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Kimberlee Burrows and Martine Powell

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## **A prosecutor's guide to improving child witness interviews about alleged sexual abuse: A view from the Australian context**

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### **Abstract**

Child sexual abuse (CSA) cases are often not prosecuted because of poor evidential quality of the investigative interview, the central plank of CSA investigations and prosecutions. The current paper addresses the need for further direction about how investigative interviews can better meet the needs of prosecutors by presenting a transcript of interview with an experienced Crown prosecutor. In the interview, we asked the prosecutor to explain what information is required, and how information should be elicited from a prosecution perspective. The transcript was then distributed to nine Crown prosecutors who were invited to reflect on the propositions made in the transcript and indicate any areas where the prosecutor's views were not consistent with their own. The nine prosecutors then met as a group and agreed on amendments to the transcript to ensure it was representative of their views. We present the final transcript (with amendments) as a tool for interviewers and trainers.

**Keywords:** *investigative interviewing; child witness; child sexual assault; prosecution; evidence*

### **Introduction**

Interviews with child witnesses form the central plank of police investigations and criminal trials about alleged child sexual abuse. The details contained within these interviews are the main evidence because (with this offence type) there is usually no physical evidence or other witnesses to the abuse (Office of Director of Public Prosecutions [ACT] & Australian Federal Police, 2005; Powell & Wright 2009; Success Works, 2011).

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Conducting interviews with children, however, is a complex and challenging task. Evaluations of child witness interviews across the globe indicate that interviewers struggle to adhere to open-ended (best-practice) questions, and rely instead on specific questions which (compared to open-ended questions) increase the risk of error in the child's account (Powell, Fisher & Wright, 2005).

Limitations in interview quality reflect the highly specialized nature of these interviews and indicate that interviewers have not been provided sufficient knowledge or practical guidance about the nature of information required and how the information should be elicited. Guidance is needed in two interrelated domains. First, interviewers need instruction in how limitations in children's memory, language and social development can be addressed to maximise the accuracy and detail of children's accounts of abuse. Second, interviewers need clarity regarding how to conduct investigative interviews in a manner that serves the requirements of evidence in chief. Much research has been conducted to address the first domain, resulting in best practice protocols emphasizing the use of open-ended questions to elicit the most detailed and accurate account from the child (see Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007). As for the second domain, while there has been an abundance of evaluations outlining broad concerns about the quality of the interview as evidence in chief (Davis, Hoyano, Keenan, Maitland, & Morgan, 1999; Hoyano & Keenan, 2010; Victorian Law Reform Commission, 2004), there has been relatively little explicit instruction regarding (a) the type and amount of information required for successful prosecution, and (b) how this information is best acquired from a prosecution perspective. To have any practical benefit, interviewers need to be provided with more than general concerns; they need to be told exactly *what* they need to achieve and *how* they need to achieve it (Powell, 2008).

The current paper addresses the need for further discussion about how investigative interviews can better meet the needs of prosecutors. As the target audience of this paper is practitioners (interviewers and trainers), we decided that the best way to present the voice of the prosecutor (while minimizing error in interpretation) was in an interview transcript with an actual prosecutor.

The procedure involved in the development of our interview transcript was fourfold. First, we discussed the focus, scope and format of the interview and then invited an experienced prosecutor who we knew (from prior research with us) had clear views which were fairly representative of all prosecutors. Second, after seeking approval from this prosecutor and his director, we conducted an electronically recorded interview over several sessions and then edited the transcript of the interview to enhance clarity and ensure a suitable length for this journal. Third, after seeking agreement from the prosecutor that the condensed interview was an accurate representation of the entire interview, the edited interview was distributed to nine Crown prosecutors representing every State and Territory in our country. The group of prosecutors were required to read the transcript in their own time, reflect on the propositions made by that prosecutor and to indicate (by writing on the transcript) areas where the prosecutor's views were not consistent with their own. Finally, the nine prosecutors met face to face with us as a group. The issues they raised were discussed and amendments to the transcript were agreed upon to ensure that it represented their collective views. The precise amendments were minimal and are indicated in footnotes throughout the transcript.

