

Report for the Royal Commission into
Institutional Responses to Child Sexual Abuse

AUGUST 2016

AN EVALUATION OF HOW EVIDENCE IS ELICITED FROM COMPLAINANTS OF CHILD SEXUAL ABUSE

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Powell, M., Westera, N., Goodman-Delahunty, J. and Pichler, A. S. (2016). *An evaluation of how evidence is elicited from complainants of child sexual abuse*. Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse.

ISBN 978-1-925289-71-8

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Published date

August 2016



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Preface

On Friday, 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations.

The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond where child sexual abuse has occurred?

5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within themes five and six. The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program visit

www.childabuseroyalcommission.gov.au/research.

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Acknowledgements

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned and funded this research project, which the following researchers carried out.

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Glossary

Acronyms and initials

Acronym/Initial	
ANOVA	Analysis of variance
AV link	Audio-visual link
CCTV	Closed-circuit television
CWS	Child Witness Service
DVD	Digital versatile disc – an optical disc used to store digital data
<i>M</i>	Mean
NSW	New South Wales
NZ	New Zealand
ODPP	Office of the Director of Public Prosecutions
SARC	Sexual Assault Review Committee
<i>SD</i>	Standard deviation
<i>SE</i>	Standard error
UK	United Kingdom
Vic	Victoria
WA	Western Australia
WAS	Witness Assistance Service

Alternate measures

Alternate measure	Description
Pre-recorded police interview	<p>An electronically recorded interview with a child complainant that is conducted during the police investigation stage and may be played during the trial as the complainants' evidence-in-chief. NSW, Victoria and WA apply a multi-disciplinary response to the investigation of child abuse, whereby police and child protection services both respond to reports of child abuse in a coordinated manner, sharing case information.</p> <p>In Victoria, the electronically recorded investigative interview is always conducted by an authorised police officer (usually the detective assigned to the case). In WA and NSW, relevant child protection staff and police are co-located, and both agencies have authority to conduct the recorded child interview. It is possible that in NSW and WA, the interview that this report refers to as the 'police interview' was conducted by a member of child protective services; however, information as to the interviewer's affiliated agency was not available to the researchers. As the focus of the current report is the criminal investigation process, for ease of presentation this report will consistently refer to the interviews as police interviews.</p>
CCTV	A complainant may give evidence via closed-circuit television from a remote room located on or off the court premises.
Pre-recorded cross-examination	The cross-examination and re-examination of a complainant that is recorded in a preliminary hearing and later submitted in court.
Screens	Screens in the court that block the accused from the complainant's view.
Alternative physical layout of the courtroom	The courtroom is altered by clearing the public gallery during the complainant's evidence, requiring members of the judiciary to remove wigs and gowns, and/or alternative seating arrangements.
Supplementary materials (online)	Supplementary materials mentioned throughout this report can be found with the online version at www.childabuseroyalcommission.gov.au .
Support persons	A person who sits with the witness as they are giving evidence and provides support. This may be someone close to the witness or a support person provided by court services. Professional support people can also help explain to witnesses the process of giving evidence and the key roles of legal players.
Restrictions on questioning	These give judges the power to disallow certain questions that are known to reduce witness accuracy or increase the stress of giving evidence. For example, a judge may disallow misleading or confusing questions, or questions put in a manner or tone that is belittling.

Executive summary

Executive summary

Child sexual abuse is difficult to prosecute and has one of the highest attrition rates of all criminal offences. Part of the difficulty in prosecuting these cases is that offending is often hidden from public view, leaving only the complainants' evidence to establish the defendants' guilt beyond reasonable doubt. The ability of child sexual abuse complainants to give quality evidence is crucial for successful prosecution, but it can be problematic for complainants to give such evidence. For both child and adult complainants, a willingness to engage in the justice process, and the accuracy and usefulness of the evidence they give, can be affected by anxiety and stress, delays in the trial process and how professionals question them.

Over the past two decades, jurisdictions have attempted to address these concerns by introducing alternate measures and guidelines for eliciting evidence from child sexual abuse complainants. This report provides a comprehensive, holistic and contemporaneous picture of this process. Specifically, it examines:

- the use and effectiveness of alternate measures
- how complainants are questioned when evidence is elicited.

The researchers used a mixed method that involved conducting 17 studies using information from various sources. Criminal justice professionals (judges, prosecutors, defence lawyers and witness advisors) were interviewed and surveyed to provide a stakeholder perspective on issues and challenges. A large representative sample of prosecution case files, trial transcripts and police video interviews with

complainants were analysed to determine trends across jurisdictions and demographic variables (such as age groups), and how measures are actually being administered. For these analyses, the Royal Commission nominated three representative Australian jurisdictions: NSW, Victoria and WA.

A brief summary of each of the 17 studies and the general discussion is provided below.

Professionals' views on how to improve evidence-taking (Study 1)

Aim: This study explored criminal justice professionals' views on how well procedures for taking evidence from child and adult complainants of sexual abuse are working, and how, if at all, methods of taking this evidence can be improved.

Method: The researchers interviewed 43 criminal justice professionals (judges, prosecutors, defence counsel and witness advisors) from the three nominated jurisdictions (and Tasmania). A qualitative, non-directive approach was used to gain an in-depth understanding of the professionals' perceptions of the effectiveness of alternate measures and courtroom questioning.

Key findings: Stakeholders perceived that alternate measures and restrictions on questioning had improved the evidence-giving processes for child sexual abuse complainants, and were routinely used – more often for children than for adults. Yet several shortcomings were perceived as reducing the practical

effectiveness of the reforms. The most commonly identified concern was the quality of police interviews, which were described as suggestive (at times), cluttered with irrelevant details and prone to omitting important evidential details. Judges and lawyers were also concerned about the use of developmentally inappropriate questions to interview children during court questioning, and expressed a desire for more training in this area. Problems with the quality and administration of video-recorded police interviews and CCTV were reportedly common, as were trial delays, the length of time complainants had to wait at court to give evidence, and the rescheduling of hearings.

Professionals' experiences with alternate measures (Study 2)

Aim: This study examined criminal justice professionals' perceptions of the scope and prevalence of alternate measures used in child sexual abuse cases. In doing so it aimed to evaluate the extent to which policy regarding alternate measures is being implemented, the effectiveness of alternate measures and current perspectives on various aspects of these cases.

Method: Five groups of criminal justice professionals (trial judges and magistrates, prosecutors, defence lawyers, police officers and witness advisors) from three jurisdictions participated in an online survey ($N = 337$). They reported their experiences with alternate measures, evaluated the effectiveness of these measures, and provided opinions about practices and procedures in child sexual abuse trials.

Key findings: Across all jurisdictions, professionals reported that the use of alternate measures was consistent with legislated policy.

While many believed that alternate measures were effective in reducing complainant stress, they raised concerns about the detrimental impact of extensive trial delays. Perceptions regarding the effectiveness of alternate measures differed by professional group and complainant age. Defence lawyers, for example, were most likely to favour in-person giving of evidence, where the complainant gives live evidence at trial. Whereas children's evidence was perceived as most credible when it was provided via pre-recorded interview, adults' evidence was perceived as most credible when it was provided in person, without the use of alternate measures.

Factors that influence perceptions of cross-examination (Study 3)

Aim: This study examined the factors that influence criminal justice professionals' perceptions of the fairness and quality of cross-examination.

Method: A total of 335 professionals (trial judges and magistrates, prosecutors, defence lawyers, police officers and witness advisors) from three jurisdictions took part in a survey. They began by reading vignettes that simulated a defence lawyer's cross-examination of a complainant at trial. Then they responded to questions about the quality, fairness and impact of cross-examination, and the appropriateness of any judicial intervention.

Key findings: Perceptions varied according to background factors (including gender and level of training) and professional group. Defence lawyers had the most tolerant views on cross-examination strategies. All professionals acknowledged that the age of the complainant should influence the style of questioning during cross-examination, and that fairness and quality of cross-examination is associated with the developmental appropriateness of questions.

Prosecution case file review (Study 4)

Aim: This study used prosecutor case files to examine whether alternate measures are being used at trial, and the reasons for their use or non-use.

Method: A manual review examined 60 prosecution files from three jurisdictions to identify common practices and considerations regarding the uses of alternate measures. The case files were coded according to whether or not prosecutors considered using a measure at trial. A thematic analysis looked at all excerpts from the file entries that referred to alternate measures.

Key findings: Consideration of alternate measures was documented for nearly all complainants, but was more typical for children than adults, and more routine and systemic in WA than in NSW and Victoria. Major themes underlying prosecutors' consideration of alternate measures were (1) complainants' needs, including their psychological and social context; (2) legislative compliance; (3) reliance on witness support officers and other criminal justice professionals; and (4) the logistics of using alternate measures. Police, defence lawyers and judges had little direct effect on prosecutors' consideration of alternate measures.

Use of alternate measures (Study 5)

Aim: This study used trial transcripts to examine how often complainants use alternate measures when giving evidence, and what problems are associated with the use of these measures.

Method: The analysis looked at trial transcripts of the evidence of 169 complainants from cases across the three jurisdictions. The transcripts were coded for complainants' use of alternate measures and any associated challenges.

Key findings: Child and adolescent complainants had ready access to alternate measures. These complainants typically gave evidence-in-chief via pre-recorded police interviews and were cross-examined via CCTV (pre-recorded or live). Adults had less access to alternate measures, and were more likely than children and adolescents to give evidence live in court. Frequent problems reduced the effectiveness of special measures. Technological issues were common, which frustrated judges and lawyers, disrupted trials and possibly increased complainants' stress.

Review of NSW Sexual Assault Review Committee minutes (Study 6)

Aim: This study examined issues that key justice stakeholders raised with the NSW Sexual Assault Review Committee (SARC) concerning use of alternate measures.

Method: Professionals' reports (such as those of prosecutors, lawyers, judges and magistrates, and witness advisors) were extracted through a manual review of 88 sets of minutes from SARC meetings held between 1993 and 2014.

Key findings: Issues relating to alternate measures were more frequently raised during the early 2000s, when increases in the use of CCTV for taking child sexual abuse complainants' evidence were most dramatic. Technological difficulties associated with CCTV, police interviews and pre-recorded cross-examination were commonplace. SARC recommended three key solutions to contemporary issues in the recent minutes: (1) urgent reforms to allow pre-recorded evidence-in-chief to overcome delays; (2) a triage system to coordinate and resolve issues around the use of alternative measures; and (3) monitoring of the new Children's Champions pilot program.

Non-verbal analysis of video and CCTV evidence (Study 7)

Aim: This study conducted an objective and descriptive assessment of how pre-recorded and CCTV evidence is displayed to the courts in two jurisdictions.

Method: Ratings were applied to 65 pre-recorded police interviews and 37 recordings of CCTV given by child sexual abuse complainants at pre-trial hearings or at trials in NSW and Victoria. The ratings focused primarily on audio clarity, image clarity, camera perspective and screen display conventions.

Key findings: More than three-quarters of all recordings were of moderate or substandard quality. Audio clarity varied substantially, and image clarity was high in less than half of all recordings. Many recordings failed to capture images of the complainant that allowed for an adequate assessment of demeanour, by omitting an image of more than just the complainant's face, or by placing the camera at such great distance from the complainant that facial expressions were not adequately displayed.

Police interviewing practices (Study 8)

Aim: This study evaluated whether police interviewing is consistent with evidence-based practice recommendations for investigative interviewing.

Method: Transcripts of 111 police interviews with child sexual abuse complainants across three jurisdictions were assessed in relation to interview guidance literature. The study focused on five broad areas which are reflected in overseas guidance material including practice guidance endorsed by the UK Ministry of Justice (for England and Wales) : open-ended rapport building; clear and simple ground rule instructions; using questions that encourage narrative responding; avoiding leading questions and nonverbal aids; and keeping interviews short.

Key findings: Although there were some positive features, the interviews were not consistent with overseas guidance on how to interview child complainants. They were characterised by low proportions of open-ended prompts; high numbers of specific, leading and developmentally inappropriate questions; complex delivery of ground rules; and an absence of open-ended practice narratives.

Courtroom discussions about police interviews (Study 9)

Aim: This study examined issues raised at trial by judges and lawyers, regarding the police interview. The purpose was to determine the impact of the interview quality at trial, and the extent to which any problems raised are amenable to change.

Method: The trial transcripts of 85 complainants from three jurisdictions were examined. A thematic analysis looked at all text that represented discussions between legal professionals about the police interview.

Key findings: Complainants' police interviews were raised in just under a quarter of cases, and in three different contexts: the usefulness of the interview as evidence-in-chief, discussions about law, and trial planning. Discussions about the usefulness of the police interview as evidence-in-chief included problems with interview structure, interview procedure and technology.

Labelling of repeated occurrences (Study 10)

Aim: This study examined how child victims, police interviewers, lawyers and judges refer to individual occurrences of abuse in order to distinguish them from one another. Children who have experienced repeated abuse find it difficult to separate the individual occurrences, so giving the occurrences 'labels' (names) is a critical tool for clarifying reports and ensuring that the questioner and child are talking about the same occurrence.

Method: Each time a label was used during the police interviews or trials of 23 complainants, the researchers recorded who created it, when it first appeared, and whether it was used consistently or replaced with a different label.

Key findings: Positively, almost all discussed occurrences of abuse were labelled. The majority of cases were first labelled during either the police interview or the prosecution's opening statement. However, each occurrence was referred to using about three different labels, which makes keeping track of occurrences confusing for everyone, especially children. The researchers compared how often the labels were replaced versus those times they were used consistently. It was equally likely that someone would create a new label to refer to a specific occurrence as they would repeat a previously established label. Children only created 13 per cent of labels used during the police interviews. This is likely due to the predominance of specific questions that

make it hard for them to give elaborate responses and thus generate labels.

Judges' instructions to child complainants (Study 11)

Aim: This study examined how judges instruct children and adolescents to behave and respond to questions in a trial. The conversational dynamics of court are different from everyday interactions. Instructing the complainant about court procedures can reduce the imbalance of authority, and teach or remind young complainants that they should indicate difficulties with questions (that is, where questions did not make sense or could not be heard).

Method: Researchers identified 11 categories of judges' instructions delivered by judges to 57 children and adolescents aged 7–17 from three jurisdictions. The length of rules was coded as a measure of the wordiness of judges' instructions.

Key findings: Two-thirds of complainants received one or more instructions. The most common were instructions to signal when a 'break' was needed, and to say 'I don't know', 'I don't understand' and 'I don't remember'. Only 12 children received any instructions to 'correct' erroneous questions or statements. Practice examples (with feedback to ensure understanding of the rules) were rare. Overall, findings indicated that judges' use of instructions was inconsistent across and within jurisdictions, seldom informed by an understanding of child development and often wordy.

Assessment of truth/lie competency (Study 12)

Aim: This study evaluated common truth/lie competency approaches to children and adolescent complainants who give evidence. While there is evidence that asking children to promise to tell the truth may promote truth-telling behaviour, the value of truth/lie questioning is not supported by the psychological literature.

Method: Researchers coded the format (recall-based or forced choice) and category (such as definition or evaluation) of all truth/lie competency questions posed to 56 child complainants from three jurisdictions. Complainants were 7–17 years old, and 64 per cent were younger than 14.

Key findings: Judges posed 1–20 (seven on average) competency questions to 64 per cent of children. When questions were asked in a way that required children to generate (rather than accept) a response, children were accurate only half the time. Judges

posed the recommended 'promise' question (that is "Do you promise that you will tell the truth?") to only seven of the children. Children who gave unsworn evidence were younger on average than children who gave sworn evidence, and judges asked them more truth/lie competency questions. Questioning was probably intended to give children the opportunity to provide sworn evidence. From a developmental perspective, the questions required more (intellectually) of younger than older witnesses.

Court questioning (Study 13)

Aim: This study evaluated the extent to which judges and lawyers are adapting the length and types of their questions to compensate for the developmental needs of children, and how often they use leading, complex and repeated question types.

Method: Transcripts of judges' and lawyers' questioning of 63 complainants of child sexual abuse from three different age groups (children, adolescents and adults) were analysed to determine the length of questioning, the types of questions asked and the types of responses complainants gave.

Key findings: Defence lawyers did not adapt the length of their questioning methods based on the age of the complainant. Judges and lawyers relied heavily on questions shown in psychological research to increase errors in reporting (e.g., leading and complex questions). Of most concern, complex language was prevalent (26–47 per cent of all questions) and just as common with children as adults.

Non-normative assumptions in cross-examination (Study 14)

Aim: This study investigated whether the questions used in cross-examination imply that children are an unreliable class of witness, and whether defence lawyers use other assumptions that are inconsistent with findings from psychological literature.

Method: The transcripts of the cross-examination of 120 complainants from three different age groups (children, adolescents and adults) were analysed to assess the themes of cross-examining lawyers' questions.

Key findings: Defence lawyers did not explicitly question children on the grounds that as a child they were unreliable, but sometimes they used questions that suggested the complainant was cognitively immature (for example, that the complainant was confusing dreams with reality). In contrast to well-established understandings of memory function, defence lawyers suggested that poor memory of

minor details was indicative of overall inaccuracy or deception. Defence lawyers also used strategies that conflicted with research findings about sexual abuse victim behaviour, by suggesting there was a typical way that victims respond to abuse. When complainants deviated from expectations (for example by delaying reporting or not resisting the assault), defence lawyers used this to imply the offending had not occurred.

Cross-examination strategies (Study 15)

Aim: This study critically evaluated the actual nature and prevalence of tactics used by defence lawyers when cross-examining child sexual abuse complainants, with a view to understanding what reforms, if any, can improve trial fairness.

Method: Transcripts of the cross-examination of 120 complainants from three different age groups (children, adolescents and adults) were analysed to identify the nature and prevalence of the strategies and tactics used by defence lawyers.

Key findings: A broad range of tactics was consistently used to test the evidence of child sexual abuse complainants. Some tactics fitted with the circumstances of the case, but many relied on unfounded stereotypes about memory and complainant behaviour. Defence lawyers consistently used every available opportunity to question the complainant, referring to reliability, credibility, plausibility or consistency, and even without any clear aim. The high prevalence of all tactics suggested they were used indiscriminately. Complainants were asked, on average, nearly a hundred different lines of questioning, regardless of age.

