I. Summary

This memorandum discusses the strategies courts employ around the world to treat child victims and witnesses and their evidence when giving testimony. International and regional human rights standards have highlighted good practices in the treatment of vulnerable young child witnesses, centering on the foundational principle of the best interests of the child. In turn, domestic courts and legislatures worldwide have created and employed a broad range of judicial approaches to the admissibility of child witness testimony; the reliability of child witness evidence, and the procedures that should be employed to facilitate child witness testimony.

First, this memorandum examines relevant international and regional human rights standards on child testimony. Second, it reviews the manner in which courts in different jurisdictions have handled the question of whether young children should be allowed to testify. Third, it outlines the question of how a child witness’s evidence should be treated from the perspective of multiple domestic systems. Last, it describes the myriad procedures courts worldwide use when child victims and witnesses testify.
II. Child Testimony: Relevant International and Regional Standards

A. International Standards

The rights of child victims and witnesses of crime are highlighted by international and regional standards included in instruments such as the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. As outlined in the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, international human rights instruments emphasize respect for several key cross-cutting principles to ensure justice for child victims and witnesses. The Convention on the Rights of the Child provides for the best interests of the child as a central animating principle, where “in all actions concerning children, whether undertaken by…courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The Guidelines note that children have the right to dignity and compassion such that each child’s special needs, interests and privacy should be respected and protected. Children also have the right to be protected from discrimination and to be treated fairly and equally,

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2 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 3(1).
3 Guidelines on Justice, supra note 1, at ¶ 8 (c)(i). “Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect.”
4 Id., ¶ 8 (c)(ii). “Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.”
5 Id. ¶ 8(a).
irrespective of gender, race, ethnicity, language, religion, disability, property or other status. In addition, the Guidelines provide for a child’s right to participation. Every child has the right to express her/his views, opinions and beliefs freely and in her/his own words and the right to contribute to the decisions affecting her/his life taken in any judicial processes. International and regional human rights instruments also draw attention to several additional rights for child victims and witnesses of crime, including the right to be informed, the right to effective assistance, and the right to be protected from justice process hardship.

Informed by these standards, international and intergovernmental human rights bodies have articulated best practices for the treatment of child witnesses within the justice system. Working in collaboration with UNICEF and the International Bureau for Children’s Rights, the UN Office on Drugs and Crime developed a Model Law for Justice in Matters Involving Child Victims and Witnesses in Crime (Model Law) in 2009 after reviewing domestic legislation and legal practices from around the world. The Model Law provides that courts shall ensure that proceedings relevant to the testimony of a child victim or witness are conducted in language that is simple and comprehensible to a child. It further recommends that if a child requires special assistance measures to testify due to her/his age, level of maturity or special individual needs, such

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6 Id., ¶ 8(b).
7 Id., ¶ 8(d). “Every child has, subject to national procedural law, the right to express his or her views, opinions and beliefs freely, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.”
9 Id., at 65-80.
10 Id., at 93-112.
12 The non-exclusive list of ‘special needs’ articulated in the Model Law includes disability, poverty, ethnicity or risk of re-victimization.
measures be provided free of charge.\textsuperscript{13} The Model Law also advises that children involved in the justice process work with a designated support person.\textsuperscript{14} Child victims and witnesses should be supported by an individual with appropriate training and professional skills from the beginning of the investigation phase and throughout the trial process in order to prevent the risk of duress, revictimization and secondary victimization.\textsuperscript{15} The support person shall provide general emotional support to the child and discuss with the child, the court, and any guardian the different options for giving evidence.\textsuperscript{16} The child’s support person shall request special assistance measures where the child’s circumstances warrant them.\textsuperscript{17} Before a child is invited to court, the competent magistrate or judge must verify that the child is already receiving the assistance of a support person and shall appoint one in consultation with the child and her/his parents or guardian if one has not yet been designated.\textsuperscript{18}

The Model Law provides that a child witness’s testimony shall not be presumed invalid or untrustworthy by reason of her/his age alone, and that a child be deemed a capable witness unless proved otherwise through a competency examination administered by the court.\textsuperscript{19} This includes testimony given with technical communications aids or through the assistance of an expert specialized in communicating with children.\textsuperscript{20} Further, children will not be required to testify against their will or without the knowledge of her/his parents or guardian, and the guardian shall generally be invited to accompany the child.\textsuperscript{21} Further to a competency

\textsuperscript{13} Model Law and Commentary, supra note 11, at ¶ 12(3).
\textsuperscript{14} Id., ¶ 15.
\textsuperscript{15} Id.
\textsuperscript{16} Id., ¶ 17.
\textsuperscript{17} Id.
\textsuperscript{18} Id., ¶ 23.
\textsuperscript{19} Id., ¶ 20.
\textsuperscript{20} Id., ¶ 20(2).
\textsuperscript{21} Id., ¶ 20(5). The guardian will not be invited in the following circumstances: where the guardian is the alleged perpetrator of the offence committed against the child; where the child expresses concern about being accompanied
examination of a child, the Model Law provides that such an examination must only go forward if the court determines that there are compelling reasons to do so and where the best interests of the child are a primary consideration.\textsuperscript{22} As in determining whether testimony can be given, the age of a child alone is not a compelling reason for requesting a competency examination,\textsuperscript{23} and the focus of the exam is on determining the child’s ability to understand simple questions and answer them truthfully.\textsuperscript{24} The Model Law recommends that questions be asked in a child-sensitive manner appropriate to the age and developmental level of the child, and that they not be related to the issues involved in the trial. Finally, a competency examination for child victims and witnesses should not be repeated.\textsuperscript{25} It is important that a child’s ability to testify not be undermined by her/his lack of capacity for abstract thought, thus if a child is unable to understand the consequences of swearing an oath, at the direction of the presiding judge or magistrate, the witness need not be required to do so.\textsuperscript{26} In such cases, the child may be offered the opportunity to instead promise to tell the truth, and the court will not be barred from hearing the child’s testimony.\textsuperscript{27}

The Model Law recommends a number of measures during the course of a trial that are rooted in the best interests of the child principle outlined above. Given children’s specific needs and vulnerabilities, the Law provides for emotional support for child victims and witnesses. The judge or magistrate shall inform the child’s support person that s/he, as well as the child

\textsuperscript{22} Id., ¶ 21(1).
\textsuperscript{23} Id., ¶ 21(2).
\textsuperscript{24} Id., ¶ 21(5).
\textsuperscript{25} Id., ¶ 21(6)-(7).
\textsuperscript{26} Id., ¶ 22.
\textsuperscript{27} Id.
him/herself, may ask the court for a recess whenever the child needs one. The courtroom layout shall ensure that, so far as possible, the child shall be able to sit close to her/his support person, parents/guardian or lawyer during all trial proceedings. Further, the Law recommends that the magistrate or judge ensure that child victims and witnesses can wait in areas that are equipped in a child-friendly manner and are not visible to or accessible to persons accused of having committed a criminal offence. If possible, the waiting areas used by children should be separate from those used by adult witnesses, and the Model Law calls on judges and magistrates to give priority to hearing the testimony of child victims and witnesses so as to minimize their overall waiting time during their court appearance.

The Model Law, building on international and regional standards, also provides for a number of measures to protect the privacy and well-being of child victims and witnesses. At the request of a child victim/witness, her/his parents or guardian, support person, or lawyer, the court may order one or more of the following measures to prevent undue distress and secondary victimization:

(a) Expunging from the public record any names, addresses, workplaces, professions or any other information that could be used to identify the child;

(b) Forbidding the defence lawyer from revealing the identity of the child or disclosing any material or information that would tend to identify the child;

(c) Ordering the non-disclosure of any records that identify the child, until such time as the court may find appropriate;

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28 Id., ¶25(2).
29 Id., ¶26.
30 Id., ¶24.
31 Id.
(d) Assigning a pseudonym or a number to a child, in which case the full name and date of birth of the child shall be revealed to the accused within a reasonable period for the preparation of his or her defence;

(e) Efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying:

   (i) Behind an opaque shield;
   (ii) Using image- or voice-altering devices;
   (iii) Through examination in another place, transmitted simultaneously to the courtroom by means of closed-circuit television;
   (iv) By way of videotaped examination of the child witness prior to the hearing, in which case the counsel for the accused shall attend the examination and be given the opportunity to examine the child witness or victim;
   (v) Through a qualified and suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities;

(f) Holding closed sessions;

(g) Giving orders to temporarily remove the accused from the courtroom if the child refuses to give testimony in the presence of the accused or if circumstances show that the child may be inhibited from speaking the truth in that person’s presence. In such cases, the defence lawyer shall remain in the courtroom and question the child, and the accused’s right of confrontation shall thus be guaranteed;

(h) Allowing recesses during the child’s testimony;

(i) Scheduling hearings at times of day appropriate to the age and maturity of the child;
(j) Taking any other measure that the court may deem necessary, including, where applicable, anonymity, taking into account the best interests of the child and the right of the accused.\textsuperscript{32}

In its General Comment 12 on the right of the child to be heard, the UN Committee on the Rights of the Child, the body charged with monitoring state implementation of the CRC, also emphasized that courtroom proceedings be “accessible and child-appropriate,” and that particular attention must be paid to the provision and delivery of child-friendly information, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.\textsuperscript{33} In addition, in common law jurisdictions, the Model Law recommends that the competent judge not allow cross-examination of a child victim or witness by the accused.\textsuperscript{34} In such cases, cross-examination may instead be undertaken by the defence lawyer under the supervision of the competent judge, who has the duty to prevent the asking of any question that may expose the child to intimidation, hardship or undue distress.\textsuperscript{35}

B. Regional Guidelines

In November 2011, the African Child Policy Forum and Defence for Children International convened a Global Conference on Child Justice in Africa. The conference, held in Kampala, Uganda, subsequently adopted the Guidelines on Action for Children in the Justice System in Africa. The Guidelines were developed as a framework to achieve full implementation of African regional human rights system instruments such as the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, and the African

\textsuperscript{32} \textit{Id.}, ¶ 28. (emphasis added)
\textsuperscript{34} \textit{Id.}, ¶ 27. Where applicable, and with due regard for the rights of the accused.
\textsuperscript{35} \textit{Id.}
Youth Charter, in addition to international human rights instruments. The implementation of the Guidelines are to be guided by the best interests of the child, and the recommendations are founded on several overarching principles, including the right of children to participate and be fully respected, the right to non-discrimination, the right to dignity, and the child’s right to survival, protection and development, as provided for in the African Charter on the Rights and Welfare of the Child. States should enact legal provisions to give effect to the rights and protections accorded to child victims and witnesses in the Guidelines, with particular attention to the protection of children’s privacy when they are involved in judicial procedures.

