

# Contemporary Comments

## *Improving the reliability of child witness testimony in court: The importance of focusing on questioning techniques\**

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Considerable discussion during recent years has focused on ways to increase the reliability of child witness evidence, and reduce the negative impact of the courtroom environment on children's credibility and their psychological well-being. A large proportion of this discussion has focused on removing child witnesses from the courtroom and developing alternative arrangements by which children can give evidence (e.g., videotaped statements used as evidence-in-chief, closed-circuit television). There is no doubt that these arrangements have played a major role in reducing children's feelings of uncertainty and intimidation, and they have increased the ability of children to tell their stories and answer questions reliably (Cashmore 2002; Eastwood & Patton 2002). However, there are many other factors, apart from the physical environment in which a child's evidence is elicited, that impact on the quality and accuracy of a child witness's evidence.

This contemporary comment focuses on one of the most important factors that impacts on the quality and accuracy of a child's evidence; the questioning techniques. It offers four recommendations for improving the reliability of child witness evidence in court, along with justifications for these recommendations and suggestions for how these recommendations might be implemented. Each suggestion focuses on the impact of questioning techniques, from pre-trial questioning to questioning during the trial. It does not focus on the rules of evidence regarding child statements or the physical environment in which children's evidence is elicited.

### **Recommendation 1: When determining the reliability of a child's statement, focus on the manner in which that statement was obtained**

The significance of questioning during the initial investigative stages when a child's statement is taken cannot be overestimated. Several experts have commented that, provided the alien and intimidating factors of the judicial experience are addressed, one of the best predictors of reliable child witness evidence is a good initial investigative interview (McGough 1994; Powell, Fisher & Wright 2005). The more complete and accurate the initial investigative interview, the more complete and accurate the child's story during examination-in-chief. A complete and accurate account, in turn, makes the child's account in cross-examination less susceptible to distortion.

Best practice guidelines for eliciting an accurate and detailed account of abuse from a child are well established. The central aim of these guidelines is to obtain an account of the alleged offence in the child's own words, at his or her own pace, and without interruption

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(Poole & Lamb 1998; Wilson & Powell 2001). The account generally proceeds with the interviewer asking a general or broad, open-ended question<sup>1</sup> (e.g., 'Tell me everything you can remember about...from the beginning to the end'). The interviewer then uses minimal nonverbal encouragers (e.g., head nods, pauses, 'Mmmm', silence, 'Uh-Huh') and further open-ended questions (e.g., 'Tell me more about that.' 'What happened then?' 'What else can you remember about...?') to steer the interviewee to the next point in the story or to gently encourage the interviewee to provide further narrative information. Once the interviewee has reached the end of the story, (s)he is usually then guided back to parts of the narrative and provided with the opportunity for further recall (e.g., 'You said Billy touched you. Tell me more about the part when he touched you'). The importance of these prompts is that they are general. They focus the interviewee on a particular part of the account but do not dictate what specific information is required. In contrast, specific questions asked about a specific detail or concept can often be answered in just one or two words (e.g., 'Who is Billy?', 'Where did he touch you?').

One of the main benefits of eliciting a free narrative account compared to a more focused or brief response is that responses to open-ended questions are more accurate than those elicited by specific or closed questions (Ceci & Bruck 1993; Lipton 1977). Open-ended questions may elicit less specific detail compared to a series of specific questions, however when open-ended questions are used, differences in the accuracy of responses among various witness groups are considerably reduced. Indeed, *all* witnesses (even those as young as four years) tend to provide highly accurate information in response to broad, non-leading, open-ended questions (Agnew & Powell 2004; Ceci & Bruck 1993; Powell 2000).<sup>2</sup>

Given young children's ability to provide reliable accounts in response to open-ended questions, many experts argue that focusing on the questioning strategies of the interviewer is a more useful indicator of the reliability of children's accounts than brief tests which require them to prove their competency (e.g., assessing children's understanding of a truth and a lie) (Bala, Lee, Lindsay & Talwar in press; Lyon & Saywitz 1999; McGough 1994). Results of such tests have *not* been found to reliably predict which children will be accurate informants (Goodman, Aman & Hirschman 1987; Pipe & Wilson 1994). When children misreport events, it is usually due to the nature of the questions asked and/or because the child misunderstands the purpose of the questions. In other words, unintentional memory errors due to complying with the perceived demand of the interview situation or inappropriate questions usually account for inaccurate testimony in child witnesses rather than intentional deception per se (Poole & Lamb 1998).

