

## **Principles to enhance communication with child witnesses**

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## Principles to enhance communication with child witnesses

Professor Martine B Powell\* and Becky Earhart\*\*

This article describes practical strategies for communicating with children and other vulnerable witnesses engaged in the legal system. The article addresses common misconceptions about interviewing, then summarises four interviewing principles, grounded in research, that maximise the quality of communication with vulnerable witnesses. The focus is on questioning that minimises miscommunication and error, and makes interviewees feel heard during the process. The article draws on recent research to demonstrate the relevance of these recommendations to current courtroom practice.

### Introduction

Questioning vulnerable witnesses is a complex skill that involves the simultaneous application of several tasks. One needs to obtain precise and accurate detail, and also manage interviewees who may be unpredictable, anxious, and who may suppress information. Fortunately, there is clear consensus in the scientific literature around how questioning should be conducted to promote the best outcomes. This article reviews the literature, which we organise around four key principles; simple communication, avoiding assumptions, flexible response options and encouraging elaboration. These principles form the acronym SAFE.

We begin by describing several misconceptions about interviewing vulnerable witnesses. We then discuss each of the four principles, with reference to the prior literature and current courtroom practice. Although the focus is on child witnesses, the findings are relevant to other vulnerable groups (eg, adults with complex communication needs).

### Misconceptions about interviewing children

Investigative interviewing is the process of eliciting accurate and detailed information from a person about an event or situation in order to facilitate decision-making. The essence of a high-quality investigative interview with a child witness is the use of non-leading, open-ended questions; questions that encourage an elaborate response but do not specify what specific information the interviewee is required to report. Unfortunately, there are widespread misconceptions about interview practices and witnesses' responses which undermine the value of open-ended questioning. These misconceptions are presented (and refuted) below:

**1. Many professionals believe that children's responses to open questions do not contain much detail, and additional support (via specific questions and physical cues/props) is needed to elicit detailed accounts.**

This is not true. Although children's initial responses to free recall or open prompts may be brief and lacking in detail, gentle persistence with open questions (particularly

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those that use children's responses as cues for further information) can result in extensive or contextually elaborate accounts, even among very young children.<sup>1</sup>

**2. Many professionals believe that witness confidence and clarity is a sign of accuracy.** The reality is that it is difficult to differentiate between accurate and inaccurate accounts, and confidence is not a good indicator of accuracy. When children come to believe what they say, they can provide convincing but false accounts of events, even involving their own bodies. When children misreport events or withhold information, it is usually due to the nature of the questions asked. The best predictor of error is the degree to which the interviewer deviated from good questioning.

**3. Many professionals believe that good interviewing is associated with certain personal attributes or background factors related to the individual interviewer.** This is not true. A range of interviewer background factors have been explored (eg, job experience, knowledge of child development or law, rank, gender). The only factor shown to relate to interviewers' performance to date is the quality of training. If an interviewer uses poor questioning, it is usually because they have had insufficient practice and feedback at asking good questions.

Knowledge of good questioning techniques comes from decades of research on the memory and language abilities of vulnerable witnesses. The following principles summarise these briefly with reference to prior research.

#### Four interviewing principles to guide communication with vulnerable witnesses

Using the right questioning techniques, vulnerable people can provide highly accurate information about experienced events. Good questioning is about avoiding bias, using non-leading, open-ended questions where appropriate, and using simple language. These four fundamental interviewing principles make up the acronym: SAFE. Adherence to the SAFE principles is known to maximise the quality of information that vulnerable people can provide.

- Simple communication
- Avoiding assumptions
- Flexible response options
- Encouraging elaboration

#### Simple communication

Although legal professionals acknowledge the importance of developmentally appropriate questioning,<sup>3</sup> child witnesses are usually questioned at trial using complex language.<sup>4</sup> In addition, ground rules provided to children by judicial officers at the beginning of their testimony (to convey expectations) are often lengthy and contain complex wording.<sup>5</sup> To provide accurate testimony, witnesses need to understand what is being asked of them.

Complex questioning can impact both the accuracy of the interviewee's report and their level of engagement. With complex questioning, vulnerable interviewees who have limited attention spans may lose interest or have trouble focusing. To optimise witness attention, interviewers should use simple language where possible. When there is a mismatch between question complexity and the ability level of the interviewee, error or misunderstanding are more likely. The following are suggested strategies to enhance communication:

**Use short sentences.** If questions are too long, the interviewee might lose interest or find the questions hard to follow, especially if attention span is a concern. Questions with multiple parts (eg, those that ask interviewees to think about multiple subjects in rapid succession) increase the opportunity for confusion and error. As a general rule, all questions should be short, direct and convey only one idea at a time.

