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**Author**

Westera, Nina J, Powell, Martine B, Milne, Becky

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**Lost in the detail: Prosecutors' perceptions of the utility of video  
recorded police interviews as rape complainant evidence**

Nina J. Westera

Griffith Institute of Criminology, Griffith University, Australia

Martine B. Powell

Centre for Investigative Interviewing, Deakin University, Australia

Becky Milne

Centre of Forensic Interviewing, Institute of Criminal Justice Studies, University of

Portsmouth, England

**Corresponding author:** Nina Westera, Griffith Criminology Institute,  
Griffith University, 176 Messines Ridge Rd, Mt Gravatt, Queensland,  
4122, Australia

Email: [n.westera@griffith.edu.au](mailto:n.westera@griffith.edu.au)

**Abstract**

This study explored the perceptions of ten Crown Prosecutors about the utility of police interviews as video evidence-in-chief for adult sexual assault complainants to determine how to improve these interviews. A themed analysis of prosecutors' responses indicated three major concerns about these interviews: the interviewer using wordy instructions, the lack of chronology and logical structure, and the relentless pursuit of unnecessary detail. These findings suggest that prosecutors' concerns are primarily due to police using cognitive interview methods that attempt to enhance the amount of detail recalled by a complainant. The authors discuss why generating large amounts of detail may be problematic in interviews with sexual assault complainants and provide recommendations for how police can adapt interview practices to better meet evidential needs.

**Keywords**

Criminal investigation, prosecution, video-evidence, cognitive interview, eyewitness testimony, sexual offences

## **Introduction**

Achieving just outcomes in adult sexual assault cases is one of the most serious and complex problems facing the criminal justice system today. A review of attrition studies in five countries (Australia, Canada, England and Wales, Scotland and the United States) conducted between 1990 and 2005 found that only 14% of all victims choose to enter into the criminal justice process by reporting to police (Daly & Bouhours, 2010). For those that do report, attrition is high and outcomes are poor, with only 12.5% of reported cases resulting in conviction. These poor prospects, prolonged prosecutions and the stress of giving testimony lead to low victim satisfaction, with some victims even reporting being 're-victimised' by the process itself (Estrich, 1987; Konradi, 1999; Lees, 2002).

To address the issue of poor reporting and prosecution rates, a number of countries have introduced the ability to use a video record of the complainant's police interview as the basis for his or her evidence-in-chief (referred to in this article as video-evidence). For this alternative measure, the video-recorded interview is played to the judge or jury, followed by any supplementary questions from the prosecutor and cross-examination by defence counsel. Video-evidence is likely to improve both the completeness and reliability of a complainant's testimony (see Loftus & Palmer, 1974; Read & Connolly, 2007; Westera, Kebbell, & Milne, 2013b), and reduce the stress on the complainant of having to recall evidence-in-chief in the courtroom (Burton, Evans, & Sanders, 2006; Deffenbacher, Bornstein, Penrod, & McGorty, 2004; Hamlyn, Phelps, Turtle, & Sattar, 2004; Kebbell, O'Kelly, & Gilchrist, 2007). Despite these potential benefits, many prosecutors are reluctant to apply to use video-evidence with adults (Criminal Justice Joint Inspection, 2009; Stern, 2010; Triggs, Mossman, Jordan, & Kingi, 2009). This study examines one of the main reasons

prosecutors give as to why they choose not to apply to use video-evidence—police interviewing practices do not present well as evidence.

There is a growing body of literature to suggest legal professionals are concerned about the suitability of police interview methods as evidence with adult sexual assault complainants (Criminal Justice Joint Inspection, 2009; Stern, 2010; Westera, Kebbell, & Milne, 2013a). Anecdotes reported in reviews of the use of special measures and the criminal justice response to rape in England and Wales include comments from prosecutors and judges that police interviews are overly long, difficult to follow, not chronological, repetitive and rambling (Criminal Justice Joint Inspection, 2009; Stern, 2010). These anecdotes are supported by a systematic analysis of the perceptions of thirty prosecutors in New Zealand (NZ), which found that one of the perceived disadvantages of video-evidence with adult sexual assault complainants was the quality of police interviewing (Westera et al., 2013a). In this NZ study, the use of a questionnaire meant only superficial responses were given, making it impossible to ascertain exactly why police interviewing was a problem. For example, it was not established whether this dissatisfaction was due to poor police practice or the interview methods used by police. Alternatively these concerns could reflect a reluctance of prosecutors to adopt video-evidence with rape complainants due to perceptions that live oral evidence is the most credible and persuasive form of testimony (see Ellison & Munro, 2013; Taylor & Joudo, 2001; Westera et al., 2013a). To date there has been no evaluation of the suitability of police interviewing methods for eliciting evidence from adult complainants. A more detailed understanding of this issue could help determine how, if needed, police practice can be adapted to better meet evidential purposes.