To provide context for the views expressed in this paper and to account for any differences in opinion of legal professionals in other jurisdictions, we now briefly explain the

Australian system of recorded evidence in child sexual abuse cases. Soon after a disclosure or report of abuse is made in Australia, prescribed persons (police and/or social workers) conduct and video record an interview with the child witness. After further investigation, the police compile the evidence, including the interview, into a brief of evidence and decide whether to refer the case to prosecution (Powell, 2008). Crown prosecutors in Australia are independent from the police, and when they are assigned a case, they decide whether to prosecute based on the strength of the evidence, the prospect of conviction, and the public interest (Community Development and Justice Standing Committee, 2008). Where the case proceeds to trial, the prosecutor may choose to admit one or more recorded interviews as the child's evidence in chief, and may lead additional evidence from the child. The child is then cross examined and re-examined before the remainder of the evidence (if any) is presented and the judge directs the jury to retire to reach a verdict<sup>1</sup>.

Each Australian State and Territory is independently responsible for training their investigative interviewers and there are minor variations in the interviewing protocols adopted across the country. However, all protocols emphasize the use of open-ended questions to elicit a detailed free narrative from the child that generates potentially useful leads, and establishes the criminal offences and particulars (Wilson & Powell, 2001). In reality, as with other jurisdictions, Australian interviewers have been criticized for relying on specific cued-recall and closed questions as opposed to open-ended questions (Burrows & Powell, in press; Powell & Hughes-Scholes, 2009; Powell & Wright, 2009).

The prosecutor interview we provide was conducted by the first author. The Crown prosecutor (who had many years' experience in child sexual assault trials) chose to remain anonymous. The interviewer's questions are in plain text while the prosecutor's responses are represented in italic font below.

### Interview Transcript

We know from our prior discussions with you that you have concerns about child witness interviews being too long and containing irrelevant detail. Could you reiterate these concerns in detail for readers?

*Sure but I want to stress at the outset that I know being an interviewer for child interviews is very difficult. I understand that it's all too easy to critique an interview afterwards, and I would think that few trial lawyers would relish the idea of their court work being critiqued. My concerns are, as you say, that firstly, often, probably too often, visually recorded interviews are too long. Secondly, the interviews often include detail about matters that don't require detail, and that can be quite problematic.*

Ok, so it would appear that there's some confusion among interviewers about what level of detail is required. Tell us what detail is required, from a prosecution perspective?

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<sup>1</sup> In many Australian jurisdictions, provisions exist that enable a child's evidence in its entirety to be taken at a recorded pre-trial hearing, rather than at trial. The recorded hearing is later played to the jury at trial in lieu of a live witness. The primary intent of the provisions is to capture the child's evidence earlier in time (see for review Corns, 2001).

*Well, the State is required to prove all of the elements of an offence beyond reasonable doubt. What do I mean by 'elements' of an offence? I mean the aggregate of all parts of the offence alleged. So, to give an example, for the charge of robbery the elements of the offence can be discerned from the Criminal Code. The elements are: (i) the accused and no one else, (ii) steals, (iii) anything, (iv) at or before threatens, or uses, actual violence, (v) to any person or property and (vi) in order to steal the thing being stolen or in order to prevent resistance to it being stolen. Those six aspects, as determined by the legislation, are the elements of the offence of robbery. In a trial of the offence of robbery, the State is required to prove each of those elements to the jury's satisfaction. If any of them is not proven to the jury's satisfaction, then the accused must be acquitted.*

*In sexual matters, fortunately, it's a little bit easier in that the elements to be proven are less in number. For example, in an indecent dealing charge, identity is clearly an important issue. The second element is that the person alleged has indecently dealt with the child. And thirdly, you have to prove the age of the child, which is a question of fact and can be proven simply by a birth certificate. So, in an indecent dealing there are really only two elements (i) the right person, and (ii) whether or not that person has indecently dealt with that child. Similarly, with sexual penetration allegations, the elements are that (i) a person, (ii) the person sexually penetrates the child. They are the elements, essentially, what offence was committed, and who committed it<sup>2</sup>.*

