence was unsworn.<sup>150</sup>

The jury found GW guilty on one of the counts (count 3) which was that GW either ejaculated or urinated onto R's pelvic area. GW was found not guilty on two counts (counts 5 and 6) and the jury was unable to reach a verdict on three counts (counts 1, 2 and 4). GW was subsequently sentenced by Penfold J.<sup>151</sup>

An appeal followed in the ACT Court of Appeal which related to several grounds, including that Burns J erred in the pre-trial ruling and that Penfold J erred in allowing the evidence of R to be given without first giving a warning. The Court of Appeal unanimously upheld the appeal on both of those grounds and set aside the verdict. Count 3 was ordered to be heard in a new trial. In relation to the pre-trial ruling, the appeal judges agreed with the appellant's submission that the *Evidence Act 2011* (ACT) gives primacy to sworn evidence due to the solemnity attached to giving an oath or affirmation. They also agreed that Burns J failed to address the correct question in section 13(3) because:<sup>152</sup>

his Honour was 'not satisfied that she *has* the capacity to understand that in giving evidence today she has an obligation to give truthful evidence' (emphasis added). This reversed the test in s 13(3). His Honour treated unsworn evidence as the 'default' position, but he should have treated sworn evidence as the 'default' position. Perhaps his Honour intended to give primacy to sworn evidence, but that is not apparent from his reasons.

In relation to giving a warning, the Court of Appeal considered that the most fundamental task of the jury was to assess the reliability of R's evidence as she was the key witness. As the *Evidence Act 2011* (ACT) gives primacy to sworn evidence, the jury should have been instructed as to the difference between sworn and unsworn evidence in order to assist them in assessing the reliability of R's evidence by taking that difference into account. The Court of Appeal referred to common law authorities,<sup>153</sup> with reference to the importance of the primacy of sworn evidence in maintaining the integrity of the courts in coming to its decision to uphold the appeal and order a new trial on count 3.<sup>154</sup> An application by the prosecution for special leave to appeal on both of the successful grounds upheld in the Court of Appeal was granted and the matter went before the High Court in 2016. In relation to the first ground of appeal, regarding Burns J's reversal of the section 13 test, the High Court stated that it is correct that '[i]t was necessary for Burns J to be affirmatively satisfied that R did not have the requisite capacity before instructing her pursuant to section 13(5) and admitting her evidence unsworn'. However, determining whether 'his Honour treated the

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149 *R v GJ [No 1]* [2014] ACTSC 108, [9], [15]–[17], [35], [44].

150 *R v GJ [No 2]* [2014] ACTSC 113. This judgment also dealt with the admissibility of evidence in the family report, which is not relevant to this article.

151 *R v GJ [No 3]* [2014] ACTSC 193.

152 *GW v The Queen* (2015) 306 FLR 104, 121 [80] (The Court).

153 *Bromley v The Queen* (1986) 161 CLR 315; *R v Lomman* (2014) 119 SASR 463.

154 *GW v The Queen* (2015) 306 FLR 104, 121–2 [87], 124–5 [101]–[103] (The Court).

reception of R's unsworn evidence as the "default" position under the [*Evidence Act 2011* (ACT)], does not turn on analysis of his remarks alone. It requires consideration of the whole of the circumstances'.<sup>155</sup>

Although the ACT Court of Appeal also considered those circumstances, the High Court gave greater emphasis to Burns J's response to the prosecution that '[i]t seems to me that the procedure is set out in 13(5)' after the prosecution had questioned R on the significance of the Bible. Burns J replied '[i]t seems to me that I need to go through the process in subsection (3) of section 13 before we get to subsection (5)'.<sup>156</sup> The High Court considered that this acknowledgement of the section 13(3) and section 13(5) requirements showed that Burns J was not under the misapprehension that there is a primacy given unsworn evidence under the *Evidence Act 2011* (ACT). The High Court also considered that 'the failure to express the conclusion in the terms of the statute did not support a finding that Burns J was not satisfied on the balance of probabilities that R lacked the requisite capacity'.<sup>157</sup>

In relation to the second ground of appeal, that a warning should have been given by Penfold J, the High Court analysed the Court of Appeal's premise that unsworn evidence is of a kind that may be unreliable as being due to the primacy given to the sworn evidence in the *Evidence Act 2011* (ACT). The High Court found that premise to be wrong as there is no primacy given to sworn evidence. In addition, the High Court considered that a warning would have the effect of being contrary to policy informing the limitations on the nature of warnings that can be given about children in section 165A.<sup>158</sup>