The Guidelines recommend that States ensure that child witnesses are able to “give their best evidence with the minimum distress” and to act to protect children from hostile or intimidating questioning. In order to uphold the child’s right to privacy, no information that could identify a child witness shall be published, and the public gallery should be cleared when child witnesses testify, especially in sexual offence cases and “cases involving intimidation.” The Guidelines provide that screens be set up around the witness box to shield the child witness

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37 Id., ¶ 17. “The best interests of the child shall be the primary consideration in the implementation of actions and decisions concerning children in the justice system, unless, exceptionally, the dictates of the communal good and public policy require otherwise. It must be recognised that the best interests of the child are best determined in a multidisciplinary approach in which the physical, social, psychological and emotional wellbeing of the child can be fully explored.”

38 Id., ¶ 16.

39 Id., ¶ 18. The Guidelines further provide for special protection to be granted to “the most vulnerable children, including children with disabilities, children living or working on the street, the girl child, children affected by HIV/AIDS, refugee and displaced children, and children who are separated from their families.”

40 Id., ¶ 19.


42 Id., ¶ 69.

43 Id., ¶ 64. “Investigation and practices of judicial bodies should be adapted to afford greater protection to children and to respect children’s rights without undermining the defendant’s right to a fair trial.”

44 Id.
from viewing the defendant, and that judicial officers, prosecutors and lawyers be permitted to wear ordinary dress during the testimony of a child witness to increase the child’s level of comfort with the proceedings.\textsuperscript{45} In a similar vein, they recommend that court proceedings be adapted to the child’s pace and attention span, with flexibility for regular breaks. Similar to the Model Laws, the Guidelines provide that defendants be prevented from personally cross-examining child witnesses, and they note that information about the previous sexual history of child victims or witnesses may not be sought or presented in trials for sexual offences.\textsuperscript{46} A child witness should also be permitted to testify before the court through an intermediary where necessary, and video-recorded pre-trial interviews with witnesses should be presented in lieu of live testimony where resources and facilities permit. Finally, the Guidelines also provide that a child’s evidence should be neither disallowed nor discounted purely on the basis of her/his age.\textsuperscript{47}

\textbf{III. Children’s Eligibility to Testify – Comparative Practices}

Courts in different jurisdictions have taken a number of approaches to the question of reliability of a child witness’s testimony and a child’s competence to testify. Frequently grounded in the common law, two legal hurdles typically exist, and according to the legal system in question, either or both may be applied by the court. The justice system grapples, firstly, with the question of the admissibility of a child’s evidence, and secondly, with the question of the reliability of this evidence. This section examines the ways in which courts in different jurisdictions have handled the question of whether - and if so when - they should take testimony given by a child into account in the determination of a case. Domestic systems have addressed this issue by requiring competency examinations of different styles, by creating an exception for

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
children to the requirement to testify under oath, by presuming a child’s competency to testify, and/or by subjecting the question of a child’s competence to testify to a cautionary rule.

A. Canada

Prior to statutory reforms in Canada, a common law country inheriting English law, a child was only permitted to testify if the child could be sworn, which required the witness to demonstrate an understanding of the “nature and consequences” of an oath.\(^48\) In the 1779 case *R v. Brazier*, the court held that “no testimony whatever can be legally received except upon oath, and that an infant…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 consequences of an oath.”\(^49\) The admissibility test required children to demonstrate not only knowledge of the concept of an oath, but also a belief in a Supreme Being who would punish false oaths.\(^50\) For instance, in *R v Holmes*, the court was satisfied of the admissibility of the child witness’ testimony when the child responded, “if he tells lies he will go to the wicked fire,” upon being asked “what becomes of a person who tells lies [under oath].”\(^51\) This common law rule was grounded on the understanding that children who could not explain the meaning of an oath were less likely to tell the truth, and should thus not be permitted to testify.\(^52\)

This competency inquiry (or *voir dire*) was modified in 1893 by the Canada Evidence Act,\(^53\) such that a child might testify if the judge was persuaded that the child understood the “duty to speak the truth.” Subsequent case law established that a child now had only to appreciate the

\(^49\) Id.
\(^50\) See *R. v. Antrobus* (1946), 63 B.C.R. 372 at 374 (C.A.)
\(^51\) See *R v Holmes* (1861), 175 E.R. 1286 at 1286 (Winter Assizes).
\(^53\) See The Criminal Code of Canada, 1892, 55-56, VICT. c.29; see also the Canada Evidence Act, 1893, 56 VICT., c.31.
“social consequences” of promising rather than the spiritual consequences of an oath. Adults were not subject to this competency test before testifying, as it was presumed that they knew the significance of taking an oath. The Evidence Act was amended in 1988 to provide that children who did not understand the nature of an oath could testify upon promising to tell the truth provided they had the “ability to communicate.” Case law indicates that there continued to be judicial inquiry into children’s understanding of the concepts of “truth”, “lie” and “promise.”

This approach to the admissibility of child testimony changed in January 2006 with the introduction of the new Child Evidence Act. Section 16.1 provides that there is a presumption that all children are competent to testify. Children are required to “promise to tell the truth” before being permitted to testify, but the Act specifies that children not be “asked any questions regarding their understanding of the nature of the promise to tell the court for the purpose of determining whether the evidence shall be received by the court.” In addition, the presiding judge has a duty to ensure that the questions posed to the child during this inquiry are appropriate to the child’s stage of development, including age-appropriate vocabulary and sentence structure. Further, a party challenging the competence of a child to testify now bears the onus of satisfying the judge that there is a genuine issue with the child’s ability to communicate in the proceedings. If this results in an inquiry, the only test for competence here is whether the child is “able to understand and respond to questions.”

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54 R v Fletcher (1982) 1 C.C.C. (3d) 370 (Ont. C.A.) at 380. See also Rv F (WJ) [1999] 3 S.C.R. 569. Note that McLachlin J commented (at para [42]) on the ‘absurdity of subjecting children to examination on whether they understood the religious consequences of the oath.’
56 See N. Bala, K. Lee, & R. Lindsay, R. v. M: Failing to appreciate the testimonial capacity of children, 40 Criminal Reports, 93-106 (2001).
58 Id., §16.1(7).
60 Id.
61 Id.
In recent years, the Canadian courts have concluded that the new provisions are consistent with the rights of an accused person to a fair trial that is conducted in accordance with the principles of fundamental justice under the Charter of Rights and Freedoms.\footnote{See e.g., \textit{R v Persaud} [2007] O.J. 432 (Sup. Ct.) (QL), per Epstein J.; and \textit{R v F(J)} [2006] A.J. 972 (Prov. Ct.)}{. In \textit{R v JS}, the British Columbia Court of Appeal stated that section 16.1 of the Child Evidence Act “discards the imposition of rigid pre-testimonial requirements which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining.”\footnote{\textit{R v JS} [2008] B.C.J. 1915(C.A), at 52.} The Court concluded that the section “reflects the [research] findings…that the accuracy of a child’s evidence is of paramount importance, not the ability of a child to articulate abstract concepts.”\footnote{\textit{Id.}, at 53.} The Court of Appeal, however, provided that child witnesses moral commitment to tell the truth, their understanding of a promise to tell the truth, and their cognitive ability to answer questions about “truth” and “lies” could be challenged on cross-examination. These issues went to the child witness’s credibility and reliability and thus could be be challenged in the same way as an adult’s testimony.\footnote{\textit{Id.}} However, the Court noted that these concerns relate to the weight of a child’s evidence rather than its admissibility.\footnote{\textit{Id.}}

\textbf{B. United Kingdom}

As described above, English common law previously provided that children of tender years (14 years and under) could only testify if they were sworn and possessed sufficient knowledge of the nature and consequences of an oath.\footnote{See also Home Office, \textit{Report of the Advisory Group on Video Evidence}, London (December 1989) at 45 \textit{[hereinafter The Pigot Report]}.} The Children and Young Persons Act of 1933 also allowed for children who did not understand the oath to give unsworn evidence.\footnote{Children and Young Persons Act 1933, 23 & 24 Geo.5 c.12, § 38. [United Kingdom]} Such a measure would be permissible through a competency test, such that in the opinion of the court,
“he [or she] is possessed of sufficient intelligence to justify reception of the evidence, and understands the duty of speaking the truth.”