Cross-examination on inconsistencies (Study 16)

Aim: This study examined cross-examination strategies that target inconsistencies to determine (1) the nature of these inconsistencies, such as whether they relate to details that are central to proving the elements of the offence, and (2) the degree to which they are generated in the criminal justice process, such as in the police interview or from the complainant repeatedly reporting events at trial.

Method: The identified inconsistencies were analysed according to their significance (central or peripheral to the offence), content, nature (whose evidence the inconsistency related to), type (contradiction, omission or addition), and source within the complainant's own account (police interview or cross-examination).

Key findings: Defence lawyers were four times more likely to question the complainant on inconsistencies in peripheral details (on average 18 lines of questioning per complainant) than inconsistencies central to proving the alleged offences. These findings suggest that defence lawyers are prolonging cross-examination through questioning about inconsistencies that could be unintentional memory or miscommunication errors. The most common source of inconsistencies within complainants' own evidence was the police interview. Lower-quality and lengthier police interviews were associated with more cross-examination regarding contradictions within complainants' accounts.

Judicial interventions (Study 17)

Aim: This study evaluated (1) whether and to what extent judges and lawyers intervene during complainant questioning; (2) whether judges and lawyers intervene more with children than adults; and (3) whether the reasons for judges' and lawyers' interventions reflect known problems with cross-examination.

Method: Transcripts of the evidence of 120 complainants of child sexual abuse were analysed according to the frequency of interventions by judges and lawyers, and the nature of these interventions. Examples included interventions on question form, question manner, question content, complainant care and issues of legal procedure or rules, and interventions to give the complainant directions or to ask them for additional information.

Key findings: Interventions were most commonly made by judges during cross-examination. There was no evidence that judges and prosecutors intervened more with children (who have more limited language ability) than with adults. The most common basis for intervention was question form, but the number of interventions was very low (on average four per complainant) considering the frequency of complex questions asked by the defence. Interventions for question content (a problematic area in cross-examination) made up less than one per cent of interventions.

General discussion

This report investigated whether restrictions on courtroom questioning and alternate measures currently available in Australia are enabling complainants of child sexual abuse to give evidence effectively.

The convergence of findings from the 17 studies suggests that alternate measures are being employed

as a matter of course with child complainants, but less so with adult complainants. The main problem to emerge with the use of alternate measures was not the measures themselves, but how they were implemented. These problems are likely to be reducing the effectiveness of the measures in achieving the purposes for which they were designed.

The investigation identified five major areas for improvement, which are all fixable problems.

1. Overcome obstacles to using technology

The high prevalence of technological problems associated with the use of CCTV, AV links and pre-recorded interviews appears to have a substantial effect on trials, delaying proceedings, extending trial times and distressing complainants.

2. Align police interviews with evidence-based practice guidance

Police interview methods were not consistent with widely supported guidance on evidence-based practice. The gap between evidence-based and actual practice is likely to have downstream effects at trial, including a low proportion of child-generated labels and extended questioning during cross-examination. Poor interviews are likely to decrease the reliability and credibility of complainant evidence. There is a need to adopt better guidance and address issues in skill development and quality assurance, to improve police interview practices.

3. Improve the quality of questioning in the courtroom

Judges' and lawyers' use of complex and extensive questioning may confuse and fatigue complainants and reduce the reliability of the evidence they give. Current cross-examination practice perpetuates myths about memory and child sexual abuse that are unfounded. This is likely to have a significant emotional impact on complainants, reduce the reliability of complainants' evidence and prolong proceedings.

4. Increase the availability of alternate measures for adults

Adult victims of child sexual abuse may be vulnerable for reasons other than age. Memory research has shown that adult complainants are also negatively influenced by delays and by the nature of the questions asked, and would benefit from increased access to a wider variety of alternate measures.

5. Reduce delays and streamline the prosecution process

Problems with delays in proceedings and the lack of a streamlined prosecution process may increase the anxiety, stress and fatigue a complainant experiences and reduce the reliability of the evidence they can give.

Overall, the findings of this report indicate that alternate measures have been a major step forward in improving the trial process for complainants of child sexual abuse. The legislative framework reflects the strong foundation that social science has laid for improving the process by which complainants of child sexual abuse give evidence, and for maximising the reliability and credibility of their evidence. Yet some areas of practice are reducing the effectiveness of these reforms. Addressing these areas will give complainants of child sexual abuse the opportunity to tell their story in a way that enables the most reliable and credible evidence to be obtained, from police disclosure to trial.

Chapter 1

Introduction

Chapter 1: Introduction

The importance of complainant evidence

Child sexual abuse is difficult to prosecute and has one of the highest attrition rates of all criminal offences.¹ Although exact figures are difficult to come by, estimates suggest that only about 8–9 per cent of child sexual assault cases reported to police are prosecuted.² Part of the difficulty in prosecuting these cases is that the offending is often hidden from public view, leaving only the complainant's evidence to establish the defendant's guilt beyond reasonable doubt.

Why have alternate measures and restrictions on questioning?

In the Australian legal system, children were traditionally viewed as an unreliable class of witness.³ Their evidence was regarded as 'valueless' by reason of their age, they were presumed to be incompetent by law and their evidence had to be corroborated.⁴ For child complainants, giving evidence at trial about sexual abuse was a potentially traumatic process, resulting in great anxiety and stress.⁵ In addition, prosecution outcomes were poor, leading many complainants (or those responsible for their welfare) to opt out of pursuing a criminal prosecution.⁶ These factors led to concerns that the process for giving evidence in criminal trials was working against the interests of justice for children, and that prosecutions failed because children could not cope with the court process.⁷ To address these concerns, alternate means of giving evidence ('alternate measures') and restrictions on questioning were introduced.⁸ Extensive research has provided justification for the use of these procedures; they are founded on three well-established factors that influence the ability of a complainant to give quality evidence.

Factors influencing complainants' ability to give quality evidence

The influence of questioning on what a complainant reports

Reporting experiences from memory is a difficult task, made even more challenging for experiences that were long ago, traumatic or embarrassing, or when the interviewee has limited cognitive abilities. The kinds of questions used to elicit memories are known to have strong and reliable effects on what gets reported.⁹ Non-leading, open-ended questions encourage elaborate responses and allow interviewees to describe their experiences in their own words.¹⁰ Leading and specific questions narrow and contort the information that is provided.¹¹ Because these latter question types restrict responses to what the questioner wants to know (rather than what the interviewee can provide),¹² answering them can require advanced levels of cognitive, linguistic and social abilities. Leading and specific questions can also contain the questioner's erroneous or biased information.¹³ They pose extra challenges for children and adults with developmental delays. The narratives of typically developing adults are affected in the same way by the kinds of questions posed, only to a lesser degree.

The use of alternate measures was intended to improve the integrity of complainants' evidence.¹⁴ One of the queries that prompted this report was whether failure to improve justice outcomes was tied to non-use of alternate measures. To provide a comprehensive answer, it was necessary to examine not only the frequency with which alternate measures are used, but also the quality of their use. For example, where pre-recorded interviews are adopted as alternate measures, are they conducted using appropriate questions? What sorts of questions are judges and lawyers using in court? The measure itself is not inherently beneficial solely by virtue of being an alternate measure.

The negative influence of delay on memory recall

Memory deteriorates over time.¹⁵ The greater the delay between the offence and the report, the less complete a complainant's memory of the abuse is likely to be.¹⁶ Time also creates opportunities for memory to become contaminated from other sources, such as conversations with other people (including family members, teachers, counsellors and friends)

and complainants become more vulnerable to suggestion, reducing the accuracy of information they report.¹⁷ Earlier reports are likely to be more complete and accurate (such as a police interview rather than evidence at trial); however, even when a report to police is contemporaneous with the alleged offending (which is often not the case), by the time of the trial a complainant's memory of events has often deteriorated due to the long delay since the offending was reported.¹⁸ Having effective alternate measures – such as pre-recorded interviews or pre-recorded cross-examination – is intended to alleviate some of the barriers associated with delay.

The influence of the complainant's psychological state on the quality of reporting

The psychological state of the complainant can also influence the quality of their report. Anxiety and stress can diminish the ability to recall information accurately.¹⁹ Having to recount abusive events in court in front of the accused and a room full of strangers, the unfamiliarity of the formal courtroom environment, and the unanticipated challenges of cross-examination can thus diminish the quality of a complainant's evidence.²⁰ Fatigue resulting from long questioning sessions is likewise problematic.²¹ Due to their age and level of development, child complainants are particularly vulnerable to these factors.²² Some measures address these problems by improving the environment in which the complainant gives evidence, for example by using pre-recorded interviews, CCTV or pre-recorded evidence.

Summary

In sum, questioning, delays and the psychological state of the complainant can all influence the quality of recall. Providing oral evidence in court in the traditional way posed major problems for child complainants, and research now suggests that these factors affect adult complainants too. These problems led to the introduction (in many countries) of alternate measures and restrictions around questioning for children, and later to some of these reforms being extended to adult complainants.

Introduction of alternate measures in Australia

To help overcome the foregoing challenges of prosecuting child sexual abuse cases, governments of the states and territories of Australia have, since the late 1980s, made fundamental reforms to the

procedures for taking evidence from child complainants.²³ As explained above, these alternate measures were designed to improve both the reliability of the evidence and the experience of the complainant in the criminal justice process. The reforms sought to achieve this without compromising the fairness of the trial for the accused. Table 1.1 displays each reform available in Australia and the potential benefits in terms of improving a complainant’s recall and evidence.

Table 1.1 Alternate measures and potential benefits

Alternate measure	Description	Potential benefit
Pre-recorded police interview	A police interview of the complainant is recorded and submitted as part or all of the complainant’s evidence in chief. ²⁴	<ul style="list-style-type: none"> • Captures an early account nearer the time of offending, with less opportunity for distortion • Captures a more complete and accurate account • Conducted in an environment free from distractions and interruptions, enabling a free-flowing narrative account • Potential for a less stressful environment • Can scrutinise questioning that may have influenced recall²⁵
CCTV	A complainant gives evidence via closed-circuit television from a remote room located on or off the court premises.	<ul style="list-style-type: none"> • Complainant does not have to give evidence in the physical presence of the accused, jury and others in court • Less intimidating than being in the courtroom • Reduces stress and anxiety • More and younger complainants are willing and able to give evidence
Pre-recorded cross-examination	The cross-examination and re-examination of a complainant is recorded at a preliminary hearing, and this recording is submitted in court.	<ul style="list-style-type: none"> • Captures a report when the memory is fresher • The child can exit the system earlier • Can be scheduled, resulting in fewer delays on the day • Potential to reduce anxiety • Inadmissible evidence can be edited out, resulting in fewer mistrials
Screens	Screens in the court block the accused from the complainant’s view.	<ul style="list-style-type: none"> • Complainant does not have to see the accused while giving evidence • Evidence is still given ‘live’ at the time of the trial • Decreased stress and anxiety for complainants
Alternate physical layout of the courtroom	The public gallery is cleared when the complainant gives evidence; members of the judiciary remove their wigs and gowns; and there are alternate seating arrangements.	<ul style="list-style-type: none"> • Facilitates the complainant giving evidence • Courtroom and legal professionals appear less intimidating • Decreased stress and anxiety for complainants
Support persons	A person sits with the witness as they are giving evidence and provides support. This person can be someone close to the witness or a support person from the court services. Professional support people can also help explain to witnesses the process of giving evidence, and key roles of legal players.	<ul style="list-style-type: none"> • Reduced stress and anxiety for complainants
Restrictions on questioning	Judges are given the power to disallow questions. This can include misleading or confusing questions, questions put in a manner or tone that is belittling, or questions based on stereotypes (e.g. race, ethnicity, sex).	<ul style="list-style-type: none"> • Increased accuracy of complainants’ evidence due to fewer complex or oppressive questions • Decreased anxiety and stress due to fewer oppressive and intimidating questions

The following sections provide a brief summary of the key legislative reforms in the special measures arena over the past five years, and a brief review of research examining the use and effectiveness of alternate measures.²⁶ They also outline the aims and overall method of the current research, and the studies forming this report.

Summary of key legislative reforms over the last five years

Over the last 20 years, legislative reforms across Australia have increased the options available to witnesses who present a specific vulnerability when giving evidence in criminal proceedings of a sexual or violent nature. These options have been codified in a number of different legislative instruments across the states and territories. In addition to this jurisdictional specificity, there are discrete differences as to what constitutes the relevant class of witness. Despite these variations, it is possible to identify some common jurisdictional options and protections available to them.

- Evidence may be given by CCTV or video link.
- Evidence may be given behind screens or physical barriers that shield the vulnerable witness from the accused.
- Unrepresented defendants may be prohibited from cross-examining a vulnerable witness.
- A support person may sit with a vulnerable witness during court proceedings.
- Courts may be closed when a vulnerable witness gives evidence.
- A written or pre-recorded video statement may be admitted as a witness's evidence in chief.
- A record of transcripts may be admitted in retrials or related proceedings.
- Evidence may be pre-recorded at a special sitting (except in NSW).²⁷

Significant legislative reforms from 2 March 2010 to 31 March 2015

Captured below is a general description of the significant legislative reforms that have occurred across Australia in the last five years, in four jurisdictions.²⁸ The text provides a summary only; detail of those reforms is contained in Supplementary Materials 1 (online).

Victoria

Victoria's *Criminal Procedure Act 2009* (CPA) now provides that the whole of the evidence of a child complainant (and cognitively impaired complainants) must be given at a special hearing and recorded as a video recording. The evidence is to be presented as a recording at a special hearing before the trial (CPA s370). In 2012, this section was amended so that a court must direct that a special hearing under the procedure for children and cognitively impaired complainants be held before the trial or during the trial (CPA s370(1A)). Before the court makes a direction under subsection 1A, the court must regard a range of expressly stated mandatory considerations. Those considerations appear to focus on the complainant's composure and needs, as well as the admissibility of the evidence to be given. The court may also consider any other relevant matters.

Although CPA s212 imposes time limits for commencing trials for sexual offences, the court may extend the time for holding a special hearing if the court considers it in the interests of justice to do so, having regard to a range of factors provided under CPA s371(2). Where a special hearing is directed to be held during the trial, under CPA s191(2)(d)(iii) the court must make every effort to start the special hearing on the date specified, and under CPA s371A must ensure the complainant's evidence is disrupted to the least extent possible. When a special hearing is held during the trial, the jury must be present in the courtroom (CPA s371(1)(ba)). Although the accused and their legal practitioner are to be present in the courtroom, the accused is not to be in the same room as the complainant when the complainant's evidence is being taken, although the accused is entitled to see and hear the complainant as the complainant gives that evidence (CPA s372(1)(a) and (b)).

Tasmania

The Tasmanian *Evidence (Children and Special Witnesses) Act 2001* (ECSW Act) provides the legislative means for supporting children and special witnesses who give evidence. On 1 March 2014, the provisions of the *Evidence (Children and Special Witnesses) Amendment Act 2013* commenced. Amendments to the substantive ECSW Act include an express statement of Parliament's intention to provide special measures for child witnesses (s3A ECSW Act). The amendments also allow courts to order special hearings to take and record a child's evidence in full (s6A ECSW Act). Except where a child gives oral evidence in court (s7 ECSW Act), legislation provides that evidence of an affected child must be given by video link (s6B ECSW Act).

Where a child (or special witness) is to give evidence at trial and there are videorecording facilities available, a video record of their evidence must be made. This record then forms part of the records of the court (s7A, ESCW Act). This record may then be admitted into evidence subject to any edits the judge may direct to be made to the evidence (s7B ESCW Act).

In circumstances where a witness is an alleged victim of the offence, a defendant is prohibited from cross-examining that witness. Cross-examination must instead be conducted by counsel representing the defendant. Additionally, where the defendant is unrepresented, the Act provides limitations on any cross-examination the defendant proposes to undertake (s8A ECSW Act).

ACT

The repeal of the ACT *Evidence Act 1971* took effect when the *Evidence Act 2011* (EA) commenced on 1 March 2012. The EA supersedes evidentiary rules contained in the now-repealed s64 of the *Evidence Act 1971* regarding young children giving unsworn evidence in any proceeding. Notably, the EA provides that where a person is not competent to give sworn evidence about a fact for any reason, they may nevertheless be competent to give unsworn evidence about the fact (EA s13(4)) if the court has informed the person of some aspects of truth telling and giving evidence in court (EA s13(5)).

The ACT *Evidence (Miscellaneous Provisions) Act 1991* (EMP Act) has relinquished the use of 'prescribed witness' to mean 'child' (EMP Act Part 2, s5) and simply uses the term 'child' to describe any witness under 18 years of age (EMP Act s15).

Northern Territory

Legislative protections for children and vulnerable witnesses (except in domestic and family violence matters) are contained in the following Northern Territory legislation:

- *Evidence Act*, Part IIA
- *Justices Act*, s105L
- *Sexual Offences (Evidence and Procedure) Act*.

From 1 April 2011, the commencement of the *Justice Legislation Amendment (Committals Reform) Act 2010* reformed the processes for committal in the Northern Territory. The *Justices Act* was amended accordingly. The main objectives of the reform were to reduce witness stress and increase the efficiency of the committals process.

The following summarises the key features of the reform of the committals process:

- A written statement on which the prosecutor is intending to rely must be admitted as the prosecution evidence as if the witness had given evidence verbally. The court can refuse to accept the evidence if it does not comply with the rules of evidence, or if the prosecutor has not provided the required documents to the court and the defendant within the required time frame. The prosecutor can seek leave from the court to have a witness give some or all of their evidence in chief orally, if it is in the interests of justice to do so.
- Where a youth and an adult are charged with offences that arise out of the same incident, their committals can be heard together. The Justice may separate the proceedings at any stage if it is in the interests of justice to do so.
- The period in which a committal brief must be served on the defendant increased from 14 days to 28 days before the committal date, unless a Justice fixes a different period for service, or the defendant consents to a shorter period of service. There is also a provision for the prosecution to provide further written statements as they become available.
- Categories of witnesses currently protected under the *Justices Act* remain protected. Children cannot give oral evidence if one of the offences with which the defendant has been charged is a sexual offence or a serious violence offence. The victim of an alleged sexual offence is also prohibited from giving oral evidence.
- The defendant cannot question a prosecution witness unless permission to do so has been sought and granted by the court, or the prosecution has consented. If leave is given for a witness to be cross-examined, the prosecution evidence is restricted to the witness identifying themselves and attesting that the witness statement they have handed up is true. The defendant is not restricted to questioning only on the issue for which permission to question was granted.²⁹

What is known so far about the use and effectiveness of alternate measures?

