

**SUBMISSION TO THE VLRC –
IMPROVING THE RESPONSE OF THE JUSTICE SYSTEM TO SEXUAL
OFFENCES**

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I INTRODUCTION

This submission relates to VLRC’s current inquiry into Improving the Response of the Justice System to Sexual Offences. I am grateful to the VLRC for the opportunity to make a submission.

I am a current PhD Candidate in the School of Law at La Trobe University, having commenced candidature in 2020. In addition, I am a barrister at the Victorian Bar practising predominantly in criminal law, for both the prosecution and the defence. I am a Committee Member of the Criminal Bar Association, as well as a Member of the Australian Bar Association’s Criminal Law Committee. This submission contains my own opinions and does not purport to reflect the views of the Criminal Bar Association, the Australian Bar Association, or the Victorian Bar.

In relation to my PhD studies, my area of research relates to child complainants¹ pre-recorded evidence in sexual abuse cases. More specifically, my research will:

- examine issues of concern with the current police-led pre-recorded evidence in Victoria;
- examine how those recordings are ultimately utilised in the court process;

¹ The term ‘complainant’ is used to mirror the language of the *Criminal Procedure Act 2009*, noting that this submission examines the criminal process prior to any finding of guilt, or otherwise, in relation to allegations.

- consider the evidence collection regime in other jurisdictions, particularly those jurisdictions where someone other than a police officer conducts the pre-recording of a child complainant's evidence; and
- consider whether a different evidence collection process could be adopted in Victoria as well as what that process could look like.

This submission is limited in focus, in that it only considers matters within the scope of my current research area and is intended to serve as a summary of issues that have previously been identified within that sphere. Accordingly, this submission seeks to provide information that may assist the Commission in its consideration of questions posited in Issues Paper 'D', namely:

Question 3: What other issues need to be addressed to improve the police investigation process for children who have been sexually harmed?

and

Question 4: What other issues need to be address during the investigation process to support successful criminal prosecutions in sexual offence cases?

The veracity of child complainants' evidence in child sex offence cases is fundamental to a fair trial and the overall effective functioning of the criminal justice system. The manner in which child complainants' evidence is obtained is a key contributing factor to the way in which trials are conducted, and also contributes to their ultimate outcome. Where the collection of child complainants' evidence is subject to vague and improper questioning; where the child complainant is exposed to repeated and lengthy interviews; and involved in a process which does not allow the narrative to be told, these issues impede the effective functioning of the prosecution, defence, and the Court.

II AN OVERVIEW OF THE CURRENT EVIDENCE COLLECTION REGIME

The legislative framework for the creation and use of pre-recorded evidence in sex offences is contained in the Criminal Procedure Act 2009 (**'the CPA'**), and Criminal Procedure Regulations 2009 (**'the CPR'**).²

Pre-recorded evidence in Victoria has become known by the Victoria Police acronym, VARE, meaning Visual Audio Recorded Evidence. To be of evidentiary use, the VARE must comply with the requirements set out in Regulations 5 and 6 of the CPR, including that:

- It must be conducted by a Victoria Police Officer, or a person authorised by the Chief Commissioner of Police, who has completed the required training program;
- The date, time and place of recording, plus the identity of those present are included in the VARE;

To be used as evidence in chief of the witness/complainant, the VARE must also comply with s 368 of the CPA which requires, *inter alia*, that a transcript must be provided to the Accused or their legal representative, and they must have been given reasonable opportunity to listen to/view the recording, and at the time of the relevant court hearing³ the witness/complainant has identified themselves, attested to the truthfulness of the recording, and is available to be cross-examined and re-examined.

A VARE is able to be edited and altered, by order of a Court per s 368, so that any parts ruled as inadmissible can be removed. In determining whether such a course of action should take place, the Court will consider whether the issues that have been raised in relation to inadmissibility can be dealt with in cross-examination and/or re-examination.⁴

² The requirements in relation to pre-recorded evidence in Commonwealth matters is not discussed as part of this submission. For reference it is contained in s 15YM of the *Crimes Act 1914* (Cth).

³ This could be at summary contested hearing, a special hearing per s 370 of the *Criminal Procedure Act 2009*, or at a trial.

⁴ See *R v Knigge* (2003) 6 VR 181; *Martin v R* (2013) 46 VR 537.

