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# **Police delivery of the opt-out procedure for children's court evidence: evidence of inadequate language awareness**

## **Abstract**

Drawing on unique observational data from police training with child volunteers, this study evaluates the linguistic patterns used by officers for transmitting complex, legally-binding information to children during the *opt-out* procedure (which determines how children's evidence is presented in court). It is shown that while the officers realise the information is difficult to explain and understand, they lack the skills to monitor and manage their linguistic choices and to respond to the children's needs. Van Lier's (1998) model of levels of language awareness is used to show where the problems arise, and it is proposed that introducing language awareness into police-child interview training could be empowering for officers. With greater control over the impact of their discourse, officers could materially improve the quality of the opt-out procedure delivery.

Key words: Child witnesses, police interviews, discourse, language awareness, law courts

## **1 Introduction**

In England and Wales, witnesses under 18 can choose how their evidence is presented in court, via the *opt-out* procedure. It falls to the police-investigating officer to present two sets of options to children and elicit their decisions. The choices made can have consequences for the later experience of the child and even for the court case as a whole, making it imperative that the procedure is correctly and completely followed.

This article presents an analysis of the spoken interaction between police officers and children in training sessions for the opt-out procedure, and interprets its features through the lens of *language awareness*. In so doing, it takes up the challenge to extend language awareness research from its core focus on language pedagogy, into other areas of professional practice (Cots & Garrett 2018: 18). Van Lier's (1998) theory of levels of language awareness is used to identify what sorts of (meta-)awareness officers need for delivering the opt-out procedure, and to analyse what happened in practice in the data.

This research is, to the author's knowledge, the first to report on the opt-out procedure (a relatively recent legal requirement), and also the first to apply the language awareness model to interactions with children in the legal setting. Most research on police-child witness

interviews has focussed on aspects of language form, such as asking questions appropriately and keeping sentences simple, whereas this study interrogates officers' capacity to reflect more deeply on the dynamics of communication, as shaped by their assumptions about the addressee's needs and knowledge.

Section 2 provides some general background on children's evidence in court and then describes the nature and requirements of the opt-out procedure. Section 3 introduces Van Lier's model of language awareness and formulates research questions to structure the analysis. Section 4 describes the methodology and Section 5 analyses the data with reference to the research questions. Section 6 summarises the findings and offers some suggestions for improving future training.

## **2. The opt-out procedure in England and Wales**

### **2.1 Interviewing child witnesses**

In England and Wales, guidelines on how to interview children have existed for some time (e.g. Home Office & Department of Health, 1992; Home Office, 2002, 2007, 2011), and training is given in how to listen to children and talk in age-appropriate ways (see Aldridge & Wood 1998, Brammer & Cooper (2011), Lamb, Sternberg & Orbach (2002) and Westcott, Kynan & Few (2006) for overviews). However, the training scope is narrow, focussing mostly on language as a formal system, particularly stages of vocabulary and grammatical development. There has been little attention to the development of children's pragmatic awareness, such as the detection of implicit meaning and unwarranted assumptions, features which, in complex interaction, can play a decisive role. Officers are not trained to 'engage' with language (Svalberg 2009:249) in a way that would enable deeper understandings of how their presentation of information shapes the child's responses.

Moreover, officers seem unaware of this gap. In an unpublished survey, the author sought police officers' views about whether a Registered Intermediary should be employed to facilitate their investigative interviews with children. Many responded that they didn't need one as they *[knew] how to talk with children because it is something everyone does*. The first step in developing awareness is acknowledging that there might be a problem; only then can the knowledge gap be identified and bridged (Cots & Garrett 2018: 4).

### **2.2 The provenance of the opt-out procedure**

The 1999 Youth Justice and Criminal Evidence Act (Home Office, 1999) introduced a number of provisions, or ‘Special Measures’, to support under-18s and other vulnerable witnesses towards giving their best quality of evidence in court (Hamlyn, Phelps, Turtle & Sattar 2004; Plotnikoff & Woolfson 2009). The provisions included the removal of wigs and gowns, the use of communication aids and a Registered Intermediary, and two modifications to how evidence was presented. Firstly, the evidence-in-chief (main witness statement) was to be pre-recorded rather than presented live in court. Secondly, for cross-examination, the child could sit behind a screen in court, or else in another room, connected by video-link. Until 2009, there was a presumption (the ‘primary rule’) that all child witnesses of serious crimes would benefit from these adjustments (e.g. Burton, Evans & Sanders, 2007), and video-recording the police investigative interview was the default option, with the alternative not always given much consideration (HMIC, 2014).

However, while these provisions were beneficial to many (Birch & Leng, 2000), a 2009 judicial report (Plotnikoff & Woolfson 2009: 174) noted that, amongst other issues, some children found the small live-link room claustrophobic, while others were upset that they could not be seen by the defendant. Moreover, it was argued (cf. Landstrom, Granhag & Hartwig 2007 and Ridley, Van Rheede & Wilcock, 2015) that while Special Measures may benefit the witness’ wellbeing, pre-recorded evidence might reduce the plausibility of the witness in the eyes of the jury. Furthermore, compulsory use of the video-link violated Article 12 of the 1990 UN Convention on the Rights of the Child, which requires practitioners to involve children in decisions that impact on their lives (Hall 2007: 37). So, in 2009, Section 100 of the Coroners and Justice Act (Home Office, 2009: 61) amended the ‘primary rule’ of visual recording and live link, so that the child could opt out of the Special Measures provisions.