*It is clearly necessary for the interviewer to establish that all of the elements of the offence have been made out, without putting words in the child's mouth, because if the elements aren't made out then prosecution is not possible. The elements need to be established for a practical reason as well. That is, if at the cross examination stage, the child divulges further information about the elements that the child hasn't volunteered before, then inevitably defence counsel will say that he's making it up because otherwise he would have given those answers earlier. Besides the elements, what jurors hear about in a trial are particulars, which are the where and the when. How, when, and where, basically. These matters are relevant though they don't have to be proven to the same standard.*

So the elements of each offence are important, and so are particulars, but to a lesser extent. Particulars don't have to be proven, but they should be ascertained? Tell me more about that.

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<sup>2</sup> Among the prosecutors who commented on this point, there was some debate about whether the timing of the offence should be included in this sentence. Two prosecutors of the panel said that although when the offence occurred isn't technically an element, it is very important because a) an allegation which is too broad in time may be attacked by defence as too vague, b) the age of the child at the time of the offence may affect the charges to be laid, and c) the legislation may have changed since the time of the offence. Another prosecutor, however, believed that interviewers placed too much emphasis on when the offence occurred. She was concerned that asking too many specific questions may result in inconsistencies or mistakes. She said "There needs to be a balance between saying that 'when' does need to be asked, but there is scope for a wide date range depending on the offence and the circumstances." Two other prosecutors suggested that no change was necessary to this sentence, because timing is discussed in the next passage. The panel agreed that if these sentences were read out of context, there may be risks of misunderstandings about the value of timing of the offence, but that the interview is accurate when read as a whole.

*Well, the State needs sufficient detail to prove the charge, that is, to satisfy each element of the charge. But it can't do that in a vacuum. The jury has to be satisfied that the allegations made by the complainant are the truth, that is, they are accurate reliable, and truthful allegations.*

*The only way that they can be so satisfied is if the child gives sufficient particulars of the offence to enable the jury to be satisfied. Particulars are relevant, not because legislation requires them, but because the accused is entitled to have, as a minimum, sufficient particularity to identify an incident from any others. This means that a description of the incident charged must be distinguished from any other similar incidents suggested by the evidence.*

*Particulars, unlike the elements, do not have to be proven by the State to secure a conviction. But they do have to be established to allow the accused to know the allegations against him or her, and to the extent necessary to establish the elements of the offence beyond reasonable doubt. That is, there is a need to establish that the child is speaking of a particular offence which is different from any other and is not speaking only in general terms, for example "oh yeh, that happened all the time".*

*Now, it may be impossible for a child to detail any allegations with any great particularity, especially a younger child. For example, if an offence occurred two years before an interview, that may be a half or one third of that child's life. It may be difficult for a child to recall when an incident happened, even which year it happened. However, even in those cases it is still possible for a jury to convict, if they are satisfied that the child is accurate, reliable and truthful. I should add that, in my experience, sometimes a child's account will actually be enhanced by a concession that he or she doesn't know specific details. A jury might consider a child more trustworthy if the child concedes, quite reasonably, that they don't remember the date of an offence. So it's not always going to be the case that an "I don't know" answer is going to be treated by the jury as a vague and unreliable account.<sup>3</sup>*

So it might be perfectly explainable that they don't have an answer?

*Yes. In one recent case where I was counsel, it was clear that the child had no real recollection of when the alleged offences occurred. He couldn't even remember the year the offence happened. Still, the interviewer asked for very specific detail about the day the event occurred, the hour the event occurred, and the course of conduct over the two hour period he was with the accused. Given the child couldn't even recollect the year; it seemed to me to be risky, at least, for the questions to become even more focused and narrow thereafter. The child inevitably attempted to give*

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<sup>3</sup> The following sentences were deleted: "Basically, if the child is clearly not able to provide particulars, an interviewer need not pursue them. Some detail about where and when the offence occurred is desirable, where possible, but not essential." One prosecutor argued that some information about where and when the offence occurred is necessary (rather than 'desirable'), at least to the extent that the information enables offences to be distinguished from one another. Other prosecutors believed that this was made clear earlier in this passage. They suggested deleting these sentences to avoid any misunderstanding.

answers to these questions. Many of these answers were later shown to be inaccurate, and the child's entire account was discredited.