Intermediaries are a relatively new feature of the current evidence collection regime. As the VLRC would be aware, their establishment arose out of the VLRC's report titled *The Role of Victims of Crime in the Criminal Trial Process*, which recommended the creation of a witness intermediary scheme, broadly based upon the scheme in operation in the UK.⁵ This recommendation was accepted by the Victorian Government, with the introduction of an intermediary scheme being announced on 7 May 2017. The Victorian scheme commenced operation, as a pilot, in July 2018 ('**the Intermediary Pilot Program**').⁶

The role, function, and appointment of intermediaries is governed by Div 2 of Part 8.2 of the CPA. Section 389H provides for the establishment of a panel of suitably qualified persons who can be appointed as intermediaries, with s 389I outlining the intermediary's role, namely:

- (1) *The function of an intermediary is—*
- (a) *to communicate or explain to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and*
 - (b) *to communicate or explain to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person.*

Crucially, s 389I also designates an intermediary as an officer of the court and confirms their duty to act impartially.

Where an intermediary is used, the evidence of the witness must be given in the presence of the intermediary and in circumstances where the Court, legal representatives, and jury (if and where applicable) are able to see and hear the witness giving evidence, including any assistance given by the intermediary.⁷ The Court and

⁵ Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process: Final Report* (2016), Recommendation 30.

⁶ In the 2019-20 Victorian State Budget, the Pilot received further funding to enable its extension through to June 2020. It is unknown how the COVID-19 pandemic has impacted upon the extension to the pilot, and little updated information appears publicly available, although the writer is aware of intermediaries being utilised in matters late in 2020 which would indicate the scheme remains funded and operational.

⁷ *Criminal Procedure Act 2009* (Vic), s 389K (2)(a)-(b).

legal representatives must also be able to communicate with the intermediary during this process.⁸

The Intermediary Pilot Program initially operated in the 'Melbourne Courts Precinct' courts, being the Children's Court, Magistrates' Court, County Court, and Supreme Court located in the CBD.⁹ The initial operation also allowed for other Courts to be gazetted as required, and it was understood that such a request would not be refused.¹⁰ The Intermediary Pilot Program's operations were subsequently extended to cover matters heard in the Geelong and Bendigo Courts.¹¹

Although the Victoria Police VARE process is not covered by the legislation in relation to intermediaries, for the purposes of the Intermediary Pilot Program four SOCIT locations – being Box Hill, Fawkner, Frankston, and Geelong – were able to request the use of an intermediary to assist with the VARE. This was subsequently extended to include three further SOCIT locations: Knox, Bendigo and Moorabbin.¹² Police officers receive training on the use of intermediaries, and the Intermediary Pilot Program has contributed to the SOCIT Brief Quality Assurance Course delivered by the Victorian Police Academy.

Where Victoria Police make a request for an intermediary through the Intermediary Matching Service,¹³ the intermediary will conduct an 'on the spot' assessment prior to the VARE commencing and will make verbal recommendations about communication strategies to assist in eliciting evidence.¹⁴

⁸ *Criminal Procedure Act*, s 389K (2)(a).

⁹ Judge M Sexton, 'Intermediaries: New Rules in Victoria' (Speech delivered at the Victorian Bar Intermediaries CPD, Melbourne, 6 June 2018).

¹⁰ *Ibid.*

¹¹ Victorian Government, *Victorian Government Annual Report 2019 – Royal Commission into Institutional Responses to Child Sexual Abuse* (2019), 16.

¹² *Ibid.*

¹³ Run by the Department of Justice and Community Safety.

¹⁴ Intermediary Pilot Program Multi-Jurisdictional Committee, Magistrates' Court of Victoria, *Multi-Jurisdictional Court Guide for the Intermediary Pilot Program: Intermediaries and Ground Rules Hearings* (2018). Note: where an intermediary is appointed by the Court, they undertake a written assessment and make recommendations which are then discussed as part of the Ground Rules Hearing process. This is detailed in the aforementioned Multi-Jurisdictional Court Guide. See also s 389E of the CPA.

III PROBLEMS IDENTIFIED WITH THE CURRENT EVIDENCE COLLECTION REGIME

The issue of deficiencies in police interviews¹⁵ of children has received increasing academic consideration, particularly within the last 15 years. Upon review of a select volume of academic research, three key problems became apparent, namely:

- A failure to use ‘free narrative’ style questioning i.e. open ended questioning;
- Failures in consistent particularisation of offences i.e. the individual description used for a specific allegation, as well as how that event is differentiated from other allegations;
- The training that investigators received.

A *Failure to use Narrative Style Questions*

In relation to the issue of a failure to use free narrative style questions, studies have shown that investigators will routinely fail to use this type of questioning, with a 2007 review showing this occurred in approximately 75% of police interviews across a wide selection of studies.¹⁶ This under use of free narrative style questioning has been consistently observed in both field interviews and mock/simulated interviews and has been described as a “major limitation of police officers”.¹⁷ Similarly, investigators will often focus in on highly specific contextual details about the allegations, with this regularly occurring in the early stages of the interview.¹⁸

More recent studies demonstrate that there has been little, if any, change. Several studies conducted between 2011 and 2018 have found that rates of open-ended

¹⁵ The term “police interview” used throughout this submission means the interview of the child complainant that is recorded for use as their evidence in chief.

