

CHILD SEXUAL OFFENCE EVIDENCE PILOT

Training for defence practitioners

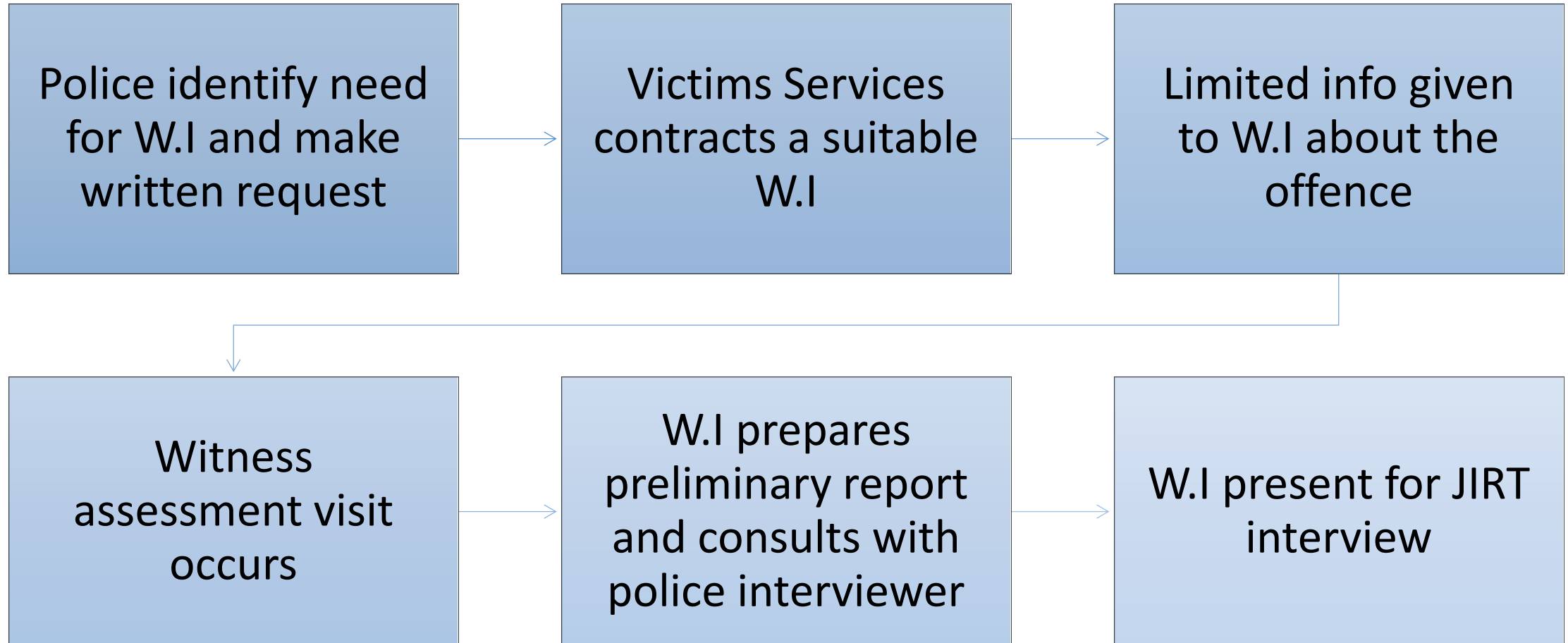
Here to Stay

- The Pilot commenced in Sydney in April 2016, and in Newcastle in July 2016.
- Legislation says it is to operate until **31 March 2019** (unless extended by the Regulations).
- Given the level of support for the Pilot from different sectors, we can expect that it will be rolled out more broadly over time. We have already seen the expansion of the Pilot to include **child prosecution witnesses** in addition to child complainants.
- In its consultation paper on criminal justice issues, the Royal Commission notes: “While CCTV and AV links may be available currently, some **adult survivors** are likely to gain real benefit from being able to use a pre-recorded police investigative interview as their evidence in chief and to prerecord their full evidence...”