*The current study*

The aim of the current study was to address these limitations in the literature by gaining an in-depth understanding of prosecutors' views regarding the usefulness of police interviews as evidence. We wanted to better understand how well current police practice met evidential purposes, and if – as in previous studies – prosecutors had concerns, the reasons for their concerns. The most appropriate method for this type of in-depth enquiry is qualitative interviews or focus groups because they allow the participants to elaborate on their experiences and perceptions. Conducting in-depth interviews would enable us to gain a thorough understanding of the reasons underlying prosecutors' views and the assumptions that underpinned them.

We focused on crown prosecutors from one jurisdiction, NZ. We selected NZ because in this country prosecutors are familiar with police interviews of adult sexual assault complainants, as police policy is to video-record these interviews (New Zealand Police, 2009). Prosecutors regularly review these interviews to decide whether to apply to use them as video-recorded evidence. To understand the applicability of this research to other jurisdictions, it is important to examine the current context of video-evidence in NZ. In this country, the Evidence Act 2006 s.103 expressly allows the use of alternative ways of giving evidence upon application to the court, including the use of the video-recorded police interview as evidence-in-chief. Either party may apply to use this alternative way of evidence, subject to a number of grounds contained in s.103 of the Act, many of which are likely to apply to adult complainants of sexual assault (e.g. the trauma suffered by the witness, the witness's fear of intimidation, the nature of the evidence the witnesses is expected to give). Also relevant to these complainants, s.104 of the Act sets out that when determining whether to grant an application, the court is required to consider the

views of the witness, and the need to minimise stress on the witness and promote recovery.

Similar to England and Wales, when conducting video recorded interviews with adult witnesses (including sexual assault complainants), NZ police are trained to use the cognitive interview. This method was developed by psychologists, Fisher and Geiselman, who applied scientific understandings about memory to help police investigators gain more detail from eyewitnesses to crime (Fisher & Geiselman, 1992; Fisher, Geiselman, Raymond, Jurkevich, & Warhaftig, 1987; Geiselman et al., 1984). The cognitive interview combines communication skills with a number of instructions that can aid memory retrieval (mnemonics) and has been shown to increase the amount of detail recalled by an eyewitness without compromising the overall accuracy of the account (Fisher & Geiselman, 1992; Köhnken, Milne, Memon, & Bull, 1999; Memon, Meissner, & Fraser, 2010). A full description of the cognitive interview is attached in Appendix 1.

## **Method**

### *Participants*

After obtaining ethical approval for the study from Griffith University, we invited Crown Prosecuting agencies from different regions across NZ to participate, and all agreed. To ensure the ecological validity of the findings, we purposefully sampled Crown Prosecutors with extensive experience working on adult sexual assault prosecutions (Strauss & Corbin, 1990). We asked a senior manager in each agency to nominate a prosecutor who they considered an expert in adult sexual assault prosecutions. Ten Crown Prosecutors were nominated and agreed to attend a focus group (six prosecutors) or participate in a telephone interview (four prosecutors) depending on what was most convenient for them. The focus group was conducted

first and supplemented by one on one interviews to eliminate the possibility that any unity of views expressed in the focus group was due to social dynamics such as conformity. We determined the number of participants by data saturation, and stopped interviewing additional prosecutors when no new information was arising (Sim & Wright, 2000). The prosecutors – five female and five male – were experienced, and had spent a mean time of 14.23 years as a prosecutor (ranging from 6 to 18 years).

#### *Data collection*

We conducted the focus group and interviews using a non-directive approach to gain an in-depth understanding of prosecutors' observations and views. Prior to the focus group or each interview, we provided participants with preparation material that set out the broad research topics: we asked them to reflect on current police practice when interviewing adult sexual assault complainants and the usefulness of these interviews as evidence. We administered the focus group (approximately 120 minutes long) and the interviews (each was approximately 60 minutes long) using an unstructured interviewing method, where minimal control was exerted over the discussions (Patton, 2005).