¹⁶ Martine Powell, Kim Roberts and Belinda Guadagno, ‘Particularisation of Child Abuse Offences: Common Problems when Questioning Child Witnesses’ (2007) 19(1) *Current Issues in Criminal Justice* 64, 66. See also ‘*An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*’ Report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse, discussed below.

¹⁷ Belinda L Guadagno, Martine B Powell and Rebecca Wright, ‘Police Officers’ and Legal Professionals’ Perceptions Regarding How Children Are, and Should Be, Questioned About Repeated Abuse’ (2006) 13(2) *Psychiatry, Psychology and Law* 251, 252.

¹⁸ Belinda L Guadagno and Martine B Powell, ‘A qualitative examination of police officers’ questioning of children about repeated events’ (2009) 10(1) *Police Practice and Research* 61, 67.

questioning in police interviews range anywhere from 4% to 57% of the total questions asked.¹⁹ The most recent of these studies found that only 13% of the questions asked in the police interviews reviewed were open-ended.²⁰ That same study found 9% of the questions asked were leading questions, and 78% of the questions asked were 'specific'.²¹

Studies have also indicated that investigators believed that open ended questions could not achieve the desired goal of a 'free narrative' and held a misunderstanding that they would be criticised in and/or by the Court for a failure to obtain highly specific contextual details for the purposes of particularisation of alleged offending.²²

Conversely, it is well established within psychological circles that free narrative questioning has significant benefits over closed or specific questioning. Those benefits have been validated in various studies dating as far back as 1977,²³ which have broadly demonstrated that: disclosed

- Responses to free narrative questions are usually more accurate;
- Specific questioning can lead investigators to under-estimate a witness' language limitations and thus over-estimate their oral comprehension;
- It allows the subject being interviewed to answer at their own pace, which promotes greater memory recall; and

¹⁹ Heather L Price and Kim P Roberts, 'The effects of an intensive training and feedback program on police and social workers' investigative interviews of children' (2011) 43(3) *Canadian Journal of Behavioural Science* 235; Kirk Luther et al, 'Child interviewing practices in Canada: A box score from field observations' (2015) 30(3) *Journal of Police and Criminal Psychology* 204; Mairi S Benson and Martine B Powell, 'Evaluation of a comprehensive interactive training system for investigative interviewers of children' (2015) 21(3) *Psychology, Public Policy, and Law* 309; Missy Wolfman, Deirdre Brown and Paul Jose, 'Taking stock: Evaluating the conduct of forensic interviews with children in New Zealand' (2016) 22(6) *Psychology, Crime & Law* 581; Karine Gagnon and Mireille Cyr, 'Sexual abuse and preschoolers: Forensic details in regard of question types' (2017) 67 *Child Abuse & Neglect* 109; Anne Sophie Pichler, 'The Relationship between Investigative Interview Quality, Trial Process, and Outcome in Cases of Child Sexual Abuse' (PhD Thesis, Deakin University, 2018).

²⁰ Pichler, above n 19, 93.

²¹ Ibid. Note: 'Specific' questions are those that force a choice (e.g. "was it blue or green?"), call for 'yes/no' answers, or cued recall (e.g. "what did you do when...?") but do not mention information not already disclosed by the child.

²² Belinda Guadagno, Martine Powell and Rebecca Wright, 'Police Officers' and Legal Professionals' Perceptions Regarding How Children Are, and Should Be, Questioned About Repeated Abuse' (2006) 13(2) *Psychiatry, Psychology and Law* 251.

²³ JP Lipton, 'On the psychology of eyewitness testimony' (1977) 62(1) *Journal of Applied Psychology* 90.

- Asking many short answer/closed questions impacts on the interviewer's mental capacity, reducing their ability to both comprehend and react to the witness' answers.²⁴

It is noted that work has recently been done within Victoria Police in relation to free narrative interviewing of child complainants, as part of the 'Whole Story' technique training.²⁵ This is discussed below.

B *Particularisation of Offences*

Particularisation of offences relates to both the individual details and description of a specific event, as well as how a distinct event is differentiated from other events where there have been allegations of repeated child sexual abuse. Issues relating to the latter are discussed in more detail in Part IV B of this submission.

One study that considered particularisation found there were several areas of broad disagreement between the various study participants (three police officers, six prosecutors, two defence lawyers, and a judge).²⁶ This included the time frame that ought to be detailed in relation to alleged offending, where answers ranged from the need for an exact date, to an unknown period of time that could span several years.²⁷

The strongest disconnect was, however, between what police officers believed to be appropriate questioning strategies and details in relation to time and place of offending, and what the legal professionals (being the six prosecutors, three defence lawyers, and the judge) believed was required.