**Avoid the use of jargon.** Although jargon can help people communicate within peer groups who share a profession or activity, it can be confusing to anyone outside the group. Child interviewees are often asked questions that include complex legal terms (legalese). The cognitive and language skills required to process and memorise jargon are advanced. Short, everyday words are more appropriate choices for vulnerable witnesses.

**Use active tense.** In passive tense, the "doer" of the action is placed after the action itself (eg, "Were you questioned by the police earlier today?"). This is a complicated phrasing that may be difficult for vulnerable interviewees to understand. It is better to place the doer of the action first, ahead of the action (eg, "Did the police question you earlier today?").

1 ME Lamb et al, "Age differences in young children's responses to open-ended invitations in the course of forensic interviews" (2003) 71(5) *Journal of Consulting and Clinical Psychology* 926; Y Orbach and ME Lamb, "Young children's references to temporal attributes of allegedly experienced events in the course of forensic interviews" (2007) 78(4) *Child Development* 1100.

2 For eg, JS Shaw, KA McClure and JA Dykstra, "Eyewitness confidence from the witnessed event through trial" in MP Toglia et al, (eds) *The handbook of eyewitness psychology*, Vol 1: memory for events, Lawrence Erlbaum Associates, 2007.

3 MB Powell et al, "An evaluation of how evidence is elicited from complainants of child sexual abuse", *Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*, 2016.

4 R Zajac, N Westera, and A Kaladelfos, "The 'good old days' of courtroom questioning: changes in the format of child cross-examination questions over 60 years" (2017) 23 *Child Maltreatment* 186.

5 Powell et al, above n 3; B Earhart et al, "Judges delivery of ground rules to child witnesses in Australian courts" (2017) 74 *Child Abuse & Neglect* 62.

**Avoid non-literal language.** Figurative and abstract language increases the chances of misunderstandings, as does the use of words that deviate from their original or conventional meaning. For example, questions like “Did your dad pass away?” or “Did he simmer down after that?” may not be well understood.

In a recent study involving three Australian jurisdictions, the questions asked of child witnesses in court by judges and legal counsel were found to be just as complex as the questions asked of adult witnesses.<sup>6</sup> Using simple language that accounts for a child’s developmental level will increase the quality of the child’s evidence.

### Avoiding assumptions

Defence counsel commonly use false assumptions about victim behaviour to imply that allegations did not occur. Further, they ask questions of child witnesses that imply that children as a group are prone to confusing their experiences with other sources of information, or that children are otherwise incapable of accurately recalling their experiences.<sup>7</sup>

Assumptions evolve from beliefs, attitudes, and opinions, which are based on various kinds of experiences and information. Assumptions that are incorrect are destructive when they influence decisions and questioning practices and make witnesses feel that they are not being heard and understood. For example, if a professional falsely assumes that all people who are sexually assaulted report that crime immediately, the professional might then infer that a complainant who delayed reporting is lying. Subsequently, that professional’s questioning will focus on confirming and detecting the reason for deception when in reality the complainant is telling the truth. Professionals should foster awareness of the assumptions they make in their own practice. The following are commonly held misconceptions about vulnerable people in the legal system:

**Assumptions about the competency of vulnerable witnesses.** Historically, children were considered unreliable witnesses based on their age.<sup>8</sup> This assumption, however, is at odds with empirical evidence on children’s abilities. While younger children, such as pre-schoolers, may struggle to recall the sources of their memories,<sup>9</sup> many children do not. In some circumstances, even very young children are capable of differentiating experiences

with other sources of information, such as dreams, films, or conversations with others. The abilities of other groups, such as adults with complex communication needs, are also often underestimated. Discrimination can lead to unfair value judgments and depersonalisation, and is not always intentional. It happens when we refer to a person by their disability, talk about someone in the third person in their presence, or assume a person will have trouble understanding. People with complex communication needs are a diverse group with a wide spectrum of abilities.

**Assumptions about victim behaviour.** When trying to understand and interpret behaviour, people tend to attribute other people’s actions to their personal characteristics, whereas they tend to consider situational factors to explain their own actions. This is called the fundamental attribution error. For example, when someone cuts us off while driving, we immediately think the driver is a self-centered person who has no regard for anyone on the road. On the other hand, when we cut someone off in traffic, we come up with excuses to validate our actions. While we tend to attribute the other driver’s behaviour to his personality or dispositional traits, we blame situational factors for our own actions. Internal attributions underestimate how important social situations are in determining others’ behaviour. When people react in ways that are counterintuitive to common sense, or counter to how we think we would respond, we are less empathic toward them, and less rational in our judgments about them. This can impact justice outcomes.

