Do Queensland judicial officers endorse the need for competence tests for non-accused child witnesses in criminal proceedings? To examine this, a suite of questions concerning competence was included in a mail survey that achieved a 46.29% response from Queensland judicial officers. The suite focussed on three general questions of interest. First, concerning the need to distinguish between children’s sworn and unsworn evidence, judicial officers rejected the need, but endorsed the retention of competence tests for each evidence-type, particularly for younger children. Second, concerning the relevance of age to competence, judicial officers presumed competence at approximately 6 years for unsworn evidence, and approximately 12 years for sworn evidence. Reporting that very young non-accused children had testified in four modalities, judicial officers confirmed age as only one indicator of competence. Third, concerning the desirability of competence test formalities, judicial officers endorsed court-approved competence questions, but rejected a jury’s presence during competence tests. Consonant with law reform endeavours, both empirical and theoretical issues are traversed in this article.

A core issue concerning the receipt of children’s evidence is the need for competence tests. A competence test is a judicial inquiry on voir dire, in a trial or committal proceeding, to assess a witness’s capacity to testify. Reducing to the questions of who can testify and how can they testify, competence has been long controversial — to Jeremy Bentham, a competence test drew an arbitrary line between competence and incompetence. In 2000,
I conducted a survey of judicial officers in Queensland, Australia, concerning the receipt of non-accused child witness’s evidence in criminal proceedings; one suite of survey questions focussed on competence. The survey’s broad impetus was the continuing Australian law reform agenda concerning the receipt of children’s evidence. The survey’s specific impetus was the continuing Queensland law reform agenda3 and Queensland legislative change.4 While the most recent legislative change — Queensland’s 2003 amendments — amends the competence sections, the results from the survey’s competence suite of questions are of continuing relevance.

Judicial perspectives are extremely useful to reform — ‘the judiciary exert considerable influence’5 in controlling court proceedings and in formulating and delivering competence tests. Yet, given the rarity of the collation of judicial perspectives, the ‘gap in the research is significant’.6 No survey of Queensland judicial officers on issues analogous to this survey has been conducted. Broadly comparable research surveying judicial perspectives concerning children’s competence was conducted in two mid-1990s surveys of judicial officers. In 1995, Judy Cashmore and Kay Bussey surveyed New South Wales’ judicial officers;7 in 1996, Margaret-Ellen Pipe et al8 surveyed five professional groups, including New Zealand judicial officers.

This article, and a companion article, report the competence suite of questions in this survey of Queensland judicial officers. The survey was timely. It coincided with both the publication of the QLRC’s first recommendations for legislative change concerning competence,9 and with the following expressions of Queensland judicial interest concerning children’s evidence: conferences of Magistrates on 29 November 1999, and of District Court judges on 19 April 2000;10 Annual Reports of the Supreme and District Courts;11 and judicial involvement with, or response to, the QLRC’s reference.

I. QUESTIONS OF INTEREST

The survey was conceived primarily as descriptive, exploratory research and focuses only on the evidence in criminal proceedings of non-accused child witnesses; additional issues pertain to accused child witnesses. The empirical, theoretical approach to reporting the survey’s competence suite of questions was premised on maximising the utility of the research to law reform, and producing feedback for judicial officers.

Four suites of questions concerning judicial perspectives on the receipt of non-accused child witnesses’ evidence in criminal proceedings feature in the survey: competence; special arrangements; appropriate techniques of questioning and judicial intervention; and educative aids including judicial education, expert evidence, and judicial directions. The

4 Legislative change amending the competence sections of the Evidence Act 1977 (Qld) includes the Criminal Law Amendment Act 2000 (Qld) Part 6, a bill at the time of the survey (assented 13 October 2000; commenced 27 October 2000), and the Evidence (Protection of Children) Amendment Act 2003 (Qld) Part 10, the most recent amendment (assented 18 September 2003; commenced 5 January 2004).
6 Cashmore and Bussey, ‘Judicial Perceptions’, above n 5, 314; Cashmore and Bussey, The Evidence of Children, above n 5, 3.
The Need for Competence Tests

The magnitude of the data has impelled discrete reports of the suites. The competence suite itself divides to two articles given the twin foci of the need for, and the content of, competence tests.

This article — Part 1 of the competence suite — focuses on the need for competence tests for sworn and unsworn evidence. Broadly, Part 1 concerns three general questions of interest: the need for a distinction between children’s sworn and unsworn evidence; the relevance of age to sworn and unsworn competence; and the desirability of competence tests and their formalities. Specifically, six Part 1 survey questions cover the following issues: the age for presumed competence; the youngest ages demonstrated for actual competence; the need for a distinction between sworn and unsworn evidence; the need for the retention of competence tests; and, assuming the retention of competence tests, the desirability both of competence tests, and of reforms to competence formalities (ie, court procedures to facilitate competence tests). The content of competence tests, as an interlinked issue to the need for competence tests, is the focus of Part 2, the companion article to this Part 1.

To indicate the significance to current Queensland law reform of the three general questions of interest, a literature review relevant to some law reform concerning the three general questions is first offered. Then, the survey’s method is outlined, followed by the results and discussion of Part 1. Readers less concerned with the survey’s Method and Results sections may move directly to the Discussion section for analysis of the most significant results.

A. Need to Distinguish Between Children’s Sworn and Unsworn Evidence

The first general question concerns whether any need exists for a distinction between children’s evidence-types (ie, sworn versus unsworn evidence).

Children’s sworn and unsworn evidence is currently permitted in sectors of the Commonwealth, and in Australia at federal and state levels. Throughout the Commonwealth, competence tests for sworn and unsworn evidence were originally drawn on common law English templates. According to the English templates, sworn evidence required an understanding of an oath; unsworn evidence required an understanding of a promise, duty or obligation to tell the truth. Most adult witnesses were presumed competent to testify sworn; potential child witnesses, presumed incompetent to testify sworn or unsworn, were required to demonstrate competence.

The need for competence tests was underpinned by historically-grounded assumptions or indicators of witness deficiency or incompetence. Two indicators are relevant here. First, a historical indicator of incompetence was the fact of belonging to the class of child witnesses. Past psychological research characterised this class as prone to unreliability, egocentricity, suggestibility, fantasy, false allegations, and moral incompetence. Characterisations of this kind are now staunchly opposed by a fund of contemporary psychological research. This research has disclosed ‘no correlation between age and honesty’, or ‘between understanding the meaning of the oath and speaking the truth in court’.

Later articles reporting the companion suites will adopt some methodological, formal and introductory content from this foundation article.


ALRC and HREOC, above n 14, [14.19]–[14.25].


Second, a supplementary indicator of incompetence was a child’s inability to demonstrate an understanding of the oath. From 1779 to 1885, admissible evidence was equated to sworn evidence. To testify sworn, a child had to exhibit ‘sufficient knowledge of the nature and consequences of an oath’. Endorsed as a disincentive to lies, the oath was classically conceived as a ‘conditional self-curse’, consigning any oath-taker who lied to the consequences of ‘eternal damnation’. However, from 1885 in the Commonwealth, admissible evidence was legislatively broadened to include unsworn evidence. Today, views continue to differ as to whether unsworn evidence is of lesser weight to sworn evidence, or as to whether an understanding of the obligation of truth-telling is qualitatively different to an understanding of oath-taking. Yet, contemporary social secular reality does not recognise the ‘oath and hell-fire’ competence test as a sufficient disincentive to lies.

(a) Relevance of the Question
The question of the need for a distinction between evidence-types is relevant to Queensland law reform. First, in 2000, Queensland legislation — section 9(3) and its reformulation, section 9(5)(a) — was premised on continuing a distinction between evidence-types (ie, sworn versus unsworn evidence). Yet section 9(3) (or section 9(5)(a)), in prescribing that the probative value of unsworn evidence is not decreased by reason only that it is unsworn, has been read by the Western Australian Law Reform Commission (WALRC) as effectively abolishing a distinction between evidence-types. Second, in 2000, the QLRC’s recommendation for retention of a distinction between evidence-types for child witnesses did not expressly advert to section 9(3) (or section 9(5)(a)), but the QLRC expressly agreed with the WALRC’s conclusions for retention. This is interesting as the rationale for the WALRC’s conclusions for retention is of uneasy fit with section 9(3) (or section 9(5)(a)). For example, in 1991, the WALRC reported that the Western Australian judiciary did not ‘favour the abolition of the distinction between sworn and unsworn evidence’; the rationale for the WALRC’s conclusions for retention was that unsworn evidence may carry less weight and be perceived as less reliable. Third, the new section 9D(2)(a) in Queensland’s 2003 amendments replicates the former section 9(5)(a).

B. Age for Competence for Sworn and Unsworn Evidence
The second general question concerns whether an age for competence should be prescribed or presumed. Age triggers for competence developed through the common law: in England, an irrebuttable prescriptive minimum age for competence precluded particular children from testifying; in the Commonwealth, rebuttable presumptions of minimum ages for competence emerged.