*That case illustrates the inevitable tension between the amount of particulars required to establish the elements reliably, truthfully, and accurately, and the need of the accused to question the child's recollection to create doubt. That is, particulars can be used to bolster the State's case from the prosecution perspective, or to weaken the State case from the prosecution perspective, depending on the accuracy or otherwise of the witness's recollection. So because they serve competing interests, particulars, are inherently risky to one side or the other in any trial. Frequently, interviewers inadvertently assist the defence or damage the prospects of conviction by seeking unnecessary particulars or detail. Of course, it is necessary for the viewer of the interview, ultimately the jury, to have sufficient detail so that they can picture how the offence occurred, but what they don't need is a slow motion, frame-by-frame account of the unfolding events.*

*I think the tendency of interviewers to seek fine detail is understandable given their job, given their knowledge of how lawyers seek detail, how lawyers in fact have an insatiable demand for detail. But although the interests of the accused must be safeguarded, they don't have to be enhanced by the visually recorded interview process. For example, in the same case I was referring to earlier, there were many questions about the detail of the room in which the offence occurred. There were many questions about the colour of the bedspreads, about how many beds were in the room, what else was in the room, whether the blind was up or down. It seems the child, understandably, got some of these things wrong. It all became grist for the cross-examination mill, for no benefit to the prosecution. Having said that, a jury must be satisfied that the witness's account is truthful, reliable and accurate, and some, perhaps extraneous, detail can be important in establishing the witness's credibility to the requisite degree. This is why it is so difficult.*

*Basic information may be helpful, but inordinate detail like this may only damage the child's interview for no forensic purpose. What happens if the child makes a mistake or gets it wrong? It's very easy for the defence to suggest that a child who made a mistake about these minutiae shouldn't be relied upon. So, an error about these details is either an innocent mistake, in which case the prospect is that the witness's evidence will be damaged for no purpose, or the error is because the child is making it all up, in which case his or her evidence will still be damaged. I think the interviewers have a tendency to seek more and more detail, and I think that tendency usually constrains and inhibits the State's prospects of conviction, not to mention making it harder for the child when being cross-examined which surely is the opposite of what was intended with the introduction of visually recorded interviews.<sup>4</sup>*

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<sup>4</sup> The following sentences were deleted: "However, I accept that a reasonable amount of detail is required from a 'justice and fair trial' perspective. Finding the right balance may be difficult.". Four prosecutors considered that these sentences were open to the misinterpretation that details about the colours of bed spreads etc. are necessary from a 'justice and fair trial perspective'. Two prosecutors supported the inclusion of these sentences, saying that it is important that interviewers remember that the accused is entitled to

Okay, so there's danger in seeking fine-tune details. But such details can help establish an offence. How do you think interviewers can achieve that right balance?

*Interviewers should let the child tell his or her story, with sufficient detail to allow a third party, namely a jury member, to evaluate the reliability. Any more than that runs the risks that I've mentioned. In my experience, interviewers tend to err on the side of getting too much information. Overall, in my opinion, once the elements are established, there are greater risks with seeking too much detail than there are with not seeking enough detail. I think it's important for the interviewers to review the charge and the elements prior to the interview, and to concentrate the interview on allowing the child to tell his or her story with those elements in mind.*

*It is really important that an interviewer understands why a question is being asked. What element does it go to establish? Or what context does it seek to set? If there is no good reason for a question to be asked, then chances are, the question should not be asked. So if the question doesn't specifically go to the element to be established, or goes into too much detail about contextual details, then most likely it ought not be asked as it is unnecessary and irrelevant. As for particulars, interviewers should just be aware of the needs of the court - that is the system needs to be satisfied but also the needs of the child to give his or her story with as little interruption and review as is possible.*

Review? Meaning when interviewers summarise what the child has said?