We used a number of techniques to ensure prosecutors could freely discuss their experiences and concerns (if any), and reasons for those concerns (Wright, Powell, & Ridge, 2006). Firstly, the topics in the interview schedule were broad. Secondly, we used a conversational style of interview to allow flexibility to pursue issues raised by prosecutors, whatever their nature. Finally, we played a passive role during the interviews, using mainly open questions to gain more elaborate detail about the issues raised. To prepare for the possibility that it was unclear if prosecutors' concerns were about poor adherence by police to best practice interviewing, or the interview methods themselves, we developed an exemplar of the different police

interviewing methods that was shown to the prosecutors once they had described their concerns.<sup>2</sup>

The focus group and interviews were audio recorded, transcribed and the transcriptions were double-checked for accuracy. A grounded theory approach was used where we analysed participants' responses inductively rather than deductively from a pre-existing theory or concept (Strauss & Corbin, 1990). The first two researchers conducted a thematic analysis of the transcripts by: (1) independently analysing each transcript and making notes about the common themes of prosecutors' responses; and (2) meeting and agreeing on the common themes. There was strong agreement between the researchers about the interpretation of the responses. In the next section, we report on the common themes of the responses and provide quotes to illustrate prosecutors' views. These quotes have been edited to de-identify all participants, and corrected to remove grammatical errors and improve readability.

## **Findings**

The over-riding theme from prosecutors' responses was that current police interview practices with adult sexual assault complainants did not present well as video-evidence. Every single prosecutor from each different region spontaneously raised this concern early in the focus group or interview, and spoke about it with passionate conviction. Specifically, prosecutors described police interviews as often being incoherent and overly long, containing a large number of inconsistencies about irrelevant issues, and not unfolding like a normal human interaction. Our analysis found that, as a result of these features, prosecutors were concerned that the quality of the evidence was reduced, jurors were less able to reliably assess complainant credibility, and the criminal justice process was made stressful for the complainant. These concerns about the poor presentation of police interviews were so strong that

prosecutors reported they often did not apply to use video-evidence, even though most preferred to use this method.

I don't use video-evidence very much in trials, and I can say it's the same for the other prosecutors where I work. There are a few reasons for that: they're long, they contain information that's not relevant or is inadmissible, and it's out of order, so the chronology's not there. It doesn't provide the jury with a helpful narrative, and it's confusing. So, usually, what we end up doing is leading the evidence from an adult complainant in court, and usually that can be done in a concisely relevant, admissible way before the jury, in a chronological narrative that makes sense to both the complainant and the jury.

I find video-evidence hopeless for court purposes. And that's mainly because they are all over the place, as people don't recall things in a chronological, sequential, logical order. Most of the complainants that we deal with don't have that capacity at the best of times, let alone in the interview. What you see in the interviews is that often they are quite long, and there might be a lot of stuff at the beginning that is not relevant, so by the time you get to actually what happened, like the rape or whatever it is, the complainant is actually really tired; they've had enough - they just want to get out of there.

When discussing the utility of the interviews, our analysis suggests that prosecutors' justifications for their concerns were three-fold. These included the use of wordy instructions, the lack of chronology and logical structure, and the relentless pursuit of unnecessary detail. The remainder of the Findings section elaborates on the themes of prosecutors' observations of police interviewing practice and the reasons they gave for their concerns under these three topics.

*Theme 1: The use of wordy instructions*

A common feature of all the prosecutors' descriptions of the interview process was the interviewer commenced the interview with a lengthy preamble, which

included a number of wordy instructions that contained large amounts of information. These instructions were all about how the witness should remember and report information, such as asking the complainant to concentrate hard and report in detail by using an example of the level of detail required, such as describing a pen or other object. Many of the prosecutors perceived that these instructions were artificial and bizarre, and contained many ‘tricks’. Prosecutors reported that as a result of the instructions the complainant would often not directly engage with the interviewer by looking away or closing his or her eyes when reporting. Prosecutors noted the interviewer would often use similar wordy instructions encouraging the complainant to repeatedly go over aspects of his or her account during the interview.

Our analysis indicates a number of common themes as to why prosecutors perceived these instructions reduced the quality of the evidence. Some of the interview instructions were considered to trivialise the process, because jurors expect the court to be a serious forum where this type of pseudo-science was out of place—a problem that was exacerbated when the interviewer was overly sympathetic. Common terms used to describe these instructions and this approach to the interview included: ‘airy-fairy’, ‘pseudo-science’, and ‘mumbo jumbo’. Prosecutors felt that the complainant’s lack of direct engagement with the interviewer—when he or she was instead concentrating—reduced the complainant’s ability to engage with jurors. They also perceived that the artificial nature of these methods meant jurors would be less able to relate to the complainant through shared human experience and as a result, would find the complainant less credible.