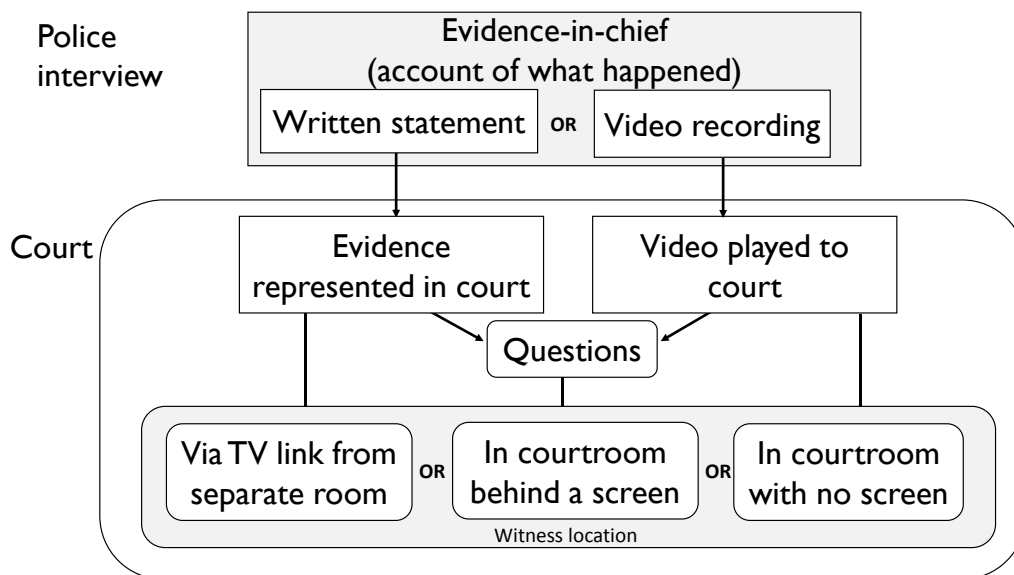
From then on, it became part of the police investigating officer’s role, when preparing to interview children, to determine whether they wanted to opt out of the standard child-witness provisions. The court has to be confident that a child witness has been given this opportunity, and that they fully understand the implications of choices made.

### **2.3 The structure and conduct of the opt-out**

The opt-out procedure has two choice components (shaded in Figure 1). In the first, the child decides how to present their evidence-in-chief. Under Special Measures provision, the evidence is video-recorded by the investigating officer and, subject to authorisation by the Crown Prosecution Service, the recording is presented to the court, meaning that the witness does not

have to give evidence again. The other option is to present the evidence in the standard adult way: an audio recording is made by the police investigating officer, which is then typed up as a written statement. In court, the witness re-tells the account in person.

The second component regards the child’s location during cross-examination. There are three options: speak from a separate room via video link; sit in the courtroom behind a screen that shields the witness from the defendant and public gallery; or sit in the courtroom with no screen, which is how adults typically present their evidence. For both components, the Special Measures provision is the default, and *opting out* refers to deliberately choosing to waive this provision, and present the evidence as an adult would.



**Figure 1: The opt-out procedure**

The interviewing police officer must explain this complex sequence of options in a manner that ensures the child “has enough information for them to come to an informed decision” (Home Office 2011: 18). The decision-making process must be fully documented in a prescribed manner. (cf. Office for Criminal Justice Reform, 2013, §1.13; Home Office 2011:20. 5.9.3). Several cases however have been criticised, by the courts, for not recording appropriate consent, and a report (HMIC 2014: 43) noted that police officers didn’t fully consider the implication of the opt-out procedure for the quality of evidence. In line with this, the author’s unpublished survey revealed that investigative officers feel burdened by the additional demands of the opt-out procedure. The evidence and discussion below will

demonstrate why this is, and suggest how increasing the police officers' engagement with language awareness would develop them as effective communicators and enhance their confidence in such interactions (cf. Andrews 2001).

#### **2.4 Essential requirements for the effective achievement of the opt-out procedures**

The police interview guidelines, *Achieving Best Evidence*, note that “to ensure that the child witness is able to express an informed view, it is important that the explanation of the individual Special Measures is clear” (Home Office, 2011:20: 59.6). But what would that entail? Figure 2 presents a schema of the elements required (for clarity, the officer is referred to as *he* and the child as *she*). Other than that components A and B must come first, the ordering is not vital, but all elements must be present. Component A alerts the child to the need to attend to this particular information: not everything said to them has this status. B ensures the child realises that the information anticipates a required action: the child should then be more attentive to what is said, and ask questions about it. When C is presented, the link with D must be made clear, since the consequences of the choices are not immediate, and require self-projection into a future experience. The options in E also have consequences, and though they are not specified in the opt-out (see section 5.2.1), they must be appreciated. Finally, the officer must formally ask for a choice on each issue and the child must select one (F).

##### **Before the options are presented,**

- A. The officer must inform the child that he has something important to say, and that the child will need to understand it.
- B. The officer must give the child warning that she will have to make some choices.

##### **Constituting the first element of the opt-out,**

- C. The two options for presenting the evidence-in-chief must be clearly laid out as:
  - i) on video
  - ii) as a written statement

##### **Building on C,**

- D. The consequences of each choice (i) and (ii) must be clearly indicated as:
  - i) video evidence will be played on a TV in the court
  - ii) the information in a written statement must be re-presented verbally to the court.

##### **Constituting the second element of the opt-out,**

E. The three options for speaking to the court must be clearly laid out as:

- i) via a TV link, from another room
- ii) in court, sitting behind a screen
- iii) in court, without a screen

**Constituting the decision phases,**

F. Each choice point must be presented and responded to:

- i) choice between Ci and Cii must be offered
- ii) either Ci or Cii must be selected
- iii) choice between Ei, Eii and Eiii must be offered
- iv) Ei, Eii or Eiii must be selected.

**Figure 2: Essential elements of opt-out procedure delivery**

In section 5, data collected from police officers during their training to deliver the opt-out procedure is evaluated but next, section 3 introduces the theoretical basis for the analyses, and the research questions taken to the data.