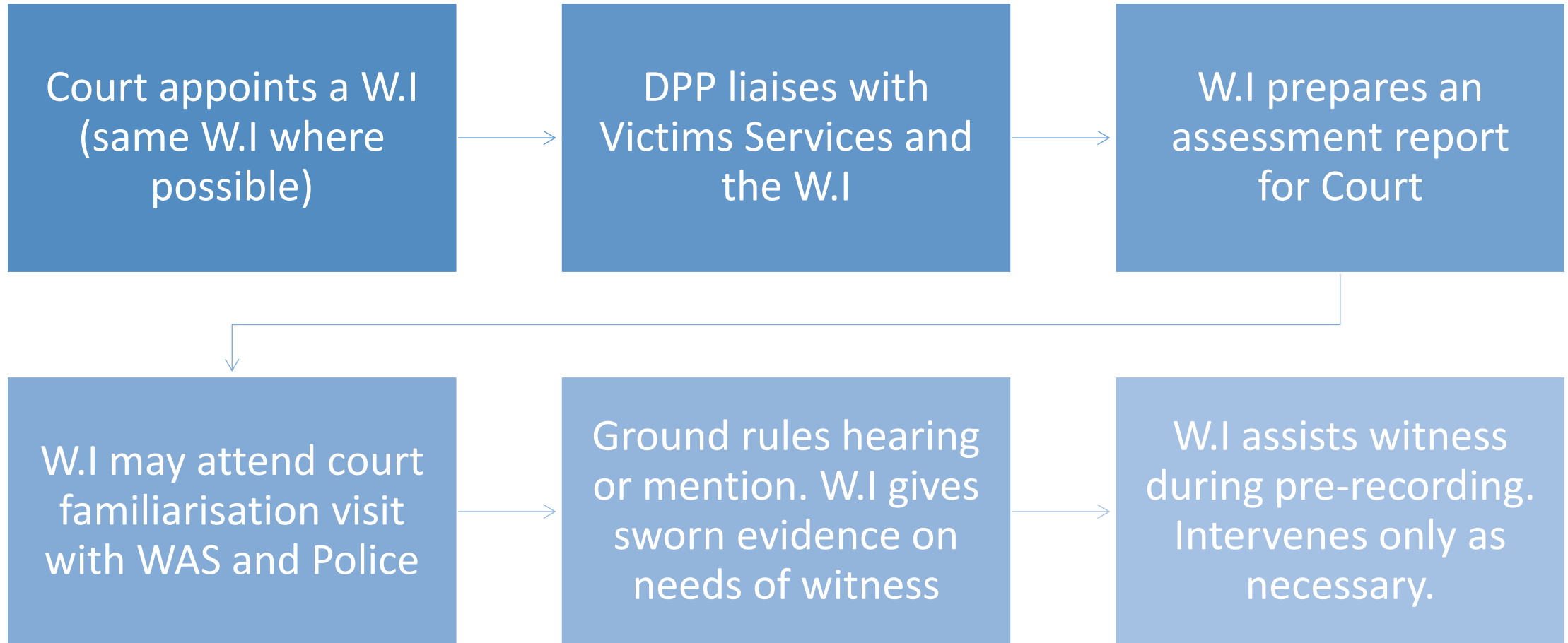
Purpose of our talk

- Outline two significant changes to the Criminal Procedure Act:
 - Introduction of **pre-recorded evidence** in child sexual assault cases, and
 - Introduction of **witness intermediaries**
- How will these changes work in practice?
- What should we be doing as defence lawyers to get the best outcomes for our clients in the context of our other various responsibilities and duties?

The Process: Before the JIRT interview



The Process: In the District Court



First, the legislation

Part 29, Schedule 2, cl 83, Criminal Procedure Act

Applies to “**prescribed sexual offences**”

(Definitions - s 3(1))

The legislation

Part 29, Schedule 2, cl 83, Criminal Procedure Act

- Applies to proceedings before the **District Court** at **Sydney or Newcastle**
- In relation to a **prescribed sexual offence** (or, if the proceedings relate to more than one offence, at least one of those offences is a prescribed sexual offence)
- Commenced by a CAN filed or indictment presented:
 - (a) on or after the commencement of this Part (**5 November 2015**),
or
 - (b) before the commencement of this Part but only if the matter:
 - (i) was not listed for trial before that commencement, or
 - (ii) was listed for trial before that commencement, but was or is re-listed for trial after that commencement.