## **Recommendation 2: Address the problems of leading and closed questioning used during cross-examination, and prepare the child where possible for this type of questioning**

Training programs for investigative interviewers largely focus on teaching interviewers to utilise open-ended questions, and thereby maximise the accuracy of the responses obtained from the child. Indeed, the use of open-ended questions has become the 'gold standard' for investigative interviewers. However, the 'gold standard' of investigative interviewing is very different to that used in the courtroom. In particular, cross-examination is largely

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- 1 Definitions of open-ended questions vary somewhat among researchers. In this contemporary comment, open-ended questions refer to questions that require multiple-word responses and allow interviewees the flexibility to choose which aspects of the event they will describe.
  - 2 This is provided that the witness actually encoded the event, and that his or her memory has not been exposed to prior sources of contamination.

comprised of closed questions that focus the witness' attention on minute details of events out of time sequence. Questions are frequently suggestive in their wording; that is, they suggest the desired response to the witness, e.g. 'You didn't see that, did you?' This long-standing technique, known as 'putting leading questions to a witness', used in combination with complex language, acts to confuse and intimidate child witnesses in an attempt to identify inconsistencies in their testimony (Brennan & Brennan 1988; Victorian Law Reform Commission 2004).

The process of cross-examination can have a traumatising effect on child witnesses (Eastwood & Patton 2002:30). However, it remains questionable whether cross-examination could be achieved without using any closed or leading questioning (Mildren 1997). Accordingly, there needs to be: (a) greater identification of the limitations of this type of questioning by prosecutors during re-examination; and (b) greater preparation of child witnesses for dealing with this type of questioning.

Re-examination offers prosecutors an opportunity to identify to the court where a child's testimony has been obfuscated during cross-examination. If a prosecutor is concerned that closed and suggestive questions during a cross-examination elicited an inconsistent or contradictory account from the child, s/he could use the re-examination to call attention to the inconsistency extracted by the different questioning procedures used. For example, the prosecutor may consider asking the child simple questions that would clarify inconsistencies in the child's evidence between examination-in-chief and cross-examination. The ability of prosecutors to address such process issues depends in large part on the prosecutor's knowledge and training surrounding the issue of children's memory and suggestibility, as well as the rules regarding re-examination.

With regard to the issue of better preparing children for courtroom questioning, research has demonstrated the usefulness of teaching the child the 'groundrules' of the investigative interview (e.g., the importance of not making anything up, correcting the interviewer, saying 'I don't know', or 'I don't understand') (Gee, Gregory & Pipe 1999; Nesbitt & Markham 1999; Saywitz & Moan-Hardie 1994). When an interview adheres to best-practice guidelines, simple instruction of the ground rules is often enough (that is, merely stating what the rules are). Under more leading, coercive or intimidating interview conditions, more extensive instruction and practice in adhering to these ground rules is often required to reduce errors (Ellis, Powell, Thomson & Jones 2003; Saywitz & Moan-Hardie 1994). The type of instruction I refer to here involves helping the child to prepare for, or be more resilient to, the courtroom process, as opposed to shaping the content of the child's account.

### **Recommendation 3: Increase the feedback to investigative interviewers regarding the judicial reaction to their interview**

As stated earlier, eliciting accurate statements from children requires the ability to maximise the number of open-ended questions and minimise the use of specific questions, particularly closed or leading questions. However, the interviewer also has to address the demands of the court, which in cases of alleged ongoing abuse requires the child to particularise the offence (i.e., identify details particular to the different occasions of abuse so that they may be distinguished from one another). Such highly specific contextual details are not always obtained in response to open-ended questions. Investigative interviewers are therefore presented with the dilemma of balancing the need to use questions that minimise inaccuracies in the child's testimony while also ensuring that sufficient detail is elicited to enable offences to be particularised in court.

Particularising an offence is an extremely complex task for investigative interviewers. It involves considerable knowledge about legislation, case law and child eyewitness memory, as well as agreed protocols between agencies engaged in assessing, investigating and prosecuting allegations of ongoing abuse of children. Investigative interviewers' knowledge and understanding of the legal aspect is understandably quite limited. Given that investigative interviewers spend little time in the courtroom, they often experience considerable confusion regarding decisions passed down by the court. This confusion provokes a sense of guilt or anxiety when they learn that the prosecution did not proceed with the case or the court dismissed charges on the basis of insufficient particulars. These emotions, in turn, may generate a change in subsequent interviewing, with interviewers increasing the specificity of their questions in pursuit of specific detail (Wright, Powell & Ridge 2004). Feedback from both experts in interviewing and lawyers is crucial for assisting investigative interviewers to balance the need for specific detail while ensuring their questions minimise inaccuracies in the child's account. This issue is portrayed well in the following quote from an experienced Australian police officer:<sup>3</sup>

Learning how to conduct an interview takes practice but it's also important to experience the whole process from start to finish... the finish point being the court and seeing how the court views the interview. Not many police actually get to that point. They are merely told that the charge couldn't be particularised...and then ask themselves 'Well why couldn't it be particularised? I thought I did particularise it.' But the court has a different view, so it gets knocked out and there's all this discussion going on between the OPP and the judge and the informant is left out of it. It's so intimidating that whole process because often you don't even know why a particular charge was dropped, or you don't know why a certain decision was made in court because we're not fed back any of that information. We would physically have to be in the court to hear why the decision was made... You can read the transcripts of the court but often it's in jargon that we don't understand. That's frustrating. And if it's frustrating for the police officer then it's frustrating for the witness and for the victim and their families because we're trying to explain a process that we don't even understand. It has the domino effect.