### **3. Language awareness as a conceptual basis for evaluating the delivery of the opt-out**

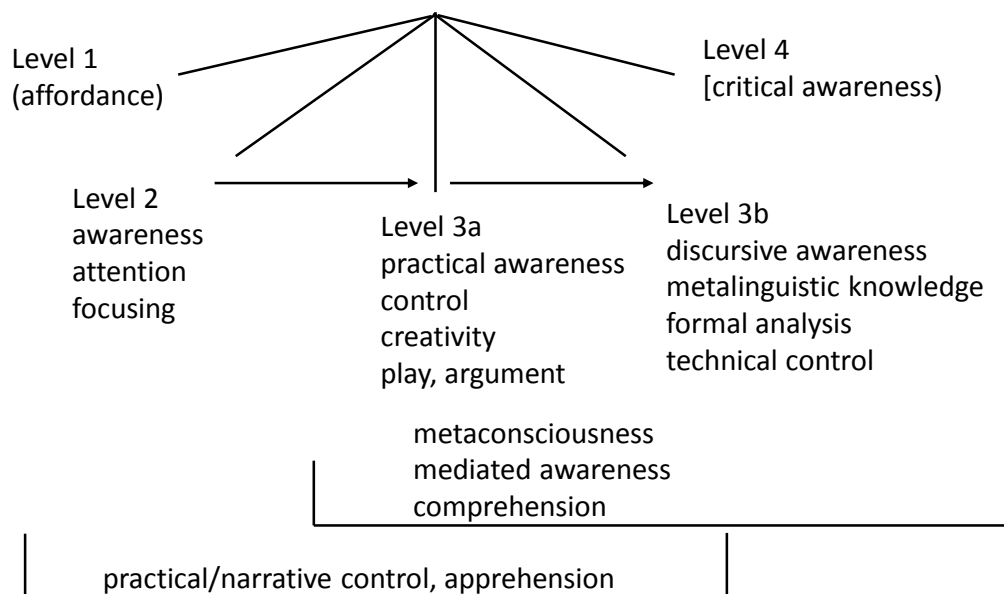
#### **3.1 Why language awareness?**

Carter's (2003: 64) definition of language awareness as "the development in learners of an enhanced consciousness of and sensitivity to the forms and functions of the language," makes clear that it is a concept centred on education, where it plays a cognitive and affective role in enhancing the capacity to 'notice' how language operates; 'consciousness raising' stimulates motivation and promotes inductive learning (p.65). However, while language learners are obvious beneficiaries of increased alertness to how modifications to their use of forms can transform the efficacy of their output, people in many other contexts can also benefit from developing deeper insights into their use of language, and metalinguistic skills are a major means for achieving this (Cots 2013: 3).

It will be argued that police interviewers need to transcend the role of simple language user when they are explaining the opt-out procedure to ensure that their language use is apposite and appropriate. They need to notice what they are saying and how it is being received by the child. They also need to read between the lines of the child's own language, and infer what information the child still requires. For this reason, language awareness is an appropriate choice for analysing their discourse.

### 3.2 Van Lier's model of language awareness

Van Lier (1998) identifies four levels of language awareness (Figure 3) which, he argues, jointly furnish the “mature language user” with the capacity for “the skilful control of creativity and convention” and “the perceptual energy devoted to paying attention to one’s own and others’ language use” (p.135).



**Figure 3: Levels of language awareness (van Lier 1998: 136)**

In Van Lier's model, at Level 1, language is a resource available for use, but not reflected upon. At Level 2, the user is aware of the role of language and can pay attention to it, but does not build on this basic awareness. Level 3a entails the capacity to manipulate the language being used. At Level 3b, speakers are able to talk about their use of language with some insight. Level 4 adds the capacity to critically evaluate and reflect on the effectiveness of language use for its intended purpose in the context of a particular social/communicative event. This social/contextual perspective contrasts with more traditional cognitive models of language awareness (e.g. Schmidt 1995), making this model particularly apt for analysing the police data where social/contextual constraints and outcomes must be accounted for to achieve best practice and/or consider possible improvements. Through realisations of these levels in the data, it is argued that Level 4 constraints/outcomes need to be brought to the attention (Level



2) of the police officers, who also need to learn how to adapt the way they interact (Level 3a) so that they can reflect upon and talk about the constraints/outcomes as necessary (Level 3b).

### **3.3 Research questions**

To evaluate the delivery of the opt-out procedure, the following research questions are addressed in section 5.

*1. How effectively was the opt-out procedure delivered?*

Answering this question entails identifying the necessary components of the procedure, and then analysing each officer's delivery to establish if they are present.

*2. What characterised the main shortcomings in the delivery?*

This question, which amounts to asking why the procedure was not presented optimally, is addressed by critically evaluating how the officers conceptualised the task, and why they did not meet their own avowed intentions for delivery.

*3. What levels of language awareness did the officers display?*

The officers' discourse is analysed in relation to Van Lier's (1998) model of levels of language awareness, to establish the cause of the delivery shortfalls. This account leads to the proposals in section 6, for improving future delivery of the opt-out through enhanced language awareness.

### **4. Data and method**

For reasons of confidentiality, the opt-out phase of real child-witness interviews cannot be observed for research purposes. Instead, the data were visually recorded, at a UK Police Headquarters, during an advanced investigative interview training course for police officers experienced in child protection, which incorporated a day's instruction on the opt-out procedure. Fourteen police officers participated, along with fourteen child volunteers aged 10-14 years, each accompanied by an adult. The research was authorised by the Police and University ethics committees.

Each child and police officer sat at a round table, and, for some, a laptop was placed in front of the child, to display images of the court and its personnel. The children were interviewed about a recent personal incident, such as their last visit to the dentist, and, beforehand, the police officer explained the opt-out procedure to the child. The officers used various techniques for presenting this information, including images on a laptop, paper handouts, partial scripts and extemporisation. The trainers were interested in establishing which materials were most effective, and particularly whether a combined visual and verbal presentation would facilitate

the child’s understanding, as has been found in other contexts including language learning (e.g. Hattie 2009, Hattie & Yates 2014, Kress, Ogborn & Martins, 1998).

Although differences in the efficacy of the various approaches were observed, the analysis below will not include a detailed critical comparison of these support materials, since they were essentially experimental, transient and local to that force. Rather, the focus will be on how the officers communicated with the children through, or in spite of, whatever resources they used.