The preamble is detrimental to the perception of the victim, because the victim is seen to be tainted by what I regard as a quacky kind of thing. If you’ve got a ‘he said, she said’ situation - which, let’s face it, that’s what we deal with - what are we telling the jury all the time? She’s real, you can believe her. What is the first thing

the jury see of our victim? Her sitting there for 10 minutes being lectured on how she's to respond.

It's embarrassing to sit there for minutes and minutes and listen to the interview preamble, like you're in some kind of encounter group and we're all going to hold hands. It taints the Crown case, we're embarrassed because we know the jury don't like it. It's airy-fairy. It's a courtroom. We're dealing with serious material... I think it has the potential to undermine the complainant's credibility.

The interview is a hard conversation, but we have conversations on a daily basis. I think if you turn it into something far more artificial you pull away from the complainant's ability to relate as a human and relate human experiences to you.

Further undermining the complainant's credibility, prosecutors perceived that the seriousness of the alleged offending meant jurors would expect a competent witness to remember what happened without memory prompts. Particular exception was taken to the instruction that it was 'okay to be uncertain and if you don't remember just tell me' due to these instructions laying down a platform for defence cross-examination establishing there was a reasonable doubt about events. Concentrating hard and reporting only partial memories were also concerns, as prosecutors considered that jurors – who are naïve to the problems with memory recall – would believe that the complainant should easily be able to remember such traumatic events if they did in fact occur.

I don't like that in the interview they say if you can't remember something completely, or can only remember it partially. The jury will think, 'Right, so she can't remember something completely, she can only remember something partially. Gee, if I was raped I reckon I'd remember everything, that would be indelibly imprinted on my memory.'

In the preamble I've seen the complainant being giving a licence to be uncertain and unsure... but what we want is certainty. What *can* you remember? Well I find the preamble where they are saying things to them like 'It's okay, if you're unsure about something just say you're unsure. If you can't remember something, just say you don't remember.' To me, that is just sowing the seeds for reasonable doubt.

Another reason for prosecutors' concerns was that the wordy and detailed instructions could create fatigue in the complainant due to cognitive overload. Prosecutors suggested this fatigue was compounded by the fact that many complainants are already under considerable emotional stress due to the nature of the crime, had already undergone a lengthy engagement process with the police prior to the interview, and were often vulnerable in other ways (e.g. suffering from mental disorder or intellectual impairment, or were repeat victims of abuse throughout their lifetime). Prosecutors were particularly concerned about the instruction to give a high level of detail adding pressure to a witness who was already likely to be overwhelmed by the task of disclosing the sexual offending. Drawing from their experience with complainants, the prosecutors suggested many complainants did not need extensive preparation because they had already thought about what they wanted to say, were cooperative and ready to talk.

I think bombarding them with a whole bunch of rules before they are then asked to recall actually undermines the process of recall. I don't think it's helpful. By the time the interviewer says now, I want you to tell me what happened, your witness has sat there for ages.

I don't think it lends itself to clarity of reporting. I think you'll get the same clarity and detail - or better - from someone who just comes in and starts having a conversation with an interviewer, who themselves understands what it is they are setting out to achieve. The fatigue issue is we're scrambling their brain. So you've

got all this time, and then you've got the lead up to the interview, and by that point we still haven't got to why we're here. I just think from their point of view it's overkill.

Overall, prosecutors perceived that police using wordy instructions during the interview trivialised the evidence giving process, undermined the complainant's credibility and reduced the reliability of her account due to fatigue.

*Theme 2: The lack of chronology and logical structure*

Another common theme to prosecutors' descriptions of police interviews was the lack of any clear structure or chronology. At the beginning of the interview, they observed the interviewer using specific instructions that encouraged the complainant to control the interview and report the account in whatever order they liked. Once the lengthy pre-ambule to the interview was over, the interviewer went from taking an active to a passive role in the interview process. Prosecutors described the interviewers encouraging the complainant to give long narrative responses and being hesitant to interrupt. Interviewers used minimal prompting and questioning, but when they did question it was often in the form of wordy instructions that again elicited long narrative responses. As a result of this approach, the complainant did most of the talking, gave his or her account in whatever order they wanted, and only reported what was important to them.

Prosecutors expressed concern that the lack of chronology in the complainant's responses reduced the coherence of the interview, made the interview confusing and difficult to follow. They perceived that jurors needed a logical structure in order to properly comprehend the evidence, especially when the allegations were historic and involved repeated offending. The interviewer's apparent reluctance to control the interview meant the account sometimes did not cover evidentially important issues that prosecutors considered were the purpose of the interview in the

first place. The prosecutors reported that the overall effect of the lack of chronology and logical structure was a reduced ability for jurors to comprehend the evidence.

