Judicial and lawyer interventions in trials of child sexual assault

Judicial and Lawyer Interventions in Trials of Child Sexual Assault

Natalie Martschuk, Martine B Powell, Jane Goodman-Delahunty, Simone Thackray and Nina Westera*

This article presents the results of a study that evaluated the extent to which judges and lawyers intervene during questioning of child and adult complainants in child sexual assault (CSA) cases. Transcripts of the evidence of 120 CSA complainants were analysed according to the frequency and nature of interventions, such as raising issues with the question form, question manner, question content, complainant care, legal procedure or rules. Judges most commonly intervened during cross-examination and to a lesser extent during evidence-in-chief. There was no evidence that judges and prosecutors intervened more frequently with children than with adults. The most common basis for intervention was the question form, but the number of interventions was very low considering the prevalence of complex questions asked by the defence. Less than 1% of the interventions were based on question content.

I. Introduction

Judicial interventions at trial arise when a judge intercedes in the questioning of a witness, either during examination-in-chief or cross-examination.[1] This is either pursuant to the general powers of s 29 of the *Evidence Act 1995* (NSW) governing how questioning may proceed in examination-in-chief or s 41 in relation to cross-examination. Aside from Australian jurisdictions, judicial provisions for interventions in witness examinations exist in various forms in many jurisdictions, including England and Wales,[2] New Zealand,[3] South Africa[4] and the United States.[5]

The Australian Uniform Evidence Legislation[6] (UEL) specifies how witnesses in a case may be questioned, and what constitutes an "improper question" in cross-examination. Section 29(1) of the *Evidence Act* gives broad scope to the manner in which witnesses can be questioned, allowing a witness to be questioned in any way the party thinks fit, subject to the balance of the Act and the directions of the court. Section 29(2) allows witnesses to give evidence in narrative form, either wholly or partially.

Section 41 defines an improper question in the context of cross-examination, and the manner in which improper questions should be addressed by the court. A "disallowable question":

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[1] Martine 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) 233.

[2] *Criminal Procedure Rules 2015* (UK) SI 2015/1490, r 3.11(d).

[3] *Evidence Act 2006* (NZ) s 85.

[4] *Criminal Procedure Act 1977* (South Africa) s 170A.

[5] See, eg, Cal Evid Code § 765 (Deering 2019).

[6] The UEL consists of *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2013* (NT); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas).

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

When a question is regarded as "disallowable", the court must not allow the question to be put to the witness; if the question has already been put, the court must inform the witness that they are not required to answer.

Section 41(2) outlines matters taken into account by the court in determining whether or not a question is improper. Section 41(4) permits a party to object to a question on the basis that it is disallowable. However, s 41(5) imposes a duty on the court to disallow an improper question regardless of whether an objection has been raised by either party.

Improper questioning provisions were implemented in their present form via the *Criminal Procedure Further Amendment (Evidence) Bill 2005* (NSW), as part of a suite of amendments introduced to provide further protections for sexual assault complainants in criminal law proceedings.[7] At that time, the provisions in the *Evidence Act* were not as extensive as those of the *Criminal Procedure Act 1986* (NSW) (*CPA*). They were significant because they imposed a positive duty on judges to preclude improper questions.[8] This duty was confirmed by the Court of Criminal Appeal in *FDP v The Queen*.[9]

Following a review of the UEL by the Australian Law Reform Commission (ALRC), the Victorian Law Reform Commission and the New South Wales Law Reform Commission (NSWLRC) commencing in 2005, the UEL was amended to adopt the New South Wales provisions.[10] The view of the Commissions was that while the provisions that were previously in place should have been sufficient for improper questions to be disallowed under s 41, an increased awareness by the judiciary of what constituted an improper question may be helpful.[11] The ALRC and NSWLRC recommended the adoption of the *CPA* provisions in the UEL for all civil and criminal proceedings,[12] as was implemented. Prior to this, the more stringent provisions of the *CPA* pertained only to criminal proceedings.[13]

A. Empirical Evidence on Judicial Intervention

In 2004, Cashmore and Trimboli conducted an evaluation of the child sexual assault (CSA) jurisdiction in New South Wales.[14] The evaluation considered: how the specialist jurisdiction had been implemented; whether the use of the specialist jurisdiction had an impact on the conviction rate in CSA matters; whether the conduct of matters had changed as a result of the specialist jurisdiction; whether the environment was less intimidating for child witnesses; and whether the specialist jurisdiction had improved the treatment of child witnesses at court. Of particular relevance, the evaluation considered the frequency of judicial interventions and reasons for intervening during a child's testimony.

The results revealed that, across 16 trials, 16 judicial interventions occurred during the child's evidence-in-chief and 291 during cross-examination. The interventions occurred most frequently to clarify the question (155 instances), followed by clarification of the response (117 instances). The evidence-in-chief

[7] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005 (Bob Debus, Attorney-General and Minister for the Environment).

[8] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 March 2005 (Bob Debus, Attorney-General and Minister for the Environment).

[9] *FDP v The Queen* (2009) 74 NSWLR 645, [26]–[28]; [2008] NSWCCA 317.

[10] New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 October 2007 (Barry Collier, Parliamentary Secretary).

[11] Australian Law Reform Commission (ALRC), *Examination and Cross-examination of Witnesses*, Report No 102 (2006) 151 [5.106].

[12] ALRC, n 11, [5.2].

