

**A DESCRIPTIVE ANALYSIS OF STATEMENTS TAKEN BY POLICE OFFICERS  
FROM CHILD COMPLAINANTS IN SEXUAL OFFENCE CASES THAT EXAMINES  
THE DEGREE TO WHICH THE FORM AND CONTENT OF THE STATEMENTS  
ACCORD WITH *BEST PRACTICE* ACROSS A RANGE OF VARIABLES .**

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**ABSTRACT**

With over twenty thousand complaints reported annually to police of child sexual abuse in South Africa, specialist police investigators are practised at taking statements from child complainants. This thesis analyses the fit between actual police practice and that recommended by international *best practice*.

Children are a special class of witness because of their inherent social, emotional, and cognitive immaturity, and they are universally acknowledged to be very difficult witnesses to interview without the interviewer lending a bias to the process and thereby contaminating the outcome. The first half of the thesis therefore provides a detailed account of the research basis of current international *best practice* and of the hallmarks of that *best practice* which result in reliable interview outcomes.

The second half of the thesis presents a descriptive analysis of 100 police statements taken from children in the Eastern Cape who had been raped in the period between 2010 and 2012. The findings of the analysis are presented in detail and then compared to the *best practice* summarised from the international research.

The detectives who deal with child complainants were found to respond within *best practice* timelines after being informed of an offence, and the South African Police Service National Instructions to which they work largely matched *best practice* guidelines, except insofar as the method used for recording the child complainant interview. In South Africa witness statements from child complainants are recorded using a written method, and this contravenes *best practice* electronic recording and thereby confounds *best practice* overall.

The eleven official languages of South Africa and two official court languages also create challenges for police investigators which the study found could only be answered by the presence of qualified interpreters in the forensic interview when the deponent and the investigator do not have the same home language.

Finally, the need for intensive and on-going training on a regular basis for specialist forensic interviewers of children was identified as a fundamental requirement for obtaining reliable interview outcomes. International protocols for interviewing children should form the basis of the training, and electronic recording of training interviews was found to be essential to the reliable assessment of interviewer performance. International researchers are currently working to determine the

form and timing of the training needed for investigators to form lasting interview habits by which to elicit reliable interview content from children.

## TABLE OF CONTENTS

|  | <b>PAGE</b> |
|--|-------------|
| <b>Abstract</b>                        | <b>ii</b>   |
| <b>Table of Contents</b>               | <b>v</b>    |
| <b>List of Tables</b>                  | <b>xi</b>   |
| <b>Acknowledgements and Dedication</b> | <b>xii</b>  |

## CONTENTS

|  |           |
|--|-----------|
| <b>1. INTRODUCTION.....</b>  | <b>1</b>  |
| <b>2. WITNESS STATEMENTS AND RELATED ISSUES<br/>PERTAINING TO ADULTS AND CHILDREN.....</b> | <b>10</b> |
| 2.1 Definitions  | 10        |
| 2.1.1 Witness  | 10        |
| 2.1.2 Statement  | 10        |
| 2.1.3 Witness statement  | 10        |
| 2.1.4 Witness statement; witness interview   | 10        |
| 2.2 The role of the witness statement in the process<br>of criminal investigation          | 13        |
| 2.3 The role of the witness statement in the process<br>of criminal prosecution            | 17        |
| 2.4 Managing language barriers during investigation<br>and prosecution                     | 21        |
| 2.4.1 Level of language skill required   | 23        |
| 2.4.1.1 <i>Best practice</i>   | 27        |
| 2.4.2 Home language of the deponent to be determinative                                    | 27        |
| 2.4.2.1 <i>Best practice</i>   | 30        |
| 2.5 Maximising witness memory  | 30        |
| 2.5.1 How memory works   | 31        |
| 2.5.2 The effects of high emotion on memory  | 33        |
| 2.5.3 Maximising retrieval of memories   | 34        |
| 2.5.4 <i>Best practice</i> in maximising witness recollections                             | 35        |
| 2.6 Methods of recording out-of-court statements   | 36        |

|           |  |           |
|-----------|--|-----------|
| 2.6.1     | The written method   | 37        |
| 2.6.2     | The electronic methods   | 40        |
| 2.6.2.1   | Table 1 Fifteen features of statement recording<br>tabulated across three methods of<br>recording                              | 42        |
| 2.6.3     | <i>Best practice</i>   | 43        |
| <br>      |  |           |
| <b>3.</b> | <b>WITNESS STATEMENTS AND ISSUES<br/>PERTAINING TO CHILDREN.....</b>   | <b>44</b> |
| 3.1       | Cognitive development  | 44        |
| 3.1.1     | Relevance and definition   | 44        |
| 3.1.2     | The theory   | 44        |
| 3.1.3     | Implications for <i>best practice</i>  | 47        |
| 3.2       | Cognitive development and language   | 48        |
| 3.2.1     | The development of language  | 48        |
| 3.2.2     | Language and thinking  | 49        |
| 3.2.3     | Implications for <i>best practice</i>  | 52        |
| 3.3       | Cognitive development and memory   | 52        |
| 3.3.1     | The research findings  | 53        |
| 3.3.1.1   | General issues   | 53        |
| 3.3.1.2   | Cues as memory retrieval aids  | 53        |
| 3.3.1.3   | Delay  | 56        |
| 3.3.1.4   | Memory of repeated events  | 58        |
| 3.3.2     | <i>Best practice</i>   | 59        |
| 3.4       | The investigative interview  | 59        |
| 3.4.1     | Disclosure   | 61        |
| 3.4.2     | Power asymmetry and suggestibility   | 65        |
| 3.4.3     | Forensic interview <i>best practice</i> protocols  | 69        |
| 3.4.4     | Sustaining <i>best practice</i>  | 70        |
| <br>      |  |           |
| <b>4.</b> | <b><i>BEST PRACTICE</i> IN THE FORM AND CONTENT<br/>OF STATEMENTS FROM CHILD COMPLAINANTS IN<br/>SEXUAL OFFENCE CASES.....</b> | <b>73</b> |
| 4.1       | Introduction   | 73        |
| 4.2       | <i>Best practice</i> regarding the setting   | 73        |
| 4.3       | <i>Best practice</i> regarding the parties present in the room   | 74        |
| 4.4       | <i>Best practice</i> regarding timing issues   | 74        |

|           |  |           |
|-----------|--|-----------|
| 4.5       | <i>Best practice</i> in eliciting the information  | 75        |
| 4.5.1     | <i>Best practice</i> in managing language barriers   | 75        |
| 4.6       | <i>Best practice</i> in method of recording  | 76        |
| 4.7       | <i>Best practice</i> in meeting the formalities and the legalities                                     | 76        |
| 4.7.1     | <i>Best practice</i> in formalities and the written statement  | 77        |
| 4.8       | The conformity with <i>best practice</i> of South African Police Service practice instructions         | 78        |
| <b>5.</b> | <b>RESEARCH DESIGN AND METHODOLOGY.....</b>  | <b>80</b> |
| 5.1       | Introduction   | 80        |
| 5.2       | Research design  | 80        |
| 5.3       | Ethical considerations   | 82        |
| 5.4       | Research method  | 82        |
| <b>6.</b> | <b>RESEARCH FINDINGS: GENERAL CHARACTERISTICS OF THE SAMPLE, ISSUES OF TIMING AND FORMALITIES.....</b> | <b>85</b> |
| 6.1       | Introduction   | 85        |
| 6.2       | Case and deponent numbers represented in the sample  | 85        |
| 6.2.1     | Crimes   | 86        |
| 6.3       | Characteristics of the children in the sample  | 86        |
| 6.3.1     | Ages in years  | 86        |
| 6.3.1.1   | Table 2 Numbers of children and age in years   | 86        |
| 6.3.2     | Gender   | 86        |
| 6.3.3     | Intellectual disability  | 87        |
| 6.3.4     | Relationship of child to offender, and offender characteristics  | 87        |
| 6.3.4.1   | Table 3 Child relationship to offender   | 87        |
| 6.3.5     | When and how the disclosures were made   | 88        |
| 6.4       | Police investigation units and investigators represented   | 89        |
| 6.5       | The timing of the statement-recording and its formalities  | 89        |
| 6.5.1     | Immediacy of statement-recording relative to police being Informed of the offence                      | 89        |
| 6.5.2     | Time between date of offence and date of statement-recording   | 91        |
| 6.5.3     | Time of day of the statement-recording   | 91        |

|           |         |   |           |
|-----------|---------|---|-----------|
| 6.5.3.1   | Table 4 | Time of day and numbers of statements recorded  | 91        |
| 6.6       |         | People present during statement-recording   | 92        |
| 6.7       |         | Identifying the deponent, by name, date of birth or identity number, guardian, and school                       | 93        |
| 6.8       |         | The truth versus a lie, and the oath  | 94        |
| 6.8.1     | Table 5 | The numbers and ages of children whose statements were sworn  | 94        |
| 6.9       |         | Proofing and certifying the statements  | 95        |
| 6.9.1     |         | Initialling of changes by deponent  | 95        |
| 6.9.2     |         | Statement read to the child before signing  | 95        |
| 6.9.3     |         | Proofing by adult on child's behalf   | 96        |
| 6.9.4     |         | Deponent initials or mark on every page and signature or mark on the next line after the last word              | 96        |
| 6.9.5     |         | Police interviewer signature at end of statement along with date, time and place                                | 97        |
| <b>7.</b> |         | <b>RESEARCH FINDINGS: CONCERNING LANGUAGE...</b>  | <b>98</b> |
| 7.1       |         | Home languages of the child deponents   | 98        |
| 7.2       |         | Languages spoken by the child deponents in the statement-taking interview                                       | 98        |
| 7.2.1     | Table 6 | Ages of children with home language Xhosa or Afrikaans said to have spoken in English during forensic interview | 99        |
| 7.3       |         | Languages the statements were written in  | 99        |
| 7.4       |         | Interpreters and translators  | 100       |
| 7.5       |         | Child words indicating verbatim language  | 101       |
| 7.5.1     |         | Child language and the meaning bracketed or otherwise explained in the statement                                | 102       |
| 7.5.2     |         | Separate statement from guardian or care-giver explaining child language  | 103       |
| 7.5.3     |         | Verbal language accompanied by body language  | 103       |
| 7.6       |         | Code mixing between two languages   | 103       |
| 7.7       |         | Adult words and formal language   | 104       |
| 7.8       |         | Lack of consent   | 105       |
| 7.8.1     | Table 7 | Lack of consent   | 105       |



## **8. RESEARCH FINDINGS: CONCERNING CONTENT . . . . 107**

|       |   |     |
|-------|---|-----|
| 8.1   | Introduction  | 107 |
| 8.2   | The elements of the offence of rape   | 109 |
| 8.3   | Numbers of words in the statements  | 110 |
| 8.3.1 | Table 8 The age of the child and the number of words in the statement, averaged across the number of children in each age group | 110 |
| 8.4   | Chronological order   | 111 |
| 8.5   | Context-background words as a percentage of the total number of words   | 111 |
| 8.5.1 | Table 9 Context-background words as a percentage of the total words in the statement, correlated with the age of the child      | 112 |

## **9. ANALYSIS AND DISCUSSION OF FINDINGS: THE DEGREE TO WHICH THE FINDINGS CONFORM WITH *BEST PRACTICE* . . . . . 114**

|         |  |     |
|---------|--|-----|
| 9.1     | Introduction   | 114 |
| 9.1.1   | <i>Best practice</i> achievement in police response time | 114 |
| 9.2     | Achieving <i>best practice</i> by following instructions | 115 |
| 9.2.1   | Procedural issues in the written method                  | 116 |
| 9.2.1.1 | Initialling of amendments                                | 116 |
| 9.2.1.2 | Deponent signature after final word                      | 117 |
| 9.2.1.3 | Evidence of having read the statement to the child       | 117 |
| 9.2.1.4 | Appropriate certification by the parties                 | 120 |
| 9.2.2   | Identifying and qualifying the child deponent            | 121 |
| 9.2.2.1 | Identifying the deponent                                 | 121 |
| 9.2.2.2 | Qualifying the child deponent                            | 123 |
| 9.3     | Achieving <i>best practice</i> through policy refinement | 125 |
| 9.3.1   | Parties permitted to be present in the interview room    | 125 |
| 9.3.2   | The use of interpreters in interviews                    | 126 |
| 9.4     | Achieving <i>best practice</i> through training          | 129 |
| 9.4.1   | Open questioning for eliciting reliable central content  | 129 |
| 9.4.2   | Particularising the crime                                | 130 |

**10. CONCLUSIONS: THE THREE INNOVATIONS WHICH  
WILL ALLOW SOUTH AFRICAN POLICE PRACTICE  
TO WHOLLY EMBRACE *BEST PRACTICE*.....132**

10.1 Signing of the statement by a child complainant 133  
10.2 Interviewer training, specialised and on-going 134  
10.3 Electronic recording of child forensic interview 135  
10.4 The use of qualified interpreters 138  
10.5 Empowering child complainants 140

**ADDENDA.....142**

ADDENDUM 1 Data Collection Form 1-Complete coverage, variables 1 to 23.. 142  
ADDENDUM 2 Data Collection Form 2-Magnification of language variables... 143  
ADDENDUM 3 Data Collection Form 3-Magnification of crime event variables 144  
ADDENDUM 4 Eastern Cape police detective units and the numbers of  
investigators represented from each unit.....145  
ADDENDUM 5 Statements containing adult words and formal language.....147

**BIBLIOGRAPHY.....149**

**LIST OF TABLES**

|         |   | <b>PAGE</b> |
|---------|---|-------------|
| Table 1 | Fifteen features of statement recording tabulated across three methods of recording                                     | 42          |
| Table 2 | Numbers of children and age in years  | 86          |
| Table 3 | Child relationship to offender  | 87          |
| Table 4 | Time of day and numbers of statements recorded  | 91          |
| Table 5 | The numbers and ages of children whose statements were sworn  | 94          |
| Table 6 | Ages of children with home languages Xhosa or Afrikaans said to have spoken in English during forensic interview        | 99          |
| Table 7 | Lack of consent   | 105         |
| Table 8 | The age of the child and the number of words in the statement, averaged across the number of children in each age group | 110         |
| Table 9 | Context-background words as a percentage of the total words in the statement, correlated with the age of the child      | 112         |

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## **DEDICATION**

**This work is dedicated to the children of South Africa.**

## 1. INTRODUCTION

There are more than twenty thousand children<sup>1</sup> per year in South Africa who are sexually abused and who report the abuse to the police.<sup>2</sup> South African police officers, specially trained and working in specialised units<sup>3</sup>, undertake the criminal investigations following a due process model.<sup>4</sup> When the Police Service considers an investigation to be complete, the docket<sup>5</sup> containing all the witness statements is forwarded to the National Prosecuting Authority<sup>6</sup> where prosecutors review the evidence, decide what charges, if any, are appropriate, and provide advice to the investigators about what further investigation and evidence gathering may be required in cases with sufficient evidentiary strength to warrant prosecution.<sup>7</sup>

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 Section 28(3) defines a child as a person under the age of 18 years.

<sup>2</sup> Annual reports of the South African Police Service 2006/2007, 25,428; 2007/2008, 22,124; 2008/2009, 20,141; 2009/2010, 27,417. [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_reprot/index.htm](http://www.saps.gov.za/saps_profile/strategic_framework/annual_reprot/index.htm) (accessed 16 October 2010 and 3 February 2011).

<sup>3</sup> In terms of National Instruction 3/2008 of the South African Police Service "If the victim of the offence is a child, only a member trained by the Family Violence, Child Protection and Sexual Offences Units (FCS) may be designated as investigating officer". The FCS Units were previously known as Child Protection Units (CPU) and introduced in 1986. There are now 176 FCS Units established throughout the 9 provinces of the Republic (Annual Report 2010/2011, accessed 31 January 2012) and, in the smaller centres, there are specialized individuals attached to detective services. [http://www.saps.gov.za/org\\_profiles/core\\_function\\_components/fcs/establish.htm](http://www.saps.gov.za/org_profiles/core_function_components/fcs/establish.htm) (accessed 6 March 2011).

<sup>4</sup> HL Packer *The Limits of Criminal Sanction* (1968) 163 and 158; see also A Ashworth *The Criminal Process* 2 ed (1998) 26.

<sup>5</sup> The 'police docket' is known by other names in other jurisdictions, and is the police file which must be opened when a crime is reported (South African Police Service National Instruction 22/1998 4(5)).

<sup>6</sup> Section 179 of the Constitution provides for the establishment of a single, national prosecuting authority. The National Prosecuting Authority Act, 32 of 1998 commenced operation on 16/10/1998. The National Prosecuting Authority is not part of the judiciary.

<sup>7</sup> Section 20(1) of the National Prosecuting Authority Act vests power in the Authority to institute and conduct criminal proceedings, carry out functions necessary and incidental to this, and to discontinue criminal proceedings.

Legal adjudication in South Africa is adversarial<sup>8</sup>, and since the decision in *Shabalala*<sup>9</sup> in 1995, which ruled as unconstitutional the "blanket docket privilege"<sup>10</sup> under which written witness statements were simply working documents and frequently inaccurate<sup>11</sup>, production of witness statements to the accused person or their representative became and remains the norm. In each of the more than twenty thousand reports of sexual offending against children per year, the officers of the South African Police Service are required to take a statement from those child victims, who are capable of communicating.<sup>12</sup> It is these statements which form the basis of the police docket and which serve to forecast the testimony which will be given in court.<sup>13</sup>

There are four distinct yet inter-related uses for the complainant's statement taken by police investigating officers. These include:

1. to guide the prosecutors in their choice of criminal charge against an accused;
2. to show the accused the strength of the state's evidence;
3. to help to refresh the memory of the witness prior to the giving of oral testimony in court; and
4. to demonstrate to the court the consistency and reliability, and therefore the trustworthiness, of the

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<sup>8</sup> D Luban *Lawyers and Justice: An Ethical Study* (1988) 56.

<sup>9</sup> *Shabalala and Five Others v The Attorney-General of the Transvaal and The Commissioner of South African Police* 1995 (2) SACR 761 (CC), in which the Constitutional Court of South Africa made an order declaring that an accused's right to a fair trial, under section 25 (3) of the Constitution, was compromised by the common law privilege against disclosure attaching to the contents of the police file.

<sup>10</sup> *Shabalala v Attorney-General* para 10. The privilege was established by the case of *R v Steyn* 1954(1) SA 324 (A).

<sup>11</sup> *Shabalala v Attorney-General* para 45.

<sup>12</sup> South African Police Service Standing Order (General) 322 PART IV, 322.2.

<sup>13</sup> M Coulthard and A Johnson *An Introduction to Forensic Linguistics: Language in Evidence* (2007) 81.

witness and their written statement alongside the oral testimony when cross-examination fails to uncover material discrepancies.

In South Africa, criminal charges against adult accused are heard in the courts of adult jurisdiction even where those charges relate to child victims. The Constitutional guarantee of a fair trial includes not only the disclosure post *Shabalala* referred to above, but also the opportunity for the defendant to confront the person making the allegations of criminal conduct, and the right to cross-examine that accuser.<sup>14</sup> When the accuser is a child, the setting and the processes designed for adults present difficulties for children who can too easily be overwhelmed by the formality of the occasion, the unfamiliar setting and language of the courts, and the skill of career advocates who have vested interests in party-party contests.<sup>15</sup>

South Africa has chosen to ameliorate this imbalance by interposing the person of an intermediary between the advocate and any witness under the mental or biological age of eighteen years who would be faced with "... undue mental stress or suffering"<sup>16</sup> while testifying in criminal hearings. The intermediary is a professionally qualified person with the court-monitored role of conveying to the vulnerable witness the

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<sup>14</sup> Constitution, section 35 (3).

<sup>15</sup> See C Eastwood "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System" (May 2003) Australian Institute of Criminology trends and issues in crime and criminal justice series <http://criminologyresearchcouncil.gov.au/reports/eastwood.pdf> (accessed 24 February 2011); and C Eastwood, W Patton and H Stacy "Children seeking justice: surviving child sexual abuse and the criminal justice system" (2000) 16 *Queensland Journal of Educational Research* 158 <http://www.iier.org.au/qjer/qjer16/eastwood.html> (accessed 11 May 2011).

<sup>16</sup> Under the South African Criminal Law Amendment Act 135 of 1991 section 170A was inserted into the Criminal Procedure Act 51 of 1977. In terms of this section, an application can be made to the court to permit the child to testify by closed circuit television from a room separate from the court room, and to have appointed an intermediary to enable the child to give evidence through that person.

import of every question asked of that witness in language appropriate to the developmental and language competencies of the particular witness.<sup>17</sup> The procedure has been held to be constitutionally valid in not contravening the rights of the accused to a fair trial.<sup>18</sup> The witness hears the questions, both in evidence-in-chief and the ensuing cross-examination via the intermediary, but the answers are provided directly to the court and not through the intermediary. The witness must remain consistent, reliable and credible if the court is to place maximum weight upon the evidence. Differences with the out-of-court recorded statement become 'prior inconsistent statements' and these are admissible during litigation to discredit the maker.<sup>19</sup>

These differences between what has been recorded in a police statement and the testimony given in court can arise from either or both police recorder error and child witness error. Sources of potential police recording error in the South African context may be caused by:

1. the written method of recording the statement which remains the norm, with no electronic simultaneous recording;
2. language complexity in the Republic with eleven official languages, and the official use of only two of them in court hearings;
3. the apparent shortage of qualified interpreters, and the use of bi-lingual parties as interpreters, out of court, in their stead;
4. practices during the taking of a statement which include permitting family members to be present during the process,

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<sup>17</sup> Criminal Procedure Act section 170A (2) (b).

<sup>18</sup> *Klink v The Regional Court Magistrate NO and Others* 1996(3) BCLR 402 (SE).

<sup>19</sup> DT Zeffert, AP Paizes and A Skeen *The South African Law of Evidence* (2003) 747.



and inadequate procedures for the child to check the accuracy of the contents of the statement; and

5. the apparent absence of recurrent training of police officers commensurate with the complexities involved in this highly specialised task of statement-taking from a child complainant.

Sources of error arising from the witness being a child may be caused by:

1. the social and emotional immaturity and inexperience of the child;
2. the child's developing brain and cognitive capacity;
3. the child's developing language and memory capacities; and
4. the non-compliance by investigators with protocols developed to guide the interviewing of children.

The non-compliance includes the use of inappropriate questioning methods which confound the narration process and contaminate the child's evidence, as highlighted by the landmark court cases in the United States of America and in the United Kingdom,<sup>20</sup> and by social science research.

Presiding officers in court trials need best evidence if they are to rely with confidence upon it in making decisions which have major social implications, as well as major implications for the parties and witnesses to the conflict. It is a social imperative that the likelihood of injustice, either that of a guilty person going unpunished or that of an innocent person incurring unjust punishment, be minimized by best practice through best evidence. There is arguably a duty upon the State to maximize the protection and safety of its members through State systems which meet, in the South African context,

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<sup>20</sup> *State v Michaels* 1994 136 N.J.299 (New Jersey); *Cleveland CC v E* [1988] FCR 625.

Constitutional provisions for the protection of the rights of all those affected by both crime and its punishment.<sup>21</sup>

Through the research findings which are presented in this thesis, it will be possible to form a view about how closely South African Police Service practices accord with recommended world *best practice* which minimizes recorder and child witness error and thereby maximizes best evidence. The findings are based upon an analysis of 100 police statements taken from child complainants in South Africa in the most serious sexual offence matters being vetted in 2010-2012 for prosecution through the High Court.

The practice in South Africa of the written method of statement-taking with child complainants in sexual offence cases, without electronic simultaneous recording, is a practice which allows for no retrospective examination of the quality of the work done by the police investigator in the investigative interview, which forms the basis of the written statement. There is no record to examine which is independent of the investigator and the handwritten notes. For these reasons a comparison between the written statements and world *best practice* is necessarily curtailed. The comparison will instead rely upon the form and content of the one-dimensional written statements alone and upon inferences which can safely be drawn from that form and content.

The written method of statement-taking from child complainants is a practice which has been largely discontinued in countries like the United Kingdom, the United States of America, Canada, Australia, Germany, Israel, and Norway. Electronic recording, in most instances by means of videotaping, of investigation interviews is the norm in cases of child sexual abuse in these

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<sup>21</sup> Constitution, Chapter 2 Bill of Rights, sections 7-39.

countries. The reasons for this will be shown in chapter 2, in which the three methods of recording out-of-court statements are compared and contrasted.

Chapter 2 explains the role of the witness statement in the processes of criminal investigation and prosecution and reveals *best practice* in managing language barriers within those processes. It also explains how the memory works and how to retrieve maximum information from memory. The implications for best practice in statement-taking are then drawn from that information. The chapter then proceeds to an analysis and comparison of the different methods of statement recording. It concludes with a summation of *best practice* in the overcoming of language barriers through the use of interpreters, in maximising the retrieval of memory in adults, and in methods of recording out-of-court statements from witnesses.

Chapter 3 looks at the issues that police investigators need to be familiar with if they are to be successful in taking reliable and full statements from child complainants. The chapter explains how the brain and thinking of a child progressively develops to full adult capacity, and the implications for both language use and memory function arising from the different stages of development. The ways of assisting children to maximise the retrieval of their memories which accord with best practice are listed for the future use of police investigators. The last part of the chapter concerns the investigative interview, which is the basis of the out-of-court statement, or indeed is itself the statement when electronically recorded. The interaction between the adult interviewer and the child witness is examined from the perspective of power asymmetry and the consequences of this in the form of child suggestibility and acquiescence to interviewer behaviour at the expense of accuracy

and completeness when that behaviour is less than ideal. On the basis of knowledge drawn from empirical research, *best practice* protocols for the interviewing of children have been drawn up, particularly in the United States of America and the United Kingdom, and these are shown to be in use in many countries. The chapter concludes with a look at the apparent difficulties in sustaining this *best practice* and at the assumptions which can be made about the standard of interviewer practice in the absence of rigorous and extensive training regimes.

Much of the information presented in chapters 2 and 3 concerns the theoretical information on which the tenets of *best practice* in child interviewing and statement-taking are based, rather than simply presenting those tenets and then drawing a comparison with police practice in South Africa. This approach has been dictated by the differences in the extent and sophistication of social development in South Africa in comparison with that in the countries in which *best practice* has been developed, and in which it is implemented. It is to be hoped that through being provided with the most up to date information about what *best practice* is in this field, and its basis, South African Police Service administrators and trainers will use it as a solid platform on which to consolidate aspects of present practice and on which to refine and further develop practice in the future.

To this end, chapter 4 provides a summary of *best practice* in the form and content of statements taken from child complainants in sexual offence cases. This summary is drawn from the material in chapters 2 and 3. In this way these chapters combined comprise a comprehensive review of the research and practice to date.