In addition, following the Criminal Justice Act of 1988, any legal distinction between the evidence of sworn and unsworn child witnesses was abolished. Section 34 of the Act removed the requirement that it was obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child.

However, the Pigot Report of 1986, submitted by a governmental advisory group on video-recorded evidence, highlighted case law that acted to limit the number of children considered competent to testify in English courts because of reliance on restrictive interpretations of the competency test. After the Court of Criminal Appeal had stated that it was “ridiculous” that any value could be adduced to the evidence of a five years old in Wallwork, the Court of Appeal Criminal Division had affirmed the view of the court in Wallwork and held that “it must require quite exceptional circumstances to justify the reception of this kind of evidence.”

Arguing that the weight of recent research indicates that young children are no more likely to give inaccurate or untruthful evidence than other witnesses, the Pigot Report proposed that the existing competence requirement applied to potential child witnesses be abolished. The advisory group noted that “once any witness has begun to testify he or she may appear to be of unsound mind…or fail to communicate in a way that makes sense. The judge is already able to rule such a witness incompetent and to advise the jury to ignore any evidence that may have been given. We think that this power…is all that is needed.” In addition, the advisory group examined the practice of allowing children who do not understand the oath to give unsworn evidence and

69 Id.
70 Criminal Justice Act, 1988, c. 33, § 34 [hereinafter Criminal Justice Act 1988].
73 The Pigot Report, supra note 67, at 47.
74 Id., at 48.
75 Id., at 50.
concluded that while there no longer existed any effective legal distinction between sworn and unsworn evidence, some jurors could be inclined to draw an inference that unsworn evidence was less reliable.\textsuperscript{76} Thus the Report proposed that all witnesses under the age of 14 give evidence unsworn.\textsuperscript{77} The Criminal Justice Act 1988, as amended in 1991, implemented these recommendations of the Pigot Report. Under section 33A of the Act, all children under the age of 14 must now give unsworn evidence so that the evidence of all child witnesses would be perceived equally by jurors, and the provision removes any special inquiry into the competence of children.\textsuperscript{78}

The Youth Justice and Criminal Evidence Act of 1999 elaborates on the competence of all witnesses to give evidence in the United Kingdom. The criteria set out for the competency of witnesses in criminal trials to give evidence are independent of the age of the witness and relate to the person’s capacity to understand questions put to her/him as a witness and to give answers to them that can be understood.\textsuperscript{79} The Act states that “at every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.”\textsuperscript{80} This new legislative regime was upheld by the Court of Appeal (Criminal Division) in \textit{R v Barker}, which concluded that it was not open to the judge to create or impose additional non-statutory criteria based on the approach of earlier generations to the evidence of small children.\textsuperscript{81}

\begin{footnotes}
\item[76] Id.
\item[77] Id.
\item[78] Criminal Justice Act 1988, supra note 70, at § 33A. [United Kingdom]
\item[80] Youth Justice and Criminal Evidence Act 1999, c. 23, § 53. [United Kingdom]
\item[81] See \textit{R v Barker} [2010] EWCA Crim., at ¶ 39.
\end{footnotes}
C. New Zealand

New Zealand also inherited the English common law tradition, although in recent years the government has undertook a number of legislative reforms that modify courtroom rules around the admissibility of child witness testimony.

While the common law required that a child be sworn in before her/his evidence could be heard and that the judge be convinced that the child could understand the nature and consequences of an oath, as above, the 1957 Oaths and Declarations Act amended this rule to allow a child under 12 to give either sworn or unsworn evidence. However, unsworn evidence could only be heard providing the child made a promise to tell the truth, and neither oath nor promise could be taken in the absence of satisfaction of the test of competence. Before the child made the declaration (“I promise to tell the truth, the whole truth, and nothing but the truth”), the court must make inquiries to ascertain whether the child is sufficiently intelligent to be capable of giving a rational account of what they have seen or heard; and whether they understand the duty of speaking the truth, which requires an understanding the difference between truth and lies and an appreciation of the solemnity of the occasion.

A ruling on competence to testify may be made prior to the trial, under section 244A of the Crimes Act 1961. Competence should also be demonstrated before the witness testifies during the trial, and in a criminal case this should take place in front of the jury in order to assist the jury in ascertaining how much weight to give to the witness’ evidence. In addition, the trial judge generally takes an active role in questioning the witness to determine her/his competence. *R v Accused* gives an example of the test in practice:

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83 Id.
85 Id. at ¶ 652.
86 See *R v P* (1992) 9 CRNZ 119, 125.
When the complainant was about to give evidence the Judge himself addressed several questions to her in the presence of the jury. He asked her age which she correctly gave to him. He asked if she knew what a promise was to which she replied she did and further that she understood what it was to promise to do something. The Judge then asked her if she knew what the truth was and what it is to tell lies. She then positively promised the Judge to tell the truth, and negatively promised him not to tell lies. Finally she promised not to tell anything which was not the truth and that she understood “all that”. ... [T]he answers she gave to the questions were single words “yeah” or “nah” but always apposite to the questions posed by the Judge.

The Court of Appeal has further held that that the competence test is preliminary and that a child should not be subjected to “an emphatic test of general cognitive skills” during this line of questioning.87 The Court went on to state that “we think that a jury should be told that a child is not disqualified simply by reason of age alone and that there is no precise age which determines a child’s competency. This depends on the child’s capacity and intelligence, or understanding of the difference between truth and falsehood and on appreciation of the duty to tell the truth.”88 Yet the New Zealand Law Commission noted in 1996 that there continued to be occasions where relevant testimony was excluded on the grounds that the witness was not able to demonstrate competence using more complex lines of questioning than that required by the Court of Appeal.89

For children over the age of 12, it is not the general duty of the judge to conduct an examination of a child’s fitness to give evidence on oath in the absence of some indication of possible incompetence.90 The challenger, usually defense counsel, has the evidential burden of

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87 R v Accused, at ¶ 652.
88 Id., at ¶ 653.
raising the issue.\textsuperscript{91} This then places the burden of proof on opposing counsel to show, on the balance of probabilities, that the witness is competent.\textsuperscript{92}

Following its 1996 review, the Law Commission recommended that all children under the age of 12 give unsworn evidence, where this evidence will be received as if given on oath.\textsuperscript{93} This paved the way for legislative reform, and the Evidence Act of 2006 and the Evidence Regulations 2007 were designed to “facilitate the admission of relevant and reliable evidence” and included fewer restrictions on witness status.\textsuperscript{94} The Evidence Act 2006 states that “in a civil or criminal proceeding any person is eligible to give evidence.”\textsuperscript{95} The general rule is that any person is eligible to give evidence and that any person eligible to give evidence may also be compelled to give evidence.\textsuperscript{96} Essentially, this replaced the former concept of competence, which involved an assessment of a witness’ level of intelligence and ability to understand the meaning and implications of promising to tell the truth with a new rule of general eligibility.\textsuperscript{97} This provision of the Act was interpreted in \textit{R v Tanner}, where the court held that if a young child is unable to give coherent evidence a judge will still retain discretion to exclude the testimony under section 8 of the Act (the general exclusion provision).\textsuperscript{98}

\textsuperscript{92} Id.
\textsuperscript{95} Evidence Act 2006, § 77(1(a).
\textsuperscript{97} Id.
\textsuperscript{98} \textit{R v Tanner} [2007] NZCA 391 at 24.
D. Namibia

At common law in Namibia, age was not the determining factor in deciding whether a child was competent to testify. Rather, children were competent to testify if, in the opinion of the court, they could understand what it meant to tell the truth.\(^9\) According to section 164 of the Criminal Procedure Act 1977 (No. 51 of 1977), if the court was satisfied that a child did not understand the nature and import of the oath or affirmation, the child was not required to give sworn evidence.\(^{10}\) Case law also suggested that a child’s evidence should not necessarily mean that it should be accorded less weight if it was unsworn.\(^{11}\) However, children were required to pass a competency test before their testimony would be admitted.\(^{12}\) Under the test, in each case, the judge or magistrate would satisfy herself/himself that the child understood what it meant to speak the truth.\(^{13}\) If the child was not deemed to have the intelligence to distinguish between what was true or false, and to recognize the “danger and wickedness” of lying, s/he would be found to be an incompetent witness.\(^{14}\)

However, the Criminal Procedure Amendment Act, 2003, introduced important changes with regard to the admissibility of child witness testimony. The competency test for child witnesses has been narrowed such that the sole criterion for competency is the ability to communicate with the court.\(^{15}\) The amended section no longer requires an inquiry into the child’s ability to understand the nature and import of the oath and affirmation, and now requires the presiding

\(^{10}\) Section 164 of the Criminal Procedure Act, 1977 (No. 51 of 1977). See also section 41 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965). [Namibia]
\(^{11}\) R v Manda, 1951 (3) SA 158 (A).
\(^{14}\) Id.
officer to admonish the child to speak the truth. Further, the inserted subsection (3) provides that “notwithstanding anything to the contrary…the evidence of any witness required to be admonished….shall be received unless it appears to the presiding judge or judicial officer that the witness is incapable of giving intelligible testimony.”

E. South Africa

In South African common law, there exists no minimum age below which a child is declared incompetent to testify. A young child will be found to be a competent witness if the presiding officer considers that they are old enough to know what it means to tell the truth and have sufficient intelligence to testify, although the courts have noted that magistrates often lack any expertise in assessing the competency of children to testify.

