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Particularisation of Child Abuse Offences: Common Problems when Questioning Child Witnesses

Martine Powell, Kim Roberts and Belinda Guadagno*

Sexual abuse of children is a global problem that affects millions of children worldwide (World Health Organization 1999), however prosecution and conviction rates are low in developed countries (e.g., Crime and Misconduct Commission 2003). Child sexual abuse is a particularly difficult crime to prosecute when several different acts of child abuse were allegedly perpetrated, or a particular act was perpetrated on multiple occasions over an extended period of time. For an offender to be charged and convicted in relation to child abuse, most jurisdictions require that the individual offence(s) be 'particularised'. Specifically, each separate act of which the suspect is charged (e.g., assault, indecent assault, unlawful sexual penetration) must be identified with reasonable precision in relation to time, place or some other unique contextual detail (*S v The Queen*). An absence of particularising details is problematic because it potentially jeopardises: the defendant's right to a fair trial; the court's ability to establish rules of evidence and procedure; the accuracy and integrity of the verdict; and the ability to determine the appropriate sentence (see *S v The Queen*). On the other hand, child witnesses have tremendous difficulty isolating the time and context of repeated occurrences. This difficulty is compounded in situations where numerous offences occurred at close intervals in time, and where the context or content was highly similar across repeated occurrences (Price et al 2006; Roberts & Blades 1998, 1999; Roberts & Powell 2001).

The justice systems in Australia, and around the globe, have become increasingly aware over the past decades of the difficulty in prosecuting alleged child abusers due to lack of particularising details. In the Australian case of *Podirsky v The Queen*, for example, the High Court acknowledged that as a consequence of repeated abuse, child complainants are often not capable of providing evidence that sufficiently distinguishes between different incidents of abuse. The court acknowledged the injustice to the complainant that often results in these cases. In response to this and other calls for reform (e.g., Sturges 1985), Australian jurisdictions amended their legislation to allow prosecution to proceed in cases where there is evidence of a course of unlawful conduct over time, but the evidence lacks the particularity required to permit charges to be laid for each of the separate criminal acts.

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A new offence¹ was implemented, charged in cases where an adult is alleged to have sexually offended against a child on at least three separate occasions but the individual occasions of offending or acts cannot be individually identified and particularised with precision.

Although the new legislative intervention intended to overcome the difficulties experienced by prosecutors in establishing particulars of specific occurrences of repeated child abuse, it failed to achieve this goal. In decisions following the introduction of the new offence (maintaining a sexual relationship with a child), the courts adopted a narrow interpretation of the legislation and held that, while the prosecution does not have to *prove* the exact date or circumstances of the offending, it must still prove some particulars and general circumstances in sufficient detail to identify the three specific occurrences of abuse that form the charge (*KBT v The Queen* 1997; Victorian Law Reform Commission 2004).

Apart from legislative intervention, the only way of increasing the likelihood that child abusers will be successfully prosecuted is to enhance the quality of child witness statements. There are three main tasks required of the witness when recalling an occurrence of a repeated offence. These tasks include the ability to: remember and mentally reconstruct the temporal and spatial context of one or more occurrences of the abuse (thus distinguishing one occurrence from another); understand exactly what details should be reported; and recall details of one or more specific occurrences without importing and amalgamating details of other occurrences with details of the target occurrence (see Roberts & Powell 2001 for review). In our experience as trainers and experts in investigative/evidential interviewing, we have observed questioning procedures being adopted at various stages of the legal process that would have potentially impeded the children's ability to perform these tasks.

Overall, there are five main problematic questioning/interviewing procedures that are compounding children's ability to particularise offences. These include:

- (a) the overuse of specific as opposed to open-ended questions;
- (b) frequent use of questions that suggest the temporal position of details;
- (c) long retention intervals between the disclosure and the time of the interview;
- (d) invitations to provide a generic account of the abuse as opposed to specific incidents;
- and
- (e) the use of ineffective labels to identify occurrences of the abuse.

The aim of the current article is to briefly describe these problematic questioning procedures with reference to the prior research where appropriate. The rationale is that a clear understanding of inappropriate questioning practices could assist lawyers when evaluating children witness statements and could assist judges and magistrates in protecting children from unfair questioning practices. While some of the problems outlined below are relevant to any interview, they are particularly problematic with child witnesses when the task is to recall one occurrence of an offence or one act in a series.