The legislation

Part 29, Schedule 2, Criminal Procedure Act

A **witness** means a means a **child** who is a **complainant** or **prosecution witness** in the proceedings

(cl 82, Sch 2 – Definitions)

Pre-recorded evidence hearings

Pre-recorded evidence hearings

Clause 84, Schedule 2

84 Pre-recorded evidence hearing

- (1) Subject to any contrary order of the Court, evidence of a witness in proceedings to which this Part applies who **is less than 16 years of age** when the evidence is given **must** be given at a hearing under clause 85 (a **pre-recorded evidence hearing**) in accordance with that clause.

- (2) The Court may, on its own motion or on the application of a party to proceedings to which this Part applies, order that evidence of a witness in the proceedings who is **16 or more years of age** when the order is made, be given at a pre-recorded evidence hearing in accordance with clause 85.

What does the Court consider when ordering a pre-recorded evidence hearing?

84 Pre-recorded evidence hearing (continued...)

- (4) The Court may make an order under subclause (1) or (2) only if it is satisfied that it is appropriate to do so in the **interests of justice**.
- (5) The **wishes and circumstances of the witness** and the **availability of court and other facilities** necessary for a pre-recorded evidence hearing to take place are the primary factors to be considered by the Court in determining whether to make an order under subclause (1).
- (6) Without limiting the other factors that the Court may take into account in determining whether to make an order under subclause (1), the Court may also take into consideration the following:
 - (a) sufficiency of **preparation time** for both parties,
 - (b) **continuity and availability of counsel** at both the pre-recorded evidence hearing and the trial,
 - (c) any other relevant matter.

How does pre-recording work?

Clause 85

- “A pre-recorded evidence hearing is to be held **as soon as practicable** after the date listed for the accused person’s first appearance in the [District] Court in the proceedings, but not before the prosecution has made the **pre-trial disclosure** required by section 141” (Cl 85(1))
- JIRT interview played as evidence in chief (Cl 85(2))
- In the **absence of the jury** (Cl 85(3))
- The pre-recorded evidence hearing is recorded, and **played by the Court at trial**, in the presence of the jury (Cl 85(4))

Pre-recording: What is happening in practice?

- Viewing of complainant's JIRT interview(s) in advance
 - Court requires this to be done before the day of the pre-recorded evidence hearing;
 - Complainant to watch the DVDs at the DPP office beforehand;
 - Where the accused is in custody then this needs to be done in the Court so time needs to be allocated for this;
 - Query the DPP's attitude to accused people coming to their office to watch DVDs with Counsel? Interpreters?
- Playing of pre-recording
 - As in the case of aborted trial or retrials, the recording does not show Counsel but only the complainant;
 - Counsel can only be heard

Leave required to give further evidence

87 Witness may give further evidence only with leave

- (1) A witness in proceedings to which this Part applies whose evidence is pre-recorded at a pre-recorded evidence hearing cannot give further evidence without the leave of the Court.
- (2) An application for leave may be made by any party to the proceedings.
- (3) The Court must not give leave under subclause (1) unless it is satisfied:
 - (a) that the witness or other party is seeking leave because of becoming aware of a matter of which the party **could not reasonably have been aware** at the time of the recording, or
 - (b) it is otherwise **in the interests of justice** to give leave.