The key outcomes of *R v GW* can be summarised as follows:

- sworn evidence is the default position;
- there is no primacy given to sworn evidence under UEL legislation as it is 'neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn';
- UEL legislation does not treat unsworn evidence as a type of evidence that is unreliable; and
- no common law warning or warning under UEL legislation needs to be given about unsworn evidence.<sup>159</sup>

However, the High Court also considered the possibility of a distinction between evidence of a child that is unsworn (especially in criminal sexual assault matters) and other witnesses giving unsworn evidence, stating that:<sup>160</sup>

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155 *R v GW* (2016) 258 CLR 108, 123 [28] (The Court).

156 *Ibid* 115–16 [15]–[16].

157 *Ibid* 123 [31] (The Court).

158 *Ibid* 127 [43] (The Court). Note that *Evidence Act 1995* (Cth) s 165A was inserted in the 2009 amendments.

159 The High Court stated that a *Murray* direction was given and that was sufficient: *ibid* 132 [55]. An additional direction would have the effect of conveying to the jury that 'even if the jury were satisfied of R's truthfulness and reliability to the criminal standard her evidence was nonetheless to be accorded less weight than sworn evidence'. See *R v Murray* (1987) 11 NSWLR 12, 19 (Lee J).

160 *R v GW* (2016) 258 CLR 108, 132–3 [57] (The Court).

It is possible that different considerations would apply where a witness other than a young child is capable of giving evidence about a fact but incapable of giving sworn evidence ... Depending on the circumstances, it might prove necessary or desirable to give some further form of direction.

This indicates that any practical purpose, or former policy to inform the need to draw a distinction between children's sworn and unsworn evidence has completely eroded, yet the default position remains to be sworn evidence and an inquiry still needs to take place.

#### IV THE ISSUES WITH COMPETENCE TESTS

Professor Kate Warner stated in 1988 that it was 'widely acknowledged that the legal system itself contributes to the difficulty of proving child sexual assault' and she proposed abolishing the competence test.<sup>161</sup> Twenty-eight years later, that recommendation remains apt. This Part will address several issues with competence tests.

##### A Competence Tests Are Contrary to the Purpose of the Rules of Evidence

Competence tests are contrary to the purpose and policy informing the rules of evidence and as a result, it can be seen that competence tests are an impediment to the course of justice: 'A major objective of the rules and principles of evidence is to bring integrity to the fact-finding process, and ensure that witnesses and parties are treated equitably and fairly in this process' with the ultimate purpose of aiding the court in the discovery of the truth.<sup>162</sup> While the operation of section 13 is not intended to apply as a directly exclusionary rule on its face, and considering the authority of *R v GW* that sworn and unsworn evidence are to be treated with equal weight, it has the real risk of having that effect in practice.<sup>163</sup> The recent cases where evidence of children was held to be contrary to law because the pre-trial process was not done properly are discussed in Part III. These demonstrate that the operation of section 13(3) and section 13(5) are detrimental to the purpose of bringing integrity to the fact-finding process. Additionally, if the competence test is merely a safeguard to prevent children from committing perjury, it is of no purpose as a child under 10 cannot be charged for an offence in any case.<sup>164</sup>

##### B Competence Tests Are Contrary to One Purpose of Pre-trials

Children who give evidence in a pre-trial hearing in cases of child sexual assault do so with the benefit that they are recalling events as contemporaneously as possible, with reduced delays in the court process that 'work against children's

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161 Warner, above n 1, 169.

162 John Anderson and Anthony Hopkins, *Uniform Evidence Law Guidebook* (Oxford University Press, 2014) 1–2, citing Peter K Waight and Charles R Williams, *Evidence: Commentaries and Materials* (Thomson Lawbook, 7<sup>th</sup> ed, 2006) 2.

163 (2016) 258 CLR 108.