Chapter 5 begins the second half of the thesis and details the research design and methodology for the collection and analysis of 100 statements from child complainants in sexual offence cases in the Eastern Cape Province.

Chapter 6 presents the research findings of the general characteristics of the sample, along with issues of timing of the statement-taking and the formalities. Chapter 7 presents the research findings concerning language. Chapter 8 presents the findings concerning content. Chapter 9 analyses and discusses the findings in relation to the extent to which they conform to *best practice*, as summarised in Chapter 4. The conclusions are presented in Chapter 10.

## **2. WITNESS STATEMENTS AND RELATED ISSUES PERTAINING TO ADULTS AND CHILDREN**

### **2.1 Definitions**

#### **2.1.1 Witness**

The term witness includes "a person who sees an event, typically a crime or accident, take place"; [and] "a person giving sworn testimony to a court of law or the police".<sup>22</sup> The first of these definitions can be extended to include the experiencing of an event through any of the five senses - orally, aurally, visually, and by touch and smell - and need not be limited to sight alone.

#### **2.1.2 Statement**

A statement is "a formal account of events given by a witness, defendant, or other party to the police or in a court of law".<sup>23</sup>

#### **2.1.3 Witness statement**

The term 'witness statement' identifies that the information provided in the statement is coming from a party other than the accused. It is "... a story told by the witness about a series of events that the witness experienced in the past."<sup>24</sup>

#### **2.1.4 Witness statement; witness interview.**

A written statement is usually presented in such a way as to give the reader the impression that a fluent story has been told and recorded, without prompting or questioning. However, the

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<sup>22</sup> J Pearsall (ed) *The New Oxford Dictionary of English* (1998) 2120.

<sup>23</sup> Pearsall *The New Oxford Dictionary* 1816.

<sup>24</sup> G Haney, "Preparing a Witness Statement" (2011)  
<http://www.haney.net/resources/drafting/> (accessed 4 May 2011).

existence of legalistic phrasing within the statement and the use of words unfamiliar in everyday speech<sup>25</sup> do provide clues to the more active role played by the police recorder in its compilation. The police officer is the expert in the room, the person who knows the elements of the offence, who knows what courts require from a witness about both the offence and the offender. It follows therefore that the police officer, in conducting the interview, would at least provide direction about what details are required, and would have to resort to questions and statements of explanation to assist the witness's recall and reconstruction. What is being reported is a legal event and it is the legalities which must be addressed. A civilian witness will need guidance about what these are and the details needed to satisfy them.<sup>26</sup>

What appears in the end product of a written statement, however, is a one sided narrative, and in the narrative form it is sometimes difficult to know what the witness has experienced directly, or indirectly as hearsay.<sup>27</sup> No access is provided to the form of the questioning and the prompts used to elicit the information, and no access is provided therefore to any bias or pressure which may have been brought to bear by the recorder through those questions and prompts. The practice of recording only the answers given by the person in whose name the statement will be produced, namely the deponent, saves time and resources, gives the gist of the evidence the witness will swear to, and

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<sup>25</sup> For example, it is highly unlikely that a 5 year old would have said "I can differentiate..." (research statement number 55).

<sup>26</sup> Coulthard and Johnson *An Introduction to Forensic Linguistics: Language in Evidence* 90.

<sup>27</sup> B Nowrojee "We can do better Investigating and Prosecuting International Crimes of Sexual Violence". Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals in Arusha, Tanzania (November 2004) [http://www.womensrightscoalition.org/site/publications/papers/doBetter\\_en.php](http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php) (accessed 17 February 2011).

presents it in an orderly format. Nevertheless, and looking at it from another perspective, the statement can also be characterized as misleading and deceptive precisely because it omits the active role played by the recorder, and does so in such a way that the presence of the recorder can be completely forgotten. Yet the recorder has materially affected the selection of the statement content and the way that the content has been written.<sup>28</sup>

The difference therefore between a witness interview and a witness statement is the form of the finished product, and not the method used, by police mostly, to construct it. It is not prepared as a transcript of a meeting or as a record of a conversation with a witness, but is instead rearranged as an ordered time sequenced story<sup>29</sup> told by a single and lone individual in monologue form.<sup>30</sup> Rock (2001), cited by Coulthard and Johnson, identified at least three stages from interview to statement, namely, the witness monologue, questions and answers based on the monologue, and then the production of a written version.<sup>31</sup>

Throughout the following document the interview behind the statement will be assumed except in the circumstances in which witnesses construct their own statements without assistance from police or legal advisors, and where, therefore, no interview has taken place.

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<sup>28</sup> Coulthard and Johnson *An Introduction to Forensic Linguistics* 87.

<sup>29</sup> Western Australian Bar Association Best Practice Guide 01/2009 "Preparing Witness Statements for Use in Civil Cases" <http://www.wabar.asn.au> (accessed 4 May 2011) 19.

<sup>30</sup> M Coulthard "Whose Voice is it? Invented and Concealed Dialogue in Written Records of Verbal Evidence Produced by the Police" in J Cotterill (ed) *Language in the Legal Process* (2002) 29.

<sup>31</sup> Coulthard and Johnson *An Introduction to Forensic Linguistics* 81.



## 2.2 The role of the witness statement in the process of criminal investigation

Police are responsible for the conduct of criminal investigations, an element of which is the taking of statements from witnesses. In sexual offence cases it is highly likely that the victim will be the only witness to the crime because it is in the nature of the crime that it tends to happen in private. In these circumstances, the investigators know that the criminal case will ultimately stand or fall on the statements provided by the complainant, and the complainant's testimony in court which must be consistent with the out-of-court statements. Even in circumstances when there is medical evidence which can corroborate genital and anal irregularities and recent injury, how those irregularities happened and who caused them will be proved, in the absence of forensic evidence, only through the evidence of the complainant.

It follows that complainants depend upon the skill and expertise of investigators to assist them to capture and preserve their best evidence while it is fresh in their minds soon after the offence so that the state's evidence will be as strong as possible and the interests of justice will be served in the future conduct of the case through the courts. Although interviews with adult rape victims continue to be written up as statements in many countries,<sup>32</sup> detailed instructions exist to guide the investigators in their pursuit of best evidence. Without exception these instructions include the injunction to

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<sup>32</sup> D Wolchover and A Heaton-Armstrong "No further excuses P-Leave" (2010) *Criminal Law and Justice Weekly* <http://www.criminallawandjustice.co.uk/index.php?/Analysis/audio-recording-witness-statements-no-further-excuses-p-leave.html> (accessed 25 February 2011).

record the exact language used by the witness<sup>33</sup> because the evidence is made up of the actual words spoken,<sup>34</sup> because meaning is derived from syntax,<sup>35</sup> and because courts of adversarial procedure need to hear the words of a witness unfiltered so as to weigh their "illocutionary force"<sup>36</sup>.

Support for the power and persuasiveness of the actual words spoken by witnesses comes from a study of mock jurors, whose perception of witness testimony in a murder case differed when reading summaries rather than transcripts. The study found that jurors reading the transcripts of testimony formed a contrary view of witness truthfulness than when summaries of evidence were read. Through reading the transcripts the jurors favoured the truthfulness of the child over the adult witness.<sup>37</sup>

In spite of these injunctions to record the actual words and syntax spoken, research cited by Milne and Bull shows that less attention to detail is given by police interviewers when interviewing witnesses and victims as opposed to suspects.<sup>38</sup> Shepherd and Milne cite three studies showing what actually went on in witness interviews conducted by experienced police

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<sup>33</sup> See Haney "Preparing a Witness Statement"; CA Sennewald and JK Tsukayama *The Process of Investigation: Concepts and strategies for investigators in the private sector* 2 ed (2001) 157; South African Police Service "Sexual Offences: Support to Victims and Crucial Aspects of the Investigation" and "Sexual Offence Statement Checklist: Annexure C" National Instruction 22/1998; South African Police Service "Sexual Offences" National Instruction 3/2008.

<sup>34</sup> Haney "Preparing a Witness Statement".

<sup>35</sup> AL Blumenthal *Language and Psychology: historical aspects of psycholinguistics* (1970) 227.

<sup>36</sup> Coulthard "Whose Voice is it?" in Cotterill (ed) *Language in the Legal Process* 19.

<sup>37</sup> CC Peterson "The Perceived Truthfulness of Children's and Adult's Testimony in the Oath versus the Competency Test" in GM Davies, S Lloyd-Bostock, M McMurrin and C Wilson (eds) *Psychology, Law, and Criminal Justice. International Developments in Research and Practice* (1992) 13.

<sup>38</sup> Milne and Bull "Interviewing Victims of Crime" in MR Kebell and GM Davies (eds) *Practical Psychology for Forensic Investigations and Prosecutions* (2006) 9, cite research by C Clarke, R Milne and M McLean, 2001, which evaluated investigative interviewing by police in the UK.

investigators.<sup>39</sup> Each of the studies analysed tape-recorded investigative interviews with witnesses in the United States and the United Kingdom, and found that the witnesses were given inadequate opportunities to talk by the over-talkative interviewers;<sup>40</sup> the interviewing was agenda-driven, looking for proof of pre-determined theory, with rapid fire questions, judgmental comments and disrupted witness monologue.<sup>41</sup> This research gives credence to witnesses giving evidence in court who blame the police recorders for the discrepancies with their out-of-court statements.<sup>42</sup>

Some of this performance anxiety manifested by investigators concerns how best to particularise the offence in the statement and this has been shown by an Australian study to be an area of disagreement between police officers and legal professionals.<sup>43</sup> Legal professionals were wanting pre- and post-offence contextual details<sup>44</sup> whereas the police officers were more attentive to the temporal and location details of the offence itself.<sup>45</sup> Aside from this content issue there has been agreement internationally about instructions to investigators on statement taking. These include:

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<sup>39</sup> E Shepherd and R Milne "Full and faithful: ensuring quality practice and integrity of outcome in witness interviews" in A Heaton-Armstrong, E Shepherd and D Wolchover (eds) *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (1999)133.

<sup>40</sup> Shepherd and Milne "Full and Faithful" in Heaton-Armstrong et al (eds) *Analysing Witness Testimony* 134, studies 2 and 3.

<sup>41</sup> Shepherd and Milne "Full and Faithful" in Heaton-Armstrong et al (eds) *Analysing Witness Testimony* 133, study 1.

<sup>42</sup> Wolchover and Heaton-Armstrong "No further excuses P-Lease".

<sup>43</sup> BL Guadagno, MB Powell and R 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 at 254.

<sup>44</sup> Guadagno et al (2006) *Psychiatry, Psychology and Law* 256.

<sup>45</sup> Guadagno et al (2006) *Psychiatry, Psychology and Law* 255.

1. the timing of the statement, as soon as possible after the offence and within 24 to 36 hours;<sup>46</sup>
2. the location of the interview, in a relaxed environment free from distractions and away from the influence of family and friends;<sup>47</sup>
3. the physical form of the finished written statement, including the identification of the deponent explicit enough for that identification not to confuse the deponent with another individual; the written determination that the deponent either understands the oath or knows the difference between the truth and a lie and can demonstrate this; a statement about which language the statement is given in and the name and qualifications of the interpreter used to produce the finished statement if in a different language; the recording of the exact words used by the deponent with no bracketed translations of idiosyncratic language; inaccuracies and changes lined through and initialled by all the parties; the signature of the deponent at the end of each page and at the end of the statement; a declaration at the end saying that the statement has been read aloud to the deponent and the contents are true and correct and signed by the deponent; and finally a certification by the police recorder of their

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<sup>46</sup> C Botha "Information through Communication" in J van der Westhuisen (ed) *Forensic Criminalistics* (1993) 58; National Policing Improvement Agency, on behalf of the Association of Chief Police Officers "Guidance on Investigating Child Abuse and Safeguarding Children" 2 ed (2009)46; South African Police Service "Sexual Offences" National Instruction 3/2008 para 9(1)(d).

<sup>47</sup> KM Hess and C Hess-Orthmann *Criminal Investigation* 9 ed (2009) 330; Botha "Information through Communication" in van der Westhuisen *Forensic Criminalistics* 58; South African Police Service "Sexual Offences" National Instruction 3/2008 para 18(2)(a).

name and official identification number, as well as the place date and time of the certification;<sup>48</sup>

4. the keeping of detailed records of observations, and photographs to supplement these, of the demeanour and physical condition of the victim including any injuries, and of all interviews conducted, and filing of the notes in the police docket;<sup>49</sup> and
5. the assignment of female officers to deal with female victims of crime.<sup>50</sup>

When the investigation is considered by the Police Service to be complete, the docket is transferred to the National Prosecuting Authority which has, in South Africa, the final say about whether a prosecution should be initiated - a separation of functions which is believed to promote objectivity.<sup>51</sup>

### **2.3 The role of the witness statement in the process of criminal prosecution**

When prosecutors examine the docket forwarded by the Police Service they do so from the perspective of the strength of the evidence against a named accused. If gaps in the evidence are found to exist, they may ask investigators for further

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<sup>48</sup> Sennewald et al *The Process of Investigation* 157; South African Police Service "Sexual Offences" National Instruction 3/2008 Annexure E, and the taking of a statement of a child victim, Annexure F.

<sup>49</sup> Hess and Hess-Orthmann *Criminal Investigation* 330; National Policing Improvement Agency "Guidance on Investigating and Prosecuting Rape" abridged edition (2010) <http://www.acpo.police.uk> (accessed 17 May 2011) 45; South African Police Service "Sexual Offences" National Instruction 3/2008 para 7(3) (b) and (e).

<sup>50</sup> United Nations (2004) Professional Training Series No 5/Add.3 <http://www.ohchr.org> (accessed 21 June 2011)46; Eastwood 2003 Australian Institute of Criminology trends and issues in crime and criminal justice series 114.

<sup>51</sup> JJ Joubert *Criminal Procedure Handbook* 8 ed (2007) 59.

investigation or evidence gathering before they begin preparing a matter for trial.<sup>52</sup> The prosecutor or state advocate bears the responsibility of presenting the state's case to the court, in the form of oral evidence from witnesses who have something relevant to say about the matter being tried.<sup>53</sup> Presiding officers<sup>54</sup>, as well as the accused, must have the opportunity to see and hear witnesses as they give their evidence. The adversarial form of contesting a criminal charge relies for its validity upon the belief that the truth of a matter can be exposed through examination-in-chief and cross-examination.

The fact that the recorded, out-of-court witness statements are disclosed to the accused prior to trial means that the witness who made the statement will have to be consistent with those recorded words when giving oral testimony. Implicit in these rules of evidence is the expectation that witnesses will be able to recall and describe events in much the same way as they did when their statements were recorded, regardless of the savagery and cunning of the cross-examination process.<sup>55</sup> The purpose of cross-examination is to test the evidence of the witness called by the opposing party, to show flaws in memory recall, to suggest malicious motivation for testimony, to question the

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<sup>52</sup> WT Pizzi *Trials Without Truth: Why our System of criminal trials has become an expensive failure and what we need to do to rebuild it* (1999) 221.

<sup>53</sup> A Palmer "Child Sexual Abuse Prosecutions and the Presentation of the Child's Story" (1997) 23(1) *Monash University Law Review* 171 at 180: "The common law generally assumes that the best form of evidence is that given by a witness on oath in an open court."

<sup>54</sup> The jury was abolished in South Africa in 1969 by the Abolition of Juries Act, 34 of 1969. Section 145(2) of the Criminal Procedure Act, 51 of 1977 provides for a trial in the superior court by a judge sitting alone or with assessor/s who can make findings on any question of fact.

<sup>55</sup> J McEwan "Ritual Fairness and Truth: The Adversarial and Inquisitorial Models of Criminal Trial" in A Duff, L Farmer, S Marshall and V Tadres (eds) *The Trial on Trial Vol 1 Truth and Due Process* (2004) 59, "... witnesses in adversarial criminal trials are not allowed to express themselves freely, but have to give their evidence while contending with rigid control and, sometimes, downright cruelty of the examining advocate."

minutiae embedded in the testimony in the hope of revealing inadequately thought-through, concocted tales, to fluster and to challenge to such an extent that the witness will be undermined, and faith in reliance upon the testimony will be shaken.<sup>56</sup>

One of the usual methods of creating doubt about the trustworthiness of witness testimony is to highlight discrepancies between what has been recorded in the out-of-court statement and what has been given as oral evidence at court. These discrepancies go to the issue of witness credibility rather than to the truth of a matter. If, in the recorded statement, the witness has sworn the truth and accuracy of that statement, which includes words not used in ordinary speech, the witness will be asked to replicate those words or to distance themselves from them. In the process of distancing, doubt can be created and credibility can be impugned. It follows, therefore, that it is essential for an out-of-court statement to be recorded in the idiomatic language of the witness and not the language of the police recorder.<sup>57</sup> It also becomes desirable should a dispute arise that there be some means whereby the court can satisfy itself about what the witness did actually say to the recorder. In the absence of an electronic statement, the only way that this could be achieved is by relying on the notes taken by the police recorder from which the written statement was formulated. Heaton-Armstrong and Wolchover claim that such disputes are often determinative of acquittals because of the

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<sup>56</sup> "... cross-examination is the primary and essential means of testing evidence for accuracy, completeness and reliability", JP Pretorius *Cross-examination in South African Law* (1997) 79.

<sup>57</sup> Western Australian Bar Association Guide 01/2009 20.

absence of reliable and electronic means of settling the doubts that have been raised.<sup>58</sup>

Cases of rape and sexual assault, as well as cases alleging domestic abuse, are those most likely to involve the word of one person, a single witness, against that of another because the crime usually occurs in private. In circumstances of this kind, the consistency between the words in a recorded statement and those spoken in the witness box can indeed be determinative of the outcome of the case. The responsibility centres on the complainant because the onus of proof beyond a reasonable doubt rests with the state bringing the charge, and the complainant is the main witness in the state case. The accused bears no onus of disproof, and can effectively remain silent.

Special legal warnings about single witnesses have existed for centuries in the English legal tradition and until quite recently it remained impossible to convict in some matters solely upon the word of one witness.<sup>59</sup> This is no longer the case in South Africa,<sup>60</sup> but caution remains warranted before convicting on the testimony of a single witness.<sup>61</sup> In order for the evidence to reach the standard of proving guilt beyond a reasonable doubt, it will be necessary for the testimony of the single witness to be considered trustworthy at the end of the cross-examination, and prior inconsistencies must be either

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<sup>58</sup> A Heaton-Armstrong and D Wolchover "Recording Witness Statements" in Heaton-Armstrong et al (eds) *Analysing Witness Testimony* 223.

<sup>59</sup> In Scotland a rule of evidence still exists which precludes the proof of a criminal offence on the evidence of less than two witnesses, JR Spencer and RH Flin *The Evidence of Children: the law and the psychology* (1990) 2.

<sup>60</sup> Section 208 of the Criminal Procedure Act 1977 provides that an accused may be convicted of any offence on the sole evidence of any competent witness; and section 164(1) provides that any child is competent to give evidence if they understand the duty to speak the truth, have sufficient intelligence, and can communicate effectively.

<sup>61</sup> J Le Roux and J Engelbrecht "The Sexually Abused Child as a Witness" in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 353.



minimized or non-existent for this to be so, or able to be shown to be the consequence of recorder error.

The quality, accuracy and completeness of the out-of-court recorded statement must necessarily be high to ensure that inaccuracies cannot be used by the defence advocate to manipulate loopholes inherent in the written method of making statements<sup>62</sup> and in the absence of a back up electronic recording of the complete interaction between the witness and the police investigator.<sup>63</sup>

## **2.4 Managing language barriers during investigation and prosecution**

South Africa has 11 official languages, and a Constitution-based language policy to restore the indigenous African languages to that of importance equal to the non-indigenous English and Afrikaans.<sup>64</sup> Nevertheless, court proceedings in South Africa continue to be conducted in either English or Afrikaans, for historical reasons, and documents needed for those proceedings must necessarily also be in one of those two official non-indigenous languages.<sup>65</sup> The history of language use in the

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<sup>62</sup> Heaton-Armstrong and Wolchover "Recording Witness Statements" in Heaton-Armstrong et al *Analysing Witness Testimony* 226.

<sup>63</sup> A Heaton-Armstrong, D Wolchover and E Shepherd "Problematic Testimony" in Heaton-Armstrong et al *Analysing Witness Testimony* 341.

<sup>64</sup> Constitution section 6(2), "Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages".

<sup>65</sup> Magistrates Court Act, No 32 of 1944, section 6(1) "Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used." HJ Lubbe "The right to language in court: A language right or a communication right?" (2006) <http://www.app.pt/RESUMOS-B/Lubbe-B-doc> (accessed 5 January 2012) 377 at 386: "While witnesses and the accused can testify in any of the eleven official languages or rely on the services of a translator when doing so, lawyers,

police service is similarly placed. English and Afrikaans have fought each other for language supremacy in the official business of the Service since its establishment in 1913, and since 1994 the use of English has taken precedence.<sup>66</sup>

Alongside these policies, in a country made up of a majority of indigenous language speakers, whose mother tongues are any one of the nine indigenous official languages and not either of the two official court languages,<sup>67</sup> it is self-evident that language translation and interpreting<sup>68</sup> would play a major role in everyday police investigation practice and prosecution practice. No other nation is similarly placed and able therefore to be used as a *best practice* guide or template for overcoming the challenges presented by this language mix. For this reason, *best practice* for managing language barriers in South Africa will need to be built on the principles to be drawn from the work of experts in the field of linguistics and interpreting, as follows.

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magistrates and judges may speak only English and Afrikaans." However, in the High Court review of the cases of *S v Matomela* 1998(3) BCLR 339 (Ck) and *S v Damoyi* 2004 (1) SACR 121 (C), the proceedings were found to have been conducted in isiXhosa when there was a shortage of interpreters, and all the judicial officers present were proficient in isiXhosa. In both cases the proceedings were held to have been constitutional and in accordance with justice, but the practicalities of having the records translated into English for the reviews caused considerable delay, Lubbe "The right to language in court" 380-381.

<sup>66</sup> K Deprez, T du Plessis and L Teck (eds) *Multilingualism, the Judiciary and Security Services* (2001) 134.

<sup>67</sup> Statistics South Africa  
<http://www.statssa.gov.za/census01/html/C2001KeyResults.asp> (accessed 31 January 2012).

<sup>68</sup> National Association of Judiciary Interpreters and Translators (2006) Position Paper 1: "Translators work with written text and interpreters work with the spoken word, rendering messages in one language into their equivalent in another language."

### 2.4.1 Level of language skill required

It is not uncommon to see written as a prelude to a police statement "... states in Xhosa and translated into English to the best of my ability ..." <sup>69</sup> with only one statement produced, written in English, and no declaration about the language qualifications of the police recorder who has also done the interpreting. In practice, it seems to be the case that a bilingual investigator will translate what a witness is saying from the indigenous language into English most commonly before writing it down, or the mother present with the child may be called on to do the interpreting. <sup>70</sup> As already discussed, however, it is the actual individual words and phraseology used by the witnesses which constitute the evidence. Precision and accuracy are therefore required when taking the statement of a witness. Multi-language oral and written skills that are sufficient to carry out some policing duties may be seen to be deficient in the context of recording witness narratives, which can form the basis of life-changing outcomes for one or more parties.

Bilingualism and multilingualism can exist on more than one level of competence, <sup>71</sup> and the majority of people who are South Africans understand more than one language to some extent, <sup>72</sup> and sufficiently for most routine purposes. <sup>73</sup> The mix of language

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<sup>69</sup> Research statements numbers 21, 50, 84 and 85, and many others have slight variations to this wording.

<sup>70</sup> Research statements numbers 36 and 54.

<sup>71</sup> TT Mukhuba "Bilingualism, Language Attitudes, Language Policy and Language Planning: A Sociolinguistic Perspective" (2005) 3(2) *Journal of Language and Learning* 268 at 269; J Edwards *Multilingualism* (1994) 2-3.

<sup>72</sup> Mukhuba 2005 *Journal of Language and Learning* 269; Statistics South Africa in the *Census Handbook* Publication <http://www.statssa.gov.za/Publications/CensusHandbook/CensusHandbook.pdf> (accessed 31 January 2012) 112.

<sup>73</sup> R Lakoff "Introduction" in M Bucholtz (ed) *Language and Woman's Place: Text and Commentaries/ Robin Tolmach Lakoff* (2004) 41.

possibilities within interpersonal communication in South African society is as many as the eleven official language speakers interacting with each other would suggest. The mix is further compounded by the historically second-class education provided to the indigenous language speakers whose second-language proficiencies in the official court languages are unlikely to be at tertiary levels.<sup>74</sup> Tone, inflexion, body language and demeanour act as extra-linguistic secondary aids to meaning and intention, and these too allow for much misunderstanding and mis-interpretation across cultures. The avoidance of eye contact by those lacking power within a formal interview setting can be mis-understood as furtiveness. Long-winded answers to apparently simple questions can mislead a listener into thinking that this is rationalizing defensive behaviour, rather than being a circumstance which does not admit of a complete response which is also a short response from the respondent's cultural perspective.<sup>75</sup>

The skill, experience and proven language and cultural knowledge competencies of a qualified interpreter, therefore, are fundamental to the accurate outcomes of inter-language exchanges which affect legal and other human rights. Such a qualified interpreter is potentially the only one of the three people in an interview situation who can understand every word spoken and every cultural concept in that exchange. Precisely because some

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<sup>74</sup> Statistics South Africa *2001 Census* 115, shows that "... the percentage of the population aged 20 years and older with no education was 17.9% ... at the national level"; and the *key results census 2001 document* showed further that of those 20 years and older, only 20.4% had completed their secondary education; Mukhuba 2005 *Journal of Language and Learning* 274: "In so far as education was concerned the African [in South Africa] was allowed the type of education [under the Bantu Education Act 1955] that enabled him to be a hewer of wood and a drawer of water".

<sup>75</sup> B Johnstone *Discourse Analysis* (2002) 31, "Different languages make available different grammatical strategies, different vocabularies ... "; at 237, "... meaning is always particular and situational", 237.

words, expressions, and concepts do not admit of direct translation, the interpreter must play an active role in restructuring a concept in order to impart the meaning intended by the question and the answer, and do so repeatedly throughout an interpersonal interaction. The interpreter is not merely someone who repeats a set of words in a different language, but also a cultural conduit, understanding and making adjustments for signals which are culturally determined.<sup>76</sup>

In the legal contexts of criminal investigation and prosecution, the issues of precision with language meaning and cultural meaning become crucial to the preservation of rights and to just outcomes.<sup>77</sup> When the person doing the interpreting makes a mistake which remains unnoticed and uncorrected, the rights of one party or another in the legal process will have been compromised. Mistakes have a snowball effect when they remain uncorrected because an inaccurate detail within a witness narrative dilutes the overall credibility of the narrative. Mistakes are able to be noticed and corrected only by a system of thorough review and active confirmation, and one which involves more than simply going through the motions. In the circumstance of compiling a witness statement, in a language not spoken or understood fully by the witness, the interpreter's responsibility and function extends to the final reading and translation of the completed document in order to endorse it as true and correct by the maker. Every interpreting event is another opportunity for error and misunderstanding, even when

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<sup>76</sup> Edwards *Multilingualism* 48: "Apart from an almost useless word-for-word exercise, every act of translation involves interpretation and judgement."