Section 164 of the Criminal Procedure Act, 1977, allowed young children to give evidence in criminal proceedings without taking the oath or affirmation after being admonished to speak “the truth, the whole truth, and nothing but the truth.” The courts have also indicated that a child’s unsworn evidence is not necessarily any less trustworthy than if it had been sworn. In *R v Manda*, the Supreme Court of Appeal held that a child “may not understand the nature or recognize the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest.”

In *S v N*, the court found that the capacity to distinguish between the truth and a lie is a prerequisite for making an admonition in terms of section 164. The legislative and common law

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106 Criminal Procedure Act (No. 51 of 1977), §164(3), as amended by the Criminal Procedure Amendment Act, 2003. [South Africa]
107 *Ex parte Minister of Justice: In re R v Demingo* 1951 1 SA 36 (A), at 43.
109 Criminal Procedure Act 1977 (Act No. 51 of 1977), §164. [South Africa]
110 *R v Manda* 1951 3 SA 158 (A) at 163.
111 *Id.*
112 *See S v N* 1996 (2) SACR 225 (C).
regime currently leaves unclear the question of whether there must be a preliminary inquiry to
determine whether a child witness can distinguish between truth and falsity. In S v B, the court
held that there does not have to be an investigation before a court can make a finding as to
whether a witness understands the nature or import of an oath, as the mere youthfulness of a
child can justify such a finding.\textsuperscript{113} This marked a shift from previous court practice that
employed a more formalistic approach to the issue, requiring a full inquiry regarding the oath. S
v B did not clarify the above question as to whether there should be an inquiry towards
understanding of the truth, however. At present, a child witness’s competence to testify may be
determined at the stage of either taking the oath, or if not taking the oath, when they are
questioned about truth or falsity prior to being admonished.

In 2002, the South African Law Commission examined the issue of child witness
competence, particularly in the context of sexual offences, and recommended that section 164 of
the Criminal Procedure Act be amended to reflect that all witnesses should be regarded as
competent to testify if they can understand the questions put to them and can in return give
answers that the court can understand.\textsuperscript{114} This recommendation was not one, however, which was
included in the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Bill, so
the question of the test remains open. The Commission also recommended that a new provision
be inserted after 192 of the Act to read:

(1) All persons below the age of 18 years shall be presumed to be competent to testify in
criminal proceedings and no such person shall be precluded from giving evidence
unless he or she is found, at any stage of the proceedings, not to have the ability or the
mental capacity, verbal or otherwise, to respond to questions in a way that is
understandable to the court.

\textsuperscript{113} See S v B 2003 (1) SACR 52 (SCA).
\textit{Sexual Offences Report}].
(2) The evidence given by a person referred to in subsection (1) shall be admissible in criminal proceedings contemplated in that subsection, and the court shall attach such weight to such evidence as it deems fit.

(3) The court shall note the reasons for a finding in terms of subsection (1) on the record of the proceedings.115

This provision has not yet been adopted, and is not included in the Criminal Law (Sexual Offences and Related Matters) Amendment Bill.

F. Zambia

The circumstances in which a child witness is deemed competent to testify have recently been subjected to legislative change, with the amendment of the Juveniles Act in 2011.116 With respect to children under 14 years of age, the court must accept the child’s testimony if it finds that the child is competent.117 This testimony will be received by the court if it finds that “the child is possessed of sufficient intelligence to justify the reception of the child’s evidence, on oath, and understands the duty of speaking the truth.”118 However, if the court determines through this competency test that the child does not have sufficient intelligence to justify the reception of the child’s evidence on oath, or does not understand the duty of speaking the truth,

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115 Id., at 107.
116 See Juveniles (Amendment) Act, 2011 (No.3 of 2011). The amended provision, section 122(1), previously read: “Where, in any proceedings against any person for any offence or in any civil proceedings, any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth; and his evidence though not given on oath but otherwise taken and reduced into writing so as to comply with the requirements of any law in force for the time being, shall be deemed to be a deposition within the meaning of any law so in force…[p]rovided that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.”
118 Id.
the court will exclude the child’s testimony from evidence.\textsuperscript{119} Children above the age of 14, however, are competent to testify without the special inquiry applicable to younger children.

G. Tanzania

Legislation in Tanzania also allows for unsworn testimony from child witnesses. Section 115(1) of Tanzania’s 2009 Law of the Child provides that where, in any case or matter, a child is called as a witness who does not, in the opinion of the court, understand the nature of the oath, the evidence may be received if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth.\textsuperscript{120}

IV. Reliability of Child Testimony – Comparative Practices

Courts around the world differ in their assessments of the reliability of a child witness’s evidence and in their treatment of this evidence. This section examines the ways in which courts in different jurisdictions have handled the question of the reliability of a child witnesses’ evidence and how the evidence of a child victim or witness should be treated. Depending on the jurisdiction, child witnesses may be subject to a corroboration rule in court proceedings on the grounds of their age. Child victims and witnesses may also be subject to an additional cautionary rule requiring corroboration of the evidence of complainants testifying in sexual offence cases. In both cases, the common law has historically warned judges that it is dangerous to convict on the uncorroborated evidence of a child and/or an alleged victim of sexual assault. Several countries have, however, recently reformed their laws of evidence such that evidence from a child witness is no longer subject to a caution or to the requirement of corroborating evidence.

\textsuperscript{119} Id.
\textsuperscript{120} Law of the Child Act (No. 21 of 2009), §115(1). [Tanzania]
A. South Africa

Historically, a rule of evidence has existed in the common such law that judges are required to warn the court of the danger of convicting on the uncorroborated evidence of certain categories of witnesses, including children and complainants in sexual offence cases, who may also be child victims.\(^{121}\) The cautionary rule is not codified in South African statute, but has evolved through the judiciary’s interpretation of the content of the rule; as such, there exists no definition of or fixed criteria for this rule to serve as a benchmark.\(^{122}\) The interpretation of and extent of application of the rule resides within the discretion of the presiding officer in the case.

Similar to other jurisdictions, a cautionary rule applies to the testimony of child witnesses due to questions about the inherent reliability of a child. In \(S v Manda\), the court listed “the imaginativeness and suggestibility of children” as two of a “number of reasons why the evidence of children should be scrutinized with care, amounting perhaps to suspicion.”\(^{123}\) In its Issue Paper 102, the South African Law Commission concluded that the perceived need for the existing cautionary approach is based on the courts’ inherent fear of the child’s ability to “make up the story”\(^{124}\) or create details relating to an act of abuse which the child cannot remember.\(^{125}\)

The courts have emphasized the inherent unreliability of children and affirmed the continuing existence of the rule on a number of occasions. In \(S v V\), the Supreme Court of Appeal held that “whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long

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123 See \(S v Manda\) 1951 (3) SA 158 (A).
124 \(R v Bell\) 1929 CPD 478 at 480.
125 \(R v Manda\) 1951 (3) SA 158 (A) at 163 C; \(Woji v Santam Insurance Co Limited\) 1981 (1) SA 1020 (A) at 1028 B-D.
been accepted that the evidence of young children should be treated with caution.”126 In *S v Vumazonke*, the High Court found that it was trite law that the cautionary law applies in respect of a child witness, and that “it is trite law that a child can be easily influenced. Psychological research has shown...that children are suggestible. Children do have a propensity to give an answer other than the one he knows to be correct because it suits him or her to do so.”127 While there is no requirement as a matter of law that the evidence of children has to be corroborated, in practice some form of corroboration is routinely required.128

The South African Law Commission has unequivocally recommended that the cautionary rule relating to children should be abolished.129 In reaching this conclusion the Commission asserted that in recent years research has been published that challenges these conventional views regarding the unreliability of children’s testimony, that empirical studies indicate that the memory of children is as accurate as adults, that children do not lie more than adults and that children can discern fact from fantasy in the context of acts of abuse.130 The Commission recommended that the Sexual Offence Act should clearly state that the cautionary rule should no longer be applied and that a provision should be adopted clearly prohibiting the application of the rules of corroboration.

South Africa’s Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 made a number of amendments in the law relating to survivors of sexual violence. The Act abolishes the cautionary rule counseling corroboration of the evidence of complainants in sexual

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126 *See S v V 2000 (1) SACR 453 (SCA).*
127 *See S v Vumazonke 2000 (1) SACR 619 (C).*
128 *Sexual Offences Report, supra* note 114, at 182.
129 *SALC Sexual Offences Process, supra* note 122, at 480.
130 *See e.g., D.J. Fote, Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform, 13 Pepperdine L.Rev.(1985) 157.*
offence proceedings. However, the Act does not refer to abolition of the cautionary rule for child witnesses. In addition, it is questionable whether this amendment will lead to courts’ abolition of the cautionary rule in respect of the evidence of children who are also alleged victims of sexual violence, as the Supreme Court of Appeal cited the common law cautionary rule in respect to a child complainant of sexual assault again in *Matshivha v The State* in 2013.

**B. Tanzania**

In Tanzania, the Sexual Offences Special Provisions Act (1998) amended section 127 of the Evidence Act 1967 to eliminate the requirement of corroboration in cases of sexual violence. This amendment also applies to the independent evidence of a child of tender years in criminal proceedings involving a sexual offence. Where the only independent evidence in the proceedings is that of a child, the court shall receive this evidence and may proceed to convict notwithstanding that such evidence is not corroborated after assessing the credibility of the evidence of the child on its own merits.