19 R v Brasier (1779) 1 Leach 199; 168 ER 202, 202.
21 Children and Young Persons Act 1933 (UK) s 38(1).
23 Evidence Act 1977 (Qld) s 9(3) — ‘The fact that the evidence of a child in any proceeding is not given on oath shall not of itself diminish the probative value of the evidence’ — was reformulated by the Criminal Law Amendment Act 2000 (Qld) Part 6. That reformulation, s 9(5)(a) — ‘... the probative value of the evidence is not decreased only because the evidence is not given on oath’ — has been replicated as s 9D(2)(a) in Queensland’s 2003 amendments. For the timing of the reformulations or replications, see above n 4.
24 WALRC, Discussion Paper on Evidence of Children and Other Vulnerable Witnesses, Project No 87 (1990) [4.4].
26 The Western Australian judiciary perceived that witnesses and juries would regard the oath as ‘more likely to encourage a witness to speak the truth’: WALRC, Project No 87 (1991), above n 22, [2.9].
(a) Irrebuttable Ages of Competence

In England, from 1958 to 1990,28 an irrebuttable prescriptive minimum age for competence decreed 5 years, and then 6 years, as the age below which children were irrebuttably incompetent. R v Wallwork29 first articulated a rule of law or practice deprecating the calling of a child of 5 years; R v Wright30 then applied the rule to a child of 6 years. In 1990, R v Z31 rejected this prescriptive minimum age for competence although Z’s rejection, as recently endorsed,32 was itself limited by a ‘care’ thesis that a child of 5 years may ‘very rarely’ be competent — ‘greater care’ attached to exercising the judicial discretion to admit the evidence of a ‘very young’ child.33 By contrast, in 1991, judicial survey results suggested a perception of a prescriptive minimum age. A question in a survey of 50 English judicial officers to evaluate live link34 focused on whether there was a ‘lower age limit below which’ a child was unable to testify. In response, 66% of judicial officers selected a lower age: 36% (N = 50) selected 5 to 7 years, with a modal age of 5 years.35

Contemporary Commonwealth final courts of appeal have not endorsed a prescriptive minimum age for competence. In R v Khan,36 the Canadian Supreme Court rejected the trial judge’s adoption of a Wallwork-like prescription that would ‘draw[] a distinction between children of very tender years and older children’; more specifically, it rejected a prohibition on calling a child under 5 years.37 Similarly, in R v Accused (CA245/90),38 the New Zealand Court of Appeal affirmed that ‘there is no rule of law or practice in [New Zealand] that the evidence of a very young child witness is inadmissible on the ground of tender age alone’.39 And in Wilkshire v R,40 the Australian High Court did not issue any Wallwork-like deprecation concerning the calling at trial of a child of 5 years. By contrast, in 1995, judicial survey results suggested a perception of a prescriptive minimum age. A question in the Cashmore and Bussey survey of 50 New South Wales’ judicial officers focussed on when a child was ‘too young’ to testify. In response, 62% perceived children under 7 years to be ‘too young’, with a modal age of 5 years.41 The lowest age selected for presumed competence was 7 to 8 years, with a modal age of 12 years and a median of 13 years.42 Cashmore and Bussey used 7 years as a descriptive marker of the ‘youngest’ witnesses.43

(b) Rebuttable Ages of Competence

Sectors of Commonwealth common law did, however, develop a rebuttable presumption of a minimum age for competence — a threshold age below which a competence test is administered to a ‘child of tender years’. In England, in 1981,44 a ‘general working rule’ was affirmed that children under 14 undergo competence tests.45 In Ontario, in 1991, the existing ‘common law presumption’ of incompetence for children under 14,46 requiring a competence test concerning a child’s understanding of an oath,47 was recommended for

29 (1958) 14 Cr App R 153.
32 Z’s rejection was endorsed in DPP v M [1998] QB 913, 915–17.
36 [1990] 2 SCR 531.
37 Ibid 539.
39 Ibid 653.
41 Cashmore and Bussey, ‘Judicial Perceptions’, above n 5, 318; Cashmore and Bussey, The Evidence of Children, above n 5, 6.
43 Ibid 320, 326.
46 OLRC, above n 17, 38.
abolition.48 But in Western Australia,49 in 1974,50 the ‘generally accepted practice’51 was for children of 12 or 13 years to be sworn absent a competence test.

(c) Relevance of the Question
The question of a minimum age for competence is relevant to Queensland law reform. First, the English and New South Wales’ judicial surveys in the 1990s suggested judicial adherence to presumed ages for competence. Second, in 1997, the ALRC advised, without explanation, that Queensland had ‘fixed a specific age below which children are presumed incompetent’;52 the ALRC nominated 18 years as this age.53 However, not only had Queensland not legislatively ‘fixed’ an age for a presumption of incompetence, but Queensland’s legislative position has been interpreted as a presumption of competence as would challenge the ALRC’s assertion: the Ontario Law Reform Commission (OLRC) considered that ‘children [in Queensland] are accorded the same rebuttable presumption of competency’ as all witnesses;54 and the WALRC saw Queensland as ‘mov[ing] in the direction of a presumption of competency’.55 Perhaps the ALRC reasoned that 18 years — the age of majority — is the trigger for prima facie competence in Queensland. Third, curial experience of the age of the youngest witnesses is of domestic and international interest. For example, in 1998, the QLRC questioned how frequently child witnesses had testified sworn,56 and in what cases ‘very young’ child witnesses had testified unsworn.57 Moreover, in 1999, Goodman et al’s survey of United States’ prosecutors58 questioned ‘the age of the youngest child who had testified’ in proceedings concerning alleged sexual abuse — the youngest age was 2 years, and the modal age, 4 years. Fourth, the new section 9 in Queensland’s 2003 amendments prescribes a blanket presumption of competence for all persons to testify sworn or unsworn — this is, at least facially, a larger reform than the QLRC’s endorsement, in 2000, for all children competent to testify sworn to do so, ‘regardless of age’.59

C. Desirability of Competence Tests and Their Formalities
The third general question concerns whether competence tests and their formalities should be abolished, retained or modified.

(a) Abolition or Retention of Competence Tests
From the time of the influential Pigot Report in 198960 up to the time of the survey, law reform agencies variously recommended the abolition or retention of competence tests for each evidence-type.61 A common reform refrain has been the abolition of current competence tests, with the retention of the concept of competence tests, and the legislative instantiation of modified competence tests for sworn evidence62 or unsworn evidence.63

48 Ibid 96, Recommendation 3.
49 WALRC, Project No 87 (1991), above n 22, [2.3].
51 Ibid 38.
52 ALRC and HREOC, above n 14, [14.59].
53 Ibid [14.59] n 154, where Evidence Act 1977 (Qld) s 19 is incorrectly attributed with fixing this age.
54 QLRC, above n 17, 38.
55 WALRC, Project No 87 (1991), above n 22, [2.26].
57 Ibid, Question 6.
61 Law reform agencies’ use of the terms abolition and retention varies according to their perception of the effect, and degree, of the modification of competence tests.
A more radical refrain is the legislative instantiation of the predominant United States' approach — a legislative presumption of competence for all witnesses.

At the time of the survey, Queensland legislation, supplemented by the common law, allowed competence tests for a child's sworn and unsworn evidence. To testify sworn, a child had to demonstrate an understanding of the nature of the oath; to testify unsworn, a child had to demonstrate an understanding of various criteria. (The content of Queensland competence tests is the focus of Part 2 of the competence suite.)

(i) Abolition of Competence Tests

Competence tests were recommended for abolition in England, Ontario and New Zealand, in favour of modified competence tests. Recommendations for abolition have assumed variable formulations.

In England, in 1989, the Pigot Committee's recommendation for abolition of competence tests dispensed with a child's oath-taking or promise to tell the truth, in favour of a child under 14 testifying unsworn. The Pigot Committee, anticipating adverse juror reaction to a child's unsworn evidence, supported a judicial admonition directing a child to testify by a 'full and truthful account of what occurred in terms suitable to their age and understanding'. Yet, in 1992, legislation purporting to implement the recommendation and abolishing the competence test for unsworn evidence, produced confusion as to how to assess a child's capacity to testify. Then, in 1995, a 'less rigorous' competence test for unsworn evidence emerged, reflecting law reform recommendations that a child's capacity for 'intelligible testimony' be assessed. This minimalist English approach to competence tests dislodged any judicial duty to conduct a competence test for children, but endorsed a judicial power to conduct a competence test for unsworn evidence on the basis of need when, for example, 'the child is very young or has difficulty in expression or understanding'.

The minimalist English approach was not supported by the OLRC in 1991. There, the recommendation for abolition of competence tests was accompanied by recommendations for the presumed competence of all witnesses, and for a reformulated competence test requiring a child's promise to tell the truth. Legislation, purporting to implement the recommendation for abolition, instantiated a presumption of competence within the following hierarchy of competence tests. To testify sworn, a child under 14, if challenged, had to demonstrate an understanding of the nature of an oath. To testify unsworn, a child had to demonstrate an understanding of 'what it means to tell the truth' and then promise to tell the truth. If, due to the 'extreme youth of the child', this requisite understanding and promise was absent, a child's evidence could be admitted if he or she demonstrated an ability to communicate 'sufficiently reliable' evidence.