The training interviews lasted between 8 and 18 minutes (mean length, 13 minutes). They were transcribed using basic principles of conversation analysis, rendering transcripts of between 723 and 2564 words (mean length, 1572 words). The transcripts were systematically examined for the following features relevant to the research questions (RQs):

- a) Attempts to deliver the components A to F of the opt-out procedure as laid out in Figure 2 (RQ1).
- b) Indications of the effectiveness of the delivery of those components, as evidenced by the linguistic content and/or the child’s response (RQs1&2).
- c) Evidence of the level of language awareness associated with the component delivery, its build-up and aftermath (RQ3).

## 5. Results and Discussion

### 5.1 How effectively was the opt-out procedure delivered?

The transcripts were coded for the elements in Figure 2, and their occurrence is presented in Table 1, where the numerals down a column indicate the order of presentation and a dash means that the component was not presented. Numerals in square brackets represent a partial presentation. If an element was presented more than once, the first instance is listed.

**Table 1: Presentation of essential components**

Component	Police officer (transcript no)													
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
A: Something important to tell you, that you must understand	1	[1]	[1]	-	-	-	-	[1]	[1]	-	-	-	-	-
B. Warning of decisions to make before information is given	-	-	-	-	[1]	-	-	-	-	-	-	-	-	-

C: Two options for giving evidence:														
i) videoed	2	2	2	1	2	1	1	2	2	1	1	1	1	2
ii) written	3	3	5	2	3	4	2	5	4	2	2	2	2	1
D: Presentation of evidence in court:														
i) videoed → via TV screen	4	4	3	-	-	2	-	3	3	-	-	[3]	3	-
ii) written → re-presented verbally	7	6	-	-	-	-	-	6	-	-	-	-	-	3
E: Three options answering questions in court:														
i) via TV link from another room	6	5	4	5	4	3	3	4	6	3	5	4	5	-
ii) in court, behind a screen	[5]	7	6	6	5	5	4	7	5	4	6	-	4	4
iii) in court without a screen	-	8	7	7	6	6	5	8	-	5	7	[7]	-	-
F: Decisions:														
i) choice of Ci or Cii offered	8	11	-	3	7	7	-	9	-	6	3	5	-	5
ii) choice of Ci or Cii made	9	12	-	4	8	8	-	11	-	7	4	6	-	6
iii) choice of Ei, Eii or Eiii offered	[10]	9	-	8	9	-	6	10	[7]	8	8	-	6	-
iv) choice of Ei, Eii or Eiii made	[11]	10	-	9	-	-	7	-	[8]	9	9	-	7	-
<b>No. of omitted elements</b>	<b>2</b>	<b>1</b>	<b>6</b>	<b>4</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>2</b>	<b>5</b>	<b>4</b>	<b>4</b>	<b>6</b>	<b>6</b>	<b>7</b>

Given that all components in Figure 2/Table 1 are essential for the opt-out procedure to be effectively communicated, these training exercises were clearly not successful. No officer presented all the components, and several omitted many. Why would this happen? The discussion below explores possible reasons by addressing RQ2.

## 5.2 What characterised the main shortcomings in the delivery?

Four characteristics are considered below: failure to assess the pragmatic entailments of the choices (5.2.1); biases in the approach to presentation (5.2.2); conflict with a secondary agenda (5.2.3); and limitations in language awareness on the part of the officers (addressed in the context of answering RQ3 in section 5.3).

### 5.2.1 Absence of formal consideration of entailments of choices

The inclusion of all components constituting the opt-out procedure may not seem vital to officers, unless they have a holistic conceptualisation of how the components relate to each other, and why each is needed. In turn, this requires an appreciation of the explicit or implicit entailments of each component. It is the officer's job to map out these relationships, because children are not in a strong position to make inferences for themselves. Firstly, Kintsch (1988) points out that anticipating possible futures requires sufficient existing relevant knowledge to integrate the new information into a suitable context. Children may lack this life-experience when faced with a novel scenario. In Example 1, for instance, the child cannot build new knowledge about court proceedings on reliable existing knowledge about what a court is.

#### **Example 1 (transcript/officer 1) [C = child, PO = Police officer]**

PO: Do you know what a court is?

C: No

PO: You haven't heard of court? ...it's where people go when they've done something wrong .....: have you heard of that?'

C: (Shakes his head firmly) No

Secondly, the pre-frontal cortex, which is responsible for advanced reasoning, is not fully developed until early adulthood (Johnson, Blum & Giedd, 2009). If children lack the full cognitive capability to assess future events and risk, they must be guided towards understanding the consequences of their decisions. In turn, police officers must be able to imagine what the child might believe and know at every stage of the process, and modify their explanations accordingly.

By way of illustration, Table 2 lays out potential entailments for the different elements of choice in the opt-out procedure. These are possible corollaries that, were the child to think of them, might influence the decision made. The instances are selectively exemplified and discussed below.

#### **Table 2: Example entailments**

Key: P = Police officer; C = child; PT = parent; ExN = see Example *N* below

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Choice	Entailment	Transcripts mentioning it and who does so
Evidence-in-chief is videoed	I only have to tell the story once	2P,8P
	I only get one go at telling the story (what if I forget or misremember something?)	
	I'll have to be filmed/watch myself on film (could be embarrassing or nerve-racking)	11P (Ex2)
Evidence-in-chief is written	The officer might write it up in a way that distorts the story (will I be able to say so?)	
	I'll have to remember the details a long time in the future (will I be able to see/hear my written statement as a reminder?)	
Address court via TV link	I'll feel cut off, without a sense of the courtroom activities, unable to see most of it.	3P,12P
	Who will be able to see me? Can I be heard and can I hear?	1C (Ex3), 7C (Ex4); 8P, 12P, 13P
	The technology might be unreliable (might not be able to hear properly; camera on barristers might not be aimed properly)	
	The room might be small, stuffy, etc	
	It would save me going into the courtroom	1P (Ex3), 12P, 14P
	Will I be on my own? Who will explain what to do when?	8P, 12C (Ex.5)
Address court from behind screen	Who will and won't be able to see me? Who will I be able to see? How will I get in and out?	2P, 3P, 4P, 5P, 6P, 7P, 7C, 9C
	Does being behind a screen make me safe?	6P, 6P (Ex6), 7P, 7C
	What/whom am I hiding from? Why is there a difference between not being <i>seen</i> by everyone if I can still be <i>heard</i> by everyone? (Who is the defendant going to be? How will I feel about seeing/not seeing them?)	(Ex4), 9P, 9(PT)
Address court without a screen	Why is this option offered? Why might it be a better choice for me?	7C (Ex4)
	Would this be much more frightening than the other options?	2(PT), 5P, 8P