[13] Explanatory Memorandum, *Criminal Procedure Further Amendment (Evidence) Bill 2005* (NSW).

[14] Judy Cashmore and Lily Trimboli, "An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot" (Legislative Evaluation No 18, New South Wales Bureau of Crime Statistics and Research, 2005).

of the child was primarily given by way of pre-recorded interview, with crown prosecutors asking a small number of questions. This procedure may account for some of the disparity between the number of judicial interventions in evidence-in-chief versus cross-examination.[15]

In their investigation of the impact of s 41 on cross-examination, Boyd and Hopkins[16] interviewed two experienced prosecutors and four defence barristers (two public, two private). The defence barristers perceived no changes in judicial interventions as a result of the implementation of s 275A (subsequently s 41). One explanation for this perception is that they assumed their manner of questioning during cross-examination was generally appropriate. By contrast, the prosecutors noticed some change in the manner of cross-examination after implementation of the legislation. One change noted was an increased awareness of the use of appropriate language in line with the developmental capacity of the children that were cross-examined. Whether this was a result of the amendments or due to other changes in procedure, such as the use of CCTV, was unknown.

A study conducted with a larger and wider sample comprised of judges, prosecutors, defence barristers and witness advisors revealed that 41% of these criminal justice professionals perceived judicial interventions to vary depending on the circumstances; 38% perceived the interventions as effective, while 21% stated they were ineffective.[17] In particular, across all stakeholder groups, interviewees suggested that the quality of judicial interventions was dependent on the presiding judge. Prosecution and defence barristers perceived that some judges did not intervene enough, even if it was necessary, while other judges intervened too much and disrupted the line of questioning. Some barristers suggested that the manner of an intervention varied depending on whether the judge was pro-prosecution or pro-defence, while other barristers and witness advisors acknowledged the dilemma faced by the judges to achieve a fair trial for both the complainant and the defendant, without giving grounds to appeal. Notably, stakeholders reported that aggressive and intimidating cross-examination was not as common as it was before because it was viewed as counterproductive.

Yet, analyses of actual trial transcripts in Australia and New Zealand suggested that questioning in court remained problematic. For instance, an analysis of trial transcripts in relation to the types of questions asked by both prosecution and defence counsel of child witnesses in New Zealand High and District Courts between 2008 and 2009, revealed that an average of 84% of questions asked during cross-examination were closed or leading, 18% used complex vocabulary and 27% contained embedded clauses.[18] (An embedded clause is a group of words, usually separated by commas, within the main sentence – for example, "the jacket, which was red, was left behind".) In line with the provision in New Zealand for judges to disallow questions that are too complicated,[19] the researchers concluded that judges were intervening more in that regard than they had 14 years prior.[20]

Similarly, analyses of trial transcripts in three Australian jurisdictions revealed that both prosecutors and defence lawyers commonly used questions that were complex in form.[21] Further, defence lawyers frequently asked questions based on stereotypes about complainant behaviour.[22] For instance, in the

[15] Cashmore and Trimboli, n 14, 51.

[16] Russell Boyd and Anthony Hopkins, "Cross-examination of Child Sexual Assault Complainants: Concerns about the Application of s 41 of the Evidence Act" (2010) 34 Crim LJ 149.

[17] Nina J Westera et al, "Courtroom Questioning of Child Sexual Abuse Complainants: Views of Australian Criminal Justice Professionals" (2019) 7(1) *Salus Journal* 20.

[18] Emma Davies, Emily Henderson and Kirsten Hanna, "Facilitating Children to Give Best Evidence: Are There Better Ways to Challenge Children's Testimony?" (2010) 34 Crim LJ 347, 352.

[19] *Evidence Act 2006* (NZ) s 85.

[20] Emma Davies, Emily Henderson and Fred W Seymour, "In the Interests of Justice? The Cross-examination of Child Complainants of Sexual Abuse in Criminal Proceedings" (1997) 4(2) *Psychiatry, Psychology and Law* 217; Emma Davies and Fred W Seymour, "Questioning Child Complainants of Sexual Abuse: Analysis of Criminal Court Transcripts in New Zealand" (1998) 5(1) *Psychiatry, Psychology and Law* 47.

[21] Powell et al, n 1, 188–195.

[22] Nina Westera et al, "Lawyers' Strategies for Cross-examining Complainants of Child Sexual Abuse" (unpublished, copy on file with authors, 2021).

recent case of *Director of Public Prosecutions (Vic) v McLachlan*, Magistrate Wallington made comment that "it was perturbing that Defence appeared unfamiliar with s 41 of the *Evidence Act 2008* (Vic), which prohibits such inappropriate questions".[23] Intervention or objection would arguably be stronger with younger children (as opposed to adolescents or adults) because young children are less able to respond accurately to complex questions or to seek clarification when faced with questions they misunderstand.

Some legal commentators, such as Caruso, raised concerns that the current legislative scheme does not change judicial behaviour, but rather confirms existing judicial obligations under the common law.[24] He submitted that judges are reluctant to intervene in questioning because of the adversarial nature of proceedings, and because of concern about being subject to an appeal. This was also the concern that stakeholders raised in the interviews conducted by Westera et al[25] (discussed above). The suggestion is in line with findings by Boyd and Hopkins (discussed above) that the amendments have not had an impact on the way practitioners cross-examine or on the frequency of intervention by the judiciary.[26]

A report by the Criminal Justice and Sexual Offence Taskforce entitled "Responding to Sexual Assault: The Way Forward", compiled by the Attorney-General of New South Wales, emphasised dependence upon the judiciary to enforce the rules in relation to improper questions in order for them to effectively protect complainants.[27] Since the implementation of the amendments on improper questions, no empirical research analyses have been conducted to determine whether or not this objective has been met.