Witness Intermediaries

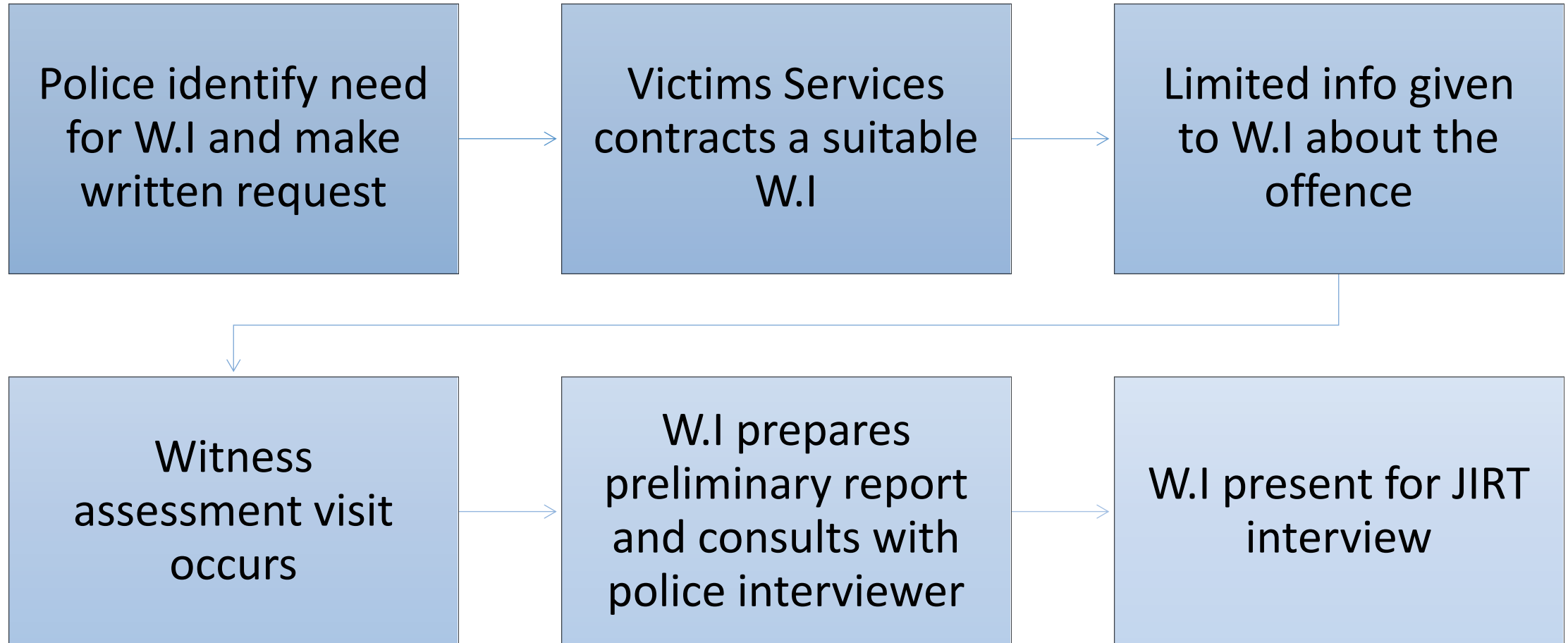
This builds on the existing law in NSW

- The court is permitted to **control the questioning** of a witness: s 26, *Evidence Act 1995*
- The court must disallow **improper questions** put to a witness in cross-examination: s 41, *Evidence Act 1995*.