**Example 2 (transcript/officer 11)**

- C: I think I would (.0) uhm I would (.) I want someone to write it down because I I am a bit nervous on camera to be honest
- PO: Are you
- C: yeah
- PO: what are you nervous about on camera
- C: I don't know it is just (.) I don't know I've just got a bit of stage fright that's all
- PO: stage frig[ht]
- C: [Yeah]
- PO: stage fright that's not good
- C: yeah
- PO: well we'll go through this anyway ok

**Example 3 (transcript/officer 1) (bold indicates emphasis)**

- PO: they're not in the court they're in a room next door
- C: cos they don't wanna be seen
- PO: yes cos well they might they **would** be seen but they wouldn't have to go into the court
- C: aaha
- PO: they wouldn't have to stand in front of those people cos that can be quite difficult if you have to stand in front of those people (points at image) and you have to say those things

**Example 4 (transcript/officer 7)**

- PO: so which one would you prefer to do
- C: I I don't like I am not sure which one I would choose. It depends on like the thing I am talking about. If it is something like not as serious then like everyone could see me but if it was something like really serious I wouldn't like everybody to see me so I'd probably get the screen if it was really serious [...] Uhm like if I was behind the screen I would be there so if it was something like really serious like the defendant would not be able to see me so he would not know who I was

PO: yeah

C: so if it happened to a lot of people um what they did then if it was less of a serious thing I would probably go in the courtroom and if it was in between I would go in a different room because people could still see me but I am more like in a safer area

PO: yeah

C: cause they are not in the same room as me

**Example 5 (transcript/officer 12)**

PO: in a separate room alright

C: and I think the judge goes behind and asks some questions

**Example 6 (transcript/officer 6)**

C: so where's the witness?

PO: There look (points to picture) so that would be you and that would be whoever was going to go with you

C: yeah, but where's the witness, I mean, no no not the witness, you know, the

PO: the person that's, that's called the defendant, the person that's

C: is he back there? Or she

PO: No, he's there look (points on picture) so he'd be standing behind you

C: oh

Table 2 shows that the main entailments mentioned by officers related to who would be able to see the child in a separate room or behind the screen, with three children also alert to this issue (Examples 3, 4, 6). But the other entailments were only sparsely represented. Only one officer, for example, mentioned that the child would not be alone in the separate room.

Few children could project themselves into a future scene and manipulate the implications in determining their choice (e.g. Examples 4 and 6). Others used reasoning to negotiate their choices, but not always with a mature logic. In Example 2, the child prefers not to speak into a camera because of nervousness, without realising that speaking live in court is likely to be at least as nerve-racking. The child in Example 4 considers the separate room option a halfway house between giving evidence in open court and giving it from behind a screen. This seems to be because she realises that on a TV link her face would be visible to all, whereas behind a

screen it would not. In contrast, the child in Example 3 is corrected by the officer for assuming that she will not be visible over the TV link.

In a few instances, the children reveal significant misconceptions. In Example 4 the child reasons that the offence will be less serious if several people have been victims of it, and also supposes that being behind the screen will prevent the defendant from knowing her identity. In Example 5 the child believes that the judge will come out to the separate room. Otherwise, the children say very little that would surface their misapprehensions, though it would be unsafe to assume they had none; rather, it demonstrates the importance of getting the children talking.

Of course, a training situation differs from real life. The assumption of the child in Example 4, that the defendant would not know her identity if she was hidden from view, may derive from the artificiality of the situation. A child interviewed about a real offence would typically have an existing relationship with the accused, and would be much more sensitive to the impact of giving evidence against them. The thought processes that could, and should, lead to the choices are therefore difficult to replicate with volunteers in a training situation.

However, it could be argued that children in the training context would be more likely, rather than less, to engage in the thought experiments that surface the consequences of different choices and reveal the risks associated with a poor understanding of the situation. A real child witness, already carrying the burden of a traumatic story, might well be plagued by concerns relating to the consequences of giving evidence at all, and be less able to think about the consequences associated with *how* it is given. This makes it noteworthy that, overall, the volunteer children did not say much, and highlights the need for scrutiny of the dynamics of the discourse and for the officer to think about the options from the child's perspective.

### **5.2.2 Biases in the approach to presentation**

Previous research (e.g. Lamb, Sternberg & Orbach, 2002; Westcott, Kynan & Few, 2006) found that police officers can be suggestive, encouraging witnesses to give answers that reflect their own values. With the opt-out procedure, there are at least three reasons why officers might exert influence, consciously or unwittingly. Firstly, they may believe that the child needs assistance in coming to the best decision. Secondly, they may want to avoid the procedure taking too long. Thirdly, they may have personal views about what is best for the child. The last of these merits particular discussion.

As noted earlier, videoing the evidence-in-chief and speaking to the court via TV-link were default procedures under Special Measures until 2009. It is, then, consistent with both previous



practice and the intentions of Special Measures that Officer 8 should describe the video-recording as *a good thing* because *you only have to tell your story in detail once*. Officer 1 refers to standing in front of people in court as *quite difficult*. Whether such comments compromise the child's free and voluntary choice is a matter for debate. Insofar as the options are not, in fact, all equally weighted in terms of potential benefit, it is perhaps reasonable to direct the child towards the default response. This perspective is reinforced, of course, by the term *opt-out* which refers to declining to take advantage of the Special Measures provisions. Opting out, which exposes the child to most potential risk, should, arguably, be the most difficult option to select unintentionally.

