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Research article

A historical comparison of Australian lawyers' strategies for cross-examining child sexual abuse complainants

Rachel Zajac[a,*], Nina Westera[b], Andy Kaladelfos[b]

[a] Psychology Department, University of Otago, Box 56, Dunedin 9054, New Zealand
[b] Griffith Criminology Institute, Griffith University, Australia

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ABSTRACT

Many child sexual abuse complainants find the adversarial trial process so distressing that they say they would never report abuse again. Their concerns stem largely from cross-examination, in which the lawyer acting for the accused attempts to discredit their evidence. We examined whether—and if so, how—Australian defense lawyers' approaches to cross-examining child sexual abuse complainants have changed meaningfully over the past 60 years. To do this, we systematically evaluated cases that were prosecuted in the 1950s, comparing them to a matched set of cases from the turn of the twenty-first century. Despite the intervening law reforms designed to improve complainants' experience in court, we found that, relative to their historical counterparts, contemporary child complainants of sexual abuse are actually subjected to far lengthier cross-examinations involving a much broader range of strategies and associated tactics. These findings have important implications for future legal practice and reform, and for the way in which these are evaluated.

1. Introduction

Around the world, child complainants of sexual abuse report finding the adversarial legal process highly unsettling (e.g., Australia: Eastwood & Patton, 2002; USA: Quas, Goodman et al., 2005; UK: Prior, Glaser, & Lynch, 1997). In fact, many say they would not report abuse again (e.g., Australia: Eastwood & Patton, 2002; UK: Prior et al., 1997). The parents of child complainants often share these views (e.g., Canada: Alaggia, Lambert, & Regehr, 2009; Australia: Eastwood & Patton, 2002), as do the legal professionals involved in these types of cases (e.g., Australia: Cashmore & Bussey, 1996; Eastwood & Patton, 2002; Powell, Wright, & Hughes-Scholes, 2011).

Such concerning sentiments typically stem from the cross-examination process, in which the child's evidence is scrutinized by the defense lawyer (Eastwood & Patton, 2002). Notably, concerns about cross-examination are still being raised after a multitude of reforms aimed at making the trial process more child-friendly (e.g., Advisory Group on Video Recorded Evidence, 1989; Malloy, Mitchell, Block, Quas, & Goodman, 2007; Powell, Westera, Goodman-Delahunty, & Pichler, 2016), leaving many with the distinct feeling that cross-examination still presents substantial challenges for children (Ellison, 2001; Kean, 2012; Powell et al., 2016). In the present study, we examined this possibility by systematically comparing the cross-examination of Australian child sexual abuse complainants at two time points: the 1950s and the 2010s. Specifically, we examined whether—and if so, how—the strategies and tactics used in cross-examination have changed over this 60-year period.

* Corresponding author.
E-mail address: rachelz@psy.otago.ac.nz (R. Zajac).

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1.1. Background and law reforms

It is often assumed that the prosecution of child sexual abuse is a relatively recent phenomenon. In fact, the opposite is true: in the late nineteenth century, sexual offending against children became the most frequent sexual offence heard in the higher courts (Finnane & Smaal, 2016). In the 1950s, these cases amounted to approximately two thirds of sexual assault cases prosecuted in the higher courts (Featherstone & Kaladelfos, 2016, p. 221). The hidden nature of child sexual abuse, however, has always made it notoriously difficult to prosecute. The absence of physical evidence and independent witnesses means these cases often come down to one piece of evidence—that of the child complainant.

Unfortunately, children's evidence has traditionally been viewed with considerable skepticism (Featherstone & Kaladelfos, 2016; Goodman, 1984). In the 1950s, for example, children under 10 years were only allowed to give sworn evidence if they could show they understood the nature of the oath by, for example, showing they knew that lying would mean they went to hell. Judges were required to warn jurors about children's inherent unreliability, and about the dangers of convicting on uncorroborated evidence from a child. Cross-examination was essentially a free for all—few questions were off limits and an unrepresented accused could even question the child directly (Hamilton & Addison, 1947).