The fundamental attribution error is often relevant to the behaviour of child victims of sexual assault. For example, commonly held misassumptions include that delays in reporting, lack of resistance, a lack of emotional response during reporting, or maintaining a relationship with the offender are signs that the victim’s story is not true. In reality, however, all of these behaviours are natural responses that are commonly displayed by victims. Some witnesses who come in contact with the law may present as “cold”, “unfeeling”, disinterested or disengaged when being interviewed. On face value these responses may seem confusing and counterintuitive, but they may be responses to trauma or a difficult background.<sup>10</sup> Ultimately, when we recognise a person’s true abilities and the importance of our own questions in bringing those abilities to fruition, we maximise the quality of evidence and future decision making that evolves from that evidence.

6 Powell et al, above n 3.

7 R Zajac, N Westera and A Kaladelfos, “A historical comparison of Australian lawyers’ strategies for cross-examining child sexual abuse complainants” (2017) 72 *Child Abuse & Neglect* 236; Powell, et al, above n 3.

8 SJ Ceci and M Bruck, “Suggestibility of the child witness: a historical review and synthesis” (2016) 113(3) *Psychological Bulletin* 403.

9 KP Roberts, “Children’s ability to distinguish between memories from multiple sources: implications for the quality and accuracy of eyewitness statements” (2002) 22 *Developmental Review* 403.

10 BD Perry et al, “Childhood trauma, the neurobiology of adaption, and ‘use-dependent’ development of the brain: how ‘states’ become ‘traits’” (1995) 16 *Infant Mental Health Journal* 271.

### Flexible response options

Suggestive and coercive interview practices are not uncommon in police interviews, as well as in-court questioning.<sup>11</sup> Such questioning reduces the accuracy of vulnerable witnesses' reports.

The flexibility of interviewees to decide what information to report is impeded by suggestive or coercive interview practices. Suggestibility is broadly defined as the degree to which an account about an event (or responses to questions) can be influenced by a range of social and psychological factors.<sup>12</sup> This broad definition acknowledges that suggestibility is not solely about memory, per se; in fact, it can arise as the result of social mechanisms. For instance, an interviewee can agree with misleading information merely to please the interviewer, avoid punishment, or protect a loved one even though he or she is fully aware that it diverges from the originally perceived event. Suggestibility is a matter of degree. All witnesses, even adults, can show suggestibility effects.<sup>13</sup> Further, increases in language and cognitive skills do not always translate to lower suggestibility. Various types of errors can arise in an interview as a result of suggestibility as follows:

**1. Acquiescence to leading yes/no questions.**

This can occur regardless of whether the interviewee believes the question's proposition to be true, remembers the event, or understands the question.<sup>14</sup>

**2. Selection of a misleading forced choice response.** This occurs when the interviewer asks a question which limits the interviewee's response to several inaccurate answers.

**3. Confabulation.** This occurs when the interviewee generates a detail in his or her response that was neither part of the event nor mentioned by the interviewer. This could be due to many reasons, including social demand characteristics (ie feeling compelled to provide a response to a question when the answer is not known).

**4. Taking on an interviewer suggestion and incorporating it into recollection of the event.** This occurs when the interviewee restates a false detail which has been provided by the interviewer.

Interviewers also influence error rates in interviews when their manner, tone or response (non-verbal or verbal) suggests what answer is desired. The table below contains a list of coercive techniques that have been described in the literature, together with examples.

**Table 1. Coercive techniques that heighten the risk of error in a vulnerable interviewee's account**

Techniques	Example	Explanation
Peer pressure	<i>"When I talked to your friends, they said..."</i>	If an interviewee is told about the statements of another witness, pressure to conform may lead that interviewee to make his or her report consistent with that of the peer.
Bribery	<i>"If you tell me more about that, then we can take a break and get a snack."</i>	If an interviewer provides a desirable material (eg, food) or social (eg, seeing mother again) reward for providing certain information, the interviewee is likely to conform.
Criticising the interviewee when they do not provide a response	<i>"You really don't know much, do you?"</i>	The pressure to please the interviewer may lead an interviewee to provide a response even when (s)he cannot remember the answer or does not know the answer.
Disputing what the interviewee says	<i>"It couldn't have happened that way. It doesn't make sense."</i>	The power imbalance between the interviewer and interviewee makes it unlikely that the interviewee will correct the interviewer if his or her answers are disputed.
Asking if the interviewee is sure about his/her response	<i>"Are you sure that's really what happened?"</i>	A vulnerable interviewee may interpret the question "Are you sure?" as indicating that the initial response (s)he gave was incorrect. This interpretation may subsequently lead them to change their original response.
Selective reinforcement	<i>"You're doing a really good job." "You're not doing well."</i>	Providing an interviewee with positive reinforcement when he or she follows the interviewer's lead, and negative reinforcement when he or she does not follow the interviewer's lead, may increase the likelihood that they will go along with a misleading suggestion.
Asking the interviewee to speculate	<i>"What do you think you would have said if that happened?"</i>	When asked to speculate about details of an event, an interviewee may later mistake his or her speculation for details that actually occurred.
Repeated suggestions		Repeating suggestions within an interview indicates to the interviewee that his or her initial response was incorrect and that (s)he should change it.