65 In accordance with the Evidence Act 1977 (Qld), and the Oaths Act 1867 (Qld).
66 Schultz, above n 13.
68 Pigot, above n 60, [5.14].
70 Criminal Justice Act 1988 (UK) s 33A(2A) (inserted per Criminal Justice and Public Order Act 1994 (UK) Schedule 9 [33]; commenced 3 February 1995); Spencer's 'less rigorous' descriptor was referred to in R v Hampshire [1996] QB 1, 8 (Auld J).
72 R v Hampshire [1996] QB 1, 7 (Auld J); this was referred to in DPP v M [1998] QB 913, 917 (Phillips LJ).
73 OLRC, above n 17, 39, 41.
74 Ibid 41: The legislation is Evidence Act 1990 (Ont) s 18.1.
Closer to the Pigot approach was the New Zealand Law Commission’s (NZLC’s) approach in 1999. There, the recommendation for abolition of competence tests purported to eliminate any demonstration of a child’s understanding of the nature of a promise. The recommendation preferred a child’s declaration or promise to tell the truth — it required that a child under 12 years testify unsworn, and be ‘informed by the judge of the importance of telling the truth and not telling lies’. A child’s unsworn evidence had to be received as if on oath. By contrast, in 1996, the New Zealand judicial officers in the Pipe et al survey did not reject competence tests. As the most positive of the five professional groups surveyed, judicial officers endorsed competence tests’ overall useful purpose, and fairness to child ‘complainants’.

(ii) Retention of Competence Tests

Competence tests were recommended for retention in Scotland and Ireland — there, competence tests did not require an understanding of the concept of obligation. The Scottish Law Commission’s (SLC’s) recommendation for retention continued the Scottish common law’s ‘liberal attitude’ of effectively presuming competence by failing to prescribe a minimum age for competence. The Scottish competence test for unsworn evidence required that a child’s ‘verbal abilities and understanding of truth and falsehood [be] adequately confirmed’ in a preliminary conversation with a judge. Specifically, this competence test required judicial satisfaction of a child’s understanding of the difference between telling truth and lies, accompanied by an admonition directing the child to tell the truth.

The Irish Law Reform Commission’s (ILRC’s) recommendation for retention expressly upheld the closeness of Irish and Scottish practice. The ILRC suggested that the fact that competence tests ‘would normally be confined to the young child’ indicated the practice of presuming a child’s competence. As a new measure, the ILRC recommended that a child under 14 years may testify unsworn by demonstrating a capacity to render an ‘intelligible account of events’. The ILRC rejected abolition of competence tests for two reasons. First, abolition would potentially allow all evidence, including unreliable evidence, to be admitted — the implication was that a judicial warning to the jury may not correct the risk of prejudice to an accused. Second, a prescription that all witnesses are competent would be of impossible application to ‘a day old baby’ and ‘[l]ess fancifully, a 2 year old’ who may be incapable of communicating ‘anything amounting to a comprehensible account of a particular experience’.

(iii) Relevance of the Question

The question of the abolition or retention of competence tests is relevant to Queensland law reform. First, in 1997, the ALRC’s recommendation for the retention of modified competence tests presumed all witnesses to be competent, and reformulated the oath as

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77 NZLC, Report No 55 (1999) Vol 1, above n 75, draft ss 73(a) and 78(2).
78 Pipe et al, ‘Perceptions of the Legal Provisions’, above n 8, 24, Table 5 Questions (a) and (f), respectively.
80 SLC, above n 80, [3.6].
81 Ibid [3.5].
82 Ibid [3.5].
83 ILRC, above n 71, [5.10], [5.13], [5.18].
84 Ibid [5.18], [5.35]–[5.36].
85 Ibid [5.13].
86 ALRC and HREOC, above n 14, Recommendation 98.
'simple and in language that the particular child understands'. Accompanying this recommendation was a call for federal and state law to converge by adopting a modified competence test for sworn evidence, formulated on the Commonwealth template.87 Second, in 2000, the QLRC recommended modified competence tests for sworn and unsworn evidence, but did not expressly evaluate the ALRC's recommendation in this context, nor adopt the Commonwealth template.88 Third, the new competence sections in Queensland's 2003 amendments substantially embrace a majority of the QLRC's recommendations for modified competence tests.89

(b) Formalities Attending Competence Tests
If competence tests are retained, the question of the efficacy of their formalities — including court-approved questions and the jury's presence — will be engaged.

(i) Court-Approved Questions in Competence Tests
An innovative formality — court-approved competence questions, or types of questions — has no Australian precedent. Prescribing court-approved competence questions may help to prevent curial departures from competence criteria; the current practice commits the formulation and delivery of actual competence questions to judicial discretion. Disputes concerning curial departures from legislative competence requirements have featured at appellate level in Australia90 and in the United States.91

(ii) Jury's Presence During Competence Tests in Jury Trials
A controversial formality — the jury's presence during competence tests in jury trials — reflects the traditional Commonwealth adherence to the English practice that emerged in R v Reynolds.92 The practice has continued in some sectors of the Commonwealth: in England, where it recently may be less well-supported;93 in Scotland, where it recently sustained no adverse comment on appeal;94 and in New Zealand, where it has been explained as assisting the jury to decide the appropriate weight of a child witness's evidence.95 In 1996, the practice underpinned Pipe et al's survey question as to whether 'child competency tests' have a positive or negative effect on a jury's perception of a potential child witness.96 The question's mean rating indicated a New Zealand judicial perception (and the perception of four of the five professional groups there surveyed) that competence tests had a slightly more positive effect on a jury's perception. However, the most-favoured Australian practice rejects the Reynolds approach and endorses the jury's absence during competence tests in jury trials.97 At the time of the survey, this common law rejection of the Reynolds approach was exhibited in Queensland, Tasmania, and Victoria; some Australian Evidence Acts98 direct a jury's absence during competence tests. The frequently-advanced rationale for rejection of the Reynolds

89 The QLRC's Recommendation 7.1 features in the retention of a distinction between evidence-types in Queensland's 2003 amendments. Recommendation 7.2(a) is cast as the new s 9B(2), and Recommendation 7.3 as the new s 9A(2).
93 KP v Her Majesty's Advocate (1991) SCCR 933.
95 Ligertwood, above n 93, [2.21]; Stephens, above n 93, 401.
96 At the time of the survey: Tasmania, Victoria, Commonwealth, New South Wales.
approach is the prejudice argument — relevantly, the jury’s absence decreases the risk of prejudice to an accused. By contrast, the Reynolds approach was endorsed equivocally in South Australia,99 and strongly in Western Australia;100 in the latter, a rationale for endorsement was that the jury’s presence during a competence test is a means of ensuring a jury trial’s fairness.101

(iii) Relevance of the Question

The question of the efficacy of the two formalities is relevant to Queensland law reform, despite the lack of focus on the formalities by the ALRC102 and QLRC.103 First, the desirability of court-approved ‘questions, or types of questions’ has innovative potential. Possible negative and positive effects, however, would need to be balanced: negative effects include the concern that stipulating competence questions would both heighten the potential for coaching children, and erode judicial discretion; positive effects include the efficacy of generic competence questions or guidelines for the exercise of judicial discretion. Second, the desirability of a jury’s presence during competence tests in jury trials is of interest given Queensland’s current rejection, but former embrace,104 of the Reynolds approach, and given the differing Commonwealth views concerning a jury’s presence. Third, neither formality was incorporated in the new competence sections in Queensland’s 2003 amendments.

II. METHOD
A. Participants

The survey participants were judicial officers in the three tiers of Queensland state courts — the Supreme Court (including the Court of Appeal), the District Court, and the Magistrates Court. Judicial officers in each tier sit in criminal proceedings where children may testify. For example, the Supreme Court, the highest state court, has jurisdiction in criminal trials concerning the most serious indictable offences. The District Court is ‘the principal trial court for . . . serious criminal offences’.105 The Magistrates Court has jurisdiction in ‘summary’ trials — non-jury trials concerning both simple offences and a limited range of indictable offences — and in ‘committal proceedings’. The function of committal proceedings is to establish a prima facie case to commit an accused for trial of an indictable offence. However, despite the courts’ jurisdictional differences, Queensland judicial officers as a general population are empowered to administer the same legislative and common law rules of evidence concerning competence.