In the absence of feedback, police officers remain uncertain about the quality of their interviewing and whether changes are needed to ensure they elicit evidence that can be used by the court. In recognition of this, the Victorian Law Reform Commission (2004) recently established a process for providing police officers with systematic feedback about the use and quality of videotaped statements involving child witnesses (referred to as VATEs). A standard feedback form has been prepared, which is completed by the prosecutor or solicitor responsible for prosecuting the case for which the VATE was made and then returned to the relevant police member. The feedback form is a single-page document that outlines whether a VATE tape was used in court and allows for brief comments regarding the admissibility, usefulness and quality of the interview. The introduction of this feedback form will no doubt be very useful. However, it is yet to be seen whether it will contain the level of specificity needed to assist police members to better understand judicial decision-making about particularisation. For feedback about the evidential quality of VATE interviews to be useful, this feedback may need to be accompanied by regular forums or

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3 The quote was obtained in May, 2004 during an interview conducted by Belinda Guadagno, a research student completing the Doctor of Psychology (Forensic) course at Deakin University. As part of her thesis, Belinda conducted 50-minute interviews with several police officers, police trainers, magistrates, judges and lawyers throughout Australia. The purpose of the interviews was to gain a better understanding of how police officers typically interview children about ongoing abuse in the field, and what specific type of information professionals believe is required for successful prosecution in cases where the evidence suggests there has been ongoing abuse.

case-conferences where legislation and case law decisions could be discussed. Further, there would need to be greater consensus or clarity among individual prosecutors as to what constitutes particularisation.

#### **Recommendation 4: Increase the amount of training among police, lawyers and the judiciary regarding children's suggestibility and the relative impact of various questions on error rates**

If there is evidence that a child has been exposed to leading or suggestive questions in his or her investigative interview, it is obviously important to examine the nature of the questioning (if possible) and the likelihood of contamination arising from the questions. Re-interviewing the child would not necessarily help to determine the impact of leading or suggestive questioning because contamination cannot always be undone. That is, the misinformation may have become a false belief or the child may not remember the source of information (Powell, Jones & Campbell 2003). Similarly, there may be little use in assessing the behaviour or demeanour of the child in the videotape (children can give highly credible, yet inaccurate, accounts). Assessing the impact of the questioning and the context in which the evidence was elicited requires a good understanding of children's suggestibility and the factors that lead to errors in children's accounts. Unfortunately, this issue is not well understood.

In particular, the likelihood of a question contaminating the child's account depends on:

- the degree to which the question includes specific details not previously raised by the child;
- whether the question presumes information that is still in dispute;
- whether the question restricts the child's response;
- whether the interviewer coerces or pressures the child to respond or elaborate on information that is still in dispute;
- the presence of group, individual or contextual factors that heighten vulnerability to suggestion;
- the social context and the child's understanding of the interview process;
- the position of a question within the interview process.

[Refer to Ceci, Powell & Principe 2002, for review].

The value of better training among members of the judiciary in relation to children's suggestibility and the impact of various questions on error rates is two-fold. Firstly, an examination of the reliability of a child's statement requires an understanding of these issues. Secondly, current legislation provides many judges and magistrates power to protect children from unfair cross-examination by controlling the types of questions asked and the manner in which they are asked. The ability of judicial officials to decide when to interject is, however, dependent on their knowledge of children's development and appropriate questioning techniques. Better training about children's suggestibility and the impact of various questions on response accuracy would assist in this decision-making process.

#### **Martine B. Powell**

Professor of Forensic Psychology in the School of Psychology, Deakin University (Melbourne Campus), and coordinator of the Doctorate of Psychology (Forensic). Professor Powell has conducted research on eyewitness memory and investigative interviewing since 1989 and has trained police, lawyers and social workers in interviewing techniques in every

state of Australia. Correspondence should be directed to Professor Powell, School of Psychology, Deakin University, 221 Burwood Hwy, Burwood, VIC. 3186, Australia. Ph; (03) 9244 6106, FAX: (03) 9244 6858, email: <martine.powell@deakin.edu.au>.

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