THE CONTENT OF COMPETENCE TESTS: QUEENSLAND JUDICIAL PERSPECTIVES ON NON-ACCUSED CHILD WITNESSES IN CRIMINAL PROCEEDINGS, PART 2

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ABSTRACT

What substantive criteria do Queensland judicial officers prefer for competence tests for non-accused child witnesses in criminal proceedings? Are competence tests for sworn and unsworn evidence distinguishable? This paper is the second reporting a suite of questions concerning competence, in a survey of Queensland judicial officers. This suite focussed on three general questions of interest: the referability of competence tests to the Queensland legislation; the substantive criteria of competence tests for sworn and unsworn evidence; and the formal framing of competence tests. Two question-types were included — judicial officers signalled, in closed-ended questions, the importance that listed criteria 'should' bear to competence tests, and, in open-ended questions, the questions they 'would' put in competence tests. Question-type seemingly affected some judicial responses. For sworn evidence, a child's understanding of an oath was assigned low importance in closed-ended questions (in two formulations), but high importance in open-ended questions. For unsworn evidence, a child's understanding of a promise was assigned extremely high importance in closed-ended questions (in two formulations), but low importance in open-ended questions. Consonant with law reform endeavours, both empirical and theoretical issues are traversed in this article.

THE CONTENT OF COMPETENCE TESTS

For a competence test for *unsworn* evidence, a Queensland judicial officer instructed: '*Used with respect to very young children.* Do you know what

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> an elephant is? Do you know what a mouse is? If I told you that an elephant is smaller than a mouse would that be the truth or a lie? Why?'
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> For a competence test for both *sworn* and *unsworn* evidence, a Queensland judicial officer instructed: 'Tell child (he/she agree) that if sun shining and I say it raining, be a lie'.

A core issue affiliated to the need for competence tests for child witnesses is the *content* of competence tests. The '*elephant and mouse*' and '*sun and rain*' instructions, in the Epigraph, illustrate the diverse content of Queensland judicial officers' competence tests. The issue of content comprises this Part 2 of the competence suite in the survey of judicial officers in Queensland, Australia, that I conducted in 2000. The survey concerned the receipt of non-accused children's evidence in criminal proceedings and included a suite of questions focussing on competence. Part 1 of the competence suite[1] concerned judicial perspectives on the *need* for competence tests for sworn and unsworn evidence.

As discerned in the United States in 2000, 'competency is more than oath-taking competency'; the competence tests 'most affected by reform' have been tests 'concern[ing] children's perception, memory, and narration'.[2] The content of competence tests is diverse. First, testimonial regimes for the receipt of children's evidence differ jurisdictionally. In 2000, some jurisdictions allowed children to testify sworn and unsworn, some required children to testify unsworn, and some preferred oath-taking competence. For example, in Australia at federal and state levels, discrete competence tests for sworn and unsworn evidence are the benchmark — a child may be incompetent to testify sworn, but competent to testify unsworn.[3] By contrast, in England, children under 14 must testify unsworn.[4] In the United States, the oath-taking competence test is the reported benchmark;[5] in only two states did children testify unsworn in 2000.[6] Second, commentators have indicated an ambiguous rationale for competence criteria. For example, in England, Spencer and Flin discerned a lack of explanation as to what a competence test 'is really supposed to be testing'.[7] Similarly, the New Zealand Law Commission (NZLC) considers it 'unclear why extracting a promise to tell the truth is so important'.[8] Finally, in the United States, the presumption of competence instantiated by Federal Rules of Evidence, Rule 601, has been interpreted to 'refer[] to the witness'[s] perception, memory, and narration, leaving the issue of sincerity

[1] K Schultz, 'The Need for Competence Tests: Queensland Judicial Perspectives on Non-Accused Child Witnesses in Criminal Proceedings, Part 1' (2003) 22(2) UQLJ 199.
[2] T Lyon, 'Child Witnesses and the Oath: Empirical Evidence' (2000) 73 *Southern California Law Review* 1017, 1022.
[3] Australian Law Reform Commission and Human Rights & Equal Opportunities Commission (ALRC and HREOC), *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [14.63] n 163.
[4] D Birch, 'A Better Deal for Vulnerable Witnesses?' (2000) *Criminal Law Review* 223.
[5] Lyon, above n 2, 1071; R Morey, 'The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?' (1996) 40 *University of Miami Law* Review 245, 251-2.
[6] Lyon, above n 2, 1023.
[7] J Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) 61.
[8] New Zealand Law Commission (NZLC), *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper No 26 (1996) [31].

to the requirements of the oath'.[9] Yet the presumption has not spelt the demise of oath-taking competence tests.[10]

I QUESTIONS OF INTEREST

This article reports judicial perspectives on the *content* of competence tests for sworn and unsworn evidence. In Queensland, a judicial officer formulates and delivers competence questions to a potential child witness, in the jury's absence. A competence test's substantive criteria may vary according to whether a child is to testify sworn or unsworn; its formal framing may vary given a judicial appraisal of a child's capacity and understanding.

Broadly, Part 2 concerns three general questions of interest: the referability of competence tests to the Queensland legislation; the substantive criteria of competence tests for sworn and unsworn evidence; and the formal framing of competence questions. Specifically, four Part 2 survey questions cover the following issues: the importance of listed criteria to competence tests for sworn evidence and unsworn evidence, respectively; and the 'three main questions, or types of questions' to be put to a child to qualify that child to testify sworn and unsworn, respectively.

To reiterate from Part 1, 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 agenda[11] and Queensland legislative change.[12] While the most recent legislative change — Queensland's 2003 amendments — amends the competence sections with effect from 2004, the results from the survey's competence suite of questions are of continuing relevance.

Similarly to Part 1, a literature review relevant to some law reform concerning the three general questions is first offered. Then, the survey's method is outlined,[13] followed by the results and discussion of Part 2. 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.

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[9] Lyon, above n 2, 1024.

[10] J Myers, 'A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code' (1996) 28 *Pacific Law Journal* 169, 188.

[11] Queensland Law Reform Commission (QLRC), *The Receipt of Evidence By Queensland Courts: The Evidence of Children*, Working Paper No 53 (1998); QLRC, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (2000) Part 1; QLRC, *The Receipt of Evidence By Queensland Courts: The Evidence of Children*, Report No 55 (2000) Part 2.

[12] 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).

[13] This includes a brief reiteration from Part 1's Method section: Schultz, above n 1, 208 ff.

A *Referability of Competence Tests to the Queensland Legislation*

The first general question concerns whether *legislative* competence requirements fit with *judicial* formulations of competence questions. In Queensland, in 2000,[14] *Evidence Act 1977* section 9 and the older *Oaths Act* 1867 section 37 articulated competence criteria. The sections articulated the *same* criteria for competence to testify sworn, but *different* criteria for competence to testify unsworn.

To testify *sworn* in 2000, a child was required to understand 'the nature of the oath'. In contemporary times, an *oath* may be variously-formulated. In 2000, Queensland common law continued to accept the traditional English oath, overlaid with the sanction of divine consequences for lying. By contrast, English common law had reformulated the oath, in 1977, as the 'higher duty' *Hayes* formulation.[15]

To testify *unsworn* in 2000, a child was required potentially to comply with the overlapping testimonial regimes in *Evidence Act 1977* section 9 and *Oaths Act* 1867 section 37.[16] In 2000, this coincidence of regimes was not legislatively addressed in the amended section 9,[17] except that section 9 was extended to *all* witnesses, with similar effect to section 37. Section 37, with continuing effect from 2000, prescribes that a person who 'appears incapable of comprehending the nature of an oath' can testify unsworn if a judicial officer is satisfied on two bases: that an oath will fail to bind the person's conscience; and that the person understands his or her 'liab[ility] to punishment if the evidence is untruthful'. If so satisfied, a judicial officer must declare how the person shall testify. By contrast, in 2000, section 9 prescribed that, if the court considers a witness 'does not understand the nature of an oath', the court's two-limbed responsibility activates: the court must explain the 'duty of speaking the truth'; and, regardless of whether the witness understands this duty, the court must receive the unsworn evidence unless satisfied that 'the witness does not have sufficient intelligence' to testify reliably. Additionally, in 2000, Queensland's overlapping testimonial regimes contrasted with the federal template for a competence test for unsworn evidence.[18] The federal template prescribed three criteria: the court must be satisfied that the person understands the difference between truth and lies; the court must tell the person of the importance of telling the truth; and the person must indicate appropriately that he or she will not tell lies[19] in the proceedings.

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[14] To recall, 2000 was the time of the survey; the legislative competence criteria in the *Evidence Act 1977* (Qld) have since been amended, most notably in Queensland's 2003 amendments, with effect from 2004: above n 12.

[15] *R v Hayes* [1977] 1 WLR 234, 237; K Stephens, *Voir Dire Law* (1997) 137-8. The *Hayes* formulation for sworn evidence requires that the judicial officer decide 'whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth' beyond the 'duty to tell the truth' that is 'an ordinary duty of normal social conduct': at 237.

[16] QLRC, Working Paper No 53 (1998), above n 11, 45ff.

[17] *Criminal Law Amendment Act 2000* (Qld) Part 6.

[18] *Evidence Act 1995* (Cth) section 13(2), as adopted by New South Wales in 1995, and South Australia in 1999.

[19] Or, as adopted in South Australia, that he or she will tell the truth.