The survey achieved a 46.29% response rate. Specifically, 62 responses were received from the 134 surveys sent to the entire complement of Queensland judicial officers at the time of the survey (Supreme Court n = 10 of 25; District Court n = 13 of 35; Magistrates Court n = 39 of 74).106

The response rate to individual Part 1 questions was consistently very high. Two types of questions however, had a higher non-response. First, in a question concerning jury trials, the higher non-response (19.35%; N = 62) is explained by the express election of some magistrates not to respond. Second, in two questions requesting judicial officers’

102 ALRC and HREOC, above n 14.
105 District Court of Queensland, (1998), above n 11, 11.
106 Additionally, 2 of the 134 judicial officers advised their non-participation for reasons that included a lack of 'special knowledge', and a lack of recent experience with child witnesses, respectively.
recall of their actual judicial experience of child witnesses in a number of modalities, a large non-response was recorded in each modality. Yet the response to each question overall was very high — 54 judicial officers (87.10%; N = 62) recorded experience in at least one modality in each question.\textsuperscript{107} By comparison, variability of judicial experience was demonstrated in the Pipe et al survey\textsuperscript{108} — there, ‘differing patterns of experience’ were recorded by New Zealand judicial officers to a question concerning their actual experience with child witnesses.

B. Procedure and Protocol

Developed through 1999 and distributed to judicial officers by the close of March 2000, the survey was a voluntary, self-administered, mail survey.

Judicial cooperation and a grant of financial support from the Australian Law Council Foundation facilitated this survey. In the design phase, the four heads of jurisdiction\textsuperscript{109} were generous in their time for consultation and agreeable to the survey protocol. The protocol included ethics controls and clearances, and confidential circulation of draft survey instruments for comment and pre-testing. Consonant with the anonymity and confidentiality attaching to survey participation, ethics controls required that the survey contained no identifiers or coding as would trace a participant.\textsuperscript{110} And, consonant with the published practice of the Judicial Commission of New South Wales,\textsuperscript{111} draft survey instruments were circulated to a small number of judicial officers for comment; this practice was useful to evaluate the survey’s appropriateness, and facilitate its quality by identifying and reducing ambiguity. Additionally, draft survey instruments were circulated for confidential pre-testing and comment by legal and academic professionals.\textsuperscript{112}

Preceding the execution phase, a letter, standard for all courts and inviting judicial officers’ participation, was delivered to each judicial officer in the materials for each court’s regular meetings. Subsequently, the survey instrument was delivered, accompanied by a stamped addressed envelope for remittance. The survey’s preface acknowledged the participating judicial officers’ reliance on ‘the assurance of the retention of confidence and anonymity’, and the undertaking that ‘no analysis will be undertaken to identify individual judicial officers’; reciprocally, judicial officers acknowledged that ‘responses may be reproduced verbatim or paraphrased’. Three weeks were allotted for initial completion. At the initial completion mark, a reminder letter and duplicate survey were delivered, allowing the next three weeks for final completion. Late surveys were gratefully received.

Three factors may have affected the response rate. First, as Freckelton recognised in his survey of Australian judicial officers on expert evidence,\textsuperscript{113} his survey’s ‘lengthy and demanding’ nature may have negatively impacted on response. Similarly, the survey that I conducted was lengthy with a demanding format.\textsuperscript{114} Given this survey profile, judicial participants’ time and efforts are particularly appreciated for contributing significantly to the research’s value. Second, the judicial description of the reform of children’s evidence as a ‘vexed question’, within the context of ‘recent lively public discussion’,\textsuperscript{115} reflects the sensitivity of the issues. Third, it was anticipated that a lack of judicial experience with non-accused child witnesses could be a factor in survey non-participation.

\textsuperscript{107} Additionally, one judicial officer could not specifically ‘recall the numerous witnesses’.


\textsuperscript{109} The Chief Justice of the Supreme Court, the President of the Court of Appeal, the Chief Judge of the District Court and her delegate, and the Chief Magistrate.

\textsuperscript{110} Hence, no demographics concerned gender, age, or the judicial officer’s geographic location.

\textsuperscript{111} J Hickey and C Spangaro, Judicial Views About Pre-Sentence Reports (1995) 14.

\textsuperscript{112} Relevantly, prosecutors, defence counsel, law reformers, legal academics, child psychologists, and sociologists.


\textsuperscript{114} A Queensland judicial officer who completed the survey translated, from a participant’s point of view, the Freckleton point — ‘survey very long + complex’ requiring ‘4 separate sessions due to interruptions + level of concentration & thought demanded’.

\textsuperscript{115} District Court of Queensland, (1998), above n 11, 28.
Hence, the response rate and sample size is useful — the response rate approached 50% of the entire judicial population, and may have exceeded 50% of the population with experience. A 50% response rate has been considered high with mail surveys of professional groups. Some recent judicial surveys have achieved lower response rates: Hafemeister’s national survey of United States’ state trial judges achieved at least a 23.6% response rate, and Redding and Reppucci’s survey of United States’ state court judges achieved a 19.1% response rate. Moreover, two broadly comparable surveys had less judicial participants than the survey that I conducted: Pipe et al’s survey had 32 judicial participants, Cashmore and Bussey’s survey had 50 judicial participants, although the entire population is not disclosed.

C. Data Entry and Analysis

For the closed-ended questions, data was double-entered and extensively checked. The method of analysis of some of the data follows some international literature concerning the receipt of children’s evidence, in comparing participants’ selections from metrically-ordered rating scales. To test the equivalence of judicial participants’ selections, two-tailed paired samples t tests were conducted with within-groups factors of competence test practices, age (ie, under 12 versus 12/over), or evidence-type (ie, sworn versus unsworn evidence). To test the equivalence of judges’ versus magistrates’ selections, one-way analyses of variance (ANOVAs) were conducted with a between-groups factor of judicial status (ie, judges versus magistrates). To cater for multiple comparisons, Bonferroni-adjusted results are reported. Frequencies are reported to more precisely describe directions in judicial views.

The survey’s total response or sample size of judicial participants was 62. However, due to missing data, the response to, and sample size for, individual questions varied. Unless otherwise specified, ‘N = . . .’ denotes the total response to the survey, or the total response to each question or variable. For each question, ‘n = . . .’ denotes the numbers of judicial officers (or judges versus magistrates) selecting a particular response. Unless otherwise specified, judges refers to Supreme Court and District Court judges as a group.

D. Survey Questions

(a) Prefatory Questions Applicable to All Suites
Prefacing all suites of survey questions, two questions requested general and specific judicial experience, respectively. First, general judicial experience was measured by a judicial officer’s time on the bench, in five-year intervals. Second, specific judicial experience was indicated by a judicial officer’s recall of the number of non-accused child witnesses who had testified in his or her court in four offence-types: sexual offences with a parent; sexual offences with a non-parent; offences of non-sexual violence; and offences

120 14 District Court judges with jury jurisdiction (64%; N = 22) and 18 High Court judges (75%; N = 24).
121 27 Magistrates and 23 District Court judges.
of property and of dishonesty and fraud. To facilitate reliable recall, the number of non-accused child witnesses was reduced to three intervals of 10 (ie, up to 9, 10 to 19, and 20 to 29 child witnesses), and child witnesses were differentiated only by age (ie, under 12 versus 12/over). Recall was limited to the two years to 2000.124

(b) Competence Suite Questions, Part I
Part 1 of the competence suite included six questions, all permitting additional comments: two interval questions on age; a yes/no question attaching a specific request for comments; and three closed-ended questions. To measure degrees of desirability, the three closed-ended questions were constructed on 5-point attitude or rating scales of continuing positivity.125

Age featured in the two interval questions. The first interval question requested judicial officers to nominate, for each evidence-type and along a one-year interval scale ranging from 2 to 18 years, an age for the presumption of competence.126 The second interval question requested each judicial officer to recall, along a one-year interval scale, the age of the youngest child witness who had testified in his or her court in each of four modalities. As Table 2 discloses, the four modalities were differentiated by evidence-type (ie, sworn versus unsworn evidence) and by special arrangements127 (ie, the absence versus the presence of section 21A special arrangements). Special arrangements are modifications of conventional court-room practice to facilitate the receipt of evidence; they are premised on alleviating the potential for a special witness’s128 unnecessary stress, without prejudicing129 the accused or prosecution. In this second interval question, recall was not limited to a time frame — judicial officers could draw on their entire judicial experience.

The remaining four questions — the yes/no question and the three closed-ended questions — effectively concerned the retention of competence tests for each evidence-type. The yes/no question, with its attached request for comments, invited judicial views as to whether a need exists to distinguish between children’s evidence-types. The following three closed-ended questions were constructed on the 5-point rating scale and differentiated children by age (ie, under 12 versus 12/over). One question requested judicial officers to rate the desirability of the retention of competence tests for sworn and unsworn evidence, respectively. Two questions assumed the retention of a competence test, and requested judicial ratings of the desirability of the following competence test formalities: court-approved types of questions; and a jury’s presence during competence tests in jury trials.