164 See *R v Cooper* (2007) 214 FLR 92, 99 [42] (Higgins CJ), citing *Criminal Code 2002* (ACT) s 25.

ability to recount events long after they occur'.<sup>165</sup> The additional benefit is that it avoids subjecting children to the often intimidating and confronting experience of attending court. Children can give all their evidence, only having to go to court once, allowing them to move on with their life. If pre-trial hearings involving children regularly attract errors of law with the effect of making their evidence inadmissible through no fault of their own and further leading to re-trials and requiring the child to be re-questioned, a fundamental purpose of a pre-trial hearing is undermined.<sup>166</sup>

### C Competence Tests Result in Inconsistent Outcomes

The current operation of competence testing can be seen as contrary to legal principles such as legal certainty. The courts have been trying to grapple with various forms of competence tests for several centuries, first through taking an oath, followed by affirmations and finally unsworn evidence. In some cases, this has resulted in unjust outcomes and obscure judgements. However, in other cases, complex legal reasoning and inconsistent statutory interpretation has resulted in evidence of a child being given in particular cases where the judges believe it is justified. This has resulted in anything but consistent law. An additional aspect of the issue in that regard has been attributed to corroborations and the 'judicial obsession with the reliability of the evidence of sexual assault complainants and a new class of warnings'.<sup>167</sup>

### D Competence Tests Are No Longer Historically Justified

The historical justifications are very significant because they provide the reasons for the implementation of the current statutory precondition to the reception of evidence. However, as '[o]ne era's distilled wisdom and common sense is another era's junk science'<sup>168</sup> the reasons for the introduction of unsworn evidence for children have become irrelevant. This article has primarily focused on two fundamental questions that have plagued judicial officers for past centuries: whether a child has sufficient understanding of the obligation to be truthful in court and whether because of their age, children are unreliable witnesses generally. However, it has now been thoroughly established that a child's ability to recite the Lord's Prayer, ability to decipher the difference between a truth and a lie or ability to understand the 'obligation to tell the truth' do not give any guidance towards the fundamental underlying issue of reliability. Reliability does not attach to some event, such as swearing an oath or taking an affirmation, or some consequence, such as being liable for prosecution for perjury. Rather, reliability is a jury question to be determined consistently with

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165 Explanatory Statement, Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) 4. Procedures for dealing with children's evidence in the ACT are largely regulated by the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ch 2, which interestingly states '[f]or this chapter, it does not matter whether evidence is to be, or is being, given on oath or otherwise': at s 7.

166 *R v GJ [No 1]* [2014] ACTSC 108, [40] (Penfold J).

167 Cossins, above n 81, 85.

168 White, above n 44, 6.

the jury's approach to the reliability of all other evidence rather than the court's insertion of one particular criterion, such as formulaic competence testing.

### **E Behavioural Studies Do Not Support Competence Tests**

Contemporary behavioural studies strongly undermine any claim that undergoing competence testing is warranted regarding both of those same two traditionally discrete reasons. The first, regarding children's conceptual understanding of oaths and truth-telling, is undermined by studies that have shown that children's conceptual understanding of truth-telling (which is what a competence test under section 13(3) assesses) is not an indication of whether they will actually give truthful answers:<sup>169</sup>

the fact that a child understands lie- and truth-telling conceptually does not relate to his or her actual truthfulness. Thus, using competence examinations to screen out children with limited understanding of lie- and truth-telling is problematic.

The second, regarding children's generally impaired recollection skills compared to an adult, is undermined by other studies that have shown that children can be very accurate regarding central details of stressful events,<sup>170</sup> even after long periods of time.<sup>171</sup> Nonetheless, psychological research indicates that children can and do tell lies from about the age of three, especially to avoid punishment.<sup>172</sup> Additionally, children's lying is more complex than adults. So while children may lie about different things to adults, there is no evidence to suggest that they are inherently more likely to lie.<sup>173</sup>

### **F Judicial Perspectives Support Abolition**

In 2003, Karen Schultz conducted a survey of judicial officers in Queensland to determine whether they endorsed the need for competence tests for non-accused child witnesses in criminal proceedings.<sup>174</sup> Most judicial officers found that the distinction between unsworn evidence and sworn evidence was unnecessary. Additionally, the majority of the judicial officers adopted a view that presumed competence occurs 'at approximately six years for unsworn evidence, and approximately 12 years for sworn evidence'.<sup>175</sup> Nonetheless, the majority remained in favour of the competence test to determine that issue.

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169 Talwar et al, above n 4, 411–12.

170 Jennifer Schaaf et al, 'Children Eyewitness Memory: True Disclosures and False Reports' in Bette L Bottoms, Margaret Bull Kovera and Bradley D McAuliff (eds), *Children, Social Science, and the Law* (Cambridge University Press, 2002) 351.

171 Carole Peterson, 'Children's Memory for Medical Emergencies: 2 Years Later' (1999) 35 *Developmental Psychology* 1493.