From the 1970s, the combined voices of academics, child advocates, feminist activists, and legal practitioners led to sweeping changes to criminal justice responses to children who allege sexual abuse (Goodman, 2006; Malloy et al., 2007; Scott & Swain, 2002). The aim of these reforms was to reduce the distress associated with the prosecution process and, in turn, to facilitate the accuracy of children's testimony. Reforms were supported by research showing that children's accuracy is chiefly influenced by the types of questions that they are asked and the circumstances under which they are interviewed. Specifically, when children are interviewed suggestively, coercively or under intimidating conditions, their accuracy decreases (see Bruck & Ceci, 1999; Ceci, Hritz, & Royer, 2016, for reviews).

Around the world, policy-makers implemented various combinations of reforms that targeted the entire criminal justice process, from disclosure to trial. Multi-agency centers were opened—conveniently housing multiple specialized services for child complainants in one location (e.g., Child Advocacy Centers, in which professionals such as health practitioners, specially trained child interviewers, criminal investigators, child welfare workers, and counselors were co-located; see Herbert & Bromfield, 2017, for a review of CACs and similar multi-agency centres). Evidential rules were amended—corroboration requirements and judicial warnings about the unreliability of children's testimony were removed, and restrictions were introduced on the admissibility of a complainant's prior sexual conduct. Delays to trial were reduced, and children were afforded a number of protections at trial: support persons, a simplified oath, pre-recorded direct evidence, and access to special measures such as closed-circuit TV or screens to shield the accused from view (Bala, 1999; Pipe & Henaghan, 1996; Westcott, Davies, & Spencer, 1999; Whitcomb, 2003).

There is some evidence to suggest that the reforms have made the criminal justice response less distressing for children. A systematic review, for example, found that child complainants, their caregivers, and professional stakeholders were more satisfied with service responses from specialist investigative units than they were with traditional police responses (Westera, Darwinkel, & Powell, 2016). There are also indications that the *way* in which children give evidence has improved. Davies and Noon (1991), for example, found that child witnesses who gave testimony via video recorded interview were less anxious than those who gave live testimony, and were asked questions that were more developmentally appropriate. Criminal justice professionals, too, perceive that the new measures have made the giving of testimony more child friendly (Powell et al., 2016).

Most evidence of the reforms' success, however, relates to the procedures of giving evidence, and direct examination more specifically. In stark contrast, legal professionals and researchers have raised concerns that the most troubling part of the evidence giving process—cross-examination—has changed little, if at all (e.g., Brennan & Brennan, 1988; Ellison, 2001; Spencer & Lamb, 2012; Zajac, O'Neill, & Hayne, 2012).

1.2. Cross-examination

During cross-examination, lawyers attempt to discredit both the evidence and the person providing it, while simultaneously seeking to elicit information that is helpful to their own case (Eichelbaum, 1989; Hampton & Wild, 2000; Salhany, 1999). Because cross-examination by definition involves testing a witness's credibility and reliability, cross-examination is not a pleasant process for any witness, including expert witnesses and police officers (Brereton, 1997; Brodsky, 2004). Nevertheless, in sexual abuse trials—where the entire case often comes down to the word of the complainant versus the word of the accused—the defense case often relies on discrediting the child's evidence, whatever form that evidence takes.

The main criticism raised by legal professionals and researchers about the content of cross-examination is the specific nature of the approaches that lawyers use in an attempt to discredit children. In particular, defense lawyers often use tactics that are based on faulty assumptions (e.g., Eastwood & Patton, 2002; Ellison, 2001; Westcott & Page, 2002). Some of these assumptions concern memory in general, and children's memory in particular. Lawyers often suggest, for example, that children are an unreliable class of witness—that they struggle to distinguish between fantasy and reality, and are prone to lying (Brennan & Brennan, 1988; Davies, Henderson, & Seymour, 1997). Yet in stark contrast to this claim, a considerable body of research shows that, in the absence of prior suggestive influences, children generally provide highly accurate reports when interviewed under optimal interview conditions (Ceci & Bruck, 1993; Lamb, Orbach, Hershkowitz, Esplin, & Horowitz, 2007; Poole & White, 1991).

Lawyers are also likely to seize on minor inconsistencies, implying that a discrepancy in one part of a complainant's statement means that *all* of that complainant's evidence is unreliable (Brennan & Brennan, 1988; Davies et al., 1997; Powell et al., 2016). Inconsistencies, however, could merely reflect miscommunication, or even the normal fragility of memory. A memory error on one

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