**C. Namibia**

The cautionary rule relating to offences of a sexual or indecent nature was abolished in the Combating of Rape Act, No. 8 of 2000. Section 5 of the Act eliminated the rule in relation to children testifying in sexual offence cases such that no court shall treat the evidence of any

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131 South Africa, Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, §60: “Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involved the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.”

132 *Matshivha v The State* (656/12) [2013] ZASCA 124 (23 September 2013), at 22.

133 The text of section 127 (7), as amended, reads: “Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth.”
complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution.\textsuperscript{134} The Act states that:

No court shall treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence.

The Combating of Rape Act was silent on the cautionary approach applicable to the evidence of children testifying in other proceedings. However, the Criminal Procedure Amendment Act 2003 then abolished the use of special caution in relation to child witnesses, holding that a court “shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.”\textsuperscript{135}

D. Kenya

Following the 2006 amendment of the Evidence Act, when in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court will proceed to convict the accused if it is satisfied that the alleged victim is telling the truth.\textsuperscript{136} As the High Court in Nankuru noted in \textit{Solomon Mungai Kanyago v Republic}, in relation to a child witness, following the amendment to section 124 of the Act the trial court can receive uncorroborated evidence in a sexual offence case and convict.\textsuperscript{137}

\textsuperscript{134} Namibia Combating of Rape Act, No. 8 of 2000, §5.
\textsuperscript{135} Criminal Procedure Amendment Act, \textit{supra} note 105, at §2, amending section 164 of the Criminal Procedure Act 1977 by the addition of subsection (4). [Namibia]
\textsuperscript{136} Kenya Evidence Act §124 (1851) (as amended by the Sexual Offences Act 2006). “Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him…[p]rovided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”
\textsuperscript{137} \textit{Solomon Mungai Kanyago v Republic} [2012] eKLR, at 5.
E. Zimbabwe

In 1995, the Zimbabwean Supreme Court examined the acceptance and reliability of child witness evidence in *S v S*. The court evaluated six main objections to relying on children’s evidence:

(a) children’s memories are unreliable;
(b) children are egocentric;
(c) children are highly suggestible;
(d) children have difficulty distinguishing fact from fantasy;
(e) children make false allegations, particularly of sexual assault; and
(f) children do not understand the duty to tell the truth.

The Court found that these objections had no merit, and, with regard to objection (d), that children do not fantasize over things beyond their own direct or indirect experience. With regard to objection (f), the Court stated that the belief that children do not understand the duty of telling the truth was a sweeping statement which ignored differences in age, intelligence and morality between children. It concluded that a new and more specific approach to cases involving children was called for and that it could not find justification for any one of the above objections. The court found it fit to refer to the age of the complainant only with regard to the imposed sentence.

F. Canada

In 1988, the Canadian Parliament abrogated the statutory rule that the unsworn testimony of a child needed to be corroborated, amending the Evidence Act. Some judges, however, continued to apply the common law warning rule, advising juries about the “inherent frailty” of

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138. *S v S* 1995 (1) SACR 51 (ZS) at 60b.
139. *Id.*
the testimony of children, whether it be sworn or unsworn. The Supreme Court revisited the issue of the reliability of child witness testimony in *R v W(R)*, in which the court rejected the “stereotypical but suspect” views about child witnesses and abolished the common law warning rule.\textsuperscript{142}

The Supreme Court observed:

> The law affecting the evidence of children has undergone changes in recent years. The first is removal of the notion, found at common law and codified in [repealed] legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution ... The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults.\textsuperscript{143}

The Court further stated that every person giving testimony in court, of whatever age, is an individual, whose “credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.”\textsuperscript{144}

In 1993 the government enacted section 659 of the Criminal Code, which expressly abolished the common law rule that it is “mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child.”\textsuperscript{145} In 1997 the Supreme Court once again returned to the issue of child witness’ reliability, stating that:

> [T]he peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skillful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her evidence.

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\textsuperscript{141} *Hearing the Voices of Children*, supra note 52, at 28.

\textsuperscript{142} *R v W(R)* [1992] 2 S.C.R. 122, at 23.

\textsuperscript{143} Id.

\textsuperscript{144} Id. at 24-26.

testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight ... and not to its admissibility.146

In addition, as noted in Part III(A) above, the British Columbia Court of Appeal, while recognizing that questioning of a child witness about their understanding of concepts such as “truth” and “promise” is impermissible when used as a test of admissibility, did not totally preclude this type of questioning in relation to the court’s evaluation of the evidence. The court stated that child witnesses’ “moral commitment to tell the truth, their understanding of the nature of a promise to tell the truth, and their cognitive ability to answer questions about ‘truth’ and ‘lies’” can still be challenged on cross-examination during their testimony.147 In conclusion, the credibility and reliability of a child witness may still be challenged in the same manner as an adult’s testimony may be challenged, and these potential concerns go towards the weight of the evidence rather than its admissibility.148

G. New Zealand

New Zealand has also made a number of recent reforms in relation to the reliability and credibility of a child witness’s testimony. Section 125 of the Evidence Act 2006 provides that a judge shall not warn the jury about the absence of corroboration of a child witness’s evidence if the judge would not have done so in the parallel case of an adult.149 The Act also prohibits the presiding judge from telling the jury that there is a need to scrutinise the evidence of children with special care, or from suggesting that children have tendencies to invent or distort, unless expert evidence is given to support such a direction.150

146 R v F(C) [1997] 3 S.C.R. 1183, at 48.
147 R v J(S) 2008 BCCA 401, at 53.
148 Id.
149 New Zealand Evidence Act (No. 69, 2006), §125.
150 Id.
Additionally, the Evidence Regulations 2007 provide that where a witness is under age six, the judge may give the jury a direction that indicates that very young children can remember and report events that have happened to them in the past, but that they may testify differently than an adult would. Regulation 49 of the Regulations indicates that the judge may give the jury a direction such as:

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

V. Appropriate Procedures for Child Testimony – Comparative Practices

Courts around the world have taken a number of initiatives to assist child victims and witnesses and facilitate their giving of testimony. This section examines some of these procedures and reforms, including witness familiarization programs, support persons and animals, intermediaries, video-recorded evidence, child-sensitive questioning, privacy measures and courtroom child-accessibility.

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151 New Zealand Evidence Regulations (SR 2007/204) 2007, regulation 49.
152 Id.
A. Witness Familiarization Programs

Several common law jurisdictions attempt to reduce the child witness’s discomfort and fears surrounding the trial process through witness familiarization programs. These programs, which take place prior to the child witness giving testimony, aim to help prepare the witness for the courtroom experience and to help avoid witnesses becoming destabilized or unnerved once they appear before the court and during the challenging experience of their cross-examination.

1. United States

Certain locations in the United States employ witness familiarization for young children victims and witnesses. One example is the creation of a “kids’ court” operated by the District Attorney’s Office of Tulare County, California.153 This program has been developed in collaboration with several agencies and interested persons to assist children through the judicial process by familiarizing them with the court environment, personnel and process. The child witness meets with various individuals who make up part of the court system, who explain what they do and respond to questions from both children and parents. In addition, professional therapists and trained volunteers interact with children and their caregivers through the program to help them understand and express their feelings and to deal with the stress associated with a court appearance.154 Parents and caregivers are fully included in the “kids’ court” process and also attend separate sessions that address their own needs. The purpose of the program is to help children get ready for the trial process by participating in a supportive group experience, rather than approaching the trial on their own.

154 Id.
2. South Africa

The South African Department of Justice and Constitutional Development’s National Policy Guidelines for Victims of Sexual Offences, and the National Guidelines for Prosecutors in Sexual Offence Cases outline a number of good practices that can help familiarize child witnesses who are victims of sexual violence. The Guidelines are formulated to “ensure that the court process is as non-traumatic as possible for the victim,” and they suggest that the following steps be followed:

1. Take the victim to the court where the case will be heard prior to the day of the trial. Arrange a suitable time with the prosecutor. A pretrial consultation with the prosecutor is imperative. Arrange for a specific prosecutor to be allocated. Take the docket to court before the proceedings to allow enough time for preparations.

2. Explain the meaning of in camera to the victim, as the prosecutor may ask the magistrate to hear the evidence in camera.

3. Give the victim his or her statement to read once again. Small details can become important in the statement, particularly in court proceedings, and this will help to prepare the victim.

The Guidelines go on to note that the child will see reporters in court, which may distress her/him, and suggest that court services reassure the victim that his her/his identifying information will not be published unless authorized by the magistrate. In addition, the policy notes that it is the duty of the police to inform the victim about the possibility of delays in the court proceedings and to encourage them to persist in the case. A program similar to the “kids’

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156 Id.
157 Id.
158 Id.
court” model is also undertaken in South Africa by organizations such as Resources Aimed at the Prevention of Child Abuse and Neglect and the Teddy Bear Clinic.\textsuperscript{159}

3. New Zealand

Child witnesses may attend the Court Education for Young Witnesses service in New Zealand to familiarize themselves with the court environment. Parents and guardians of a child witness can request that their child be enrolled in the program.\textsuperscript{160} The service falls under the umbrella of the broader Court Services for Victims service delivered by “victim advisers”, who provide victims with information about the court, services, and victims’ rights, in addition to advice on the progress of the case concerning them.\textsuperscript{161} They also help victims to participate in the court process.\textsuperscript{162}

The main goal of the service is to ensure that children and youth are better equipped to cope with the court process through familiarization with the court environment by building their confidence and giving the child an understanding of the role s/he will play as witness.\textsuperscript{163} The victim adviser, or a police officer or court staff member, is also responsible for setting up a visit to the courtroom for the child prior to the trial, and the adviser must keep child witnesses and their caregivers informed about the case as it progresses through the court system.