The problem is in terms of clarity, chronology, and the way the complainant's coming across as confused. We very rarely use the videos as evidence because they don't often have a good enough logical structure as you would lead evidence, to be able to clearly prove charges to a jury. So they bounce around throughout the interview and come back to points, sometimes in a contradictory way, where you're better to simply abandon the interview. Frequently the problems are that the questioning doesn't elicit sufficient detail on the elements of an offence that you've got to prove, and sometimes elements are glossed over, or missed entirely.

Often it's very difficult for us; we get these massive interviews, long transcripts, which are quite unwieldy. And we go through those and try to figure out for ourselves what happened first, second and third of the incidents, and also within an incident what happened first, second and third, because that's all relevant to the jury's assessment. Chronology is really important, that's how humans relate stories to each other.

In sum, the prosecutors perceived that the style of police interviewing was not conducive to producing a coherent account that jurors could easily comprehend.

### *Theme 3: The interviewer's relentless pursuit of unnecessary detail*

All prosecutors described a lengthy interview process where the complainant reported a high level of detail across the whole account. The interviewer was observed to encourage this high level of detail through explicit instructions to the complainant to report everything using an example of detail (as described earlier), and by repeatedly going over aspects of the account with the complainant. Prosecutors perceived that this relentless pursuit of detail resulted in the complainant providing so much detail that the account was even more incoherent.

Our analysis suggests that prosecutors perceive the prioritisation of maximising detail throughout the interview as unnecessary and often counter-productive for a number of reasons. Although a high level of detail about matters directly relevant to the alleged offending was considered important (e.g. issues around consent and the sexual acts), a global increase in detail was perceived as problematic. Prosecutors were concerned that unnecessary descriptive or contextual detail unrelated to the offence cluttered the account, making it less coherent. An increase in detail also had the potential to generate more inconsistencies within the complainant's account and with other evidence. Even though these inconsistencies were often minor and not directly relevant to the case, this added fodder for defence counsel to use when cross-examining the complainant.

Who says more detail is better? This is the fundamental conflict. The police just pile on the detail as though it's a good thing, and we don't need all that detail... It depends what the detail is. There's relevant and necessary detail and there's completely unnecessary detail.

Maximising information is different to maximising relevant information and relevant detail. And if we get a lot of detail but we don't have context and we don't have any chronology, then we can't really use it anyway, and it only serves to blur the picture and potentially act as a goldmine for defence in cross-examining a complainant.

In a trial situation it's easy for small inconsistencies to be made to look quite large, and so if you've got a really lengthy interview, where they go over the same incident repeatedly time and again, she might use slightly less words with slightly different descriptions, or she might come at it from a different angle, or the interviewer might, and sometimes that results in the defence suggesting that she has been really inconsistent. And whilst you and I know that what she's really saying is the same,

it's harder to persuade the jury because they think, 'Well why did she use a slightly different description? Why didn't it all come to her the first time?', and defence really make a lot of it. Sometimes I think going over something again and again and again—whilst it might elicit a little bit more detail—might actually not be that helpful, in terms of the relevant detail, and the positive value of it being outweighed by the problems that can arise.

Another theme to prosecutors' concerns was that the process of eliciting this extra detail prolonged the interview process and exhausted the complainant. They perceived that fatigue during the interview could result in the complainant making more errors when reporting events that would later expose them to damaging cross-examination. This problem was considered to have a flow-on effect to the rest of the court process, making every stage - from reviewing of the interview when preparing to give evidence to being present in court whilst the video was played as evidence in chief - more onerous.

And you want to encourage the witness, and I think if you sort of empowered the witness in a way by saying how would you like to talk about this? It takes away, because all they worry about is what they're going to say... I think it becomes too overwhelming and we get too much detail about too little. What becomes a controller of the interviews is tiredness and exhaustion rather than structure.

They've probably gone there to unload and that's what's important to them. They're potentially nervous. But then this instruction for detail trivialises what they are there to talk about. They're going to be talking about the most intimate things that have happened to them, and they're being told about how to describe a cup of tea or a pen, and I just think that that is complete anathema to what they understand they are there for.

Prosecutors were also concerned that the large amount of detail lengthened the time taken for criminal justice decision makers to review the interview. They

themselves found it difficult and time consuming to review the interviews in preparation for trial and to identify the specifics of each alleged offence, especially with historical and partner offending where there are multiple counts. They were concerned that jurors would become fatigued, ‘switch off’, and not properly listen to the evidence due to this extra length and overall lack of coherence. The extra detail was also considered to make it difficult for jurors to distinguish between important and unimportant details.