*Yes. Now some judges really don't like that, and will tell a jury to ignore a re-statement. It is<sup>5</sup> a dangerous endeavor, to summarise what the child has said. Especially if different words are used. Paraphrasing should not occur. If it is clear what the child's allegations are, for example, a child says 'he touched me on my willy under my clothes', then that's the allegation! Why go over it?*

Okay, so summarizing should be avoided. Are there other questions that should generally be avoided, or are unnecessary?

*I think any extraneous material which is designed perhaps from the interviewers' perspective to confirm the clarity of the child's recollection should usually be avoided. The risks of adducing irrelevant information are too high. Exploring such extraneous material can, for example, cause child witness fatigue, it can lead to child irritation, it may lead to false answers, or bland, general answers like "that's all I can remember". It may lead to the child seeking to please the interviewer, to give the interviewer an answer, when in reality there maybe isn't one. For example, in one matter I was dealing with, the interviewer asked the child many questions about very specific information, this 'frame-by-frame' enquiry, like "Where were the accused's hands?", "Which way were his fingers pointing?", "How much of your testes did the accused's*

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know what the allegation against him is. The prosecutors eventually agreed that the sentences should be removed. These sentences were not considered necessary, and were at risk of misinterpretation.

<sup>5</sup> This sentence previously read "It can be a dangerous endeavour...". A prosecutor of the panel commented that it is not that paraphrasing *may* be dangerous, it *is* dangerous.

*hand cover?"*. That type of information, even if desirable from a proof of evidence stand point, which I would almost always dispute, is almost always counterproductive. If you have been traumatized by some man groping you, how and why would you remember minute detail as to where his leg was when he touched your penis? Particularly when you are recounting an incident that happened, say 6 to 12 months earlier? Of course, humans are infinitely variable, there will be some children who recall precisely what happened, but I think they are in the minority and justifiably so.

*Frankly, I don't think jurors expect that precise recollection, because, of itself, a juror may think that precise recollection may mean evidence that is not necessarily reliable; it's a bit suspicious. I had another trial where both the child witnesses gave, what I thought was really good evidence. However, when speaking with a journalist after trial, she found their evidence too good to be true and she didn't believe them at all. So, I think interviewers should avoid pursuing very specific details in the interview. But of course, I cannot really know what a juror may be thinking, which is of course why lawyers always default to asking detailed questions, even when they are not relevant. From a strictly legal perspective, it is hard to justify my assertions, and easy for a lawyer to insist that more or complete detail is required. However, I would still argue that interviewers do not have to seek that detail. If a lawyer thinks it is so essential he can ask the questions in court.*

When it comes to particularization, do interviewers need to, or should they attempt to, particularize all alleged offences?

*That's a difficult one because it may not be apparent until the interview is in progress as to what the child is going to say. It is, after all, their story. If the child can remember ten occasions of abuse in detail, then great, particularise all ten. If the child is only able to provide detail about one occasion, then just get particulars for that one. If it's a historical case, and/or the child has been systematically abused, it may be very difficult for the child to provide a unique detail about each occasion. That's the reality of abuse, not a failing on the part of the interviewer.<sup>6</sup>*

*If multiple offences are alleged, then I think deal with the most recent offence first and go back to others. Any alleged offence, if it's going to be separately charged, requires any particulars that can be received, with the qualifications and cautions that I've mentioned about seeking extra detail. If a child is vague, and unclear about incidents that happened in the past, then we don't necessarily need specifics of the multiple occasions in the past because all that evidence can be led as uncharged acts. So the jury will still hear that evidence, will still be told about it, but will be told it's an uncharged act and that it is not a matter directly going to the charges that are made against the accused. It can contribute to sentencing, with some qualifications.*

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<sup>6</sup> The four preceding sentences were added following suggestions from the panel of prosecutors.

What about detail around anatomy? Stakeholders have previously highlighted that a lot of children struggle to describe and name their anatomy. How much detail do interviewers need to elicit about anatomical details?