B. Support Persons and/or Animals

Several jurisdictions provide for a support person or animal to aid child witnesses in giving testimony and throughout the trial process. The purpose of such an individual is to provide

\begin{footnotes}
\item[159] Handbook for Professionals and Policymakers, supra note 79, at 71.
\item[162] Id.
\item[163] Id.
\end{footnotes}
emotional support and to reduce the harmful impact of a court appearance on the child victim or witness. In many cases the child witness is accompanied at all times by an appropriately trained adult, such that their presence would be comforting when the child witness feels unduly stressed during the trial.

1. **Australia**

According to the Criminal Procedure Act, child witnesses are entitled to have a support person of their choice present when they give evidence for a trial, including when they do so using closed circuit television (CCTV). This rule generally applies to any criminal proceeding and to any proceedings related to sexual offences, victims’ compensation, personal assault or child protection. When working in their professional capacity with the child witness, the support person should be allowed to be near the child and within the child’s sight.

In addition, organizations that render assistance to child victims in certain regions, such as Protect All Children Today, in Queensland, provide trained volunteers to assist children before and after their appearance in court. These volunteers serve as support persons by sitting near child witnesses during their testimony, entertaining them during the waiting period before their appearance in court and familiarizing them with the court environment.

2. **United States**

United States legislation describes the role of a child witness’s support person in the context of judicial proceedings. The United States Code states that federal courts, at their discretion, “may allow the adult attendant to remain in close physical proximity to or in contact

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164 Criminal Procedure Act 1986, §294C(1) and §306ZK(2). [Australia]
166 *Id.*
167 *Handbook for Professionals and Policymakers*, pg 69.
with the child while the child testifies.”\textsuperscript{168} The child witness’s support person can also, if allowed by the court, hold the child’s hand, and the court may permit the child to sit on the adult attendant’s lap through the course of the courtroom proceeding.\textsuperscript{169} The support person is not to provide the child with an answer to any question directed at the child during the course of her/his testimony or to otherwise prompt the child.\textsuperscript{170}

Certain jurisdictions in the United States also allow for the use of support animals, most frequently dogs, to comfort young child witnesses. In such states as Arizona, Hawaii, Idaho and Indiana, trained dogs have been used alongside child witnesses.\textsuperscript{171} This new practice began in 2003, when the prosecution won permission for a dog to provide courtroom support to a victim of child sexual assault in Seattle.\textsuperscript{172}

3. France

Child victims in France can access a victim service unit, such as the \textit{Institut national d’aide aux victimes et de mediation}.\textsuperscript{173} This unit will make initial contact with child victims through phone calls and provide information on the status of the case. In addition, a representative from the unit will sit with victims during and/or before and after the hearing in order to explain courtroom procedure. Support persons help by listening to victims, helping victims fill out legal forms, and answering technical questions and defining legal terms that may

\textsuperscript{168} United States Code collection, Title 18, chapter 223, section 3509, \textit{Child victims’ and child witnesses’ rights}, subsection (i).

\textsuperscript{169} Id.

\textsuperscript{170} Id.


\textsuperscript{172} Id.

\textsuperscript{173} \textit{Handbook for Professionals and Policymakers}, supra note 79, at 69.
be new to victims. Support persons from the unit can also inform victims of other available resources, such as counseling and relevant security measures.

4. **Zimbabwe**

Child witnesses can also be accompanied to court by a social worker or support person in Zimbabwe. If it seems likely that the child witness is likely to suffer substantial emotional stress from giving evidence or be intimidated by the accused, any other person or the nature or location of the proceedings, the court will usually appoint a support person to provide moral and emotional support to the child victim. The Criminal Procedure and Evidence (Amendment) Act provides clarity in the selection of a support person. The court shall select a parent, guardian or other relative of the witness as his/her designated support person, or any person who the court considers appropriate may provide the witness with moral support while s/he gives evidence in court.

Under the Act, a support person shall be entitled to sit or stand near the witness while the witness is giving evidence so as to provide her/him with moral support. The support person shall perform such other functions for that purpose as the court may direct. It is notable, however, that the Act states that the court shall pay due regard to the effect of the appointment of a support person on the witness’s evidence and on any cross-examination of the witness when determining what weight, if any, should be given to the evidence of a vulnerable witness.

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174 *Id.*
175 *Criminal Procedure and Evidence (Amendment) Act, section 319B. [Zimbabwe]*
176 *Criminal Procedure and Evidence (Amendment) Act, section 319F. [Zimbabwe]*
177 *Id.*
178 *Id, article 319G.*
179 *Id, article 319H.*
5. United Kingdom

Legislation in the United Kingdom allows for the provision of support persons with the title of Court Witness Supporters for vulnerable witnesses, which include child witnesses. These support persons can provide emotional support, familiarize the witness with the court and its proceedings, and accompany the witness on pre-court visits. In addition, support persons in the United Kingdom are empowered to liaise with legal, health, educational and social services on behalf of the child, and identify or arrange any special measures that may be needed for the child to testify and participate in the judicial process as full a manner as possible.

The support person is prohibited from discussing the evidence or the content of the testimony with the child to avoid allegations of coaching the witness. Court Witness Supporters may be drawn from a variety of individuals, but where possible an inter-disciplinary approach undertaken by a trained professional in contact with different relevant agencies is preferable in order to maintain consistency for the child witness.

C. Intermediaries

Distinct from support persons, some domestic systems allow children to communicate with intermediaries during the course of the trial. Child witnesses’ understanding of the questions put to them may hinder their ability to give accurate testimony, and the court may appoint specially appointed counsel, a psychologist or expert, or another individual to communicate with the child.

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182 Id.
183 Id.
184 Id.
when the judge believes that the child witness does not fully understand a question put to them. A child may testify through an intermediary in some cases, and in some jurisdictions an intermediary functions to protect the child witness from physically appearing in the courtroom.

1. South Africa

Under South African criminal law, children who are victims or witnesses are able to testify through intermediaries where it seems that to appear and testify before the court would expose them to undue mental stress or suffering. The court may appoint a competent person as an intermediary through which a child victim or witness may give evidence. Section 170A(1) of the Criminal Procedure Act states as follows:

Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

The South African Constitutional Court has explored the constitutional interpretation and implementation of this provision. In the Court’s view, the object of this subsection is to protect child complainants in sexual offence cases, and other child witnesses, from undergoing mental stress and suffering that may be caused by testifying in court. The child witness need not first be exposed to undue mental stress or suffering before an intermediary may be appointed. The Act gives judicial officers discretion to determine whether to appoint intermediaries, and the exercise of judicial discretion in the appointment of an intermediary

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185 A training manual, supra note 181, at 69.
186 Criminal Procedure Act 1977 (Act No. 51 of 1977), §170A(1). [South Africa]
187 See e.g., Director of Public Prosecutions (DPP), Transvaal v Minister for Justice and Constitutional Development and Others 2009 (4) SA 222 (CC).
189 Id., at 103.
allows the officer to assess the individual needs, wishes and feelings of each child, an evaluation which the Constitutional Court noted conforms to the principle of best interests of the child.\textsuperscript{190} In applying the best interests principle, judges must consider how the child’s rights and interests are, or will be, affected if the child testifies without the aid of an intermediary; if the prosecutor does not raise the matter of the appointment of an intermediary, the judge must do so of her/his own accord.\textsuperscript{191}

2. \textbf{Ireland}

Child witnesses may use registered intermediaries to help them give evidence in court or at the police station in Ireland. Irish intermediaries are individuals who are approved by the court and independent of the defense or prosecution.\textsuperscript{192} Such intermediaries explain to the witness the questions asked by the court, the defense or the prosecution, and in some cases they communicate the responses the witness gives. The Criminal Evidence Act discusses evidence given through intermediaries, providing that the court may:

\begin{quote}
[O]n the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.\textsuperscript{193}
\end{quote}

The Act further provides that the questions put to a child witness through an intermediary must be either in the words used by the questioner or “so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.”\textsuperscript{194}

\begin{flushright}
\begin{footnotes}
\item[190] \textit{Id.}
\item[191] \textit{Id.}
\item[192] \textit{A training manual, supra} note 181, at 69.
\item[193] Criminal Evidence Act, 1992, (No. 12 of 1992), §14: Evidence through intermediary. [Ireland]
\item[194] \textit{Id}, §14(2).
\end{footnotes}
\end{flushright}
3. Zimbabwe

Child witnesses who testify in Zimbabwe’s Victim-Friendly Courts may speak to the magistrate and the accused person through an intermediary. The Victim-Friendly Courts, which currently exist in towns such as Hwange, Bulawayo and Harare, are primarily intended to be used for the trial of sexual offences committed against children and for trials involving other vulnerable witnesses. Vulnerable witnesses are defined as those who are likely to suffer emotional stress from giving evidence or to be intimidated by the accused or by the nature or location of the proceedings such that they are limited in giving full and truthful evidence. Child victims of sexual violence are often classified as vulnerable witnesses under this regime.