¹ The new provisions enacted in the Australian Capital Territory (*Crimes Act* 1900 (ACT) s92EA), Northern Territory (*Criminal Code* 1983 (NT) s131A), Queensland (*Criminal Code* 1899 (Qld) s229B), Tasmania (*Criminal Code* 1924 (Tas) s125A), Victoria (*Crimes Act* 1958 (Vic) s47A) and Western Australia (*Criminal Code* 1913 (WA) s321A) state that it is an offence to *maintain a sexual relationship* with a young person or child of a prescribed age. In South Australia (*Criminal Law Consolidation Act* 1935 (SA) s74) and New South Wales (*Crimes Act* 1900 (NSW) s66EA) the new offence is named '*Persistent sexual abuse of a child*'.

Interviewers Overuse Specific, as Opposed to Open-Ended, Questions

One of the most frequent concerns expressed by experts in the investigative interviewing literature is the high proportion of specific, as opposed to open-ended, questions (Powell, Fisher & Wright 2005). A non-leading open-ended question is usually defined as any prompt that encourages an elaborate response but does not dictate or suggest what information is required (Powell & Snow 2007). Effective open-ended questions/prompts include 'Tell me what happened when ...', 'Tell me all about the part where ...', 'What happened after that ...'. In contrast, specific questions focus on specific details or acts and tend to elicit shorter and more focused responses. Specific questions typically commence with the words 'Who', 'What', 'When', 'Where' or 'How'. Although trainers recommend that the majority of questions should be open-ended, most of the prior evaluation research in Europe, the United States and Australia has revealed rates of open-ended questions of approximately 25 per cent (see Powell et al 2005 for review). The low rate of open-ended questions is due to many factors but primarily it is due to a lack of ongoing practice and expert feedback in professional interviewer training programs (Powell, Wright & Clarke in press).

The importance of using open-ended, as opposed to specific questions when eliciting details about an occurrence of a repeated offence is highlighted when one considers the effect of repeated experience on memory. When a child (or any person) experiences multiple occurrences of an event, details that are fixed (experienced exactly the same way during each occurrence) are strengthened in memory and become highly resistant to suggestion (Connolly & Lindsay 2001; Powell et al 1999). Details that *vary* across occurrences, however, are easily confused and subject to interference (Powell et al 1999; Powell & Thomson 1996, 1997a, 1997b, 2003). Such details (e.g., remembering what clothing was worn, where other people were, or precisely what somebody did or said during a specified occurrence of the event) are the types of details required by law to particularise the offence. It is important to note that the detail is not necessarily forgotten per se. Oftentimes it is the temporal position of the detail that is forgotten, resulting in the intrusion of details from other occurrences of the event into the occurrence that is being recalled. Research has clearly established that such intrusion or migration errors are heightened as questioning becomes more specific (Connolly & Lindsay 2001; Farrar & Goodman 1992; Hudson 1990; Powell & Roberts 2002; Powell et al 1999; Powell & Thomson 1996).

There are several reasons why intrusion errors are minimised in response to open-ended questions. First, open-ended questions, which cast the 'net' wide and facilitate a detailed free-narrative account of what happened, encourage a deep level of memory processing which is less conducive to errors (Broadbent 1958; Kahneman 1973). Recalling events allows information to be retrieved that can be used to determine the temporal and contextual source of individual events (Johnson et al 1993). Second, when witnesses are invited to provide narrative accounts, they tend to report information that they truly remember. With specific questions, however (e.g., 'when did it happen', 'how long were you there', 'what was the weather like outside'), children tend to adopt a 'familiarity criterion' whereby they report details that are familiar without thoroughly examining the source of the details (Roberts & Blades 2000). Further, when specific questions are asked about details that are not in the child's memory store, the child may guess or make up a response due to social pressures or demand characteristics associated with the interview situation.

Finally, open-ended questions are less likely than specific questions to refer to precise details, and are thus less prone to confusion and misunderstandings. Specific questions about

a repeated event tend to focus on temporal and contextual details (Guadagno & Powell in press), thus they are more likely to include language and request concepts that are too complex for the child's level of cognitive development and to impose the interviewer's expectations, language and framework of the event, rather than the child's framework. It is a fallacy to assume that open-ended questions (when used effectively) cannot elicit highly specific event details. In relation to temporal attributes, for example, recent research has shown that more details are elicited from children using open-ended prompts that probe recall memory than specific prompts that probe recognition memory (Orbach & Lamb in press).