Use of alternate measures

Despite the availability of similar alternate measures across Australia, prior research suggests there are marked differences in their use across jurisdictions. In NSW, the use of alternate measures has steadily increased since their introduction in the early 1990s.³⁰ By the mid-2000s, the majority of children gave evidence via CCTV or a pre-recorded investigative interview.³¹ In 2002, when research last reviewed alternate measures in Queensland and Western Australia, access to these measures was least frequent for children in Queensland, and most frequent and complete for children in Western Australia.³² Contemporary reports for other states are unavailable, and there are some indications of resistance to the uptake of alternate measures in those states.³³

Large and more recent studies conducted in the UK and NZ revealed distinct patterns in the use of alternate measures.³⁴ In both jurisdictions CCTV tends to be used for younger children and children testifying against family members, whereas screens are more commonly used for older children and adults, and in cases where the accused is not an immediate family member. Overall, CCTV and pre-recorded evidence are used more often than other alternate measures such as screens, removal of wigs and gowns, and child intermediaries. These trends may reflect views on which measures are more effective in helping complainants testify.

Effectiveness of alternate measures

Most empirical studies have examined the effectiveness of CCTV and pre-recorded investigative interviews for improving complainants' experiences in court, and case outcomes. Fewer studies have examined the effectiveness of other alternate measures and uses of alternate measures for adult complainants.

CCTV

CCTV appears to be very effective for vulnerable victims in reducing the stress and anxiety of testifying, primarily because these victims do not have to meet

or see the defendant while being examined.³⁵ However, juries perceive children who testify via CCTV in less positive terms, judging them as less accurate, honest and credible than children who testify in person in court.³⁶ This may be due to the greater perceived distance between the child and the jury when CCTV is employed, and/or to the reduction in visual cues via CCTV. Results of the few studies of how CCTV evidence influences on the perception of adult complainants are inconclusive³⁷, and studies that have examined conviction rates have found no evidence that CCTV had any impact on these rates.³⁸

Police interview

In terms of the pre-recorded police interview, vulnerable witnesses have reported that its use as evidence-in-chief was beneficial, relieving their stress and anxiety at trial because they were not required to testify in court.³⁹ There is also strong consensus among legal professionals that using the interview as evidence-in-chief is more reliable than live evidence due to the closer proximity in time to the events at issue.⁴⁰ However, professionals did express concerns over the quality of police interviews, which were often unnecessarily long, and cluttered with irrelevant details.⁴¹ From the point of view of jurors, studies indicate that jury members view children who testify on video as less confident and honest than children who testify live⁴², but these perceptions do not translate into any differences in credibility judgments, which are poor irrespective of how the child gives evidence.⁴³

Other special measures

The effectiveness of pre-recording all aspects of a child or adult victim's evidence (whether evidence-in-chief, cross-examination or re-examination) has not been empirically tested. The use of screens and other courtroom modifications does not appear to substantially benefit complainants⁴⁴, and the influence of screens on jury perceptions of complainants and defendants is untested.

Restrictions on questioning

In addition to alternate measures, other procedural reforms may assist complainants in child sexual abuse cases. Restrictions on the nature and scope of cross-examination questions have been introduced to reduce the detrimental effects of conventional cross-examination on witness evidence caused by repetitive and confusing questions. Whether these reforms have led to changes in the frequency of judicial interventions to stop inappropriate questioning or to changes in the approach and/or linguistic style of defence lawyers who cross-examine children and vulnerable adult witnesses remains untested.

Expert evidence and judicial instructions

Expert evidence and judicial instructions have been proposed as additional available legal safeguards to reduce the impact on jurors of common misconceptions that may influence outcomes in child sexual abuse trials. Experimental and archival studies have shown that both methods are effective in increasing jurors' knowledge of child sexual abuse cases and increasing the perceived credibility of the complainant.⁴⁵

Research aims and methodological approach

Prior research on the use and effectiveness of alternate measures has provided mixed results. To better understand the situation, the Royal Commission commissioned the current program of research. The overriding aim was to provide a broad, contemporaneous and in-depth examination of how evidence is actually being elicited from complainants of child sexual abuse.

Specifically, the Royal Commission was interested in knowing the extent to which alternate measures and restrictions on courtroom questioning are being used in Australia, and are effective in enabling complainants of child sexual abuse to give evidence.

To this end, the current research focused on two interrelated components:

- The use and effectiveness of alternate measures
- How complainants are questioned when evidence is elicited.

From a methodological perspective, there are various ways that the two above-mentioned areas can be examined. These include surveys and interviews of professionals, retrospective analyses of documentation and comparisons of actual practice, with recommendations arising from social science research and experimental studies. Each individual method carries strengths and limitations that need to be considered when drawing conclusions. The next sections briefly discuss the pros and cons of each method and describe the approach of the current research program.

Stakeholder surveys and interviews

One way of evaluating how a system is operating is to examine the perspectives of those responsible for administering it. Surveys and in-depth interviews with

stakeholders who work in the system provide such perspectives. Although worker perspectives cannot establish the efficacy that a particular program or policy has on hard outcome indicators (such as conviction rates), worker perspectives help to understand how measures are actually being implemented, the challenges faced in their administration (that is the factors that apparently constrain or enable the measures to be effective) and how the system can be improved on a practical administrative level. Having a range of professional perspectives (judges, lawyers, witness services and police) can help provide a holistic understanding of the perceived strengths and weaknesses of the system.⁴⁶

Retrospective analysis of documentation

Another way to evaluate how a system is operating is to analyse documentation such as transcripts of evidence, prosecution case files and video-recorded interviews. The main benefit of this approach is that it examines actual case progress at the point of service delivery (when the procedures were actually being implemented) instead of via retrospective anecdotal recollections. Further, the documentary format allows for systematic fine-grained analysis of the data. This type of analysis can be highly reliable, especially when based on verbatim observational data (court transcripts), and when procedures and events are recorded from various sources.

However, it needs to be kept in mind that documentation is not necessarily accurate. Any qualitative data (notes, reflections or discussion about decisions) still reflects the perspective of individual professionals. It is not necessarily a reflection of what should or did actually happen.

Comparison with recommendations arising from social science research

One of the most common methods of examining the effectiveness of measures is to compare how they were implemented against conclusions drawn from social science research about the best way to implement procedures. Critical comparisons between actual and recommended practice rely on observational case data. Through statistical techniques, conclusions can be made about common trends, differences between jurisdictions, and the association between demographic variables (such as age) and observed outcomes.

Analyses of practices can be longitudinal or cross-sectional, although for practical reasons the latter type is most common. Rather than representing trends over time, cross-sectional analyses are based on data collected from a population, or a representative subset, at one specific point in time. Broad conclusions can be made with cross-sectional data, although the actual figures must not be assumed to represent a broader subset such as what is happening in other jurisdictions or at other points in time. A particular problem associated with examining court trials is that records of procedures that were used in the trial but collected earlier may no longer be contemporaneous. A good example of this is the police interview, which is used as evidence-in-chief but typically recorded long before the case goes to trial. Even when attempts are made to collate the most contemporaneous trial transcripts, what is documented may not reflect what will occur in future trials due to the interrelated but lengthy chain of procedures.

It also needs to be acknowledged that when comparing performance with recommendations arising from social science research, the reasons for observed patterns cannot always be ascertained. Indeed, the literature is replete with examples of situations where justice policy could not achieve the ideals suggested by psychological research. Police and criminal justice professionals' practices are inevitably constrained to some degree by legal doctrine, legislation and policy.

Experimental studies

Experiments refer to procedures where behaviours and thought processes are examined in artificial (laboratory) settings rather than natural settings. The advantage of experimental design is that when examining the types of influences on court practices, it is possible to dictate what occurs and thus to examine phenomena under controlled conditions – isolating, manipulating and evaluating the impact of specific factors that can affect how people respond.

Typically, laboratory research is directed toward testing formal theories about patterns of responding. The problem with these studies is that the researchers can only go so far to approximate the actual look, feel and procedure of a real court trial, which may reduce external validity (the degree to which the results apply to real court trials).

The current research approach

In recognition of the strengths and limitations of each individual research methodology, the current researchers adopted a mixed method approach. Each research procedure was adopted simultaneously to

provide a comprehensive picture of the use and effectiveness of alternate measures in child sexual abuse cases in Australia. Specifically, 17 different studies were conducted, using a variety of research methods and information obtained from diverse sources. The rationale for using a variety of different methodologies is that any limitations of the individual studies could be mitigated by the commonality or convergence of findings across methodologies. This approach was further strengthened by the compilation of a research team with a multi-disciplinary (psychology and law) background and collective prior employment experience across all stages of the criminal justice process. However, it must be noted that the researchers were not involved in the actual trials being evaluated, so any conclusions were limited and tentative.

To assist the analysis of documentation, the Royal Commission provided the researchers with unprecedented access to all case-related trial documentation in three jurisdictions: NSW, Victoria and WA. These jurisdictions each provided prosecution files for the most recent child sexual abuse cases that had gone to trial, for 'historical' cases (where the alleged abuse occurred before 2010 and the trial occurred after 2010) and 'contemporary' cases (where the alleged abuse occurred after 2010). In total, documentation from 156 cases was obtained. Missing documentation in some case files (including transcripts of complainant evidence) and time restraints meant that not all of the studies analysed all of these cases, but together these cases provided a representative and relatively large sample of data on which to base conclusions. The documentation included prosecution files, police interview transcripts and videos, and trial transcripts, all of which were either obtained by notice or summons, or granted by the relevant organisations in each state.

As with any research, the design had to be evaluated and approved by the Human Research Ethics Committees attached to the organisations that took part, and each of the researchers' tertiary institutions (Deakin University, Griffith University and Charles Sturt University). The role of the ethics committees was to ensure that the research was conducted in accordance with prevailing moral standards and humane practices, and had minimal risk to the complainants and professionals who were (inadvertently) included in the research.

Structure of the report

This report contains a chapter for each of the 17 studies conducted, followed by a general discussion. The first three studies examine criminal justice professionals' perceptions of how alternate measures are currently used. These studies involved interviews (Chapter 2) and surveys (Chapters 3 and 4) with these professionals, including judges, prosecutors, defence lawyers, witness assistants and police (Chapters 3 and 4). The report then examines the current use of alternate measures and any problems associated with them, through a review of prosecution case files (Chapter 5), trial transcripts (Chapter 6) and notes from the minutes of the NSW Sexual Assault Review Committee (Chapter 7).

The remaining studies provide a more detailed examination of police interviewing practices and courtroom questioning. These studies include

evaluating the quality of the video recordings of police interviews (Chapter 8) and police interview practices (Chapter 9); examining the problems legal professionals raised at trial regarding police interviews (Chapter 10); and tracking the labels used to describe different offences in cases of repeat offending, from police interview through to trial (Chapter 11). Chapters 12 to 18 examine questioning in the courtroom, from how judges explain court procedure to child complainants and assess their competency (Chapters 12 and 13), through to the types of questions lawyers and judges ask (Chapter 14), the tactics defence lawyers use to cross-examine complainants (Chapters 15 to 17), and judges' interventions (Chapter 18). The general discussion (Chapter 19) synthesises the findings of the studies, and identifies areas for improving the criminal justice response to how evidence is taken from complainants of child sexual abuse.

Endnotes

¹ Australian Law Reform Commission, 2010; Eastwood, Krift and Grace, 2006; Goodman, 2006.

² Community Development and Justice Standing Committee, 2008; Fitzgerald, 2006.

³ Cossins, 2006; G. Davies, 1994.

⁴ Pigot, 1989; Victorian Law Reform Commission, 2004.

⁵ Eastwood and Patton, 2002; Eastwood et al., 2006; Hamlyn, Phelps, Turtle and Sattar, 2004.

⁶ Cashmore, 1995; Daly and Bouhours, 2010; Fitzgerald, 2006.

⁷ G. Davies, Wilson, Mitchel and Milson, 1995; Pigot, 1989.

⁸ Pigot, 1989.

⁹ Dent and Stephenson, 1979; Fisher and Geiselman, 1992; Hutcheson, Baxter, Telfer and Warden, 1995; Lamb, Orbach, Hershkowitz, Horowitz and Abbott, 2007; Milne and Bull, 1999; Powell, Fisher and Wright, 2005.

¹⁰ Powell and Snow, 2007.

¹¹ Powell and Thomson, 2001.

¹² Hutcheson et al., 1995; Lipton, 1977.

¹³ Ceci, Kulkofsky, Klemfuss, Sweeney and Bruck, 2007.

¹⁴ Pigot, 1989.

¹⁵ Ebbinghaus, 1913; Read and Connolly, 2007.

¹⁶ Ebbinghaus, 1913; Read and Connolly, 2007; Rubin and Wenzel, 1996.

¹⁷ French, Garry and Mori, 2008; Gabbert, Memon and Allen, 2003; Loftus and Palmer, 1974; Tuckey and Brewer, 2003.

¹⁸ Ebbinghaus, 1913; Read and Connolly, 2007.

¹⁹ McNally, 2003; Powell, Gary and Brewer, 2013.

²⁰ Deffenbacher, Bornstein, Penrod and McGorty, 2004; Goodman et al., 1998; Yerkes and Dodson, 1908; Zajac and Hayne, 2003.

²¹ Powell, Mattison and McVilly, 2013.

²² Ceci and Bruck, 1993; Poole and White, 1993; Zajac and Cannan, 2009.

²³ Cossins, 2010.

²⁴ This refers to electronically recorded interviews with child complainants that are conducted during the police investigation stage and is also (potentially) played at the trial as the complainant's evidence-in-chief. Some Australian jurisdictions apply a multi-disciplinary response to the investigation of child abuse, whereby police and child protection services both respond to reports of child abuse in a coordinated manner, sharing case information. In Victoria, the electronically recorded investigative interview is always conducted by an authorised police officer (usually the detective assigned to the case). In WA and NSW, relevant child protection staff and police are co-located and both agencies have the authority to conduct the recorded child interview. It is possible that in NSW and WA, the interview referred to as the 'police interview' in this report was conducted by a member of child

- protective services; however, information as to the interviewer's affiliated agency was not always available to the researchers. As the focus of the current report is the criminal investigation process, for ease of presentation the interviews will be consistently referred to as 'police interviews'.
- ²⁵ Pigot, 1989; Victorian Law Reform Commission, 2004.
- ²⁶ For a comprehensive legal review of alternate measures in Australia, please see Supplementary Materials 1 and Cossins, 2010; for a comprehensive literature review of the use and effectiveness of alternative measures in Australia, please refer to Appendix A.
- ²⁷ *Evidence Act 1977* (Qld) ss21A, 21A1–AO; *Evidence Act 1929* (SA) s13A; *Criminal Procedure Act 2009* (Vic) s368; *Evidence Act 1906* (WA) s106HB; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence (National Uniform Legislation) Act* (NT) s21E.
- ²⁸ For a comprehensive review prior to 2010, Cossins, 2010.
- ²⁹ Department of the Attorney-General and Justice, 2015, p5.
- ³⁰ Eastwood and Patton, 2002.
- ³¹ Cashmore and Trimboli, 2006; Eastwood and Patton, 2002.
- ³² Eastwood and Patton, 2002.
- ³³ Oliver, 2006.
- ³⁴ Burton, Evans and Sanders, 2006; Hamlyn et al., 2004.
- ³⁵ ALRC, 1992; Cashmore and De Haas, 1992; Eastwood and Patton, 2002; Flin, Kearney and Murray, 1996; Landstrom and Granhag, 2010.
- ³⁶ Goodman et al., 1998, Landstrom and Granhag, 2010.
- ³⁷ Ellison and Munro, 2014; Taylor and Joudo, 2005.
- ³⁸ Bennett, 2004; Davies, 1999; Goodman et al., 1998.
- ³⁹ Eastwood and Patton, 2002.
- ⁴⁰ Burrows and Powell, 2014a; Davies and Hanna, 2013; Westera, Kebbell and Milne, 2013a.
- ⁴¹ Burrows & Powell, 2014b, 2014c; Westera, Kebbell, & Milne, 2013b.
- ⁴² Landström and Granhag, 2010; Landström, Granhag and Hartwig, 2005, 2007.
- ⁴³ Landström et al., 2005, 2007.
- ⁴⁴ Hamlyn et al., 2004; Pipe and Henaghan, 1996.
- ⁴⁵ Brekke and Borgida, 1988; Goodman-Delahunty, Cossins and Martschuk, 2014; Goodman-Delahunty, Cossins and O'Brien, 2010, 2011.
- ⁴⁶ The interviews were with stakeholders who have regular experience with the whole evidence-gathering process. This approach meant that police – who initially gather the evidence from complainants but are not involved day-to-day in the administration of trials – were not interviewed.

Chapter 2
Professionals' views on how to
improve evidence-taking
(Study 1)

Chapter 2: Professionals' views on how to improve evidence-taking (Study 1)

People with day-to-day experience of the criminal justice process – prosecutors, witness advisors, defence lawyers and judges – constitute one of the most valuable sources of information on how well the taking of evidence from complainants is currently working in practice.

This study extends previous research by adopting a constructive approach to provide an up-to-date and in-depth understanding of the views of criminal justice professionals on:

- how well procedures for taking evidence from child and adult complainants of childhood sexual abuse are working
- how, if at all, the taking of this evidence can be improved.

Given the paucity of prior evaluative research, a non-directive and elaborate method of inquiry was used to explore professionals' perceptions of practice.

Method

Criminal justice professionals

The researchers contacted the head of each relevant agency to seek approval for their members to participate in interviews. To ensure participants could

provide their perceptions about the variety of alternate measures available, only agencies with members that have regular experience in the whole evidence-giving process were approached to participate in this study. Agencies that agreed to participate included offices for public prosecution, law firms conducting criminal defence work, a barristers' society, the judiciary and witness assistance agencies. The participants were from NSW, Victoria, WA and Tasmania. How the study identified and approached potential participants depended on the preferences of the head of each agency. Either, the head of the agency nominated participants considered to have expertise in child sexual abuse cases, or the agency (or their representative, such as Legal Aid) sent an email requesting volunteers to participate.