The police officers believed that in order to obtain the specific details required for what they thought was proper particularisation, they would have to ask specific questions. Their reasons for believing so were that:

²⁴ See for example the summary of various studies contained in Martine B Powell, Ronald P Fisher and Rebecca Wright, "Investigative Interviewing" in Neil Brewer and Kipling D Williams (eds) *Psychology and law* (The Guilford Press, 2005) 11.

²⁵ A broad overview of the 'Whole Story' technique is provided in: Patrick Tidmarsh, Martine Powell and Elli Darwinkel, 'Whole story: a new framework for conductive investigative interviews about sexual assault (2012) 4(2) *Investigative Interviewing: Research and Practice* 33.

²⁶ Guadagno, above n 22.

²⁷ Ibid 255.

- In their experience, child complainants did not provide specific details in response to open-ended questions;
- They would be less vulnerable to criticism in court if they had obtained as much specific detail as possible; and
- They had a level of confusion as to why some cases and/or charges did not proceed i.e. there was a lack of feedback from legal professionals.²⁸

In relation to that latter reason, the police officers assumed that a matter did not proceed, or did not result in a conviction, as a result of their failure to obtain an adequate number of particulars, thus making the lack of success their responsibility.

Conversely, the legal professionals universally de-emphasised the need for such highly specific details and were not supportive of the 'more is better' approach favoured by police officers. The legal professionals group reported that attempts to obtain too many specific details from a child complainant often resulted in confusion which could damage both the evidence given and the child's credibility. Further, they were universally supportive of the emphasis being on the quality and accuracy of the details obtained, as opposed to specificity and completeness.²⁹

C Investigator Training

The issue of the investigative interview training that police officers receive has been subject to increasing academic discourse over the past several decades.³⁰ This research has identified and promulgated some now well-established principles underpinning

²⁸ Ibid 255-256.

²⁹ Ibid 256 -258.

³⁰ See for e.g. Mairi Benson, Belinda Guadagno and Martine Powell, 'Improving child investigative interviewer performance through computer-based learning activities' (2016) 26(4) *Policing and Society* 365; Susan Clark, Martine Powell and Rebecca Wright, 'Improving the competency of police officers in conducting investigative interviews with children' (2010) 11(3) *Police Practice and Research* 211; Carolyn Hughes-Scholes, Martine Powell and Stefanie Sharman, 'An Examination of Police Officers' Beliefs About How Children Report Abuse' (2014) 21(1) *Psychiatry, Psychology and Law* 127; Martine Powell, 'Specialist Training in Investigative and Evidential Interviewing: Is it Having Any Effect on the Behaviour of Professionals in the Field?' (2002) 9(1) *Psychiatry, Psychology and Law* 44; Martine Powell, 'Designing Effective Training Programs for Investigative Interviewers of Children' (2008) 20(2) *Current Issues in Criminal Justice* 189.

the process of forensic interviewing. Broadly, these are that questions should correspond to the interviewee's communicative abilities, rapport needs to be established, the interview process should be clearly explained, open-ended questions and a free narrative account are to be preferred, leading questions and other coercive practices should be avoided, and alternative hypotheses should be tested.³¹

Research has indicated that the guidelines developed in line with those principals have historically had little effect on the actual performance of investigative interviewers in the field,³² and that training is often delivered only once, and with minimal follow-up or refresher training.³³

Additionally, it has been noted that investigative interviewers are usually recruited internally, rotated through roles too frequently and, despite the provision of specialist training, had minimal knowledge in relation to eyewitness memory.³⁴ It has further been noted (with criticism) that the development of interview protocols is often left to operational staff who lack expertise in investigative interviewing, have little experience of creating/delivering education, are in limited tenure roles, operating with little accountability.³⁵

Given that successful completion of investigative interview training necessarily requires trainees to have demonstrably met a required level of competence, the question as to why there appears to be such a significant level of skill and/or knowledge erosion post-completion of investigative interview training must be considered.

There is a significant volume of human resource related research into what is known as the 'transfer of training', being the process of implementing skills learned in the training environment into the workplace. That researching indicates the factors which impact upon the proper and effective transfer of skills can be broadly separated into:

³¹ Martine Powell, 'Specialist Training in Investigative and Evidential Interviewing: Is it Having Any Effect on the Behaviour of Professionals in the Field?' (2002) 9(1) *Psychiatry, Psychology and Law* 44.

³² Ibid.

³³ Cristina Cavezza et al, 'Examination of the consistency of interviewer performance across three distinct interview contexts' (2010) 16(7) *Psychology, Crime & Law* 585.

³⁴ Martine Powell, 'Designing Effective Training Programs for Investigative Interviewers of Children' (2008) 20(2) *Current Issues in Criminal Justice* 189.