<sup>77</sup> FR Olanrewaju *Forensic Linguistics. An Introduction to the Study of Language and the Law* (2009) 7.

the interpreter is appropriately qualified, and safeguards must be robust and effective.<sup>78</sup>

When the interpreter is a bi-lingual police officer of undeclared cultural and language proficiency in either or both languages of the statement-taking exchange,<sup>79</sup> then the completed witness statement is unlikely to bear a sufficiently strong relation to the words actually spoken by the witness or to the sense that the witness wanted to convey.<sup>80</sup> Even the review and confirmation of the contents of the statement is compromised by virtue of being perhaps inexpertly re-interpreted back into the original language in which it was spoken, if in fact this process is honoured. Under these circumstances it is virtually impossible to recreate the original words, phraseology and intent of the witness.<sup>81</sup>

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<sup>78</sup> National Association of Judiciary Interpreters and Translators 2006 3: "Research reveals that interpreting accurately and consistently at a moderate rate of speech (120 words per minute) is relatively difficult. Memory, speed, mental flexibility, patience, and many cognitive skills come into play."

<sup>79</sup> National Association of Judiciary Interpreters and Translators 2006 1: "... basic English is not sufficient when an individual is confronted with the criminal justice system [and] ... a highly developed knowledge of both languages is necessary."

<sup>80</sup> In the South African Police Service Application Form to be completed by a person applying to become a police officer, the section on language asks for a self-rating of good, fair, or poor on each of three languages (the first specified as English and the other two being unspecified) in the spoken, written and reading skills. [http://www.saps.gov.za/saps\\_profile/strategic\\_framework/annual\\_report/2010](http://www.saps.gov.za/saps_profile/strategic_framework/annual_report/2010) (accessed 31 January 2012).

<sup>81</sup> S Berk-Seligson "The Miranda Warnings and Linguistic Coercion: The Role of Footing in the Interrogation of a Limited-English-Speaking Murder Suspect" in Cotterill (ed) *Language in the Legal Process* 127-143, through the study of transcripts of police interviews of a murder suspect with mother-tongue Spanish and limited English, Berk-Seligson was able to say that the role of the police officer designated as interpreter was an ambiguous one, because the police officer remained a police officer even though performing the interpreting function. For the person being interviewed there was some resultant undermining through language, at 127, and the police officer performed the duties of interpreting both inaccurately and unenthusiastically, at 134, failing to interpret many of the questions and statements. Although this study involved the interview of a suspect, Heaton-Armstrong argues that the same issues apply to the interviewing of witnesses.

#### **2.4.1.1 Best practice**

Best evidence gathering requires that the method most likely to produce accurate outcomes be utilised with both witnesses and suspects alike. It is submitted that such method entails the use of properly qualified interpreters who attest to the accuracy of the translation, sign each page of a statement as being a true interpretative account, exercise their responsibility of ensuring that the person making the statement has had the statement read back to them in the language in which it was made, and remain available to be called as a witness should the content and the process be the subject of in-court dispute.

#### **2.4.2 Home language of the deponent to be determinative**

An overarching problem with any interpreting and translating from one language to another is that of language-embedded cultural difference, particularly in instances of great cultural disparity, which impacts on listener understanding of even simple stories.<sup>82</sup> This problem can be highlighted by the following example: there is no word in the isiXhosa language for the English word 'adoption', and a legal issue of who was to be compensated in the death of an adult carer had to be decided by using expert evidence to bridge the gulf between European-

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In Heaton-Armstrong et al "Problematic Testimony" in Heaton-Armstrong et al *Analysing Witness Testimony*, 341, the authors argue that it is naïve for authorities to fail to supply to witnesses the same safeguards against misrepresentation as those supplied to suspects through mandatory electronic recording of statements. The National Association of Judiciary Interpreters and Translators 2006, also argues against the use of a party as the interpreter, saying such a person is not neutral, has an interest in the outcome, is not tested for language proficiency, not trained to retain meaning, and does not know the limits of the role.

<sup>82</sup> MB Powell "PRIDE: The Essential Elements of a Forensic Interview with an Aboriginal Person" (November 2000) 35(3) *Australian Psychologist* 186 at 187.

law-based statutes and indigenous parenting and cultural practice.<sup>83</sup>

By way of further example, there are now in Australia special legal rules which recognise that Australian Aboriginal cultural practice has to be protected from misunderstanding and misinterpretation within the English law based legal system.<sup>84</sup> These Anunga Rules apply to suspects and were formulated as a result of cases of injustice and miscarriages of justice. They address Aboriginal issues of English language misuse; behavioural compliance in the presence of authority; and behavioural avoidance practices born of historical abuse by the non-indigenous. The Rules prescribe what action is to be taken by an interviewing police officer to not only protect the interest of a suspect being interviewed, but also to prove compliance with the Rules in ensuing court hearings.

Similarly, there is great cultural disparity in South Africa between indigenous language groups and those of English and Afrikaans mother-tongue speakers. The situation in South Africa though is made even more complex by the continuing requirement that court business and associated documentation be conducted only in English or Afrikaans. The witness statement written in either of these two official court languages can be achieved in a variety of ways, and isiXhosa is used here as the indigenous language of example because it is the most prevalent indigenous language in the Eastern Cape where the research has been conducted:

1. A home-language Xhosa speaking witness may, if asked whether or not they speak English, agree to speak in

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<sup>83</sup> *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (AD).

<sup>84</sup> D Mildren "Aboriginals in the Criminal Justice System" (2008) 29 *Adelaide Law Review* 7 at 10.



second-language English for the purpose of facilitating the statement.

2. A home-language Xhosa speaking witness may make the statement by speaking in Xhosa to a home-language Xhosa speaking police interviewer who may make notes of the interview in Xhosa and then later translate these into a statement written in English. Alternatively, the police officer may prepare the statement in Xhosa, and then translate it into English. Whichever option is chosen, the statement will necessarily need to be read to the deponent in Xhosa in order to be properly certified as being correct and acceptable.
3. A home-language Xhosa speaking witness and a home-language Afrikaans speaking police interviewer may agree to each speak second-language English in order to facilitate the statement making process.
4. A witness and a police interviewer who each speak an official language but who have no understanding of each other's language may rely on a party<sup>85</sup> or a co-worker<sup>86</sup> to be the interpreter.

All of these options are unsatisfactory to a greater or lesser degree. The production of the document is given the greater focus rather than the focus being and remaining on the capture of verbatim language of witnesses in the languages of their respective home cultures.

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<sup>85</sup> In the compilation of research statements numbers 36 and 54 the children's mothers interpreted between the Xhosa speaking children and the English speaking police interviewers.

<sup>86</sup> Research statements numbers 51 and 87.

#### **2.4.2.1 Best practice**

In order to reinforce the capturing of verbatim language and meaning as the primary purpose of the process of making a statement and to prevent interviewers from deflecting their effort into subsidiary goals of simply producing gist documents, the home language of the deponent needs to be mandated as the deciding factor in the selection of spoken language at interview. To record statements either in the home language of the police interviewer or of the courts, as is suspected may sometimes be the case,<sup>87</sup> is to contravene the constitutional rights of the complainants who are thus forced to use second and third languages, and to thereby compromise future legal outcomes. The use of qualified interpreters right from the outset of a criminal investigation will give appropriate status back to the indigenous languages spoken by the majority of witnesses and thereby assist progress towards realising the language policy goals of the Constitution. It will also produce best evidence for the realisation of just outcomes in criminal prosecutions.

### **2.5 Maximising witness memory**

The human memory is a complex brain function which develops alongside growth in thinking complexity and it can properly be seen to be derived autonomically from comprehension.<sup>88</sup> The process of remembering is completed through a series of stages called encoding, storage and retrieval, each of which may be

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<sup>87</sup> Research statements numbers 32 and 33 were said to have been given in English by a six year old child whose home language was Xhosa.

<sup>88</sup> AL Brown "The Development of Memory: Knowing, Knowing about Knowing, and Knowing how to Know" in HW Reese (ed) *Advances in Child Development and Behavior Volume 10* (1975) 105-107.

subject to malfunction.<sup>89</sup> Although there is a passive, tape-recorder like stage of registering incoming perceptual data, literal recall of what has been experienced is rare,<sup>90</sup> and remembering is an active process of construction and reconstruction.<sup>91</sup> Legal processes of investigation and prosecution, relying as they do on the memory of witnesses, have a vested interest in finding and using the best ways of capturing accurate memories, preserving them, and assisting witnesses thereby to consolidate them for future recall.

### 2.5.1 How memory works

There exist sub-groups of memory, called short-term and long-term, where short-term memory lasts only a few seconds, sufficient for data to be registered, and where long-term memory stores the information which is actively called upon in conscious acts of recollection.<sup>92</sup> Furthermore, within long-term memory there are two functionally different, yet closely interacting, memory systems - episodic which is personal and unique, and semantic which is shared knowledge of the world.<sup>93</sup> The adversarial legal system has functioned for centuries on the core role of the long-term episodic memory,<sup>94</sup> conceptualised as a reliable recording of events able to be played back at will and without distortion and forgetting beyond what the refreshment of

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<sup>89</sup> G Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 7-13.

<sup>90</sup> FC Bartlett *Remembering. A study in Experimental and Social Psychology* (1932) 204.

<sup>91</sup> Bartlett *Remembering* 213.

<sup>92</sup> Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 6.

<sup>93</sup> E Tulving *Elements of Episodic Memory* (1983) v. See also Brown "The Development of Memory" in Reese (ed) *Advances in Child Development* 108; D Reisberg *Cognition: Exploring the Science of the Mind* 2 ed (2001) 216; U Neisser and E Winograd (eds) *Remembering Reconsidered: ecological and traditional approaches to the study of memory* (1988) 7.

<sup>94</sup> Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 6.

memory will repair, and robust enough to resist the rigours of testing through cross-examination.<sup>95</sup>

This model of memory functioning has been challenged now after more than a century of scientific study.<sup>96</sup> Memory is more malleable and more complex and more prone to error than the robust historical view of it. Elizabeth Loftus has been able to show through experiments, conducted with people as eye-witnesses to events typical of those the subject of litigation, that eye-witnesses, through being provided with misinformation, can be led into making mistakes<sup>97</sup> which surprise even the most diligent and sincere of witnesses.<sup>98</sup> The majority of errors that do occur in memory take place at the time of encoding<sup>99</sup> and both this encoding error and memory storage failure result in the irretrievable loss of original data.

Retrieval failure, however, can often be rectified if the right cues or links are supplied,<sup>100</sup> although cues are effective only

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<sup>95</sup> JL McGaugh *Memory and Emotion: the making of lasting memories* (2003) Preface ix: "In mediaeval times [before writing] ... to maintain records of important events, ... a young child about seven years old was selected, instructed to observe the proceedings carefully, and then thrown into a river. In this way, it was said, the memory of the event would be impressed on the child and the record of the event maintained for the child's lifetime."

<sup>96</sup> McGaugh *Memory and Emotion* 4.

<sup>97</sup> CB Wortman, EF Loftus and ME Marshall *Psychology* 4 ed (1992) 208-209, experiments designed by Loftus and her colleagues in 1978 showed that when witnesses were shown inaccurate information a week after witnessing an event when the factual details are dimmer in memory, they adopted the misinformation as additional fact 80 per cent of the time. The same results were obtained in her experiments in 1980 with regard to recognition of faces and the misidentification of suspects; and see Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 12-13.

<sup>98</sup> McGaugh *Memory and Emotion* 5.

<sup>99</sup> NL Stein "Children's Memory for Emotional Events: Implications for Testimony" in K Pezdek and WP Banks (eds) *The Recovered Memory/False Memory Debate* (1996)185.

<sup>100</sup> Tulving *Elements of Episodic Memory* 171, "... retrieval is always cued"; Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 11-12.

if they were encoded at the time of the experience.<sup>101</sup> Personal involvement, such as that of a witness in an event, almost always ensures active processing and therefore encoding of some aspect of the ongoing situation.<sup>102</sup> It is retrieval failure, therefore, which is responsible for much forgetting, aside from the amount of memory lost being also a function of time and memory decay.<sup>103</sup>

### 2.5.2 The effects of high emotion on memory

Witness testimony commonly relates to events which have high emotion attached to them, either because they are contentious and therefore divisory, or because they excite moral condemnation or produce physical fear. The emotional content is usually negative, charged as it often is with an element of surprise and apprehension<sup>104</sup> and it results in emotional stress along with autonomic-hormonal changes.<sup>105</sup>

These emotionally charged events have been found to be remembered differently depending on whether or not they are a single event or part of repeated and prolonged trauma, with the single event producing vivid memories, and the repeated events producing "spotty" memories.<sup>106</sup> In addition to this difference,

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<sup>101</sup> Cohen "Human Memory in the Real World" in Heaton-Armstrong et al *Analysing Witness Testimony* 13, citing E Tulving's 'encoding specificity principle'.

<sup>102</sup> Stein "Children's Memory for Emotional Events" in Pezdek and Banks *The Recovered Memory* 173.

<sup>103</sup> AD Baddeley *The Psychology of Memory* (1976) 58-59, citing the classical experiment of Hermann Ebbinghaus in 1879 on the forgetting curve. Baddeley goes on to give the two causal interpretations of forgetting, either the *trace decay hypothesis* which provides for spontaneous deterioration of the memory trace over time, or the *interference hypothesis* which attributes forgetting to a memory trace masked or obliterated by other events.

<sup>104</sup> S-A Christianson "Emotional Stress and Eyewitness Memory: A Critical Review" (1992) 112(2) *Psychological Bulletin* 284 at 284.

<sup>105</sup> Christianson 1992 *Psychological Bulletin* 285.

<sup>106</sup> GS Goodman, JA Quas, JM Batterman-Faunce, MM Riddlesburger, and J Kuhn "Predictors of Accurate and Inaccurate Memories of Traumatic Events Experienced in Childhood" in Pezdek and Banks *The Recovered Memory/False Memory Debate* 7, citing the 1988 study by L Terr; K Nelson "The

the 1992 review by Christianson of research into the interaction of emotional stress and eyewitness memory found that central and peripheral<sup>107</sup> details of an event are differentially remembered, relatively accurately in the case of the central detail, and relatively inaccurately in the case of the peripheral details,<sup>108</sup> especially when tested after short retention intervals.<sup>109</sup> However, the review by Christianson also found reliable evidence that the completeness and accuracy of the peripheral information can restore itself during a short delay before testing, or after repeated memory testing.<sup>110</sup>

### 2.5.3 Maximising retrieval of memories

Retrieval failure is less likely when multiple retrieval cues are provided,<sup>111</sup> supporting the multiple trace theory of memory,<sup>112</sup> based on the network of associations which make up our memories. A practical example of the effectiveness of multiple retrieval cues can be found in the cognitive forensic interview for witnesses, whose credibility is not in question,<sup>113</sup> which draws on the two principles of encoding specificity<sup>114</sup> of context cues and the multiple trace theory in its design.<sup>115</sup> The

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Ontology of Memory for Real Events" in Neisser and Winograd *Remembering Reconsidered* 253.

<sup>107</sup> Christianson 1992 *Psychological Bulletin* 291, where peripheral detail is defined as that which is "... irrelevant or spatially peripheral to the source of the emotional arousal."

<sup>108</sup> Christianson 1992 *Psychological Bulletin* 298.

<sup>109</sup> Christianson 1992 *Psychological Bulletin* 303.

<sup>110</sup> Christianson 1992 *Psychological Bulletin* 284 at 303; see also E Scrivner and MA Safer "Eyewitnesses show hypermnesia for details about a violent event" (Aug 1988) 73(3) *Journal of Applied Psychology* 371 at 381-382.

<sup>111</sup> Reisberg *Cognition* 216.

<sup>112</sup> BR Clifford and A Memon "Obtaining detailed testimony: the cognitive interview" in Heaton-Armstrong et al *Analysing Witness Testimony* 147.

<sup>113</sup> M Steller and P Wellershaus "Information enhancement and Credibility Assessment of Child Statements: The Impact of the Cognitive Interview Technique on Criteria Based Content Analysis" in Davies et al *Psychology, Law, and Criminal Justice* 125.

<sup>114</sup> See note 101 above.

<sup>115</sup> Clifford and Memon "Obtaining detailed testimony" in Heaton-Armstrong et al *Analysing Witness Testimony* 146-148,

interview utilises four different instructions to the witness about how to search their memory to maximise recall.<sup>116</sup> The results of a study by Clifford in 1992, comparing the information gathered from adult witnesses through the Cognitive Interview with that obtained via the Standard Police Interview, demonstrate clearly its effectiveness in maximising witness recall.<sup>117</sup> The Cognitive Interview increased the collected information five-fold.<sup>118</sup> Such open-ended invitations as these asking witnesses to tell what they know has been shown to produce the greatest amount of information, concomitant with cognitive development, and for this information to be the most accurate.<sup>119</sup>

#### **2.5.4 Best practice in maximising witness recollections**

Even under circumstances of both short and prolonged high emotion, adults are able to encode and store information in such a way that it passes into long-term memory. It is the retrieval of those memories and their capture which forms the substance of a witness statement. Retrieval can be maximised by the witness being provided with memory cues; by a short delay of some hours rather than days before interviewing to allow for the heightened effects of emotion to subside; and by the open-invitation interviewing method which increases the amount of reliable information the witness is able to provide. When the memory is assisted to retrieve information from long term storage by

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<sup>116</sup> Clifford and Memon "Obtaining detailed testimony" in Heaton-Armstrong et al *Analysing Witness Testimony* 147-148.

<sup>117</sup> R George and B Clifford "The Cognitive Interview: Does it Work?" in Davies et al *Psychology, Law, and Criminal Justice* 147.

<sup>118</sup> George and Clifford "The Cognitive Interview" in Davies et al *Psychology, Law, and Criminal Justice* 147.

<sup>119</sup> HR Dent and GM Stephenson "An experimental study of the effectiveness of different techniques of questioning child witnesses" (1979) 18(1) *British Journal of Social and Clinical Psychology* 41.

multiple open-invitation retrieval strategies, the information recalled will be both accurate and maximised.

## **2.6 Methods of recording out-of-court statements**

The method of recording witness statements which brings the decision-maker closest to the disputed events is the one which will provide the best, most reliable<sup>120</sup> evidence. That method is by video-recording. The video-recording of a witness statement allows the viewer to see and hear the witness simultaneously while also observing the process of thinking that accompanies language choice and the body language which accompanies that process.<sup>121</sup> This adds additional information about the witness which assists the court in its assessment of trustworthiness. Nevertheless, the written method of recording remains the method most favoured in most jurisdictions in the world for taking the statement of most adult witnesses to crimes.

For the sexual offence victim, however, in many jurisdictions now, special practice and evidentiary rules have been formulated to allow for electronically recorded statements to be made early in the investigation process,<sup>122</sup> and in some instances for these

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<sup>120</sup> R Rosenthal J.D. "Suggestibility, Reliability, and the Legal Process" (2002) 22 *Developmental Review* 334 at 346: "'Reliability' concerns the inherent quality of evidence. Each piece of evidence at trial is subject to a reliability determination by the judge."

<sup>121</sup> G Kress "The Social Values of Speech and Writing" in R Fowler, B Hodge, G Kress and T Trew *Language and Control* (1979) 48-49.

<sup>122</sup> For example, A Russell "Documentation and Assessment of Children's Forensic Interview Statements" (2009) 16 *Widener Law Review* 305 <http://widenerlawreview.org/files/2011/03/Russell.pdf> (accessed 11 May 2011) 314: as at 2010 fifteen States of the USA have legislation specific to electronic recordings of investigative interviews with child victims of abuse, with eleven of them mandating the electronic recording under certain conditions of abuse, and three of those mandating the recording be by video rather than by audio or video; LS McGough "For the Record: Videotaping Investigative Interviews" (1995) 1 (2) *Psychology, Public Policy, and Law* 370



to become the complainant's evidence-in-chief at the trial.<sup>123</sup> These measures have been introduced because of the uniqueness of sexual offending and its fundamental violation of the victim, together with the fact that the prosecution usually stands or falls on the evidence of the complainant, who is usually female, often a child and usually a single witness.<sup>124</sup>

### 2.6.1 The written method

In jurisdictions where witness statements remain written and collaboratively constructed documents,<sup>125</sup> they provide advantages which favour only a State treasury, and not the court or the witness, because the costs are minimal in comparison with the alternatives. The police officers are already employed, and a

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at 380: England has adopted a video-taping statute for children who are witnesses in criminal prosecutions, and precautionary audiotaping of children's interviews has been standard police practice in Denmark and Sweden for more than 20 years; ML Lamb, Y Orbach, KJ Sternberg, I Hershkowitz and D Horowitz "Accuracy of Investigators' Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims" (2000) 24(6) *Law and Human Behavior* 699 at 699: electronic recording of child witness investigative interviews are mandatory in Israel.

<sup>123</sup> For example, BD McAuliff and M Kovera "The Status of Evidentiary and Procedural Innovations" in BL Bottoms, M Bull Kovera and BD McAuliff (eds) *Children, Social Sciences, and the Law* (2002) 414: as at 2002 37 States of the USA had enabling legislation for the videotaped testimony or depositions of child victims of sexual abuse; Australian Government, Australian Law Reform Commission Publication 26 "Reporting, Prosecution and Pre-trial Processes: Pre-recorded evidence" (2010/2011) <http://www.alrc.gov.au/publications/26.%20Reporting%2C%20Prosecution%20and%20Pre-trial%20Processes%20-%20Pre-recorded%20evidence> (accessed 24 February 2011) at 26.157: electronic recording of child victim statements is not mandated, but there is enabling legislation in eight of the nine Australian jurisdictions providing for the use of pre-recorded evidence in criminal hearings and trials; A Cunningham and P Hurley *A full and candid account: using special accommodations and testimonial aids to facilitate the testimony of children* (2007) Centre for Children and Families in the Justice System: Canada [http://www.lfcc.on.ca/4\\_VideorecordedEvidence.pdf](http://www.lfcc.on.ca/4_VideorecordedEvidence.pdf) (accessed 11 May 2011): under the Canadian Criminal Code, provision is made for the admission of video-recorded statements, under conditions; Crown Prosecution Service UK "A Protocol between the Police and the Crown Prosecution Service in the Investigation and Prosecution of Allegations of Rape" (2005) [http://www.cps.gov.uk/publications/agencies/rape\\_protocol.html#\\_ftoc2\\_05](http://www.cps.gov.uk/publications/agencies/rape_protocol.html#_ftoc2_05) (accessed 16 February 2011): since September 2007 all rape victims are eligible to apply for their visually recorded interview to be admitted as their evidence-in-chief.

<sup>124</sup> See Chapter 2.3.

<sup>125</sup> See Chapter 2.1 The Witness statement; The witness interview.

part of their official policing function is to speak to witnesses and record what they have to say. There is no means of assessing the quality of the police work being done and the type and degree of influence the police interviewer has had on the content because the police officer is silent in the completed document. There are therefore no training and re-training implications which present themselves as they do when trainers listen to an electronically recorded interview. There is no special equipment needed and no specially constructed space needed in which the statement-making is to take place.

From the witness's point of view, such written statements are less than adequate because they represent a re-worked version<sup>126</sup> of what was said at the time to the police recorder and as such they do not necessarily represent an accurate account. Thereby the statement also fails to fulfil another of its intended roles, that of refreshing witness memory to the extent required for the giving of best evidence. 1994 research by Koehnken and colleagues found that even when the statement was written immediately after the witness interview, it contained only two-thirds of the relevant information reported by the interviewees.<sup>127</sup> A study by Lamb and colleagues in 2000 which compared verbatim contemporary accounts taken by police officers from child witnesses with the audio-taped recordings of the accounts found similarly that twenty-five per cent of incident-relevant detail provided by the children was not reported.<sup>128</sup>

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<sup>126</sup> Milne and Bull "Interviewing Victims of Crime" in Kebbell and Davies *Practical Psychology for Forensic Investigators* 12.

<sup>127</sup> G Koehnken, C Thurer and D Zoberbier "The Cognitive Interview: Are the interviewers' memories enhanced too?" (1994) cited in Milne and Bull "Interviewing Victims of Crime" in Kebbell and Davies *Practical Psychology for Forensic Investigations* 10.

<sup>128</sup> Lamb et al 2000 *Law and Human Behavior* 699: the interviewers in this study were experienced Israeli Youth Investigators for whom such interviewing formed the basic function of their statutory role.

Adult, literate witnesses would be better served if they were to write their own statements in their own words and in their cultural home language soon after the witnessed event and then to have this document sworn and attached to the police docket. Providing that some initial guidance could be given to ensure that witnesses concentrated their statement information on the elements of the crime, such a statement would represent a full verbatim account of what the witness had to say and, as such, it would be a genuine memory refresher prior to giving oral testimony.<sup>129</sup>

From the court's point of view, there is no advantage accruing to it from the written out-of-court statement.<sup>130</sup> There is only disadvantage. In cases of serious crimes, which attract penalties of imprisonment, and in the circumstances of having only single witnesses to those crimes, written statements represent opportunities for defence counsel to impugn witness credibility, because of prior inconsistencies, for reasons which may have nothing to do with the quality of the witness testimony, everything to do with inherent difficulties of the method of production, and therefore nothing to do with justice *per se*.<sup>131</sup> In cases in which it becomes imperative for the presiding officer to know exactly what was said by the witness in their out-of-court statement, and with what provocation, then

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<sup>129</sup> Massachusetts Police Department USA "Interviewing victims and Witnesses" Policy and Procedure No 1.06 Accreditation Standards (undated) <http://www.municipalpoliceinstitute.org/.../1.06%20Interviewing%20Victims%20and%20Witnesses.doc> (accessed 17 February 2011): this is one example of police practice which allows for the witness to write their own statement, unless they are illiterate or injured.

<sup>130</sup> Heaton-Armstrong et al "Problematic Testimony" in Heaton-Armstrong et al *Analysing Witness Testimony* 343.