III. Results
A. Prefatory Questions and Judicial Experience Profile
(a) General Judicial Experience
The general judicial experience of the 62 judicial officers, in terms of their time on the bench, was fairly evenly distributed up to 15 years on the bench, but tapered off thereafter:

124 An option of 'not applicable' was included for a judicial officer who had not seen a child witness in his or her court.
125 '1' represented not at all desirable; '2', a little desirable; '3' moderately desirable; '4', very desirable; and '5', extremely desirable.
126 An option of 'not applicable' was included for a judicial officer who did not consider a witness of any age should be presumed competent.
127 Special arrangements (Evidence Act 1977 (Qld) s 21A), at the time of the survey, included: (a) excluding an accused from the court-room, or obscuring an accused from a special witness’ view; (b) excluding persons from the court-room; (c) allowing a special witness to testify outside a court-room; (d) allowing a support person’s presence; (e) videotaping.
128 'Special witness' (Evidence Act 1977 (Qld) s 21A(1)) includes a child. The age for a child 'special witness', at the time of the survey, was under 12, and, in Queensland’s 2003 amendments, is under 16.
129 The prejudice caveat, cast as s 21A(3) at the time of the survey, proscribes unfair prejudice; the caveat, recast as s 21A(8) in Queensland’s 2003 amendments, proscribes judicial instructions to the jury, and proscribes ‘(a) . . . draw[ing] any inference as to the defendant’s guilt . . . etcetera.'
up to 4 years (27.42%); 5 to 9 years (25.81%); 10 to 14 years (24.19%); 15 to 19 years (16.13%); and 20 to 24 years (6.45%).

(b) Specific Judicial Experience

In the two years to judicial officers’ completion of the survey in 2000, specific judicial experience with non-accused child witnesses differed in terms of both jurisdiction and offence-type. Overall, 54 judicial officers (87.10%; \( N = 62 \)) recorded experience in the lowest interval (up to 9 child witnesses) and, hence, with \textit{at least} one younger or older child witness in one of the four offence-types; additionally, one judicial officer recorded additional experience with up to 9 younger, and older, child witnesses in traffic offences. Of this 54, some judicial officers saw child witnesses in at least one offence-type in the higher intervals: 17 judicial officers (31.48%; \( N = 54 \)) saw 10 to 19 child witnesses; and 3 judicial officers (5.56%; \( N = 54 \)) saw 20 to 29 child witnesses. Frequently, judicial officers who recorded experience within one higher interval saw child witnesses in a \textit{number} of offence-types in the higher intervals.

Two caveats pertain to the data captured here. The first caveat is that judicial experience is affected by intra- and inter-court allotment of cases. \textit{Intra}-court allotment of cases is diverse — for example, judicial officers within the Supreme Court (and similarly the District and Magistrates Courts) are allotted variable caseloads concerning non-accused children of a particular age or offence-type. \textit{Inter}-court allotment of cases depends on the differing jurisdictional features of the courts: for example, the District Court is the principal trial court for non-accused child witnesses in serious offences; and the Magistrates Court has various jurisdictional points of contact with children through committal proceedings and summary trials. The second caveat is that this question captured recent \textit{judicial experience} — experience with child witnesses outside the two-year time-frame, or outside judicial status, was not captured. The rationale for the narrow time-frame is underlined by one judicial officer’s ‘very approximate’ recall, and by one’s expressed inability to ‘recall the numerous witnesses’. Some judicial officers who did not respond to this question evidenced wider experience of child witnesses in later questions.

Caveats aside, Supreme Court judges recorded limited experience relative to judicial officers on the District and Magistrates Courts. For example, 100% (13 of \( n = 13 \)) of District Court judges, and 94.87% (37 of \( n = 39 \)) of Magistrates, recorded experience with child witnesses. By contrast, 40% (4 of \( n = 10 \)) of Supreme Court judges saw child witnesses, and then only in the lowest interval (up to 9 child witnesses), and only in two of the four offence-types (offences of violence, and of a sexual type with a non-parent/non-carer). Hence, only judicial officers in the District Court and the Magistrates Court saw child witnesses in the two higher intervals. \textbf{Table 1 presents the numbers of judicial officers recalling non-accused child witnesses in the two years to 2000.}

More judicial officers saw child witnesses in sexual, than in non-sexual, offence-types. In the lowest interval (up to 9 child witnesses), judicial experience in only one non-sexual offence-type (older child witnesses in offences of violence) approached that recorded for each of the sexual offence-types. In the highest interval (20 to 29 child witnesses), judicial officers saw child witnesses only in sexual offences. Moreover, for each \textit{sexual} offence-type, similar numbers of the 62 judicial officers recorded experience of younger (under 12) and older (12/over) child witnesses, respectively. Yet, for each \textit{non-sexual} offence-type, more judicial officers recorded experience with older (12/over) than younger (under 12) child witnesses.

130 There were additions and retirements to the Supreme and Magistrates Courts circa the time of the survey.
131 One judicial officer with experience, but who could not ‘recall the numerous witnesses’, was excluded.
132 Four judicial officers recorded children testifying in their court outside the two-year time-frame; one indicated pre-judicial experience of child witnesses as defence counsel.
Table 1. Numbers of Judicial Officers Recalling Child Witnesses in the 2 Years to 2000

<table>
<thead>
<tr>
<th>Offences</th>
<th>JO recalling CW under 12</th>
<th>Total JO N = 62</th>
<th>JO recalling CW 12/over</th>
<th>Total JO N = 62</th>
</tr>
</thead>
<tbody>
<tr>
<td>A sexual type on a child by a parent/carer</td>
<td>31 6 1</td>
<td>38</td>
<td>31 7 2</td>
<td>40</td>
</tr>
<tr>
<td>A sexual type on a child by a non-parent/non-carer</td>
<td>30 7 0</td>
<td>37</td>
<td>33 6 1</td>
<td>40</td>
</tr>
<tr>
<td>Violence (but not of a sexual type)</td>
<td>19 1 0</td>
<td>20</td>
<td>28 4 0</td>
<td>32</td>
</tr>
<tr>
<td>Property and dishonesty/fraud</td>
<td>10 1 0</td>
<td>11</td>
<td>18 6 0</td>
<td>24</td>
</tr>
</tbody>
</table>

Note. JO = judicial officers. CW = child witnesses.

B. Ages for Competence for Sworn and Unsworn Evidence

(a) Presumed Competence

The presumption of competence question recited, 'irrespective of current Queensland law or your court room practice pursuant to that law, at what age do you consider witnesses should be presumed competent to testify?’. Judicial officers generally preferred the presumption of competence at a higher age for sworn than for unsworn evidence. Sworn evidence had an older witness profile — judicial nominations of ages for presumed competence clustered within 8 to 15 years. By contrast, unsworn evidence had a younger witness profile — judicial nominations clustered within 4 to 10 years, with one judicial officer asserting 'a younger age is appropriate for competency of a child witness’ to testify unsworn. Figure 1 displays the ages nominated by judicial officers for presumed competence for each evidence-type.

For sworn evidence, the modal preference for the presumption of competence was 12 years (32.73%; N = 55). This clear preference was more than double the second preference of 8 years (n = 7). The mean was 11.38 years, and the median 12 years. Of the 7 judicial officers who did not select ages, 5 selected 'not applicable'.

For unsworn evidence, the modal preference for the presumption of competence was 6 years (26.42%; N = 53). This preference was accompanied by a bimodal second preference of 5 years and 10 years (each 15.09%; N = 53). The mean was 7.68 years, and the median 6 years. In fact, at least half the judicial officers nominated presumed competence at 6, 7 or 8 years or below: 69.81% (N = 53) selected 8 years or below; 60.38%, 7 years or below; and 50.94%, 6 years or below. Of the 9 judicial officers who did not select ages, 6 selected ‘not applicable’.

There was a significant difference between the mean ages of presumed competence for sworn versus unsworn evidence: t (52) = 9.59, p < .001.

There was no significant difference between judges’ and magistrates’ selections of an age for presumed competence for sworn evidence.

The question expressly directed that this selection signalled that a judicial officer did ‘not consider a witness of any age should be presumed competent’.

There was no significant difference between judges’ and magistrates’ selections of an age for presumed competence for unsworn evidence.
Nineteen judicial officers attached additional comments to this presumption of competence question. Judicial comments were directed, expressly or implicitly, to competence or to its presumption — interestingly, some comments read as if a presumption itself should be variable.

The additional comments presented two caveats to nominating ages for presumed competence: first, competence depends on a child’s maturity, intelligence or understanding; and, second, age is ultimately irrelevant. The first caveat was articulated by 7 judicial officers who expressly linked a child’s competence (or its presumption) to the following indicators: maturity (n = 3); intelligence (n = 4); ‘level of understanding’ (n = 1); and comprehension (n = 1). This first caveat was additionally articulated by 5 judicial officers who linked a child’s competence (or its presumption) to a ‘particular’ or ‘individual’ child (n = 2), or to a child’s understanding of an oath or concepts of religion (n = 3).

The second caveat was articulated by 9 judicial officers who expressly rejected age as the effective criterion for competence (or its presumption). As one judicial officer commented, age should cede to a child’s ‘maturity, education and general intelligence’. Rejecting presumed competence for a witness of any age, one judicial officer commented, ‘Different children appreciate the nature of sworn evidence at different times in development’. Continuing this theme, judicial officers (n = 2) reported that age was an ‘arbitrary’ or ‘variable’ marker of competence. Taking the theme to the extreme, judicial officers (n = 5) described, generally or specifically, the act of nominating an age for presumed competence as ‘impossible’ or ‘inappropriate’ — ‘[p]resumeing competence related solely to age is inappropriate’.