Some effects of overlapping testimonial regimes were demonstrated in Cashmore and Bussey's survey[20] of New South Wales' judicial officers, and their accompanying evaluation of 45 transcripts of judicial officers' competence questions. The transcripts indicated[21] that competence questions conflated the criteria of both the old and amended New South Wales' legislation — some judicial officers used the old criteria, and some, the amended.[22] The survey revealed[23] that judicial officers' three most 'reported questioning practices for testing competence' concerned 'an understanding of truth and the need to tell the truth' (with a 72% subscription), 'an ability to respond to questions and describe events' (44%), and 'some understanding of the reason for being at court' (16%). Cashmore and Bussey's additional finding of a well-subscribed practice — a child's understanding of the consequences of punishment for telling a lie (24%) — would, on the percentages they record, propel that to the third most-reported questioning practice. Moreover, judicial officers variously accepted or rejected the oath. While some expressed a 'continuing conservative preference for the religious form of the oath',[24] some expressed doubts concerning 'the value of the oath in a predominantly secular society' and 'the discriminatory aspect of testing children, not adults'.[25]

(a) Relevance of the Question

The question of the fit of legislative competence criteria with judicial competence questions is relevant to Queensland law reform. First, in 2000, the legislative criteria were not unavailingly clear: for sworn evidence, the *oath* requirement could be variously-formulated; and for unsworn evidence, two testimonial regimes existed. Second, in 2000, the need for a child's understanding, or a judicial explanation, of an *obligation* of truth-telling appeared in competence tests for both sworn and unsworn evidence, in *Evidence Act 1977* section 9. By contrast, *Oaths Act 1867* section 37, with continuing effect from 2000, does not require this understanding, or explanation, of *obligation* in the competence test for unsworn evidence. Third, the distinction between competence tests is unclear as some judicial officers administer a 'dual-purpose' competence test for both evidence-types (ie, exactly the same 'questions, or types of questions' are used for each evidence-type). A dual-purpose competence test reflects the view that '[o]ne inquiry will usually serve' for a judicial officer's 'determination on both issues' of sworn and unsworn evidence.[26] Fourth, consonant with particular Queensland law reform recommendations,[27] the new

[20] J Cashmore and K Bussey, *The Evidence of Children* (1995); J Cashmore and K Bussey, 'Judicial Perceptions of Child Witness Competence' (1996) 20 *Law and Human Behavior* 313.
[21] Cashmore and Bussey, 'Judicial Perceptions', above n 20, 319.
[22] Cashmore and Bussey did not specifically distinguish the regimes for sworn and unsworn evidence in *The Evidence of Children* or 'Judicial Perceptions': above n 20.
[23] Cashmore and Bussey, 'Judicial Perceptions', above n 20, 319.
[24] Ibid 327.
[25] Ibid 319.
[26] *Lau v R* (1991) 6 WAR 30, 59 (Owen J).
[27] QLRC, Report No 55 (2000) Part 2, above n 11, Recommendations 7.2 and 7.3. Two of the three QLRC recommendations to amend the *Evidence Act 1977* (Qld) were implemented in the 2003 amendments. Recommendation 7.2(a) was implemented — the QLRC recommended that a competence test for sworn evidence requires a child's understanding that both testifying is a 'serious matter', and the 'obligation to give truthful

competence sections[28] in Queensland's 2003 amendments modify the legislative competence criteria that pertained in 2000. With effect from 2004, the competence criteria for sworn evidence are a person's capacity for giving an 'intelligible account' of events,[29] a person's understanding that testimony is a 'serious matter', and a person's understanding that the 'obligation to tell the truth' is beyond 'the ordinary duty to tell the truth'.[30] The competence criteria for unsworn evidence are a person's capacity for giving an 'intelligible account' of events,[31] and a court's explanation to a person of the 'duty of speaking the truth'.[32]

B *Substantive Competence Criteria for Sworn and Unsworn Evidence*

The second general question concerns whether the substantive criteria of competence tests for sworn and unsworn evidence are distinguishable. The substantive criteria of all competence tests theoretically include a child's truth-telling. There is, however, contention concerning the requirement of a child's understanding of *obligation*, whether cast as an oath, promise or duty: '[t]he competency questions are designed to determine if the witness is capable of promising to tell the truth. The promise itself is assumed to increase the likelihood that a witness will be truthful'.[33] Irish judicial views indicate that 'the critical issue' for determining competence is a child's understanding of the difference between telling truth and lies, and not a child's understanding of *obligation* — an oath 'add[s] an unnecessary layer of complication'.[34]

Arguably, competence tests for sworn and unsworn evidence are not fundamentally different if they share substantive criteria. Three critical criteria are a child's understanding of the nature of an obligation of truth-telling, a child's understanding of the consequences of lying, and a child's 'sufficient intelligence' to testify reliably. The first and second criteria are elements of the traditional 'oath and hell-fire' competence test, otherwise referred to as the 'stringent "nature and consequences" test'.[35] The third criterion, concerning capacity, was incorporated in the original 1885 English competence test for unsworn evidence. The three criteria are examined below.

(a) Criteria of the Nature of an Obligation of Truth-telling

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evidence' is beyond 'the ordinary duty to tell the truth'. Recommendation 7.2(b) was not implemented — the QLRC recommended that a competence test for sworn evidence additionally requires a child's capacity to give 'a rational answer to a question [concerning] a fact in issue'. Recommendation 7.3 was implemented — the QLRC recommended that a competence test for unsworn evidence requires a child's capacity to give an 'intelligible account of events'.

[28] Relevantly, *Evidence Act 1977* (Qld) Division 1A, 'Competency of witnesses and capacity to be sworn', new ss 9, 9A, 9B and 9C.

[29] *Evidence Act 1977* (Qld) s 9A(2).

[30] *Evidence Act 1977* (Qld) s 9B(2).

[31] *Evidence Act 1977* (Qld) s 9A(2).

[32] *Evidence Act 1977* (Qld) s 9B(3).

[33] Lyon, above n 2, 1064.

[34] Law Reform Commission Ireland (ILRC), *Report on Child Sexual Abuse*, LRC No 32 (1990) [5.29].

[35] Ontario Law Reform Commission (OLRC), *Report on Child Witnesses* (1991) 22.

Competence tests frequently reflect the *nature* element of the 'nature and consequences' test — they require a child to demonstrate understanding of the nature of *obligation*, whether cast as an oath, promise or duty. Obligation may be encased in language requiring a child witness to tell, or promise to tell, the truth.

To be competent to testify *sworn*, a child must demonstrate understanding of an oath, whether cast as the traditional religious oath or the 'higher duty' *Hayes* formulation of the oath. The traditional religious oath requires a 'belief in God and in divine vengeance';[36] this understanding was frequently discharged if the child was perceived to understand the consequences of divine sanction for lying on oath. By contrast, sanctioned in England in 1977, the 'higher duty' *Hayes* formulation of an oath requires a 'sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth';[37] this responsibility extends beyond 'the duty to tell the truth which is an ordinary duty of social conduct'.[38] For a competence test for sworn evidence, Queensland's common law[39] in 2000 continued to embrace the traditional oath and not the *Hayes* formulation.[40] With effect from 2004, the *Hayes* formulation has been legislatively adopted in Queensland's 2003 amendments to the *Evidence Act 1977*. Moreover, with continuing effect from 2000, Queensland's spare legislative definition of 'oath' is wide — it includes a 'promise',[41] as would be compatible with the *Hayes* formulation.

To be competent to testify *unsworn*, a child must frequently demonstrate understanding of a promise, whether cast as a promise to tell the truth, a promise not to tell lies, or both. Recent research recognises that competence can be understated by requiring a child to explain an obligation conceptually as a *promise*: children may not understand the concept of a promise,[42] but may understand that they must tell the truth. Although recommending that children be requested to '"promise" that they will "tell" the truth',[43] Lyon and Saywitz counsel a cautionary use of the term *promise* in competence tests. From their recent finding that the term *promise* is less well understood by young children than the term *will*,[44] they conclude that 'it is likely that children understand the obligation to tell the truth even if they do not understand the obligatory nature of promising to do so'.[45] For example, *maltreated* young children, of 7 years, 'were ambivalent regarding the relative certainty of promising', but understood the term *will* (ie, in the formulation *I will tell the truth*). *Non-maltreated* children exhibited a similar later understanding of *promise* than

[36] ALRC and HREOC, above n 3, [14.60]; cf *Lau v R* (1991) 6 WAR 30, 60 (Owen J).
[37] *R v Hayes* [1977] 1 WLR 234, 237.
[38] Ibid; accepted by *R v Bellamy* (1985) 82 Cr App R 222, 225.
[39] *R v Brown* [1977] Qd R 220, 221-2 (Wanstall ACJ), 226 (DM Campbell J), 237-8 (Williams J); Stephens, above n 15, 136-7; QLRC, Report No 55 Part I (2000), above n 11, 21, 43-4.
[40] The 'higher duty' *Hayes* formulation was referred to, but not accepted, in *R v Brown* [1977] Qd R 220, 225 (Wanstall ACJ), 230 (DM Campbell J): Stephens, above n 15, 138.
[41] *Acts Interpretation Act 1954* (Qld) s 36.
[42] Cf Myers, above n 10, 189.
[43] Lyon, above n 2, 1063; T Lyon and K Saywitz, 'Young Maltreated Child's Competence to Take the Oath' (1999) 3 *Applied Developmental Science* 16.
[44] Lyon, above n 2, 1062.
[45] Ibid 1063.

will, although their understanding emerged up to two years earlier than maltreated children.

Hence, traditional formulations of competence tests for each evidence-type commonly require a child's demonstration of an understanding of an *obligation* of truth-telling. To Spencer and Flin, this commonality practically ensured that the distinction between sworn and unsworn evidence 'was almost a distinction without a difference'.[46]

A similar sentiment was expressed by the Ontario Law Reform Commission (OLRC). In Ontario in 1959, the introduction of a legislative competence test for unsworn evidence, modelled on the 1933 English formulation,[47] offered an alternative to an 'oath and hell-fire' competence test. But in *R v Khan*,[48] the competence criteria for both evidence-types were interpreted, and so modified.[49] The modified competence test for *sworn* evidence required a child's 'appreciation of the significance of testifying in court' by oath, and a child's understanding of the oath as binding the conscience; the modified competence test for *unsworn* evidence required a child's understanding of 'the duty to speak the truth in terms of ordinary social conduct'. To the OLRC, the *Khan* modifications ensured that 'there is no longer a meaningful distinction between sworn and unsworn testimony' — the courts have 'rendered the two tests virtually indistinguishable'.[50]

Recently, the NZLC addressed this issue of the indistinguishability between competence tests for the two evidence-types. The NZLC preferred a child's declaration or *mere promise* to tell the truth[51] to a child's demonstration of an understanding of the nature of a promise. Advising that 'a witness's evidence may be tested in terms of truthfulness or accuracy without requiring the witness to explain the nature or effect of a promise',[52] the NZLC recommended that 'a judge is not required to, and should not'[53] inquire as to a child's understanding of the meaning of telling the truth. This recommendation clarifies the description of the New Zealand practice of receiving a child's evidence, 'without the formality of oath-taking, but on a promise to tell the truth', once a child's 'sufficient appreciation of the solemnity of the occasion' is established.[54]

(b) Criteria of the Consequences of Lying

Competence tests frequently reflect the *consequences* element of the 'nature and consequences' test — they require a child to demonstrate an understanding of the

[46] Spencer and Flin, above n 7, 52.
[47] OLRC, above n 35, 20-1.
[48] [1990] 2 SCR 531, 538.
[49] OLRC, above n 35, 21-6.
[50] Ibid 25, 39.
[51] NZLC, Preliminary Paper No 26 (1996), above n 8, vii, [47], [51], [53]; NZLC, *Evidence – Reform of the Law*, Report No 55 Vol 1 (1999) [351]-[357].
[52] NZLC, Report No 55 Vol 1 (1999), above n 51, [357].
[53] Ibid [354].
[54] *R v Accused (CA 245/90)* [1991] 2 NZLR 649, 653.

consequences of lying. Traditional consequences equate to divine retribution. Secular consequences equate to the consequences to a child (ie, a child's punishment), or the consequences to an accused (ie, an accused's conviction).