Effective cross-examination arguably necessitates the use of a high proportion of specific questions (Mildren 1997). However, it puzzles some experts why investigative interviewers adhere predominantly to these questions (Wright & Powell 2006). Recent research has shown that this is not just an issue of inadequate training, but also inadequate knowledge among investigative interviewers about what is needed to particularise events. In a study by Guadagno, Powell and Wright (2006), a group of Australian police officers and legal professionals (i.e., prosecutors, defence lawyers and a judge) who specialise in child abuse offences were interviewed about how particularisation is best achieved in cases of repeated child abuse. Overall, the police officers perceived that highly specific details (such as the location, date and time of the offence) are *essential* for particularisation to occur, and that maximising the number of separate offences and specific details about each offence increases the chance of successful prosecution. In contrast, the legal professionals perceived that the primary goal should be to elicit a coherent free-narrative account of one or more offences and that the accuracy and quality of information elicited was more important than the quantity. A high proportion of specific questions was perceived to negatively impact on the child's credibility by contaminating the evidence. This is well illustrated in the following quote by a female prosecutor:

I think what we really want to do is facilitate the voice of the child in a way that enables them to describe as accurately as they can their experiences. This is the best way of understanding the nature of the criminality alleged ... We can become too overly focussed and lost in the minutiae ... You've got to look at the child's experience as a whole ... If the headset of the interviewer is 'I need to know X, Y and Z' well then they may not realise they've already got what they need in the narrative (Guadagno et al 2006:257).

The problem, however, is that many police members in Australia currently receive very little feedback regarding their questioning technique because they have limited exposure to court, are sometimes not involved in the investigation, and because criminal investigators or prosecutors are often not involved in the interview process in the early stages of the investigation (Wright et al 2006; Guadagno et al 2006). Further, when feedback is given it is often provided well after the interview has taken place. To be most effective, feedback needs to be pro-active; that is, to help interviewers to think *in advance* of potential avenues to follow in the interview and what precise detail needs to be elicited to support various charges (Powell, Fisher & Hughes-Scholes in press).

Interviewers Frequently Use Questions that Suggest the Temporal Position of Certain Details

In a series of studies reported in 2006, Guadagno provided a detailed critique of police officers' questioning of children about repeated events. Specifically, the rate of temporally-, as opposed to content-, leading questions was compared. Content-leading questions were defined as those questions that suggest or presume the occurrence of details that have not previously been mentioned by the child. Temporally-leading questions were

defined as those questions that referred to the position of such details within the series of occurrences. Examples of temporally-leading questions include:

- (a) 'You said [alleged offender] touched your fanny with his hand this second time. Did [alleged offender] put his doodle in your fanny this second time as well?' when the child had not previously mentioned being penetrated on the second occurrence;
- (b) 'Tell me about the last time [alleged offender] kicked you' when the child had not previously stated that [alleged offender] kicked him on more than one occasion; and
- (c) 'Did [alleged offender] give you a treat the last time he played the sex game?' when the child had previously mentioned a sex game, but no treat at all.

Importantly, content- and temporally- leading question categories are not mutually exclusive. For example, consider question (c) above. This question is leading in terms of content because the content detail (treat) that allegedly occurred in the event (sex game) was not previously mentioned by the child. The question is also leading in terms of temporal detail because it makes reference to the time when the content detail (treat) allegedly occurred (i.e., the *last* time the child and offender played the sex game).

Guadagno's (2006) studies showed that the rate of temporally-leading questions was higher than that of content-leading questions. Suggestions about the temporal position of details occurred directly (as in the examples above) when a previously-mentioned or new detail is linked to a particular occurrence of the offence without establishing first whether this was the case. Suggestions about the temporal position of details, however, also occurred when the interviewers rapidly shifted focus between occurrences without providing appropriate verbal cues to indicate that they had done so. In this way, interviewers sometimes *inadvertently* linked particular details to wrong occurrences, due to lack of clarity about which occurrence is being referred to.