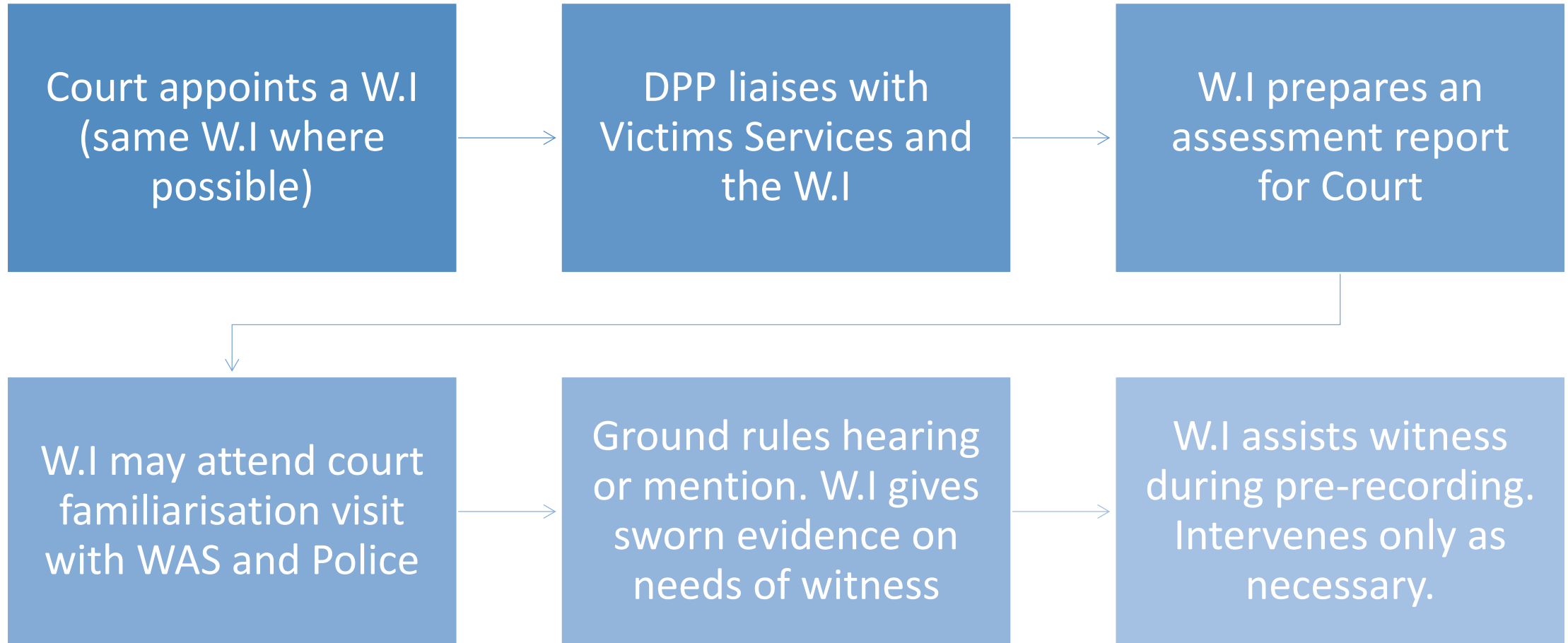
An improper question can be:

- a) *misleading or confusing*
- b) *unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive*
- c) *put to the witness in a manner or tone that is belittling, insulting, or otherwise inappropriate, or*
- d) *Has no basis other than a stereotype (for example a stereotype based on the witness's sex, race, culture, ethnicity, **age or mental, intellectual** or physical capacity)*

The Process: Before the JIRT interview



The Process: In the District Court



The Sydney pilot in practice

- Judge Traill is holding a call-over for matters in the Pilot on Monday afternoons at 3pm.
- The ground rules hearing is usually held on the morning of the pre-recording.
- After the pre-recording the Court is setting further mentions to case manage the matters, particularly where there are legal arguments to be resolved. This will normally involve time being set aside for further mentions (Mondays at 3pm) or legal argument.

The Newcastle pilot in practice

- Judge Girdham or Judge Traill travels to Newcastle for one week per month.
- The Court is keen to fill that week for the Judge, and there is very little flexibility about when things get listed. They will inevitably be listed in the next week that a Judge is attending.
- Case management is occurring at the first mention/arraignment at Newcastle DC.

What to expect at the call-over/ arraignment

- Timetable “as soon as possible”
 - First or second mention: timetable set for service of NOPC and defence response;
 - Witness intermediary (WI) is appointed and orders made for the preparation and service of the WI report;
 - Dates fixed for pre-recording and trial;
 - Further mentions to case manage issues as required;
- Things to be conscious of:
 - Police/Crown using the mention to ensure that all material has been served;
 - Expect to be asked what the issues are. Need to be across the entire brief as would be for trial, including:
 - Issues that need to be covered in cross-examination,
 - Pre-trial issues,
 - Missing evidence or evidence to be obtained by subpoena,
 - Are there any reasons the matter is not ready to be listed for a pre-recorded hearing?

Intermediaries NOT Children's Champions

88 Role of children's champions

- (1) A person appointed as a children's champion (who may also be called a **witness intermediary**) for a witness is to communicate:
 - (a) to the witness, questions put to the witness, and
 - (b) to any person asking such a question, the answers given by the witness in replying to them,and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- (2) A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.