*I think basically as much detail as is sensible, depending upon the child's age. If it's a really young child, the interviewer might not reasonably expect anything more than "where I wee or poo". Or the child might have interesting names for genitalia, and I think there's no need to go beyond those interesting names as long as it's apparent what the child is meaning.*

Is it appropriate for the prosecutor to follow up strange names of genitalia at a later stage?

*It's possible, but frankly it's preferable to have clarity at the time of the interview. However, clarity doesn't mean going over and over the same things. If a child talks about 'penis' as 'willy', then, that's enough. We don't need to know what the child thinks a 'willy' is used for, how often he uses it and so on. My experience has been that where there is any difficulty relating to genitalia in an interview, the difficulty is in the detail sought from a child which can become somewhat cringe worthy.*

What's ideal in that situation where the child uses slang names?

*I think the ideal is to allow the child to give his or her story, I mean that's what it's all about at the end of the day. We are only seeking to allow the child to give his or her story. All that needs to be done is to ensure that others know what he or she means when they refer to his or her genitalia as something else, if they do.*

Ok. Another area that can be difficult for interviewers is establishing penetration. How much detail should be sought to establish penetration?

*Establishing penetration can be difficult. My own view is that, well, firstly, of course, an interviewer cannot ask leading questions. If the child doesn't make it clear whether there was a technical penetration (i.e., a digital or penile penetration, going so far as to actually go into the child's vagina or anus), then so be it, frankly. I mean, if the child's recollection is that he or she isn't sure whether there was penetration, well, maybe there should not be a conviction for that offence anyway.*

*In my experience, repeated, increasingly detailed questions about penetration are unlikely to succeed in establishing penetration and will only probably lead to some dispute about the admissibility of those questions later at trial because they are likely to tend more and more towards leading questions. Pursuing penetration with these questions may therefore increase the risk that the accused will be acquitted of that charge. Where penetration is not part of the child's story, it may be more appropriate to establish a lesser charge, such as an indecent dealing, which may be likely to secure a conviction, where a penetration charge is not.*

Ok. Please summarise what you think an ideal interview from a prosecution perspective would look like in terms of its structure and length.

*Well, I think it's essential that the interview be in the child's own words, using the child's language. What traditionally happens in interviews is the child gives a relatively long blanket answer with as much detail as he or she can, and then that answer is forensically 'chopped up' into many pieces and regurgitated, by way of asking the child questions about each piece of the story. I think there has to be great care in doing that because there still needs to be, before every question is asked, a consideration by the interviewer of: what is this question going to establish, and what are the risks, as I've indicated.*

*If more than one offence is alleged, deal with the most recent offence first, then depending on if the child is still with the interviewer, that is, they haven't flagged due to tiredness, then earlier offences can be considered and elaborated. It's not necessary to explore every offence. It is, of course, necessary to establish who the offender is in a sexual matter. But even that may not require any more than "it was my Uncle Billy". If we get that statement from the child, we don't then need "What's his age? What are his features? What does he look like? How often do you see him? Does he have a beard? Which address does he live at?", because we know the allegation is against Uncle Billy.*

*In all, my ideal interview would be an interview that lasts no longer than one hour, both for the reasons of the child, who is likely to become more fatigued as time goes on, and for the important reason of not boring a jury. Now of course in every legal matter, for every rule there will be an exception. There will be some cases where it is necessary to spend much longer than an hour with a child. But in general, if the allegation is one of indecent dealing or sexual penetration on one or two occasions, it would be, I think, surprising if a comprehensive and focused interview could not be completed inside say, 45 minutes.<sup>7</sup>*

That's been really helpful. Is there anything else you would like to add?

*No, I think we've covered it pretty comprehensively.*

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<sup>7</sup> This comment caused some debate amongst the panel of prosecutors. One prosecutor believed that it was dangerous to suggest a duration for interviews because interviewers may think that this represents a time *limit*. Another prosecutor supported the provision of a duration suggestion, adding that a jury's attention span is likely to be only about 50 minutes in any case. This prosecutor emphasised that the duration will depend on the age and nature of the child, and that after 45 minutes, there should at least be a break in the interview.

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