<sup>131</sup> Wolchover and Heaton-Armstrong "No further excuses": they have for some years now in the United Kingdom been urging that the witness statements of all significant witnesses in serious offences be audio-recorded.

the written statement will not assist the court.<sup>132</sup> Recourse to the investigator's notes will also not assist because they are not always reliable. A study by Lamb et al found that there was a systematic misattribution of details having been elicited reliably by open prompts rather than by the distorting focused prompts which later impinge upon witness consistency and credibility.<sup>133</sup> In a 1999 study by Warren and Woodall, interviewers claimed to have asked few if any leading and other specific questions when in fact eighty per cent of the questions asked were leading and specific, and the interviewer notes made after the interviews included only twenty per cent of the questions asked.<sup>134</sup>

### **2.6.2 The electronic methods**

When the out-of-court statement is electronically recorded, then the opportunity for the court to make its own decision about witness reliability and interviewer bias is provided. Such were the circumstances in the *Michaels* case in the United States of America.<sup>135</sup> The defendant Margaret Michaels was convicted on the in-court testimony of the child witnesses, which referred extensively to the pre-trial statements of the children,<sup>136</sup> but the conviction was overturned on appeal when it was found to have been based on several major prosecution errors, which included the investigatory interviews conducted with the child witnesses.<sup>137</sup> When the recordings of the interviews<sup>138</sup> with the

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<sup>132</sup> Heaton-Armstrong et al "Problematic Testimony" in Heaton Armstrong et al *Analysing Witness Testimony* 335.

<sup>133</sup> Lamb et al 2000 *Law and Human Behavior* 699 at 704.

<sup>134</sup> A Warren and CE Woodall "The reliability of hearsay testimony: How well do interviewers recall their interviews with children? (1999) cited in Lamb et al 2000 *Law and Human Behavior* 700.

<sup>135</sup> *State v Michaels*.

<sup>136</sup> *State v Michaels* 2.

<sup>137</sup> *State v Michaels* 1.

children by the state investigators were replayed and analysed, the investigators were found to have contaminated the children's evidence by compromising its reliability.<sup>139</sup> The defendant could not be retried because the state was unable to discharge its onus, at pre-trial hearing, of showing that the reliability of the evidence had not been contaminated beyond redemption.<sup>140</sup> The defendant had already served some 7 years in prison, and without the existence of the taped interviews, she would still be there serving out the original aggregate 47 years.

This case was a seminal one in the United States in that it gave a legal platform to the social science research into the suggestibility of children,<sup>141</sup> to show how it was and is possible to obtain and rely on evidence from children which is both accurate and reliable, providing that it is also possible to critically examine the electronically recorded conduct of the interviewers.<sup>142</sup> Both audio and video recording will serve the purpose of preserving the witnesses' actual words and the questions and prompts of the police investigators, but video

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<sup>138</sup> *State v Michaels* 5: there were 39 transcripts of taped interviews with 34 children, and the remainder of the interviews with the children, one half of the earliest, were unrecorded.

<sup>139</sup> *State v Michaels* 7: "... we note the kind of practices used here - the absence of spontaneous recall, interviewer bias, repeated leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes and cajoling, as well as the failure to videotape or otherwise document the initial interview sessions ...."

<sup>140</sup> *State v Michaels* 1.

<sup>141</sup> Committee of Concerned Social Scientists "The Suggestibility of Children: Evaluation by Social Scientists" (1994) The Amicus Brief for the Case of *State of New Jersey v Michaels* (1994), <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/suggestibility.html> (accessed August 2010).

<sup>142</sup> Committee of Concerned Social Scientists "The Suggestibility of Children" 36: "We must also know the verbatim statements and questions of the interviewer as well as the verbatim responses of the children. Because this verbatim information fades most rapidly from memory (within a matter of minutes), it is crucial that it be electronically recorded. Without this information, one cannot begin to evaluate the reliability of the children's allegations."

recording will also provide the visuals of the interaction, and thereby complete the sensory picture. This is especially important in the case of children who are being interviewed, because as developing beings - physically, cognitively, and emotionally - there is an elevated importance to be given to their accompanying body language, giving as it does additional clues to their thinking and to their responses to interviewer behaviour.<sup>143</sup> However, it is really the interviewer who is being monitored more closely during an interview with a child because interviewer behaviour and verbatim speech is fundamental to the reliability or unreliability of child witness information, as will be detailed in Chapter 3 of this review. The studies of interviewer behaviour post-training in *best practice* protocols show an early reversion to interviewing practices which contaminate information from children, making ongoing monitoring and training of interviewers essential.<sup>144</sup>

Table 1, below, summarises sixteen desirable features of statement recording and tabulates them across the three recording methods of video and audio, audio alone, and writing.

**2.6.2.1 Table 1 Fifteen features of statement recording tabulated across three methods of recording**

| <b>Features</b>                                      | <b>Video and Audio</b> | <b>Audio</b>           | <b>Written</b> |
|--|------------------------|------------------------|----------------|
| Verbatim Record, no errors of commission or omission | Yes, complete capture  | Yes, complete capture  | No             |
| Able to be replayed for max. information extraction  | Yes, unlimited replays | Yes, unlimited replays | No             |
| Primary evidence preserved, live talk captured       | Yes                    | Yes                    | No             |

<sup>143</sup> RW Shuy *Language Crimes: use and abuse of language evidence in the courtroom* (1993) 185.

<sup>144</sup> MB 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 at 46 - 48.

|   |                           |                      |           |
|---|---------------------------|----------------------|-----------|
| Primary evidence preserved, live pictures captured                | Yes                       | No                   | No        |
| No reinterview by different professional audiences                | Yes                       | Yes                  | No        |
| Evidence of interviewer behaviour and speech                      | Yes, behaviour and speech | Yes, of speech       | No        |
| Encourages interviewer skill by the prospect of a future audience | Yes                       | Yes                  | No        |
| Potential use in court to clarify doubt                           | Yes                       | Yes                  | No        |
| Evidence of the strength of the State case                        | Yes, strong               | Yes, weaker          | Yes, weak |
| Focuses the interviewer on its future uses                        | Yes                       | Yes                  | No        |
| Ease of the process of recording and time taken to record         | Yes, likely one hour      | Yes, likely one hour | No, slow  |
| The need for special equipment                                    | Yes, audio and video      | Yes, audio           | No        |
| The need for special recording location                           | Yes, special locations    | No, not necessarily  | No        |
| The need for secure and confidential storage                      | Yes                       | Yes                  | Yes       |
| Refreshes witness memory  | Yes, strong               | Yes, weaker          | Yes, weak |

### 2.6.3 *Best practice*

As can be seen from the chart, the main advantage of using the written method of recording over the electronic methods consists merely in the absence of the need for special equipment and a special recording location. The video and audio methods of electronic recording share many of their advantages for the deponent, the investigator, the prosecution and defence lawyers, the court, and other relevant professionals. The absence of visuals does detract from the completeness of the record in significant ways, especially when the witness is a child. This may be seen to be offset by the reduced cost of the audio recording equipment and its greater portability. Without doubt the video method of recording a witness statement is the ideal, with the audio recording method in clear second place.

### **3. WITNESS STATEMENTS AND ISSUES PERTAINING TO CHILDREN**

#### **3.1 Cognitive development**

##### **3.1.1 Relevance and definition**

Children are immature human beings whose immaturity is acknowledged and accounted for in educational, social and legal systems variously. The legal age at which a child stops being a child and becomes an adult is one which is artificially imposed and which varies across international jurisdictions.

What cannot be artificially imposed is the controlling function of the developing brain alongside the inseparable physical growth and development. Called cognitive development, it relates to the development of cognition, defined as "the mental action or process of acquiring knowledge and understanding through thought, experience, and the senses".<sup>145</sup> It is because of this cognitive immaturity that children require a specialised understanding from adults of their capabilities at any given time, and of their particular yet changing vulnerabilities. Interviewing and taking a statement from a child complainant therefore is a specialised skill and a brief outline of the stages of cognitive development will demonstrate why this is so.

##### **3.1.2 The theory**

The work of Jean Piaget revealed that cognitive functional capacity develops over time, a time which could be stipulated and predicted in the normally developing child<sup>146</sup> and as Piaget's work continues to be the basis for modern scholarly enquiry in

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<sup>145</sup> J Pearsall (ed) *The New Oxford Dictionary of English* (1998) 355.

<sup>146</sup> J Piaget and B Inhelder *The Psychology of the Child* (1969) 93.



this area, his theory will be used for explanatory purposes here.<sup>147</sup> According to his theory, there are three broad stages in each of which cognitive development is qualitatively different, and which are ordered and constant.<sup>148</sup> If the end of childhood was to be defined in purely cognitive terms, Piaget's work would have that age as being 16 years when the cognitive functional development of the person is complete as compared to the cognitive functioning of an older person.<sup>149</sup>

The first stage is called sensori-motor and it spans the time from birth until approximately eighteen months or two years of age, ending when intelligible language<sup>150</sup> from the child begins to be expressed. Language is an essential element of the continuous progression of the brain towards the complete conceptual thinking capacity which Piaget calls intelligence.<sup>151</sup>

Stage two extends from the appearance of this language function until eleven or twelve years of age, and has within it two distinct sub-stages of development, from two or three years of age until six or seven years, and from seven or eight years of age until eleven or twelve years. The first sub-stage is called pre-operational and is characterised until age four to four and a half years by children's judgments deriving purely from their own experiences,<sup>152</sup> and by ego-centric thinking which is thinking distorted to the child's point of view and seen only in relation to the child itself.<sup>153</sup> At around four and a half years there emerges the more developed intuitive thinking, such thinking

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<sup>147</sup> K Nelson *Language in Cognitive Development* (1996) 3.

<sup>148</sup> RM Beard *Piaget's Developmental Psychology* (1969) 16.

<sup>149</sup> Piaget and Inhelder *The Psychology of the Child* 130-149.

<sup>150</sup> Nelson *Language in Cognitive Development* 120, where language is defined as information transfer from one mind to another which remains intact during transfer in form and content.

<sup>151</sup> Piaget and Inhelder *The Psychology of the Child* 5.

<sup>152</sup> Beard *Piaget's Developmental Psychology* 8-9.

<sup>153</sup> Beard *Piaget's Developmental Psychology* 9.

being dominated by immediate perceptions, where judgments are variable from person to person and within the same person on different occasions.<sup>154</sup> The child's thinking is still egocentric though there has been development sufficient for the child to be able now to give reasons for beliefs, but not sufficient for those reasons to be ordered and sequenced. They cannot make comparisons mentally and must build them up one at a time, as reflected in the 1950 experiment by Andre Rey.<sup>155</sup> For these reasons, the thinking of the child is for the most part inaccessible to discussion, but it is subject to unconscious imitation, and to suggestion.<sup>156</sup> Intuitive thinking is not reversible in the way that logical thinking is so that the ability to see simple relations (for example, I am his sister, and he is my brother) remains confusing at this stage.

By the time the second sub-stage starts around age seven, the child can make comparisons mentally, and isolated play or play in company is being replaced by genuine co-operation with others.<sup>157</sup> This sub-stage is called Concrete Operations because by its end, around age eleven, thinking relates directly to objects but not yet to verbally stated hypotheses.<sup>158</sup> Reversible transformations of reality in the form of inversions, where +A is reversed by -A, and reciprocity, where  $A < B$  is reciprocated by

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<sup>154</sup> Beard *Piaget's Developmental Psychology* 12.

<sup>155</sup> Beard *Piaget's Developmental Psychology* 11, where the experiment by Andre Rey is described: "He drew a square, with side [sic] a few centimeters, on a large square piece of paper and asked people of different ages to draw the smallest and largest squares possible on the same page. Adults and children over about 7-8 years immediately drew a very tiny square and one following the edge of the paper. But children in the intuitive stage at first drew squares little smaller or larger than the standard, proceeding from these by successive drawings ... to still smaller and larger ones, evidently unable to see the final result without first seeing and making a series of squares."

<sup>156</sup> Beard *Piaget's Developmental Psychology* 59.

<sup>157</sup> Beard *Piaget's Developmental Psychology* 76.

<sup>158</sup> Piaget and Inhelder *The Psychology of the Child* 100.

B>A,<sup>159</sup> replace the intuitive thinking of the pre-operative stage. Limitations in verbal reasoning persist, however, and fluency with language at this stage can mislead adults into thinking that the children have grasped concepts which they are yet to master.<sup>160</sup>

The final stage starts at eleven or twelve years and lasts until 15 or 16 years of age.<sup>161</sup> This marks the final process of decentring, which is the mastery of a general logical structure of thinking and the achievement of the generalising rather than a step by step method of reasoning. It is the achievement of hypothetico-deductive or formal thought.<sup>162</sup>

### **3.1.3 Implications for best practice**

Shorn of its detail the whole process is revealed as one in which the developing child undergoes a long and arduous process that begins with the subjective centring of itself in the physical world, and then moves through a progressive decentring via language-enabled socialization, including cognitive, affective and moral growth, to reach a complete decentring<sup>163</sup> - the mental freedom given by the capacity to generalise and to think according to rules of logic.<sup>164</sup> This extended, sequential, developmental process has major implications in terms of what children progressively notice of the world outside themselves, how what is noticed is able to be remembered and characterized by them, and how the children's language skills can sometimes mask their actual level of cognitive operation and thereby create unrealistic expectations of them.

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<sup>159</sup> Piaget and Inhelder *The Psychology of the Child* 97.

<sup>160</sup> Beard *Piaget's Developmental Psychology* 92.

<sup>161</sup> Piaget and Inhelder *The Psychology of the Child* 3-149.

<sup>162</sup> Piaget and Inhelder *The Psychology of the Child* 132.

<sup>163</sup> Piaget and Inhelder *The Psychology of the Child* 130.

<sup>164</sup> Piaget and Inhelder *The Psychology of the Child*.

Statement-takers need to be mindful and cognizant of this development process and to follow protocols developed to assist children at each different stage to tell the story of their abuse in as much detail as their developmental stage permits and without the content being distorted by inappropriate adult interaction.

## **3.2 Cognitive development and language**

### **3.2.1 The development of language**

The expression of intelligible language is heard around eighteen months of age with a form of "baby prattle"<sup>165</sup> that daily carers can make sense of because they have experience of the child in the context around the sounds. This is followed by the child's first words, which are more generally recognisable, and then the child begins to build a vocabulary, in the language most likely to be the mother-tongue of the cultural context in which the child lives. Only six months later, by the age of two years, an important shift in language use occurs when the child begins to talk about events which are removed from the immediate context.<sup>166</sup> This skill, clearly fundamental to the ability to tell narratives about past events, allows children as young as two to tell about prior experience.

However, receptive competence, the ability to understand, precedes productive competence, the ability to use the language, in most language learning,<sup>167</sup> and this means that utterances by themselves are neither a full indication of the young child's

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<sup>165</sup> J Piaget *The Language and Thought of the Child* (1926) 9.

<sup>166</sup> C Peterson and R Rideout "Memory for Medical Emergencies Experienced by 1- and 2-year-olds" (1998) 34 (5) *Developmental Psychology* 1059 at 1060, citing R Brown (1973) *A First Language: The early stages*.

<sup>167</sup> Shuy *Language Crimes* 194.

linguistic competence nor of the extent of their intended meaning.<sup>168</sup> When the language skills (and the memory retrieval skills) are rudimentary and emergent, the young child needs adult assistance through 'scaffolding' words (*So-*, *And-*) prefacing questions and prompts to help them to produce spontaneous narrative.<sup>169</sup> Adult-like communicative competence is not fully developed until 10 - 12 years of age.<sup>170</sup>

### 3.2.2 Language and thinking

Piaget studied language as it related inextricably to cognitive development<sup>171</sup> and social integration<sup>172</sup> and an understanding of the staged process of cognitive development allows a parallel understanding of the extent and nature of the representation provided through language at each stage. This is because language is structured by the logic of cognition, rather than the other way around,<sup>173</sup> and the stage of cognitive development will always be the base from which language expressed by a child is to be understood and interpreted. The following examples will serve to indicate the effect of the stage of development on the language function.

- Children under age seven or eight years are unable to formulate a reasoned answer to the question 'why?', and the words of logic 'because' and 'since' are used by them without their meaning being understood until after ages

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<sup>168</sup> R Fowler *Understanding Language: An Introduction to Linguistics* (1974) 195.

<sup>169</sup> A Johnson "So ...?: Pragmatic Implications of *So*-Prefaced Questions in Formal Police Interviews" in Cotterill *Language in the Legal Process* 97; and see K Saywitz "Developmental Underpinnings of Children's Testimony" in HL Westcott, GM Davies and RHC Bull (eds) *Children's Testimony* (2002) 5.

<sup>170</sup> Saywitz "Developmental Underpinnings of Children's Testimony" in Westcott et al *Children's Testimony* 4.

<sup>171</sup> Piaget and Inhelder *The Psychology of the Child* 51.

<sup>172</sup> Piaget and Inhelder *The Psychology of the Child* 58.

<sup>173</sup> Piaget and Inhelder *The Psychology of the Child* 90.

seven and eight as the progressive development allows the child some new participation in abstract thought.<sup>174</sup>

- The words 'if', 'so', 'before', 'while', 'when', 'after', 'until', are confusing and without meaning to the child under seven years;<sup>175</sup> it is the same lack of understanding and incapacity by the child under seven years which allows them to carelessly fill in gaps of comprehension when faced with confusing language by simply making up an answer.<sup>176</sup>
- Preschool aged children have unrefined language skills even with small and common words<sup>177</sup> and may use the same adjective for several different meanings.<sup>178</sup>
- Children under seven or eight years describe time in broad terms of day and night, light and dark, after and before school or lunch or supper, and many are not able to tell correctly what times their usual routines happen.<sup>179</sup>
- The ability to arrange a story or an explanation in a definite order is generally acquired between the ages of seven and eight, because the absence of arranged order is the norm until age seven and the exception by age eight.<sup>180</sup>

The progressive formation of cognitive and associated language skills in children has practical application for settings in which words assume an importance which affects the legal rights of parties. In making a statement to police or in giving evidence in court the meanings conveyed by words and sentences

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<sup>174</sup> Piaget *The Language and Thought of the Child* 71.

<sup>175</sup> E Davies and FW Seymour "Child Witnesses in the Criminal Courts: Furthering New Zealand's commitment to the United Nations Convention on the Rights of the Child" (April 1997) 4 (1) *Psychiatry, Psychology and Law* 13 at 19, citing research by BW Dzeich and CB Schudson (1989) *On trial: America's courts and their treatment of sexually abused children* Boston: Beacon Press.

<sup>176</sup> Piaget *The Language and Thought of the Child* 126.

<sup>177</sup> Nelson *Language in Cognitive Development* 134.

<sup>178</sup> Nelson *Language in Cognitive Development* 134.

<sup>179</sup> Nelson *Language in Cognitive Development* 286.

<sup>180</sup> Piaget *The Language and Thought of the Child* 109.

are the foundation of later judicial decision-making. Children are easy prey to the skilled word-smith or to the confusing and well-meaning untrained and unqualified interpreter. As will be shown later in this chapter, children acquiesce with adult mis-statements and reflect in other ways of compliance their state of being overborne by adult power.

The simple and easily understood ways that mothers tend to structure sentences to young children<sup>181</sup> is in stark contrast to the "compound questions"<sup>182</sup> sometimes addressed to them by investigators, and the "pragmatically complex"<sup>183</sup> questions of lawyers. The difficulties that children have in understanding different question styles was shown in a 1994 study by Brennan, quoted by Gibbons,<sup>184</sup> of children aged six to fifteen years who were asked to repeat questions from counsellors, teachers and lawyers. The questions from counsellors were almost always reproduced with their sense intact; those from the teachers were reproduced about eighty per cent intact, and those from the lawyers were reproduced only fifty seven per cent of the time with their sense intact.<sup>185</sup> The results of this study provide strong support for the use of an intermediary to convey the purport of the questions asked of children in court, as provided for in South African legislation.<sup>186</sup>

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<sup>181</sup> RJ Wales "Language and Learning" in A Davies (ed) *Language and Learning in Early Childhood* (1977) 26

<sup>182</sup> Lamb et al "The Effects of Forensic Interview Practices" in Westcott et al *Children's Testimony* 135.

<sup>183</sup> CL Lane "Language on Trial: Questions Strategies and European-Polynesian Mis-communication in New Zealand Courtrooms" (PhD thesis, University of Auckland, 1988) 1.

<sup>184</sup> J Gibbons *Forensic Linguistics; An Introduction to Language in the Justice System* (2003) 203.

<sup>185</sup> Gibbons *Forensic Linguistics* 203.

<sup>186</sup> See Note 16.

### **3.2.3 Implications for best practice**

It is necessary for police investigators to know the limits of language and cognitive competence of any child from whom they are taking a statement if they are to elicit content which the child intends, understands and can replicate. The onus rests with the interviewer to match the interview to the developmental level of each child, and to record and preserve the actual words used by each child in telling their story. The words chosen by the child are those which express what the child intends to say at that time, and the recording of the child's language makes the statement not only accurate but authentic.

### **3.3 Cognitive development and memory**

There are three types of memory, namely recognition, reconstruction and recollection,<sup>187</sup> which are ordered here in terms of their emergence and their complexity beginning with recognition memory in the first few months of life. The basis on which a memory is understood and stored depends upon a child's cognitive development level, and is modified therefore during cognitive growth.<sup>188</sup> This understanding of how memory works in children has been tested by social science research, and there is now a body of knowledge sufficient to be prescriptive about how to maximise the retrieval of accurate and reliable information from the memories of children, as well as to know the effects of extra-memorial influences, such as delay. What follows will be a summary of knowledge which would be essential for police to assist them in their interviewing of child complainants in sexual offence cases. It is necessary

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<sup>187</sup> J Piaget *On the Development of Memory and Identity* (1968) 11.

<sup>188</sup> Piaget *On the Development of Memory and Identity* 2.



information because it helps to form the basis of what can be expected of children at different ages and stages of development. It also provides guidance to investigators about the timing of interviews relative to the event, about the context, the setting, and the cues which can help children to remember reliably as much as they can.

### **3.3.1 The research findings**

#### **3.3.1.1 General issues**

From the age of three years onwards children form and retain accurate memories of events in their lives and can talk about them.<sup>189</sup> Younger children acquire less information from comparable exposure to an event than do older children, because older children are able to process information faster, generally know more, and have learned more efficient ways of storing memories and retrieving them.<sup>190</sup> School-aged children are already developing the skill, which is honed with increasing age and development, of actively searching their memories.<sup>191</sup> Pre-school age children in retrieving memories need adult support through the provision of prominent and conspicuous cues, whereas school age children can make use of a wider range of cues.<sup>192</sup>

#### **3.3.1.2 Cues as memory retrieval aids**

The non-verbal cues which can help children to remember more information without negatively affecting the reliability of the information have been the subject of much research, reviewed by

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<sup>189</sup> R Fivush "Children's recollections of Traumatic and nontraumatic events" (1998) 10 *Development and Psychopathology* 699 at 712.

<sup>190</sup> L Baker-Ward and PA Ornstein "Cognitive Underpinnings of Children's Testimony in Westcott et al *Children's Testimony* 26.

<sup>191</sup> Baker-Ward and Ornstein "Cognitive Underpinnings of Children's Testimony in Westcott et al *Children's Testimony* 29.

<sup>192</sup> H Nelson "The Ontology of Memory for Real Events" in Neisser and Winograd *Remembering Reconsidered* 253.

Pipe and her colleagues.<sup>193</sup> This information provides great assistance to police investigators because it acts as expert advice about how to equip the rooms used for interviewing children and about what memory aids will have positive outcomes.

#### Prop items

Prop items from an event, that is actual items from an event, have been shown to facilitate the recall and production of greater quantities of information from children, providing that the props are simply present in the room and not interacted with.<sup>194</sup> When children are specifically asked about the prop items or asked to use them to demonstrate what happened, accuracy decreases significantly,<sup>195</sup> even years later when children were asked to re-enact what happened.<sup>196</sup>

#### Distractor items

Distractor items not from the relevant event but present in the room during the information gathering had the same effect as the prop items; that is, they increased inaccuracy when they were handled or interacted with<sup>197</sup> because the child's attention was deflected from memory into play.<sup>198</sup>

#### Dolls and toys

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<sup>193</sup> ME Pipe, K Salmon and G Priestly "Enhancing Children's Accounts: How useful are non-verbal techniques?" in Westcott et al *Children's Testimony* 161.

<sup>194</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 162.

<sup>195</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 163.

<sup>196</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 163.

<sup>197</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 163.

<sup>198</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 163.

Dolls and toys in the room during interviews with children, under five years especially but not exclusively, have been shown to cause unacceptable levels of error in information reported by the children.<sup>199</sup> There has been found a three-way relationship between the age of the child, the type of doll or toy, and the way in which it has been used by the interviewer, and these props are not recommended for use during criminal and abuse investigations.<sup>200</sup>

#### Human figure diagrams

Human figure diagrams act as recognition prompts and there is evidence that the use of the diagrams promotes in the interviewer a directive interviewing style which is neither appropriate nor recommended.<sup>201</sup> The only studies that have provided accuracy assessments of information elicited through the use of the diagrams<sup>202</sup> show that they elevate false reports of touching by making it too easy for children to point to body parts which were not touched.<sup>203</sup>

#### Drawing

An interviewer instruction to a child to 'draw and tell' increases the amount of information reported by children aged between five and ten years with no compromise of accuracy, but is less effective for younger children between three and five years.<sup>204</sup> However, drawing during the interview also extends the

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<sup>199</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 167.

<sup>200</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 165.

<sup>201</sup> DA Poole, M Bruck and M-E Pipe "Forensic Interviewing Aids: Do Props Help Children Answer Questions About Touching?" (2011) 20 (1) *Current Directions in Psychological Science* 11 at 13.

<sup>202</sup> Poole et al 2011 *Current Directions in Psychological Science* 12.

<sup>203</sup> Poole et al 2011 *Current Directions in Psychological Science* 13.

<sup>204</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 167.

length of the interview relative to the standard one, so that the effectiveness of drawing may in fact be derived from a longer interview rather than from the drawing alone or at all.<sup>205</sup>

### Photos

Photos are understood by children as young as two and a half years as being symbolic, and this understanding develops earlier than that for models and toys.<sup>206</sup> Three and four year olds shown photos of real props from an event provided more correct information as did three to seven year olds interviewed after a ten day delay, and five and six year olds after a one year delay. The photos elicited information which questioning alone failed to retrieve, and the error rate was low.<sup>207</sup> In another study photos increased accuracy by reducing incorrect details, and they increased the number of action details reported from the event.<sup>208</sup>

#### **3.3.1.3 Delay**

Investigators need as much information as they can retrieve from the memories of child complainants without in the process compromising quality. Delay in verbalising a memory allows it to fade through both interference and forgetting, and the younger the child the faster the memory will be lost. Younger children tend to have verbatim memory traces which are more susceptible to memory loss whereas older school-age children are developmentally equipped to rely on gist memory which is longer

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<sup>205</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 170.