In total, 43 criminal justice professionals from a mix of professions agreed to participate. All were experienced in their role and with child sexual abuse cases (16 from NSW, 10 from Victoria, 13 from WA and 4 from Tasmania). Of the potential participants nominated by their agency, 15 did not respond to a request for an interview. Table 2.1 describes the participants in detail. To protect the anonymity of the participants, the study provides no further demographic details, instead using broad descriptors to identify the source of interview quotations.

Table 2.1 Participant gender and experience by professional group

	Number	Gender		Average years in current role	Average years in profession	Average number of cases
		Male	Female			
Prosecutors	12	3	9	16	20	115
Defence counsel	11	6	5	11	17	119
Judges	14	7	7	13	29	174
Witness assistance advisors	6	1	5	9	20	300+

Procedure

In late 2014, one of the researchers interviewed nine participants face to face and 34 by telephone. Prior to the interview, the researcher sent each participant a semi-structured interview schedule that she developed for this study. This schedule outlined the themes and topics to be discussed during the interview, namely:

1. preparing the complainant for trial
2. using alternate measures for presenting evidence
3. taking an oath or competency testing a child complainant
4. questioning the complainant when presenting evidence
5. judicial interventions during in-court questioning
6. professional development for legal professionals in evidence-based practice.

For each topic, the researcher asked the stakeholders to reflect on the following questions, for both child and adult complainants:

- What is the current practice, policy and process in your jurisdiction?
- Where applicable, what are the reasons for variations in practice?
- What are the strengths and limitations of current practice, and how, if at all, could this process be improved.

Finally, the researcher posed two broad questions about the professionals' experiences with alternate procedures: "Overall, how do you think the system for complainants giving evidence is operating as a whole?" and "Do you have any other recommendations for improvement?"

Rather than relying on pre-existing theories or frameworks, the study adopted an inductive, bottom-up approach to data collection in order to gain insight into what stakeholders perceived were the major issues for practice.¹ The researcher conducted the interviews in an open manner, asking only broad open-ended questions to encourage elaborate

responses. Discussion of the topics proceeded in the order raised by each participant. At the end of the interview, each participant provided details about their experience of the agency's role in the criminal justice system, and an estimate of the number of child sexual abuse prosecutions they had worked on (selecting from the following categories: 1, 5, 10, 20, 30, 40, 50, 70, 100, 150, 200, 250, 300 or more). The interviews were on average 63 minutes long (range: 31–115 minutes).

All interviews were audio-recorded, transcribed verbatim, double-checked for accuracy and de-identified.

Analysis

The main researcher and another researcher subjected each transcript to open coding, independently conducting a line-by-line analysis of the transcripts (reduction) and identifying concepts within statements.² Statements with similar concepts were grouped together. The two researchers met to identify common concepts, and found a high rate of agreement. They re-examined transcripts for statements that supported the identified categories then grouped identified concepts and categories (and sub-categories) according to core themes. Identification of core themes reduced the large volume of natural language data into meaningful and concise units of analysis.³ Once the two researchers had agreed on all themes, a third researcher re-analysed the transcripts using these themes, and identified quotes representative of them. The study provides quotations to illustrate the findings. The researchers have removed potentially identifying information and have corrected minor wording or grammatical errors.

Results

The overriding theme from criminal justice professionals was that the procedures for gathering and presenting evidence of sexual abuse complainants can be improved. All participants were passionate in this view and many expressed frustration that more had not been done. Stakeholders identified a number of areas that the criminal justice system could target to improve responsiveness to complainants and increase just outcomes. This view was tempered by another strong theme in their responses: while further reform might reduce the stress of giving evidence, the adversarial nature of criminal trials means that giving evidence was always going to be taxing for complainants. The themes of the stakeholders' responses were consistent across all jurisdictions.

The stakeholders' overwhelming concern about current practices was the quality of police questioning in the pre-recorded investigative interviews that constitute child complainants' evidence-in-chief. Prosecutors, defence counsel and judges expressed a strong and unanimous view that the poor conduct of police interviews often reduced the likelihood of a successful prosecution. As such, they most frequently identified police interview practice as the area for further reform.

Courtroom questioning that was unfair to the complainant was the next most criticised practice, but stakeholders had disparate views on whether improvements could be made by further reform. Nevertheless, there was general consensus that more training and professional development for prosecutors, defence counsel and judges on how to question children could enhance courtroom practices. Other limitations of alternate procedures centred on the quality of the sound and picture in CCTV and video-recorded police interviews, and delays caused by using this technology in the courtroom. Of greater concern to stakeholders were the difficulties attributable to broader aspects of trial procedures rather than alternate measures. These difficulties include the protracted period between the time a complainant reports an alleged offence and the time the matter proceeds to trial; the length of time the complainant has to wait on standby at court before giving evidence; and the last-minute re-scheduling of hearings and other legal proceedings. Insufficient access to professional support persons and inadequate preparation for trial were also identified as areas that could be addressed to improve the complainant's experience in giving evidence.

Before discussing the stakeholders' views about specific reforms in more detail, it is important to note the consensus among criminal justice professionals

that the introduction of past reforms in evidence-taking had improved complainants' experience of the trial process. Stakeholders were generally satisfied with the alternate measures and procedures, and reported that these were now a standard part of trial procedure. These views were so established that during their interviews most professionals assumed alternate procedures were an integral part of the court process, and only offered their views about the strengths of these procedures when asked specifically what, if any, the benefits were.

Stakeholders perceived that alternate procedures were generally an effective way to reduce the complainant's stress when giving evidence, without compromising the fairness of the proceedings to the accused. Reduction in stress was, in turn, thought to improve the reliability and completeness of the complainant's evidence. Stakeholders believed that pre-recorded police interviews, CCTV and the presence of a support person were the most effective and frequently used alternate procedures. They considered screens to be less effective and reported that they were seldom used. Stakeholders reported that alternate measures were used less frequently with older youths (aged 13 years and over) and adults, but many advocated making these measures (such as pre-recorded investigative interviews and evidence) more readily available to a wider range of complainants.

Next, the study examines in more detail the themes that emerged in the stakeholders' interview responses. Each procedure for taking evidence from the complainant is examined in a separate section of this paper. In each section, the main themes that emerged from stakeholders' interviews – in relation to the procedure in question – are presented in order of the frequency with which the theme was mentioned, with the most common listed first. In general, the themes did not differ for child and adult complainants, so unless otherwise stated the study addresses them together.

This section starts with preparing the complainant for trial and examines the different alternate procedures, followed by questioning the complainant to present evidence, and lastly, other trial processes. There were no discernible differences according to jurisdiction, so to maintain anonymity, the quotes provided are not differentiated by jurisdiction. A full list of quotes from stakeholders' responses in support of each theme is provided, by category, in Supplementary Material 1.

Preparing the complainant to give evidence in court

The stakeholders strongly supported procedures to prepare all witnesses to give evidence in court. For children, 65 per cent stated that the preparation was working effectively, 26 per cent stated that it depended on the circumstances and 10 per cent stated that it was not working effectively.⁴ For adults, 54 per cent stated it was working effectively; 32 per cent stated it depended on the circumstances; and 14 per cent stated that it was not working effectively.

The reform included two main aspects: firstly, a briefing by the prosecutor, and secondly, familiarisation with the legal procedures for witnesses. The researchers identified four common themes in stakeholders' interview responses:

- preparation improves the quality of the complainant's evidence
- the quality of preparation is inconsistent
- more resources are needed
- a flexible approach is required.

Preparation improves the quality of the complainant's evidence

The stakeholders agreed that a well-prepared complainant was more comfortable and confident with court procedures and more able to give more detailed, reliable and accurate evidence. Prosecutors commented that briefing the complainant before the trial allowed them to build rapport and create a relationship of trust, which facilitated evidence collection. Stakeholders also commented on the importance of familiarisation with the court facilities and procedures, such as explaining the CCTV system, taking a walk through the court and being briefed about procedures for witness examination, either with a witness advisor or the prosecutor in the case.

Text box 2.1

If the witness knows me, they are comfortable and they trust me, and if I have taken the care and time to build rapport with them, then their evidence will be more detailed, more accurate and more reliable, which is fairer to everybody. (Prosecutor 1)

Regardless of the age, a physical walkthrough is probably really helpful. (Judge 1)

It is of enormous assistance because it prepares them for the process; it is not something that is sprung on them on the day of the trial. (Judge 2)

The quality of preparation is inconsistent

A common theme in the stakeholders' responses was that the quality varied in the preparation

complainants received, and that this was an area that could be improved. The stakeholders suggested that the quality and level of preparation depended on the particular briefing of the complainant. For example, some prosecutors did not 'proof' adult complainants (that is, they did not go through the complainant's evidence with them before the trial), or provide these complainants with a copy of their prior statement before the trial. Defence lawyers asserted that it was important that the briefing did not go too far, and that the briefing should not include instructions to the complainant on how to respond to questions that were likely to arise in cross-examination.

Text box 2.2

A sensible and professional preparation is important so that they are competent, confident witnesses. (Judge 14)

Prosecutors vary a lot in terms of the amount of time they invest in gaining rapport with the complainant and making the complainant feel supported. (Defence Lawyer 9)

Witness assistance professionals familiarised most children with the court, but many stakeholders commented that adults would benefit from a similar service. Several stakeholders suggested that all complainants would benefit from having greater preparation for cross-examination. Stakeholders perceived that for complainants, this aspect of their evidence was one of the most onerous, and it often appeared that the complainant was not expecting questions that discredited their evidence-in-chief. Preparation for cross-examination (as long as it does not extend to coaching) may help complainants to answer the questions and appear less defensive. If they anticipate this phase of the evidence, and realise it is part of the standard legal procedure, they are also less likely to view it as a personal attack.

More resources are needed

Prosecutors and witness assistance professionals both reported that limited resources were a common barrier to effectively preparing a complainant. Prosecutors often felt their workload was so high that they did not spend as much time as they would like developing the kind of rapport and relationship of trust with complainants that would be beneficial. Late assignment of their cases and impending trial dates exacerbated this problem. Witness advisors also reported a high workload, which meant they had to prioritise cases rather than assist all complainants as much as possible. For adults, unlike children, there were limited services to help prepare them to give evidence at trial, which meant that many adults simply missed out.

Text box 2.3

It is quite difficult to prepare adequately, simply because the lack of resources means that the Crown prosecutors are briefed very late. (Prosecutor 1)

We do not have enough resources to do the best preparation that we could possibly do. We are more often than not being reactive, rather than proactive. (Witness Advisor 1)

A flexible approach is required

The consensus among stakeholders was that the process of preparing a complainant for court should be flexible and should depend on the needs of the individual. Prosecutors and witness advisors both explained that the method and level of preparation of the complainant varied. The stakeholders spent more time with complainants they considered more anxious or vulnerable. Some deliberately spent less time with complainants who were more comfortable and unconcerned about attending court, to avoid heightening their anxiety. Several defence counsel suggested they could put the complainant more at ease by meeting briefly with them before the trial and explaining their role in the legal process.

Text box 2.4

If they are not worried about court, I leave them alone. If they are, I bring them in and show them the courtroom and the CCTV room, and I do a bit of basic court preparation to ease their anxiety, because they always have preconceived ideas about what court is going to be like. You just base it on each individual's needs. (Witness Advisor 5)

They should be more amenable to speaking to defence lawyers. Quite often we can reduce the scariness at trial for a complainant. I cannot speak for all lawyers; some might like the idea that a complainant is scared of them. My particular view is that it is not helpful for anyone. (Defence Lawyer 4)

One prosecutor was concerned that developing a rapport with a complainant could become problematic – that developing any sort of relationship may lead to criticism that they have become too involved or may have coloured the view of the complainant. Stakeholders described the need to ensure sufficient and appropriate preparation as a constant balancing act.

Pre-recorded investigative interviews

Stakeholders showed strong support for using pre-recorded investigative interviews with children as evidence-in-chief: 67 per cent of stakeholders supported the reform, 28 per cent supported it

depending on the circumstances, and one defence lawyer did not support it. They generally agreed that the introduction of pre-recorded interviews increased the access of child complainants to justice. Among prosecutors, use of the police interview as evidence-in-chief was reported as a common practice with children. They either used it in all cases or in certain circumstances. Prosecutors nearly always used the pre-recorded interviews as evidence-in-chief with children aged 12 or younger, but did so less consistently with adolescents due to a perception that the older age group was more capable of giving live evidence.

Unlike most other alternate measures, legislation in most jurisdictions does not generally permit the use of pre-recorded interviews as evidence-in-chief for adult sexual abuse complainants (with the exception of the Northern Territory and Tasmania). Support for extending the use of pre-recorded investigative interviews as evidence-in-chief for adult complainants was mixed: 36 per cent of stakeholders supported the introduction of this measure; 22 per cent supported it depending on the circumstances; and 42 per cent did not support it. All witness advisors strongly supported this alternate procedure for adults, but prosecutors, defence counsel and judges were divided in their views regardless of their role.

First, the study into pre-recorded investigative interviews discusses the themes that arose from stakeholders' discussions about current practice with children, namely:

- the prevalence of poor-quality police interviews
- the need to adduce more complete, reliable and credible evidence from child complainants
- certainty about the evidence leading to better case preparation
- credibility assessment being more difficult via video.

The discussion then turns to the main theme arising from the possibility of extending this practice to adults: the idea that extending pre-recorded interviews to adults will raise similar but more complex issues.

Poor-quality police interviews

The most frequent theme in stakeholders' interview discussions was their extensive concerns about the quality of police interviewing practices. Nearly all of the prosecutors, defence counsel and judges spoke passionately about their dissatisfaction with police interviews of children. Many reported inconsistencies in police practice. They observed that the skills of the interviewer determined the utility of the police interview as evidence. Stakeholders acknowledged that interviewing sexual abuse complainants is a

difficult skill to learn, especially when there is a need to balance investigative and evidential requirements. But many of the interviews were not skilfully conducted and it did not appear as though the interviewers had planned effectively for the interview. The strong dissatisfaction with the quality of the police interviews led some stakeholders to suggest that the gap between actual and desired practice could only be overcome if legally trained experts, not police, conducted the interviews. In short, stakeholders perceived that the inconsistent quality of police interviews hampered successful prosecution of these cases.

Text box 2.5

There are many, many, many bad interviews.
(Defence Lawyer 1)

The initial interviews are poorly conducted, and that creates considerable problems in court. In essence, they are too long and question the child about irrelevant material. The interviews have been so long that it has created enormous problems at trial, both in terms of having to play long interviews to a jury, and making it more difficult for the child who is exposed to cross-examination about a whole lot of irrelevant material that is included in the interview. (Judge 2)

One of my concerns about the way that evidence is led is the ability of the interviewer, because that interview then shapes the rest of the prosecution. So it needs to be done by somebody who is very skilled; rather than a police officer, it should at least be a lawyer who has experience in the laws of evidence. (Defence Counsel 4)

The inadequacies of the interviews could be a whole topic in itself. (Prosecutor 6)

Many aspects of police interviews frustrated the legal professionals. The most frequently discussed concern of prosecutors, defence counsel and judges was that police interviewers tended to elicit too much irrelevant detail – for example, a child might be questioned about the colour of the underwear they were wearing at the time of the offence. They expressed how inappropriate it was to see such lines of questioning. Stakeholders perceived that too much irrelevant detail led to more inconsistencies in the child's evidence, creating unfair opportunities for cross-examiners to undermine the credibility of the complainant. The delay between interview and trial was seen to exacerbate this problem. Some legal professionals commented that the child was even less able to remember the details by the time of the trial than at interview, but felt pressured to remember the details they had originally provided, which resulted in them resorting to guessing.

Text box 2.6

A lot of the interviews go into 'Which hand did he use?' or 'What were you wearing?' The problem is that when a significant amount of time has passed, the child is cross-examined and they get confused, they cannot remember which hand the accused used, or whether he used two hands. And then defence closes by saying to the jury, 'Well, she's unreliable, she can't remember which hand, she can't remember whether it was two hands, she can't remember what she was wearing'. It undermines their credibility. (Prosecutor 8)

From a defence perspective, a bad interview is a good thing, because you can get the prejudicial or inadmissible parts edited out, so the prosecution loses that evidence. You can request another interview and then you will get some inconsistencies, or if a witness says something for the first time that they did not say back in their original interview, then you can take advantage of that. (Defence Lawyer 2)

Oh my God, if I have to deal again with what colour the lunchboxes were or what colour the underpants were, I think I am going to die! (Defence Lawyer 1)

Poor-quality interviews perpetrate prior inconsistent statements because the children are confused and they give different answers to what might be regarded as the same question at different stages of the interview, just because they have not really followed what the interviewer is getting at. (Judge 10)

A few stakeholders suggested that the extensive questioning of the child to elicit more detail contributed to errors in the child's reports. Both prosecutors and defence counsel suggested that less extraneous detail would help the prosecution, and that police should spend less time revisiting the information provided by the child and asking for more descriptive detail.

Text box 2.7

Sometimes the way the interviews are structured is almost setting the complainant up to give inconsistent evidence, particularly with younger children.
(Prosecutor 2)

Children who have been sexually abused are not going to go into that kind of detail. If you have been sexually penetrated you are not going to remember that picture, the fabric and how many pillows were on the bed. They are in fight or flight mentality, so all this questioning that goes on and on, and the recapping of the evidence is just so frustrating. (Prosecutor 9)

There is too much irrelevant detail. The moment that the interviewer starts to break it down they are opening up a chasm of potential cross-examination that results in the complainant being unreliable, because there is no way that two years down the track a child will remember what he or she recollected at the time and be able to effectively recount what they said, even if it is the truth. (Defence Lawyer 1)

Stakeholders often perceived interviews as overly long and incoherent due to the large amount of detail obtained. They were concerned that this could cause jurors to tire and lose interest when watching the child's evidence.