The intermediary and the public prosecutor are expected to meet before the trial so that the prosecutor can give the intermediary a brief background of the case, including details such as the age of the child and her/his home and language. On the day of the trial, the child gives evidence from a victim-friendly room separate from the court-room, where s/he meets the intermediary. At this stage, the intermediary at this stage informs the child about the court proceedings and answers questions. During the course of the trial the main role of the intermediary is to convey the testimony of the child to the court and the accused without altering any meaning and vice-versa, and to use language that the child can understand without difficulty. Additionally, the intermediary may work with the child using anatomical dolls to help the child

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196 *Id.*, at 104-105.
197 *Zimbabwe Magistrates’ Handbook*, at 75.
199 *Id.*
witness demonstrate what happened in cases where the witness has difficulty verbalizing events that transpired.\footnote{Protocol for the Multisectoral Management of child sexual abuse in Zimbabwe, 2nd edition (June 2003), at.18.}

4. **Lesotho**

Lesotho’s Children’s Protection and Welfare Act includes specific provisions to protect child victims and witnesses when testifying. Section 150(1) of the Act allows for the appointment of intermediaries for child witnesses. The section reads in full:

Whenever proceedings involving children are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he/she testifies at such proceedings, the court may, subject to subsection (5), appoint a competent person as an intermediary in order to enable such witness to give evidence through an intermediary.\footnote{Children’s Protection and Welfare Act, §150(1). [Lesotho]}

5. **Israel**

A robust intermediary system exists in Israel, which reformed its procedures for child witnesses in 1955.\footnote{Kirsten Hanna, Emma Davies, Emily Henderson, Charles Crothers & Clare Rotherham, Institute of Public Policy, AUT University, \textit{Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy} (2010), available at https://www.crin.org/docs/NZ_Child_Witnesses.pdf, at 157 [hereinafter Child Witnesses in New Zealand].} The government created specialist youth interrogators who have sole jurisdiction over certain child witnesses – they conduct interviews and determine how the child participates in proceedings. In addition, the youth interrogator has the power to veto the child testifying, and will then present the child’s evidence in his/her stead.\footnote{Id.} This innovative system was introduced in order to protect children from the trauma of prolonged and aggressive cross-examination, and the trauma of testifying against family members.\footnote{K.J. Sternberg, M.E. Lamb & I. Hershkowitz, (1996). \textit{Child Sexual Abuse Investigation in Israel} In B. L. Bottoms & G. S. Goodman (Eds.), \textit{International Perspectives on Child Abuse and Children’s Testimony: Psychological Research and Law}. Newbury}
Youth interrogators are assigned to children under 14 who are witnesses to sexual, violent, parental abuse/neglect, prostitution and vice offences, as well as all child defendants under 12. The interrogator is required to interview the child witness within 72 hours of the offence being reported, and interviews take place in a range of settings, which can include the witness’s home or school. No other professionals interrogate the child aside from the interrogator; the child is usually only interviewed once. Should the interrogator determine that the child requires a medical examination or that s/he should testify in court, s/he will accompany the child. In general, interrogators give two main reasons for refusing to allow the child to testify in court: that the child is likely to suffer trauma due to testifying or that delays of months or years before the trial make it likely that testifying would reopen the trauma of the earlier events. The video-recorded interview and written report of the interview are forwarded for the review of the prosecutor.

The majority of child witnesses do not testify in court, although when they do the interrogator takes on the more traditional intermediary role in the questioning. In addition, the interrogator reads the testimony the child gave during their interview and then stands with the child while s/he testifies. While intermediaries cannot interfere with questioning, they can ask the court to discontinue the hearing if the child is too distressed. The court itself may also initiate a discontinuance for a distressed child, asking the interrogator to re-interview the child.

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205 Law of Evidence Revision (Protection of Children) Law 1955, §9. [Israel]
206 Child Witnesses in New Zealand, supra note 202, at 143.
207 Id.
208 Id, at 144.
210 Child Witnesses in New Zealand, supra note 202, at 144.
211 The Role of the Youth Interrogator, supra note 209, at 107-8.
again instead. \footnote{Id, at 107.} Furthermore, during the trial, the interrogator can refuse to put any or all requested questions to the child if s/he believes they are distressing in nature. \footnote{Id.}

Should the child be deemed unable to testify, as aforementioned, the interrogator will serve in his/her place, recounting the child’s disclosures and presenting an assessment of the child’s credibility. The interrogator’s testimony must be corroborated, and defense counsel (or the prosecutor where the child witness is a defendant) can also request that the child be re-interviewed if new material emerges after the first interview. \footnote{J.R. SPENCER & R. FLIN, THE EVIDENCE OF CHILDREN: THE LAW AND THE PSYCHOLOGY (2nd ed.). Oxford: Blackstone Press Limited (1993), at 398 [hereinafter The Evidence of Children].}

**D. Video-Recorded Evidence**

Video-recorded evidence from the child witness is admissible in several jurisdictions. This addresses the concern that a child’s memory of events may fade between the offence and the trial such that the child longer remembers all the events described in an investigative interview. \footnote{Alison Cunningham and Pamela Hurley, Centre for Children and Families in the Justice System, A Full and Candid Account: Video Recorded Evidence - Book 4 (2007), available at http://www.lfcc.on.ca/4_VideorecordedEvidence.pdf, at 2.} Evidence indicates that having to recall abusive or frightening experiences overwhelms children with negative and painful emotions such that they find it difficult to repeat a description of events they witnessed or experienced in court. \footnote{See e.g. Gail S. Goodman, Elizabeth Pyle Taub, David P.H. Jones, Patricia England, Linda K. Port, Leslie Rudy, Lydia Prado, John, E.B. Myers & Gary B. Melton, Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims, 57:5 Monographs of the Society for Research in Child Development (1992); see also Louise Dezwirek-Sas, Empowering Child Witnesses for Sexual Abuse Prosecution, in Helen Dent & Rhonda Flin (Eds.) CHILDREN AS WITNESSES, J. Wiley and Sons (1992).} Admitting a video-recorded interview as testimony serves the function of preserving the child’s early account of the alleged events. In many cases, the right of the accused to a fair trial is addressed by providing for cross-examination of the witness, either directly or through the interviewer.
1. Norway

The Norwegian legal system includes both inquisitorial and adversarial elements, and it has a unique and long-standing practice of video-recording of child witness testimony. The system dates back to 1926, following a campaign by women’s organizations concerned about the possibility of trauma to child witnesses.217 Today all children in sexual assault trials under the age of 16, and some additional child witnesses in cases of domestic violence, testify under judicial supervision before the trial in the Field Investigative Interview of Children.218 This interview is video-recorded, and the child’s evidence is taken before the judge with counsel on both sides attending.

While clinical psychologists commonly undertook questioning in the 1990s, today it is generally conducted by a police officer who has specialized in forensic interviewing of children.219 There exists scope for defense and prosecutorial contribution to the questioning, as interviewers must consult both lawyers and the judge during the interview. The interviewer, having at an earlier stage forwarded his/her plan for the interview to the judge, first conducts the interview to the best of his/her judgment, then takes a break to consult counsel and the judge. Counsel cannot question or cross-examine the witness directly, but can challenge the evidence and put lines of inquiry to the witness through the interviewer.220 The interviewer returns to the room to address these issues and the process repeats until the judge and counsel are satisfied.221

217 Child Witnesses in New Zealand, supra note 202, at 161.
218 Id.
221 Child Witnesses in New Zealand, supra note 202, at 162.
These interviews are videotaped, and a written transcript is compiled. This record of the interview becomes the child’s evidence in place of live testimony.\textsuperscript{222} The child generally does not appear at the trial at all; instead the video is played for the court and the members of the court are given copies of the transcript. This interview must take place at an early stage in the proceedings – by law it is required to be convened within two weeks of the report to the police.\textsuperscript{223}

2. Canada

In 1988, section 715.1 of Canada’s Criminal Code was enacted to allow for the admission of video-recordings of interviews with children under the age of 18 in cases of specific sexual offences, provided that the recording was made within a “reasonable time” of the given events.\textsuperscript{224} The practice of video-recording investigative interviews with child victims of sexual abuse had originally been undertaken to eliminate the need to subject the child to repeated interviews, as the video could be shared with different investigators and therapists. Under the Code, this video-recording would become admissible evidence in court should the child witness testify in person in court and verbally “adopt” the contents of the recording whilst on the stand.\textsuperscript{225} The child witness must also be made available for cross-examination about the contents of the video-recording if requested.