<sup>206</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 167.

<sup>207</sup> Pipe et al "Enhancing Children's Accounts" in Westcott et al *Children's Testimony* 167.

<sup>208</sup> E Aschermann, U Dannenberg and A-P Schulz "Photographs as Retrieval Cues for Children" (1998) 12 *Applied Cognitive Psychology* 55 at 59, where action detail included any detail expressed by a verb, including conversations.

lasting.<sup>209</sup> In addition to this, children do forget significantly more over time than adults.<sup>210</sup> A 1992 study comparing forgetting and accuracy in three different age groups of children and adults found significant differences after a five month delay but none after a one day delay.<sup>211</sup>

Within memories, including traumatic ones, some details, the peripheral ones, have been found to fade faster than others, and these therefore need to be captured without delay. The central details, on the other hand, remain strongly detailed comparatively and regardless of age.<sup>212</sup> One type of peripheral detail called temporal detail (where in a sequence particular items occurred), have been found to decline within a week, whereas the content details of an event may still be remembered for many months, even by children as young as four.<sup>213</sup> Studies by Peterson alone<sup>214</sup> and with colleague Rideout<sup>215</sup> have confirmed the enhanced retention of central details when compared to the peripheral details in children aged two to twelve years following delays of seven days, six months, one year and two years.<sup>216</sup>

Many of what have been regarded as peripheral details in the research context may be of more central importance in the

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<sup>209</sup> Baker-Ward and Ornstein "Cognitive Underpinnings of Children's Testimony in Westcott et al *Children's Testimony* 30.

<sup>210</sup> R Flin, J Boon, A Knox and R Bull "The effects of a five-month delay on children's and adults' eyewitness memory" (1992) 83 *British Journal of Psychology* 323.

<sup>211</sup> Flin et al 1992 83 *British Journal of Psychology* 323 at 333.

<sup>212</sup> ML Howe, ML Courage and C Peterson "How can I remember when I wasn't there: Long-term Retention of Traumatic Experiences and Emergence of the Cognitive Self" in Pezdek and Banks *The Recovered Memory/False Memory Debate* 135.

<sup>213</sup> MB Powell and DM Thomson "Children's Memories for Repeated Events" in Westcott et al *Children's Testimony* 73.

<sup>214</sup> C Peterson "Children's Memory for Medical Emergencies: 2 Years Later" (1999) 35 (6) *Developmental Psychology* 1493.

<sup>215</sup> Peterson and Rideout 1998 *Developmental Psychology* 1059.

<sup>216</sup> Peterson 1999 *Developmental Psychology* 1502.

context of criminal investigation and statement-taking. To capture that detail without delay is the ideal.

#### **3.3.1.4 Memory of repeated events**

Many cases of child sexual abuse involve repeated instances of abuse over time. The same abusive event by the same perpetrator will have been repeated even though there will have been contextual differences. This general pattern can have a distorting effect upon the child's memory for a particular episode<sup>217</sup> and investigators must be aware of this effect and take steps to counterbalance it in their interviewing in such cases. This effect is particularly marked in the pre-school age child who will tell the repeated elements that have formed a type of script<sup>218</sup> although it has been found that children as young as four years can indeed separate out the memories for different yet similar events<sup>219</sup> when they are assisted through cues and scaffolding to do so.<sup>220</sup>

Those episodes which vary in context and content are likely to be the best remembered, as are the first and the last episodes.<sup>221</sup> Investigators need to be mindful of how best to help a child complainant of repeated abuse to separate out particular episodes when telling their story in an interview, and to do so without delay. In addition to the usual reasons for minimising delay with child complainants, there is an additional reason for urgency in these cases of repeated abuse because the memory for

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<sup>217</sup> JA Hudson "Constructive Processing in Children's Event Memory" (1990) 26 (2) *Developmental Psychology* 180 at 186.

<sup>218</sup> Nelson "The Ontology of Memory for Real Events" in Neisser and Winograd *Remembering Reconsidered* 252.

<sup>219</sup> Powell and Thomson "Children's Memories for Repeated Events" in Westcott et al *Children's Testimony* 75.

<sup>220</sup> Powell and Thomson "Children's Memories for Repeated Events" in Westcott et al *Children's Testimony* 72.

<sup>221</sup> Powell and Thomson "Children's Memories for Repeated Events" in Westcott et al *Children's Testimony* 74.

the particular episode quite quickly merges with the general event memory.<sup>222</sup>

### **3.3.2 *Best practice***

The information which has been presented in this section can guide investigators in how to use props, cues, drawing, and photographs to help children to recall as much as possible of the events stored in their memory. The information will inform *best practice* for both investigators and for their employers and trainers. Taking a full and reliable statement from a child complainant is a highly specialised skill which demands both knowledge and training as its base. *Best practice* will be reflected in the absence of delays before interview.

## **3.4 The investigative interview**

In the circumstances of the present research, almost all of the children who made the statements that were being analysed were living at home at the time of the alleged abuse, or staying somewhere else temporarily with other family, and going about their usual lives. The circumstances around the disclosures about the sexual abuse were not those in which abuse had been suspected and there were no instances of a child being 'diagnosed' by child protection officers as being a sexual abuse victim, a practice both uncertain and fraught with misdiagnoses.<sup>223</sup> The reports to the police came from relatives and community members after they had either been approached by

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<sup>222</sup> Powell and Thomson "Children's Memories for Repeated Events" in Westcott et al *Children's Testimony* 72.

<sup>223</sup> R Shaw "The Cleveland Report: by Judge Elizabeth Butler-Sloss" 2011 *The Internet Child Care Magazine* <http://www.childrenwebmag.com/articles/key-child-care-texts/> (accessed 9 January 2012).

the child or they had approached the child with evidence from another source. By the time the notification about the abuse was made to the police, the children had made positive utterances of being sexually abused by an offender, who was able to be named in almost all cases.

In the present research cases the usual procedure has been for police officers to speak firstly to the child victims who can communicate and to satisfy themselves that the reports of sexual abuse are genuine. They have then arranged for a medical examination of the child. During this time the police officers will have been taking notes, and gathering information about the alleged offender, perhaps even arresting a person. After the medical examination, which has almost always provided some corroborative evidence of sexual activity or genital/anal irregularity, the child and a responsible adult have attended at the office of the Family Violence, Child Protection and Sexual Offences Unit for the formal statement-making by the child. It is this interview which is the investigative interview and which forms the basis for the child's statement.

From the child's perspective, this interview is another humiliation in a series of humiliations beginning with the abuse, then the telling more than once about what happened, then having an intrusive medical examination, and then having to talk with a stranger and tell the story again. As a victim of abuse the child is already disempowered; it is common knowledge and common sense that disempowerment is inherent in being abused and being victimised. From the investigating police officer's perspective, the child-victim-single-witness holds the key to the course which future legal proceedings may take, with the investigative interview and the resulting statement forming the



basis of any prosecution, and the quality of the information obtained through interview being determinative in decisions about how the case will proceed.<sup>224</sup>

The investigative interview, therefore, has the four primary goals of not traumatising the child further, of obtaining maximum information from the child, of doing so reliably without contaminating the information, and while meeting investigation practice standards.<sup>225</sup>

### **3.4.1 Disclosure**

Disclosure is the process referred to when a child victim of trauma gives information about what has taken place.<sup>226</sup> It implies that knowledge exists which has been hidden, and then revealed or uncovered in an act of disclosure. The term reflects belief that children have, within their long-term memory, information which they choose to keep to themselves unless prompted by a particular circumstance to reveal it. The term also reflects the very real impact that abusive behaviour has upon the child's behaviour, demanding silence and concealment, often accompanied by threats or inducements, and often not counterbalanced by a safe environment and a non-punishing adult. There is, however, some imprecision in the use of the term *disclosure* which requires that it be defined within the context in which it is to be used.<sup>227</sup>

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<sup>224</sup> JC Yuille, R Hunter, R Joffe and J Zaparniuk "Interviewing Children in Sexual Abuse Cases" in GS Goodman and BL Bottoms (eds) *Child Victims, Child Witnesses: understanding and improving testimony* (1993) 98.

<sup>225</sup> Yuille et al "Interviewing Children in Sexual Abuse Cases" in Goodman and Bottoms *Child Victims, Child Witnesses* 100.

<sup>226</sup> A Carty and J Mair "Some Post-Modern Perspectives on Law and Society" (1990) 17(4) *Journal of Law and Society* 395 at 407.

<sup>227</sup> D Jones "Editorial : disclosure of child sexual abuse" (2000) 24 (2) *Child Abuse & Neglect* 269.

Looked at in a context broader than child abuse, the term disclosure is used in relation to the revealing of a secret by a person of any age or circumstance,<sup>228</sup> where secrets involve information purposefully concealed,<sup>229</sup> and where purposive secret-keeping behaviour is necessarily aimed to achieve a particular end.<sup>230</sup> Decisions to reveal secrets are said to be different from other self-disclosures because they involve more than just evaluating the reasons to disclose;<sup>231</sup> other factors, which must also be weighed, concern how significant others will respond to the content of the secret and to the act of deception in having kept the secret. Incremental disclosures can be seen in this light, of uncertainty about whether or not to tell, of telling a small amount and looking at how the information is received before telling more.<sup>232</sup> On this basis then the term disclosure could be replaced with the phrase 'telling a secret' or in the case of intra-familial sexual abuse, 'telling a family secret', and without exception all people could relate immediately and unreservedly to the difficult and vexing considerations involved in such a telling.

In a national survey of women in America in 1993, approximately one woman in twelve reported retrospectively one rape, at least, prior to their eighteenth birthday, and twenty-eight per cent of these women had told no-one prior to the survey; forty-seven per

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<sup>228</sup> TD Afifi and WA Afifi *Uncertainty, Information Management and Disclosure Decisions. Theories and Applications* (2009).

<sup>229</sup> Afifi and Afifi *Uncertainty, Information Management and Disclosure Decisions* 280.

<sup>230</sup> Afifi and Afifi *Uncertainty, Information Management and Disclosure Decisions* 281.

<sup>231</sup> Afifi and Afifi *Uncertainty, Information Management and Disclosure Decisions* 284.

<sup>232</sup> Afifi and Afifi *Uncertainty, Information Management and Disclosure Decisions* 290; T Sorensen and B Snow "How Children Tell: The Process of Disclosure in Child Sexual Abuse" (1991) LXX(1) *Child Welfare* 3 at 5; see also RC Summit "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177.

cent didn't tell anyone for over five years after the rape.<sup>233</sup> The older age of the child at the first rape was significantly predictive of telling the secret within a month, and if raped by a stranger the victim was almost four times more likely to tell about it within a month.<sup>234</sup> These results attest to the difficulty of purposefully telling the secret. While delayed revelations of sexually abusive events cause in the listeners some wonderment about why the child has maintained the secret until now, and what now has prompted the breaking of the silence, the answers can often be found in the child's immediate family and social context.<sup>235</sup>

In the absence of pending family litigation, in which competing adult demands may motivate manipulation of the child to the self-interested ends of one party, the reliability of the child's disclosure may be assumed until shown otherwise. This is because it makes intellectual and psychological sense that the revealing of a secret about sexual abuse within the family will impact upon the functioning of the whole family, and will not always result in support for the victim.<sup>236</sup> In fact, the forty five per cent of the sample children who revealed the secret accidentally, as opposed to purposefully, showed less clinical

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<sup>233</sup> DW Smith, EJ Letourneau, BE Saunders, DJ Kilpatrick, HS Resnick and CL Best "Delay in Disclosure of Childhood Rape: Results from a National Survey" (2000) 24 (2) *Child Abuse & Neglect* 273 at 277-278.

<sup>234</sup> Smith et al 2000 *Child Abuse & Neglect* 285.

<sup>235</sup> In research statement number 92 the child purposefully disclosed the serial abuse by the father when the neighbour came to assist the family during a violent dispute; in research statement number 63 the child purposefully disclosed the abuse by the father after she left her father's care and went to live with the aunt.

<sup>236</sup> M Sauzier "Disclosure of child sexual abuse. For better or for worse" 1989 12(2) *Psychiatric Clinics of North America* 455: the data presented in this longitudinal study of clinical intervention with children who had revealed sexual abuse showed that the parents of the children were equally divided about whether the disclosure was helpful or harmful to the family and the child, and nineteen percent of the adolescents in the data regretted their decision to disclose the secret.

distress in the Sauzier longitudinal study,<sup>237</sup> a result which underscores the emotional load which comes with purposeful telling about the secret behaviour of family members. It is not only the victims of the abuse who are ambivalent about revealing secret family behaviour; Paine and Hansen report the results of many studies showing that professionals mandated to report cases of both suspected and known cases of child abuse fail in that duty to a significant extent,<sup>238</sup> and an archival study of confirmed cases of child sexual abuse records showed that the child's confidante failed in a quarter of the cases to report the abuse on the child's behalf.<sup>239</sup>

A hallmark of legal reliability in criminal matters usually hinges on the spontaneity and immediacy of a victim's official complaint, yet child sexual abuse disclosure is allowed some legal latitude. A court is prohibited from drawing a negative inference from delay-in-reporting alone,<sup>240</sup> precisely because of the complexities involved in both the motivation to tell on the one hand and in the ability to tell on the other.<sup>241</sup> In addition to the factors already mentioned, studies have revealed the fact that five to seven year old children are reluctant to talk about their private parts and intrusive experiences<sup>242</sup> and five and six year olds are hesitant to tell about the misdeeds of adults<sup>243</sup> and frequently conceal adult misdeeds even when they are not asked to do so.<sup>244</sup>

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<sup>237</sup> Sauzier 1989 *Psychiatric Clinics of North America* 455.

<sup>238</sup> ML Paine and DJ Hansen "Factors Influencing Children to Self-Disclose Sexual Abuse" (2000) 22 *Child Psychology Review* 271 at 272.

<sup>239</sup> Paine and Hansen 2000 *Child Psychology Review* 273.

<sup>240</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, section 59.

<sup>241</sup> A Mortimer and E Shepherd "The Frailty of Children's Testimony" in Heaton-Armstrong et al *Analysing Witness Testimony* 46.

<sup>242</sup> Paine and Hansen 2000 *Child Psychology Review* 288.

<sup>243</sup> Paine and Hansen 2000 *Child Psychology Review* 288.

<sup>244</sup> Paine and Hansen 2000 *Child Psychology Review* 288.

Typically, according to the 1991 study by Sorenson and Snow, only 26 per cent of children, most likely adolescents, purposefully tell the secret, and 74 per cent, most likely pre-school aged children, do so accidentally.<sup>245</sup> School aged children were equally divided on each measure, which supports findings by Wilson and Pipe that nine and ten year olds make up their own minds, and that five and six year olds do not purposively tell a secret.<sup>246</sup> Even when the request to tell about adult male transgression was made authoritatively, forty three per cent of the three year olds and seventy one per cent of the five year olds maintained the secret either by silence or by lying.<sup>247</sup>

### **3.4.2 Power asymmetry and suggestibility**

The word *suggestibility* in the context of adult interaction with children concerns the degree to which the memory processes of children and their reports of those processes can be affected by both social and psychological influences.<sup>248</sup> It covers therefore the degree to which children of different ages can be persuaded to conform to demands which distort what they know to be the facts of the matter, as in the silence or the telling of lies in order to keep secrets. In a 2002 summary of the relevant research, Ceci and his colleagues detailed the five conditions, supported by research results, under which young children are

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<sup>245</sup> Sorenson and Snow 1991 *Child Welfare* 7.

<sup>246</sup> JC Wilson and M-E Pipe "Children's Disclosure of Secrets: Implications for Interviewing" in Davies et al *Psychology, Law, and Criminal Justice* 186.

<sup>247</sup> Paine and Hansen 2000 *Child Psychology Review* 289.

<sup>248</sup> SJ Ceci and M Bruck "Suggestibility of the Child Witness: A Historical Review and Synthesis" (1993) 113(3) *Psychological Bulletin* 403 at 404.

able to be suggestively influenced.<sup>249</sup> Those which are relevant to police practice during investigative interviews are:

- (1) when the children experience repeated erroneous suggestions from authority figures who hold pre-existing stereotypes;
- (2) when they are asked to use anatomically detailed dolls to re-enact an alleged event; and
- (3) when they are questioned by a biased interviewer who pursues an hypothesis single-mindedly.<sup>250</sup>

Vrij's 2002 review of the literature on children and deception was able to add some further conditions under which children may be influenced suggestively to make statements which are wrong, as distinct from intentional lies. These conditions which may be present during investigative interview are:

- (1) being asked the same question twice in the one interview, which sometimes results in the child giving a different answer, believing their first answer was not accepted;<sup>251</sup> and
- (2) being asked a question which includes the definite article 'the' rather than an indefinite article 'a', because it can persuade the child's memory to be more certain than is in fact the case.<sup>252</sup>

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<sup>249</sup> SJ Ceci, AM Crossman, MH Scullin, L Gilstrap and M Huffman "Children's Suggestibility Research: Implications for the Courtroom and the Forensic Interview" in Westcott et al *Children's Testimony* 118.

<sup>250</sup> Ceci et al "Children's Suggestibility Research" in Westcott et al *Children's Testimony* 118.

<sup>251</sup> Saywitz "Developmental Underpinnings of Children's Testimony" in Westcott et al *Children's Testimony* 11.

<sup>252</sup> A Vrij "Deception in Children: A literature Review and Implications for Children's Testimony" in Westcott et al *Children's Testimony* 176.

These conditions, with the exception of the use of the doll, concern the power relationship in the one-to-one interface between a child and an adult. This relationship is greatly asymmetrical in favour of the power of the adult, even more so in the sexual abuse interview by a police officer because of the police officer's authority additional to that of being an adult, and because of the vulnerabilities of the child complainant, addressed under disclosure. The adult interviewer must consciously and deliberately form a compatible rapport relation with a child<sup>253</sup> if the child is to be sufficiently at ease to disclose accurately the private details of abuse. Labov gives the example of a previously monosyllabic eight year old child who was transformed into a loquacious eight year old by the neutralising of the adult interviewer's power and the increasing of the child's personal power and confidence.<sup>254</sup>

The sexual abuse has also happened in the context of asymmetrical power and in the Cleveland Report of the Inquiry into the removal of 197 children from families in England on suspicion of child abuse in 1987, Judge Butler-Sloss made explicit the link between abuse and power in relation to both the offenders and the investigators.<sup>255</sup> Investigators need also to understand it in this way if they are not to abuse the child further by contaminating the criminal investigation through how they use their own power. In some of the Cleveland reported interviews of the children, the police effectively interrogated, rather than interviewed, and bullied the children.<sup>256</sup> Interrogators achieve their end by coercion and intimidation<sup>257</sup>

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<sup>253</sup> W Labov *Language in the Inner City: Studies in the Black English Vernacular* (1972) 212.

<sup>254</sup> Labov *Language in the Inner City* 212.

<sup>255</sup> M Freeman *The Moral Status of Children* (1997) 274.

<sup>256</sup> Freeman *The Moral Status of Children* 289.

<sup>257</sup> RW Shuy *The Language of Confession, Interrogation and Deception* (1998) 13.

whereas interviewers make less use of their power and do so to encourage, by showing that they are listening and by providing time and space for interviewees to proceed at their own pace.<sup>258</sup>

Research has shown that children are eager to please and to conform to expectations in the forensic interview,<sup>259</sup> and those expectations therefore must be made explicit to counterbalance any tendency in the child to conform mistakenly to content which is wrong.<sup>260</sup> Giving permission and encouragement to the children to correct inaccuracies by the interviewers is an essential part of levelling the power asymmetry in the information exchange. It is also essential for accuracy. In 1999 Roberts and Lamb studied the transcripts of 161 interviews by police officers and social workers of three to fourteen year olds; 68 of them involved 'distortions' which either altered the apparent meaning or contradicted what a child had said.<sup>261</sup> Only one third of the distortions were corrected by the children, and then only those ones which were embedded in simple rather than complex grammar.<sup>262</sup> Because of the prevalence of the distortions the authors of the study suggested the need to provide children with the opportunity, before the interview begins, to practice correcting the interviewer, rather than just telling the children that it was permissible to do so.<sup>263</sup>

The effects of such practice training were tested in an experiment by Saywitz and Moan-Hardie, which provided training

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<sup>258</sup> Shuy *The Language of Confession, Interrogation and Deception* 13.

<sup>259</sup> K Sternberg, M Lamb, I Hershkowitz, L Yudilevitch, Y Orbach, PW Esplin and M Hovav "Effects of Introductory Style on Children's Abilities to Describe Experiences of Sexual Abuse" (1997) 21 (11) *Child Abuse & Neglect* 1133 at 1134.

<sup>260</sup> Sternberg et al 1997 *Child Abuse & Neglect* 1134.

<sup>261</sup> KP Roberts and ME Lamb "Children's responses when interviewers distort details during investigative interviews" (1999) 4 *Legal and Criminological Psychology* 23 at 25.

<sup>262</sup> Roberts and Lamb 1999 *Legal and Criminological Psychology* 23 and 28.

<sup>263</sup> Roberts and Lamb 1999 *Legal and Criminological Psychology* 23.



to one group of children and not to another to resist pressure for acquiescence; it resulted in the training group producing significantly fewer errors (26%) through acquiescence with no generation of additional errors on other question types.<sup>264</sup> The authors concluded that the giving of permission alone to children, without practice and training, is not effective<sup>265</sup> in the context of the power differential between a child and an adult.<sup>266</sup> Further support for the effectiveness of training children in what is expected of them in the forensic interview comes from the 1997 study by Sternberg and colleagues which evaluated two rapport-building techniques with children aged between 4 and 12 years.<sup>267</sup> The interviews were done in Israel by Youth Investigators, who are mandated by statute as specialist interviewers of child abuse victims.<sup>268</sup> The results showed that the children who had the opportunity to practice what was expected of them in their answer format provided two and a half times as many details and words<sup>269</sup> in both the practice and the formal investigative interview.<sup>270</sup>

### **3.4.3 Forensic interview best practice protocols**

It is research, such as the above, which has informed the development of the child forensic interview protocols which exist now throughout the world. Wakefield has conveniently summarised the recommendations for the contents of the

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<sup>264</sup> KJ Saywitz and S Moan-Hardie "Reducing the Potential for Distortion of Childhood Memories" in Pezdek and Banks *The Recovered Memory/False Memory Debate* 258.

<sup>265</sup> Saywitz and Moan-Hardie "Reducing the Potential for Distortion of Childhood Memories" in Pezdek and Banks *The Recovered Memory/False Memory Debate* 258.

<sup>266</sup> Saywitz and Moan-Hardie "Reducing the Potential for Distortion of Childhood Memories" in Pezdek and Banks *The Recovered Memory/False Memory Debate* 247; see also Saywitz "Developmental Underpinnings of Children's Testimony" in Westcott et al *Children's Testimony* 9-10.

<sup>267</sup> Sternberg et al 1997 *Child Abuse & Neglect* 1136.

<sup>268</sup> Sternberg et al 1997 *Child Abuse & Neglect* 1136.

<sup>269</sup> Sternberg et al 1997 *Child Abuse & Neglect* 1141.

<sup>270</sup> Sternberg et al 1997 *Child Abuse & Neglect* 1141.

protocols, across eleven variables, from a total of twenty four articles and books.<sup>271</sup> Eight articles were selected, from the total of twenty four, and tabulated separately by Wakefield because these have been chosen for use by professional bodies and for national practice standards in the United Kingdom, United States, Norway, Australia and Israel.<sup>272</sup> The remaining fourteen articles are by professionals writing about conducting competent forensic interviews with children.<sup>273</sup>

The results of this comparison show that across two variables there is complete agreement by the eight selected articles and the remaining sixteen. The first is variable seven, which enjoins the interviewer to use open questions as much as possible and to encourage free narrative. The second is variable nine, which enjoins the interviewer to avoid pressure, coercion, and suggestion through pitting the child against another party, asking leading questions and asking repeated questions.<sup>274</sup>

#### **3.4.4 Sustaining best practice**

In spite of this professional knowledge, its formulation as best practice protocols and the training of the interviewing professionals in the use of the protocols, the protocols are not being followed. The breaches have been found by analysis of

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<sup>271</sup> H Wakefield "Guidelines on Investigators Interviewing of Children: What is the Consensus in the Scientific Community?" (2006) 24 (3) *American Journal of Forensic Psychology* 57.

<sup>272</sup> Wakefield 2006 *American Journal of Forensic Psychology* 58: The eight selected articles are, Memorandum of Good Practice from the United Kingdom, NICHD [National Institute of Child Health and Human Development, Bethesda USA] Investigative Interview Protocol, AACAP Practice Parameters, Yuille's Stepwise Interview, National Institute of Justice Recommendations, APSAC Practice Guidelines, National Children Advocacy Center's forensic evaluation model, and Center for Child Protection (San Diego) forensic interview protocol.

<sup>273</sup> Wakefield 2006 *American Journal of Forensic Psychology* 58.

<sup>274</sup> Wakefield 2006 *American Journal of Forensic Psychology* 58.

interviews in the United States of America, the United Kingdom, Sweden and Israel with up to half the information in the investigative interviews studied being elicited by the contra-indicated, reliability-reducing, focused question type.<sup>275</sup> There is other evidence of training failure, from the 1992 Clyde Report of the Inquiry into the Removal of Children from their homes in Orkney Scotland in 1991 which described the skills of the forensic interviewers as incomplete and insufficient;<sup>276</sup> from the United Kingdom Home Office Research conducted between 1992 and 1994 which found that one third of the interviews were of no evidentiary worth, and in the remainder an undisclosed number breached the Memorandum of Good Practice by directed interviewing and the asking of leading questions;<sup>277</sup> three years later, Davies and Wilson in their 1997 research "Implementation of the Memorandum: An Overview" found similarly.<sup>278</sup>

The breaches of *best practice* protocols attest to the failure of training to sustain long term *best practice* skills in the forensic interviewers, who are themselves specially trained either through professional accreditation or through on-the-job specialisation. The widespread occurrence of the problem, in English-speaking and non-English speaking language and cultural settings, raises questions about the training methods that have

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<sup>275</sup> Lamb et al "The Effects of Forensic Interview Practices on the Quality of Information" in Westcott et al *Children's Testimony* 133, where the authors cite seven independent studies from 1996 to 2000 which have shown the reversion to poor interviewing practice.

<sup>276</sup> R Bull "Good Practice with Video Recorded Interviews with Child Witnesses for Use in Criminal Proceedings" in Davies et al *Psychology, Law and Criminal Justice* 100.