Text box 2.8

The visually recorded interviews are often incredibly long-winded, certainly much longer than they need to be and they are quite repetitive... And I wonder if that's a useful tool for defence lawyers but perhaps not so much for the prosecution. Quite often the interviewers go back and forth over the subjects and get the child to tell their story a number of times. And as with any story that has been told a number of times, small details will change. As defence lawyers, when small details change we tend to jump all over those. (Defence Lawyer 3)

It is really important that these child interviewers be given a lot of training and I am not sure that we have really reached the best level of conducting these interviews that one could reach, because they are often extremely long, which must be distressing for the child and makes the jury switch off. They often go into a lot of very irrelevant detail as to who was wearing what and what the room looked like. (Judge 3)

Another criticism of police interviews was that they did not always establish the elements of the offence. This meant that the police would often have to re-interview the child prior to trial (often more than once), creating extra interview records. Not only was this process onerous on the child, but these additional records could be used by the defence to confuse the child and form the basis for cross-examination on any inconsistencies generated.

Text box 2.9

Sometimes police have missed crucial things relating to the elements of the offences and what has to be proved. (Prosecutor 1)

Sometimes the interviewer can lose sight of what the law is and what they need to achieve in the interview. (Judge 13)

Finally, several lawyers and judges were concerned about police using leading or suggestive questions. This type of questioning had sometimes resulted in part or all of the interview being rendered inadmissible or fatally damaging to the prosecution case. However, this view was not universal, as others reported that police practice had improved and that this type of inappropriate questioning was rare.

Text box 2.10

There is a great variety of skill in the questioning, and some interviews end up leading witnesses. (Defence Lawyer 7)

Interviewers are normally terrible at being able to frame their questions in a non-leading fashion. (Defence Lawyer 5)

Adding more complete, reliable and credible evidence from a child

The stakeholders' responses indicated that using pre-recorded investigative interviews as evidence-in-chief is perceived as an important part of improving the criminal justice response to these cases. Stakeholders reported that these interviews resulted in more complete and reliable evidence from child witnesses for a variety of reasons. The main benefit was the freshness of the evidence captured in the interview in contrast to evidence given after a lengthy delay waiting for trial. This freshness was perceived to reduce memory decay, enabling a child to give more complete and reliable evidence than was previously possible. A skilled police interviewer could elicit evidence in the child's own words, thereby further contributing to higher-quality information.

Text box 2.11

The strength of the recording for children is that if you capture them close to the time, their memory is fresh. (Prosecutor 1)

The advantage of these interviews is that the story is told and presented to the court. If you do not have the pre-recorded interview available, you can get situations where the child will simply seize up in the witness box and you get nothing. (Judge 2)

Another benefit perceived by stakeholders was that using pre-recorded evidence was less stressful for the child than giving live evidence at trial. Reasons included the more relaxed environment of the interview; not having to recall everything that happened in front of the accused and strangers on the jury; and avoiding the additional anxiety of attending the trial.

Text box 2.12

From a prosecution point of view pre-recorded interviews are beneficial, because otherwise the child is terrified by the experience. Imagine being that young, having to sit in court and then say everything. So you can understand why using the interview has raised the prosecution's ability to get convictions. (Defence Lawyer 6)

The pre-recorded interviews are good, particularly with a child, because they do not have the pressure of the jury. (Judge 14)

Pre-recorded interviews are terrific because you are getting the child at a very early stage, when events are fresh in their memory, and it is in the less threatening atmosphere of the police station. (Judge 11)

Finally, many of the stakeholders perceived that a well-conducted police interview could result in more powerful evidence due to heightened levels of accuracy and detail inherent in a more contemporaneous report. Jurors could place more faith in the reliability of the evidence given by the child in the police interview, than in the live evidence given months later in court.

Text box 2.13

The great strength of pre-recorded interviews is that you are getting the evidence immediately, and you are not saying, 'Tell me what happened 18 months ago', and the child becomes confused. (Judge 5)

The pre-recorded interview captures the complainant's evidence when it is really fresh, so the jury has the opportunity to see the evidence when the child first discloses. That is a lot more powerful than when complainants are being asked questions and giving answers 12 months down the track. It also captures a lot of detail that possibly would not be captured later on. (Witness Advisor 2)

Certainty about the evidence leading to better case preparation

Prosecutors, defence counsel and judges perceived that using pre-recorded police interviews as evidence improved case preparation due to the greater certainty this afforded about the child's evidence before trial. Prosecutors commented that they could prepare more effectively for trial because they could see the evidence in final form, and knew the strengths and weakness of the evidence. This knowledge enabled them to better tailor their opening address and pitch the case to the jury from the outset of the trial. Defence counsel also benefited from the certainty regarding the child's evidence, because they could better analyse the evidence and prepare their arguments and lines of cross-examination before the trial.

Text box 2.14

When it comes to preparing for trial, it is great that you know exactly what your main witness is trying to say. So you can pitch your case very well in an opening address. (Prosecutor 2)

I suppose the benefit of the police interview from a defence perspective is that you know exactly what the evidence is. You know what is going to be said in court, so you can plan your cross-examination, and what you are going to do. (Defence Lawyer 6)

All of the legal professionals responded positively to the reduced risk of inadmissible evidence being introduced at trial, due to the ability to edit irrelevant or inadmissible evidence from the video.

Assessment of credibility is more difficult via video

A small number of prosecutors, defence counsel and judges raised concerns that a video record of the interview did not allow for effective assessment of the complainant's credibility when compared with live evidence. The poor quality of the recordings exacerbated this problem. In some instances, the complainant might have been seated far from the camera and microphone, so that when the video was viewed in court the jury had difficulty hearing their evidence, and could not see the child's facial expressions. Often the interview room was cluttered with other items that could distract jurors from looking at the child. Stakeholders perceived this problem as restricting the ability of the jury or defence to assess the credibility of the complainant, potentially reducing the fairness of the trial to the accused and the impact of the child's evidence.

Text box 2.15

The complainant is often sitting on a couch surrounded by toys and books so they get readily distracted, and as a viewer you are not getting a very good image, you cannot really look at the child as they are answering the questions, which is obviously important. (Prosecutor 4)

There are significant limitations on the fairness to the accused with recorded evidence; the jury and defence cannot properly assess their evidence. (Defence Lawyer 4)

With pre-recorded evidence, there is always the problem that the child is removed from reality, even more so these days when there is so much reality TV, because the jury can potentially only watch TV and see nothing live. (Judge 1)

Extending pre-recorded interviews to adults would raise similar but more complex issues

The overriding theme in stakeholders' responses was that the issues associated with introducing pre-recorded interviews as evidence-in-chief for adults were similar to those for children, but more varied and complex. Clear consensus emerged that this reform could reduce the stress experienced by an adult complainant giving evidence. Witness advisors were particularly strong in supporting this potential reform. Stakeholders in favour of the reform often suggested that it was unfair to have an arbitrary age at which this mode of evidence was no longer an option.

Many also expressed the view that adult complainants of sexual offences are still vulnerable witnesses, and should therefore be entitled to the same options for giving evidence as are child witnesses. This was especially the case when the characteristics of the complainant or the alleged offending heightened the risk that they would feel intimidated by the defendant or the court process.

Text box 2.16

At the moment, we do not record any adult complainants' statements, which is unfortunate, because often you have people who are very vulnerable, or who would greatly benefit from having their statements recorded. (Prosecutor 1)

The more accurately you can record a person's evidence the better, so a recorded interview is much better for all concerned. Not only do I get to understand precisely what the complainant has said, but there is no confusion about interpretation later on. (Defence Lawyer 8)

It would be fantastic. Adults are not that different from children; they are still feeling the same things – the anxiousness, the nerves – and the length of time between the report and trial obviously affects their memory as well; then being up there and then getting asked all those intimate details. (Witness Advisor 5)

On the other hand, some of the stakeholders commented that there was no reason to give adult complainants of sexual abuse special treatment (when compared to adult complainants of other types of crimes) by making pre-recorded evidence available to them. Furthermore, the process may have an inherent unfairness to the accused, as it enabled an adult complainant to rely on their recorded interview rather than actually recall the evidence live in court.

Text box 2.17

We can all agree that children have to have special rules that apply to them, but it is fair to expect that adults should be required to deal with the stress of examination-in-chief, as well as cross-examination. (Defence Lawyer 8)

There is an inherent unfairness to the accused if a witness is able to rely on a video interview without actually having to recall the events and give evidence of them. (Defence Lawyer 6)

Once you are an adult you have to be treated as an adult, and give evidence in court. They should have to elect to give evidence, and by all means use a remote witness room, but they need to be dealt with like any other witness in any other court case. (Judge 14)

Many legal professionals perceived that the fresher account on video would result in more reliable and complete evidence and in reduced stress on the complainant, as for children.

Text box 2.18

One advantage is that the evidence is there, so further down the track you do not have a problem if the complainant is frightened and decides they do not want to come and give evidence, or a situation where they are so terrified in court that they do not give their evidence. (Prosecutor 4)

The evidence-giving process would be less traumatic if complainants only reported once, and if the report was closer to the event so that they would remember better. (Judge 9)

Having video-recorded interviews for adults would be amazing. It would reduce a lot of the anxiety that adult victims have, because quite often people will say 'I'm trying not to forget, I'm trying to think about it, I'm trying to re-read my statement'. When they do that for 12 months to two years, then they are actually worrying about the fact that they may forget something, which is just an additional anxiety that they are facing. (Witness Advisor 1)

Other professionals, however, questioned the benefits of using this method with adults. They perceived that the primary reason justifying the need to record child interviews – namely, their reliability – was no longer an issue in adulthood. For example, an adult can reasonably be expected to remember the events following a delay before trial, and should be capable of giving live evidence in court (with the use of other alternate measures, such as a screen or CCTV). Further, if an adult was reporting historical allegations then the benefit of the video capturing a fresher account was lost.

Text box 2.19

Pre-recorded interviews are not necessary for adults, particularly adults who are discussing child sexual abuse, because memory is no longer an issue. (Prosecutor 3)

If you have an adult complainant who is reasonably clear with what they say happened, and there is not going to be any great loss of memory over the following 12 months, I do not see any advantage to having them interviewed; they can provide a really clear, comprehensive statement. (Prosecutor 2)

Views varied on whether the live oral evidence or pre-recorded police interview would be more credible evidence. Some stakeholders suggested that the complainant may give a more compelling account in the police interview, especially if the offence was recent. Others suggested that the interviews could suffer the same problems of child interviews and

contain large amounts of irrelevant information that could damage the complainants' credibility. In cases of complainants of historical this concern was heightened, as these cases often involve allegations of repeat abuse. Stakeholders perceived that irrelevant detail could result in the complainant being confused when making their initial report to police, leading to an ambiguous and incoherent account. This could later be used to damage the credibility of the complainant. Some stakeholders suggested that the opportunity to report the event prior to trial (in the interview and sometimes with the prosecutor) and the skills of a prosecutor in presenting evidence might make live evidence more ordered and coherent.

Text box 2.20

Initial recording of adult complaints, particularly where they are fresh, could capture potentially very compelling complaints because of the presentation of the complainant. This could be very important evidence because those trials always inevitably focus on the credibility of the complainant. (Prosecutor 1)

The jury gets to see the complainant's response when they first go to the police, instead of years down the track, and their first disclosure can be very compelling in how they answer questions. It is much more artificial in court. (Prosecutor 4)

God! I dread the day that pre-recorded police interviews for adults would be inflicted upon us. It would not help anyone other than the defence. All those interviews do, by drilling down into colours of lunchboxes, is open up an excess of detail that the defence can cross-examine on. I would be sad to see that happen. (Defence Lawyer 1)

I would not advocate using the recorded police interview for adults, because there is this tension between the investigative and evidence-producing process. If they are able to give an account in court, which is focused on the issues so it results in evidence-producing questioning rather than investigative questioning, then it is likely to be more condensed and generally more impressive before the jury. (Judge 2)

Pre-recording the complainant's entire evidence

There was strong support for the reform allowing the pre-recording of the complainant's evidence-in-chief and cross-examination at a preliminary hearing in advance of the trial. Despite this, the reform is available only in some jurisdictions, and usually only for children: 74 per cent of stakeholders supported the reform; 24 per cent supported it depending on the circumstances; and 3 per cent did not support it. Those participants who had experience with this alternative to in-court evidence from the complainant reported its frequent use with children, but that it was used less with adolescents and not at all with adults.

There was a rare exception for extremely vulnerable adults with an intellectual impairment or psychological distress. The extent of support for pre-recorded evidence of adult sexual abuse complainants was varied: 30 per cent supported the reform; 30 per cent supported it depending on the circumstances; and 39 per cent did not support it.

The study identified five common themes in responses from stakeholders regarding uses of pre-recorded evidence. According to these responses, pre-recorded evidence for adults:

- overcomes problems faced by the complainant due to trial delays
- facilitates trial preparation
- creates unforeseen legal and logistical problems
- enables increased flexibility of proceeding in the absence of a jury
- has a reduced impact compared with live evidence at trial.

Overcoming problems faced by complainants due to trial delays

Stakeholders perceived that a major benefit of pre-recorded evidence was the avoidance or reduction in the numerous problems associated with delays between reporting abuse and the ultimate trial date. Complainants could give evidence at a time much closer to the initial report, rather than waiting years to give evidence about the events at trial. Expediting the evidence was beneficial to the wellbeing of the complainant because it enabled them to exit the criminal justice process earlier, thereby reducing the anxiety of waiting to give evidence against the accused.

Text box 2.21

The biggest advantage is that cross-examination and re-examination are conducted sooner. So the process of the child giving evidence is completed earlier. (Prosecutor 5)

I would much rather be cross-examining, especially a child, closer to the incident. From a defence perspective, if we are going to think about this carefully, any concession I get from a child five years after the event automatically is discounted because (a) they are a child, and (b) five years has passed. So it is in my client's interests to be able to test the evidence approximate to the time the allegation is made. (Defence Lawyer 8)

The shorter the delay, the better chance you have of the witness recalling detail. The second advantage is that the child is not exposed to a long period of trauma while waiting and worrying about giving evidence. (Judge 2)

Less delay meant a complainant would have a fresher memory for events, and was thus perceived likely to remember more details about what happened and to give higher-quality evidence than later at trial.

Facilitating trial preparation

Stakeholders identified certainty about the entirety of the evidence as another common benefit of pre-recorded evidence, as it enabled better trial preparation. Knowledge of this central evidence in advance of trial facilitated preparation of prosecutors' and defence cases, potentially shortening and focusing the trial time.

Text box 2.22

The strength is that you know exactly the evidence that you can open up on, and you know that under cross-examination, sometimes extensively, they have held their ground, and so you know that you have got a case to answer, you can speak confidently in your opening. (Prosecutor 9)

The advantage is to both sides, both the state and the defence. The main witness's evidence is in the can, so everyone knows what the main evidence is, and that often shortens the trial; it becomes more focused upon what the issues are, and it can lead to a more positive presentation of the case. (Judge 2)

Certainty about the complainant's evidence also meant both the prosecutor and defence counsel could make more informed plea bargaining decisions that could lead to earlier case resolutions; this would be of benefit to both the accused and the complainant.

Creating unforeseen legal and logistical problems

Other themes in stakeholders' interview responses suggested that an earlier recording of the complainant's evidence was at times a disadvantage. Prosecutors and defence counsel were concerned that any evidence uncovered between the time of pre-recording and the trial date could change the facts at issue at trial. The extent and effectiveness of cross-examination might also be constrained by scheduling cross-examination before all evidence was collected, depriving defence counsel of the opportunity to test the entirety of the evidence. This meant the case strategy might change, but an inability to change the questioning of the complainant would limit how the case could be constructed. Another problem with pre-recording evidence arose if the same prosecutor was not available for both the pre-recording and the trial. If the new prosecutors preferred a different approach to the case this could not be implemented due to the pre-recorded evidence of the complainant.

Text box 2.23

I cannot imagine a case where you could cross-examine someone as effectively at a preliminary hearing as you could after more preparation. You just find out so much more as time goes on. (Judge 5)

Pre-recording of cross-examination raises a number of different issues. The main one is a resource issue; it is difficult to understand how it could be resourced to be done quickly. It would be highly undesirable get to a situation where one counsel is briefed and prepares the cross-examination in advance to enable a recording to be made, yet when the allocation of a trial date is being set down, list judges say 'We cannot cater to counsel's availability, brief someone else'. (Defence Lawyer 7)

Without having all of the relevant information at the time of the cross-examination, you are then deprived of the opportunity to speak to the witness about it. (Defence Lawyer 10)

Several stakeholders expressed concern that pre-recording wasted the court's time as judicial resources were expended twice, once at a pre-trial hearing to pre-record the evidence and again at trial to play the recorded evidence. It was a more efficient use of court resources simply to hold the trial.

Text box 2.24

There seems to be a movement towards the reduction of pre-recording evidence of children, simply because it is time-consuming and costly, and there is an inherent duplication of resources. (Prosecutor 9)

Enabling increased flexibility of proceedings in the absence of a jury

Another theme that emerged in the interview responses of stakeholders was the increased flexibility of proceedings in the absence of a jury. Stakeholders identified two main reasons for this. First, the pre-recording process was perceived to improve the scheduling of a child's evidence. When a complainant gives evidence at trial, start times are not fixed because it is difficult to predict how long it will take to empanel the jury, to complete the judge's directions and opening arguments, and for any legal discussions to take place (which can take hours). In contrast, the start time for a pre-recording was fixed, which reduced the burden on complainants and the anxiety of waiting at court to be called to present their evidence. Similarly, the child could take breaks as needed without the judge having to excuse the jury and without the risk that a jury might draw an adverse inference about the accused due to the child's need to take a break.

Text box 2.25

One advantage is that the child has a fixed time for the pre-recording, whereas with a trial you often have legal argument, the empanelling of a jury, the opening addresses, and if the child is the first witness, they do not get started until about 12 o'clock, if they are lucky. So there is a lot of waiting around. And, obviously, with children you do not want them waiting around and the anxiety that comes with it. And afternoons are not the best time for a child; it is best to get them when they are bright and sparky at 10 o'clock. So the fixed start time has a big advantage. (Prosecutor 5)

Secondly, at the pre-recording hearing, lawyers can more freely ask questions of the complainant without having to worry about whether they are eliciting inadmissible evidence, because the recording can be edited before trial. Judges can also more readily intervene without the concern that doing so may bias jurors' decision making. The ability to edit the evidence is likely to save court time due to reduced interruptions for legal discussions about admissibility (while complainants and jurors are in another room waiting for the outcome). It also means that the trial is not aborted if the complainant gives inadmissible evidence.