A child's demonstration of competence has been associated with understanding the consequences of lying. In the United States in 2000, a child who 'understands that lying leads to punishment' is frequently held competent.[55] In Western Australia in 1991, it was held that '[t]he duty of speaking the truth is certainly tied up with the concept of an understanding of liability to punishment'.[56] Spencer and Flin explain young children's usual response to the question of why telling the truth in court is important: children consider that if they lie 'they will be detected and punished, not that it will lead to a wrongful conviction'.[57] This association of lying with punishment is supported by research[58] — young children of 4 and 5 years, in tests requiring the child to identify lies as wrong or to explain why lies are wrong, have understood that 'lying is bad and leads to punishment'.[59] Moreover, Lyon and Saywitz's recent research confirms 'that both maltreated and non-maltreated children are clearly aware of the consequences of lying at an early age'.[60]

(c) Criteria of the Capacity for Truth-telling

As a later legislative development to the 'nature and consequences' test, competence tests for unsworn evidence frequently require a *capacity* element — they require a child to demonstrate a capacity to testify reliably in terms of a *sufficient intelligence* test. At common law, the 'capacity to understand questions and to answer rationally'[61] was traditionally conceived as an issue of witness credibility for the tribunal of fact, not law. For example, the NZLC concluded, 'whether a witness has sufficient intelligence to give a rational account of past events' is not a question for, nor can be appropriately assessed by, a judge.[62] Yet, legislative competence tests for unsworn evidence have incorporated criteria of capacity.

The definition of 'sufficient intelligence', as a criterion of capacity, is unclear. Although compared to the capacity to 'intelligibl[y] account',[63] 'sufficient intelligence' may be wider. For example, in Queensland, with continuing effect from 2000, 'intelligence' includes a 'witness's level of intelligence, including the witness's powers of perception, memory and expression'.[64] In Western Australia,

[55] Lyon, above n 2, 1049 nn 105, 106.
[56] *Lau v R* (1991) 6 WAR 30, 47 (Murray J).
[57] Spencer and Flin, above n 7, 58.
[58] Ibid 333-4.
[59] Lyon, above n 2, 1049 n 106, citing recognised international research.
[60] Ibid 1051.
[61] A Ligertwood, *Australian Evidence* (3rd ed, 1998) [7.24].
[62] NZLC, Preliminary Paper No 26 (1996), above n 8, [22].
[63] Ligertwood, above n 61, [7.22].
[64] In 2000, the relevant phrases – the 'level of intelligence' and 'powers of perception, memory and expression' – appeared in *Evidence Act 1977* (Qld) s 9A; in 2004, they appear in the new s 9C.

'sufficient intelligence' has been equated to a witness 'understand[ing] the concepts of truth and falsity and the duty not to conceal relevant portions of the facts'.[65]

(d) Relevance of the Question

The question of the content of competence tests is relevant to Queensland law reform. First, in 2000, the competence tests for each evidence-type in *Evidence Act 1977* section 9 required a child's understanding, or a judicial explanation, of an obligation — an oath for sworn evidence, and a 'duty of speaking the truth' for unsworn evidence. By contrast, in *Oaths Act 1867* section 37, the competence test for unsworn evidence did not require this understanding, or explanation, of obligation. Second, in 2000, the QLRC recommended[66] *modified* competence tests for each evidence-type. The modified competence test for *sworn* evidence (ie, an understanding of the *Hayes* formulation of an oath, and a demonstration of capacity) is evidently distinguishable from the modified competence test for *unsworn* evidence (ie, a demonstration of capacity), as the latter does not refer to an obligation of truth-telling.[67] Third, in 1998, the QLRC questioned whether criteria of 'intelligence' could be equated to 'intelligibility', and whether the core criterion of a competence test for unsworn evidence could be identified with the following: intelligence; the *Evidence Act 1977* section 9 formulation (ie, the linked criteria of a 'duty of speaking the truth' and 'sufficient intelligence'); a presumption of competence; or an intelligible account.[68] In 2000, the QLRC answered this by recommending the inclusion in modified competence tests of the following capacity criteria: for *unsworn* evidence, a witness's 'intelligible account'; and for *sworn* evidence, a witness's 'rational answer' to a question concerning a fact in issue. Interestingly, the new section 9C in Queensland's 2003 amendments — concerning the admission of expert evidence — links the capacity for giving an 'intelligible account' to the 'level of intelligence'. Fourth, while the new competence sections in Queensland's 2003 amendments to the *Evidence Act 1977* modify the legislative competence criteria that pertained in 2000, commonalities exist between the legislative competence criteria in 2000 and in 2004. For example, for sworn evidence, the legislative competence criteria in 2000 and in 2004 both include an oath requirement. Yet, in 2004, the oath requirement is 'more relaxed'[69] as it does not require a child's understanding of a traditional religious oath. For unsworn evidence, the legislative competence criteria in 2000 and in 2004 both include a duty requirement. Yet, in 2004, the duty requirement is more relaxed as it does not require a child's understanding of the duty.

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[65] *Lau v R* (1991) 6 WAR 30, 47 (Murray J).

[66] QLRC, Report No 55 (2000) Part 1, above n 11, 30; QLRC, Report No 55 (2000) Part 2, above n 11, Recommendations 7.2, and 7.3, respectively.

[67] This does not ignore that the QLRC's criteria (in its Recommendations), for demonstrating capacity, differ between the competence tests: for sworn evidence, demonstration of a 'rational answer' is required; for unsworn evidence, demonstration of an 'intelligible account' is required.

[68] QLRC, Working Paper No 53 (1998), above n 11, 59, Questions 10 and 11.

[69] Stephens characterises the *Hayes* formulation as 'a more relaxed approach to the pre-requisites required to be satisfied': above n 15, 137.

C *Formal Framing of Competence Questions*

The third general question concerns whether the formal framing of substantive criteria differs in competence questions. Although children's performance in a competence test can be 'dramatically affect[ed]'[70] by the formal framing of competence questions, this framing is not explicitly delineated in Australian federal or state legislation. Similarly, in the United States, '[c]ompetency statutes do not specify the questions ... to ascertain testimonial competence'.[71] This lack of definition has resulted in concerns that children's competence may be overstated or understated.

Overstating competence may occur: '[a] single forced-choice question or yes/no question can exaggerate competence' due to 'response biases (yes-bias, last option bias)'.[72] While response biases and causal effects are not clear-cut,[73] research reports that yes/no questions — 'tag' or leading questions — predispose or 'reliably pull for a "yes" response'.[74]

Understating competence may occur. First, 'most young children' who can identify truthful statements and lies 'cannot define "truth" and "lie" or explain the difference between the two'.[75] Research reports that young children more easily identify statements as *truth* or *lies*, than define the terms *truth* or *lies*, or explain the difference between the terms.[76] Most children of 5 years appeared to understand the 'meaning and wrongfulness of lying',[77] while most children of 7 years could define but 'less than half ... could explain the difference between the terms'.[78] Stephens exemplifies difficult competence questions: '"what does it mean to tell a lie?" or "what does it mean to tell the truth?["] or "what is a fib?"'.[79]

Second, understating competence may occur if competence questions inadequately cater for children's motivational difficulties. Motivational difficulties include a child's 'fear of calling the interviewer a liar',[80] and may be implicated in a child's reluctance to 'discuss[] the negative consequences of lying',[81] or to describe the wrongfulness of lying,[82] or even to identify lies.[83] Recent academic guidelines for framing competence questions reject questions seeking child-generated explanations of the wrongfulness of lying,[84] and prefer the following: questions focussing on the

[70] Lyon, above n 2, 1072.
[71] Ibid 1028.
[72] Ibid 1047.
[73] Cf NZLC, *Total Recall? The Reliability of Witness Testimony*, Miscellaneous Paper No 13 (1999) [124]-[128].
[74] Lyon, above n 2, 1030-1.
[75] Ibid 1047.
[76] Ibid 1039, adverting to Lyon and Saywitz, above n 43.
[77] Ibid 1048.
[78] Ibid 1039.
[79] Stephens, above n 15, 177.
[80] Lyon, above n 2, 1048.
[81] Ibid 1056.
[82] Ibid 1051ff.
[83] Ibid 1045.
[84] Ibid 1057.

consequences to another child or, perhaps, to 'people in general';[85] or questions comprising a 'series of forced-choice questions in which the child identifies which of two story characters "told the truth" or "told a lie"'.[86] Like motivational difficulties, the guidelines are not clear-cut.

Potential overstatement or understatement of competence was demonstrated in some judicially-formulated competence questions in Cashmore and Bussey's evaluation of 45 transcripts of New South Wales' competence questions.[87] Questions potentially *understating* competence required a child of 5 years to spell his or her surname, and a child of 11 years to define perjury. Some judicial officers incorporated 'formal and intimidating warnings' of the need to tell the truth, some required 'definitions of truth and lies and an understanding of the consequences of not telling the truth', and a 'few held unreasonably high expectations'. Questions potentially *overstating* competence required 'affirmative answers to a single relatively simple and leading question'.[88]

(a) Relevance of the Question

The question of the formal framing of competence questions is relevant to Queensland law reform. No legislative competence criteria pertained to formal framing in 2000 or in Queensland's 2003 amendments to the competence sections. Yet the formal framing question was subsidiary, in this survey, to the substantive content of competence tests.

II METHOD

A *Participants*

As reported in Part 1,[89] the survey achieved a 46.29% ($N = 134$) response rate from the entire judicial population. The 62 judicial participants were drawn from the three tiers of Queensland courts (Supreme Court $n = 10$ of 25; District Court $n = 13$ of 35; and Magistrates Court $n = 39$ of 74). The response rate to individual Part 2 questions was consistently very high — non-response did not exceed 8.06% ($N = 62$).

B *Procedure and Protocol*

This was reported in Part 1.[90]

[85] Ibid 1056, n 132.
[86] Ibid 1048.
[87] Cashmore and Bussey, 'Judicial Perceptions', above n 2021, 320.
[88] Ibid.
[89] Schultz, above n 1, 208.
[90] Ibid 209 ff.

C *Data Entry and Analysis*

For closed-ended questions, as reported in Part 1,[91] data was double-entered and extensively checked. The method of analysis was to compare participants' selections from metrically-ordered rating scales. To test the equivalence of judicial participants' selections, one-way repeated measures analyses of variance (ANOVAs), using Bonferroni adjustments, were conducted with a within-groups factor of *listed criteria* (ie, competence test practices or questions). Additionally, two-tailed paired samples *t* tests were conducted with within-groups factors of *listed criteria*, and *evidence-type* (ie, sworn versus unsworn evidence). To test the equivalence of judges' versus magistrates' selections, one-way 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.