³⁵ Martine B Powell, 'An Overview of Current Initiatives to Improve Child Witness Interviews about Sexual Abuse' (2013) 25(2) *Current Issues in Criminal Justice* 711, 714.

- Trainee-related factors;
- Training-related factors; and
- Workplace-related factors.

Studies spanning several decades have consistently found that two key factors trainee-related factors impact upon a successful transfer of skills: the trainee's motivation to learn and their understanding of the relevance of the training to their work,³⁶ and the trainee's level of self-efficacy and feeling of preparedness.³⁷

Meanwhile, trainee satisfaction with the quality and content of the training, and whether this met their needs and expectations is the key training-related factor.³⁸

Finally, there are three workplace-related factors that influence the efficacy of skill transfer. The first relates to whether or not the organisational culture explicitly

³⁶ Timothy Baldwin, Richard Magjuka and Brian Loher, 'The perils of participation: Effects of choice of training on trainee motivation and learning' (1991) 44(1) *Personnel Psychology* 51; John E Mathieu, Scott I Tannenbaum and Eduardo Salas, 'Influences of individual and situational characteristics on measures of training effectiveness' (1992) 35(4) *Academy of Management Journal* 828; Raymond A Noe, and Neal Schmitt, 'The influence of trainee attitudes on training effectiveness: Test of a model' (1986) 39(3) *Personnel Psychology* 497; Amalia Santos and Mark Stuart, 'Employee perceptions and their influence on training effectiveness' (2003) 13(1) *Human Resource Management Journal* 27; Kenneth Wexley and Timothy Baldwin, 'Post-training strategies for facilitating positive transfer: An empirical exploration' (1986) 29(3) *Academy of Management Journal* 503.

³⁷ Brian Blume et al, 'Transfer of Training: A Meta-Analytic Review' (2010) 36(4) *Journal of Management* 1065; D Chiaburu and S Marinova, 'What predicts skill transfer? An exploratory study of goal orientation, training self-efficacy and organizational supports' (2005) 9(2) *International Journal of Training and Development* 110; Marilyn E Gist, Cynthia Kay Stevens and Anna G Bavetta, 'Effects of self-efficacy and post-training intervention on the acquisition and maintenance of complex interpersonal skills' (1991) 44(4) *Personnel Psychology* 837; C L Holladay and M A Quiñones, 'Practice Variability and Transfer of Training: The Role of Self-Efficacy Generality' (2003) 88(6) *Journal of Applied Psychology* 1094.

³⁸ Timothy T Baldwin and J Kevin Ford, 'Transfer of training: A review and directions for future research' (1988) 41(1) *Personnel Psychology* 63; Elwood F Holton III and Timothy T Baldwin, 'Making transfer happen: An action perspective on learning transfer systems' in Holton III and Baldwin (eds), *Improving Learning Transfer in Organizations* (Jossey-Bass, 2003), 3.

supports the use of the skills as trained.³⁹ The second factor relates to the volume, frequency, and utilisation of opportunities to undertake trained tasks 'on the job'.⁴⁰ In relation to policing, it has been noted that that an individual's implementation of training and the utilisation of opportunities to use that training can be impacted by the context of the working environment and its culture.⁴¹

The third and final workplace-related factor impacting upon the transfer of training relates to the degree of supervision, coaching, and performance feedback provided in the working environment post-training.⁴²

In relation to investigator training in Australia it has been suggested that part of the difficulty in maintaining an effective workplace climate relates to an absence of processes that facilitate inter-agency collaboration and feedback, as well as a lack of self-efficacy in officers whose efforts have gone unrecognised by management.⁴³

Notably, one recent study attempted to synthesise recent (being from 2000 to 2015) published research on the efficacy of in-service police training, with a view to establishing what training techniques had been shown to be effective, and whether those techniques had been assessed for long-term effectiveness. That systematic

³⁹ Constantine Kontoghiorghes, 'Factors Affecting Training Effectiveness in the Context of the Introduction of New Technology – A US Case Study' (2003) 5(4) *International Journal of Training and Development* 248; Doo Hun Lim and Michael Lane Morris, 'Influence of trainee characteristics, instructional satisfaction, and organizational climate on perceived learning and training transfer' (2006) 17(1) *Human Resource Development Quarterly* 85; Mathieu et al, above n 36; Janice Z Rouiller and Irwin L Goldstein, 'The relationship between organizational transfer climate and positive transfer of training' (1993) 4(4) *Human Resource Development Quarterly* 377; J Bruce Tracey, Scott I Tannenbaum and Michael J Kavanagh, 'Applying trained skills on the job: The importance of the work environment' (1995) 80(2) *Journal of Applied Psychology* 239.