Text box 2.26

If you do have an unpredictable or young complainant, defence might want to know that if the child says something that is inadmissible, it can just be edited out, rather than blowing a jury, or causing a jury to be prejudiced. So, if they thought that was a danger in that particular case, defence would probably want the pre-recording. (Defence Lawyer 2)

One advantage of pre-recording is that the child can have a break and you can have all sorts of discussions about things if required, and of course there can be editing. (Judge 1)

Diminished impact compared with giving live evidence at trial

In a similar vein to criticisms of CCTV evidence (see below), some stakeholders were concerned that pre-recorded evidence had less impact than in-person live evidence given in court. They described watching the complainant give evidence on a screen as artificial, distant and removed. Participants suggested that as a result, jurors may be less engaged with pre-recorded than live evidence. Without the live connection with the witness, some stakeholders were concerned that jurors may become desensitised to the content. Adding to this problem, the presence of a lawyer asking questions in the courtroom is more dynamic than pre-recorded questions and answers. Stakeholders suggested it was difficult for jurors to connect with a witness seen only on screen, whereas the effect of live evidence – seeing a child walk into

court and having them sit in front of the jury explaining what had happened to them – was considered more impressive.

Text box 2.27

Pre-recording is like watching a not-always-very-interesting TV show. It becomes a bit more artificial and a bit more removed. There is less to engage them [the complainant] because when it is live the lawyer is standing in front of them, so they are moving and changing their view between the lawyer and the screen, whereas when it is pre-recorded they are just looking at the screen. (Prosecutor 2)

You can become desensitised when the witness just becomes a head on a screen; you do not seem to have that live connection. (Prosecutor 9)

It gives a slightly unreal spin to the evidence as far as the jury is concerned. Seeing another human being sitting in front of you and explaining what has happened to them is much more impressive than seeing a pre-recording or even evidence from a remote witness room. (Judge 10)

Closed-circuit television

Stakeholders generally supported the reform allowing witnesses to give evidence from a remote location via CCTV. For use with children, 76 per cent supported the reform; 22 per cent supported it depending on the circumstances; and 2 per cent did not support it. For use with adults, 81 per cent of stakeholders supported the reform; 16 per cent supported it depending on the circumstances; and 3 per cent did not support it. Prosecutors reported frequent use of CCTV with both children and adults, but that use depended on the circumstances. The reform was nearly always used with children, but there was more variability in its use with adolescents and adults, depending on the complainant's preference and perceived vulnerability. The themes that emerged in the stakeholders' responses were similar regardless of their profession or whether they were discussing child or adult complainants.

Next, the study discusses the six themes that arose in the stakeholders' discussions of CCTV, namely that:

- CCTV reduces the stress of giving evidence
- some complainants want to give evidence in person at trial
- improvements can be made in the use of the technology
- CCTV diminishes the impact of the complainant's evidence
- CCTV does not diminish the impact of the complainant's evidence
- CCTV is not unfair to the accused.

CCTV reduces the stress of giving evidence

The most prominent theme to emerge from stakeholders' responses was that for a variety of reasons, CCTV is effective at reducing the stress to complainants of giving evidence live. CCTV allowed complainants to avoid confronting the accused at trial, an experience that many complainants were perceived to find intimidating and fear-provoking. The location of the CCTV room away from the court was especially beneficial because it avoided a potential in person encounter between the complainant and the accused at the courthouse. CCTV reduced the distress to complainants of giving evidence in front of a jury of strangers, which stakeholders perceived as an embarrassing and traumatic experience for many complainants. Some professionals suggested that the distance afforded by CCTV also made cross-examination less intimidating than when conducted face to face. Stakeholders perceived children to be particularly susceptible to these stressors.

Text box 2.28

The remote room is fantastic. You have people who do not want to come into the court and see the accused – they are too traumatised by what has occurred – so, by allowing them to give their evidence remotely they do not have to look at the accused and they feel safe. (Prosecutor 8)

If the witness is going to be really upset, or if it is a matter relating to violent or sexual allegations, then they are in a position to give evidence using CCTV, whereas if they were brought into court it may well be that the matter would not proceed. (Judge 1)

One of children's biggest fears is facing the accused, hearing the accused, and being intimidated by the accused in the court. Obviously with CCTV they will not see or hear the accused, so that fear is removed and they can be much more comfortable in giving evidence. (Witness Advisor 2)

Another perceived benefit of CCTV was that it more readily allowed complainants to ask for a break when needed.

Text box 2.29

The impact of any distress caused by counsel in cross-examination is minimised by them being on video, because the child can just say 'Your Honour, I need a break', and the judge will give it to them. (Defence Lawyer 3)

The professionals commonly reported that reducing the stress on the complainant by using CCTV was likely to improve the quality of the evidence given by the complainant. Overall, stakeholders perceived the use of CCTV as an improvement on traditional oral evidence in court because it allowed complainants to feel more confident, comfortable and safe, thereby

increasing the likelihood that the trial would proceed and that the court would receive higher-quality evidence from the complainant.

Text box 2.30

It makes it easier for complainants to give their evidence, not being in the court environment. Courts are a stressful place for any witness, especially with child sexual abuse cases. (Defence Lawyer 8)

A lot of children do not have well-developed public speaking skills, which is what you need to be able to give your evidence in an open forum like that; whereas when they are in the CCTV room it is a lot more intimate, they are only talking to one person and they do not have to worry about what is happening around them. (Witness Advisor 2)

Some complainants want to give evidence in person at trial

Some stakeholders, including many of the witness advisors, indicated it should be the complainant's choice whether to give evidence via CCTV or live in court. On occasion, some complainants had expressed the desire to confront the accused in the courtroom, to look the accused in the eye, and to demonstrate to the accused that they were no longer scared of him or her. Another reason to give evidence live in court was to have the opportunity to tell the story of what happened directly to the jury. This applied to both adult complainants and children as young as 10 years old. Sometimes witness advisors and prosecutors cautioned complainants against attending court because, from experience, they perceived that the complainant was unaware of how stressful the process would be, but they also reported that some complainants were capable of giving quality evidence live and should have the opportunity to do so. Some stakeholders commented on laws that presumed the evidence would be given via CCTV. This made it onerous to apply for live courtroom evidence and created an obstacle to enabling complainants to choose how they preferred to give their evidence.

Text box 2.31

Some complainants want to go into the courtroom and give their evidence there, because it is important to them to tell their story in the same room as the person who they say did these things to them. (Prosecutor 5)

I have had a few complainants who really want to face the accused, and that is a big thing for them. So, having the option to give evidence in court is a good thing. (Prosecutor 3)

I have seen them turn around and look at the accused in a defiant way. It is not necessarily desirable for that to occur, but it does happen. Some witnesses are quite strong and almost relish the opportunity of not showing fear and of giving evidence in the presence of the perpetrator. (Judge 10)

Improvements can be made in the use of the technology

Most of the stakeholders indicated that the effectiveness of CCTV could be improved in numerous ways. Some courtroom technology was perceived as outdated and slow, causing disruptions to the court process – for example, a signal cutting in and out, the screen freezing, or the audio and visual becoming out of sync. The sound may also be soft, resulting in difficulties for the jury in hearing the evidence. In older courtrooms the screens were considered too small or the image poor, such that juries were unable to clearly see the complainant’s face or their size, which made it difficult to ascertain how young they were. This information was often considered important to the case. The newer courtrooms provided examples of how high-quality technology could capture a clear and more lifelike image, potentially remedying any negative effects on the jury of seeing the complainant only on a screen rather than live in court

Text box 2.32

Sound is the biggest issue: making sure everyone can hear one another and it is not too loud or too soft. (Defence Lawyer 1)

What does create a disadvantage is poor-quality recording or replaying; for example, not getting the best head shot, having crackly sound, having a signal that fades in and out so you suddenly get the frozen hand movements and the chopping of the voice, or you hear the voice but the lips are not moving because the image is frozen. (Judge 11)

Some stakeholders expressed frustration that court staff members are not always familiar with the equipment, resulting in delays for the complainant and jury while waiting for it to be set up correctly.

Text box 2.33

Sometimes the lack of training is an issue, and the sheriffs do not know how to use the equipment. (Witness Advisor 1)

Another difficulty was that the presentation of exhibits to both the witness and jury can be logistically difficult and time-consuming without adequate preparation in advance. This problem occurred most often when defence counsel sought to introduce exhibits that were not planned for prior to the trial.

Text box 2.34

When there is documentary evidence it can make it a little harder, but there are ways to get around that now, like walking the exhibits back and forth. (Prosecutor 7)

Stakeholders reported that in regional areas in some jurisdictions, complainants found the remote rooms too far away for convenient access. A further problem with some remote rooms was that their placement or design made it difficult to get the complainant in or out without encountering the accused and the accused’s supporters, or the jury.

Text box 2.35

Courts are incredibly ill-designed, and even getting people into the remote witness room without them encountering supporters of the accused is nigh on impossible. (Prosecutor 10)

CCTV diminishes the impact of the complainant’s evidence

A common theme in stakeholders’ responses was that CCTV lessened the impact of giving oral evidence compared to a live appearance in court. Many prosecutors, defence counsel and judges suggested that viewing the complainant on a screen was less compelling than having the complainant physically present in the courtroom. Some stakeholders suggested that the emotions and nuances of the complainant’s evidence are lost, which reduces jurors’ ability to assess demeanour and engage with the complainant. One prosecutor highlighted that this was in contrast to the jury’s engagement with the accused. The jury may develop some sort of commitment to the accused because, unlike the complainant, he or she is present in person throughout the entire trial. Some legal professionals suggested that juries are more likely to convict when evidence is presented live in the courtroom.

Text box 2.36

Even though they are giving evidence live from another room, it does seem to lose its impact once it is on the video screen, for some reason. A bit of that human factor is lost. I am not sure why, but when you can see someone in there you seem to get a lot more feeling from them than you do off a video camera. (Prosecutor 3)

The jury have the accused in the room for the whole trial, so there is some sort of commitment to the accused, whereas they do not see the complainants in the flesh, they just see them like watching somebody on TV. (Prosecutor 10)

I have had a couple of adult complainants volunteer to give evidence in person, and by far their evidence is more powerful and vivid than someone giving evidence via remote link. (Defence Lawyer 1)

There is nothing worse from a defence perspective than having a witness in court who is just so gut-wrenchingly emotional, and sitting so close to the jury. You know yourself if someone is really sobbing it is very hard to control your own emotions. So when they

are on a screen I think that really does remove it, because everyone is doing things on screens all the time these days. (Defence Lawyer 6)

In my view, the prospect of a conviction is lessened by evidence from a remote facility; it appears more like TV than direct live evidence in a courtroom. (Judge 12)

CCTV does not diminish the impact of the complainant's evidence

Other stakeholders expressed views in direct contrast to the foregoing, by reporting that CCTV did not lessen the impact of complainants' evidence, for a variety of reasons. They perceived that juries appeared to be just as engaged with and empathetic towards a complainant's evidence irrespective of the use of CCTV. Advances in technology provided jurors with a good, clear view of the complainant, making this evidence as effective as live evidence. Some commented that video footage is now such a common part of life that jurors are unlikely to find it unusual or less persuasive. Based on their experience, these stakeholders perceived that the use of CCTV did not influence case outcomes.

Text box 2.37

I have never really thought that they are engaging less with the witness because they are on CCTV rather than in person. (Prosecutor 7)

They still have a very immediate presence in the courtroom. It is not as if they become abstracted by the use of the technology such that a jury may have less empathy for them. (Defence Lawyer 9)

I have not really experienced a great differentiation in terms of a case that you think should result in a conviction but did not because of CCTV. (Judge 13)

CCTV is not unfair to the accused

Another common theme in the stakeholders' interview responses was that criticisms about CCTV being inherently unfair to the accused (by potentially signalling that the complainant needs 'protection' from the accused) were invalid. Some stakeholders commented that jurors were unlikely to be aware that CCTV was a departure from usual practice, as they were unfamiliar with the court process. For jurors, the fact that other witnesses – in addition to the complainant – gave evidence via AV link made it appear a common feature of courtroom practice. Defence counsel suggested that their clients at times wanted to see the complainant give evidence in court, and believed instinctively that the process was unfair. However, in their experience, both prosecution and defence counsel reported that there was no unfairness or detrimental impact on the accused when a complainant gave evidence via CCTV. No stakeholders raised concerns that CCTV was unfair on

the accused. Indeed some defence lawyers suggested that oral evidence by a complainant in court was more powerful, and therefore CCTV was advantageous to the accused.

Text box 2.38

Juries do not appear to think that the complainant is giving evidence in that way [via CCTV] because the accused is a danger to them and they cannot have them in the courtroom. (Defence Lawyer 9)

As a defence practitioner, the general view is that there is no harm to defence in having complainants use remote facilities. In fact, most people would agree it is more powerful when someone comes into court. (Defence Lawyer 2)

Screens

Stakeholders reported only rare use of the reform to employ screens that shield the accused from the view of a complainant who is giving live evidence in court. They supported this reform less than other alternate measures. For use with children, 25 per cent of stakeholders supported the reform; 8 per cent supported it depending on the circumstances; and 67 per cent did not support it. For use with adults, 29 per cent of stakeholders supported the reform; 7 per cent supported it depending on the circumstances; and 64 per cent did not support it. Many of the prosecutors never used this measure, and others used it infrequently with children and adults. Generally, legal professionals preferred to use CCTV, but screens were sometimes considered a helpful alternative when a complainant wanted protection from the accused but preferred to give evidence live before the jury.

The three main themes in stakeholders' responses regarding the use of screens were that it:

- was unfair to the accused
- was ineffective at reducing stress
- enabled the complainant to give evidence live at trial.

Unfair to the accused

Many of the stakeholders, especially defence counsel and judges, criticised the use of screens as unfair to the accused for two main reasons. One reason was that the accused should have the right to see the person who is giving evidence against them, and the screen prevents this from happening. Another reason is that the screen may inadvertently suggest that the accused is being guarded at the back of court and is so scary that he or she must be shielded from the view of the complainant. As such, jurors may interpret the screen as implying the accused is guilty, subverting the principle of innocent until proven guilty.

Text box 2.39

Screens are available within the legislation, but I have a real problem with them because they have the express impact of telling the jury that the person on the other side of the screen, which is the accused, is guilty. (Defence Lawyer 5)

It is like the accused is some monster, he is already at the back of the court in the dock, with a guard in front of him, and then you put the screen up. (Judge 6)

Ineffective at reducing stress

Stakeholders commonly criticised screens as ineffective. In the stakeholders' experience, in some cases the accused could be seen if he or she wanted, by simply moving, rendering the screen useless. Further, despite the presence of a screen, the complainant was still aware of the proximity of the accused in the courtroom and hence the screen was unlikely to alleviate the fears of the complainant. Moreover, the complainant would often have to walk past the accused to the witness box, as the screen only shielded the accused from view from the witness box. While some courtrooms had well-designed and purpose-built screens, others did not, and instead relied on large whiteboards or projector screens for this purpose. As a result, the professionals reported that using a screen was often a negative experience for the complainant, adding an extra layer of complexity to the process, and at times unintentionally blocking the view of other members of the court.

Text box 2.40

If the complainant is too nervous to give evidence when seeing the accused or knowing that they are right next to the accused, being behind a board does not seem to make them feel any different. (Prosecutor 3)

It is quite unnatural to be asked questions from behind a screen, so you are adding another layer of complication to an already fairly confronting environment. (Defence Lawyer 8)

Even with the use of screens, the child still has to walk into the courtroom and that is going to be traumatic. It is more difficult to have a court person close, it is more difficult to have breaks, and it is a more stressful environment, even if they are not in a position where they are going to see the jury and the accused. (Judge 1)

Enables the complainant to give live evidence

A small number of stakeholders, primarily prosecutors, supported the use of screens because they perceived that this option reduced some of the stress of giving evidence in front of the accused, while enabling the complainant to give evidence live in court. These stakeholders perceived that this method

was a viable option only if the screen was unobtrusive and did not interfere with the legal proceedings. The use of a screen was also perceived as beneficial to the jury members, as they could view the complainant's evidence live and in some cases not even realise a screen was in place.

Text box 2.41

That is actually the second best option from my point of view. I like them in court. The screen is a great idea if it is unobtrusive and not distracting, and from a practical perspective you can show exhibits more easily, but that is not really related to the comfort of the complainant. (Prosecutor 4)

A support person for the complainant

Stakeholders unanimously supported reforms that allowed both child and adult witnesses to be accompanied by a support person while giving evidence in court. For children, 88 per cent supported the reform and 13 per cent supported it depending on the circumstances. For adults, 90 per cent supported the reform, and 10 per cent supported it depending on circumstances. They reported that this reform was used whenever children or adults requested support.

The study identified two common themes in the stakeholders' interview responses on this topic, namely that:

- the presence of the support person reduces complainants' stress when giving evidence
- the effectiveness of a support person depends how appropriate they are.

The presence of the support person reduces complainants' stress when giving evidence

The stakeholders suggested that the main benefit of the presence of a support person was that complainants were more comfortable and relaxed in their presence. Stakeholders perceived that witnesses provided better-quality evidence when supported.

Text box 2.42

It is nice that there is somebody supportive there. It increases the complainant's sense of comfort. The more comfortable they are in their environment, the more reliable they are as witnesses, and the better witnesses they make. (Prosecutor 1)

As a father, I entirely endorse the notion of there being a support person present because it is an intimidating process. Sometimes they just need somebody that they can trust to communicate with. I do not have a problem with it. (Defence Lawyer 5)

Support people are fine. Often, they are out of sight so you do not know. The alternative is a five-year-old or a 10-year-old with nobody there except a stranger who is in uniform: a court officer or a sheriff's officer. Really, as a human society you have got to have that kind of provision. (Judge 14)

All of the stakeholders agreed that witness support staff performed an important role and that their presence was useful. Many praised the work of current professional witness support persons.

Effectiveness depends on the appropriateness of the support person

Some of the stakeholders reported negative experiences when a support person was inappropriately selected or was either ineffective or inappropriate – for a number of reasons – in performing their role. Examples of inappropriate selection included other witnesses in the case or family members. Inappropriate support involved over-stepping the role and interfering with the case – for example, by attempting to intervene in questioning, and by coaching the complainant's responses. Stakeholders preferred it when the support person was not visible in the remote AV link facility while the complainant was giving evidence, and cautioned that witness support persons should not make comments to the complainant during the questioning (for example, about being believed). Careful selection of the support person was considered important.