B. The Present Study

No quantitative analysis of judicial interventions in sexual assault trials has been conducted in Australia since the 2004 study by Cashmore and Trimboli. The purpose of the present study was to determine what factors influence whether or not a judge intervenes during complainant questioning. The study analysed the incidence of interventions by judges and lawyers, both in relation to adult and child complainants of CSA, and considered the rate of intervention during examination-in-chief and cross-examination. Further, the study compared practices in three Australian jurisdictions, taking into account the age of complainants.

The study aimed to evaluate:

(1) whether, and to what extent, judges and lawyers are intervening during complainant questioning;
(2) whether judges and lawyers intervene more with children than adolescents and adults; and
(3) the reasons for judges' and lawyers' interventions.

The hypotheses for the first two aims were as follows:

- *Hypothesis 1* – Judges and lawyers would intervene more during cross-examination than evidence-in-chief.
- *Hypothesis 2* – Judges and lawyers would intervene more with younger children than with adolescents and adults.

The third aim regarding the nature of interventions was exploratory, so no specific hypotheses were postulated.

[23] *Director of Public Prosecutions (Vic) v McLachlan* (Unreported, Magistrates' Court of Victoria, Wallington B, 15 December 2020) 130 [757].

[24] David Caruso, "Proposed Reforms for the Cross-examination of Child Witnesses and the Reception and Treatment of Their Evidence" (2012) 21 JJA 191.

[25] Westera et al, n 22, 32–33.

[26] Caruso, n 24, 12.

[27] Criminal Justice and Sexual Offences Taskforce, "Responding to Sexual Assault: The Way Forward" (NSW Attorney-General's Department, 2005).

II. Method

A. Transcripts

The study sample was comprised of 120 transcripts of complainant evidence from 94 CSA trials[28] from three Australian jurisdictions (New South Wales, Victoria and Western Australia). Three-quarters of the complainants were female (n = 91) and one-quarter were male (n = 29). The complainants included: children and adolescents alleging contemporary CSA; adult complainants alleging that they were sexually abused as children; and adolescent complainants who were young children at the time of the abuse, such as a 17-year-old alleging historical abuse at five years of age. All child complainants and all but three adolescent complainants presented their evidence-in-chief via pre-recorded police interviews, while the three complainants and majority of adults presented their evidence-in-chief live via CCTV or in court. In cases that went to trial multiple times, video recordings of the complainant's evidence in the previous trial were presented in the subsequent trial. Overall, three-quarters of the complainants' evidence-in-chief were pre-recorded.

Most defendants were male (97.9%, n = 94); two were female (2.1%). One case involved three defendants. All defendants were adults at the time of the offence. For those cases in which the defendant's age was known, the age ranged from 22 to 76 years (M = 47.09, SD = 13.38) at the time of the offence.

In most cases, the complainant knew the defendant prior to the offence: 45% of the complainants (n = 54) knew the defendant as an acquaintance, family friend or professional; for 30% of the complainants (n = 36), the defendant was an immediate family member residing with the complainant; and for 22.5% of the complainants (n = 27), the defendant was an extended family member. In only three cases (2.5%) was the defendant a stranger.

B. Coding Scheme

The researchers conducted a thematic analysis of the types of interventions present in the trial transcripts,[29] to quantify what occurred during courtroom questioning. The coding scheme was developed with guidance from current rules of evidence codified in Australian legislation and current guidelines for judges in the three jurisdictions in the sample.[30]

One researcher read half of the transcripts and discussed these with another researcher. As a result, refinements to the coding scheme were made. The researchers conducted backwards and forwards engagement with the text as themes developed and were refined. Six broad themes of interventions were identified, presented in Table 1.

[28] Age range: 6.87–12.89 years – *Number* = 40 children, *Mean age* = 10.44 years, *Standard Deviation* = 1.77 years. Age range: 13.23–17.54 years – n = 40 adolescents, M = 16.01 years, SD = 1.11 years. Age range: 18.02–54.33 years – n = 40 adults, M = 27.24 years, SD = 8.93 years.

[29] Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications Inc, 1990).

[30] Australasian Institute of Judicial Administration (AIJA), *Bench Book for Children Giving Evidence in Australian Courts* (2015) <https://aija.org.au/wp-content/uploads/2017/07/Child-Witness-BB-Update-2015.pdf>; District Court of Western Australia, *Guidelines for Cross-examination of Children and Persons Suffering a Mental Disability* (2010) <https://events.development.asia/system/files/materials/2018/01/201801-course-2-conduct-and-control-court-gender-sensitization-d-guidelines-cross-examination.pdf>; Judicial College of Victoria, *Victorian Criminal Charge Book* (2016) <http://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm>; Judicial Commission of New South Wales, *Criminal Trials Court Bench Book* (2014) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/child_witness_accused.html>; Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (2015) <https://www.judcom.nsw.gov.au/publications/benchbks/equality/>.