The problem with the high rate of temporally-leading questions is that children are more suggestible in response to temporally-leading as opposed to content-leading questions (Powell, Roberts et al in press). Recent research suggests that, when asked questions that contain details and references to when the detail may have occurred (e.g., 'Did you see X when you watched the video?'), children simply ignore the source (video) and respond on the basis of the detail's familiarity (Cameron & Roberts 2005). Further, errors in response to temporally-leading (as with content-leading questions) decrease the chance of successful prosecution. If a child accurately describes an incident of abuse but confuses the time and place of the incident with another similar incident, the perpetrator may be able to provide an alibi and be exonerated even though the child may be truthfully relaying abuse that had actually occurred at some point in the past. Like errors related to content, temporal confusion errors would be minimised if interviewers were effectively trained to avoid making presumptions about the timing of event details, exhaust an account of one occurrence before moving the child's focus to another occurrence, and utilise open-ended questions where possible. Because open-ended questions (by definition) encourage elaborate responses and are generally broad in focus (Poole & Lamb 1998), they reduce the risk that the interviewer will raise specific details which (in turn) reduces the risk of contamination from misleading information. Conducting separate interviews for each occurrence would also reduce the risk of contamination.

Interviews are Frequently Conducted after Long Retention Intervals

In their 2004 report, the Victoria Law Reform Commission identified the features of sexual offence cases which make committals and trials particularly distressing for many complainants. High among their concerns was the long delays between reporting of offences and trials. Long delays are not only frustrating for witnesses. They also impede the quality of evidence elicited. It is well established that the amount of correct information that can be recalled about an event declines as the retention interval between the target occurrence and the interview increases (Hudson 1990; Powell & Thomson 1996). The decline in performance with time is a robust finding in all areas of memory research; however, it is particularly crucial in tasks that require children to remember a particular occurrence of a repeated event. While memory for content details as well as temporal-source information decline over time, source information appears to be forgotten more rapidly (Powell & Thomson 1997a; Schacter et al 1984).

The effect of retention interval is moderated by several factors. Some of these factors include: the age of the child, the saliency and position of the occurrence in the series, and the number and frequency of occurrences. With regards to age, research has established that younger (i.e., 4- to 5-year-old) children provide fewer correct details when recalling an occurrence of a repeated event than older (i.e., 6- to 8-year-old) children (Hudson 1990; Powell & Thomson 1996). The first and last occurrences are likely to be more easily distinguished compared to other occurrences in the series (Powell, Thomson & Ceci 2003), as are occurrences that are more distinct in terms of content or context (Pearse et al 2003). Furthermore, research has shown that a person can discriminate between competing sources of information more successfully when the total number of occurrences is small rather than large (Lindsay 1994; Linton 1982), and when the interval between the occurrences is long rather than short (Hintzman & Block 1970; Slamecka 1967). All of these factors could affect the extent to which a child can maintain details specific to one occurrence of a repeated offence over time.

Interviewers Sometimes Encourage Generic Recall

Children's narrative reports of repeated events are qualitatively different to those of single (once-experienced) events. After repeated experience, children usually establish a 'script' whereby features that are common across the occurrences are well-remembered and used to structure recall (see Hudson, Fivush & Kuebli 1992). Thus, children who allege repeated abuse will often describe individual occurrences with generic phrases like 'he always does it like this'. Although scripts can be useful for organising and producing accurate recall of the general aspects of events, they can lead to several kinds of memory errors when recalling a particular occurrence. The use of the script to guide recall is so strong that script-consistent details can be recalled even when they were not actually experienced or witnessed in a particular occurrence (Bower, Black & Turner 1979; Powell & Thomson 1996). When generic accounts are provided it is not clear which occurrence (if any) the child is recalling. Children do not like repeating their accounts and their attention is limited. Further, children who describe a repeated offence in generic terms are considered by mock jurors to be less credible than children who can provide specifics (Brubacher & Roberts 2007; Connolly et al in press). Thus, the time in an interview should be focused primarily on eliciting information needed to particularise an account (e.g., details specific to an occurrence).

One of the problems we have observed in field interviews is that interviewers sometimes allow children to give an account of multiple incidents in general terms before probing specific details that will identify individual incidents. Consider the transcript below:

Child: I like playing with Steven.
 Interviewer: Mmm hmm.
 Child: Yeah but sometimes he does the tickling game and I don't like it.
 Interviewer: What happens when Steven does the tickling game and you don't like it?
 Child: Um ... he just tickles me on my rude spot and my boobies.
 Interviewer: What else happens when Steven does the tickling game?
 Child: One time he kissed my boobies.
 Interviewer: Tell me everything that happens when Steven tickles your rude spot.