Who are witness intermediaries?

- 60 intermediaries have been trained and accredited
- They are experts or have experience in child communication
- 14 hours of role specific CPD per year
- Must be tertiary qualified as speech pathologists, psychologists, social workers, teachers [special needs] or occupational therapists
- Recruited and managed by Victims Services
- Self employed:
 - They can accept or reject a brief
 - They are paid an hourly rate for assessments (\$144/hr) and a set rate for reports (\$550)
- “Their paramount duty is to the court and their role is to support effective communication” (Procedural Guidance Manual (2016))

They are not...

- A second interviewer,
- An interpreter, supporter, advocate or counsellor,
- An expert witness. They should not be asked to give an opinion on the complainant's reliability or competence,
- A witness in the case: A third party (e.g. a police officer) should always be present when a witness intermediary is with a witness,
- A questioner at court,
- They do not replace WAS or FACS.

Witness Intermediary reports

- The Procedural Guidance Manual recommends including the following sections:
 - General observations
 - Attention and listening skills
 - Auditory comprehension/ understanding of spoken language
 - Spoken expression (expressive language)
 - Speech sound intelligibility
 - Reading and writing ability
 - Non verbal communication
 - View of witness on being assisted by a W.I
 - Other relevant information (social, level of education and development, emotional state)

Recommendations for questioning

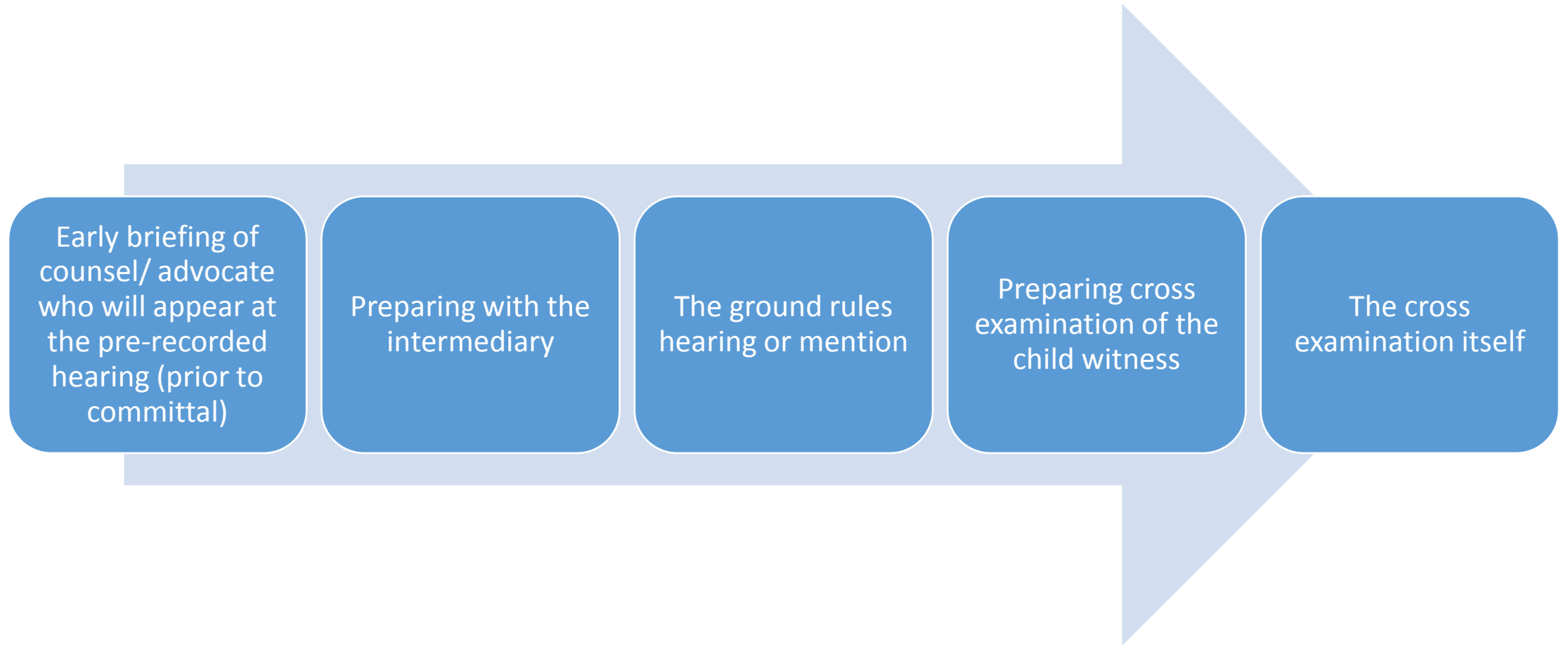
(screenshot from Procedural Guidance Manual (2016))