Some comments relayed useful points of practice. Two judicial officers suggested a child’s competence could depend on the anticipated ‘nature’ or ‘type of evidence’ — one exemplified the fact of hearing a noise as ‘an account of a simple factual matter’ where ‘the age [for competence] . . . might be very low’. Additionally, one judicial officer indicated that expert assistance was required due to ‘the incorrect assertions’ concerning ‘children and their capacity to relate events’; one nominated an age for presumed competence for unsworn evidence, on the assumption that a child would testify ‘within weeks’ of the event.

Some of the 7 judicial officers selected more than one indicator: for example, ‘[a]ge may be irrelevant — maturity and comprehension are more important’.

By selecting ‘not applicable’ on the age-scale.
(b) Actual Competence

Each judicial officer was requested to record the age of the youngest non-accused child witness who had testified in his or her court in each of four modalities. Overall, 58 judicial officers (93.55%; N = 62) saw child witnesses in at least one of the four modalities. Of this 58, 24 judicial officers (41.38%) had experience in all four modalities; an additional 9 judicial officers (15.52%, N = 58) had experience in three modalities. Evidently, the data captured was affected by a caveat concerning the specific judicial experience of offence-types — relevantly, that the intra- and inter-court allotment of cases affects judicial experience. Additionally, a second caveat is apposite. In requesting judicial recall of the age of the youngest child witness, and not the number of witnesses who had testified at this youngest age, this question anticipated that a judicial officer may have seen a number of witnesses at this youngest age.

Caveats aside, it is instructive to focus on the intersection of the four modalities with the lower ages recorded for child witnesses in judicial officers’ courts. Witnesses of 8 years or below are emphasised as some researchers and legislators select 7 or 8 years as a fault-line to describe the youngest witnesses.

The number of judicial officers recalling a witness of 8 years or below in their court escalated with the serial introduction of modalities from de rigueur to the most flexible: 8 judicial officers (21.05%; N = 38) recalled witnesses of 8 years or below for sworn evidence without special arrangements; 14 judicial officers (33.33%; N = 42) for sworn evidence with special arrangements; 21 judicial officers (58.33%; N = 36) for unsworn evidence without special arrangements; and finally, 38 judicial officers (88.37%; N = 43) for unsworn evidence with special arrangements. Hence, most judicial officers saw very young witnesses in the most flexible modality — unsworn evidence with special arrangements. Table 2 presents the age of the youngest child who testified in a judicial officer’s court.

The age of the youngest witness, in each of the four modalities, fell within a range of 3 to 6 years. The judicial officer recording the witness of 3 years described the child as ‘extremely precocious and (seemingly) quite unmoved by the proceedings — an exceptional child’. Similarly, one judicial officer indicated that ‘[s]ome children do not wish a screen or . . . video’, and then recorded a pro-active practice of questioning the child to ‘satisfy myself that they understand what could be provided’ if they so elected. By contrast, concerning the higher ages recorded for child witnesses in judicial officers’ courts, Table 2 discloses more older child witnesses in the two sworn evidence options. Although this question did not focus on higher ages, older children of 12 to 16 years were recorded as testifying both unsworn without special arrangements, and sworn with special arrangements.

C. Need to Distinguish Between Evidence-types

Two questions effectively concerned the need to distinguish between evidence-types — one general, one more specific.

(a) Need to Distinguish Between Evidence-types

The general question — ‘Do you consider there is a need to distinguish between the sworn and the unsworn evidence of child witnesses?’ — requested judicial officers to select a yes/no option, and then to comment. From the response rate to the yes/no selection (98.39%; N = 62), a seeming consensus emerged. Of the 61 judicial officers responding, 65.57% (N = 61) selected ‘no’ and so rejected a distinction between children’s sworn and unsworn evidence.139

139 There was a significant difference between the number of judicial officers selecting ‘yes’ versus ‘no’: \( \chi^2 (1, N = 62) = 5.92, p < .05 \). There was no significant difference between judges’ and magistrates’ selections of ‘yes’ versus ‘no’.
### Table 2. Numbers of Judicial Officers Recalling Their Youngest Witness

<table>
<thead>
<tr>
<th>Age</th>
<th>For Sworn Evidence</th>
<th>For Unsworn Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>YW Testifying Without s21A SA</td>
<td>YW Testifying With s21A SA</td>
</tr>
<tr>
<td></td>
<td>(N = 38)</td>
<td>(N = 42)</td>
</tr>
<tr>
<td>2 years</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>3 years</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>4 years</td>
<td>—</td>
<td>2</td>
</tr>
<tr>
<td>5 years</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>6 years</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>7 years</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>8 years</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>9 years</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>10 years</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>11 years</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>12 years</td>
<td>5</td>
<td>10</td>
</tr>
<tr>
<td>13 years</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>14 years</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>15 years</td>
<td>3</td>
<td>—</td>
</tr>
<tr>
<td>16 years</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>17 years</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>

**Note.** "—" means no judicial officer recalled a witness of this age, in this modality. YW = youngest witness. SA = special arrangements.

However, as only 21 judicial officers attached reportable comments, the response rate for comments (34.43%; N = 61; or 33.87%; N = 62) does not match the 98.39% (N = 62) of the yes/no selection. Of the 21 judicial officers commenting, 6 endorsed (and so retained) a distinction, and 15 rejected it.

(i) **Comments Retaining a Distinction**

Of the 6 judicial officers retaining a distinction, 5 justified it by emphasising that oath-taking was conditioned on a child’s understanding of an oath. One, however, critiqued the religious basis of the labels, sworn and unsworn: ‘[s]worn and unsworn are not apt indicators of the reliability of the witness where the religious basis for an oath [has] little meaning’. This judicial officer required a different ‘basis for binding the conscience of the witness whether child or adult’, and endorsed an oath detached from religious belief.\(^{140}\) The nature of an oath was not otherwise questioned by judicial officers retaining a distinction.\(^{141}\) Additionally, 2 judicial officers yoked the understanding of an oath to a child’s understanding of conse-

\(^{140}\) The judicial officer’s rationale was that ‘establish[ing] if the child witness has sufficient understanding [to swear an oath]’ is frequently ‘a difficult procedure if God belief [or] afterlife consequences are introduced’.

\(^{141}\) One judicial officer asserted that ‘an oath should not be taken unless understood’; and one referred this need for a distinction between evidence-types to ‘the difference in understanding on which sworn evidence is predicated’.
sequences and responsibility, respectively: one required a child’s belief in consequences; and one emphasised that the older a child, the greater the importance of a child’s understanding of the responsibility to testify sworn. Finally, the remaining judicial officer endorsed the distinction’s ‘significant impact on [the] weight and probative value of evidence’.

(ii) Comments Rejecting a Distinction

Of the 15 judicial officers rejecting a distinction, 11 emphasised the greater importance of a child understanding the truth than an oath — a ‘mere requirement to tell the truth’ was preferred to oath-taking. Of this 11, 2 expressly endorsed a child’s capacity for, and delivery of, truthfulness: ‘I believe a child is conscious of the seriousness of the task and will strive to answer truthfully whether sworn or unsworn’; ‘[c]hildren are generally truthful’. Some judicial officers supplemented their requirement that a child understand the truth: 3 required a child to understand, or to be admonished on, punishment or consequences; and one required a determination of a child’s sufficient intelligence.

In rejecting the oath as a measure of competence, 7 judicial officers variously asserted the oath’s superfluity. First, the oath was considered superfluous to truth-telling by 4 judicial officers — the oath fails to effect any ‘greater sanction’ (n = 1), or ‘any’ or ‘much’ difference to the child or to ‘the truthfulness of the evidence’ (n = 2), or any ‘magic . . . particularly as now very few have any established religious belief’ (n = 1). Second, the oath was considered superfluous due to its discriminatory character — 2 judicial officers adverted to the ‘unfair’ nature of requiring children’s competence tests as ‘a large number’ of adults would be ineligible to testify sworn if required to explain their understanding of an oath. Third, one judicial officer conceived the oath as an impediment because ‘very young children’, if required to be ‘sworn or even explain what is meant to tell the truth in court’, may be ‘frightened [to the point of] saying things’ in order to avoid trouble. This comment echoes the Pigot Committee’s remarks that the ‘psychological and symbolic aspect’ of swearing an oath, or promising to tell the truth, may both enhance witnesses’ truthfulness and adversely affect witnesses: ‘the formality and solemnity of the court room context . . . may actually have a deleterious effect on the fullness and accuracy of children’s testimony’.

Four judicial officers expressed the following ages below which sworn and unsworn evidence ought not be distinguished: under 11 years (n = 1); under 12 (n = 2); and under 14 (n = 1).

Finally, the remaining judicial officers (n = 2) adverted to the fact that any distinction between evidence-types should be determined from the weight of the evidence, and hence by the tribunal of fact, not law.