11 Powell et al, above n 3.

12 Ceci and Bruck, above n 8.

13 JA Quas et al, "Individual differences in children's and adults' suggestibility and false event memory" (1997) 9 *Learning and Individual Differences* 359.

14 AH Waterman, M Blades and C Spencer, "Do children try to answer nonsensical questions?" (2000) 18 *British Journal of Developmental Psychology* 211.



## Encouraging elaboration

Although open-ended questioning is common to most investigative interview protocols,<sup>15</sup> police interviewers do not typically adhere to these recommendations with children. Investigative interviews are commonly dominated by specific questions,<sup>16</sup> which are known to increase errors.

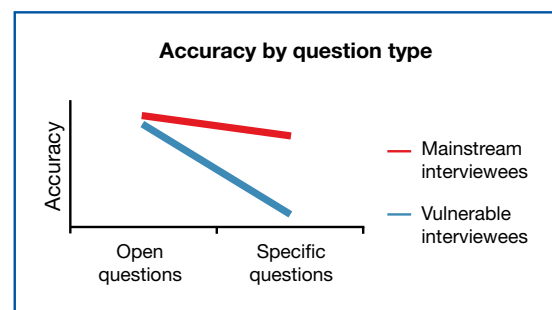
The accuracy and coherence of a vulnerable person's account of an event depends largely on the style of questioning used to elicit the account. Open-ended questions are most likely to elicit an accurate and detailed narrative,<sup>17</sup> but all question types (open or specific) vary in terms of their risk of error, according to several features.

Questions are classified according to the degree of elaboration that they prompt and the degree to which they dictate what specific information needs to be recalled. We dichotomise questions as open-ended or specific. Open-ended questions encourage an elaborate response but *do not* specify what specific information the interviewee is required to report. Because these questions aim to keep the narrative going, they allow the interviewee the freedom to choose what information will be reported and to narrate the story in his or her own words (eg, "What else happened? Tell me about the part where ..."). Specific questions specify what precise information the interviewee is required to report, and they usually elicit shorter responses than open-ended questions. There are two types of specific questions that an interviewer may ask. Specific cued-recall questions typically start with "Wh-" (ie, "who", "what", "when", "where", "why"). Specific closed questions dictate a "yes" or "no" response, or offer alternative responses for the interviewee to choose from.

While specific questions necessarily dominate interviews conducted by trial lawyers, open-ended questions are ideal when the aim is to elicit accurate and detailed information, as is appropriate in investigative interviews and other out-of-court questioning contexts. When used appropriately, open-ended questions elicit the most accurate, detailed and complete account of the

offence or situation, and in a manner that minimises unnecessary stress or discomfort of the interviewee. Two decades ago, most experts perceived that responses to open-ended questions (while accurate) were scant in detail, and that additional support via specific or closed questions and physical cues/props was usually needed to elicit detailed accounts.<sup>18</sup> More recent research indicates that this is not so. Open-ended questions that use the interviewee's utterances as cues for further information can elicit detailed accounts, even among very young children (eg, four years of age).<sup>19</sup>

Vulnerable people vary markedly in their communication and memory abilities. For some, there is very minimal information transfer and a naive listener would have enormous difficulty making sense of a narrative. It would be erroneous, however, to automatically abandon an open-ended style with such interviewees in favour of specific questioning. Specific questions and cues put less reliance on the interviewee's verbal capacity, but we need to prioritise *accuracy*. Whether interviewees provide little information or a lot, all groups respond with high accuracy to open-ended questions. In fact, the detrimental effect of specific questions on accuracy is greater for vulnerable, compared to mainstream, witnesses. When considering response accuracy, open-ended questions minimise individual differences in responding arising from variability in memory, language and social skills. This is well illustrated in the following diagram based on a study by Agnew and Powell.<sup>20</sup>



15 For eg, National Institute of Child Health and Development (NICHD) protocol; ME Lamb et al, "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: a review of research using the NICHD investigative interview protocol" (2007) 31 *Child Abuse & Neglect* 1201; Standard Interview Method (in press); MB Powell, "Recommendations for improving the competency of investigative interviewers of children", paper presented at the 28th International Congress of Applied Psychology, Paris, France, 2014.