⁴⁰ J Kevin Ford et al, 'Factors affecting the opportunity to perform trained tasks on the job' (1992) 45(3) *Personnel Psychology* 511; Alice P Gaudine and Alan M Saks, 'A longitudinal quasi-experiment on the effects of posttraining [sic] transfer interventions' (2004) 15(1) *Human Resource Development Quarterly* 56; 2004; Lim and Morris, above n 39.

⁴¹ Janet Chan, 'Changing Police Culture' (1996) 36(1) *The British Journal of Criminology* 109; Gayre Christie, Simon Petrie and Perri Timmins, 'The Effect of Police Education, Training and Socialisation on Conservative Attitudes' (1996) 29(3) *Australian and New Zealand Journal of Criminology* 299.

⁴² Timothy T Baldwin and J Kevin Ford, 'Transfer of training: a review and directions for future research' (1988) 41(1) *Personnel Psychology* 63; Robert O Brinkerhoff and Max U Montesino, 'Partnerships for training transfer: Lessons from a corporate study' (1995) 6(3) *Human Resource Development Quarterly* 263; Mary L Broad and John W Newstrom, *Transfer of Training: Action-Packed Strategies to Ensure High Payoff from Training Investments* (Addison-Wesley Publishing Co, 1992); Lisa A Burke and Timothy T Baldwin, 'Workforce training transfer: A study of the effect of relapse prevention training and transfer climate' (1999) 38(3) *Human Resource Management* 227; Chiaburu and Marinova, above n 37; Nicholas Clarke, 'Job/work environment factors influencing training transfer within a human service agency: some indicative support for Baldwin and Ford's transfer climate construct' (2002) 6(3) *International Journal of Training and Development* 146.

⁴³ Powell, above n 35, 715.

review failed as a result of an insufficient number peer-reviewed published empirical and/or evaluative (as opposed descriptive) research on any one topic or technique.⁴⁴

D *The 'Whole Story' Technique*

The academic work underpinning and implementing 'Whole Story' technique training⁴⁵ has demonstrated its utility in the interviewing process where it resulted in an immediate increase in the number and quality of free narrative questions asked by investigators.⁴⁶ Unfortunately, and consistent with other research, the effect of the training did not last, with follow up study showing a reduction in open questions about pre-disclosed aspects/incidents, and a return to pre-training levels in relation to specific recall, specific yes/no, and open "tell me what happened next" questions.⁴⁷

Whilst it was acknowledged that further work would be required to determine how the 'Whole Story' technique can best be utilised in the interviewing sphere, ⁴⁸ this recent study confirmed a significant degradation in skillsets in circumstances involving "a one-off training program format, with little follow-up, high workloads and sporadic supervision".⁴⁹

The 'Whole Story' training program was considered as part of an internal Victoria Police Audit into SOCIT training in 2016,⁵⁰ as well as being the subject of a 12-month follow-up study focussing on the impact of that training on investigators attitudes in sexual offence cases.⁵¹

⁴⁴ Laura Huey, 'What Do We Know About In-service Police Training? Results of a Failed Systematic Review' (2018) *Western University (Ontario) Sociology Publications* 40.

⁴⁵ Tidmarsh, Powell and Darwinkel, above n 25; Patrick Tidmarsh, 'Training sexual crime investigators to get the "Whole Story"', (PhD Thesis, Deakin University, 2016).

⁴⁶ Tidmarsh, above n 45, 112.

⁴⁷ Ibid 119-120.

⁴⁸ Ibid 121.

⁴⁹ Ibid 120.

⁵⁰ The details and outcome of which are unknown to the writer.

⁵¹ Patrick Tidmarsh, Gemma Hamilton and Stefanie J Sharman, 'Changing Police Officers' Attitudes in Sexual Offense Cases" A 12-Month Follow-Up Study' (2020) 47(9) *Criminal Justice and Behaviour* 1176.

IV *Findings of the Royal Commission into Institutional Responses to Child Sexual Abuse*

The Royal Commission into Institutional Responses to Child Sexual Abuse (“**the Child Abuse Royal Commission**”) investigated evidence gathering and use of child complainant’s evidence in sex offences cases. This investigation resulted in the release of a report entitled “An evaluation of how evidence is elicited from child sexual abuse complainants” (“**the Royal Commission Evidence Report**”).

The Royal Commission Evidence Report identified three problematic areas in how complainants’ evidence is elicited, being:

- Failures in the interviewing and questioning techniques of investigative interviewers;
- Failure of investigative interviewers to use the correct labelling of repeated occurrences i.e. the particularisation problem; and
- Difficulties with the usefulness of the police interview being used as evidence in chief, based upon the interview’s structure and procedure.

A *Failures in Interviewing and Questioning Techniques*

The Royal Commission Evidence Report considered 118 police interviews conducted in New South Wales (33), Victoria (31), and Western Australia (54). Those interviews were evaluated with reference to the following core recommended practice measures:

- open-ended rapport building;
- clear simple ground rule instructions;
- the use of free narrative questions;
- avoidance of leading questions;

- avoidance of non-verbal aids; and
- keeping interviews short.