172 British Psychological Society, 'Guidelines on Memory and the Law' in Judicial Commission of New South Wales, 'Sexual Assault Trials Handbook' (Judicial Guidelines, 2007) 2263, 2283.

173 Kang Lee, 'Little Liars: Development of Verbal Deception in Children' (2013) 7 *Child Development Perspectives* 91. See Victoria Talwar and Kang Lee, 'Social and Cognitive Correlates of Children's Lying Behavior' (2008) 79 *Child Development* 866; Jennifer Schaaf et al, above n 170; Talwar et al, above n 4; Angela D Evans and Kang Lee, 'Brief Report: Emergence of Lying in Very Young Children' (2013) 49 *Developmental Psychology* 1958.

174 Schultz, above n 3.

175 *Ibid* 199.

However, in the United Kingdom, the abolition of competence testing (replaced with the requirement that all children give unsworn evidence) was supported by 93 per cent of judges and 56 per cent of barristers evaluated in a study.<sup>176</sup>

More recently, in 2016, Martine Powell and her colleagues submitted a report to the Royal Commission into Institutional Responses to Child Sexual Abuse involving a qualitative inquiry interviewing 14 judges, 11 defence counsel, 12 prosecutors and 6 witness assistant advisors on competence testing.<sup>177</sup> It was found that there is a widely held belief that competence tests do not test 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'.<sup>178</sup>

### **G High Court Authority That Any Basis for Competence Testing Has Vanished**

As previously discussed, the most recent High Court case on the distinction between sworn and unsworn evidence was *R v GW*, which indicates that any basis for the retention of a distinction between sworn and unsworn evidence, such as some form of primacy given to sworn evidence, has vanished.<sup>179</sup> Nonetheless, the statutory precondition and distinction between sworn and unsworn evidence is maintained by section 13. If an objection is later raised on that ruling, an analysis of the trial judge's section 13 inquiry 'requires consideration of the whole of the circumstances'<sup>180</sup> to determine whether the trial judge came to the right conclusion. In *R v GW*, this allowed the High Court to reach a justified outcome. However, it now sets a precedent that leaves one to question the result should it ever be applied the other way (ie, a whole and inclusive enquiry to find that the trial judge reached the wrong conclusion regarding competence). If upon that wide examination, that objection is successful, the consequence is that the evidence was not legitimately admitted under section 21, and the Court of Criminal Appeal cannot apply the proviso in the criminal appeal legislation. As unsworn evidence is to be treated no differently from other evidence, that consequence is ultimately formalistic and without true reflection of the fairness of the process or of a substantive defect in the jury's verdict. A quashed conviction can also result in unjustifiable negative consequences for the child witness.

### **H Section 13 May Be Considered Contrary to Policy Informing Section 165A**

The distinction between sworn and unsworn evidence may still inject some form of subtle reliability issue about the child's evidence which is contrary to the

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176 Graham Davies et al, *Videotaping Children's Evidence: An Evaluation* (Report, Home Office, 1995) 11.

177 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).

178 Ibid 38.

179 (2016) 258 CLR 108.

180 Ibid 123 [28] (The Court).

views expressed in the *ALRC Evidence Report 2005*, subsequently endorsed by the Explanatory Memorandum to the Evidence Amendment Bill 2008 (Cth):<sup>181</sup>

Despite the fact that research shows that the evidence of children is not inherently less reliable than that of adults, it has been found that the credibility of children's evidence is still often underestimated by juries and the community generally. Given that such misconceptions still appear to be prevalent, the Commissions consider that there are grounds for adopting a provision prohibiting judges from giving general warnings about the unreliability of child witnesses ...<sup>182</sup>

In *R v GW*,<sup>183</sup> the High Court also alluded to this point, but it was in the context of the ground of appeal that an instruction should have been giving to the jury explaining the difference between sworn and unsworn evidence. The High Court opined that any instruction regarding the legal condition of admitting evidence unsworn could only be material to the jury's assessment if it went toward the fact that he or she is a less reliable witness. However, the fact that the child gave her evidence unsworn was not material to whether her evidence was truthful, as so the jury should not act on that fact.<sup>184</sup>