16 AC Cederborg et al, "Investigative interview of child witnesses in Sweden" (2000) 24(10) *Child Abuse & Neglect* 1355; T Myklebust and RA Bjorklund, "The effect of long-term training on police officers' use of open and closed questions in field investigative interviews of children" (2006) 3 *Journal of Investigative Psychology and Offender Profiling* 165; Powell, et al, above n 3.

17 KJ Sternberg et al, "The relation between investigative utterance types and the informativeness of child witnesses" (1996) 17 *Journal of Applied Developmental Psychology* 439; SE Agnew and MB Powell, "The effect of intellectual disability on children's recall of an event across different question types" (2004) 28 *Law & Human Behaviour* 273.

18 G Goodman and RS Reed, "Age differences in eyewitness testimony" (1986) 10 *Law and Human Behaviour* 317; MB Powell and DM Thomson, "Children's eyewitness-memory research: implications for practice" (1994) 75 *Families in Society: the Journal of Contemporary Social Services* 204.

19 Lamb et al; Orbach and Lamb, above n 1.

20 Agnew and Powell, above n 17 at 285.

While open-ended questioning is essential for eliciting accurate and elaborate interviewee responses, other skills are helpful too. These additional skills, and their benefits, are described below:

**Open-ended rapport building.** It is well established that the quality of interpersonal connection between an interviewer and interviewee (hereby referred to as “rapport”) can have a profound impact on interviewees’ ability and willingness to disclose detailed (particularly personal or sensitive) information.<sup>21</sup> The consensus is that good rapport is established through open-ended questioning during the introductory stages of an interview (eg, “Tell me about something fun you’ve done recently; tell me all about [event]”; rather than “How old are you? What school do you go to?”). The open-ended rapport building approach maximises narrative detail (about the topic of interest) because it primes the interviewee to a style of interaction that is conducive to detailed reporting.<sup>22</sup> Open-ended rapport building also gives interviewees the clear message that their job in the interview is to do most of the talking.

**Clear, simple ground rule instructions.** Ground rules are instructions about the communicative expectations of the interview — for example, to not

guess at answers, to correct interviewers’ mistakes and to signal miscomprehension. Although there is some debate as to how much benefit they actually confer, most child interviewing experts agree that ground rules are necessary. The main goal of the ground rules is to highlight the role of the interviewee as the knowledgeable informant in the interview.<sup>23</sup> To be effective, instructions must be short and concise, use simple language and make the expectations clear. Table 2 provides a list of rules commonly included in interview guides, and examples of (recommended) simple phrases to convey these rules.

### Conclusion

The research cited throughout this article has highlighted deviations from best-practice questioning of child witnesses in both investigative interviews and in-court questioning. There is an urgent need for better awareness of, and compliance with, best-practice witness questioning. The communication guidelines recommended in this article will improve the quality of evidence obtained from witnesses by minimising the potential for miscommunication and error.

**Table 2. Examples of interview ground rules**

Ground rule	Example of recommended wording
Don't know	<i>If I ask you a question and you don't know the answer, just say "I don't know".</i>
Don't understand	<i>If I ask you a question and you don't understand, just say "I don't understand".</i>
Don't remember	<i>If I ask you a question and you don't remember the answer, just say "I don't remember".</i>
Correct me	<i>Sometimes I might say things that are wrong. You should tell me because I don't know what's happened.</i>
Break	<i>You may take a break at any time.</i>
Taking notes	<i>I will write things when you talk. It helps me remember what you say.</i>
Use any words	<i>You may use any words that you want when we are talking.</i>

21 R Collins, R Lincoln and MG Frank, “The effect of rapport in forensic interviewing” (2002) 9 *Psychiatry, Psychology and Law* 69; I Hershkowitz, “Socioemotional factors in child sexual abuse investigations” (2009) 14 *Child Maltreatment* 172.

22 KP Roberts, ME Lamb and KJ Sternberg, “Effects of rapport-building style on children’s reports of a staged event” (2004) 18(2) *Applied Cognitive Psychology* 189.

23 For a review, see SP Brubacher, DA Poole and JJ Dickinson, “The use of ground rules in investigative interviews with children: a synthesis and call for research” (2015) 36 *Developmental Review* 15.