Text box 2.43

Sometimes they choose an inappropriate support person; for example, a witness in the case, so you have to say she cannot be in there. It might be someone that comes to the conference and has an agenda, which you can tell if she is interrupting me all the time, or trying to put words in the victim's mouth; then, we suggest to the victim on the side: "We would prefer you not to choose that person; get someone that is just going to sit there and listen and just be there for your support". (Prosecutor 6)

I have had the problem where a support person was saying things to the complainant during the break that are inappropriate; for example, "You're doing okay, don't worry, people will believe you". The support person could see nothing wrong with that. I wonder how often things like that are said and we just do not hear about it. (Judge 5)

I am personally quite concerned about the role of support persons and counsellors. Those people are very important, I just do not know if their role has been defined to them and the parameters of what they should and should not be doing. I have experienced cases where a support person or counsellor has moved beyond that role and has either attempted to coach evidence or to fix errors that he or she can see during cross-examination. That is no good. (Defence Lawyer 8)

For these reasons, the stakeholders preferred the use of a specially trained witness support professional who is neutral and is only there to provide emotional support. Being trained in giving this support, they would know the limitations of their role. There was, however, some concern that there were not enough specially trained witness support professionals to meet the turnover of cases, as they were often available only for children and not for adults.

Text box 2.44

I have got absolutely no problem with the professional witness support people, but I have some problems with sloppy support people who are not trained and who take a partisan position. (Judge 8)

The support person should be somebody other than a family member or somebody other than a potential witness. I also think they need some degree of professional training. (Defence Lawyer 5)

Testing children's competence to give evidence and take the oath

Stakeholders had mixed views on the usefulness of testing the competency of – or taking an oath or affirmation from – child witnesses. Fifty per cent stated that the process worked effectively; 11 per cent stated it depended on the circumstances; and 39 per cent stated it was not effective. The requirements in the four jurisdictions canvassed in this study varied with regard to this aspect of testimonial evidence.⁵ Overall, there was less discussion on this topic than on other topics, with many of the stakeholders perceiving this aspect of the trial requirement to be a non-issue in terms of any potential negative effects on the complainant.

Despite differences in the legislation, the researchers identified three themes common to professionals' responses, namely that:

- some judges are better than others at testing competency to give evidence
- asking a child about truth and lies does not test what it should
- a child taking the oath does not matter to a jury.

Some judges are better than others at testing competency to give evidence

As occurred in response to questions about effective judicial interventions, many of the stakeholders commented that effectively taking the oath of and testing the competency of a child witness depended on the individual judge. Two issues emerged regarding the testing of the child's competence as a witness: knowing when it was necessary to use the procedures, and the process itself.

Some judges were known to test a child witness's competence even though there was no longer a legal requirement to do so. This overzealous approach was criticised for lengthening the amount of time the child was questioned on the stand.

In terms of the procedure used to question the child to make a determination about competency as a witness, the stakeholders' comments on the skill of different judges ranged from very positive to very negative. Some judges were praised for being prepared, using appropriate and simple language, and for thoroughly testing the child's competence. Stakeholders reported that clear guidelines for the testing of competence were used to good effect in some courtrooms. Yet certain judges were described as using complex, nonsensical and developmentally inappropriate questions that left the child confused.

Text box 2.45

It is an area that is badly handled by many judges, both in addressing a question that does not need to be addressed in the first place, and then once they do decide to enter into that enquiry, doing it badly. (Judge 5)

Some judges have a good spiel that they use, but some others are so bad that it makes you wonder if they have had any interaction with children over the last century. (Prosecutor 3)

Some judges will ask a 10-year-old to take an oath and it makes no sense to the child. They just say "yes" without any explanation. Some judges will ask questions or give the child examples, which is great, rather than very open questions like "Tell me what a lie is" or "What is the truth?" (Witness Advisor 1)

Asking a child about truth and lies does not test what it should

Lawyers and judges commonly expressed concern that the questioning used to test a child's understanding of the difference between truth and lies did not reflect whether they were able to tell the truth. Understanding the difference between the truth and a lie was considered a difficult concept for anyone, let alone a child, to articulate. The legal professionals suggested that these simple yes/no questions were impractical and insufficient to gauge the capacity of the child to understand more subtle distinctions in telling the truth. Further, even if a child responded correctly to competency testing questions, this did not mean they would tell the truth. Some judges expressed frustration about having to complete this process even though it was futile.

Text box 2.46

They used to use what I called the pink elephant test, which was just farcical: "If there was a pink elephant in the room, is that a truth or a lie?" It is not actually

testing much conceptually at all, because it is an impractical and very clear test of what the difference is. Obviously you want to know if the child has a more subtle understanding of the distinction between a truth and a lie. (Defence Lawyer 5)

I do not know whether this is a very good system to ask children questions, because we have standard questioning and the questions we ask are such obvious yes or no answers. So I am not actually sure that it is doing much, but that is the procedure that we have to employ in our court. (Judge 3)

Does it make much difference? No. Because most children, for example my three-year-old, could tell you the difference between a truth and lie; it does not mean they will tell the truth straight after that. (Defence Lawyer 4)

A child taking the oath does not matter to a jury

Many of the stakeholders perceived that whether a child passed the competency test and was able to give evidence under oath had little impact on a jury. As one defence counsel put it, the process was almost redundant, since the evidence would be accepted anyway, whether the child was sworn in or not. The main impact of using unsworn evidence was on directions the judge gave to the jury in their summary of the case. However, the stakeholders believed that this made little difference to the jury. One of the prosecutors explained that a jury may accept that people will lie under oath anyway, because ultimately when a complainant and accused give evidence, one of them is lying or mistaken.

Text box 2.47

It does not appear to matter to a jury whether the child's evidence is sworn or not. They make the same assessment of a child's credibility whether or not the child is put through the rigours of swearing in front of them. (Prosecutor 1)

We would always jump up in defence and say the child does not understand, the child has to be unsworn, but in the end it does not make a huge difference, the evidence still gets taken, people can still get convicted on the unsworn evidence of a child. (Defence Lawyer 3)

Questioning of the complainant at trial

The second most prominent issue that the stakeholders discussed was complainants being questioned in court by prosecutors, defence counsel and judges. Opinions were divided as to whether further reforms were needed to regulate courtroom questioning of child and adult complainants of sexual abuse. Regarding children, 33 per cent felt that questioning was working effectively; 41 per cent said

it depended on the circumstances; and 26 per cent felt that it was ineffective. Regarding adults, 41 per cent felt that it was working effectively; 33 per cent said it depended on the circumstances; and 26 per cent felt that it was ineffective. Most responses on this topic focused on questioning during cross-examination, especially with child complainants. When asked about professional development needs in evidence-based practice, questioning of complainants was the most frequently mentioned topic, hence why it is included in this section.

The researchers identified five themes in stakeholders' responses, namely that:

- the suitability of questioning depends on the lawyer or judge
- aggressive cross-examination of children is counterproductive to the defence
- adults should be tested more robustly
- current questioning guidelines are sufficient but poorly enforced
- lawyers and judges need more extensive training and professional development in this area.

The suitability of questioning depends on the lawyer or judge

The variability of questioning practices among prosecutors, defence counsel and judges was the most frequently discussed theme on the topic of effectively questioning complainants at trial. Some legal professionals were perceived to be very effective at establishing rapport with the child, communicating effectively and putting the complainant at ease throughout the process. Some interview participants suggested that legal professionals who had their own children were particularly skilled in questioning children. Other legal professionals were considered ill-equipped to question complainants, for a variety of reasons. Stakeholders gave examples of legal professionals who were aggressive, dismissive, rude, harassing, confusing and repetitive. Some defence counsel were suspected of deliberately trying to inflict distress. In one extreme example, a prosecutor was involved in a case where this resulted in the trial being aborted and the complainant being hospitalised that night. The general tone of comments suggested that stakeholders were concerned about the harm caused to complainants by cross-examination, and perceived that the legal process was unfair to complainants.

Text box 2.48

Much like the police interview, cross-examination varies so wildly depending on the capability of the person asking the question. (Defence Lawyer 1)

There are lawyers who are antagonistic and aggressive in these cross-examinations and there are some that are not... I have seen defence counsel be

aggressive with child witnesses, and sometimes it appears that they are deliberately trying to cause distress. (Defence Lawyer 3)

There are still some older-style barristers whose tone is belittling and humiliating, and often victims say to me at the end of it "Why are they allowed to just call me a liar? Why am I on trial? I didn't do the wrong thing". Overwhelmingly, victims feel quite horrified by the ordeal that they have been put through in cross-examination. (Prosecutor 1)

I have seen prosecutors and defence counsel who should not be allowed near a complainant, especially vulnerable complainants in sex cases. (Judge 13)

The stakeholders' views about the main practical problems with the trial questions varied for children and adults. The most common criticism of questioning was the inability of many legal professionals to adapt their question style and form to the developmental level of the child, in two main ways. Firstly, questions were described as often formatted in a confusing and complex way (for example, the common use of lengthy, compound, multiple and leading questions). Secondly, the language used by legal professionals did not meet the developmental needs of child witnesses (for example, the use of complex terminology, legalese and confusing and conceptually difficult questions). Overall, the problems with questioning were perceived to elicit unreliable responses from the child.

Text box 2.49

Lawyers vary a lot in terms of their capacity to understand the cognitive limitations of children. Some of them talk to children as if they are adults, and some of them talk to them as if they are babies. Trying to pitch their questions in terms that are appropriate to the child's level of language ability is a difficult thing. I have seen very ineffective cross-examination because the defence counsel gets that wrong. (Defence Lawyer 9)

The main problems I see are double-barrelled questions, multiple questions rolled up into one, confusing topics that make the questions confusing, the use of legal terminology as opposed to simple plain English, and changing topics. (Prosecutor 5)

Everyone needs more education on the appropriateness of the language used. (Judge 1)

The questions are always complex and ambiguous, and children do not understand so they just agree. (Witness Advisor 5)

In relation to adults, the main concern was the aggressive and demeaning questioning of the complainant. Many of the stakeholders expressed strong views that all complainants of sexual abuse offences should be considered vulnerable witnesses in the court, irrespective of age. The questioning of complainants was often described as insulting,

belittling and humiliating. Witness advisors were particularly concerned about the trauma that cross-examination could cause to a complainant. In their experience, almost all complainants found this process distressing and felt anger towards defence counsel. These professionals suggested that more needed to be done to protect adult complainants from cross-examination.

Text box 2.50

All victims of sexual abuse are vulnerable in the witness box. They are vulnerable to suggestion, to being insulted, humiliated and worn down. All of the comments regarding cross-examination of children apply equally to adults. (Prosecutor 1)

I certainly would not want to be a complainant. It is a strange situation to be in because victims also have the presumption of innocence during the trial, and if these victims are genuine victims, then they are spoken to in a way that they should not be spoken to. (Defence Lawyer 2)

Cross-examination re-traumatises complainants. Some people get quite angry. Some people get highly distressed. We actually have vomit bags because people get so distressed that they vomit. So, that vigorous and relentless sort of cross-examination causes a lot of distress. (Witness Advisor 4)

Defence are a lot more aggressive with adults; for example, they will raise the tone of their voice and make facial expressions at the jury depending on how the victim answers the question. (Witness Advisor 1)

Aggressive cross-examination of children is counterproductive to the defence

Despite the criticisms of current practice, many of the prosecutors, defence counsel and judges suggested that attitudes towards the cross-examination of children had changed over the last 30 years. They perceived that an aggressive and harassing style of cross-examination was less prominent than it used to be. Defence counsel were particularly vocal in stating that treating a child aggressively or disrespectfully during cross-examination was counterproductive in defending their client. They suggested that jurors would look negatively on this behaviour, which could potentially bias the jury against the accused. Aggressively questioning children was perceived to indicate the incompetence of the defence counsel and/or outmoded practice. Many stakeholders suggested that the fairest approach for both the child and the accused was a more considered and careful approach to cross-examination.

Text box 2.51

The days are long gone when we thought that destroying the witness meant defence had done the best they could. That just does not happen anymore. (Judge 7)

Defence counsel are far less aggressive with children because they know it will completely turn off the jury. So they are much more careful about their questions because they know the child has to understand them, and the judge will jump on them [the defence counsel] if they are using complex or multi-barrel questions. (Prosecutor 16)

I think there is a wide understanding among defence counsel that you do not win any points with the jury by speaking rudely to a child, trying to confuse them, or being unduly nasty. That sort of hostility in cross-examination is on the decline. But there are different people with different styles. My experience of watching defence counsel cross-examine children is that generally they do it quite well, in a way that would not leave them feeling too attacked. (Defence Lawyer 2)

Sensible counsel have taken the view that extremely aggressive questioning of a child witness or even an adult complainant in a sexual matter can often be counterproductive. (Judge 2)

Adults should be tested more robustly

In contrast to the views of certain stakeholders, some lawyers and judges expressed strong views that adult complainants are not as vulnerable as children and could be cross-examined more robustly. Unlike children, adults were considered developmentally and emotionally mature, and therefore in need of less protection. With appropriate preparation for court, these professionals assumed that adult witnesses were better able to withstand vigorous cross-examination. Prosecutors and judges were content to let the cross-examination of adults continue with less interference because of the need to ensure that their evidence is sufficiently tested. Some legal professionals suggested that a more aggressive style of cross-examination was an inherent part of the adversarial process and necessary to ensure the fairness of the trial to the accused. Indeed, many stated that both the accused and the jury would expect defence counsel to vigorously test an adult complainant's evidence through cross-examination.

Text box 2.52

If it is historical sexual abuse, you need more protection the other way. The evidence needs to be fully and rigorously tested. (Prosecutor 3)

In certain circumstances, adults are more robust, they have better memories, they have life experience, so you can ask them frank questions and you can be blunt with them without being rude. (Defence Lawyer 5)

It is a bit different with adult complainants compared to a child, because you have an adult cross-examining another adult, putting their client's case forward. So there is room for a bit more appropriate aggression or frankness. (Judge 14)

Current questioning guidelines are sufficient but poorly enforced

A common theme in lawyers' and judges' responses was that current practice guidelines for the questioning of both child and adult complainants of sexual abuse gave adequate protection to complainants, but the degree to which they were followed varied (see, for example, the *Uniform Evidence Act* s41). Lawyers and judges perceived that the current guidelines provided sufficient direction, fair to both parties, about inappropriate questioning behaviour (that is, questions that are misleading, harassing, repetitive, intimidating or complex) and adequately protected complainants from unfair questioning. However, they were concerned that the guidelines were sometimes disregarded – at times deliberately and at other times due to a lack of skill or awareness of their existence or form. In such cases, legal counsel had a basis for objection and the presiding judges had sufficient power to intervene, but objections were not usually made and the judges did not always exercise this power.

Text box 2.53

The rules we have currently are sufficient, and the judge's ability to handle questions allowed in the Evidence Act permits them to do that. I do not think it needs to be further limited. (Defence Lawyer 4)

There is this brilliant practice direction but defence lawyers have not read it and judges do not enforce it, so it is basically useless. (Prosecution 5)

We have published guidelines on cross-examining child witnesses and witnesses with mental disabilities. The guidelines assist both the judge and counsel to understand what the expectations are. But sometimes it does not matter how many guidelines you have, some counsel are just incapable of framing a question in a simple way. (Judge 2)

One of our judges has drawn up some guidelines, which guide defence and prosecution about how they need to be talking to children. The problem is that it depends on the judge actually managing that process. (Witness Advisor 2)

Some defence counsel highlighted one rule regarding the questioning of the complainant, which they perceived could be reformed to improve the complainant's experience in court: having to ask the complainant about the accused's theory of the case. This common law requirement means the defence must seek a response from the complainant about any claims by the defendant that call into question the complainant's account. Often this requirement is effected by means of questions such as "I put it to you that..." or "I suggest to you that...". These lawyers questioned the utility of this long-standing practice

both evidentially and in terms of the potential harm and confusion it might cause to complainants.

Lawyers and judges need more professional development in this area

There was a strong acknowledgement by lawyers and judges alike that it is very difficult to cross-examine a child, and that a high level of skill is required. Fifty-nine per cent of stakeholders stated more professional development was needed; 9 per cent stated it depended on the circumstances; and 32 per cent stated it was not needed. A majority of legal professionals expressed a desire for more training and professional development opportunities for evidence-based questioning of children. Some also desired equivalent training on questioning adults, but access to this was not viewed as having the same level of importance: 47 per cent of stakeholders stated that more professional development was needed; 13 per cent stated it depended on the circumstances; and 41 per cent stated it was not needed. Current levels of professional development varied across the jurisdictions and professions. Some of the professionals were happy with the current level of training provided by their organisations, suggesting that they received initial and ongoing opportunities for professional development, but others were not and instead had to learn on the job. A few of the judges suggested that their current level of training was inadequate and pointed out the negative impact this might have on trials. Defence counsel were considered to be particularly at risk of not receiving ongoing development because, unlike judges and prosecutors, they did not often have organisational support for training. Furthermore, stakeholders recognised that even when opportunities for professional development existed, there was no guarantee that professionals would take advantage of them.

Text box 2.54

Judges can ruin a trial and make it ridiculous. Some judicial officers have very outdated views of counterintuitive behaviours; for example, about victims who stay in the home with their stepfather who has been sexually abusing them for years. You need judges who understand and who are trained in the psychology of victims, and about how complaining occurs. (Prosecutor 1)

We are doing a pretty good job at professional development, but it comes down to the individual and how much they take on board. For those people who really believe in the work we do, it's great. Other people will just do it to get the professional development points. In terms of what is being offered by our office as an organisation, I think we are doing pretty well. (Prosecutor 2)

We have continuing professional development every year about various strands of our practice. In criminal law, a lot of us do child sex (or sexual) type matters. But I think the development in this area is something that you learn from experience, rather than being told. (Defence Lawyer 4)

Generally we have no evidence-based practice. We are full of mythology about what juries think, and how adults and children react. Legal training generally is very limited. There is a lot of misplaced intellectual snobbery about learning from social science disciplines. A lot of research about juries, child development and children's disclosure in sexual offence cases is being done but is not actually known and is not easily accessible to practising lawyers and judges. There is a real risk that unfounded belief and mythologies continue to be perpetuated. (Judge 11)

A further theme in the responses from lawyers and judges was that training should be more practical and should include external expertise (for example, from child development experts). They suggested the use of more video, role-playing and outside speakers. Some legal professionals wanted more specific knowledge, direction, practice and feedback on appropriate questioning of complainants. Lawyers, who do most of the questioning in the courtroom, wanted more training that involved practice and feedback, particularly regarding cross-examination of children. In regards to child witnesses, the professionals commented on the need for training to focus on developmental stages and responses to sexual abuse.