TABLE 1. Types of Interventions by Judges and Lawyers

Code	Explanation	Example from the Transcripts
Question Form	Vague question	**Defence (D):** Now, in your interview in relation to that, you said that you went there by yourself. That can't be right, can it? **Complainant (C):** What are you talking about? The computer room? **Judge (J):** I think you have to explain to him what the interview is you're talking about.
	Misleading question	**D:** And you had already had your shower? **C:** No, I had a bath. **J:** Yes, you … **D:** Well, bath, sorry. I keep saying shower. **J:** I know. You slipped that one in, but he picked you up on it.
	Complex non-legal language	**D:** Was that a separate bedroom that [accused] had? **C:** I don't know **J:** Separate may not be a word that she understands.
	Complex legal language	**D:** Okay. And then, I'm going to suggest to you that in April … **J:** So – so if you say to him, "I suggest to you," perhaps explain what you mean by that.
	Complex sentence structure	**D:** When you went out from the house at nanny and grandpa's I take it you would have always gone out with an adult, would that be fair? **J:** Rephrase that question, I think; that was too complex for her.
Question Manner	Repetitive questioning	**J:** Can I just ask, this is repetitious? **D:** Yes, Your Honour. **J:** Unless it goes to another point, I won't permit repetition. **D:** No it goes to … **J:** No you don't need to tell me what it goes to, I'm just simply saying I won't permit unnecessary repetition. It's not fair to the witness. **D:** I understand it's … **J:** Not fair to the jury. If you're going to go back to something you've examined the witness upon, you need to get to the point. **D:** Yes.
	Speed of questioning	**D:** All right. Now, Ms [complainant], just for the purpose of the transcript, I'm just going to try and describe … **J:** Can we just slow it down. That's better, thanks.
	Interrupting the complainant	**Prosecutor (P):** Your Honour, I'm just going to object again. **J:** Why? **P:** If [defence] could please not interrupt? He is answering the question and just let him answer the question. **J:** Yes. **P:** It's hard enough, Your Honour. **J:** Right. **D:** I'm suitably reproved, Your Honour, and I'll … **J:** Yes. **D:** … try and avoid doing that. Sorry [complainant], I was interrupting you.

TABLE 1. *continued*

	Changing topics abruptly	**J:** Were you not asking the witness about the incident in the computer room? **D:** No, I was asking about … **J:** I thought that's what led to this … **D:** No. **P:** I also understood it was about the computer room. **D:** I'm asking now about the episode in the bedroom and your description of it in the first statement. **J:** That's why I intervened and asked very clearly for you to clarify that with the witness.
	Oppressive/harassing questions	**D:** I see, there's no more? But you just remembered? Any more you've just remembered now? In our cross-examination just now? **C:** We've already spoken about numbers. **D:** No more? No more numbers? **P:** I object to that. **D:** I withdraw that. **P:** It's harassing the witness; it's gone on long enough, Your Honour. **J:** Mr [defence]. **D:** Thank you, Your Honour.
Question Content	Questions based solely on stereotype	**D:** It [abuse] was something that you felt shouldn't happen to you correct? **C:** Yes. **D:** You could have stopped that by telling your uncle what happened. Correct? **J:** I reject that. **C:** Yeah.
	Inconsistency	**J:** Cross-examining children is a very difficult thing, Mr [defence]. **D**: Yes, of course. **J:** I sympathise utterly with the position you find yourself in, but this is not only a young witness but she's young for her age. Now the jury are conscious of the fact that she's given inconsistent answers here. Do you want to put to her generally that she's making it up or something? Because I really think that asking her to focus on particular questions is not going to be productive. But that being said, you are the cross-examiner and you are entitled to a considerable degree of leeway.
Matter of Law	Discussion between lawyers and/or judge and lawyers about legal decisions (includes all other issues of relevance, introduction of sexual history evidence, and editing of the police interview)	**P:** Because it was suggested to her that that was the reason why she had the break and that's not … **J:** She can be asked that. It's an open-ended question. I don't see the difficulty. **P:** I think it's unfair to [complainant], because she's being asked to remember something that happened four months ago. **J:** Madam Crown, that's the difficulty if you call child witnesses. I mean, there's nothing that says that child witnesses can't be asked these kind of questions, just because they may have difficulty remembering something that happened four months ago. But it's not an unfair question in my view. **P:** As Your Honour pleases.

TABLE 1. *continued*

Complainant Care	Suggesting breaks	**D:** Okay. Now, are you saying that nobody ever asked you about [accused] when you were young? **C:** No. I don't – I don't know. **D:** Okay. Well … **J:** Do you want a break? **C:** Yeah, actually.
Complainant Directions or Questions	Complainant directions	**J:** Right, [complainant]. Just wait for Ms [defence] to answer – to put the question – and then you answer it, otherwise if you talk over her, then she doesn't get to put her question and we don't get …
	Clarifying complainant answers or asking novel questions of the complainant	**D:** So it was before this happened, are you sure about that? **C:** I'm reasonably sure. **J:** So you're saying the motel incident was before the incident at [place]? **C:** As far as I can recall, yes.

An intervention was defined as a discussion between the judge and lawyer(s), or between the lawyers themselves, that broke the flow of the complainant's evidence. Any interventions that occurred from the time the complainant began giving evidence until they were excused from court were coded.

The intervenor was classified into one of four categories: (1) the judge in evidence-in-chief; (2) the defence lawyer; (3) the judge in cross-examination; and (4) the prosecutor. It is important to note that only interventions that clearly fitted into one of the themes identified by the coding scheme were coded. Purely routine interventions or interventions that were unrelated to the questioning of the complainant were not coded. For example, interventions to admit exhibits, to suggest routine breaks (eg lunch breaks), to address technological difficulties, or when a judge or lawyer simply did not hear the answer to a question were not coded.