The interviewer gets too much wrong detail, so that what happens is the right detail is diluted in its power and strength, because there’s so much wrong detail in there.

One of the difficulties is at the time of the interview no one knows what is going to become important down the track, and so what we might lead in a trial is what will be important. If I can give an example: a rape happens in a car, and defence might challenge whether the accused owned that car at the time, to undermine whether it even happened. The complainant is asked to describe the interior of the car. What was the car like? What were the seats covered by? What colour were they? But what I’m saying is, if there’s no contest about the person owning the car at the time, then all that detail is irrelevant – completely irrelevant.

Finally, we explored prosecutors’ views on how to improve the usefulness of police interviews as evidence. Our analysis found that, based on their observations when prosecuting these cases, prosecutors commonly reported that neither the lengthy instructions nor the desire for high levels of detail were warranted. Many referred to the inherent tension of using an investigative interview for evidential purposes, especially when it is not known at the interview what issues will later be relevant at trial. Nevertheless, most of the prosecutors were adamant that a complainant was capable of giving a quality account that could meet both investigative and evidential purposes. They suggested interviewers could achieve this outcome by using well-

crafted and structured questioning that enabled the complainant to simply tell their story and focus on details about issues that are likely to be relevant to the case.

## **Discussion**

Consistent with prior research, the current study found prosecutors in NZ were concerned that police interviewing methods severely limit the usefulness of video-evidence with adult sexual assault complainants (Criminal Justice Joint Inspection, 2009; Stern, 2010; Westera et al., 2013a). Specifically, prosecutors criticised police interviews for being too long and incoherent, containing a large amount of irrelevant information that was sometimes inconsistent, and unfolding in a way that was far removed from a usual human interaction. As a result, despite most prosecutors preferring video-evidence, they reported that the poor utility of police interviews as evidence meant they often did not apply to use video-evidence with adult sexual assault complainants.

The value prosecutors placed on ensuring the interview provides a credible account is supported by previous research that suggests a complainant's credibility is often the central issue in rape trials and is readily eroded by extra legal factors such as victim blaming stereotypes (Daly & Bouhours, 2010; Estrich, 1987; Lees, 2002). Prosecutors' views suggest that how police conduct the interview of the complainant is just another extra legal factor defence counsel can use to discredit the complainant. Their sensitivity to these issues highlights that trying to counter victim blaming attitudes in the courtroom and optimise complainant credibility is a vital component of presenting the prosecution case.

This study went beyond other studies by exploring the precise reasons for prosecutors' concerns about the utility of police interviews as evidence, and how these interviews could better meet evidential needs. Our analysis found that three

main features of police interviews underpinned prosecutors concerns. Those features were: (1) interviewers giving long instructions to the complainant; (2) a lack of chronology and logical structure; and (3) interviewers unnecessarily pursuing detail. Prosecutors' concerns about these features were overwhelmingly consistent regardless of what region they were from or whether they participated in the focus group or an interview, suggesting this is a robust finding that reflects a nationwide problem. Prosecutors were able to justify their concerns with systematic, logical and multi-faceted reasons. They perceived that these features of police practice made the interview and evidence-giving process more tiring and stressful for the complainant and decreased the quality of the evidence he or she could give. They also perceived that the interviews captured an artificial human interaction, were fatiguing for jurors to watch, and were often incoherent and reduced the ability of jurors to effectively assess the complainant's credibility. Despite the gravity of these concerns, prosecutors suggested police could easily improve the usefulness of the interviews as evidence by simplifying the interview process.

After careful reflection on the nature of prosecutors comments and the interview protocol used by police, we believe prosecutors' concerns are primarily due to police using recommended evidence-based practice in how to interview adult witnesses, not poor adherence to this practice (with the exception of expressing too much sympathy and not exploring evidentially relevant details). The cognitive interview, which is used by police in NZ and other countries when conducting video interviews, increases the amount of detail obtained from a witness through the use of mnemonics (in the form of instructions) and the witness controlling the flow and structure of the interview process (Fisher & Geiselman, 1992). These features are the same as those directly criticised by the prosecutors. The prosecutors were clearly

familiar with cognitive interview methods, and they were able to describe them in detail without prompting, and when they were shown the exemplars of interview practice they were directly critical of what they saw. The finding that the very methods police are trained to use are the primary cause of prosecutors concerns suggests that this problem is likely to be present in other countries where the cognitive interview is used (e.g. England and Wales).