<sup>277</sup> GM Davies, C Wilson, R Mitchell and J Milsom "Videotaping Children's Evidence: An Evaluation" (1995) *Home Office Research and Statistics Department, Research Findings No 20* <http://webarchive.nationalarchives.gov.uk/> (accessed 3 May 2011).

<sup>278</sup> G Davies and C Wilson in H Westcott and J Jones (eds) *Perspectives on the Memorandum: Policy, Practice, and Research in Investigative Interviewing* (1997) cited in Lamb et al "The Effects of Forensic Interview Practices" in Westcott et al *Children's Testimony* 134.

so far been used to short effect and what can be used to replace them.<sup>279</sup> Lamb and his colleagues used four different strategies to train experienced forensic interviewers, and then compared their post-training and pre-training interviews from six months earlier.<sup>280</sup> They found that effective training was resource intensive, and consisted of a highly detailed interview protocol, monthly day long return training seminars, additional to some extra individual training as indicated by the on-going review of recent interviews.<sup>281</sup>

In the absence of such a training and follow-up regime, any programme administrator can be fairly certain that *best practice* interview protocols are being breached by the frontline interviewers, and that the information being gathered from child sexual abuse victims as a consequence of the breaches is, at best, sparse and, at worst, contaminated and compromised.

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<sup>279</sup> Lamb et al "The Effects of Forensic Interview Practices" in Westcott et al *Children's Testimony* 140: the authors list six studies between 1992 and 1999 which have documented the ineffectiveness of training, to that time, and which recommend variously intense and prolonged training accompanied by field supervision.

<sup>280</sup> ME Lamb, K Sternberg, Y Orbach, I Hershkowitz, D Horowitz and P Wesplin "The Effects of Intensive Training and Ongoing Supervision on the Quality of Investigative Interviews with Alleged Sex Abuse Victims" (2002) 6(3) *Applied Developmental Science* 114.

<sup>281</sup> Lamb et al 2002 *Applied Developmental Science* 123.

## **4. BEST PRACTICE IN THE FORM AND CONTENT OF STATEMENTS FROM CHILD COMPLAINANTS IN SEXUAL OFFENCE CASES**

### **4.1 Introduction**

This chapter brings together a summary, extracted from the preceding chapters, of the hallmarks of *best practice* in the form and the content of statements from child complainants in sexual offence cases. At the end of the summary it will be shown that the South African Police Service National Instructions concerning police practice in taking statements from such child complainants accord in great measure with these hallmarks of *best practice*. There are three notable differences, one in the strength of the wording rather than the purport of the instruction. Another is a more fundamental difference in conceptualising when a qualified interpreter is needed in the out-of-court procedure rather than in the court room itself. The final notable difference, which is also a fundamental one, lies in the method of recording the statement. These differences will be addressed individually at the end of this chapter.

### **4.2 Best practice regarding the setting**

The interview should take place in a room which is private, quiet, free of interruption, and which promotes a feeling of safety in the child. It should be a place which is away from the child's home and away from the crime scene. Apart from any equipment needed for recording the interview the room should be free of clutter. Physical cues which aid the retrieval of information can be present. These include photographs of the

crime scene and prop items from the scene, and paper and pencils for the child to draw with should the interviewer want to ask the child to draw and tell during the interview.

#### **4.3 Best practice regarding the parties present in the room**

The interviewer and the child should be alone in the room with three possible exceptions:

(1) If the interviewer is a male who is interviewing a female, a female should also be present regardless of the child's stated wishes which may or may not be reflecting acquiescence to the authority of the questioner. Invariably the offender has been male and the female child needs the comfort, safety and security of another female being present in the closed room. Ideally, the investigator would be female if the victim is female.

(2) If the interviewer does not share the same home language as the child, a qualified interpreter should be present to interpret for both parties - (see 4.5.1 below).

(3) If a particular child is too young or too apprehensive to be separated from the mother or care-giver, that carer may also be present, with instructions to be seated behind the child - the child may be seated on the carer's lap - and to remain silent.

#### **4.4 Best practice regarding timing issues**

(1) The interview should be held as soon as possible and within 36 hours of the police receiving and confirming the report of

the sexual abuse. As a general rule of thumb, the younger the child the sooner the interview should be held.

(2) The interview should be held at a time of day which fits the usual eating, sleeping, and schooling routines of the child.

(3) The interview can be expected to last between thirty minutes and one hour other than in circumstances which are exceptional.

(4) The process preliminary to the interview of building rapport with the child and training the child in what is expected and wanted in the forensic interview can be time intensive and should not be rushed.

#### **4.5 Best practice in eliciting the information**

The interviewer should follow an international protocol for the interviewing of a child. There are a number of such protocols in use around the world. They have many features in common, two of which are shared by them all: the first is the prescription to ask open-ended questions of the child and to encourage free narrative from the child; the second is the prohibition against the interviewer applying pressure, coercion and suggestion to the child by playing parties off against each other, by asking leading questions and by asking repeated questions.

##### **4.5.1 Best practice in managing language barriers**

(1) The child deponent should speak during the interview in their home language.

(2) When the deponent and the interviewer do not share the same home language, a qualified interpreter should be used.

(3) When the statement is recorded in writing, the interpreter has other responsibilities apart from interpreting the interview. The interpreter should read the statement back to the child before the child attests to its accuracy; initial every page and every alteration; sign the statement at the end along with words which explain the role completed in the interview process, and qualifications held.

(4) Where the deponent and the police officer do share the same home language, the interview should be recorded in that language. The statement can be later translated into the language needed for court where this is a different one again.

#### **4.6 Best practice in the method of recording**

*Best practice* lies in the video-recorded interview and statement with simultaneous audio-recording to allow for ease of transcript preparation when this is needed.

#### **4.7 Best practice in meeting the formalities and the legalities**

(1) The interviewer should record the place, day, date and time of the recording of the statement.

(2) Regardless of the method of recording the statement, it is necessary that the deponent be accurately identified by the baseline requirements of the first name and family name of the child, along with the date of birth, and the names of the child's legal guardian/s.



(3) The names and functions for each person present should also be recorded. In the electronic statement each person present should identify themselves so that the different voices are recorded.

(4) The child needs to be qualified legally as someone who can understand the difference between the truth and a lie, and who can agree to tell the truth in the statement. This needs to be done before the statement is recorded.

#### **4.7.1 Best practice in formalities and the written statement**

The purpose of formalities in structuring the written page of the statement in a certain way is to preclude any addition to the contents in the future without the knowledge of the deponent. To this end:

(1) Paragraphs should be numbered, the final word on one page should be part way through a sentence which continues onto the next, and the deponent's signature or mark should be immediately after the last word of the statement.

(2) Additionally, the deponent should initial every alteration, and the bottom, at least, of every page. The police interviewer should also similarly initial alterations and pages, along with the interpreter who also signs separate words at the end of the statement about the function that has been performed.

(3) If the guardian or care-giver was present she or he should sign words which say the statement was taken in their presence.

(4) At the bottom of the written statement the police officer must also sign last of all, and enter the place, time, day and date.

#### 4.8 The conformity with best practice of South African Police Service practice instructions

Relevant Practice Instructions issued by the South African Police Service conform to the hallmarks of *best practice* outlined above except in regard to three issues. The first difference regards the method of recording the statement and, as already mentioned, the method of recording the child complainant's statement in South Africa is the written method, with no back-up electronic recording. The instruction that the precise words and language of the child be written down and reproduced in the statement<sup>282</sup> is *best practice*, yet it is a difficult one for investigators to achieve from written notes alone.

The second difference is the guidance given about when to use the services of a qualified interpreter. The instruction given can be seen to compound the difficulties of recording exact child language in the circumstance of such language variety as exists in South Africa. The instruction assumes that to be "conversant" with the language of the deponent is sufficient for interpreting purposes for the out-of-court statement when both parties speak one of the eleven official languages.<sup>283</sup>

The third difference between South African practice and *best practice* is the guidance given about allowing the presence of an interested adult in the room with the child and the police officer. The Guidelines assume a *status quo* of a parent/guardian or independent adult being present in the room while the child is interviewed, and allow for exceptions to

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<sup>282</sup> South African Police Service National Instruction 3/2008, 3.2.

<sup>283</sup> South African Police Service Standing Order (General) 322 Part IV, Police Activities, Case Dockets, Information of Crime [SAP 4], 322.5.1.

this.<sup>284</sup> *Best practice* on the other hand provides that the usual practice should be to exclude such a party, unless the child is too young or too dependent to cope alone.

Having established *best practice* regarding the form and the content of the statement of a child complainant in a sexual offence case, it remains now to compare actual South African police practice with this *best practice*. The comparison will be made with the detailed procedures contained in the Practice Directives under which serving police officers are expected to carry out their duties and which comply with *best practice*. Although many of these relate to the recording of the written statement, which is not *best practice*, studying to what extent daily practices accord with Practice Instructions, that police are trained in and expected to comply with, will provide excellent feedback to administrators and trainers who are responsible for the standard of the policing work carried out on a daily basis.

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<sup>284</sup> South African Police Service National Instruction 3/2008 Annexure F, section 2.

## **5. RESEARCH DESIGN AND METHODOLOGY**

### **5.1 Introduction**

The children in South Africa who contact the police after being sexually abused come from all parts of the country. This meant that the opportunities to draw cases for study were many and widespread, and yet it was quite unrealistic for a single researcher to attempt to manage a study of the size required by random selection for the results to have meaning across many variables. In addition to sample size and geography, it was important for the researcher to be able to collect some information from the docket about disclosure issues and the child/offender relationship, where this information was not contained in the actual statement.

### **5.2 Research design**

All of these considerations were met by a research design which studied cases of the one offence type drawn from one large, yet defined geographical area, and in numbers sufficient to allow for some generalization of the findings across the wider national population. A sample of 100 written statements taken by police officers from child complainants in rape cases in the Eastern Cape Province was decided on as meeting all the research requirements. These cases were current ones and the subject of prosecutorial decision-making by the Grahamstown office of the Director of Public Prosecutions.

Inherent in making the decision to source the sample through the Grahamstown Prosecution Service, rather than randomly, was the embedded decision that the sampling method chosen was a non-

probability one. Relevant child complainants, therefore, who made up the total statistical population, had unequal chances of being selected for inclusion in the sample<sup>285</sup> unlike the equal chances they would have had in probability sampling achieved through random selection.<sup>286</sup>

The quota sampling method used in this research did ensure however that the sample accurately reflected the whole statistical population on selected characteristics.<sup>287</sup> These characteristics were two in number, the first being the age of the statement makers being under the age of 18 years and the second, their circumstance of being complainants in a reported sexual crime of rape, as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act.<sup>288</sup> The method of sample selection also mirrored the majority of research studies in being one of both *convenience* and *availability* and the method can validly also be characterised in this way.<sup>289</sup>

The sourcing of the statements through the Prosecution Service, rather than through a particular police district, meant that a wide number of police stations in the Eastern Cape were represented in the sample and therefore a variety of police investigators were also represented. Such wider representation will assist in minimising any local bias the sample may otherwise have had and in making the findings of the study more able reliably to be generalised to the total statement

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<sup>285</sup> SL Jackson *Research Methods and Statistics. A Critical Thinking Approach* 3 ed (2009) 96.

<sup>286</sup> Jackson *Research Methods and Statistics* 94.

<sup>287</sup> Jackson *Research Methods and Statistics* 96.

<sup>288</sup> s3.

<sup>289</sup> RM Thomas *Blending Qualitative and Quantitative Research Methods in Theses and Dissertations* (2003) 92.

population group. This is not an exact science, however, because of the absence of the random selection processes.

### **5.3 Ethical considerations**

Although secondary data was to be used in the research and there was to be no researcher contact with the deponents, it was still necessary to seek ethics committee approval in relation to the on-going protection of the documents. A system was devised for the recording of the identifying information from the documents and then the de-identifying of the hard copy documents themselves so that the privacy of the deponents was protected in the event of loss of or theft of the documents.

That system entailed the identifying data of the deponent being entered onto a password protected electronic list and the case being assigned a number, and the statements within the case, in the event of more than one complainant, being assigned a statement number. On the hard copy, the identifying information was then blacked out. This meant that the hard copy statement, without the cross-referencing electronic listing, could not be traced back to an individual maker of the statement.

### **5.4 Research method**

The statements were copied as and when they reached the relevant Senior Prosecutor, until the sample size of 100 had been reached. At the same time, the researcher was permitted to read the case docket and thereby to capture desired research data about disclosure issues and offender-victim relationship issues,

which were not necessarily a relevant part of an individual statement. This process took approximately seventeen months.

The contents and the form of each statement were then re-recorded on three separate data collection sheets designed for the purpose. The first and most general of these tracked twenty-three variables, and sub-categories, derived from Police Service Practice documents along with additional items of particular interest about the disclosure process and timelines, and the victim-offender relationships. These twenty-three variables included identifying details of the victim, the crime itself, the disclosure about it, the date-place-language-and time of recording the statement, the parties present in the room during the process, and each statement's compliance with legal technicalities about confirming that the child could differentiate between the truth and a lie and/or could understand the oath, appropriate certification by the child of having had the contents read to him or her and of the correctness of the contents, and certification by the police investigator of the time, date and place of the process, and the signatures of the parties. This data collection sheet has been reproduced and is shown in Addendum 1.

The second data collection sheet captured and enhanced the eight variables relating to spoken and written language use by the parties, including the home language of the child, the use of named and qualified interpreters, and the recording of verbatim language as evidenced by the presence of child words and phraseology, and the absence of adult words and legal terminology that the child deponents may have difficulty defining and reproducing. This data collection sheet is shown in Addendum 2.

The third and final data collection sheet magnified the two variables and their sub-categories about the details of the crime itself and examined how much of the content of each statement related to peripheral details of context and background or to central details of setting and crime elements. This sheet is shown in Addendum 3.

The research findings are presented in the following three chapters.



## **6. RESEARCH FINDINGS: GENERAL CHARACTERISTICS OF THE SAMPLE, ISSUES OF TIMING, AND FORMALITIES**

### **6.1 Introduction**

The following presentation of the findings from the study of the sample of written statements is a descriptive one. It is not a quantitative one, except in the sense that for each variable and sub-category described, its prevalence in relation to the whole is stated. Beyond this there will be no statistical analysis of the significance or non-significance of a particular number in its comparison to the whole.

The personal characteristics of the police investigators have not been tracked or recorded. Little is therefore known about the investigators regarding their gender, their length of experience in general policing and specialised policing, their home languages and other language proficiency and skills, and their educational qualifications.

### **6.2 Cases and deponent numbers represented in the sample**

The 100 statements making up the sample came from 91 complainants. In nine instances, nine complainants made two statements which are both included in the sample. In fact there were more instances than these nine of dual statements from the one complainant but in many cases the second statement was restricted in breadth to a single issue. In order for the statements in the sample to be comparable, it was decided

therefore to collect only second statements which also covered the field as the first one had.

The 91 individuals who are the deponents of the 100 statements came from 81 cases. In eight cases there were two victims, and one case there were three victims.

### **6.2.1 Crimes**

The 100 statements in the study concern the crime of rape. There were eighteen statements from fifteen complainants who were victims in multiple rape offence cases, where the period of offending ranged from three days to over three years.

## **6.3 Characteristics of the children in the sample**

### **6.3.1 Ages in years**

The ages of the 91 children ranged from three years to seventeen years inclusive. The breakdown of numbers by age is shown in Table 2 below.

**6.3.1.1 Table 2 Numbers of children and age in years**

|                           |   |   |    |    |   |   |    |    |    |    |    |    |    |    |    |
|---------------------------|---|---|----|----|---|---|----|----|----|----|----|----|----|----|----|
| <b>Child Age in years</b> | 3 | 4 | 5  | 6  | 7 | 8 | 9  | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| <b>Number of Children</b> | 3 | 2 | 10 | 12 | 4 | 9 | 11 | 7  | 6  | 7  | 1  | 7  | 4  | 5  | 3  |

### **6.3.2 Gender**

Of the 91 children, 86 were female and 5 were male. At the time of making their statements, one of the males was 6 years, one was 7 years, two were ten years and one was fourteen years of age. Because the numbers of the male children are few, there

will be no further separation by gender in the following findings.

### 6.3.3 Intellectual disability

Only two children in the sample were known by investigators to have an intellectual disability; one aged 16 and the other 17 years. The functional cognitive age of the 17 year old was estimated to be that of an eight year old, and the functional cognitive age of the 16 year old was not specified.

### 6.3.4 Relationship of child to offender, and offender characteristics

The children were related to thirty-six of the offenders; forty-four of the offenders were familiar to the child but not related to them, and thirteen of the offenders were strangers. Table 3 below gives the complete picture of these relationships.

#### 6.3.4.1 Table 3 Child relationship to offender

| Child Relationship To Offender | Numbers of Children |
|--------------------------------|---------------------|
| <b><u>Related</u></b>          |                     |
| Father                         | 12                  |
| Uncle                          | 7                   |
| Grandfather                    | 1                   |
| Cousin                         | 7                   |
| Stepfather                     | 7                   |
| Other Relation                 | 2                   |

|  |    |
|--|----|
| <b><u>Familiar but not Related</u></b> |    |
| Guardian's partner                     | 2  |
| Neighbour                              | 14 |
| Employee Home/School                   | 4  |
| Otherwise known                        | 24 |
| <b><u>Stranger</u></b>                 | 13 |

In two cases there were two offenders. In four instances, the same offender was charged in two cases; in one instance, the same offender was charged in three cases. This makes a total of 86 offenders in all. All of the offenders were male.

#### **6.3.5 When and how the disclosures were made**

The knowledge about when and to whom the child disclosed the abuse, and whether it was disclosed accidentally or deliberately, was learned through a reading of the case docket rather than from the statements themselves, although some statements did include some of this information. This disclosure information is presented here to demonstrate the fact that the children had either told someone about the abuse before the police spoke to them or alternatively the child purposefully told a police officer about it immediately after the event. This means that the police investigators were not in the position of having to convince a child to reveal the abuse event, although the usual issues of cognitive, social and emotional, and language constraints continued to apply in the interview situation.

Sixty-three of the 91 children disclosed the abuse within twenty-four hours of the event, ten children disclosed it within

one week, three children disclosed it within a month and of the remaining fifteen children, twelve disclosed it after the lapse of a month, and for three children it could not be determined exactly when the disclosure had occurred. The sample was almost evenly divided between accidental disclosure (forty children) and purposeful disclosure (forty-two children) where purposeful disclosure is defined as the child volunteering the information without being asked to. This information was unavailable in relation to nine children.

#### **6.4 Police investigation units and investigators represented**

In the sample of 81 cases, there were represented thirty-five police detective units and eighty-six police investigators. The names of the actual police units and the numbers of separate investigators represented in the sample from each police unit are shown in Addendum 4.

#### **6.5 The timing of the statement-recording and its formalities**

##### **6.5.1 Immediacy of statement-recording relative to police being informed of the offence.**

In order to find out how soon the police recorded a child's statement after being told about a child being allegedly raped, it is necessary to know when the crime was reported to the police, and when the statement was recorded. In relation to those complainants who made only one statement, for eighteen of the total 91 the exact date on which the police were told about

the crime could not be specified. For nine additional complainants of the 91 single statement makers, the date of the statement being recorded was not shown on the statement, and remains therefore also unknown.

Sixty-four statements remain for analysis. Thirty-one of them were recorded on the same day as the crime was reported to the police, fourteen of them were recorded on the next day after the crime was reported to the police, five of them two days after the crime was reported to the police, and another three were recorded within seven days of the crime being reported to the police. One statement was recorded one year seven months after the crime had been reported to the police, and of the remaining nine statements two were recorded within two weeks, one within three weeks, and five within one to five months of the crime being reported to the police.

The dates on which the nine second statements were recorded relative to the date of the crime being reported to the police is not pertinent to the speed of the police response to the crime, but it is relevant to the issue of delay and its effect on the child's memory. It is for this reason that those results are also presented. Three second statements were recorded in cases in which the precise date of the police being told about the crime was not able to be established, and one second statement was undated. The remaining five second statements were recorded respectively one after two weeks, two after three months, and two after four months from when the crime was reported to the police.

### **6.5.2 Time between date of offence and date of statement-recording**

The 91 first statements that qualify for analysis on this variable are reduced to 73 when deductions are made for the nine which have no statement-recording date and the nine in which a specific crime date could not be determined. Out of the remaining total of 73 statements, fifty-one of them were recorded within two weeks of the date of the crime, with thirty-four of these being recorded on the same day or the day after the crime.

### **6.5.3 Time of day of the statement-recording**

The following findings about the time of day of the statement-recording are given for all 100 statements rather than for the first statements alone. On twenty-five statements there was no time written as part of the certification by the police officer. For the remaining seventy-five, the times of recording are shown in Table 4 below.

#### **6.5.3.1 Table 4 Time of day and numbers of statements recorded**

| <b>Time of Day</b> | <b>Numbers of Statements Recorded</b> |
|--------------------|---------------------------------------|
| 00 - 06:00         | 2                                     |
| 07:00              | 1                                     |
| 08:00              | 3                                     |
| 09:00              | 2                                     |

|       |    |
|-------|----|
| 10:00 | 5  |
| 11:00 | 8  |
| 12:00 | 10 |
| 13:00 | 8  |
| 14:00 | 5  |
| 15:00 | 11 |
| 16:00 | 6  |
| 17:00 | 0  |
| 18:00 | 6  |
| 19:00 | 2  |
| 20:00 | 0  |
| 21:00 | 2  |
| 22:00 | 2  |
| 23:00 | 2  |

Of the statements recorded between 21:00 and overnight to 06:00, two were from five year olds, one from a six year old, and one each from a nine year old, ten year old, twelve year old and a fifteen year old. Fifty-nine of the seventy-five statements were recorded at the child-friendly times between 07:00 and 17:00.

## **6.6 People present during statement-recording**

In fourteen of the 100 statement-recordings it was not possible to determine who else was present other than the child and the



police officer. In eleven further instances it was recorded that the only people present were the child and the police officer. All of these latter eleven children were aged ten years and above. In only three other cases was there an adult present who was independent and not related to the child, one being a social worker, another the mother of the child's friend and the person to whom the child disclosed the abuse, and the other a care giver from a child welfare placement.

This means that there were 72 statements recorded while a relative of the child was present in the room. Overwhelmingly these were guardians, fifty-nine in total, and thirty-six of whom were specified as being female. This group was followed by other adults, all but one specified as female, who were mostly grandmothers, aunts and sisters. In the remaining three cases the party present with the child was a minor brother, a cousin, and a boyfriend.

#### **6.7 Identifying the deponent, by name, date of birth or identity number, guardian, and school**

Of the 100 statements in the sample, ninety-eight had both a first name and a surname written in the preamble. One child was permitted to make her statement under her make-believe name, and as an addendum to the statement she was identified by the adult with her by her proper names. In another statement there was no surname given. Thirty-one statements recorded a date of birth, and eleven recorded an identity number. Fifty-five recorded neither.

A full residential address was included in eighty-five of the total 100, and another one had a part address included. Only

five statements included home and contact details for guardians with an additional four giving part information about the guardian.

Eighteen children were not at school because they were either too young or old enough to have left, and of the remaining eighty-two, in sixty-eight statements the name of the school was written, in two cases the address was also written, the child's grade was included in fifty-one statements and the child's class teacher in twenty-eight.

## **6.8 The truth versus a lie, and the oath**

In forty-three of the 100 statements there was written an acknowledgement that the child 'knows the difference between the truth and a lie'. Seven of these included this acknowledgement and were sworn to as well. Of the remaining fifty-seven, fourteen statements were neither sworn nor included any acknowledgement from the child about knowing the difference between the truth and a lie, or saying further that their statement was the truth. Forty-three statements had no statement about the truth and a lie, and they were instead sworn to at the end. No statements were affirmed. The ages and numbers of the children who took the oath are shown below in Table 5.

**6.8.1 Table 5 The numbers and ages of children whose statements were sworn**

| <b>Child age in years</b> | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
|---------------------------|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|
| <b>Statements sworn</b>   | 0 | 1 | 4 | 4 | 1 | 2 | 4 | 5  | 5  | 6  | 0  | 6  | 6  | 5  | 3  |

Of the fifty-two children tabulated above, in one statement from a five year old child the preamble said the statement was sworn, but there was no evidence at the end of the statement of it being sworn. One of each of the sixteen and seventeen year olds who took the oath were said to be intellectually disabled.

## **6.9        Proofing and certifying the statements**

### **6.9.1        Initialling of changes by deponent**

Forty-one of the 100 statements had no alterations or corrections within them. Of the fifty-nine statements which did have amendments within them, four statements contained the child's initials next to the amendments, in two instances the child alone initialled them, and in the other two the police officer also initialled the changes.

Fifty-five statements contained alterations which were not initialled by the child. In two instances the adult present with the child initialled them on the child's behalf.

### **6.9.2        Statement read to the child before signing**

In two instances it was written that the mother read the statement on the child's behalf before the child signed it as being an accurate record of what had been stated. In the statements of a six year old, a ten year old, and a seventeen year old, it was written that the child read the statement herself. In seven statements it was written that the statement had been read to the child. In eighty-eight out of the 100 statements there was no evidence of the statement being read to the child before the signing of it by the child.

### **6.9.3 Proofing by adult on child's behalf**

In seven of the 100 statements, the adult present during the interview wrote that the statement had been obtained in their presence and that they (the adult) had read the contents. In four of the seven instances the adult had signed their name at the end of these words along with the time, the date and the place. In the other three, the adult had signed only or signed and dated the words.

There were eleven instances in which it was written that the child and the police officer were alone during the statement-taking interview, and another fourteen instances in which there was no information about who was in the room in addition to the child and the police officer. This makes a possible total of twenty-five instances in which there would have been no other adult in whose presence the statement had been taken. This means that sixty-eight statements were taken in the presence of another adult but these statements were without any words written and signed by the adult present, along with the date the time and the place. There were, however, forty-nine statements which included the signature of the adult present during the interview, but without any particular words accompanying the signature.

### **6.9.4 Deponent initials or mark on every page and signature or mark on the next line after the last word**

Eighty-three of the 100 statements showed the child's initials or fingerprint on each page of the statement. In forty-seven statements these initials were accompanied by the initials of the adult civilian present, and in seventeen instances the child's initials or mark was accompanied by the initials of the

police interviewer. Sixty-nine of the 100 also had the child's signature or mark correctly placed at the end of the statement contents, without any blank space in-between.

In twelve instances there was a gap of one line between the end of the contents and the signature or mark, in four instances there were several blank lines, in three instances a complete blank page between the contents and the signature, and in one instance there was more than one blank page. In seven statements there was no evidence of a signature or mark by the child deponent.