### **5.2.3 Conflicting secondary agenda: building rapport**

The unfamiliarity of a police interview and its setting, along with the emotional impact of the events experienced, risk leaving children unable or unwilling to talk freely. For this reason, rapport-building is recommended. Carried out ahead of the main interview, its aim is to get the children relaxed and accustomed to speaking, to facilitate the delivery of their testimony (Home Office, 2011). The ABE guidelines (Home Office, 2011:70) suggest police interviewers build rapport by “briefly asking some neutral questions not related to the event which can be answered positively and, therefore, create a positive mood.”

However, in this data, a conflict arose between the need to build rapport and explain the opt-out procedure, with the former superimposed on the latter, to the detriment of both. For instance, in Example 7, the officer recaps the child's previous summary of the two choices for evidence-in-chief. Instead of then informing the child of the options for presenting the evidence to the court, he asks the child for ideas (though it is the officer that provides the answer). While good practice for rapport-building, it potentially undermines the child's capacity to understand that there are exactly two, fully prescribed, options, not least because the exchange does not result in any mention of how the written statement would be presented.

#### **Example 7 (transcript/officer 1)**

PO: You know you said there's two ways to speak to the policeman (.) videos and written down

C: Yeah (folds arms leans slightly towards screen)

PO: what d'you think we could do with that video

- C: (considers – hand on chin, crossed legs)  
PO: can we play it to the court (.) to tell them what you said  
C: yeah yeah (nods)  
PO: so we could play that video (.) to tell the court what you have said

Other instances included chatty comments about the slowness of slide animations, and the use of a picture of the courtroom to quiz the child about the roles of personnel, while also trying to explain the options for evidence presentation.

The legal requirements of the opt-out procedure are essentially incompatible with simultaneous rapport-building. In the latter, the aim is to give the child full rein to reply in any desired way, with the officer extemporising questions likely to spark a response. In the former, specific information must be conveyed, prescribed questions must be asked, and answers clearly given. The required replies are from a closed set.

Being aware of this conflict of agendas and anticipating the impact would encourage officers to establish rapport *before* embarking on the opt-out procedure. This could increase the likelihood of the children admitting to not understanding something and asking for clarification, and increase their confidence about interrogating the options and their consequences.

### **5.3 What levels of language awareness did the officers display?**

The officers were certainly aware that they must use language appropriately to achieve the required outcome, and their Level 2 awareness is characterised by the use of words like *tell* and *explain*, pointing to the computer screen to hold the child's attention, and acknowledging that the child was not familiar with certain terms. Often, such acknowledgement led to Level 3a (practical awareness): recognising ambiguity and correcting speech errors (Example 8), acknowledging to the children the difficulties of explaining the ideas (Example 9), glossing words in a more child-friendly form (Example 10) and signalling when they thought a term would be unfamiliar (Example 11).

#### **Example 8 (transcript/officer 5)**

PO: So not everyone would be able to hear, sorry, see John

**Example 9 (transcript/officer 6)**

PO: if there's anything you don't understand, just tell me, cause is it quite hard to explain

**Example 10 (transcript/officer 2)**

PO: we call it evidence but all it really is is it's your story about what's happened, ok?

**Example 11 (transcript/officer 3)**

PO: something which is called opt-out (.) Ok I know that probably won't mean much to you

While Level 2 language awareness enabled the officers to admit to talking too much of the time (Example 12), they were not establishing why they were doing so, nor intervening (Level 3 activities). Typically, Level 3 activities such as giving the children opportunities to speak more were missed. Terms were explained in confusing or inaccurate ways and poor word choices led to stumbles and unclear explanations. At Level 3b (discursive awareness) speakers can talk about their use of language with some insight. Example 13 is one of the few instances of a Level 3b intervention.

**Example 12 (transcript/ officer 8)**

PO: I know I'm going on and I'm sorry I am

**Example 13 (transcript/officer 7)**

PO: That's the prosecuting lawyer, that's a grown-up word isn't it!

Level 4 awareness was not evident in the data. It would have added critical evaluation, and reflection on the effectiveness of the language for its intended purpose, and awareness of the power dynamic (Van Lier 1995: xi).

More extensive evidence that the officers relied largely on Levels 2 and 3a awareness is offered in the discussion below, which considers how they constructed the discourse, including how well they could take the child's perspective. (5.3.1), their choices of vocabulary (5.3.2) and grammar (5.3.3).

### 5.3.1 The officers' construction of the discourse

The officers all presented lengthy monologues (Officer 8's first turn was an uninterrupted 612 words, Officer 7's 298), interspersed with notional comprehension checks like *okay?* *right?* and *do you understand that bit?* to which the children generally gave confirmative minimal responses. Lengthy input is challenging for children's concentration and memory capacity (Quas, Malloy & Schaaf, 2007), and yet the children rarely interrupted, which probably reflected the asymmetrical power relationship (Heffer, 2018). The officers appeared to overlook both the children's inability to interrupt, and their own responsibility to properly check understanding (Level 3a awareness). Rather, some delivered the opt-out procedure as a ritualised communicative event, according to which, as long as the words were said correctly, the event had been delivered. They seemed to prioritise form over the broader intended function: they transmitted the facts rather than "participating in the process" (Van Lier, 1998: 128). In Example 14, the officer ignores the child's introduction of new information, and returns to the script, even though responding could have created an opportunity to align with the child's understanding of the topic.

#### Example 14 (Transcript/officer 3)

- C: My uncle had to go to court  
PO: Did he? (surprised sound rising intonation)  
C: =mm (nods)  
PO: When I said about the screens [...]