(b) Desirability of the Retention of Competence Tests

The more specific, closed-ended question requested judicial officers, ‘irrespective of current Queensland law’, to rate the desirability of retaining each of four competence tests. The competence tests were constructed from combinations of evidence-type (ie, sworn versus unsworn evidence) and age (ie, younger (under 12) versus older (12/over) children). Table 3 presents the mean ratings of desirability for the four competence tests, in terms of judicial officers in aggregate, and as judges or magistrates.

For each evidence-type, an effect of age was demonstrated. For both evidence-types, retention of competence tests for older children was consistently assigned a lower desirability.
Table 3. Judicial Officers’ Ratings of the Desirability of Retaining Competence Tests

<table>
<thead>
<tr>
<th>Competence tests for</th>
<th>Judicial officers</th>
<th>Judges/magistrates*</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M    SD  N</td>
<td>M    SD  n</td>
</tr>
<tr>
<td>Sworn evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For children under 12</td>
<td>3.44  (1.06) 55</td>
<td>3.20  (1.20) 20</td>
</tr>
<tr>
<td></td>
<td>3.57  (1.01) 35</td>
<td></td>
</tr>
<tr>
<td>For children 12/over</td>
<td>2.95  (1.16) 55</td>
<td>2.45  (1.15) 20</td>
</tr>
<tr>
<td></td>
<td>3.23  (1.09) 35</td>
<td></td>
</tr>
<tr>
<td>Unsworn evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For children under 12</td>
<td>3.52  (1.04) 56</td>
<td>3.48  (1.03) 21</td>
</tr>
<tr>
<td></td>
<td>3.54  (1.07) 35</td>
<td></td>
</tr>
<tr>
<td>For children 12/over</td>
<td>3.11  (1.15) 56</td>
<td>2.86  (1.20) 21</td>
</tr>
<tr>
<td></td>
<td>3.26  (1.12) 35</td>
<td></td>
</tr>
</tbody>
</table>

*In each judges/magistrates’ cell, the first line presents judges’ means and frequencies; the second line presents magistrates’ means and frequencies.

For each age, however, no effect of evidence-type was demonstrated.\textsuperscript{145} Collapsing the two highest degrees of desirability, at least half the judicial officers rated competence tests for younger children as very and extremely desirable for each evidence-type: for sworn evidence, 52.73\% (N = 55); and for unsworn evidence, 57.14\% (N = 56). For older children, judicial nominations of very and extremely desirable decreased: for sworn evidence, 36.36\% (N = 55); and for unsworn evidence, 41.07\% (N = 56). This question did not elicit large numbers of extreme responses. At least a quarter of judicial officers endorsed each of the four competence tests as moderately desirable: for younger children, 25.45\% (N = 55) for sworn evidence, and 25\% (N = 56) for unsworn evidence; and for older children, 27.27\% (N = 55) for sworn evidence, and 26.79\% (N = 56) for unsworn evidence.\textsuperscript{146}

In additional comments to this question, 2 judicial officers\textsuperscript{147} endorsed the jury’s presence during competence tests. One asserted that ‘the jury ought to see whatever investigation of competency is undertaken’; endorsing this, the second believed ‘a judge sitting alone or a jury should . . . assess a witness’ evidence on reliability etc’.

D. Desirability of Formalities Attending Competence Tests

Continuing the distinction of children by age (ie, younger (under 12) versus older (12/over)), two questions concerned the desirability of competence test formalities. Judicial officers were requested to rate the desirability ‘irrespective of current Queensland law or your court-room practice pursuant to that law’ of two formalities — court-approved

\textsuperscript{145} For younger children, there was no significant difference between the desirability of retaining competence tests for sworn versus unsworn evidence. Similarly, for older children, there was no significant difference.

\textsuperscript{146} There was no Bonferroni-adjusted significant difference between judges’ and magistrates’ ratings of the desirability of retaining each of the four competence tests. For the one unadjusted comparison of significance, the retention of a competence test for older children’s sworn evidence was assigned a lower desirability by judges: \(F (1, 53) = 6.28, p = .015\).

\textsuperscript{147} Each preferring one of the two lowest degrees of desirability for the retention of competence tests.
questions, and the jury's presence. Table 4 presents the mean ratings of desirability for the two formalities in terms of judicial officers in aggregate, and as judges or magistrates.

(a) Court-approved Questions in Competence Tests
This question requested judicial officers to rate the desirability of questioning younger and older children, in a competence test, with court-approved questions or types of questions.\textsuperscript{148} Collapsing the two highest degrees of desirability, at least half of the judicial officers rated questioning with court-approved questions as very or extremely desirable: 56.90% ($N = 58$) for younger children; and 50% ($N = 58$) for older children. However, this question did not elicit large numbers of extreme responses. For both younger and older children, 36.21% ($N = 58$) of judicial officers considered court-approved questions to be moderately desirable.\textsuperscript{149}

In comments appended elsewhere, two judicial officers endorsed competence guidelines as a legislative improvement to overcome difficulties in implementing the Queensland legislation concerning the receipt of children's evidence.\textsuperscript{150}

(b) Jury's Presence During Competence Tests in Jury Trials
This question requested judicial officers to rate the desirability of the jury's presence during competence tests in jury trials. As a jury question, this question translated to a

| Table 4. Judicial Officers' Ratings of the Desirability of Competence Test Formalities |
|---------------------------------|--------------|-------------|--------------|
|                                  | Formalities being | Judicial officers | Judges/ magistrates* |
|                                  | $M$ | $SD$ | $N$ | $M$ | $SD$ | $n$ |
| Court-approved questions         |                |              |               |          |          |      |
| For children under 12            | 3.60 | (0.84) | 58 | 3.41 | (0.85) | 22 |
|                                  | 3.72 | (0.81) | 36 |          |          |      |
| For children 12/over             | 3.43 | (0.88) | 58 | 3.36 | (0.85) | 22 |
|                                  | 3.47 | (0.91) | 36 |          |          |      |
| Jury's presence                  |                |              |               |          |          |      |
| For children under 12            | 2.34 | (1.45) | 50 | 1.57 | (1.25) | 21 |
|                                  | 2.90 | (1.35) | 29 |          |          |      |
| For children 12/over             | 2.28 | (1.41) | 50 | 1.57 | (1.25) | 21 |
|                                  | 2.79 | (1.32) | 29 |          |          |      |

*In each judges/magistrates' cell, the first line presents judges' means and frequencies; the second line presents magistrates' means and frequencies.

\textsuperscript{148} There was no Bonferroni-adjusted significant difference between the desirability of court-approved questions for younger versus older children. For the unadjusted comparison, court-approved questions were assigned a lower desirability for older children: $t (57) = 2.46, p = .017$.

\textsuperscript{149} For younger children, there was no significant difference between judges' and magistrates' ratings of the desirability of court-approved questions. Similarly, for older children, there was no significant difference.

\textsuperscript{150} The first judicial officer suggested 'court protocols' as a legislative improvement to rectify his or her lack of knowledge of 'what questions to ask' when confronted with the difficulty that 'children don't understand [the] oath'. The second judicial officer suggested 'a competency test' as a legislative improvement to rectify the difficulty of a 'lack of a competency test and otherwise guidelines with respect to the test'.
higher than usual lack of judicial response (19.35%; \(N = 62\)); some magistrates expressly labelled the question ‘not applicable’ to their judicial office and experience.\(^{151}\) For competence tests for both younger and older children, the low desirability of the jury’s presence was evidenced by the notable judicial subscription (48%; \(N = 50\)) to the most negative extreme on the rating scale. Collapsing the two lowest degrees of desirability, at least half the judicial officers rated the jury’s presence as not at all or a little desirable: 54% (\(N = 50\)) for younger children; and 56% (\(N = 50\)) for older children.

Strong rejection of the jury’s presence is ultimately due to judges’, as opposed to magistrates’, perspectives.\(^{152}\) For both younger and older children, the jury’s presence was consistently assigned a lower desirability by judges. This was evidenced by the large percentage of judges (80.95%; \(n = 21\)), relative to magistrates (24.14%; \(n = 29\)), who nominated the lowest degree of desirability.

In additional comments to this question, one judicial officer commented that the jury’s presence was ‘not at all desirable unless the question of competence is left to the jury’.

Finally, comparisons of the desirability of the two formalities revealed significant differences.\(^{153}\) For both younger and older children, the jury’s presence was consistently assigned a lower desirability than court-approved questions.

IV. DISCUSSION

The trend in Commonwealth law reform has been to reject exclusionary rules of evidence that disqualified witnesses for belonging to historically-deprecated, vulnerable groups. Disqualified witnesses included women, children, and persons with mental disabilities. To Jeremy Bentham, competence tests and this practice of disqualification drew an arbitrary line between competence and incompetence. Today, the need for competence tests is an issue of continuing importance.

This survey focussed on the receipt of non-accused child witnesses’ evidence in criminal proceedings. This article — Part 1 of the competence suite — focusses on the need for competence tests; Part 2\(^{154}\) focusses on the interlinked issue of the content of competence tests. The 62 judicial participants (46.29%; \(N = 134\)) had wide judicial experience; this experience was indicated by the very high number of judicial officers who recalled non-accused children testifying in at least one of four offence-types (in the two years to 2000), and in at least one of four testimonial modalities. Findings from the six survey questions intersect with the three general questions of interest, as follows.