A hierarchical rule was applied when coding intervention types where an intervention could potentially fit into multiple categories. The researchers were interested in the operation of legislation and guidelines that allow judges to intervene when "improper" questions are asked.[31] Therefore any interventions that could fit into these categories (eg stereotypes, misleading questions) were coded as such. Matters of law – that is, discussion between lawyers and/or judge and lawyers in relation to a legal issue, such as relevance – was used as a lower-order category, and interventions were only coded in this category if they did not fit into any of the higher-order categories. In effect, interventions on the basis of improper questioning may have been over-represented rather than under-represented because an improper question that fit into more than one category (eg inappropriate form and inappropriate content) was counted twice.

1. Inter-rater Reliability

To ensure that the codes accurately reflected the intervention types, inter-rater reliability (adequate agreement between individual coders of the transcripts) was established. Two researchers independently coded 20% of the transcripts from each age group. The codes were compared using a statistical analysis, which demonstrated a substantial level of agreement.[32] Disagreements were resolved through discussion, after which one researcher coded the remaining transcripts.

[31] *Evidence Act 1995* (NSW) s 41; *Evidence Act 2008* (Vic) s 41; *Evidence Act 1906* (WA) s 26; AIJA, n 30; District Court of Western Australia, n 30; Judicial College of Victoria, n 30; Judicial Commission of New South Wales (2014), n 30; Judicial Commission of New South Wales (2015), n 30.

[32] Cohen's kappa is a quantitative measure of the agreement between two coders, corrected for how often they may agree by chance. Across the three age groups (children, adolescents, adults) the Cohen's kappa coefficient was 0.80 (a coefficient of 0.61–0.80 is considered substantial and 0.81–1.00 trends towards perfect agreement).

C. Analysis

Statistical tests[33] were used to compare the interventions, looking for statistically significant differences within and between the following categories:

- reason for intervention (as listed in Table 1);
- point of intervention (complainant questioning or cross-examination);
- intervenor (judge, prosecutor or defence lawyer);
- age group of complainant (children, adolescents or adults); and
- jurisdiction (New South Wales, Victoria or Western Australia).

Only those findings directly relevant to the research questions are reported. The differences are statistically significant unless otherwise stated.

III. Results

A. Interventions During Complainant Questioning

As Table 2 shows, interventions were most common by judges in cross-examination. Judges intervened nearly four times as much as prosecutors.[34] The rate of judges' interventions in evidence-in-chief was one-fifth of their rate of interventions in cross-examination. Notably, in some cases judges did not intervene at all (10.0%, $n = 12$), while in other cases they intervened more in evidence-in-chief than in cross-examination (13.3%, $n = 16$).

TABLE 2. Number of Interventions by Judges, Prosecutors and Defence Lawyers

Intervention Source	Total Number of Interventions	Mean (Standard Deviation)	Median	Range
Judge evidence-in-chief	262	2.18 (4.81)	1.0	0–45
Judge cross-examination	1,293	10.78 (4.41)	5.0	0–162
Prosecutor	344	2.87 (4.40)	1.5	0–26
Defence lawyer	110	0.9 (1.48)	0.0	0–26
Total	**2,009**	**16.74 (22.24)**	**9.0**	**0–169**

B. Interventions with Children versus Adults

To determine whether the mean number of interventions differed between the three groups (ie children, adolescents, adults), an Analysis of Variance (ANOVA) was conducted. This analysis also explored whether any between-group differences were influenced by the complainant's age, intervention type and jurisdiction (ie whether any interaction effects emerged). The average number of interventions for each intervenor by complainant age group and jurisdiction is reported in Appendix A.

Figure 1 shows the average number of interventions for each intervenor by complainant age group. There are two important findings. First, a significant interaction was found between intervenor and age group.[35] As shown in Figure 1, judges intervened more with adults than with either children or adolescents during evidence-in-chief; in cross-examination they intervened more with adults than with children.[36] In

[33] A combination of analyses of variance (ANOVAs) and *t*-tests, depending on what was most appropriate. Tukey's post-hoc testing was conducted when required.

[34] *Evidence Act 1995* (NSW) s 41; *Evidence Act 2008* (Vic) s 41; *Evidence Act 1906* (WA) s 26; AIJA, n 30; District Court of Western Australia, n 30; Judicial College of Victoria, n 30; Judicial Commission of New South Wales (2014), n 30; Judicial Commission of New South Wales (2015), n 30.

[35] The ANOVA result, $F(2.45, 135.97) = 3.07$, $p = 0.039$, $\eta^2 = 0.052$, indicates a medium effect size. An effect size quantifies the magnitude and strength of difference between two groups.