In relation to the use of free narrative questions, the study found that whilst Victorian interviewers used significantly more free narrative questions (18%, versus 13% for NSW and 10% for WA), the rate of free narrative questions was comparable to interviewers who have received no investigative interview training.⁵² Where free narrative questions were used, they tended to be repetitions of the same questions. In relation to question stems (e.g. “tell me more.”, “what happened when..”), Victorian interviewers were the most repetitive, with one interviewer using the stem “Tell me about...” more than 50 times in one interview.⁵³

In relation to leading questions, an average of 11% of all questions asked were leading, which is again is comparable to untrained interviewers.⁵⁴ Researchers noted this figure was relatively high and became “even more concerning” when translated to raw data, which showed that a total of 2,163 leading questions were asked.⁵⁵ Only one interview contained no leading questions.

Overall, researchers found that the interviews were “characterised by a low proportion of open-ended prompts; high numbers of specific leading and developmentally inappropriate questions; ... and an almost complete absence of open-ended practice narratives”.⁵⁶

B *Failure to use Correct Labelling of Repeated Occurrences*

Successful prosecution for each occurrence of abuse relies on specific and cogent particularisation for each event. The correct labelling of each allegation helps complainants distinguish between the event they are being asked to recall, and other

⁵² Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse* (2016), 153 (‘*An Evaluation of how Evidence is Elicited*’).

⁵³ Ibid 154.

⁵⁴ Ibid 155.

⁵⁵ Ibid.

⁵⁶ Ibid 159.

similar events. Consistency of labelling, i.e. using the same label for each allegation from investigation through to trial, is crucially important.

In looking at the labelling, the Royal Commission Evidence Report found that the labelling of instances of abuse generally fell into one of five categories:

1. Temporal;
2. Locational;
3. Abuse related i.e. linked to a specific act;
4. Situational i.e. being linked to a contextual detail about the abuse (e.g. “the time when my brother was sick”);
5. Mixed, where multiple types of label are used (e.g. “the last time he kissed me” being in this example both temporal and abuse related).

The Royal Commission Evidence Report looked at sample of 23 complainants alleging multiple instances of sexual abuse, which covered 36 police interviews (some complainants gave multiple interviews) and 22 trial transcripts. The study was limited to complainants from WA, as the trial transcripts from NSW and Victoria did not include all aspects of the trial, such as opening statements.⁵⁷

The study found that of the 61 incidents discussed in those interviews, 59 of them were labelled. These 59 labelled occurrences, however, generated 177 separate labels. Of those 177 separate labels, 118 were used to replace a label already in use for that occurrence (“relabelling”).⁵⁸

When that relabelling was broken down, researchers found the generation of a first label for an incident occurred most frequently during the police interview (37 labels), however relabelling occurred most often during cross-examination (50 labels).⁵⁹

⁵⁷ *An Evaluation of how Evidence is Elicited*, above n 52, 171.

⁵⁸ *Ibid.*

⁵⁹ *Ibid* 172.

In relation to the progression of labels from police interview through to trial, of the 46 labels (both first and replacement labels) used in the police interview, 28 were never used again and 36 were replaced with a different term during the trial. Only 10 labels created during the police interview were utilised through to the end of the trial.⁶⁰

Of particular note is the fact that children created only 13% of the total labels. In comparison to other studies – where children created 48% of all labels – this is remarkably low.⁶¹ Also of note is the fact that 15% of the replacement labels (18 labels) were created by the Judge.⁶²

C *Utility of Police Interviews as Evidence – Practical Issues*

The Royal Commission Evidence Report found that in courtroom discussions about police interviews, one of the most frequently cited difficulties related to their poor structure. Of the sample size of 85 police interviews, 21 were identified as being problematic in terms of their structure. The police interviews were variously described as “very poorly structured”, “jumping from place to place”, and “having things all over the place” and otherwise not following any chronological order.⁶³

Long interviews were reportedly often seen as problematic, both in terms of the complainant being unable to remember all of their evidence and thus could not be effectively cross-examined on it, as well as issues relating to complainant and juror fatigue whilst those interviews were played to the court.⁶⁴

⁶⁰ *An Evaluation of how Evidence is Elicited*, above n 52, 172.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid* 163-164