For the reasons listed above, our recommendation is that questions that encourage the child to talk in present tense should be minimised as much as possible and used only *after* detailed descriptions of individual incidents have been obtained. As soon as cues are provided by the child that the event was repeated, the interviewer should (a) establish in the form of a yes/no question whether the offence occurred on one or more occasions and (b) if so, invite the child to recall one of these occasions (Orbach et al 2000). Having the child recall what generally occurred first could potentially contaminate his/her account of a specific occurrence as the details may not be the same. Once the child has commenced recalling a specific occurrence, reminders like 'Remember we're just talking about the *last* time Steven played the tickling game with you in the bath' can be effective in keeping the child's focus on that occurrence rather than veering back into a generic account.

Ineffective Labels are Commonly Used to Identify Occurrences of Abuse

Children's ability to identify and label occurrences is an important consideration when interviewing about a repeated offence. Without unambiguous identification of occurrences, charges cannot be laid, and sentences assigned that represent the true nature of the crime committed. For example, if a child has been repeatedly abused but can only identify specific details from one occurrence, only one charge will be laid (the exact charge to be determined by the child's description of what occurred). Second, without effective labels for occurrences, the child and interviewer are unclear about which incident is being referred to (Guadagno & Powell in press). When this occurs, interviewers may inadvertently link details to the wrong occurrence and the defence can use any resulting confusion or inconsistency in the child's account to undermine the child's credibility. Enhancing *identification* of occurrences is a promising way to reduce confusion because labels: (a) reduce ambiguity about which occurrence is being described ('tell me more about the time in the bedroom'), (b) assist in keeping the respondent focused ('let's stick to the time in the bedroom'), and (c) communicate the forensic need for details specific to a particular occurrence.

Current best-practice guidelines recommend that investigative interviewers should not suggest or generate labels for individual occurrences (e.g., 'Let's call that the bathroom time'). Rather, they should encourage children to generate their own labels (Roberts & Powell 2001). The rationale for this is twofold. First, children's spontaneous recall is usually more accurate than when they are cued to provide information by interviewers (Pipe et al 2004). Temporal terms such as 'first' or 'last' can be used, but contextual cues are more effective than temporal cues in facilitating recall of an occurrence of a repeated variable event (Pearse et al 2003). Second, to be effective a contextual label needs to be unique to an occurrence. Because interviewers are usually naïve as to what occurred in the event,

confusion and misunderstandings will be reduced if interviewers refrain from making presumptions about the structure of the event (Guadagno & Powell in press).

Unfortunately, the limited research to date suggests that children are not necessarily accurate when identifying effective labels to distinguish similar occurrences of an event. In a large pilot study completed by Roberts and Powell (Roberts, Powell & Brubacher 2006), 90 5- to 8-year-olds participated in four occurrences of a staged event at their school and were later asked to describe the two occurrences that they 'remembered best'. After describing each occurrence, the interviewer asked if anything was different about the occurrence and requested a label. Overall, the children were aware that certain details had varied (81 per cent correctly indicated that the recalled occurrence was different to the other occurrences) and children were often successful in choosing a label that reflected a detail that had varied across the series of occurrences (only 14 per cent of the labels chosen reflected items that did not change across the series, e.g., saying 'the time we read a book' when a book was read each time). However, for variable items where there was a unique detail in the occurrence, only half of the labels provided by the children reflected this unique detail. These data suggest that children sometimes confuse details from multiple occurrences, thus compromising their credibility. It also suggests that prosecutors may be underestimating the number of occurrences (e.g., if a child cites '*the* time in the bedroom', there may have been multiple times in the bedroom). On a positive note, researchers are now starting to focus on developing ways to improve children's ability to identify and label occurrences of a repeated event.

Conclusion

Prosecuting child abusers is often difficult due to lack of particularising details. Two possible ways of addressing this difficulty are: (a) to change the justice system to better serve prosecution for repeated offences (i.e., allow generic testimony), and (b) to bolster children's testimony. As this article has illustrated, there is still considerable potential for increasing (b). Given the low prosecution rates of child abuse offences, the need for exceptional interviewer training programs coupled with resources for ongoing supervision is now critical. While there have been some major improvements in child witness investigative interviews over the past two decades, there are still numerous common deficiencies. These difficulties are particularly evident in interviews about repeated abuse.

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