For open-ended questions, I conducted an extensively-checked, content-based coding of judicial officers' nominations of their 'three main questions, or types of questions' for each evidence-type. The nominations were reduced to specific variables to capture each judicial officer's mention of *at least* one variable of a specific type. Then, to develop themes via a hierarchy of variables, specific variables were collapsed within both meta-variables (ie, general types of specific variables), and combined-variables (ie, combinations of specific variables within a particular meta-variable).

Two caveats pertain to the data captured in the open-ended questions. First, each open-ended question's request for competence 'questions, or types of questions' resulted in variously-phrased responses: some judicial officers formulated questions proper; some listed types of questions in phrases or clauses; and some referred to the criteria in the complementary closed-ended questions. Second, to cater for linguistic, semantic or interpretive diversity, a hierarchy of variables was developed in order to capture differences and similarities in judicial officers' nominated competence questions: specific variables record differences; and meta-variables and combined-variables record similarities by collapsing specific variables and developing themes. Yet, not all differences or similarities could be presented in Table 2. For example, similarities or themes appearing within more than one meta-variable are presented in the text.

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

[91] Ibid 210.

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

This was reported in Part 1.[92]

(b) Competence Suite Questions, Part 2

Part 2 of the competence suite included four questions: an open-ended question for each evidence-type; and a closed-ended question for each evidence-type. The two *open-ended* questions requested the 'three main questions, or types of questions' that each judicial officer 'would' ask a child in a competence test. The two *closed-ended* questions recited '[i]n light of current Queensland law, how important, in your estimation, should each of the following [criteria] be to a judicial officer's assessment' of a child's competence. Importance was measured on a 5-point rating scale of continuing positivity.[93] In each closed-ended question, the listed criteria included *6 criteria* common to each evidence-type, and *additional criteria* particular to each evidence-type. Table 1 replicates the specific wording of the listed criteria; Figures 1 and 2, and the text below, use shorthand terms.

The *6 pairs of common criteria* reflected legislatively-or judicially-articulated features of competence tests, and collapsed to the following three *types* of criteria. *Promise criteria* (criteria 3 and 4) focussed on a child's understanding of the nature of a promise, and comprised a positive and negative formulation of a promise to tell the truth. *Consequences criteria* (criteria 5 and 9) focussed on a child's understanding of the consequences of lying, and comprised punishment criteria (ie, punishment to a child), and accused criteria (ie, consequences for an accused). *Capacity criteria* (criteria 6 and 7) focussed on legislative requirements concerning a child's demonstration of a capacity to testify, and comprised perception criteria (ie, 'perception, memory and expression') and intelligible account criteria (ie, 'rational response' and 'intelligible account').

The *7 additional criteria* (ie, 2 for sworn evidence, and 5 for unsworn evidence) emphasised the definitive element of each evidence-type: for sworn evidence, the 'higher duty' that an oath connotes; and for unsworn evidence, truth-telling. The seven additional criteria collapsed to three *types* of criteria. *Oath criteria* (criteria 10 and 8) focussed on the traditional religious oath and the *Hayes* formulation of an oath, and comprised a God and a higher duty criterion, respectively. *Truth criteria* (criteria 1 and 2) focussed on one judicial officer's alternative to an oath — a 'mere requirement to tell the truth' — and comprised a positive and a negative

[92] Ibid 210-11.

[93] '1' represented *not at all desirable*; '2', *a little desirable*; '3' *moderately desirable*; '4', *very desirable*; and '5', *extremely desirable.*

formulation, respectively, of a truth-telling requirement. *Practical criteria* (criteria 11, 12 and 13) focussed on recent psychological research concerning very young children's evidence,[94] and comprised three practical examples of tests of a child's understanding of truth or lies.

The listed criteria are not exhaustive of competence criteria. For example, an extra criterion for each evidence-type — that a child 'understands the general concept of a court hearing' — was nominated by one judicial officer as *extremely important.* Moreover, while truth-telling features in both evidence-types, truth criteria and practical criteria were included only for unsworn evidence due to the definitive emphasis in unsworn evidence on truth-telling, and concern with participant fatigue.[95]

III RESULTS

A *Prefatory Questions and Judicial Experience Profile*

As reported in Part 1,[96] 87.10% of the 62 judicial participants recorded some judicial experience of non-accused child witnesses in the two years to 2000. The greatest experience was in cases of sexual offence-types. If the two-year time limit for judicial experience is disregarded, the profile of experienced participants increased to 93.55% ($N = 62$).

B *Competence Criteria in Closed-ended Questions*

Two closed-ended questions requested judicial officers to rate the importance that each of 19 *listed criteria* (ie, competence test practices or questions) should bear to a judicial officer's assessment of a child's competence to testify sworn or unsworn, respectively. Of the 8 criteria for sworn evidence, and the 11 for unsworn evidence, 6 were common to each evidence-type. An initial inspection of the means, medians and modes suggested four categories of criteria. The four categories were confirmed by pair-wise comparisons of three repeated-measures within-groups ANOVAs. **Table 1 presents the means of the raw data for the 19 criteria, by evidence-type, grouped in the four categories, and listed in *virtually* descending order of judicial ratings of importance.**[97]

[94] Lyon and Saywitz, above n 43.
[95] With hindsight, the survey could have profited from including the truth and practical criteria as common criteria for both evidence-types.
[96] Schultz, above n 1, 211-12.
[97] The descending order was complicated by slightly varying means of some of the common criteria.

Table 1. Judicial Officers' Ratings of the Importance of Criteria in Competence Tests

Criteria	Sworn evidence			Unsworn evidence		
That a child:	*M*	*SD*	*N*	*M*	*SD*	*N*
Category 1						
1. Understands that s/he must tell the truth		—		4.56	(0.57)	59
2. Understands that s/he must not tell lies		—		4.50	(0.60)	58
3. Understands the nature of a promise to tell the truth	4.53	(0.70)	60	4.42	(0.77)	59
4. Understands the nature of a promise not to tell the truth	4.51	(0.75)	59	4.43	(0.75)	58
Category 2						
5. Understands that s/he may be punished if s/he lies	4.12	(0.13)	60	4.02	(0.95)	58
6. Demonstrates adequate perception, memory and expression to testify	4.12	(1.03)	60	4.02	(0.95)	58
7. Responds rationally to questions and gives an intelligible account of events	3.86	(0.93)	59	4.05	(0.96)	60
Category 3						
8. Understands the nature of a duty higher than an ordinary promise to tell the truth	3.67	(1.28)	58		—	
9. Understands the consequences for the accused if s/he lies	3.60	(1.20)	60	3.57	(1.13)	58
Category 4						
10. Believes in God and in divine vengeance	2.82	(1.37)	60		—	
11. Understands truth/lies by reference to a judicial officer's examples of truth/lies		—		3.03	(1.20)	58

12. Understands truth/lies by explaining abstract concepts of truth/lies	—	2.81	(1.22)	58
13. Understands truth/lies by identifying, by reference to a judicial officer's examples of truth/lies, when the judicial officer tells a lie	—	2.81	(1.22)	57

Note. '—' means the criterion was not listed for a particular evidence-type.

To check the post hoc categorisation, a within-groups ANOVA ($N = 53$) compared judicial officers' ratings of the importance of all 19 criteria, and revealed a significant main effect of listed criteria: $F(18, 936) = 28.51, p < .001$. Separating the criteria by evidence-type, two within-groups ANOVAs (one for each evidence-type) revealed a significant main effect, respectively: for *sworn* evidence ($N = 56$), $F(7, 385) = 21.99, p < .001$; and for *unsworn* evidence ($N = 55$), $F(10, 540) = 37.64, p < .001$. Bonferroni-adjusted pair-wise comparisons in each of the three analyses confirmed that there were no significant differences within each of the four categories of criteria.

To assess the effect of *evidence-type* on the importance of each of the 6 pairs of common criteria, Bonferroni-adjusted paired t tests[98] compared judicial officers' ratings of each criterion's importance within each of the 6 pairs, and revealed no significant differences.[99]

To assess the effect of *judicial status*, sets of one-way between-groups Bonferroni-adjusted ANOVAs (ie, a set of 8 criteria for sworn evidence, and a set of 11 for unsworn evidence) compared judges' and magistrates' ratings of each criterion's importance, and revealed no significant differences.[100] Table 1 presents the numbers of judicial officers for each criterion.

The four categories are extensively described, below, through the frequencies. **Figures 1 and 2 display the frequencies for the criteria in descending order of judicial endorsement of the two highest degrees of importance (ie, *very* or *extremely important*).**

[98] The paired t tests had slightly different N's ($N = 58$ or 59).

[99] For the one unadjusted comparison of significance, the punishment criterion was assigned a lower importance in a competence test for unsworn evidence: $t(57) = 2.62, p = .011$.

[100] For the one unadjusted comparison of significance, the perception criterion for sworn evidence was assigned a lower importance by magistrates: $F(1, 57) = 5.17, p = .027$.

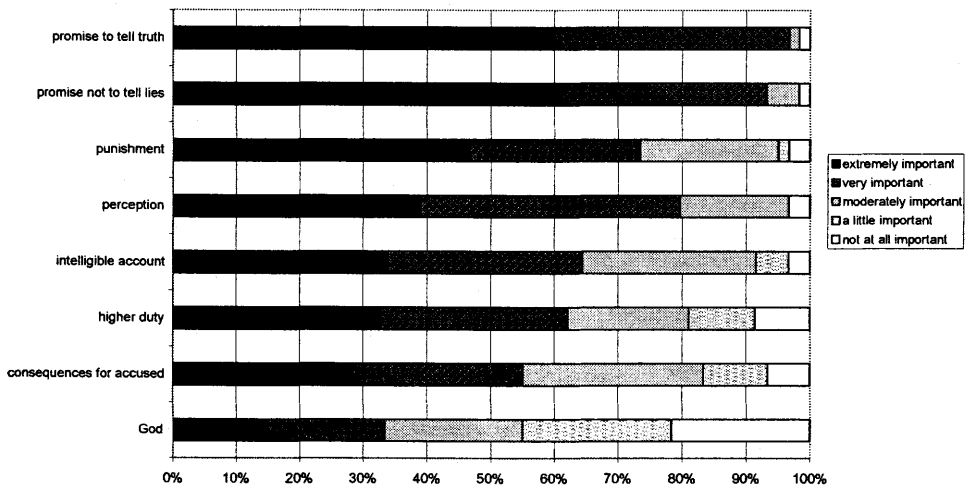

Figure. 1 Judicial officers' ratings of the importance of criteria in a competence test for sworn evidence