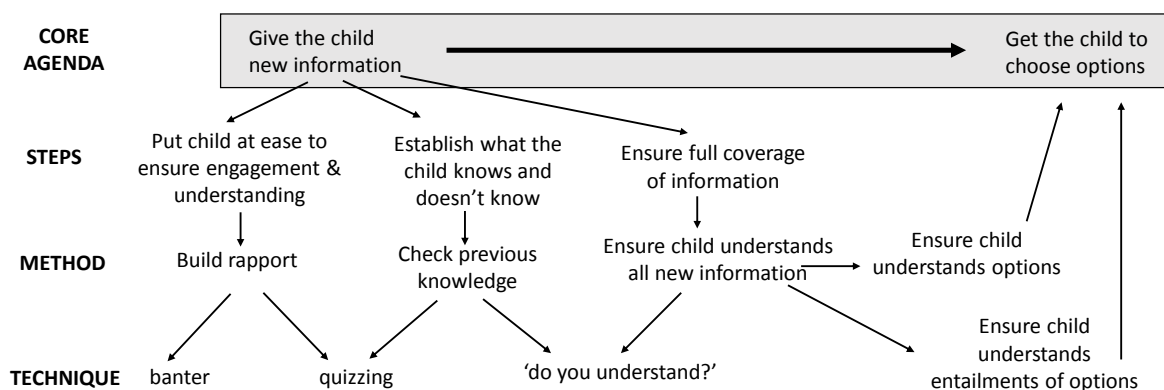
The officers' discourse behaviours tended to undermine their avowed intentions. They told the children that they wanted them to interact, ask questions and say if they didn't understand, but their delivery minimised the children's opportunities to do so.

Between them, the 14 officers asked if the children understood, or said that it was important they did, on 41 occasions. With greater language awareness, they might have wondered if those gestures were creating adequate opportunity for the children to admit to not understanding. Young children typically answer *yes* to adult questions (Hayes, Stewart & McElwee, 2017). With Level 4 language awareness, the officers might have asked themselves, *what is this child likely to say if I ask "do you understand?", and why?* They might have wondered if the very frequency of their asking indexed how confusing they perceived their own explanation to be. It is noteworthy that no officer asked the child to re-explain the opt-out information to

demonstrate comprehension, even though this would be the most direct way to identify problems. Perhaps they sensed that the children had not, in fact, understood as much as they hoped. A measure of success in a more language aware approach would be that officers had greater confidence that their explanations were indeed adequate for the child willingly and ably to respond to such an invitation.

Turning now to how the complex content of the opt-out was managed in the discourse, Figure 4 lays out the different things that the officers had to achieve simultaneously. While the core agenda appears simple, the route involves a number of steps and methods that could upset the process.

Firstly, in the absence of preceding rapport-building, in order to give the child the new information, the officer had to undertake three steps simultaneously: put the child at ease, establish what the child already knew, and deliver the information that the child didn't already know. We have already seen that there is a potential conflict between rapport-building and the other tasks, and Figure 4 reveals part of why that is. Two techniques, quizzing and comprehension-checking, are each motivated by more than one method.



**Figure 4: Officers' communicative tasks in the opt-out procedure**

The child is quizzed both to build rapport (e.g. *Can you remember my name?*) and to establish existing knowledge (e.g. *Do you know what evidence is?*). In the former, the child's answer and the officer's onward response are immaterial. But in the latter, the child's answer is an important piece of information that should shape the presentation of the core content. The officer must somehow hold in mind this difference between the purpose and status of the

questions and attend differently to the answers. That requires a sustained engagement of language awareness at (at least) Level 3a.

Similarly, the checking of understanding is triggered in two ways. If the officer asks: *Do you understand what a jury does?* the answers *yes* and *no* are equally acceptable, since the question regards information about knowledge. Not so with the superficially similar question: *Do you understand what I just said?*, where answering anything other than *yes* could imply a negative evaluation of the officer's competence or the child's intelligence or attentiveness. Officers need Level 4 awareness, including a recognition of the social challenges for a child (-power) interacting with an officer (+power), both to appreciate this difference and to modify their language towards eliciting an honest answer in the latter case.

Secondly, as we have seen, to secure legitimate choices, the officer must ensure the child not only *understands* the options but also *realises what they entail* now and later (Home Office, 2011: 20: 5,9,5). Noticing (Level 2) is necessary, but not sufficient if the child is to be assisted towards appropriate decisions. The child must be guided to, and beyond, explicit entailments such as that information in a written statement will be re-presented in court, on to the more sophisticated, unspoken entailments, like the need to remember the details for many months, and the likelihood of feeling nervous when standing in the courtroom. Such considerations (see Table 2) can be coaxed into view if the choices, in their contexts, are fully thought through by the child. Higher levels of language awareness in officers would increase the likelihood of that happening. For example, with Level 3b awareness, officers could ask and answer the question, *what is this child likely to think and reply, if I say that?* Level 4 awareness would enable them to interrogate their discourse to pinpoint what exactly was triggering a given response.

### **5.3.2 The officers' choice of vocabulary**

Adjustments need to be made for children's limited knowledge, experience, vocabulary and cognitive development. But this can generate a paradox in the legal context. Unless very carefully managed, simplified explanations can undermine legally-binding acts or give the wrong impression. For example, describing the court as *where you go if you've done something wrong* (Officer 1) is not only inaccurate but inappropriate when the child is being prepared to go to court. Officer 1 also explains the public gallery as *just the people who sit and listen to what's happened*, and then the jury as *twelve members of the public just ordinary people so they just sit there listening to everything happening in court*. Navigating the narrow path between legal precision and child comprehensibility requires alertness to the way the child

responds to the input, and to which linguistic choice best aligns full understanding with accuracy.

The data illustrate some Level 3a awareness of the differences between officers' own and the children's vocabulary knowledge. Officer 4 says, '*defendant*' it is a long posh word. Officer 9 is more proactive (Level 3b), saying *We should probably change that word because that's quite a grown-up word isn't it?* On the other hand, the officers showed little ability to see how their approach for checking vocabulary knowledge might come across to the child (Level 3b) For instance, *I know that won't mean much to you* (Officer 3) is rather negative and disempowering, as is Officer 1's incredulity in Example 1.