⁶⁴ *Ibid* 164; These issues have also been considered in other studies, including Burrows, Kimberlee and Powell, Martine, ‘A prosecutor’s guide to improving child witness interviews about alleged sexual abuse: A view from the Australian context’ (2013) 5(1) *Investigative Interviewing: Research and Practice* 12; Kimberlee Shannon Burrows and Martine Powell, ‘Prosecutors’ recommendations for improving child witness statements about sexual abuse’ (2014) 24(2) *Policing and Society* 189-207; Kimberlee S Burrows, Martine B Powell and Jeromy Anglim, ‘Facilitating child witness interviewers’ understanding of evidential requirements through prosecutor instruction’ (2013) 15(4) *International Journal of Police Science & Management* 263; J Cashmore and L Trimboli, *An evaluation of the NSW child sexual assault specialist jurisdiction pilot* (NSW Bureau of Crime and Statistics Research, 1992); Emma Davies and Kirsten Hanna, ‘Pre-recording testimony in New Zealand: Lawyers’ and victim advisors’ experiences in nine cases’ (2013) 46(2) *Australian and New Zealand Journal of Criminology* 289 and Pichler, above n 19.

The Royal Commission Evidence Report also found there were often arguments during the trial about how useful the police interview actually was, with this issue arising in 29 out of 85 discussions, with 17 of those 29 being in Victoria alone. Concerns raised included the interviewer putting a wrong version of events to the complainant, or the interviewer mixing details of multiple incidents together. Other concerns raised related to whether the police interviews contained any evidence which established the necessary elements (e.g. penetration) of the charge, or whether enough particularisation of alleged offending had been obtained.⁶⁵ The Royal Commission Evidence Report noted one such example where the police officer conducting the interview moved so quickly between allegations of abuse it resulted in the child complainant stating an alleged act had not happened, although this alleged act was charged.⁶⁶

Notably, there were cases where the presiding judicial officer either overtly criticised the police officer conducting the interview, or otherwise expressed a level of irritation with the behaviour of the police officer (such as interrupting the complainant or jumping from topic to topic) and the impact this had on the child.⁶⁷

Further concerns raised in courtroom discussions related to the impact of the admissibility of interview topics insofar as they were required to be addressed either by way of editing the video of evidence, or judicial directions. Discussions on judicial directions ordinarily related to context, tendency, and relationship evidence; arguments in relation to editing also covered the accused's motive, as well as competency testing of the complainant conducted by police.⁶⁸

The Royal Commission Evidence Report also alleged that the reviews of the trial transcripts showed that the poor structure was often used by defence counsel to confuse complainants in cross-examination.⁶⁹

⁶⁵ *An Evaluation of how Evidence is Elicited*, above n 52, 165.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid* 166.

⁶⁹ It is presumed that, in order to make such an assessment, the writers of the Royal Commission Evidence Report had access to closing addresses that showed the confusion of the child complainant following cross-examination was relied upon by the defence, and that this was not merely a result of the cross-examiner's own confusion arising out of the poorly structured interview. It is noted the writers of the Royal Commission Evidence Report cited only one example which was a prosecutorial objection to a particular cross-examination, with no suggestion it was a deliberate strategy by the cross-examiner.

V *Concluding Remarks*

There is now a considerable volume of research indicating that, for a variety of reasons, and not in spite of training that has been subject to ongoing development, there remain a significant number of issues with the way in which police interviews of child complainants are being conducted.

Whilst it has to be accepted that there have been substantial developments over the years, the temporal breadth of the research in this area indicates it is the same or similar issues that continue to arise. It may be argued that greater adherence to the existing policies and guidelines for police interviews of child complainants would assist with these concerns. It is unrealistic, however, to expect this to be a cure in light of the extensiveness of the research showing widespread non-compliance with even the most fundamental principles of investigative interviewing.

This ultimately begs the question of whether police officers should continue carry out the questioning of child complainants where the recording of that questioning is to be used as evidence in chief, or whether other options should be considered.

There are other jurisdictions throughout the world where it is not police officers who conduct the interviews of child complainants. One example is Texas, USA, where the law allows for a recorded interview of a child complainant taken by a “neutral individual”⁷⁰ to be admitted as evidence.⁷¹ Perhaps consideration should be given as to whether and how such a system, or something similar, could be utilised within the Victorian context and framework.

There is, unfortunately, no easy remedy for the dichotomy that exists between the differing positions of police investigators – who understand the police interview as a tool for investigation purposes and evidence gathering – and the legal profession

⁷⁰ Being neither for the prosecution or defence.

⁷¹ Penal code 38.071 2(a). Texas also allows for both prosecution and defence to provide written interrogatories, which are presented to the child by the same neutral individual, with this also being recorded and admitted into evidence, subject to various legislative preconditions / conditions.

(prosecution, defence and the Courts) who by necessity must evaluate the police interview with reference to its relevance, probity and admissibility as evidence.

What is clear, however, is that ongoing issues with police interviews of child complainants in sexual abuse cases represents a fundamental and inherent limitation in the current system.

Noting again the limitations of this submission, I would be happy to provide more detailed information on specific issues raised herein if the VLRC would find this of assistance.

Thank you for the opportunity to make a submission.

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