A. Need to Distinguish Between Children’s Sworn and Unsworn Evidence; Desirability of Competence Tests

The fit of two findings must be examined: (a) the first finding, judicial officers’ two-thirds rejection of a need to distinguish between children’s evidence-types; and (b) the second finding, judicial officers’ endorsement of the desirability of the retention of competence tests for each evidence-type.

(a) Two-thirds Rejection of a Need to Distinguish Between Children’s Evidence-types

The first finding rejects a distinction between children’s evidence-types, and so fits with the relevant Queensland legislative prescription that the probative value of evidence is not

\(^{151}\) There was no significant difference between the desirability of the jury’s presence for younger versus older children.

\(^{152}\) For younger children, there was a Bonferroni-adjusted significant difference between judges’ and magistrates’ ratings of the desirability of the jury’s presence: \(F (1,48) = 12.55\), adjusted \(p < .01\). Similarly, for older children, there was a significant difference: \(F (1,48) = 10.92\), adjusted \(p < .01\).

\(^{153}\) In competence tests for younger children, there was a Bonferroni-adjusted significant difference between the desirability of court-approved questions versus the jury’s presence: \(t (48) = 6.21\), adjusted \(p < .001\). Similarly, in competence tests for older children, there was a significant difference: \(t (48) = 5.44\), adjusted \(p < .001\).

\(^{154}\) Schultz, above n 13.
decreased by reason only that it is unsworn. This first finding emerges from the majority ‘no’ response to a highly-subscribed question (98.39%; \(N = 62\)), requesting both a yes/no selection and comments as to whether there is a need to distinguish between children’s evidence-types. There was no significant difference between judges’ and magistrates’ selections. Yet the dearth of comments (34.43%; \(N = 61\)) limits explanation of the basis of the yes/no selection. With hindsight, the question could have profited from expressly distinguishing ‘children’ by age (ie, younger (under 12) versus older (12/over)), a distinction included in the question producing the second finding. A distinction of this type would have anticipated some judicial officers’ accompanying comments that rejected a need to distinguish between evidence-types for younger children only.

Nevertheless, within the accompanying comments, the rejection or retention of a distinction depended on judicial officers’ views as to whether an understanding of an oath promotes truth-telling. Comments rejecting a distinction (a two-thirds majority) emphasised the importance of truth-telling — as opposed to oath-taking — and demoted an oath’s power to secure the truth. By contrast, comments retaining a distinction (a one-third minority) emphasised the importance of understanding an oath, and so endorsed truth-telling mediated by oath-taking. Within the comments, the majority emphasised the significance of truth-telling, and the minority, the significance of oath-taking. Yet truth-telling could be reconciled with oath-taking where the requirements of each are formulated to share an understanding of an obligation of truth-telling; this reconciliation was a question for Part 2 of the competence suite concerning the content of competence tests.

(b) Retention of Competence Tests for Discrete Evidence-types

The second finding retains a distinction between competence tests and hence between children’s evidence-types, and so fits with the ALRC’s and QLRC’s retention of modified competence tests, and with Queensland’s 2003 amendments. This second finding emerges from judicial officers’ assignment of a fairly high desirability to each of four competence tests: competence tests for sworn evidence for younger and older children, respectively; and competence tests for unsworn evidence for younger and older children, respectively. There was no significant difference between judges’ and magistrates’ perspectives. There was, however, an effect of age — for each evidence-type, competence tests were more highly desired for younger children.

(c) Reconciling the Findings

How can the findings be reconciled? The first finding rejects a distinction between children’s evidence-types; the second finding retains a distinction between children’s evidence-types by endorsing the retention of competence tests for each evidence-type. An answer lies in the formulations of the relevant Queensland legislative prescription that the probative value of evidence is not decreased by reason only that it is unsworn. The first finding is not necessarily a call to abolish competence tests for each evidence-type. To so explain the first finding would contradict the second finding, and ignore the effect of the relevant Queensland legislative prescription. This legislative prescription rejects a distinction between the probative value of evidence-types. Hence, the rejection of a distinction between children’s evidence-types (ie, the first finding) fits with this legislative prescription when what is rejected is a distinction between the weight of the evidence-types. Only one judicial comment (in the comments retaining a distinction) negates this explanation.

Equally, the second finding is not necessarily a call to distinguish the probative value of children’s evidence-types, and to so ignore the effect of the relevant Queensland legislative prescription.

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155Evidence Act 1977 (Qld) s 9(3), reformulated as s 9(5)(a) in Queensland’s 2000 amendments; in Queensland’s 2003 amendments, s 9(5)(a) is now replicated as s 9D(2)(a), above n 23.
legislative prescription. For this legislative prescription is premised on the retention of competence tests for each evidence-type (ie, the second finding). Due to an effect of age, the second finding itself rejects a distinction between the evidence-types: for younger children, competence tests for both sworn and unsworn evidence were assigned similar desirability; and, similarly, for older children.

B. Age for Competence for Sworn and Unsworn Evidence

(a) Presumed Competence
For Queensland judicial participants, the presumption of competence had a younger witness profile for unsworn evidence (ie, a mode and median of 6 years, a mean of 7.68 years, and a lowest age of 2 years) than for sworn evidence (ie, a mode and median of 12 years, a mean of 11.38 years, and a lowest age of 6 years). There was no significant difference between judges' and magistrates' perspectives. Queensland judicial participants in 2000 subscribed to a lower age for presumed competence than did New South Wales judicial participants in 1995. The findings fit with trends in contemporary reform and psychological research, but seem facially closer to the QLRC's non-adoption of a blanket presumption of competence,156 than to the adoption of a blanket (evidently rebuttable) presumption in Queensland's 2003 amendments.

This survey requested only the ages for a rebuttable presumption of competence, and not, as did previous judicial surveys,157 the ages for an irrebuttable presumption of incompetence. Presumed competence dispenses not with competence tests, but with a prima facie need to administer a competence test to children of a particular age.

Differing judicial understandings of the implications, or meaning, of a presumption may have impelled some resistance to selecting a lower, or any, age for presumed competence. For some, a presumption may have been equated to a prescription — it may be that some judicial officers considered a presumption could ossify to a prescription and be difficult to rebut. For example, the selection of 18 years (the Queensland age of majority) by a small number of judicial officers as the age of presumed competence signalled that no child would be presumed competent — by this selection, all children would undergo a competence test. The slightly more popular selection of 'not applicable' signalled, as the question explicitly directed, that no witness of any age should be presumed competent — by this selection, all witnesses would undergo a competence test. This latter selection would be of revolutionary impact on the adult presumption of competence (ie, the age of majority). Alternatively, it may reflect the judicial voice, in additional comments, that rejects age as the ultimate marker of presumed competence. This voice prefers a child's maturity, intelligence or understanding, and endorses both the probative potential of children's evidence, and children's capacity for truthfulness. And this voice fits with the trend of contemporary international reform and psychological research.

(b) Actual Competence
A question requested the age of the youngest child who had testified in each judicial officer's court in four testimonial modalities. The responses to this question cannot answer the QLRC's question concerning the frequency of child witnesses' sworn testimony,158 but can affirm — in partial answer to the QLRC's accompanying question159 — that very young witnesses have testified unsworn in Queensland. Moreover, the findings here...
indicate that very young witnesses of 6 years and below have testified in all modalities. This negates one judicial officer’s comment\(^\text{160}\) that ‘[children] are never sworn’. Admittedly, however, judicial officers most frequently recalled their youngest witnesses (ie, witnesses below 8 years) in unsworn modalities, and, more specifically, for unsworn evidence with special arrangements.

C. Desirability of Competence Test Formalities

Finally, given the findings endorsing the retention or continued desirability of competence tests, the question of the desirability of introducing two competence test formalities — court-approved competence questions, and the jury’s presence during competence tests in jury trials — is not a hypothetical. There was a significant difference between the desirability of the two formalities — judicial officers assigned a lower desirability to the jury’s presence than to court-approved questions. With hindsight, the question of competence test formalities could have profited from expressly distinguishing between the evidence-types (ie, sworn versus unsworn evidence).

Judicial officers assigned a fairly high desirability to court-approved questions as could invite a change to current Queensland practice. There was a weak effect of age — judicial officers assigned a higher desirability to court-approved questions for younger children, complementing the earlier finding of a higher desirability of competence tests for younger children. There was no significant difference between judges’ and magistrates’ perspectives.

By contrast, judicial officers assigned a low desirability to the jury’s presence during competence tests in jury trials as would preserve current Queensland practice. There was no effect of age — judicial officers assigned a low desirability to the jury’s presence for both younger and older children. However, there was a significant difference between judges’ and magistrates’ perspectives — judges, with the carriage of jury trials, assigned the lowest desirability to the jury’s presence.

\(^{160}\) To the question concerning the desirability of retaining competence tests for younger children’s sworn evidence.