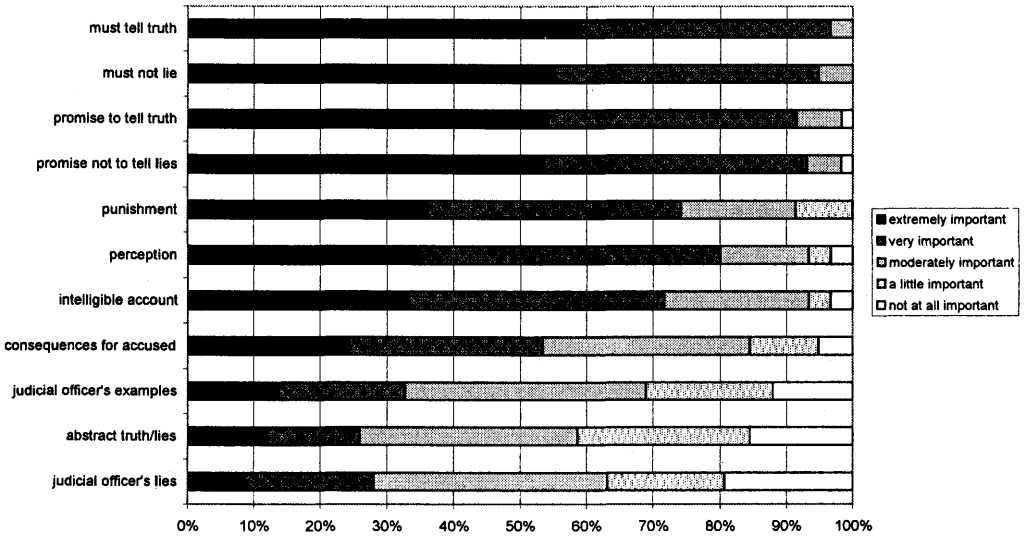

Figure. 2 Judicial officers' ratings of the importance of criteria in a competence test for unsworn evidence

(a) Category 1 Criteria

Comprising the two promise criteria (included for each evidence-type) and the two truth criteria (included for unsworn evidence alone), Category 1 criteria featured the highest means, medians and modes, the greatest frequency of *very* and *extremely important* ratings, and the lowest standard deviations. All Category 1 criteria had medians and modes at the highest rating, *extremely important.*

For each evidence-type, the alternative formulations of the promise criteria — the positive ('a promise to tell the truth'), and the negative ('a promise not to tell lies') — exhibited similarly extreme means. Paired *t* tests revealed no significant differences between the formulations.[101]

The frequencies illustrate the strength of the judicial perception that little distinguishes a promise cast positively or negatively. Each formulation was endorsed by at least 53.45% of judicial officers as *extremely important* to competence tests for each evidence-type.[102] Collapsing the two highest degrees of importance, at least 91.56% rated each formulation as *very* or *extremely important.*[103]

A similar profile of extreme endorsement was accorded to the two truth criteria. As with the promise criteria, one truth criterion was cast in the positive formulation, and one in the negative. Each formulation was endorsed by at least 55.17% of judicial officers as *extremely important* to competence tests.[104] Collapsing the two highest degrees of importance, at least 94.83% rated each formulation as *very* or *extremely important.*[105] As the truth criteria were included for unsworn evidence alone, the similar profiles for the promise criteria and truth criteria indicate that, *at least for unsworn evidence*, dispensing with the promise element did not reduce the level of judicial officers' endorsement for the truth element.

(b) Category 2 Criteria

Comprising the two capacity criteria (included for each evidence-type) and the punishment criteria (one of the two consequences criteria included for each evidence-type), Category 2 criteria featured very high means, medians and modes, but, relative to Category 1, featured somewhat fewer ratings of *very* and *extremely important.* All Category 2 criteria had medians and modes at the second highest

[101] For the positive formulation, there was no significant difference between its importance in sworn or unsworn evidence; similarly, for the negative formulation. For sworn evidence, there was no significant difference between the importance of the positive or negative formulation; similarly, for unsworn evidence.
[102] For sworn evidence, 60% ($N = 60$) endorsed the positive formulation, and 61.02% ($N = 59$) the negative; for unsworn evidence, 54.24% ($N = 59$) endorsed the positive formulation, and 53.45% ($N = 58$) the negative.
[103] For sworn evidence, 96.67% ($N = 60$) endorsed the positive formulation, and 93.22% ($N = 59$) the negative; for unsworn evidence, 91.56% ($N = 59$) endorsed the positive formulation, and 93.10% ($N = 58$) the negative.
[104] 59.32% ($N = 59$) endorsed the positive formulation; and 55.17% ($N = 58$) the negative.
[105] 96.61% ($N = 59$) endorsed the positive formulation; and 94.83% ($N = 58$) the negative.

rating, *very important*, except that the modes for sworn evidence for both the punishment criterion and intelligible account criterion were at *extremely important*.

The punishment criteria were endorsed by at least 36.21% of judicial officers as *extremely important* to competence tests for each evidence-type.[106] Collapsing the two highest degrees of importance, at least 73.33% rated the criteria as *very* or *extremely important*.[107]

The perception criteria, one of the two capacity criteria, were endorsed by at least 35% of judicial officers as *extremely important* to each evidence-type.[108] Collapsing the two highest degrees of importance, at least 79.66% rated the criteria as *very* or *extremely important*.[109]

The intelligible account criteria, the second of the two capacity criteria, were endorsed by at least 33.33% of judicial officers as *extremely important* to each evidence-type.[110] Collapsing the two highest degrees of importance, at least 64.41% rated the criteria as *very* or *extremely important*.[111]

Comments by two judicial officers asserted the irrelevance of the capacity criteria to sworn evidence: one submitted that no test of 'perception/memory etc' is performed on a witness; the second submitted that the capacity criteria 'relate more to whether the evidence should be admitted' than to a witness's competence to testify sworn. By contrast, the capacity criteria in both evidence-types were endorsed in some judicial officers' nominated competence questions (below); moreover, two judicial officers expressly included criterion 6, from Table 1,[112] in their nominated competence questions for unsworn evidence.

(c) Category 3 Criteria

Comprising the higher duty criterion (one of the two oath criteria included for sworn evidence alone), and the accused criteria (one of the two consequences criteria included for each evidence-type), Category 3 criteria featured a spread of means, medians and modes from *moderately important* to *extremely important*. All Category 3 criteria had medians at the second highest rating, *very important*. Yet the modes diverged: the higher duty criterion was at *extremely important*; the accused criteria in each evidence-type were (due to multiple modes) at least at *moderately important*.

[106] For sworn evidence, 46.67% ($N = 60$); and for unsworn evidence, 36.21% ($N = 60$).
[107] For sworn evidence, 73.33% ($N = 60$); and for unsworn evidence, 74.14% ($N = 58$).
[108] For sworn evidence, 38.98% ($N = 59$); and for unsworn evidence, 35% ($N = 60$).
[109] For sworn evidence, 79.66% ($N = 59$); and for unsworn evidence, 80% ($N = 60$).
[110] For sworn evidence, 33.90% ($N = 59$); and for unsworn evidence, 33.33% ($N = 60$).
[111] For sworn evidence, 64.41% ($N = 59$); and for unsworn evidence, 71.67% ($N = 60$).
[112] Criterion 6 reads 'Demonstrates adequate perception, memory and expression to testify'.

The higher duty criterion was endorsed as *extremely important* by 32.76% ($N = 58$) of judicial officers. Collapsing the two highest degrees of importance, 62.07% ($N = 58$) rated the criterion as *very* or *extremely important*.

The accused criteria were endorsed by at least 24.14% of judicial officers as *extremely important*.[113] Collapsing the two highest degrees of importance, at least 53.45% rated the criteria as *very* or *extremely important*.[114]

Relative to Category 2 criteria, Category 3 criteria revealed approximately twice the subscription to the two *lowest* degrees of importance. For Category 3, this subscription fell within 15.52% to 18.97%.[115] By contrast, for Category 2, this subscription fell within 3.39% to 8.47%.[116]

Comments by two judicial officers asserted the irrelevance or inefficacy of the accused criteria. One judicial officer submitted that, for sworn evidence, 'consequences to [an] accused are not explained to any witness'; a second that, for unsworn evidence, questions concerning the consequences to an accused 'could be distressing for a child who loves the offender ... It may not elicit truthful evidence'. By contrast, the accused criteria were endorsed in some judicial officers' nominated competence questions. For example, one judicial officer's preference was clear — 'I am interested in [the] consequences to the defendant, rather than to the child'. Some ($n = 5$) targeted the consequences for both the child and accused, as follows. Two referred broadly to the persons hurt by lies: 'if you tell a lie will anyone suffer'; and 'do lies hurt people'. Two referred specifically to the accused: one questioned whether telling the truth 'is very important for everyone including [the] accused'; and one questioned 'do you understand that you can get yourself and Mr ... (the [defendant]) [in] trouble if you tell lies'. This last formulation is problematic — 'Mr ..'. could be in 'trouble' if the child told the truth. Finally, one judicial officer, for sworn evidence, contextualised the issue of the consequences of lies: 'What happens at [home/ school/ pre-school] if you or a class-mate is caught fibbing'.

(d) Category 4 Criteria

Comprising the God criterion (one of the two oath criteria included for sworn evidence alone) and the three practical criteria (each included for unsworn evidence alone), Category 4 criteria featured the lowest means, highest standard deviations, and greatest frequency of the lowest ratings. All Category 4 criteria had medians and modes at the mid-rating, *moderately important*, except for the God criterion's

[113] For sworn evidence, 28.33% ($N = 60$); and for unsworn evidence, 24.14% ($N = 58$).
[114] For sworn evidence, 55% ($N = 60$); and for unsworn evidence, 53.45% ($N = 58$).
[115] Concerning the higher duty criterion, 18.97% ($N = 58$); and concerning the accused criteria, 16.67% ($N = 60$) for sworn evidence, and 15.52% ($N = 58$) for unsworn evidence.
[116] Concerning the punishment criteria, 5% ($N = 60$) for sworn evidence, and 8.33% ($N = 60$) for unsworn evidence; concerning the perception criteria, 3.39% ($N = 59$) for sworn evidence, and 6.67% ($N = 60$) for unsworn evidence; and concerning the intelligible account criteria, 8.47% ($N = 59$) for sworn evidence, and 6.67% ($N = 60$) for unsworn evidence.

mode at *a little important*. As Figure 1 displays, the God criterion alone of the criteria had similarly-spread frequencies for each degree of importance.