## I Constructional Issues

Almost half a century of statutory reform and ALRC reports endorsing the trend for less stringent law related to competence (which led to, for example, the introduction of section 165A regarding warnings in relation to children's evidence generally) has passed.<sup>185</sup> Through this, many recommendations have been made, some have been adopted, and the intended operation of section 13 has become blurred. For example, section 13(4) uses the word 'may' regarding a judge's capacity to admit a child's unsworn evidence after telling him or her to tell the truth. This would seem to imply some judicial discretion, but that is arguably misleading.<sup>186</sup> This leads to a position where the section 13(5) instruction regarding truthfulness from the judge to the witness must occur in a very strict fashion, or else the evidence is 'non-evidence'.<sup>187</sup> However, the judge has no discretion where it is clear that the child does not give any meaning to that instruction. It would seem more justified, seeing as a whole inquiry into the child's competence has just occurred, to allow a judge to rephrase the instruction, for example by avoiding the statutory language of words like 'pressure', in accordance with the child's apparent level of understanding.

An additional constructional complexity is the repeated use of the word 'competence' for the separate tests in section 13, referred to in this article as 'general competence' and 'specific competence'.<sup>188</sup> The issue with this is well

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181 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 12<sup>th</sup> ed, 2016), 1402 citing Explanatory Memorandum, Evidence Amendment Bill 2008 (Cth).

182 *ALRC Evidence Report 2005*, above n 4, 608 [18.64].

183 (2016) 258 CLR 108.

184 *R v GW* (2016) 258 CLR 108, 131–2 [53]–[54] (The Court).

185 See, eg, *Interim Evidence Report 1985*, above n 79, 286 [521].

186 *SH v The Queen* (2012) 83 NSWLR 258, 261 [8] (Basten JA).

187 *R v Brooks* (1998) 44 NSWLR 121, 125 (Grove J).

188 See Part II of this article regarding the distinction between 'general competence' and 'specific competence'.

illustrated in the case of *R v Brooks* as Sperling J and Grove J disagreed on which type of competence the trial judge was actually referring to leading to different conclusion on which element of the section 13 inquiry had not been met.<sup>189</sup> The use of distinct terms for the two concepts would be desirable, perhaps even avoiding describing the capacity to give sworn or unsworn evidence as kinds of ‘competence’ at all.

The final constructional issue is the question that the High Court left open in *R v GW*.<sup>190</sup> The High Court discussed a distinction between evidence of a child that is unsworn (especially in criminal sexual assault matters) and general unsworn evidence, stating that different considerations may apply to a witness incapable of giving sworn evidence and that ‘[d]epending on the circumstances, it might prove necessary or desirable to give some further form of direction’.<sup>191</sup> This indicates that it may be beneficial for there to be some statutory safeguard to prevent children from so readily falling into the broader category of ‘a person who is not competent’.

### J Addressing the Counter-Argument

In the interest of completeness, it is important to recognise some of the meritorious arguments for the retention of competence testing of children before giving unsworn evidence, which may be summarised as follows. Historically, there was no distinction between sworn and unsworn evidence as it was necessary for all evidence to be sworn. In that context, competence testing was essential due to the importance of the oath: ‘the importance of an oath is this – *when we swear, we stake our souls*’.<sup>192</sup> However, the situation where children would rarely ‘pass’ the thorough examination of oath-taking required for them to give sworn evidence is not the current position. The statutory invention of unsworn evidence has affected the balance so that a child’s evidence will often be received. This has a very significant effect on some fundamental principles, including the principle of procedural fairness afforded to the accused. Further, the rules of evidence are a critical and practical element of procedural and adjudicative fairness, and quite intentionally, ‘the adversarial model is modified in the criminal justice context by altering the balance to accord the accused certain procedural safeguards.’<sup>193</sup> As such, statutory mechanisms in place to ensure the balance is in favour of the accused are justified.<sup>194</sup> Maintaining the distinction between sworn and unsworn evidence is thus seen as further justified as it ensures that the criminal burden of proof beyond reasonable doubt is not undermined. It prevents the courts from hearing evidence of no probative value as well as protecting the remaining sanctity of giving an oath or taking an affirmation. Even if that argument is not accepted on the grounds that, as the

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189 See discussion of *R v Brooks* (1998) 44 NSWLR 121 in Part III(E) of this article.

190 (2016) 258 CLR 108.

191 *R v GW* (2016) 258 CLR 108, 132–3 [57] (The Court).

192 John Browne, *An Essay on the Nature and Importance of Legal Oaths; and on the Awful Consequences of Perjury, and of Profane Swearing* (Whittaker & Co, 1<sup>st</sup> ed, 1840) 17–18 (emphasis in original).