Questioning Recommendation	Advice for questioner	Rationale	v Directed
Avoid implying that AA took an active role in the alleged events, nor that she could have prevented them.	Instead of asking AA about 'sucking', ask about 'something being put in your mouth'	AA may give inaccurate responses to questions that imply that she did things rather than had them done to her. ⁶²	
Refer to the witness and the children's champion by their first names.	Preface questions with the witness's name for example, 'A, what happened after that?'	AA's attention may wander and using her name is likely to help her focus on the question.	
Use AA's specific vocabulary for body parts	Use 'minnie' for vagina Use 'titties' for breasts	AA may not recognise words such as vagina and breast.	
Use questions that start with a question word.	Rather than 'You have two sisters' say 'Do you have two sisters?'	AA might not recognise a statement with a question implied by intonation.	
Avoid 'tag' questions	Rather than 'It was raining, wasn't it?' ask 'Was it raining?'	AA may give unreliable responses to 'tag' questions as they are usually linguistically complex and may also be powerfully suggestive.	
Avoid idiomatic language	Rather than 'Did they hit it off?' ask 'Were they friends?'	AA may interpret words literally and may not understand idiomatic language in the way that the speaker intended.	

Other witness-specific recommendations

- Advocates sharing the wording of their questions with the W.I to seek advice. You should speak to the W.I in advance
- Where the W.I will stand/ sit during the child's evidence
- How the W.I and other people in Court should be referred to (e.g. first name)
- How the W.I will intervene if a communication issue arises
- Best time of day for the witness to give evidence
- Scheduling of breaks and best way for break to be conducted
- Whether and how the Judge and advocates will meet the child beforehand
- Use of communication aids, maps, diagrams etc.

5 points at which we can make an impact



Preparing with the intermediary

“Children’s champions must keep in mind that one of the aims of the cross-examining advocate is to ‘destroy and/or weaken evidence unfavourable to their client. The children’s champion’s task here is to **help the advocate in phrasing questions in a way that the witness can fairly deal with them but not ‘protect’ the witness from being challenged on their evidence.** They therefore need to examine the questions from the stand point of the witness’s communication needs. Children’s champions **must not disclose the content of the questions** to another party or to the witness in advance of questioning. **Children’s champions should encourage advocates to consult with them in order to minimise the likelihood of any interruptions to the questioning in Court**” (Procedural Guidance Manual (2016))

The ground rules hearing or mention

- The ground rules hearing is being held whenever a WI is appointed, usually on the day of the pre-recorded evidence hearing
- Arrangements are made for the complainant to attend later in the day (11am or 2pm)
- The ground rules hearing usually takes no more than 30-60 minutes
- The procedure:
 - The WI is asked to enter the witness box and is sworn or affirmed;
 - The judge asks the WI to take the Court through the recommendations;
 - The judge will check with the WI as to arrangements that have been made or need to be made to accommodate particular requests (e.g. stress ball);
 - Counsel have an opportunity to ask questions/clarify the position;
 - The judge will clarify how the WI should intervene if necessary (usually raise hand) and other matters (e.g. no wigs).