Relative to Categories 1, 2 and 3, Category 4 criteria displayed a lower subscription to the two *highest* degrees of importance. Category 4 criteria were endorsed by at least 8.77% of judicial officers as *extremely important*.[117] Collapsing the two highest degrees of importance, at least 25.86% of judicial officers rated Category 4 criteria as *very* or *extremely important*.[118]

At the opposite extreme, and relative to Categories 1, 2 and 3, Category 4 criteria displayed a higher subscription to the two *lowest* degrees of importance. For Category 4, this subscription fell within 31.03% to 45%.[119]

Comments by some judicial officers variously reject or endorse the God criterion. Rejecting the God criterion, three judicial officers detached 'divine vengeance' from the oath; one of the three explained that a 'belief in God and divine vengeance', 'although theoretically important[,] is out of step with many thinking adults' concept of God'. Two judicial officers suggested that children lacked understanding of the God criterion: one asserted that children of 13 years generally 'have a very good understanding of [all the listed criteria for sworn evidence] with the exception of [the God criterion]'; the second indicated a child's competence test for sworn evidence as frequently 'a difficult procedure if "God belief" [or] "after-life consequences" are introduced'. Endorsing the God criterion, one judicial officer indicated that 'the oath has little meaning' without a 'belief in God and divine vengeance'; a second nominated a question as to a child's 'belief in God and divine punishment' as one of his or her nominated competence questions for sworn evidence.

Finally, comments by a few judicial officers endorsed the practical criteria. One judicial officer specifically modified criterion 12[120] — he or she required a child's explanation of 'abstract concepts of truth/lies' to be 'appropriate to [the child's] age and intelligence'. Moreover, two judicial officers included the practical criteria, from Table 1, in their nominated competence questions (below) — one expressly included criterion 12, and one, criteria 11 and 13.[121]

[117] For the God criterion, 15% ($N = 60$); for criterion 11, 12.07% ($N = 58$); for criterion 12, 13.79% ($N = 58$); and for criterion 13, 8.77% ($N = 57$).

[118] For the God criterion, 33.33% ($N = 60$); for criterion 11, 25.86% ($N = 58$); for criterion 12, 32.76% ($N = 58$); and for criterion 13, 28.07% ($N = 57$).

[119] For the God criterion, 45% ($N = 60$); for criterion 11, 41.38% ($N = 58$); for criterion 12, 31.03% ($N = 58$); and for criterion 13, 36.84% ($N = 57$).

[120] Criterion 12 reads 'Understands truth/lies by explaining abstract concepts of truth/lies'.

[121] Criterion 11 reads 'Understands truth/lies by reference to a judicial officer's examples of truth/lies'; Criterion 12 reads 'Understands truth/lies by explaining abstract concepts of truth/lies'; Criterion 13 reads 'Understands truth/lies by identifying, by reference to a judicial officer's examples of truth/lies, when the judicial officer tells a lie'.

C *Competence Criteria in Open-ended Questions*

An open-ended question requested judicial officers to nominate the 'three main questions, or types of questions' that they would put to a child in competence tests for sworn and unsworn evidence, respectively. The content of judicial officers' nominated competence questions is described through the following hierarchy of variables.

- Seventeen *specific variables* (denoted by single quotes) identify core substantive emphases or elements of nominated competence 'questions, or types of questions'.

- Four *combined-variables* (denoted by single quotes, and designated as 'combinations') collapse specific variables to identify alternative formulations, or shared features, of specific variables. In recording the number of judicial officers who included *at least* one of two or three specific variables, combined-variables have a lesser *n* than the aggregation of their specific variables. Three combined-variables appear within the Truth variables, and one within the Capacity variables.

- Five *meta-variables* (denoted by initial capitals) collapse general types of specific variables to identify broad themes or similarities. In recording the number of judicial officers who included *at least* one specific variable of a general type, meta-variables have a lesser *n* than the aggregation of their specific variables.

Optimally, judicial 'three main questions, or types of questions' reduced to three discrete specific variables within three discrete meta-variables. Yet some responses fell below three meta-variables (usually to two), due mainly to repetition of specific variables; some responses exceeded three (usually reaching four), due mainly to long, multi-faceted sentences. **Table 2 presents the numbers of judicial officers who nominated the various specific variables, combined-variables, and meta-variables.**

Specific variables, within the five meta-variables, can be illustrated through representative types of competence questions. (The adjective 'bare' is attached to three specific variables[122] that share the name of a meta-variable or a combined-variable).

[122] Relevantly, 'oath' variables, 'tell truth' variables, and 'consequences' variables.

Table 2. Numbers of Judicial Officers Nominating Variables in their Competence Tests

Variables	Sworn ($N = 56$)	Unsworn ($N = 57$)
1. At least one Oath variable	41	4
'oath' variable	19	3
'belief in God' variable	22	—
'bible' variable	14	2
'religious belief' variable	8	1
2. At least one Truth variable	41	48
'tell truth' combination	34	38
'tell truth' variable	17	29
'duty/promise' combination	17	10
'duty to tell truth' variable	7	2
'promise to tell truth' variable	13	8
'truth/lie' combination	15	24
'difference of truth/lie' variable	9	15
'meaning of truth/lie' variable	7	11
3. At least one Consequences variable	29	28

'punishment' variable	19	17
'consequences' variable	10	11
'accused' variable	2	4
4. At least one Proceedings variable	12	22
'why in court' variable	8	16
'importance' variable	6	7
5. At least one Capacity variable	13	24
'general' variable	9	18
'recall/ability' combination	7	12
'recall' variable	4	9
'ability' variable	4	8

Note. Combined-variables precede the specific variables that they collapse.

- *Oath variables* comprise four specific variables concerning a child's understanding or affirmation of an oath or its perceived religious features: (1) a bare 'oath' variable (ie, what does the oath mean? what is an oath or the nature of an oath?); (2) a 'belief in God' variable (ie, do you believe in God?); (3) a 'Bible' variable (ie, do you believe in, or read, the Bible?); and (4) a 'religious belief' variable (ie, do you have religious beliefs?).

- *Truth variables* comprise five specific variables concerning a child's understanding or affirmation of truth-telling, or, alternatively, a child's understanding or explanation of truth or lies: (1) a bare 'tell truth' variable, featuring the *tell truth* formula (ie, do you understand that you must tell the

truth? do you understand the importance of telling the truth?); (2) a 'duty to tell truth' variable, adding a duty element to the *tell truth* formula (ie, do you understand the duty to tell the truth?); (3) a 'promise to tell truth' variable, adding a promise element to the *tell truth* formula (ie, do you promise to tell the truth?); (4) a 'difference of truth/lie' variable, emphasising the difference between truth and lies (ie, do you understand the difference between the truth and a lie?); and (5) a 'meaning of truth/lie' variable, emphasising the nature of truth or lies (ie, do you understand what a lie is?). Truth variables collapse to three combined-variables: (a) the 'tell truth' combination, collapsing the bare 'tell truth' variables with the two specific variables in the 'duty/promise' combination; (b) the 'duty/promise' combination, collapsing the 'duty to tell truth' variables with the 'promise to tell truth' variables; and (c) the 'truth/lie' combination, collapsing the 'difference of truth/lie' variables with the 'meaning of truth/lie' variables. Variables in the 'tell truth' combination were cast positively as 'telling the truth' or negatively as 'not telling lies'.

- *Consequences variables* comprise three specific variables concerning a child's understanding or affirmation of the consequences of lying: (1) a bare 'consequences' variable, emphasising consequences generally (ie, what will happen if you tell lies or do not tell the truth?); (2) a 'punishment' variable, emphasising a child's punishment (ie, do you understand that you may be punished for telling lies?); and (3) an 'accused' variable, emphasising the consequences to an accused (ie, will lies hurt the accused or anyone?).

- *Proceedings variables* comprise two specific variables concerning a child's understanding or affirmation of the conduct of proceedings: (1) a 'why in court' variable, emphasising a child's presence in court (ie, why are you here? do you understand what is going on?); and (2) an 'importance' variable, emphasising the seriousness of court proceedings (ie, do you understand how important court proceedings are?).

- *Capacity variables* comprise three specific variables concerning a child's demonstration of capacity: (1) a 'general' variable, emphasising general issues (ie, how old are you? how are you doing at school? what school? what grade?); (2) a 'recall' variable, emphasising recall or memory; and (3) an 'ability' variable, emphasising ability, intelligence or perception. Judicial officers did not nominate the 'recall' or 'ability' variables as proper questions. The 'recall/ability' combination collapses the 'recall' variables with the 'ability' variables. Moreover, the 'recall/ability' combination sometimes expressly intersected with the 'general' variables. For example, one judicial officer would introduce a competence test with a 'general chat ... to assess child's intelligence and to put at ease'; and a second explained the question 'how are you getting on at school?' as a 'question to illuminate [the] apparent intelligence of the child'.

Meta-variables and combined-variables develop themes and similarities. Some combined-variables fall within one meta-variable — they are presented in Table 2. For example, the *tell truth* formula appears within three specific Truth variables (ie, bare 'tell truth' variables, 'duty to tell truth' variables, and 'promise to tell truth' variables); to record similarities, all three variables were collapsed within the 'tell truth' combination. By contrast, some combined-variables fall within more than one meta-variable — they are presented in the text. For example, variables of obligation in the 'duty/promise' combination appeared within both Oath variables and Truth variables.

Coding was not clear-cut concerning the *tell truth* formula. For example, some competence questions were formulated in terms of the *meaning of truth-telling* (ie, what does it mean to tell the truth?), or the *meaning of the obligation of truth-telling* (ie, what does it mean to promise to tell the truth?). Given the specific reference to the *tell truth* formula here, and the nebulous reference to *meaning*, both formulations were only characterised within the 'tell truth' combination. Second, some competence questions were formulated in terms of Consequences variables (ie, three specific variables concerning the consequences of departing truth-telling). Given the specific reference to consequences here, and the incidental reference to truth-telling, Consequences variables were not additionally characterised within the Truth variables.

The content, and then the formal framing, of judicial officers' nominated competence questions are reported below.

(a) Judicial Competence Questions for a Dual-purpose Competence Test

Of the judicial officers who nominated competence questions for both evidence-types ($N = 56$), 26.79% indicated that they would use a *dual-purpose* competence test (ie, exactly the same 'questions, or types of questions' in competence tests for each evidence-type). All judicial officers but one ($n = 14$) included at least one Truth variable in their dual-purpose competence test. The exception indirectly adverted to the 'truth' by incorporating a bare 'consequences' variable that required a child to affirm the prohibition on telling 'fibs'. Less than half the judicial officers ($n = 7$) included variables of obligation, whether cast in terms of Oath variables ($n = 3$) or as a variable in the 'duty/promise' combination ($n = 4$). More than half the judicial officers ($n = 9$) included at least one Consequences variable.