#### **6.9.5 Police interviewer signature at end of statement along with date, time and place**

The four items of signature, date, time and place required from the police interviewer were present in seventy-five of the 100 statements. In nine instances there was no signature. In the remaining sixteen statements there were varying combinations of: signature alone (one statement); signature and place without date and time (three statements); signature with time and date but no place (three statements); signature and date alone (one statement); and signature with date and place but no time (eight statements).

## **7. RESEARCH FINDINGS: CONCERNING LANGUAGE**

### **7.1 Home languages of the child deponents**

In twenty-five of the 100 statements, the home language of the child was not stated. In the remaining seventy-five statements the home languages were stated as being Xhosa for fifty-nine deponents, Afrikaans for thirteen deponents, Sotho for two deponents, and English for one deponent.

### **7.2 Languages spoken by the child deponents in the statement-taking interview**

Fourteen statements did not declare what spoken language the child used in the interview. Forty-two statements said the child spoke in English, thirty-three said the child spoke in Xhosa, nine said the child spoke in Afrikaans and two said the child spoke in Sotho.

According to the information on the statements, there were twenty-eight children whose home language was written as being different to that of the language in which the child is alleged to have made the statement. Twenty-one of these deponents had Xhosa as their home language, and seven of them had Afrikaans as their home language, and all of them were said to have spoken in English at the interview. The ages of these children are shown in Table 6 below.

**7.2.1 Table 6 Ages of children with home languages Xhosa or Afrikaans said to have spoken in English during forensic interview**

| Child age in years      | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | Totals |
|-------------------------|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|--------|
| Home language Xhosa     | 1 | 0 | 1 | 4 | 0 | 3 | 2 | 1  | 0  | 1  | 0  | 2  | 3  | 1  | 2  | 21     |
| Home Language Afrikaans | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3  | 1  | 2  | 0  | 0  | 0  | 1  | 0  | 7      |

Of the two seventeen year olds shown in the table with home language Xhosa, one is said to have had an intellectual disability.

### **7.3 Languages the statements were written in**

No statements were written in Xhosa or Sotho. Seven were written in Afrikaans. One was written in Afrikaans and a translation provided in English so that there were two statements in the docket. The other ninety-two statements were written in English alone. The six statements written in Afrikaans alone were translated for the researcher by the Senior Advocate research liaison at the National Prosecuting Authority in Grahamstown. That advocate is a second-language Afrikaans speaker who has studied Afrikaans at the tertiary level and who uses Afrikaans along with English in the course of her duties as a prosecutor.

#### **7.4 Interpreters and translators**

It is certain according to the recorded information that thirty-seven statements were either translated or interpreted into their final English language form. For another fourteen statements it is not known if they too needed translation or interpreting because the language spoken at interview was not written down in the statement.

Seventeen statements included the following message at the beginning: "States in Xhosa: Translated into English to the Best of My Ability", and it must be assumed that it is the police officer certifying the statement that these words refer to as the translating agent. Another statement has written "...under oath in Afrikaans...translated into English" and, in the absence of any evidence to the contrary, again it must be assumed that it is the certifying police officer who has done the translation.

Two other statements said they have been translated from the spoken Sotho into English but they do not say by whom. Three statements identify the person who did the interpreting during the interview as the mother in two instances, and a named person who was also designated as an interpreter in the third instance. No qualifications were provided for this person.

In this third instance, three languages were used in the process from interview to written statement. The child spoke in Afrikaans, the police officer spoke Xhosa and the statement was produced in English. The postscript to the statement indicates that the named interpreter assisted with translating from Xhosa to Afrikaans and *vice versa*, but there is no indication about



who did the translation into English. Again it is assumed to have been the police officer.

This leaves a minimum of fourteen statements and a possible maximum of twenty-eight statements in which there was no mention of the process of translation being used to effect a written statement in English, and no mention therefore of the person who had completed it in each instance.

### **7.5 Child words indicating verbatim language**

Child words in this context are those words which children use to describe both body parts and actions. In Annexure F to Police Service National Instruction 3/2008 there are several examples given<sup>290</sup> which are reproduced here as a guide to the following findings:

| <b>Words of Child</b>                       | <b>Adult Translation</b>                    |
|---|---|
| The uncle spanked me                        | Mr Nel assaulted me                         |
| The naughty man put his toti into my flower | Mr Ndlovu inserted his penis into my vagina |
| He put his wee-wee into my wee-wee          | Mr Rodricks raped me                        |

Only thirty-two of the 100 statements had language in them which could be described as child words, even though in four of these statements these words were common euphemistic terms which may also be used by adults when talking to children. Twenty-three of these thirty-two statements had a ring of authenticity to

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<sup>290</sup> South African Police Service National Instruction 3/2008 Annexure F, 3.2.

them in both the vocabulary and the phrasing, but this is only a subjective view and therefore not statistically valid.

Apparent child words used to describe relevant body parts included 'his stick', 'his thing', 'his private', 'my behind', 'in my back', 'his pencil', 'his willie', and 'my private formation'. Apparent child words used to describe physical actions included 'he did funny things on me', 'he did nasty things to me' 'he made dirty things with me' and 'he exercised on me'.

In the remaining sixty-eight statements there was no persuasive evidence of verbatim child language.

#### **7.5.1 Child language and the meaning bracketed or otherwise explained in the statement**

In eight statements, of the thirty-two containing evidence of child words, the meaning of an apparent child word was bracketed next to it. For example, 'stick (penis)' 'his thing (piepie)' 'pencil (penis)' 'cookie (vagina)'. In an additional two statements the child word or phrase was explained by the child in the statement. For example, to explain 'my private with his willie' the three year old is recorded as having said "Boys don't have privates they have willys. [Name of offender] is a boy". In the other example, the eleven year old is recorded as having defined 'cookie' as "the body part of the female to urinate".

### **7.5.2 Separate statement from guardian or care-giver explaining child language**

There was no instance in the sample of a separate statement from a guardian or a care-giver explaining the meaning of a child word or phrase.

### **7.5.3 Verbal language accompanied by body language**

Ten of the sample 100 statements, eight of which are also included in the thirty-two statements containing apparent child language, also contained examples of the deponent either pointing to a body part of their own by way of explanation, or actively demonstrating behaviour they were narrating. One six year old is said to have demonstrated "I must lie down like this", "I spit it out like this" and "I take it out of my mouth like this".

## **7.6 Code mixing between two languages**

There were thirty of the 100 statements which included words from a language other than the English that all thirty statements were recorded in. Eighteen of them concerned statements said to have been given in the spoken language of Xhosa, in three of them the spoken language is not recorded, and in the remaining nine, the statements were said to have been spoken in English. Nine of these statements are also included in the thirty-two which show evidence of verbatim child language.

It is possible that these additional twenty-one statements are also showing evidence of verbatim child language; for example, in the words reproduced in the home language and not translated

into English, seven instances, or translated and then the word in the home language bracketed next to the translation. The issue causes some uncertainty about relying on what is written in the preamble to a given statement about the spoken language used by the deponent in giving the statement. For example, a ten year old deponent, with home language Afrikaans, in a statement said to have been given in English, uses the phrase "het met haar geseks" in mid-sentence with no translation into English. Another example concerns a six year old deponent with home language Xhosa and a statement said to have been given in English. One complete sentence is firstly given in English "he inserted his penis in my vagina" and then followed by a bracketed translation into Xhosa "(wafaka ipipi yakhe engqungwiniyam)". It seems most likely in this instance that the six year old spoke the Xhosa sentence, which would then perhaps be verbatim language.

### **7.7 Adult words and formal language**

Adult words for this purpose are defined as words which children, who are either not at school or still in primary school especially, may have difficulty explaining, defining and understanding. Legal or formal words are those which are not generally used in everyday speech. Thirty-seven of the 100 statements have included in them either or both adult words and formal language which are unlikely to have been spoken by the child deponents they are attributed to. Some of the examples are stark, like the following from a six year old, "On the day in question I was at my place of residence", and from another six year old, "the suspect" and "assault me", and from a nine

year old, "erected penis" "penetrated me" and "finished ejaculating".

The listing of the deponents by age in the sample and some of the examples their statements contain of both the adult words and formal language are shown in Addendum 5.

## **7.8 Lack of consent**

There were nine statements which contained concluding words purportedly said in each instance by the deponent which denied giving anyone permission to rape them. The legal definition of rape of course includes an absence of consent, making the giving of permission to rape an impossible concept. It has been presumed that investigators were trying to establish an absence of consent to intercourse in the cases of the children over twelve years of age,<sup>291</sup> and yet as can be seen from the table below, some of the children said to be making these remarks are younger than twelve years.

### **7.8.1 Table 7 Lack of consent**

| <b>Child age in years</b> | <b>Concluding words of the Child's Statement</b> |
|---------------------------|--|
| 15                        | I did not give anyone permission to rape me      |
| 9                         | I never gave anyone permission to rape me        |

<sup>291</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 s1(3)(d).

|    |   |
|----|---|
| 11 | I didn't give anyone the right to rape me   |
| 16 | I did not give anyone permission to rape me and beat me up  |
| 9  | I did not give consent for the sexual assault or intercourse. I did not give any person reason or permission to rape me |
| 11 | I did not give anyone right, reason or permission to rape me  |
| 10 | He had no right to do so [rape me] without my consent   |
| 12 | I did not give anyone permission to rape me   |
| 8  | I gave no one permission to rape or touch me in my private parts  |

## 8. RESEARCH FINDINGS: CONCERNING CONTENT

### 8.1 Introduction

In this study there was no access to the interviews at which the statements were elicited and this means that there was no direct method of finding out and categorising, into open and directed or closed, the questions asked by the police investigators. There was therefore no means of being able to form an opinion about the likely reliability of the contents, remembering that reliability with directed and closed questions are in an inverse relationship.

A 2007 study by Snow and Powell<sup>292</sup> presented itself as the basis for a way to bring forth some meaning about police interviewing behaviour from the contents of the written statements, and to bring therefore some measure of reliability. Snow and Powell analysed transcripts of electronically recorded police interviews with children and they did so on the basis of categorising the child utterances into either (1) story grammar elements in the narrative paradigm designed by linguists Stein and Glenn<sup>293</sup> or (2) context-background or (3) a 'don't know' answer by the child. Story grammar elements are used to codify the information which is directly transferred by a story-teller

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<sup>292</sup> PC Snow and MB Powell "Getting the story in forensic interviews with child witnesses: Applying a story grammar framework" (March 2007) Criminology Research Council Report, Grant: CRC 04/04-05 <http://www.criminologyresearchcouncil.gov.au/reports/200405-04.html> (accessed September 2010).

<sup>293</sup> NL Stein and CG Glenn "An Analysis of Story Comprehension in Elementary School Children" in RO Freedle (ed) *New Directions in Discourse Processing* (1979) 53.

about an event which is circumscribed by time, and which has a beginning and an end.

The link between story grammar elements and investigative interviews with children had already been tested and established by the 2004 Westcott and Kynan study.<sup>294</sup> Snow and Powell studied a new aspect, however, that being the possible linkage between the type of question asked by the police officer and the category of information elicited - either story grammar or context-background. They codified the interviewer questions as either open-ended or specific.

The results of the study showed that only about one third of the children's utterances qualified for any of the seven story grammar elements, and two-thirds therefore qualified as context and background information or "don't know". The results also showed that two thirds of the interviewer prompts were specific rather than open-ended, and these resulted more often than not in information categorised as context-background information which was not central to the narrative. The study therefore was able to make the connection between specific questions eliciting context-background information rather than story content. The one third open questions elicited the most story grammar content. These results allowed Snow and Powell to conclude that police interviewing procedure was more effective in drawing forth context and background information, peripheral information, rather than detailed story content, which contained information central to the story.

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<sup>294</sup> HL Westcott and S Kynan "The application of a 'story-telling' framework to investigative interviews for suspected child sexual abuse" (2004) 9 *Legal and Criminological Psychology* 37.



A coding system was designed so that the contents of the written statements in this study could be similarly assigned to central and peripheral information. Five categories, which together covered the seven story grammar elements, were devised and the words of each statement were counted and assigned to one of the categories. Those five categories are:

1. The setting of the abuse episode, with sub-categories of place, time of day, day and date, month and year, and the name and description of the abuser.
2. The initiating event which set the scene for the later abuse.
3. The abuse episode, with three sub-categories of offender actions, child responses, bribes and threats, with each of these having a sub-category of pre-rape, during rape, and post-rape.
4. The resolution of the abuse episode.
5. Context/Background/Other.

This data collection sheet is reproduced in Addendum 3.

After completing the process of counting and assigning the words in each statement, it was then just a matter of totalling the words in each category and sub-category to reach an overall word total, and then deriving percentages of the overall for any particular category or sub-category. These findings are presented below after the more general findings.

## **8.2 The elements of the offence of rape**

All ninety-one first statements had within them the necessary offender actions to support the charge of rape.

### 8.3 Numbers of words in the statements

The overall numbers of words in the statements according to the age of the child are shown below in Table 8. It was expected that the statements from the younger children would contain fewer words than those of the older children, and this proved to be the case.

**8.3.1 Table 8 The age of the child and the number of words in the statement, averaged across the number of children in each age group**

| Child age<br>in years | Average number<br>Of words |
|-----------------------|----------------------------|
| 3                     | 90                         |
| 4                     | 115                        |
| 5                     | 127                        |
| 6                     | 195                        |
| 7                     | 127                        |
| 8                     | 252                        |
| 9                     | 238                        |
| 10                    | 356                        |
| 11                    | 380                        |
| 12                    | 336                        |
| 13                    | 350                        |
| 14                    | 369                        |
| 15                    | 281                        |
| 16                    | 540                        |
| 17                    | 392                        |

#### **8.4 Chronological order**

Police are expected to present the contents of the child's statement in chronological order.<sup>295</sup> In ninety-four of the 100 statements, the contents were presented in chronological order. The six, which were not presented in this way, were very short, and five of the six were from children under seven years of age. The remaining statement was from a nine year old and only contained 105 words.

#### **8.5 Context-background words as a percentage of the total number of words**

Words which were counted as context and background were those words which did not transfer information by the story-teller, the deponent, about the crime or the offender or the relationship between the offender and the child which provides story content in showing familiarity and prior experience with each other. Alternatively the context-background information was relevant to the event but peripheral and in these findings it is information which concerns mostly what happened AFTER the event and after the offender-victim contact had finished. It is information which is provided by other witnesses and is not needed in the child's statement. For example it answers the questions 'who did you tell?' 'what did they say?' 'what did they do?' 'who took you to the doctor?'. Without this information the statement would still have been a complete coverage of the elements of the offence. Table 9 presents these findings by both percentage of the whole and age of the child.

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<sup>295</sup> South African Police Service National Instruction 3/2008 Annexure F,3.2.

**8.5.1 Table 9 Context-background words as a percentage of the total words in the statement, correlated with the age of the child**

| Child Age<br>in<br>Years | Context-Background (Peripheral) words as a percentage of the total words |           |           |           |           |          |          |          |
|--------------------------|--|-----------|-----------|-----------|-----------|----------|----------|----------|
|                          | 0-9%   | 10-19%    | 20-29%    | 30-39%    | 40-49%    | 50-59%   | 60-69%   | 70-79%   |
| 3                        | 2  |           |           |           |           | 1        |          |          |
| 4                        | 1  |           |           | 1         |           |          |          |          |
| 5                        | 4  | 1         | 2         | 2         | 2         |          |          |          |
| 6                        |  | 3         | 4         | 4         | 1         |          | 1        | 1        |
| 7                        |  | 1         |           | 1         | 2         |          |          |          |
| 8                        |  | 1         | 3         | 2         | 1         | 2        | 2        |          |
| 9                        | 2  | 1         | 1         | 3         | 3         | 2        |          |          |
| 10                       |  | 1         | 1         | 3         | 2         |          | 1        |          |
| 11                       |  | 1         | 1         | 2         | 1         |          | 1        |          |
| 12                       | 1  |           | 2         |           | 2         | 2        |          |          |
| 13                       |  |           |           |           | 1         |          |          |          |
| 14                       |  | 2         |           | 2         | 2         | 1        |          |          |
| 15                       |  | 1         | 2         |           | 3         |          |          |          |
| 16                       |  |           |           | 2*        |           | 1        | 1        | 1        |
| 17                       |  |           | 1         | 2*        |           |          |          |          |
| <b>Totals</b>            | <b>10</b>  | <b>12</b> | <b>17</b> | <b>24</b> | <b>20</b> | <b>9</b> | <b>6</b> | <b>2</b> |

The asterisks in the table under the 30-39% column opposite both 16 and 17 years show that one of each of these two statements are those of the two children who were intellectually disabled, and whose functional cognitive capacity is not therefore reflected in their age in years.

## **9. ANALYSIS AND DISCUSSION OF FINDINGS: THE DEGREE TO WHICH THE FINDINGS CONFORM WITH *BEST PRACTICE***

### **9.1 Introduction**

The research findings presented in the previous three chapters will be analysed and discussed by dividing them into three sections, which follow in this chapter. The first section will focus on those findings which would mirror *best practice* if the South African Police Service Instructions had been followed in the field. The second section will focus on those findings which support the need for policy refinement and re-thinking if *best practice* is to be achieved. The third section will focus on those findings which reflect a need for further and on-going skills training in eliciting reliable content from a child complainant.

There persists an overall caveat to these results that *best practice* cannot be fully achieved through the use of the written method of recording the statement from a child complainant.

#### **9.1.1 *Best practice achievement in police response time***

At the outset of the analysis of these findings it is important to highlight the timely response, in line with *best practice*, by police officers after being notified of a sexual crime against a child. Of the sixty-four statements from cases which contained the information relevant to deriving this response-time outcome, over seventy-eight percent of the children made statements within two days of the police being informed. When taking into account the fact that there has been no separation between rural and city response times in these findings, and that the police

officers have already taken the children for forensic medical examination prior to taking the statements, these findings are exemplary.

This response time equates with international *best practice*. The South African Instructions advise the statement to be taken within 24 - 36 hours of the crime being reported to police which is a more precise measure than the data collected in this sample was able to achieve. Twenty-four to thirty-six hours is recommended as a time period which has allowed for a lessening of the intensity of the trauma suffered by the victim and allowed time to establish a better rapport between the investigating officer and the victim.<sup>296</sup>

The *best practice* timelines have been drawn from developed countries which inherently have more of what is needed to respond to the demands for services and to do so in a timely manner. For the South African police officers, in most instances, to be able to match the response time in those benchmark countries is indeed a glowing reflection on the dedication of the officers and their desire to capture the offender and capture and preserve best evidence.

## **9.2      Achieving *best practice* by following instructions**

The issues are mixed which fall into this category of best practice having been achieved if Practice Instructions had been followed. They include some which relate to the procedures involved in the written method of recording, and several which

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<sup>296</sup> South African Police Service National Instruction 22/1998, 6.1.

relate to the identifying and qualifying of a child complainant making a statement in any form.

## **9.2.1 Procedural issues in the written method**

### **9.2.1.1 Initialling of amendments**

Where amendments are made within a written statement, it is necessary that the deponent initial each amendment prior to signing the statement at the end. Without such initialling, the police recorder leaves him or herself open to the allegation of having tampered with the statement at a later time and in the absence of the relevant deponent. The certified statement is a legal document and as such it needs to be accorded the legal procedures which accompany the protection of the rights of all the parties to the transaction. The only way for this to occur is for appropriate signatures and marks to be affixed within each party's presence.

Fifty-nine of the 100 statements analysed had amendments within them, but only four of these bore the mark or initials of the child deponent next to the alteration. In the other fifty-five instances the police recorder had placed his or her initials next to the amendment.

This behaviour by the investigators reflects a misunderstanding about the rule relating to the notation of amendments. An investigator's mark can have been placed beside the amendment at any time, and its being there does not attest to the amendment being made in the presence of and with the consent of the deponent.



#### **9.2.1.2 Deponent signature after final word**

The same considerations apply to the placing of the deponent's signature relative to the final words of the statement. Any space which remains empty of words or lines crossing it through remains available for words to be added after the parties have left the process.

Only 69% of the statements had correctly followed the instruction to have the deponent sign on the next line after the final word. Looked at from the other perspective, there were thirty-one statements which allowed for the possibility of the contents being tampered with after certification. Instructions about formalities are written for the protection of the rights of all the parties, and officers need to be mindful of the legal implications in breaching such apparently innocuous instructions.

#### **9.2.1.3 Evidence of having read the statement to the child**

It is the child deponent who owns the statement in the sense that the contents are attributed to the child and not to the recorder. It is the child deponent who will be required to reproduce the contents of the statement at another time and place, at the trial which may follow and also perhaps in the prosecutor's office when decisions are being made about the strength of the witness testimony.

Therefore, and again it is to be stressed, the Instruction, based on best practice, that the contents of the statement must be read to the child carries with it very important ramifications. This task is not a perfunctory one. It is designed to allow the child the opportunity to say that something in the statement is not correct, and with this in

mind, it is necessary that the child be able to define and understand all the words and concepts used within it.

Since children are shy to challenge adult behaviour, it is unlikely that any child will actively seek to find fault with what has been written on their behalf. The process of the child deponent proofing the statement for accuracy, therefore, needs to be one which is based on the mutual understanding that it is strongly desired that the child will find fault.

In 88% of the statements analysed there was no evidence that the statement had been read to the child. In only 7% of them was there a positive endorsement to the effect that the contents had been read to the child before signature. 3% said that the child alone had read the statement, and one of those children was only six years of age. 2% said the mother of the child who had been present in the interview read the statement on the child's behalf and then attested to its accuracy. Without the requirement that recorders make a positive statement of having read the statement to the child, it is very likely that the requirement will continue to be overlooked and misunderstood.

An issue which goes hand in hand with this one is that of the language used in the statement. For children to truly understand the written version of what they have said, that writing must duplicate what in fact the child did say. This issue will be addressed further in the second section of this analysis. Further, it is insufficient for a child to attest to having read a statement without further evidence, appended to the statement, of the child's competency to read the language of the statement. It is much simpler for the investigator, or interpreter, to read the contents to the child and for the child to attest to that process having been followed.

The issue is a contentious one, however, and one which can set the child up for failure in future hearings. When the language of the child has not been recorded verbatim, when the child is tired and emotionally drained at the end of the interview, when the child under seven, if not even under 10, years may not possess the cognitive capacity to listen and reflect upon their own words repeated to them, then the signature of the child on the document becomes meaningless at best, and mischievous at worst. Furthermore, in the light of the findings presented in chapter 3 of this thesis about child compliance with adult authority and child acquiescence in cases of power asymmetry, the likelihood of any child being able to listen in these circumstances, without internal interference, to a replay of his or her own words and to correctly note errors in recording, borders on the impossible.

Perhaps the onus needs to rest with the police recorder to attest to the accuracy of the contents, and yet this course of action carries its own dangers. As demonstrated earlier in the thesis, in chapter 3, forty-two per cent of the interviews analysed in the Roberts and Lamb study contained distortions which altered the meanings of or contradicted what the children had actually said. It was only the fact of electronic recording that enabled actual transcripts to be created which thereby allowed the mis-hearings to be identified. These results argue strongly for an independent means of checking the accuracy of the recording of what children have said, and that independent means would ideally be one which is free of the possibility of human error - that is, the electronic recorder.

#### **9.2.1.4 Appropriate certification by the parties**

Appropriate certification of the statement by the parties present during interview, including the police recorder, is another essential legal process. The purpose of certification is as follows:

1. it identifies the witnesses to the process of taking the statement;
2. it identifies the roles played by each of them; and
3. it identifies the police officer who has been responsible for calling the parties together at a certain time, day, date and place.

The intention of these processes is again to protect each party to the process as well as to protect the integrity of the process itself. It is foolhardy to create legal documents without such inbuilt means of protecting the integrity of the document.

In 7% of the 100 statements there was no signature or mark by the child deponent. In these cases there is therefore no direct evidence that the child was even present at the process. Without the signature or mark of the deponent the statement is rendered legally worthless, unless there is an accompanying statement by the police recorder attesting to the presence of the child. A fingerprint of the child deponent, as seen on many of the research statements made by the younger children, may also answer this dilemma of having children sign a document they may be too young to understand the import of - the issue addressed in the previous section. The print would merely substantiate the presence of the child and identify the child as the person who had been interviewed.

In 9% of the statements there was no signature by the police recorder, and another 16% lacked one or other of the details about time day date and place. Nevertheless 75% of the statements had all the correct details and signatures, and this reflects an adequate understanding by the police officers of the importance of this certification process. Good habits must be built to follow that understanding.

## **9.2.2 Identifying and qualifying the child deponent**

### **9.2.2.1 Identifying the deponent**

Regardless of the method used for the recording of a statement from a child deponent, it is necessary to identify the deponent with such particularity that the statement can only have been made by that particular person. In the absence of video and audio recordings, which provide additional visual and voice identification, the usual means of achieving this is through the provision of particulars which are officially recorded and of which there are sufficient to answer any cases of superficial similarity.

In the absence of photo and or voice identification, as provided through the electronic forms of statement-recording, these other details must stand on their own with certainty. In South Africa the date of birth makes up a part of the identification number of a person so that it is not necessary to record both. It is, however, necessary to record one of them or to make it clear that a particular child has neither official registration. In the latter case it becomes necessary to provide further particulars to achieve the purpose of certain identification.

Residential addresses are less certain as a means of identification of a person because it is so very easy to leave

an address and move elsewhere or be taken elsewhere in the case of a child. Where forms of identification secondary to the names and dates of birth are needed, the full names and contact details of parents and guardians provide greater certainty and greater accountability.

55% of the 100 statements had recorded neither the date of birth nor the official identification number, and 85% recorded the residential address. 5% recorded the home and contact details of the parents or guardians, however these results were confounded by the fact that almost 40% of the offenders were related to the children, and some family details were officially recorded via this avenue, but nevertheless these details were not shown on the child's statement.

Overall there were sufficient details provided in the statements through either the above means or through a named family member being present during interview to allow for the fairly certain identification of the majority of the children. Nevertheless, it behoves investigators to be mindful of the duty to particularise the identity of the deponent with certainty, and to take appropriate measures to achieve this.

The details of the child deponent's school enrolment - the name of the school, address, teacher and grade - help both with particularising the child but also help with placing the child in context and providing investigators with another avenue through which to garner information about the child's cognitive and social functioning, independent of the family. It is universally accepted that children are difficult to interview and the greater the knowledge by the interviewer about a particular child, the more likely a satisfactory outcome.