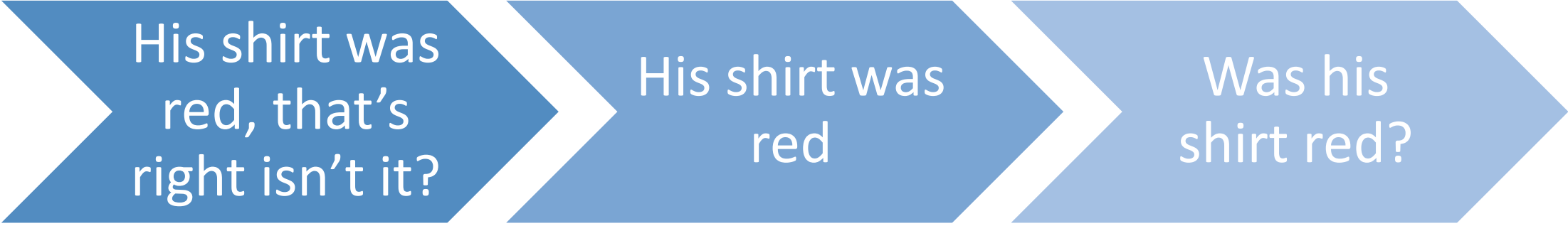
How can we use this mention?

- Defence Counsel need to recognise the opportunity the ground rules hearing offers to protect our client's interests and the opportunity to ensure we are able to put our cases effectively and appropriately. By Counsel participating in the process this gives the Court and the WI confidence that we are working with them not against them.
- This will or may impact on the way you can ask questions.
- Engage with the process
- Don't be defensive
- Be ready with suggestions
- Be open to asking questions in a new or different way
- For example:
 - Signposting;
 - Propositions with neutral examples first that are both correct and incorrect;
- Be prepared with questions- if you are unsure whether they offend against the ground rules the WI's are happy to go through them with you
- Speak, and speak early, with the WI

In practice – techniques

- Session next year on techniques of questioning and other very practical skills
- Today, think about some basics:
 - Slow down
 - Check you mean the same thing as the witness (e.g. touching)
 - Short questions
 - Chronological order
 - Signposting
 - Have you asked a question? Or have you just stated a proposition?
 - No tag questions (tag questions contain a statement and a short question)

In practice: Re-thinking tag questions



His shirt was
red, that's
right isn't it?

His shirt was
red

Was his
shirt red?

Cross examination techniques

What are we trying to avoid?

(© Cooper & Mattison, 24/3/16)

“The corner shop, is it in a busy area?”

Was there a shop?

Was that shop on the corner?

Did you ever go to that shop?

Was that shop in a busy place?

“you are probably a little shaken up at this stage?”

Don't use it!

“Putting the defence case”

The defence case was simply that it didn't happen. The defence originally wanted to put:

Q: X didn't put his willy in your mouth, did he?

With the judge's approval, and on the advice of the intermediary, defence counsel's questions were reframed. The traditional “statement and tag” form was avoided. This form was used:

- **Q: You said X put his willy in your mouth.**
- **X says he didn't put his willy in your mouth.**
- **Did X really put his willy in your mouth?**

Some observations from the intermediary perspective

“Too many under fives who are sole witnesses to murder – seven in one year was too much”

“A six year old witness was questioned for over three hours using language entirely inappropriate to any child”

(Cooper, 2014)

The intermediary perspective

“...on the suggestion of the prosecution barrister, the defence willingly ran all the questions, to be put to a 7 year old, [past] me. After reading the relevant toolkits over a weekend she then asked to go through some more questions. The cross examination was then only 10 minutes long. In another trial the defence asked for my advice as to how to phrase questions”

(Cooper, 2014)

Conclusion: Issues to think about...

- Early briefing of the cross-examiner
- Think about effective use of:
 - The Court timetable
 - The report
 - The intermediary
- Rethinking your approach to preparation and cross examination in these matters
- Is an effective cross examination one that results in:
 - a) No interruption by the witness intermediary, and
 - b) Appropriate ventilation of your instructions in cross examination?
- How do you achieve that?
- Defence experts may be necessary in the appropriate case
- Editing of transcripts and video

Acknowledgements

- Training provided by Prof Penny Cooper and Dr Michelle Mattison, 24 March 2015
- Slides and resources assembled by Helen Shaw and Sophie Williams, Legal Aid NSW
- Advocate's Gateway Toolkit