(b) Judicial Competence Questions for Sworn Evidence

In competence questions for sworn evidence, judicial officers ($N = 56$) most frequently nominated variables within the meta-variables of Oath and Truth, followed by Consequences — 73.21% included at least one Oath variable and at least one Truth variable, respectively. Judicial officers either included at least one Oath variable ($n = 41$), or did not ($n = 15$, where 14 included at least one Truth

variable). Coincidentally, judicial officers either included at least one Truth variable (n = 41), or did not (n = 15, where 14 included at least one Oath variable). Moreover, 48.21% (N = 56) included *both* Oath and Truth variables in their nominated competence questions.

The preferred formulations of Oath and Truth variables emphasised obligation and truth-telling, respectively. The *preferred Oath variables* were a 'belief in God' variable (n = 22), and a bare 'oath' variable (n = 19). There was a religious emphasis, even in bare 'oath' variables (n = 19, where 13 were accompanied by at least one of the religious Oath variables). The *preferred Truth variables* were variables in the 'tell truth' combination (n = 34), comprising bare 'tell truth' variables (n = 17, where 5 additionally emphasised the importance of telling the truth), and variables in the 'duty/promise' combination (n = 17). The preferred formulation of the next most-nominated meta-variable, the Consequences variables, was a 'punishment' variable (n = 19).

The emphasis on obligation (in Oath variables) and truth-telling (in Truth variables) was intensified by judicial officers' references elsewhere to obligation and truth-telling, respectively. First, the Oath variables' emphasis on obligation was intensified by references to obligation in Truth variables. For example, of the judicial officers who did not include an Oath variable (n = 15), some (n = 6) referred to obligation by casting their Truth variable in terms of variables in the 'duty/promise' combination. Second, the Truth variables' emphasis on truth-telling was intensified by references to truth-telling in Consequences variables. For example, of the judicial officers who did not include a Truth variable (n = 15), some (n = 7) referred to truth-telling by incorporating a Consequences variable cast in terms of the consequences of, or punishment for, telling lies or departing truth-telling.[123]

Hence, in their competence questions for sworn evidence, similar numbers of judicial officers referred to obligation (n = 47, where 41 were Oath variables, and 6 were Truth variables), or to truth-telling (n = 48, where 41 were Truth variables, and 7 were Consequences variables).

(c) Judicial Competence Questions for Unsworn Evidence

In competence questions for unsworn evidence, judicial officers (N = 57) most frequently nominated the meta-variables of Truth, followed by Consequences, and then Capacity and Proceedings — 84.21% included at least one Truth variable. Judicial officers either included at least one Truth variable (n = 48) or did not (n = 9, where 2 included Consequences variables, 1 included a bare 'oath' variable, and 6 variously included Capacity and Proceedings variables). Notably, 24.56% (N = 57) included variables of obligation, whether cast in terms of variables in the

[123] This included one judicial officer who cast competence questions in terms of Consequences variables only: 'what happens if you, a class-mate or "someone" tells a fib'.

'duty/promise' combination (n = 10), or in terms of Oath variables (n = 4, where 3 were bare 'oath' variables).[124]

The preferred formulations of Truth variables emphasised truth-telling. The *preferred Truth variables* were variables in the 'tell truth' combination (n = 38), comprising bare 'tell truth' variables (n = 29, where 10 additionally emphasised the importance of telling the truth), and variables in the 'duty/promise' combination (n = 10). Preferred formulations of the next most-nominated variables — Consequences, Capacity and Proceedings variables — clustered together in similar, lower frequencies. The *preferred Consequences variables* were 'punishment' variables (n = 17); the *preferred Capacity variables*, 'general' variables (n = 18); and the *preferred Proceedings variables*, 'why in court' variables (n = 16).

(d) Linkages of Meta-variables in Competence Questions

The most popular linkages of meta-variables reflect the judicial emphases on Oath and Truth variables for sworn evidence, and the judicial emphasis on Truth variables for unsworn evidence. Linkages of *three* meta-variables did not feature strongly — the most popular linkage (n = 13) featured an Oath, a Consequences and a Truth variable in competence questions for sworn evidence. Linkages of *two* meta-variables featured more strongly. In competence questions for *sworn* evidence (N = 56), the most popular linkages featured Oath and Truth variables: an Oath with a Truth variable (48.21%); a Truth with a Consequences variable (39.29%); and an Oath with a Consequences variable (33.93%). In competence questions for *unsworn* evidence (N = 57), the most popular linkages all featured Truth variables: a Truth with a Consequences variable (45.61%); a Truth with a Capacity variable (29.82%); and a Truth with a Proceedings variable (28.07%).

(e) Judicial Competence Questions Relative to Evidence-type

Truth and Consequences variables, at meta-variable level, were not preferred for a particular evidence-type. Yet, at the level of specific variables and combined-variables, Truth variables were preferred relative to evidence-type. For example, variables in the 'duty/promise' combination were more favoured for sworn evidence (n = 17) than unsworn evidence (n = 10). Bare 'tell truth' variables, and variables in the 'truth/lie' combination, were more favoured for unsworn evidence (n = 29, and n = 24, respectively) than sworn evidence (n = 17, and n = 15, respectively). Consequences variables at the level of specific variables were not favoured for a particular evidence-type.

By contrast, Oath, Capacity and Proceedings variables, at meta-variable level, were preferred for a particular evidence-type.[125] For example, Oath variables were more

[124] However, half the judicial officers (n = 7) who included variables of obligation here, proposed dual-purpose competence tests.

[125] As Table 2 presents, this preference continued at the level of specific variables or combined-variables.

favoured for sworn evidence (n = 41) than for unsworn evidence (n = 4). Capacity variables and Proceedings variables were more favoured for unsworn evidence (n = 24, and n = 22, respectively) than for sworn evidence (n = 13, and n = 12, respectively). Moreover, 10.53% (N = 57) of judicial officers formulated their competence questions for unsworn evidence *only* in terms of Capacity or Proceedings variables.

D *Formal Framing of Competence Questions*

To briefly report the formal framing of judicial officers' competence questions, the most popular variables — Truth and Oath variables — are emphasised. Three caveats pertain to the data captured. First, in requesting judicial officers' 'three main questions' and generic 'types of questions', the open-ended questions focussed on substance, not formal framing. Second, this report is limited to formulations of proper questions, not incompletely-formulated questions. Third, judicial officers' nominated competence questions do not equate to a transcript of voir dire questions and evidently lack context. A competence test's context, including the fact of a child's developmental maturity, is critical to competence question formulation — as one judicial officer recognised, 'the form of questions will vary depending on the answers'.

Caveats aside, judicial officers' nominated competence questions disclosed the following features.

- *More than half the judicial officers incorporated at least one direct 'do you' question concerning understanding, knowledge or belief.* Representative examples of 'do you' questions include 'do you understand what telling the truth means', 'do you understand that you may be punished for telling lies', and 'do you believe in God'. 'Do you' questions were put by 52.63% (N = 57) of judicial officers in at least one competence question. While 'do you' questions are ostensibly amenable to a yes/no response, the following is moot: the degree to which a child's bare affirmation would answer questions of this type; the degree to which questions would be adjusted for context; and the degree to which a child's explanation would be subsequently required.

- *Judicial officers did not formulate 'tag' questions.* Overstatement of competence by 'tag' or leading questions was not exhibited — the closest may be the '*sun and rain*' instruction (in the Epigraph).

- *Few judicial officers expressly requested a child to 'explain' the oath, or truth/lies.* For sworn evidence, 3 judicial officers explicitly requested a child to 'explain' the oath (n = 2) or truth-telling (n = 1). For unsworn evidence, 5 explicitly requested a child to 'explain' truth and lies (n = 3), or

the 'difference' between truth and lies ($n = 2$). Of the 5, 2 expressly adopted criterion 12, from Table 1.[126]

- *Some judicial officers impliedly requested a child to 'explain' the oath, or truth/lies.* Requests for a child's explication of their *understanding*, or their understanding of *meaning*, are requests for child-generated explanations. For sworn evidence, judicial officers put questions to the effect of 'what does a promise on the bible to tell the truth mean' ($n = 2$), 'what does the oath mean' ($n = 1$), and 'what is your understanding of the nature of an oath' ($n = 1$). For unsworn evidence, judicial officers put questions to the effect of 'what does the truth, or telling the truth, mean' ($n = 4$), and 'what is a lie' ($n = 3$). For dual-purpose competence tests, judicial officers put questions to the effect of 'clarify truth/lies' ($n = 1$), and 'what is a lie' ($n = 1$).

- *Few judicial officers requested child-generated 'examples' of truth/lies.* Requests for a child's 'examples' of truth and lies are requests for child-generated explanations. Judicial officers requested, for sworn evidence, 'examples' of 'what is a lie and what is the truth' ($n = 1$), and, for unsworn evidence, 'examples' of 'what telling the truth means' ($n = 2$), and 'the difference between telling the truth and a lie' ($n = 1$).

- *Few judicial officers self-generated examples of truth/lies.* Lyon's advice is relevant to judicially-generated lies: 'children may falter ... for fear of calling the interviewer a liar'.[127] The two judicially-generated examples of truth and lies (in the Epigraph) requested a child to identify the judicial example as the truth or lie. The '*elephant and mouse*' instruction is more clearly a request for a child's explanation of a judicially-generated lie than the '*sun and rain*' instruction — the latter has features of an admonition and of a leading question. Additionally, one judicial officer expressly adopted both criteria 11 and 13, from Table 1,[128] as appropriate competence questions for unsworn evidence.

- *Some judicial officers demonstrated overtly child-inclusive or child-sensitive techniques.* Judicial officers incorporated techniques that involve a child in the court process: 'establish[ing] whether the child had any concerns or difficulty' in testifying; requesting 'the child's assistance'; ensuring 'the child [is] aware that he [or] she is not in trouble'; and beginning with a 'general chat ... to assess [a] child's intelligence and to put at ease'. Judicial officers demonstrated some Lyon and Saywitz

[126] Criterion 12 reads 'Understands truth/lies by explaining abstract concepts of truth/lies'.
[127] Lyon, above n 2, 1048.
[128] Criterion 11 reads 'Understands truth/lies by reference to a judicial officer's examples of truth/lies'; Criterion 13 reads 'Understands truth/lies by identifying, by reference to a judicial officer's examples of truth/lies, when the judicial officer tells a lie'.

suggestions. Some judicial officers simplified the obligation of truth-telling by using direct, obligatory verbs: 'do you promise to tell the truth?' ($n = 2$) and 'will you promise to tell the truth?' ($n = 1$). Some formulated the wrongfulness of lying in general terms — 'do lies hurt people?' and 'what happens to people who tell lies?'