Of the 82 children attending school at the time of the interview more than 82% had recorded the name of the school they were attending, 62% the grade the child was in, and 34% recorded the name of the class teacher. The lower recording percentages of the grade and the class teacher may perhaps reflect an absence of rapport building with the child, given that to chat about school is an ideal avenue for making the child comfortable, and had that been done the information would likely have been known.

#### **9.2.2.2 Qualifying the child deponent**

There is little purpose in taking a statement from a person who cannot tell the difference between the truth and a lie, and who cannot agree to tell only the truth in their statement. 14% of the 100 children were not qualified in the recommended manner. Such a process of qualifying a deponent is no guarantee of a factually truthful outcome but it does increase the likelihood of such, and thereby it becomes an essential part of the prelude to the statement.

In the case of children especially, it is undesirable to wait until the end of what they are saying and then have them acknowledge the truth of what has been said. The deponent requires knowledge of the expectation beforehand so that what is said by them can be filtered by the expectation of truthfulness. 43% of the 100 statements included words in the prelude about the child understanding the difference between the truth and a lie and giving a commitment to tell the truth. 57% did not include such words. Although Police National Instruction 3/2008 Annexure F at 3.2 gives the method of checking a child's ability to differentiate the truth from a lie, no statement provided evidence of the means used to achieve this. Given what we know of children's developing cognition as a function of age in the

normal child, it is insufficient simply to ask a child a closed question ("Do you know the difference between the truth and a lie?") and to then rely upon the answer. It becomes necessary to ask each child to demonstrate their cognitive competence through the means of a concrete observable test as happens in the court room.

Even in cases in which the child deponent is above the age of twelve years, at which it is to be expected that the child understands the oath,<sup>297</sup> it is no burden on the investigator or the deponent to differentiate between the truth and a lie before beginning the formal statement, even when swearing to it at the end. In the present study there were seven instances in which the child answered to both processes.

It is wholly undesirable however to have children under twelve years give no verbal or concrete understanding of their capacity to differentiate the two concepts, and to ask them instead to swear to an oath they cannot understand. They should not be asked to swear. The process and its content are meaningless. The oath is an abstract concept requiring cognitive development sufficient for such reasoning. 26% of the children who were asked to swear the oath were aged less than twelve years, and two of those over twelve years were said to be intellectually disabled. In all likelihood these twenty-eight children had no understanding of the oath or the words said in the swearing process. Even the words of the oath are difficult conceptually, for example 'conscience' and 'binding', and unlikely to be understood by children who have not reached the beginning of the final stage of cognitive development, at around twelve years of age.

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<sup>297</sup> South African Police Service National Instruction 3/2008 Annexure F 2.



The statements showing the inappropriate use of the oath and those reflecting the absence of any form of attesting to the truth of the statement amounted to an aggregate total of 42%. This result appears to reflect an inadequate understanding by the police recorders of the purpose of this qualifying process, and suggests a need for further training.

### **9.3      Achieving *best practice* through policy refinement**

#### **9.3.1      Parties permitted to be present in the interview room**

*Best practice* dictates that the child be alone with the interviewer in the statement-taking interview, unless there is a need to have an interpreter present, a need to have another independent adult female person present for the sake of gender parity with a female child and a male recorder, or a need by the younger child to be comforted by a carer.

The instruction to police in the South African Practice guideline says that "it is not always necessary, possible or desirable"<sup>298</sup> for an accompanying adult to be present in the room with the child, and this language is of a slightly different import to the language of *best practice*. The actual practice shown through the research findings reflects a belief by investigators that the child deponent is to be accompanied at interview by an adult, and an adult relative at that. Leaving aside the fourteen instances in which it could not be determined who else was present with the child and the police officer, in seventy-two instances of the remaining total of eighty-six, over

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<sup>298</sup> South African Police Service National Instruction 3/2008 Annexure F 2.

83%, there was present in the room an adult relative while the statement was being taken.

The basis of *best practice* is two-pronged. The first consideration is the fact that the witness is a child and as such is overly subject to and influenced by the power and authority of adults, and adult family members in particular. The second consideration is inextricably linked to the first because the family has a duty of care of and for the child which has arguably not been discharged, and in more than a third of the cases the offender was a family member. These relationships represent vested interests. It follows therefore that the adult relative accompanying a child cannot be considered to be a disinterested party in all but a small minority of cases. Except in those few cases there is within the interview room an interested party who may still be exercising influence over the child merely by their presence. This interview practice can be construed as a secondary victimising of a child complainant and *best practice* is unequivocal in its demand that the child complainants be given the freedom and the privacy to make their statements without on-site family influence. It is ideal that guardians provide consent for processes to occur but it is not ideal that they be present while those processes take place.

### **9.3.2 The use of interpreters in interviews**

The actual language used by the deponents is to be recorded in their statements if *best practice* is to be realised, because it is the words and the syntax used by witnesses which gives the evidence its ring of authenticity, and which enhances and enables their later recall. *Best practice* therefore calls for witnesses to provide their statements in their home languages, those home languages also being the languages of their dominant

cultures, and the languages in which they will each be able to provide the most exact words and nuances so essential for conveying complete meaning.

In this study the evidence of the presence of child language in the statement was equated with the recording of verbatim language, and the evidence of the presence of adult and formal language was equated with translation of the child language by the recorder. 32% of the 100 statements showed evidence of child language; 68% evinced no such evidence, but instead showed evidence of having been translated into adult and formal language.

These findings are difficult to interpret as being from a single cause. They may come from the inadequate language proficiencies between the statement-makers and -takers; they may come from the statement-taker's reliance on note-taking and memory as the basis for the final written statement. More than likely the findings are a mix of these two factors acting in tandem. The end result of these operational influences is a statement which is not accurate, not persuasive, and difficult if not impossible for the deponent to replicate. Clear directions are indicated for managing the language issues. If the statement-taker does not share the home language of the deponent, and the language the interview is to be conducted in, then *best practice* logically determines that a qualified interpreter be present to interpret accurately between the parties, and later to read the written statement back to the deponent in the home language and to certify as having done this.

Standing Order (General) 322 is clear in saying that a statement made in an official language must be recorded in that language, and yet practice does not reflect that instruction. Thirty-

three interviews were conducted in Xhosa, yet no statement was recorded in Xhosa. Two interviews were conducted in Sotho, but not recorded in Sotho. However, the seven interviews conducted in Afrikaans were recorded in Afrikaans, and the forty-two interviews said to have been conducted in English were recorded in English.

There can be seen here a bias operating against the indigenous languages, and therefore a failure to reflect in practice the language goals of the Constitution. These practices which favour non-indigenous home language speakers need to be redressed through policy refinement and clarification. Later in the same paragraph as that quoted above, the Standing Order implies that the only time an interpreter would be used is when the language spoken by the deponent is a language other than an official South African one. This needs to be clarified because it can be seen to be saying that any level of competence and familiarity with any official language is sufficient for the purposes of taking a witness statement. This policy needs re-thinking.

It is not possible for the goals of the forensic interview of a child complainant to be realised in the presence of inaccurate language and inadequately understood second and third languages, even where these are all official languages. The process needs to be accorded the same status as that of giving evidence in court. The witnesses in court are provided with an interpreter so that they may give their evidence in their home languages.

## **9.4 Achieving best practice through training**

### **9.4.1 Open questioning for eliciting reliable central content**

The skill of interviewing by open invitations to witnesses to freely relate their stories is a learned one rather than a natural innate ability. This assertion is supported by the recent studies quoted earlier in this thesis about the failure of training to support long term maintenance of the skill, and the reversion by dedicated and professional interviewers to closed, directed and other distorting interview questioning styles.

Specialised job placement, repetition of specialised functions such as child interviews, and the best will in the world have been found to be insufficient to maintain initial training and the skills arising therefrom. The research findings in this study support these training insufficiencies, and support the findings by Snow and Powell that police interviewing is more effective in eliciting context and background peripheral information than content central to the story.

As the research findings presented here have shown, only ten of the 100 statements were composed of less than 10% context-background peripheral information. These ten statements came from the younger children, all twelve years and under, with seven of the ten coming from three, four, and five year olds. At the other end of the scale, it can be seen in Table 9 that the statements containing 50% and more of peripheral information came from children aged eight years and above, with only three exceptions, a three year old and two six year olds. The average number of words per statement can be seen in Table 8 to have increased markedly at eight years of age, going over 200 words

for the first time, and yet the increased number of words is not positively correlated with an increase in central story content. Almost three quarters of the statements (seventy two) contained between 10% and 50% of context-background peripheral information. Sixty-two contained between 20% and 50% peripheral information. More than half of the statements (fifty-three) contained between 30% and 50% peripheral information. The study by Snow and Powell also showed that peripheral information was positively correlated with having been elicited by questioning other than open questions. This means that the findings of this study which reflect high percentages of peripheral content also point to a questioning style in the interviews which is strongly associated with unreliable information.

Training is needed so that these specialised police investigators can build open-invitation interview skills which become habits. Particular forms of training are needed to support the development and maintenance of the interview skills which elicit central story information from children. The link has already been established by Snow and Powell between central story content and open questioning. The problem with reversion to prior inappropriate habits, the problem of training failure, is one which is presently the subject of international focus and there is now a growing body of research addressing this very issue in order to establish the form of training which will result in long-term sustained skills maintenance.

#### **9.4.2 Particularising the crime**

Training is also needed to guide the investigators about what information is desired by the prosecutors for the particularising of a crime. It remains possible that the Police Service and the Prosecution Service are not of one mind on this

issue, and working presumptions need to be clarified and made explicit. Prosecutors may, for instance, need more information about the prior relationship between the child and the accused so as to be able to prove the element of grooming in the lead-up to the offence and its influence in the offence itself. As only thirteen per cent of the offenders in this study were strangers then eighty-seven per cent of the offenders had a prior relationship with the child victim, a relationship which may have been relevant to the grooming process, and about which information needs to be gathered.

**10. CONCLUSIONS: THE THREE INNOVATIONS WHICH WILL ALLOW SOUTH AFRICAN POLICE PRACTICE TO WHOLLY EMBRACE *BEST PRACTICE***

The reality that over twenty thousand children in South Africa annually inform the police that they have each been the victim of a sexual crime is a tragedy with social and personal ramifications which will last well into the next generation and beyond. The specialised Family Violence, Child Protection and Sexual Offence Units now established throughout the nine Provinces, along with the specialist detectives who work specifically with the child complainants, evidence the National Government's commitment to meet the challenges posed by these social circumstances.

In these circumstances, and with the research findings documented in this study to act as an impetus and a guide, the time is right for police practice to wholly embrace *best practice* by augmenting the excellent existing structures and staff with three innovations. These innovations are the introduction of qualified interpreters into the forensic interview process with child complainants, the introduction of either or both video and audio recording of the interview-statement, and a new routine of intense and on-going skills training for the interviewers of children.

The existence of a National Police Service operating across Provincial boundaries makes easier an accord about desired policy and practice changes along with the implementation of changes to both policy and practice. It also makes easier the further and repeated training of the officers who specialise with child complainants. Although it can be argued that *best*



*practice* can be achieved through the implementation strategies suggested in the previous chapter, it will still be *best practice* with several caveats: it will be *best practice* circumscribed by information contaminated and foreshortened through inappropriate questioning, by inadequately expressed and understood language at interview, which is inadequately and imprecisely recorded. These deficits are so fundamental to the outcome of a reliable and trustworthy complainant statement that without them other best practices can be seen to be utilised in vain.

Adherence to procedural and interviewing protocol guidelines will result in statements which have the potential to be rich in content and legally sound, yet these measures will not assist the investigators to maintain appropriate interviewing skills over time, to record the verbatim language of the child deponent, nor assist in monitoring the accurate and reliable interpretation from one language to another. The only way that these latter needs can be met is through the presence of qualified interpreters, the electronic recording of the child complainant statements, and very specific training for interviewers which is on-going on a regular basis. Each of these three needs will be addressed individually after a preliminary note about a procedural issue which requires further thought.

### **10.1 Signing of the statement by a child complainant**

As discussed in chapter 9, the procedural requirement for a child complainant to make their mark at the end of their written statement begs the question about what that mark is intended to

signify. It perhaps locates the mark-maker in the interview room at the relevant time and place, but there is little else which it can be said with any confidence to reflect. As the issues have been canvassed already in chapter 9 they will not be repeated. What will be said here is that this issue needs to become the focus of research in its own right. Such research needs to answer the dilemmas alluded to in the earlier discussion and also needs to make recommendations about how to safeguard child complainant rights during the recording of forensic interviews, in the absence of electronic recording of those interviews.

## **10.2 Interviewer training, specialised and on-going**

As shown throughout this thesis, the skill needed to successfully interview a child complainant, particularly in a sexual offence matter, is skill acquired over time and after training. It is also however skill which is displaced by what appears now to researchers to be a default interviewing style which is the antithesis of best child interviewing practice. As researchers concentrate on finding the best form of training for producing lasting skills which conform to *best practice*, in the interim there can be implemented training which sets out to make each interviewer of children highly competent in following the contents of a particular interview protocol, chosen from those available world-wide as being the most suitable model for South African police interviewers. For interviewers to understand the basis of the demands of the protocol it will be necessary for them to have thorough knowledge of the cognitive development stages of childhood, the associated language competencies and inadequacies, and knowledge about how memory works and how and

when to maximise the retrieval of accurate memories from children. This theory will prepare the ground for these specialist interviewers to further adjust their own styles to the demands of childhood, and to make their mastery of an interviewing protocol more than just a matter of rote learning. The findings of studies quoted earlier in this thesis make it clear that interviewers are not reliable reporters of their own behaviours at interview, and for this reason any training must include the electronic recording of practice interviews so that trainers and learners can know that the training has produced *best practice* outcomes. In order to know that these *best practice* outcomes will be lasting, training needs to be scheduled at regular intervals, thereby providing reinforcement of desired habits and gradual extinction of those which are undesirable. This need for repeated and intensive training is such that it may increase the standing of the specialist interviewer of children, earmarking such a specialist as being fundamental to just legal outcomes for child sexual offence victims.

### **10.3 Electronic recording of child forensic interview**

Just as the training interview needs to be electronically recorded so that trainers and learners have access to actual performance rather than remembered performance on which to base further training and/or certification of competencies at a particular time, so too the actual forensic interview with a child demands the same permanence through electronic recording. As shown in Chapter 2, the video recording with simultaneous audio recording is the method which now reflects *best practice*

internationally for the reasons outlined in that chapter. However, the electronic audio recording is an acceptable mid-stage position between the written method and the video recording. It has almost all of the many advantages of video recording, and in addition it has the financial advantage of its own in costing less to set-up and maintain than video systems.

The disadvantages of electronic recording lie chiefly in the costs of the initial outlay for the equipment, and then for its maintenance, repair and upgrading. Rapid technological advances ensure that recording equipment can become quickly outmoded by what is newer, better, faster, and these advances ensure that it will be insufficient to merely outlay for the equipment needed just the one time. Recurrent expenditure is a necessity, and in addition to the equipment itself, there is the added cost of secure storage facilities for the actual recording, whatever its form, and appropriate protection of the data over lengthy time periods.

The audio or video recording, which can be replayed by authorised parties, exposes the interviewers' performances to scrutiny and comment unlike the present silent and unrecorded child complainant interview. This is either an advantage or a disadvantage depending upon perspective. For interviewers who lack confidence and skills it can be seen to represent performance pressure which can be intimidating in the short-term until confidence grows and skills are enhanced. For interviewers who are confident and skilled, the live recording of their work represents the opportunity to display that skilled work, and to be appropriately recognised and rewarded for it. For trainers and administrators, the recordings would represent

hard data about the effectiveness of their training programmes, and provide the basis for further planning.

To interview anybody and to do it well requires planning, active listening and appropriate cuing of the interviewee, active thinking, and extreme concentration. To interview a child requires all of the above plus specialised knowledge of the child's developmental capabilities, sensitivity to the undesirable influences of adult power, and specialised skills in the means of eliciting reliable content from a child. To be asked to achieve all these necessary facets of successful interviewing, and to take notes at the same time is to compromise the interviewing, the note-taking, or both. Electronic recording allows the interviewers the complete freedom to concentrate their energies and effort into the successful interview, while the recording takes care of itself. The recording is a verbatim recording of the words, the tone, and the interaction between the parties. It is a complete capture of visuals and sounds in the case of the video recording, and a complete capture of the sounds in the case of the audio recording. It makes it possible for a listener to hear beyond the words, as it were, and the recording thereby adds what no amount of written words of description could do.

Children change developmentally with the progression of time. When sexual offences are delayed in being brought to resolution through trial, the electronically recorded interview will place the child back at the time of the offence. This reinstatement of child context can only enhance the completeness of the crime record in the mind of the parties authorised to access the recording for the preparation of their respective cases. The recording exists for the investigator as the reliable basis from

which to draw up a written statement if this remains a requirement. The recording is also available for transcription.

The recording also remains available to be heard or seen by the prosecutor preparing for trial, the witness refreshing memory prior to in-court testimony, the defence advocate on behalf of the accused, and by the Court should a dispute arise about the inconsistency of testimony with what was said at the interview.

#### **10.4 The use of qualified interpreters**

The circumstances which would require the presence and skills of the interpreter at the interview are those in which the home language of the deponent is not the same as the home language of the investigator-recorder. In this study, based as it was in the Eastern Cape, Xhosa was the dominant indigenous language amongst the complainants. It may also have been the dominant indigenous language of the officers serving in the region. If that is so, then many of the interviews could have been then, and in the future, conducted wholly in the indigenous language and recorded in that language also, and the statements prepared in the indigenous language. The process then of reading the statement to the child and ensuring his or her understanding of the contents could all be completed in the indigenous language. What would then be needed would be a qualified translator to translate the final statement into the language required for official court documents. This translation process would not impact on the child complainant at all.

In circumstances where there is a mis-match between the home languages of the complainant and the investigator, then the services of a qualified interpreter would be needed at

interview. The inconvenience to the police investigator of having to co-ordinate another party can be seen to be a disadvantage of having a qualified interpreter in the interview, and the regular use of interpreters will necessitate a system within each detective unit to facilitate and co-ordinate their use. Bilingual officers may also feel that their own language skills would have been sufficient to allow them to dispense with the official interpreter and perhaps a system within the Police Service, of officially accrediting those of its members who have the requisite language skills in at least two official languages, would answer this concern.

Interpreters and translators would have to be paid for their services and this would increase the policing expenses. Ideally this cost would need to be offset against a saving or a benefit, either a financial one or one in terms of the achievement of desired social and legal outcomes. The inclusion of interpreters also slows down the process of the interview because time needs to be afforded to the interpreting process which by its nature cannot be rushed. This slowing of the process, however, has advantages for the investigator and the child alike. It allows time for reflection, for consideration, and for making certain that all the issues have been covered. Extending the interview time may also have beneficial outcomes in and of itself when children are the deponents, and when so much of their performance depends upon the rapport which has been built with the investigator.

## 10.5 Empowering child complainants

When foundations are solid and sound, superstructures don't cause them to buckle and fold. They take the weight. The child complainants' statements are the foundations of the superstructures of future prosecutions. The children have been through shocking and traumatising experiences and they must tell their private and uncomfortable stories to strangers. They must tell those stories in such a way that they reflect their worth as future witnesses in bringing to account the people who have offended against them. Children will perform at their best and provide their best narrations when they are permitted to speak in their own home languages, and when there is another person in the room with them who similarly uses that language. It is a familiarity, and a comfort. Misunderstandings and mis-hearings are minimised, idiom and phraseology are understood, and their narrations are enriched by the additional information brought through such shared knowledge and understanding.

The complainant is, after all, the person on whom future prosecution will stand or fall. Although only a prosecution witness in legal terminology, the child complainant is much more than this. Without the child complainant there is no case at all. With the child complainant made confident by a statement full of his or her own verbatim language, and a statement full of essential story content, the credibility of the child is likely to be enhanced. Child sexual abuse cases rest almost exclusively on the credibility of the child complainant. Society owes children every chance of preserving their credibility right from the moment they are victimised by the crime of rape and forced to rely on professional investigators



and prosecutors to help them through the trauma and the process of seeking redress.

## ADDENDA

### ADDENDUM 1: Data Collection Form 1 - Complete coverage, variables 1 to 23

|  |  |  |  |   |   |  |
|--|--|--|--|---|---|--|
| 1. Date of alleged crime   | 3. Disclosure Date   | 5. Person of first report  | 7. Date police notified  | 9. Home language child?   | 12. Interpreter<br>a. named<br>b. quals<br>c. s/ment?<br>d. signed<br>e. changes initialled | 13. Statement made<br>a. where<br>b. time<br>c. people present<br>d. length in words |
| 2. Child age   | 4. Circs   | 6. Relationship Offender/Child   | 8. Date statement signed   | 10. Spoken lang of statement?<br>11. Written lang of statement?       |   |  |
| 14. <u>Format</u><br>a. <u>pgs init/lled by parties</u><br><br>b. <u>corrections init'lled/dated</u> | 15. <u>Preamble</u><br>a. name/surname<br><br>b. Sworn/affirmed/ neither?                          | 16. Child details<br>a. ID #/DOB<br>b. reside. address<br>c. guardian<br>d. school name<br>address<br>teacher<br>grade | 17. <u>Content</u><br>Truth vs Lie<br><br>"I know....truth"  | 18. Child Language<br>a. child words<br><br>b. description bracketed? | 19. Adult Language<br><br>a. examples   | 20. Explanatory<br>a. s/ment expl'ng child words?<br><br>b. from whom?               |
| 21. Chronological Order?<br>a. detail prior to crime?<br><br>b. detail after crime?                  | 22. Details of crime<br>a. offender<br>b. place<br>c. elements<br>d. afterwards<br>e. when exactly | f. threats/ inducements<br><br>g. violence during?   | 23. <u>Ending</u><br>a. read to child<br>b. child sign after last word<br>c. ch initial changes<br>d. sworn? | e. parent/guard statement?<br>f. p/g signature?<br>g. date/time/place | h. police officer<br>signature<br>date<br>time<br>place                                     |  |

**ADDENDUM 2: Data Collection Form 2 - Magnification of language variables**

|                                     |  |   |
|-------------------------------------|--|---|
| Home Language of Child:             | Language Statement Spoken in:<br><br>Age of Child: | Language of Written Statement:  |
| Child Words:<br><br>(Variable 18 b) | Meanings Bracketed:<br><br>(Variable 18 c)         | Parent/Caregiver/Police<br><br>Statement Explaining Meaning:<br><br>(Variable 20) |
| Words in One Language:              | Translation Bracketed:                             | Body Language<br><br>to Indicate meaning:   |
| Adult Words: (Variable 19)          |  | Interpreter Details:<br><br>(Variable 12)   |
| Legal Words (Variable 19)           |  |   |

**ADDENDUM 3: Data Collection Form 3 - Magnification of crime event variables**

|                          |                 |                          |                 |                |
|--------------------------|-----------------|--------------------------|-----------------|----------------|
| Age of Child:            | Number of Words | Number of Words          | Number of Words | Total # Words: |
| Setting:                 | Where:<br>Time: | Day/Date:<br>Month/Year: | Who:            |                |
| Initiating Event:        |                 |                          |                 |                |
| Abuse Episode:           | Pre-Rape        | During Rape              | Post-Rape       |                |
| Offender Actions         |                 |                          |                 |                |
| Child Responses:         |                 |                          |                 |                |
| Bribes/Threats:          |                 |                          |                 |                |
| Resolution:              |                 |                          |                 |                |
| Context/Background/Other |                 |                          |                 |                |

**ADDENDUM 4: Eastern Cape police detective units and the numbers of investigators represented from each unit**

| Police Investigation Detective Unit | Number of Police Investigators |
|-------------------------------------|--------------------------------|
| Addo                                | 4                              |
| Adelaide                            | 1                              |
| Alexandria                          | 6                              |
| Aliwal North                        | 2                              |
| Barkly East                         | 1                              |
| Bathurst                            | 1                              |
| Beacon Bay                          | 1                              |
| Bolo                                | 1                              |
| Burgersdorp                         | 1                              |
| Cookhouse                           | 6                              |
| Cradock                             | 6                              |
| Dordrecht                           | 3                              |
| Duncan Village                      | 2                              |
| East London                         | 3                              |
| Elliott                             | 1                              |
| Fort Beaufort                       | 1                              |
| Gonubie                             | 1                              |

|               |    |
|---------------|----|
| Grahamstown   | 6  |
| Jansenville   | 1  |
| Kenton On Sea | 1  |
| Kirkwood      | 1  |
| Klipplaat     | 1  |
| Maletswai     | 3  |
| Middleburg    | 3  |
| Molteno       | 1  |
| Port Alfred   | 1  |
| Queenstown    | 13 |
| Rhodes        | 1  |
| Sea Field     | 1  |
| Somerset East | 4  |
| Sterkstroom   | 3  |
| Steynsburg    | 1  |
| Stutterheim   | 5  |
| Thomas River  | 1  |
| Ugie          | 1  |

**ADDENDUM 5: Statements containing adult words and formal language**

| Age in Years | Adult Words and Formal Language Contained in the Statement          |
|--------------|---|
| 5            | He raped me he inserted...  |
| 5            | Anus vagina   |
| 6            | Penis vagina  |
| 9            | Erected penis penetrated me finished ejaculating                    |
| 5            | Penis vagina  |
| 6            | Penis vagina inserted his penis                                     |
| 3            | Sometime ago  |
| 7            | Penis vagina  |
| 8            | Anus  |
| 10           | Raping penis vagina   |
| 11           | Penetrated me with his erected penis A whitish mucus-like substance |
| 6            | Penis vagina On the day in question I was at my place of residence  |
| 4            | Penis vagina rape   |
| 6            | He instructed anus he warned me the accused<br>I proceeded that way |
| 6            | Forcefully penis raping abandoned me this incident                  |
| 12           | Then did comply he instructed me to                                 |
| 10           | Up to his satisfaction  |
| 8            | On the first occasion penetrating                                   |

|    |  |
|----|--|
| 9  | To accompany him      suspect  |
| 4  | I can differentiate      Residing at      raped me   |
| 6  | Buttocks   |
| 6  | Condom   |
| 7  | Buttock  |
| 6  | To accompany him      as a result      assaulted me      Examination   |
| 5  | Another locality      I was examined      reported this matter<br>on the day in question      denied the allegations |
| 5  | Inserted his penis to my vagina      he instructed me      about this incident                                       |
| 8  | I must clarify      place of residence      the suspect  |
| 3  | Inserted   |
| 8  | Alleged offence      of the said person  |
| 12 | Suspect  |
| 7  | I have reported both incidents   |
| 10 | Suspect      day of the incident   |
| 8  | I then thereafter      he then thereafter  |
| 8  | Instructed   |
| 9  | Defence counsel  |
| 12 | This is all I can declare  |
| 9  | To buy the said items  |



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