[36] Again, the ANOVA, $F(2, 111) = 3.72$, $p = 0.027$, $\eta^2 = 0.063$, revealed a medium effect size.

contrast to expected practice, the number of interventions by prosecutors and defence lawyers did not differ as a function of the complainant's age.[37]

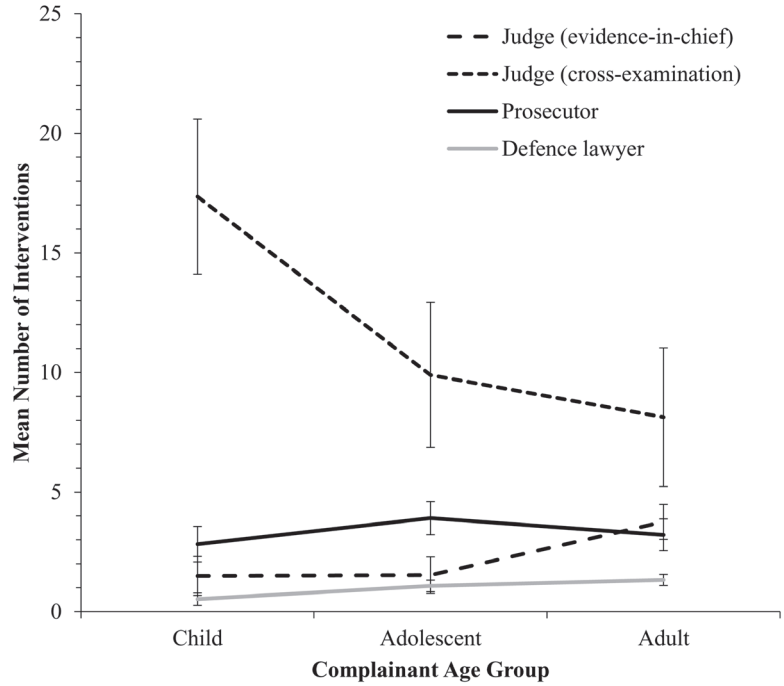

FIGURE 1. Average Number of Interventions by Intervenor and Complainant Age
Note: Error bars are standard errors.

Secondly, there was a significant difference based on jurisdiction,[38] with mean scores revealing that, while more interventions occurred in New South Wales than Western Australia, there were no other differences. There was also a significant interaction between complainant age and jurisdiction.[39] As shown in Figure 2, there were, on average, more interventions with children and adolescents in New South Wales than Victoria and Western Australia.[40] With adults, there were more interventions in Victoria than in Western Australia and New South Wales.[41]

[37] All *p*-values were below 0.05, the level required for statistical significance.

[38] $F(2, 111) = 4.23$, $p = 0.017$, $\eta^2 = 0.071$, with a medium effect size.

[39] $F(4, 111) = 2.50$, $p = 0.047$, $\eta^2 = 0.082$, with a medium effect size.

[40] New South Wales (children – $M = 8.10$ times, $SE = 1.37$; adolescents – $M = 6.53$ times, $SE = 1.88$) versus Victoria (children – $M = 6.21$ times, $SE = 2.17$; adolescents – $M = 2.99$ times, $SE = 1.29$) and Western Australia (children – $M = 2.33$ times, $SE = 1.22$; adolescents – $M = 2.78$ times, $SE = 1.29$).

[41] Victoria ($M = 6.84$ times, $SE = 1.60$) versus Western Australia ($M = 2.79$ times, $SE = 1.42$) versus New South Wales ($M = 2.68$ times, $SE = 1.37$).

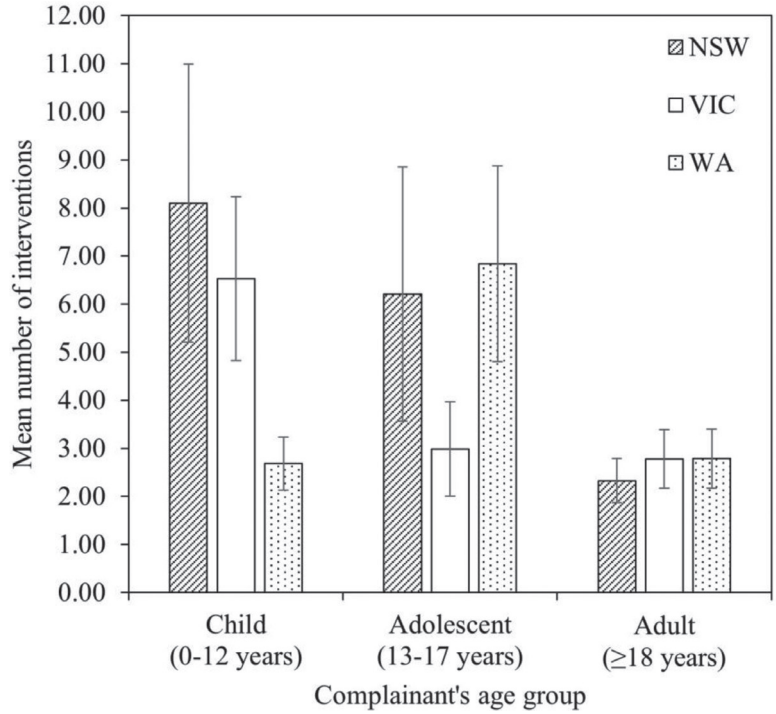

FIGURE 2. Average Number of Interventions by Complainant Age and Jurisdiction
Note: Error bars are standard errors.

C. Reasons for Interventions During Cross-examination

Next, the researchers explored the reasons for the interventions made by judges and prosecutors during cross-examination to investigate whether these reflect known problems with cross-examination. Interventions in evidence-in-chief were not included in this analysis due to their low prevalence. To control for the variation in the number of interventions by each party, proportions of each type of intervention were used rather than raw counts.

Table 3 shows the reasons for interventions, according to complainant age and intervenor. Note that the interventions for question content (ie inconsistency or questions based on stereotypes) were so low they were not included in any further analyses.