(a) Additional Comments

In competence questions for both sworn ($n = 2$) and unsworn evidence ($n = 2$), some judicial officers specifically indicated that the questions were variable, and were dependent on the factor of age. For example, the '*elephant and mouse*' instruction (in the Epigraph) was limited to 'very young children'.

In comments appended elsewhere, one judicial officer identified a 'child's understanding of taking an oath' as a difficulty experienced in implementing the legislation; the specific legislative improvement was 'taking children's evidence on a promise to tell the truth'. As less specific legislative improvements, one judicial officer submitted a 'competency test', and one, an amendment to the 'out of date' *Evidence Act 1977* section 9 as 'children do not understand [the] oath'.

IV DISCUSSION

The trend in Commonwealth law reform and in developmental psychological research, concerning competence tests, rejects the need for a child's explanation of abstract concepts, and prefers a less onerous demonstration of a child's understanding of the need for truth-telling in court. As Lyon remarks, 'competencies first believed to emerge later in childhood have been exhibited by very young children if the verbal demands of the tasks are minimised and if the tasks are stripped of extraneous complications'.[129] The content of competence tests, and the judicial formulation of competence questions, are issues of continuing importance.

In Queensland, legislation prescribes the content of competence tests. For *sworn* evidence, the legislative oath requirement requires a child's understanding of 'the nature of an oath'. Queensland common law continues to require the traditional English oath, overlaid with the sanction of divine consequences for lying. For *unsworn* evidence, there are overlapping testimonial regimes — *Evidence Act 1977* section 9, and *Oaths Act 1867* section 37. Both sections include a truth requirement, but section 9 adds a duty requirement and a capacity requirement, while section 37 adds a punishment requirement. This translates to the following: section 9 requires a child's understanding, or a judicial explanation, of the 'duty of speaking the truth', and additionally requires a child's 'sufficient intelligence'; by contrast, section 37 requires a child's understanding of 'punishment' for lies. An issue emerges, then, as to whether a competence test for unsworn evidence requires compliance with each testimonial regime.

[129] Ibid 1035.

In this Part 2 of the competence suite, four survey questions comprised a closed-ended and open-ended question for each evidence-type. *Closed-ended questions* requested judicial ratings of the importance that listed criteria 'should' bear to a judicial officer's competence test, '[i]n light of current Queensland law'. Of the 8 criteria for sworn evidence, and the 11 for unsworn evidence, 6 were common to each evidence-type. *Open-ended questions* requested the three main competence 'questions, or types of questions' that judicial officers 'would' themselves put to a child. Five general themes or types of variables were discerned in judicial officers' nominated competence questions.

Findings from the four survey questions intersect with the three general questions of interest — the findings are first summarised, and then discussion of the effect of *question-type* (ie, closed-ended versus open-ended questions) follows.

A *Referability of Competence Tests to the Queensland Legislation*

The question of whether competence tests are referable to Queensland legislation concerns how the judicial ratings (from closed-ended questions) or nominations (from open-ended questions), respectively, of competence criteria fit with Queensland's legislative competence requirements.

(a) Findings from Closed-ended Questions

- *Competence criteria for sworn evidence.* The low importance assigned to two formulations of a child's understanding of an oath seemingly contrasts with the legislative oath requirement.[130] Yet an oath's definitive characteristic — an obligation — fits with the extremely high importance assigned to two formulations of a child's understanding of a *promise.* The four remaining competence criteria in this survey question were not referable to express legislative requirements for sworn evidence. Hence, the high importance assigned to three criteria — a child's understanding of *punishment* for lying, and two formulations of a child's demonstration of *capacity* — suggests that competence tests are not limited to legislative requirements. The lower importance assigned to a child's understanding of the consequences for an *accused* may indicate a judicial sensitivity to the motivational difficulties that may result (particularly for complainant children) from judicially-articulated competence questions concerning the consequences for an accused.

- *Competence criteria for unsworn evidence.* The extremely high importance assigned to four competence criteria — two formulations of a child's understanding of *truth-telling*, and two of a child's understanding of a

[130] Queensland common law has not expressly adopted the 'higher duty' *Hayes* formulation for sworn evidence.

promise — fits, respectively, with the legislative truth requirement,[131] and the legislative duty requirement.[132] Moreover, the high importance assigned to three criteria — a child's understanding of *punishment*, and two formulations of a child's demonstration of *capacity* — fits, respectively, with the legislative punishment requirement,[133] and the legislative capacity requirement.[134] The four remaining competence criteria in this survey question were not referable to express legislative requirements for unsworn evidence. The lower importance assigned to a child's understanding of the consequences for an *accused* may indicate a judicial sensitivity (as for sworn evidence). The lowest importance assigned to three formulations of child-generated explanations of abstract concepts of truth and lies may indicate a judicial sensitivity to the understatement of competence that may result from unnecessarily difficult tasks.

(a) Findings from Open-ended Questions

Competence criteria for sworn evidence. The high number of nominations for a child's understanding of an *oath*, and for a child's understanding of an *obligation* of truth-telling, fits with the definitive characteristic of sworn evidence — an obligation. Although a religious emphasis was attached here to the oath, there was no notable subscription to the traditional oath (ie, an oath overlaid with the sanction of divine consequences).

- *Competence criteria for unsworn evidence.* The high number of nominations for a child's understanding of *truth-telling*, unmediated by obligation, illustrates the conundrum of the competing requirements of Queensland's overlapping testimonial regimes for unsworn evidence.[135] For example, this high number of nominations contrasts with the legislative duty requirement,[136] and fits with the *lack* of a legislative duty requirement.[137] Similarly, the high number of nominations for a child's *capacity*, and a child's understanding of *proceedings*, fits with the legislative capacity requirement.[138]

B *Substantive Competence Criteria for Each Evidence-type*

To assess the distinction between competence tests for sworn and unsworn evidence, judicial perspectives concerning the substantive criteria for each evidence-type and each question-type can be compared.

[131] *Evidence Act 1977* (Qld) s 9.
[132] *Evidence Act 1977* (Qld) s 9.
[133] *Oaths Act 1867* (Qld) s 37.
[134] *Evidence Act 1977* (Qld) s 9.
[135] *Evidence Act 1977* (Qld) s 9; *Oaths Act 1867* (Qld) s 37.
[136] *Evidence Act 1977* (Qld) s 9.
[137] *Oaths Act 1867* (Qld) s 37.
[138] *Evidence Act 1977* (Qld) s 9.

(a) Findings from Closed-ended Questions

- *Similarities between competence tests.* For both evidence-types, the order of (and preference for) the 6 common criteria was the same — from the most important *promise* (in positive and negative formulations), to *punishment*, to *capacity* (perception and intelligible account), and then to the least important *accused.*[139] The low importance that judicial officers assigned an *oath* (included for sworn evidence alone) did not rebut this similarity of competence tests.

- *Distinction between competence tests.* As a weak effect, the lesser importance assigned to punishment for lying in unsworn evidence may indicate a sensitivity to the motivational difficulties that may result for younger children from judicially-articulated competence questions concerning punishment.

(b) Findings from Open-ended Questions

- *Similarities between competence tests.* For both evidence-types, a child's understanding of *truth-telling*, and a child's understanding of the *consequences* of departing from truth-telling, were highly nominated. Additionally, more than a quarter of judicial officers nominated *dual-purpose* competence tests (ie, where exactly the same 'questions, or types of questions' were used in both evidence-types).

- *Distinctions between competence tests.* A child's understanding of *obligation* — whether cast as an *oath*, promise or duty — was more highly nominated for sworn evidence. A child's understanding of *proceedings*, and a child's demonstration of *capacity*, were more highly nominated for unsworn evidence.

C *Formal Framing of Competence Questions*

Of subsidiary interest here, the formal framing of competence questions did not reveal notable incidence of judicial overstatement or understatement of competence. Judicial officers eschewed 'tag' or leading questions, and formulated simplified questions — they avoided convoluted or indirect questions, judicially-generated lies, and child-generated explanations.

D *Effect of Question-type in the Survey*

Question-type (ie, closed-ended versus open-ended questions) appeared to affect judicial endorsement of some competence criteria. For example, judicial

[139] There were no Bonferroni-adjusted significant differences between the importance of each common criterion in sworn versus unsworn evidence.

endorsement of the criterion of *obligation* differs between closed-ended questions (ie, the importance that listed criteria 'should' bear in a competence test, in light of current Queensland law) and open-ended questions (ie, the criteria that a judicial officer 'would' nominate in competence test questions). Open-ended questions can be equated to judicial practices, and closed-ended questions to judicial perspectives.

For *sworn evidence*, in open-ended questions, judicial officers highly nominated the *oath*; by contrast, in closed-ended questions, they assigned the *oath* low importance (in two formulations),[140] but a *promise* extremely high importance (in two formulations).[141] This may suggest the following: in 2000, judicial *practices* required an oath, but did not favour the traditional oath (with its divine consequences) or the 'higher duty' *Hayes* formulation; and judicial *perspectives* required a child's understanding or affirmation of, at least, a promise of truth-telling. This relaxation of the oath requirement (to a promise of truth-telling) coheres with the QLRC's recommendations in 2000, although the QLRC adopted the *Hayes* formulation for sworn evidence.[142]

For *unsworn evidence*, in open-ended questions, judicial officers scarcely nominated an *obligation*; by contrast, in closed-ended questions, they assigned a *promise* extremely high importance. This may suggest the following: in 2000, judicial *practices* required a simplified truth-telling request to a child; but judicial *perspectives* required a child's understanding or affirmation of a promise of truth-telling. Perhaps the language of *promise* overlaps here with the mere requirement of *truth-telling*. To recall, some overlap is exhibited in recent recommendations of the NZLC,[143] and Lyon and Saywitz[144] — both retain use of the language of *promise*, but prefer a child's affirmation of truth-telling to a child's explanation of the nature of a promise.

Finally, the distinguishability of competence tests can be described more broadly. In open-ended questions, judicial officers' use of *obligation*, *capacity* and *proceedings* criteria differed between evidence-types. By contrast, in closed-ended questions, judicial officers' endorsement of the six common criteria (including two promise and two capacity criteria) did not significantly differ between evidence-types.

[140] Criteria 8 and 10, from Table 1, included for sworn evidence alone.
[141] Criteria 3 and 4, from Table 1, included for each evidence-type.
[142] QLRC, Report No 55 (2000) Part 2, above n 11, Recommendation 7.2(a). There, the QLRC recommended that a competence test for sworn evidence requires a child's understanding that testifying is a 'serious matter', and that the 'obligation to give truthful evidence' is beyond 'the ordinary duty to tell the truth'.
[143] NZLC, Report No 55 Vol 1 (1999), above n 51, [354] and [357].
[144] Lyon and Saywitz, above n 43; Lyon, above n 2, 1062-3.