Language awareness on the part of police officers is paramount for monitoring ambiguity, so that terms are clear and accurate (Battin, Ceci & Lust 2012: 168). In trying to mediate between technical vocabulary and what the child will understand, the officer must engage in a sort of diglossia, and this requires alertness to potential traps. The most striking example in the data is the term *screen*. Children are likely to know the word in relation to image projection (e.g. television or computer screen), and, indeed, the officers used it to refer to the presentation of the videoed evidence and of the TV-link from a separate room, as well as to images displayed on the laptop. However, *screen* was also used for the barrier that prevents some people in the courtroom from seeing the witness. Thus, even in the discourse of one officer, *screen* was sometimes a tool of visibility and sometimes of invisibility (Examples 15 and 16).

#### **Example 15 (Transcript/officer 3)**

PO: They'd be able to see you on this **screen**

#### **Example 16 (Transcript/officer 3)**

PO: But only the judge (pointing) and these people here (pointing) would be able to see you (.) because (.) what we would do is we'd put **screens** up (.) do you know what I mean by **screens**?

Across the dataset, *screen* was used 63 times by the officers to refer to a barrier in the court, 28 times for a TV screen, and twice for a laptop screen. Meanwhile, Officer 8's comparison of the screen to shower curtains (Example 17) is fraught with potential associations of over-exposure and vulnerability, particularly inappropriate in a sexual abuse case.

### **Example 17 (Transcript/officer 8)**

PO: if you're feeling nervous about all these people looking at you we can put screens around you like, you know like when you're in the shower and you pull the shower curtain across and nobody can see in

Level 3a awareness would alert the officers to the advisability of using different terms for each meaning of *screen*. Level 4's critical awareness would let them track how appropriate their use of a term is in context and enable them to select and test appropriate and consistent modifications. The same applies to other problematic vocabulary choices. For example, several terms were used for the options available, including *way*, and *choice*. *Story* was used to refer to the child's evidence, even though for children the word resonates with frames of make-believe (Goffman 1974) and possibly also lying (e.g. 'telling stories').

### **5.3.3 The officers' grammatical choices**

Greater sensitivity was also needed towards the very subtle shades of meaning imparted by certain grammatical choices. Most strikingly, the officers often used conditional modals (*may*, *might*) for future certainty rather than future possibility, e.g. *you might be asked questions* (Officer 3); *these two people might just want to check a few things* (Officer 8); *there may be people who will ask you questions* (Officer 6). *May* and *might* here are probably devices of cognitive distancing, reducing the sense of threat. But this interpretation is only pragmatically accessible to those who know that the event is inevitable (i.e. the officers and worldly-wise adults). Much as with the subtle variations on the meaning of *we* (Handford 2014), the officers would probably not recognise fine semantic distinctions unless brought to their attention. However, once aware of them, they would be more able to notice them again (Level 2), control their usage (Level 3a), analyse them (level 3b) and finally work out the impact of different possible usages (Level 4).

## **6. Conclusion and recommendations**

Three research questions were posed in this article. To the first, *How effectively was the opt-out procedure delivered?* the answer (section 5.1) amounts to *not very*, for the information necessary for the children to make informed decisions was not reliably given (Table 1). The second question was, *What characterised the main shortcomings in the delivery?* Three structural features were identified in section 5.2. Firstly, the officers'



presentations of the information failed to point the children towards entailments of the information that were vital for making an informed choice (Table 2). Secondly, the officers expressed biases in relation to the choices the children should make. Although probably protective of the children's interests, this influence appeared to be unconscious, and it would undermine the legal expectation of fully informed choices by the children. Thirdly, the officers were trying to manage the competing agendas of the opt-out procedure and rapport-building, with some techniques used for both purposes.

Regarding the question *What levels of language awareness did the officers display?* it was demonstrated in 5.3 that the officers' construction of the discourse, lexical and grammatical choices rarely exceeded Van Lier's Level 3a. Yet Levels 3b and 4 (discursive awareness, metalinguistic knowledge, formal analysis, technical control or critical awareness; see Figure 3) were needed for meeting the children where they were, and leading them to a full understanding of the opt-out procedure. The law places a considerable burden on the investigating police officers, in requiring that they inform child witnesses of their right to choose how their evidence is presented, and elicit decisions from them. Successful delivery of the opt-out procedure demands more than familiarity with its content and general training in how to talk to children. Officers need high levels of language awareness to notice, track, critically evaluate and modify their linguistic usage, if they are to ensure the discourse favours the needs of the child and the imperatives of the procedure.

What recommendations can be made for future practice? There are two potential routes. The 'easy' route would introduce additional support materials and methods. For example, the entire opt-out procedure could be captured in a high-quality animated film, where the different scenarios are described and illustrated, the decision points made fully clear, and the currently unspoken entailments of the choices more directly demonstrated. Alternatively, the officers could be given a script that includes carefully thought out explanations of terms and avoids confusing vocabulary choices. Or an approved list of terms and definitions could be drawn up, for officers to use when extemporising. Finally, there could be a formal requirement that rapport-building is achieved before the opt-out procedure begins.

These are all good ideas, but they are limited in their capacity to break through the challenges, and they could even reduce the officers' alertness to the situation on the ground. Each child is different, each case is different, and the trajectory of the rapport-building element will set up each onward conversation differently. Each iteration of the procedure will, if it is

functioning properly, throw up different questions and evidence of misunderstanding. No formulaic solution can be flexible enough to suit every situation.

The more imaginative and radical solution is to train officers into higher levels of language awareness, giving them the skills, insights and confidence to use their own words to explain to each child what that particular child needs to be told, in the most appropriate manner; and to listen and react flexibly and creatively to the child's responses. Developing such language awareness would require a significant time commitment from officers, whether in a training environment, self-study, or both. Training materials for police investigating officers specifically aimed at raising their language awareness could offer an effective entry point. Such learning would be eminently transferable: to other vulnerable witnesses, to the public at large, to interactions with colleagues, and into everyday life beyond work. For these reasons, a recommendation of this study is that the feasibility of using Van Lier's levels of language awareness model for officer training be explored in further research.

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