193 Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 12<sup>th</sup> ed, 2016) 2.

194 *R v BBR* (2009) 195 A Crim R 330, 338 [38] (Chesterman JA).

NSW Court of Criminal Appeal has stated, '[i]t is not correct to treat the operation of s 13 as involving a balance between the interests of the child witness and those of the accused', the Court still considered the statutory precondition justified. This is because section 13 is not directly concerned with the interests of young children – rather, its purpose is to assist in collecting relevant evidence to the determination of a criminal charge. It is therefore directly concerned with the interests of general public.<sup>195</sup>

Another possible justification for the retention of unsworn evidence is that it is 'designed to limit the danger that people with a limited understanding of the concept of truth telling [especially children] may be confused or intimidated by the fact that a person with apparent authority is seeking agreement to a proposition'. That is, allowing children to give unsworn evidence protects them from the often-intimidating process of taking an oath or affirmation.<sup>196</sup>

A final argument for retention is that often, in practice, one inquiry will usually serve for a determination on both issues of sworn and unsworn evidence.<sup>197</sup> This means that unless both steps in the inquiry are removed, there is no increased delay in time assessing the competence of the child, as the first test (regarding the ability to understand and answer questions about a fact) must occur in any case.

## V CONCLUSION

Views regarding the reliability of children's evidence have progressed. The historic requirement of proving some religious understanding which children under the age of criminal responsibility were generally presumed to have to meet in order to give sworn evidence is no longer the position. Nonetheless, unjust outcomes remain, in part due to the difficulty of maintaining the statutory distinction between sworn and unsworn evidence and the associated tests as set out in section 13.

The NSW Court of Criminal Appeal has observed that it is incorrect to treat section 13 as a balance between the interests of a child and the interests of the accused.<sup>198</sup> However, as a matter of practical reality, that is how it operates. This is because competence tests remain the law's way of continuing the historic belief that children are an unreliable class of witness. This is the case despite the fact that the historic view that children's unsworn evidence carries less weight than other forms of evidence is not endorsed by the High Court, relevant legal stakeholders, ALRC reports or behavioural studies.

Through the historic analysis provided in this article, it has been demonstrated that the foundations of unsworn evidence no longer exist. As the test is not well-founded, contemporary application is very difficult as there is

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195 *SH v The Queen* (2012) 83 NSWLR 258, 264–5 [23] (Basten JA).

196 *Ibid* 261–2 [12]–[13], 264–5 [23], [26] (Basten JA).

197 *ALRC Evidence Report 2005*, above n 4, 104 [4.42]; see also Schultz, above n 3; *Lau v The Queen* (1991) 6 WAR 30, 59 (Owen J).

198 *SH v The Queen* (2012) 83 NSWLR 258, 264–5 [23] (Basten JA).

arguably no justifiable policy remaining to inform the mechanism. It is no wonder that judicial officers continue to struggle with the inquiry into a child's understanding of the obligation to tell the truth, and applying the rest of the section 13 test properly. Nonetheless, part of the issue must be attributed the judges themselves. In recent years following the authority of *R v Brooks*,<sup>199</sup> the court have interpreted unnecessary complexity into section 13. This has had the unintended effect of undermining section 13, and often, contrary to the policy behind the section, making it more difficult for a child to be heard. It seems that a judicial stigma continues to attach to evidence of a child that is unsworn.<sup>200</sup>

Any future cases being found 'contrary to law', thereby disallowing the court from applying the proviso and consequentially being set aside for re-trial due to the current interpretation of section 21 and section 13 will be unjust. If such a case does occur, it will be yet another example alongside those that have already been provided of unjust procedures leading to unjust outcomes and, regrettably, it will most likely be to the detriment of a vulnerable child, involved in a case of sexual assault. The role of the jury, as the trier of fact, is to assess whether it believes the evidence that has been put before it. In a practical sense, whether the evidence is sworn or unsworn, the jury will determine its own assessment of the reliability and weight of that evidence. As the High Court found in *R v GW*, the fact that R did not give sworn evidence was not material to the jury's assessment of the reliability of his or her evidence.<sup>201</sup> If it is not material, it should not be distinguished. Further, if it is not material, then if the pre-trial ruling was not arrived at in strict compliance with the statutory formula, it should not be held 'contrary to law'.

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199 (1998) 44 NSWLR 121.

200 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, 57.

201 *R v GW* (2016) 258 CLR 108, 132 [54] (The Court).