More research is required to explore the validity of prosecutors' concerns, especially given the resistance to new reforms in rape cases found with the introduction of other alternative forms of evidence (e.g. Burton et al., 2006). Another limitation of this study is that it relies on the views of a small number of prosecutors who may not represent the views of prosecutors more generally. Nevertheless, this study provides useful insights into the reasons for prosecutor's concerns about the utility of police interviews as evidence. Further, psychological theory and research findings support many of the prosecutors' concerns. Researchers have found the presence of cognitive interview mnemonics have no effect on credibility judgements about a witness (Fisher, Mello, & McCauley, 1999; Kebbell, Wagstaff, & Preece, 1998; Westera, Kebbell, & Milne, 2011). But, these studies do not examine prosecutors specific concerns about defence lawyers using the mnemonics and extra detail in the cognitive interview as other avenues for cross-examination. Defence counsel using the cognitive interview mnemonics to discredit the witness could be an effective tactic given jurors' limited understanding of the problems with eyewitness memory (Benton, Ross, Bradshaw, Thomas, & Bradshaw, 2006).

The cognitive interview has been found to take more time and produces on average 40% more detail than an interview that does not use mnemonics (Köhnken et al., 1999; Memon et al., 2010). This global increase in detail may account for

prosecutors' concerns about the presence of irrelevant detail, juror fatigue and a lack of coherence. A lack of coherence has been found to reduce juror credibility ratings of a witness (Klettke, Graesser, & Powell, 2010; Pennington & Hastie, 1993) and may decrease decision makers' (e.g. police; legal professionals) ability to systematically process the information and instead defer to heuristics (Chaiken, 1980; Chaiken, Liberman, & Eagly, 1989; Petty & Cacioppo, 1986). People experiencing trauma are often less able to report what happened coherently, so it could be the characteristics of these victims rather than the interview methods causing this problem (Brewin, 2007; Shepherd et al., 1999). More research is needed to examine how trauma and the use of the cognitive interview affects coherence of an adult's account during interview and the amount of evidentially irrelevant information produced.

Some scholars have suggested that with adaptations and skilled use the cognitive interview could help promote victim recovery from trauma (Fisher & Geiselman, 2010; Latts & Geiselman, 1991; Shepherd, Mortimore, Turner, & Watson, 1999). On the other hand, adult complainants of sexual assault have reported that supplying a high level of detail is tiring and stressful (McMillan & Thomas, 2009), and it is well established that high levels of stress can impede cognitive performance (Deffenbacher et al., 2004; Yerkes & Dodson, 1908). This may be particularly problematic in sexual assault cases because many complainants are already distressed due to the nature of the offence (Atkeson, Calhoun, Resick, & Ellis, 1982; Kilpatrick, Resick, & Veronen, 1981; Kilpatrick et al., 1989). Further the effectiveness of the cognitive interview has not been properly tested on memory for stressful events, or events that last longer than ten minutes or repeat events (Memon et al., 2010), features that are likely to be prevalent in interviews with sexual assault complainants. More

research is required to explore the utility of the cognitive interview in these types of scenarios.

If prosecutors' concerns are valid, it is difficult to reconcile that the problems with the suitability of police interviews as evidence can be addressed without a fundamental shift in how police conduct interviews with adult sexual assault complainants. One possibility is to edit out or not record the cognitive interview mnemonics at the beginning of the interview. This solution is however unlikely to overcome prosecutors concerns which are directed at the very core of why the cognitive interview is used in preference to other evidence-based interview methods—the extra detail generated (Fisher & Geiselman, 1992).

The cognitive interview was originally developed by Fisher and Geiselman to increase the amount of detail available for investigations, such as a bank robbery, where detail is vital to identifying the offender and solving the crime (Fisher & Geiselman, 1992). The extra level of detail elicited by the cognitive interview may be vital to an investigation where the offender is not known, but in the vast majority of sexual assault cases the offender is known to the victim (Daly & Bouhours, 2010).<sup>3</sup> In these cases, the defence is usually that the complainant consented, and there is seldom corroborating evidence on this issue due to the hidden nature of the alleged offence (Lees, 2002). Hence the focus of an interview is not likely to be about gaining as much detail as possible, but about gaining an accurate narrative of events covering relevant evidential issues (e.g. consent and the nature of the sexual acts), and assessing the credibility of the complainant. Detail about issues relating to consent may be important (e.g. conversations with the alleged offender), but as previously discussed, high levels of descriptive detail may also reduce coherence, the perceived credibility of the complainant, and the ability for anyone who reviews the interview to