TABLE 3. Reason for Interventions (as Proportion of Total) in Cross-examination by Intervenor and Complainant Age

Reason for Intervention	Judge			Prosecutor		
	Under 13	13–17 yrs	Adult	Under 13	13–17 yrs	Adult
Question form	.343 (.050)	.374 (.053)	.455 (.058)	.348 (.068)	.395 (.063)	.434 (.065)
Question manner	.021 (.009)	.043 (.014)	.028 (.012)	.030 (.013)	.050 (.018)	.033 (.015)
Question content	.001 (.001)	.000 (.000)	.00 (.000)	.000 (.000)	.000 (.000)	.000 (.000)
Complainant care	.147 (.043)	.102 (.042)	.076 (.032)	.041 (.026)	.020 (.013)	.036 (.026)
Complainant directions or questions	.374 (.050)	.269 (.048)	.222 (.041)	.020 (.017)	.053 (.035)	.066 (.037)
Matter of law	.039 (.017)	.061 (.024)	.093 (.032)	.087 (.035)	.132 (.034)	.155 (.039)

Note: Standard errors are in parentheses.

Results of an ANOVA to test judges' and prosecutors' reasons for interventions showed they differed significantly according to complainant age. As illustrated by the small spread of proportions in Table 3, judges and prosecutors did not differ significantly in their reasons for interventions as a function of complainant age (ie there was no interaction).[42]

There were differences in the overall proportions of each reason for intervention.[43] As shown in Figure 3, judges and prosecutors intervened most based on question form, followed by giving directions or asking for clarification,[44] matters of law[45] and complainant care;[46] they intervened least based on the manner of the question.[47]

A comparison was then made between judges and prosecutors, comparing the proportion of times these intervenor groups used each intervention. This revealed that judges intervened more than prosecutors for complainant care[48] and to give the complainant directions or to ask questions.[49] As Figure 3 shows, there were no significant differences between judges and prosecutors in the proportion of times they intervened regarding question form,[50] question manner[51] or matters of law.[52]

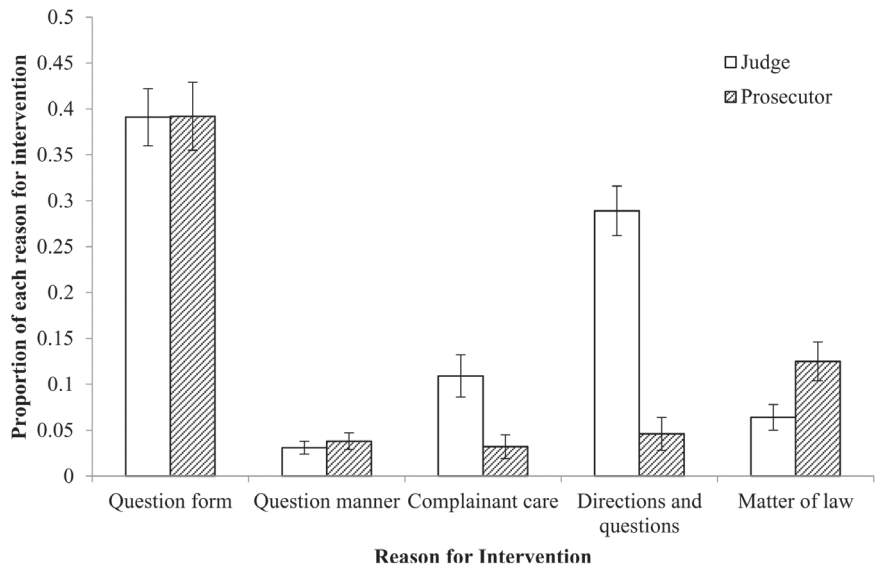

FIGURE 3. Reason for Intervention by Judges and Prosecutors

Note: Error bars are standard errors.

[42] $F(10, 228) = 1.57$, $p = 0.116$, $\eta^2 = 0.065$. The medium effect size does, however, indicate a significant effect may be found with a different or larger sample.

[43] $F(5, 113) = 25.46$, $p < 0.001$, $\eta^2 = 0.530$, large effect size.

[44] $M = 0.167$, $SE = 0.017$.

[45] $M = 0.095$, $SE = 0.013$.

[46] $M = 0.070$, $SD = 0.013$.

[47] $M = 0.033$, $SD = 0.006$ (Bonferroni corrected, $p < 0.001$).

[48] $F(1, 117) = 7.76$, $p = 0.006$.

[49] $F(1, 117) = 61.86$, $p < 0.001$, $\eta^2 = 0.346$.

[50] $F(1, 117) = 0.00$, $p = 0.001$, $\eta^2 = 0.000$.

[51] $F(1, 117) = 0.29$, $p = 0.594$, $\eta^2 = 0.002$.

[52] $F(1, 117) = 5.86$, $p = 0.017$, $\eta^2 = 0.048$ (Bonferroni corrected, $p < 0.01$).