The Supreme Court of Canada examined this practice in \textit{R v DOL}, concluding that:

By allowing for the videotaping of evidence under certain express conditions, section 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.\textsuperscript{226}

\textsuperscript{222} \textit{The Evidence of Children}, supra note 214, at 399.
\textsuperscript{223} \textit{Child Witnesses in New Zealand}, supra note 202, at 162.
\textsuperscript{225} \textit{Hearing the Voices of Children}, supra note 52, at 37.
Subsequent decisions of the Supreme Court held that a video-recording would “almost inevitably reflect a more accurate recollection of the events than will testimony given later at a trial.”\textsuperscript{227} The Court also affirmed the validity of the practice of “adoption” of video-taped evidence by the child witness at trial.\textsuperscript{228} To do so, it is not necessary for the child witness to have a recollection of the events described therein while testifying; rather it is sufficient for her/him to recollect having made the video-recorded statement.\textsuperscript{229} Courts have also accepted that should there be inconsistencies between the young child’s statements on the video-recording and what s/he says at trial, the video may be regarded as “more reliable,”\textsuperscript{230} although if the child when testifying has virtually no recollection of the events in question, it may be appropriate to acquit the accused.\textsuperscript{231}

More recently, amendments in 2006 altered section 715.1 so that video-recorded evidence can now be used by child witnesses in any proceeding. In addition, the amendments strengthened the adoption of the evidence rule, creating a strong presumption of admissibility by stating that provided the recording was made within a reasonable time of the alleged offence and is adopted by the witness, it “shall” be admitted into evidence “unless the judge is of the opinion that admission…would interfere with the proper administration of justice.”\textsuperscript{232}

E. CCTV and Screens

Closed circuit televisions (CCTV), which allow for the transmission of oral testimony given in a special interview room in the courthouse to the courtroom via television technology, have been recommended and used in cases involving child testimony in several jurisdictions. CCTV and similar techniques, such as opaque screens and one-way mirrors, allow the child to give

\textsuperscript{228} \textit{Id}, at 45.
\textsuperscript{229} \textit{Id}, at 44.
\textsuperscript{230} \textit{R v Vanderwerff} [2006] AJ. 620 (Q.B.).
\textsuperscript{232} \textit{See, e.g. R v Ortiz} [2006] ONCJ 72.
evidence without having to see the accused, which is frequently a traumatic experience for the child victim or witness, especially in cases involving sexual assault.233

F. Child-Sensitive Questioning and Cross-Examination of Witnesses

The right of the accused to question or have questioned a child witness may give rise to questioning that is inherently intimidating for the child victim or witness or can be used purposefully to intimidate. In order to avoid frightening or abusive lines of questioning and direct confrontation with the accused, courts worldwide have developed methods to promote child-sensitive questioning during the trial.

1. United Kingdom

Under United Kingdom legislation, an unrepresented accused is barred from cross-examining child witnesses under certain circumstances. The Youth Justice and Criminal Evidence Act 1999 introduced a range of measures that aim to facilitate the giving of evidence by vulnerable and intimidated witnesses.234 The Act provides that vulnerable child victims in sexual offence cases are subject to mandatory protection from cross-examination by the accused in person and that the court has discretion to prohibit an unrepresented defendant from cross-examining child witnesses in other types of offence.235

2. New Zealand

Under the Evidence Act 2006, unrepresented accused are prohibited from cross-examining children in sexual offences cases.236 In addition, under section 85 of the Act, judges have discretion to disallow questions put to the child witness or to direct that the witness is not obliged

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233 For more on this technique, please see the Avon Global Center for Women and Justice Memorandum, “Closed-circuit television in cases involving child testimony” (June 2014).
235 Id.
236 Evidence Act 2006, §95. [New Zealand]
to answer any unacceptable questions put to her/him. These include questions that the judge may consider improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

3. **Australia**

Under the Western Australia Evidence of Children and Others (Amendment) Act 1992, a judge may appoint a representative for the accused for the specific purpose of cross-examining a child witness. This representative will relay the determined questions of the accused to the child, with the aim of avoiding direct contact and potential intimidation.

**G. Privacy Measures**

It is generally recognized that all victims have a right to privacy, and that vulnerable child victims and witnesses are entitled to have their information remain confidential where possible. Domestic courts work to protect the privacy of child witnesses by restricting the disclosure of information on child victims and witnesses, and by restricting the attendance of persons in courtrooms.

1. **Switzerland**

Swiss legislation includes general rules that authorize judges to order *in camera* proceedings for the appearance of child victims and witnesses. In addition, closed sessions of the court are automatic for proceedings that deal with sexual offences, including those involving child witnesses.  

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237 *Id*, §85.


2. **Zimbabwe**

Significant protections for child witness privacy are provided for in Zimbabwe’s specialized child court system. The publication by the media of the name, address, school, or any other information likely to reveal the identity of any child who is or has been involved in the proceedings of a children’s court is prohibited. All proceedings of the court are held *in camera*, where the only individuals who may attend are those authorized by law or directly by the court. The Act states that no person shall be present at any sitting of a children’s court unless:

(a) His presence is necessary in connection with the proceedings of that court or he is an officer of that court; or

(b) He is a parent or guardian of a child or young person whose presence is necessary in connection with the proceedings of that court; or

(c) He is the legal practitioner representing such child or young person or parent or guardian; or

(d) The officer presiding at that sitting has granted him permission to be present; or

(e) He is the person in charge of the home or institution in which the child is residing or the nominee of such person.

**H. Courtroom Child-Accessibility**

The experience of testifying in court can be very stressful for children. With a view for reducing the hardship involved in testifying in the judicial process, a number of jurisdictions have worked to make courtrooms more accessible for young children. These measures include changes in general courtroom practices, timelines and formalities, as well as the provision of special interview and/or waiting rooms for child victims and witnesses.

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240 Children’s Act, Cap.5:06. [Zimbabwe]
242 The Children’s Act, §5(6).
1. United States

The United States Code designates policies that allow for a swifter trial when vulnerable witnesses are involved in the legal process. The Code provides that in designated cases the court shall expedite the proceeding, ensuring that it takes precedence over other hearings.\textsuperscript{243} The goal is to minimize the length of time the child “must endure the stress of involvement with the criminal process.”\textsuperscript{244} In addition, when deciding whether to grant a continuance, the court shall take into consideration both the age of the child victim or witness involved and the potential adverse impact the associated delay may have on the child’s wellbeing.\textsuperscript{245}

2. United Kingdom

The United Kingdom’s “Supplementary pre-trial checklist for cases involving young witnesses”, produced by the Crown Prosecution Service\textsuperscript{246} for the use of judges, attempts to put child victims and witnesses at ease in their courtroom surroundings by creating a more informal and friendly atmosphere.\textsuperscript{247} This guidance document for courts provides that child witnesses may express their views about court attire, and that wigs and gowns may be removed, where necessary, by judges and counsel.\textsuperscript{248} In the U.K., Crown Courts have previously exercised their discretion to dispense with the wearing of wigs and gowns by the judge and by legal representatives in cases where child witnesses are concerned\textsuperscript{249}; the practice was subsequently codified in the Youth Justice and Criminal Evidence Act 1999\textsuperscript{250} and is described in more detail in the pre-trial

\textsuperscript{243} United States Code collection, Title 18, chapter 223, section 3509, \textit{Child victims’ and child witnesses’ rights}, subsection (j), Speedy Trial: \\
\textsuperscript{244} \textit{Id}. \\
\textsuperscript{245} \textit{Id}. \\
\textsuperscript{246} International Centre for Criminal Law Reform and Criminal Justice Policy, \textit{Model Guidelines for the Effective Prosecution of Crimes against Children: Annotated Version} (August 2011) at 16. \\
\textsuperscript{247} \textit{Handbook for Professionals and Policymakers}, supra note 79, at 77. \\
\textsuperscript{248} United Kingdom, Crown Prosecution Service, Children’s Charter, 2005, §4.19. \\
\textsuperscript{249} Ministry of Justice, \textit{Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures}, March 2011, at 165. \\
\textsuperscript{250} Youth Justice and Criminal Evidence Act, 1999, §26. [United Kingdom]
checklist. In Crown Court cases, this measure, along with other special measures\(^\text{251}\), may be discussed at a plea and directions hearing, at which pre-trial planning and initial decisions to be taken about special measures available to child witnesses may be determined.\(^\text{252}\) At these hearings, which involve young witnesses, the judge completes the supplementary checklist, informed by the legal representatives and having seen any existing videotapes of the child’s evidence.\(^\text{253}\)

3. **Zimbabwe**

With respect to specialized children’s courts in Zimbabwe, the court is not bound by existing rules relating to civil or criminal proceedings, and proceedings are instead conducted in such a manner as seems best fitted to do substantial justice.\(^\text{254}\) In the Victim-Friendly Courts, there is special recourse made for a victim-friendly room for child witnesses. This room is separate from the courtroom and is shared with an intermediary.\(^\text{255}\) Should the child victim or witness need to identify the accused, the accused is taken to the victim-friendly room and the victim taken to the courtroom, where they can view each other on the closed-circuit television screen without coming into the other’s physical presence.\(^\text{256}\)

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\(^{251}\) The additional special measures outlined in the Youth Justice and Criminal Evidence Act, 1999, include: the use of screens (§23), the use of live TV link (§24), giving evidence in private (for sexual offences and offences involving intimidation, §25), use of video-recorded interviews as evidence-in-chief (§27). Vulnerable witnesses are also eligible for communication through intermediaries (§29) and the use of special communication aids (§30).


\(^{253}\) *Id.*

\(^{254}\) Children’s Act, Cap. 5:06, §5(1).

\(^{255}\) *The Juvenile Criminal System in Zambia*, at 105. (Includes comparative review of Zimbabwean law)

\(^{256}\) *Id.*, at 106.
V. Conclusion

This memorandum has explored international and regional standards on child witnesses and explored the varied ways in which courts in different jurisdictions have handled the questions of whether young children should be allowed to testify, how a child witness’s evidence should be treated, and what measures courts worldwide use when child victims and witnesses testify. Courts around the world have adopted a range of practices to determine the competence of child victims and witnesses to testify and the reliability of their evidence. Many jurisdictions have also approached the issue of child witnesses’ evidence with creativity and special sensitivity to their unique courtroom experiences, developing special measures to help facilitate their testimony.