comprehend the complainant's version of events (whether jurors, police or legal professionals). Indeed research on child interviewing practices suggests police often over-estimate the need for contextual detail for evidential purposes when compared to prosecutors (Burrows, Powell, & Anglim, 2013). Further, more detail may provide more avenues for cross-examination to discredit the complainant on prior inconsistencies (Evans, 1995; Fisher, Brewer, & Mitchell, 2009). This is especially the case if there is an increase in incorrect detail, and although the cognitive interview does not influence overall accuracy (the ratio of correct to incorrect details), it increases the amount of incorrect details recalled (Memon et al., 2010).

Future research with investigators and legal professionals needs to explore what content is required for an evidential interview in adult sexual assault cases and how best to elicit this detail. Fundamental to this inquiry will be to balance the need for investigators to gather sufficient information for a thorough and impartial investigation, for the courts to have an interview that meets evidential purposes and presents well as evidence, and for the process to be fair to the complainant and the alleged offender. In cases when the offender is unknown every detail may be important and a version of the cognitive interview adapted for adult sexual assault complainants is likely to be the most useful method of interviewing. But when the offender is known, and if more detail is not the objective of the interview, it is worth exploring whether the cognitive interview mnemonics are needed. Improving the suitability of the police interviews as evidence, whilst still maintaining a high quality of information for an investigation may be achieved by simply removing the mnemonics and improving the skills of officers in using open-ended questions or prompts (e.g. 'Tell me what happened') to obtain narrative account of events from the complainant. These types of questions are a central feature of all evidence-based

witness interviewing protocols (Milne & Bull, 1999; Powell, Fisher, & Wright, 2005),<sup>4</sup> and will give an interviewer the flexibility to obtain a high level of detail about issues relevant to the investigation or evidence through skilled (and structured) questioning.

## **Conclusion**

The nature of the offending and the effects of sexual offending on the complainant's behaviour at interview, and the need to meet both investigative and evidential purposes means that these interviews are likely to be some of the most challenging for police interviewers. This study highlights the importance of scholars understanding the views of prosecutors when examining the usefulness of police interview methods as evidence (Burrows & Powell, 2013). We found a clear mismatch between what prosecutors perceived was best evidence from rape complainants and the style of police interviews. Instead of the long, unstructured and highly detailed account encouraged by police, prosecutors preferred a coherent and concise account from the complainant. These features of police interviewing practice reflect a focus by interviewing scholars on the primary goal of eliciting more detail from complainants without compromising accuracy. What is needed now is a better understanding about how, if at all, police interview methods can be adapted to meet evidential requirements while still generating a high quality of information for investigations. Simplifying the interviewing process is a promising means of achieving both these objectives and ensuring the interview process meets the unique needs of complainants of sexual assault.

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**Footnotes**

<sup>1</sup> These countries include England and Wales (s.19 of the Youth Justice and Criminal Evidence Act 1999) and New Zealand (s.103 of the Evidence Act 2006).

<sup>2</sup> Contact the first author for a copy.

<sup>3</sup> In this review of 13 studies where offender-victim relationship was reported, only 26% of cases reported to police involved a stranger; a number that appears to be decreasing as more non-stranger rapes are reported.

<sup>4</sup> This includes the cognitive interview, which combines the mnemonics with good communication skills.

**Appendix 1***Description of the cognitive interview (adapted from Milne, 2004)*

Method	Description
Focused retrieval and concentrate hard	Instruction for the witness to use high levels of concentration due to the level of detail required.
Transfer control	Instruction for the witness to control the interview.
Report everything	Instruction for the witness to report everything without editing, even if it is not important or only partially remembered. An example may be given of the level of detail required. e.g. description of an object.
Context reinstatement	Instruction that uses a series of prompts to encourage the witness to recreate the physical and personal features of the event.
Free report	An open-ended invitation is used to solicit an uninterrupted free report from the witness about events.
Witness-compatible questioning	The witness's account is broken down into episodes and expanded by going through these episodes in the order given by the witness.
Activate and probe the image	Instruction for the witness to focus on one aspect of the event and expand what they have reported.
Change in temporal order	Instruction for the witness to report events in the reverse order.
Change in perspectives	Instruction for the witness to report events from another persons' perspective.
Sketch plan	Instruction for the witness to draw a diagram of a location and use the diagram to talk through events.
Investigatively important questions	Questioning of the witness towards the end of the interview about any topics important to the investigation where more detailed is required.