IV. Discussion

One of the core roles of the judge is to facilitate the administration of justice. To perform this role effectively, judges are likely to have to intervene more in cross-examination – where the most problematic questioning of complainants occurs – than in evidence-in-chief. In line with Hypothesis 1 and previous research findings,[53] judges in this study did so, which suggests they are sensitive to the fact that more regulation is required in this phase of the trial process. Prosecutors at times intervened to address some of the problems arising in cross-examination, but to a lesser extent than judges. In contrast, regarding Hypothesis 2, there was no evidence that judges and prosecutors were intervening more with children than with adults, even though previous studies have shown the frequent use of problematic questions (eg complex and repetitive questions) with children.[54]

With all age groups, when judges and prosecutors did intervene, it was most often for an improper question form (nearly 40% of all interventions). This finding indicates a shift in judicial interventions within the last 15 years, considering that Cashmore and Trimboli[55] found in their 2005 evaluation of judicial interventions during a child's testimony that interventions occurred most frequently to clarify questions or answers of a response. These result also supports the prior finding that the vast majority of questions asked in court are closed and leading, contain complex vocabulary or embedded clauses.[56] At the same time, the finding suggests that judges and prosecutors are aware of the difficulties that poor questioning can pose for a complainant. However, when compared to the total number of complex questions asked by defence lawyers,[57] the actual number of interventions for question form was low. This could be due to a range of factors, such as the judge not wanting to appear to favour the prosecution (as suggested in an interview study on questioning and judicial interventions in Australia[58]) or the judge deciding that the complainant understood the question despite its complexity. A further potential explanation is that judges and prosecutors need up-skilling in how to identify the types of questions that are likely to decrease the accuracy of complainants' responses.

Interestingly, interventions for question content made up less than 1% of all interventions. Thus, judges and prosecutors seem not to regulate question content even though defence lawyers frequently employ questions based on stereotypes about complainant behaviour.[59] Judges and prosecutors may be reluctant to intervene because they perceive that the adversarial process should allow defence lawyers to test the evidence as they see fit.[60] Another reason is that s 41 of the *Evidence Act* defines stereotypes based on group membership (eg race, gender, age etc), not on how child sex abuse victims might behave.

Notably, judges were more likely than prosecutors to intervene for complainant care and to give directions or seek clarifications. This is readily explained by role differences between judges and prosecutors at trial. While judges monitor the trial, consider what evidence is admissible and, where applicable, give directions to the jury about the law, prosecutors present the case against the defendant with all available evidence and provide submissions about case law and legislation that is relevant to the case.

Further, the present study showed that the number of judicial interventions varied considerably. While most judges intervened more during cross-examination than evidence-in-chief, some judges intervened more during evidence-in-chief or not at all. These results are in line with findings in the study by Davies, Henderson and Hanna that judicial interventions were dependent on the presiding judge.[61] These differences also provide some support for barristers' perceptions that interventions might also depend

[53] Cashmore and Trimboli, n 14.

[54] See, eg, Davies, Henderson and Hanna, n 18; Powell et al, n 1, 188–195.

[55] Cashmore and Trimboli, n 14.

[56] Davies, Henderson and Hanna, n 18.

[57] Powell et al, n 1, 188–195.

[58] Westera et al, n 17.

[59] See, eg, Powell et al, n 1, Chs 15–16; Westera et al, n 22.

[60] See, eg, Westera et al, n 17.

[61] Davies, Henderson and Hanna, n 18.

on whether a judge appears to be pro-prosecution or pro-defence.[62] However, some disparities in the number of interventions between evidence-in-chief and cross-examination can be explained by the fact that the majority of complainants presented pre-recorded evidence-in-chief, while cross-examination was live. Thus, there was more opportunity to intervene during the cross-examination than during the evidence-in-chief.

In all, the study showed that judges (and prosecutors) recognised poor questioning used by defence barristers at trial and intervened if they deemed it necessary. However, the number and type of interventions depended on the presiding judge. Together, the findings suggest that more training is needed in asking appropriate questions at trial.

APPENDIX A: AVERAGE NUMBER OF JUDGES AND LAWYERS

TABLE A. Interventions by Complainant Age and Jurisdiction

Intervention by	Age of Complain-ant	New South Wales	Victoria	Western Australia	Total
Judge evidence-in-chief	Child	2.13 (1.18)	0.33(1.87)	2.00 (1.05)	**1.80 (0.39)**
	Adolescent	2.25 (1.62)	1.12 (1.11)	1.20 (1.18)	**1.38 (0.32)**
	Adult	1.20 (1.18)	7.91 (1.38)	2.14 (1.22)	**3.38 (1.21)**
Judge cross-examination	Child	25.87 (4.70)	19.67 (7.42)	6.53 (4.17)	**15.75 (4.60)**
	Adolescent	14.63 (6.43)	8.06 (4.41)	7.00 (4.97)	**8.96 (1.66)**
	Adult	4.00 (4.96)	13.82 (5.48)	6.57 (4.86)	**7.60 (1.53)**
Prosecutor	Child	3.60 (0.80)	4.33 (1.70)	0.53 (0.96)	**2.25 (0.67)**
	Adolescent	7.50 (1.47)	2.29 (1.01)	2.29 (1.01)	**3.20 (0.80)**
	Adult	4.00 (1.07)	4.27 (1.25)	1.36 (1.11)	**3.15 (0.62)**
Defence lawyer	Child	0.80 (0.38)	0.50 (0.59)	0.26 (0.33)	**0.50 (0.17)**
	Adolescent	1.75 (0.51)	0.47 (0.35)	1.00 (0.36)	**0.93 (0.23)**
	Adult	1.53 (0.38)	1.36 (0.44)	1.07 (0.39)	**1.33 (0.28)**
Total		**5.77 (0.90)**	**5.35 (0.99)**	**2.63 (0.77)**	

Note: Standard errors are in parentheses.

[62] Davies, Henderson and Hanna, n 18.