Text box 2.55

There is a need for experts in child psychology to speak to lawyers. (Defence Lawyer 8)

Education is needed for lawyers and judges regarding the appropriateness of the language used with children. We have had a little bit, but we need a lot more. (Judge 1)

The more professional development available and the more we base things on evidence, the better. Tell our politicians that. (Judge 8)

Judicial interventions

The stakeholders were divided in their views about the effectiveness of judicial interventions when child and adult complainants are questioned, mostly because it depended on the individual judge. For children, 38 per cent of participants stated that interventions were working effectively; 41 per cent stated it depended on the circumstances; and 21 per cent stated it was ineffective. For adults, 34 per cent stated interventions were working effectively; 46 per cent stated it depended on the circumstances; and 20 per cent stated it was ineffective.

The study identified two themes from the stakeholders' responses, namely that:

- some judges are better at intervening than others
- intervening regularly is detrimental to a fair hearing.

Some judges are better at intervening than others

As in the case of stakeholders' assessments of complainants being questioned in court, a strong theme in responses about the scope and quality of interventions was that they depended on the individual characteristics of the presiding judge. Some judges allowed inappropriate cross-examination to continue without intervening, whereas others erred by intervening too much, which disrupted the flow of the trial. How often a judge intervened was perceived to relate to their individual skill, personality and knowledge.

Text box 2.56

It depends on the particular view of the judge and their attitude toward whether their role is to intervene, or be a more traditional judge who should leave it to the parties and intervene as little as possible. (Prosecutor 3)

The process of cross-examination is necessarily one that is meant to test the evidence, and the question is: when does it reach the point of being too testing because it becomes too traumatic for the witness or too aggressive? The dividing line is a matter of judgment, which can vary from judge to judge. (Judge 2)

Stakeholders offered a variety of reasons for the observed inconsistencies in judicial practice. Their explanations centred on how the judge balanced the need to protect the welfare of the complainant with the right of the accused to a fair trial. The degree to which a judge restricted cross-examination was considered to reflect the degree to which the judge leaned towards the prosecution or defence. Some judges were perceived as being more protective of complainants due to a better understanding of their needs and of the myths around sexual abuse allegations. Judges who were more understanding were often also perceived to be more likely to be friendly to complainants and able to put them at ease, improving the complainants' experience throughout the legal proceedings. Prosecutors and defence counsel perceived that the variability in how judges intervened was problematic because it meant that the particular judge assigned to a case could exert a strong influence on the outcome of the trial.

Text box 2.57

The success and failure of a case can depend on which judge you get. It affects everything. It affects the interventions that they make and how they speak to the complainant. It affects when you object to a cross-examination that is unfair, convoluted or confusing to a child, as you are dependent on whether they allow the objection or not. (Prosecutor 6)

Some judges are fantastic and will stop defence when they keep asking the same question, or when they have been at cross-examination for days on end. But there are judges who just allow things to go on ad nauseam. So it is a personality choice as well when you are choosing the judicial officers. Some of them are divine, they put victims at their ease. Other judges, usually the older males, can be rude and dismissive. (Prosecutor 1)

There are so many different judges. I had one judge who was very defence-leaning and although no one was being nasty, there were lengthy cross-examinations, without due regard for the needs of the children. But you also get the other extreme of that. (Defence Lawyer 2)

Some judges are really good at making sure that the victim understands the questions and they do intervene if the questions are too long or confusing. But, at the same time, some judges will not say one word to the victim during the whole of the evidence and cross-examination. (Witness Advisor 1)

Intervening regularly is detrimental to a fair hearing

Many of the lawyers and judges reiterated that the role of the judge in an adversarial trial is to oversee the trial and ensure that both parties adhere to the law when questioning the complainant. Hence, there was general consensus that judges should intervene only minimally when lawyers were questioning the complainant. There were concerns that a judge's frequent interventions might bias juror decision-making by implying support for one side. Thus, intervening during cross-examination of the complainant could be prejudicial to the accused, as it may appear that the judge has sided with the complainant. Furthermore, sometimes it was an advantage to the prosecution if defence counsel was using inappropriate questioning because this might prejudice jurors against the accused. The stakeholders discussed the need for a judge to find a balance between protecting the witness and allowing a fair trial.

Text box 2.58

The more the judges butt out and leave it to the parties running the case the better. Judges batting for either side is dangerous, and it can backfire if it becomes too obvious. The judge has a lot of power

and they should be very careful about using it. (Defence Lawyer 2)

The prosecutor does not necessarily mind that the defence counsel are asking inappropriate questions, to a point, because it does not go down well with the jury, so it may actually advance your case. (Prosecutor 10)

I avoid intervening during counsels' questioning because it is not a good look. I am not running the trial, the advocates are running the trial. Their job is to represent their respective clients, the complainant and the accused. My job is to keep my head down. (Judge 14)

There is, in my view, great wisdom in aspiring to silence when on the bench. (Judge 12)

Both prosecutors and defence counsel expressed strong views that an overly interventionist judge can inappropriately disrupt a line of questioning and the lawyers' ability to test the evidence. Some judges adopted a more inquisitorial manner and asked questions or elicited information. This approach was perceived to be contrary to the nature of the adversarial system. Another disincentive for judges to intervene was that it could provide grounds for appeal; hence, adopting a conservative approach reduced the likelihood of a re-trial and of the complainant having to repeat the experience of giving evidence in court.

Text box 2.59

Some judges are so interventionist that they keep interrupting and try to run the trial themselves. You might be asking a line of questioning when they cut you off and ask a series of questions, so when they tell you to continue it has completely stuffed up your line of questioning. (Prosecutor 8)

Judges are intervening for everything you can imagine; it is really completely unnecessary. They just need to sit back, and if there is anything detrimentally wrong then by all means they should intervene, but unless they are called upon they should just adjudicate. They are there as the law's judge; they need to make sure the law is in force in their courtroom, but they are not an inquisitor. (Defence Lawyer 1)

The judge should not interfere with the adversarial process, and it is for counsel, being conscious of their obligations, to decide what questions are going to be asked and what questions are not going to be asked. That has led judges to be reluctant to intervene in cross-examination. (Judge 2)

A lot of judges stay out of it to a certain degree because if they do intervene it could be an appeal point. (Witness Advisor 5)

Other areas for reform

Finally, in addition to the foregoing procedures that were discussed in all stakeholder interviews, stakeholders were passionate about certain topics that they perceived had a major impact on a complainant's ability to give evidence. The main topic was trial scheduling, and there were two main sub-themes to their concerns.

First, they were concerned about long delays between date of charging and date of trial. The stakeholders perceived that these delays were stressful for the complainant, impeded the complainant's recovery due to the lack of closure, and reduced the quality of the complainant's evidence as details were forgotten. This problem was heightened if there was a video recording of the complainant's interview closer to the time of the offence, which contained a high level of detail that defence counsel could use to find inconsistencies during cross-examination when the complainant's memory for events was weaker. One defence counsel noted that the delay was advantageous for their client because it meant there was more opportunity for inconsistencies to arise within the complainant's evidence and between the accounts of other witnesses. And yet, defence counsel generally perceived that these delays were detrimental to the accused who may be in custody and who had the damaging effects of an allegation hanging over them even though they were supposedly presumed innocent until proven guilty. Trial delays were viewed as problematic even in jurisdictions where delays between charging and trial were 12 months or less. Case management was seen as a potential solution to this problem.

Text box 2.60

Child sexual abuse allegations should be dealt with more expeditiously, ideally within a month of the disclosure being taken. When the complainant makes a disclosure, the accused should get advice from defence counsel within a month, so that the child's evidence should be completed prior to the trial, and then used in full at the trial. That would be useful. (Prosecutor 3)

I had a case recently where the child had become so traumatised by the prospect of having to give evidence that the child ran away from home. So the longer you have got a delay the longer that trauma can build up to the point where the child just cannot cope. (Judge 2)

Case management: in the best jurisdiction I worked in, everything got done properly, quickly and efficiently. The delays dropped around the system; the accused got trials quicker so they were in custody for a shorter period of time. This is a massive change for the mental health of people who are charged with these offences. (Defence Lawyer 1)

Secondly, there were problems with complainants having to wait for extended periods of time at court before giving evidence. Setting a court date did not establish a fixed time at which the complainant was to give evidence, leaving complainants anxious and frustrated as they waited to be called as witnesses. Despite arrangements for a complainant to give evidence first, complainants nonetheless often waited for hours while preliminary procedures ensued – namely, legal discussions before trial, the empanelling of the jury, judicial directions and opening arguments. This problem was compounded by regular court breaks, which often meant the complainant had to return to court on subsequent days. Adding to this problem, court dates often changed. A complainant would psychologically prepare to give evidence, arrive at court and wait, only to learn that proceedings were adjourned to another date.

Text box 2.61

We might have a four-year-old waiting all day long, only to be told that we cannot start today, and they have to come back tomorrow. That is just not okay when we are dealing with people that are highly traumatised and very prepared to go. (Witness Advisor 1)

Particularly with a young child, it is undesirable to keep complainants waiting for a lengthy time before they give their evidence – I mean on the day. Children that have limited concentration span and limited capacity to wait get very frustrated, very quickly. That is just the nature of being a child. (Judge 4)

Stakeholders also recommended several other areas of reform, including:

- having specialised courts and legal professionals
- an accreditation system for legal professionals
- improving efficiency through case management;
- using expert evidence to explain complainant behaviour
- using intermediaries when witnesses are being questioned in court.

See Supplementary Material 1 for quotes relating to these recommendations.

Conclusion

The overriding theme in stakeholders' interviews was that procedures for taking evidence from sexual abuse complainants can be improved. Stakeholders perceived that alternate procedures and restrictions on questioning complainants were accepted practice and had generally improved both the reliability and completeness of evidence and the experience of complainants in court. Yet shortcomings in implementing the reforms meant problems remained for both the complainant and the quality of their evidence. Stakeholders specified four areas in need of improvement.

Lawyers and judges most commonly expressed frustration over pre-recorded police interviews.⁶ Although they saw that using them as evidence was a highly effective reform – because it preserved a reliable and complete account for the courts – these professionals noted that the interviews were often of a poor standard: cluttered with irrelevant details, omitting important evidential details and sometimes using suggestive or leading questions. This made the interviews counterproductive by creating opportunities for cross-examination that could unfairly damage the credibility of the complainant. Ensuring skilled police interviewing capability was considered a high priority.

The use of developmentally inappropriate questions with children in court and the more aggressive and demeaning questioning of adults were considered highly problematic. Professionals perceived that in practice, reforms intended to limit aggressive, intimidating and confusing questions were inconsistently applied. They expressed a desire for more practice-based professional development in this skill.

Stakeholders were generally satisfied with alternate procedures for witness examination, but called for the range of available alternate procedures to be extended and made more accessible to a wider range of complainants. One area noted for improvement was the quality and administration of the video and audio in pre-recorded police interviews and CCTV. Stakeholders also endorsed the use of professional support persons to accompany the complainant when giving evidence, and the importance of preparing the complainant for trial, although these services were often under-resourced.

Stakeholders noted that trial delays, the length of time complainants had to wait at court to give evidence, and rescheduling of hearings are major sources of stress for complainants. These problems with trial management could be alleviated by implementing policies that are more responsive to complainants' needs.

Endnotes

¹ Strauss and Corbin, 1990.

² Strauss and Corbin, 1990.

³ Miles and Huberman, 1984.

⁴ Not all stakeholders expressed a view one way or the other. Due to rounding, not all percentages add up to 100.

⁵ For a review of legislation on alternative procedures see Supplementary Material 1.

⁶ Of note, no police or anyone who conducts police interviews participated in this study.

Chapter 3
Professionals' experiences with
alternate measures
(Study 2)

Chapter 3: Professionals' experiences with alternate measures (Study 2)

An important means of understanding how effectively alternate measures are working in practice is to understand the views of those who have day-to-day experience with use of these measures. To supplement the in-depth interviews examining criminal justice professionals' perceptions of alternate measures in Study 1, Study 2 used a questionnaire completed by a large number of respondents to explore the scope and prevalence of the views of criminal justice professionals.

The study examined criminal justice professionals' perceptions of the use of alternate measures in three jurisdictions. It aimed to evaluate:

- the extent to which policy regarding alternate measures is being implemented in practice and the reasons why it may not be implemented
- the effectiveness of alternate measures in terms of:
 - the delay experienced by complainants while waiting to give evidence at court
 - the impact on complainants' credibility and reliability
 - the impact on conviction rates
- current perspectives on:
 - practice and legal procedures in child sexual abuse cases
 - the use and effectiveness of expert evidence
 - professional training on child sexual abuse
 - how child sexual abuse trials can be improved.

Method

Procedure

Using a convenience sampling method, an online survey was administered to five professional groups working in the criminal justice systems in the states of NSW, Victoria and WA.¹ The target professional groups were judges and magistrates, prosecutors, defence lawyers, police officers, and witness assistance and support officers. The Royal Commission invited potential participants in these groups to participate by sending emails to their respective organisations. Invitations were also made to Court Network, a court support service operating in Victoria and Queensland. Participants received no financial incentive for their participation.

Participants

Professional groups

In total, 335 criminal justice professionals participated in the study, drawn from three states: NSW (43.6 per cent, $N = 146$), Victoria (27.8 per cent, $N = 93$) and WA (28.7 per cent, $N = 96$).²

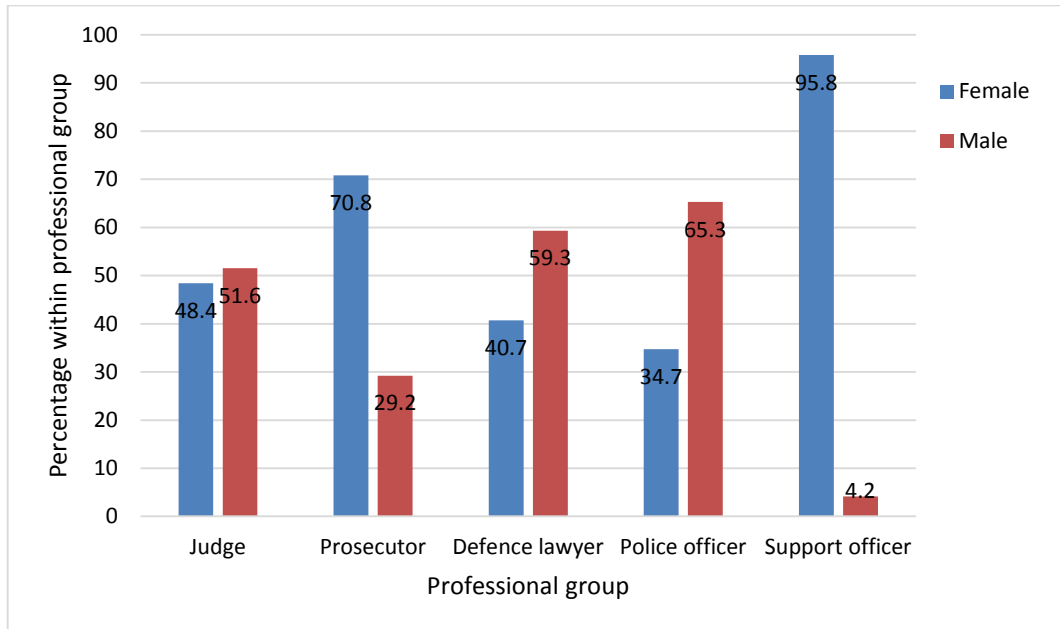
Participants comprised five groups: judges and magistrates (19.4 per cent, $N = 65$)³; prosecutors (19.4 per cent, $N = 65$); defence lawyers (17.6 per cent, $N = 59$); police officers (29.3 per cent, $N = 98$); and Witness Assistance Service, Court Support and/or Victim Support Service officers (14.3 per cent, $N = 48$ – referred to generally as 'support officers').⁴

Gender

In total, 54 per cent of participants were women ($N = 181$), 45.8 per cent were men ($N = 153$) and the gender of one participant was unspecified.⁵

Figure 3.1 shows the gender breakdown by professional group. The prosecutor and support officer groups included significantly more women while the group of police officers was predominantly male.

Figure 3.1 Participant gender by professional group (per cent)



Experience with child sexual abuse cases and training

Based on their reports, the median duration of participants' experience with child sexual abuse cases in their current professional roles was eight years (ranging from less than one year to 40 years). Across their careers, the median number of cases that participants worked on was 60.⁶ In other words, half of the participants had experience with fewer than 60 child sexual abuse cases across their careers.⁷ One in 10 participants reported working on more than 500 cases. Some members of each professional group reported having experience with higher numbers of cases.⁸ Participants reported experience with a median of 20 historical complaints⁹ – that is, cases where the alleged offences occurred five years or more prior to reporting the matter to authorities.

Fifty-nine per cent of participants ($N = 197$) had received training on child sexual abuse. Across the professional groups, witness support officers (85.4 per cent, $N = 41$) had the highest rate of training, followed by police (69.4 per cent, $N = 30$). Among the states, participants from Victoria reported the highest rate of child sexual abuse training (69.9 per cent, $N = 65$), followed by NSW (59.6 per cent, $N = 56$) and WA (46.9 per cent, $N = 45$).

The results revealed significant jurisdictional differences in attendance at child sexual abuse training by judges. A higher proportion of judges in Victoria reported receiving child sexual abuse training (86.7 per cent, $N = 13$) than judges in NSW (38.9 per cent, $N = 14$) and WA (14.3 per cent, $N = 2$). In WA, prosecutors (73.9 per cent, $N = 17$) and defence lawyers (42.9 per cent, $N = 6$) were more likely to have received child sexual abuse training than those in NSW (prosecutors 31.6 per cent, $N = 6$; defence lawyers 32.1 per cent, $N = 9$) and Victoria (prosecutors 69.6 per cent, $N = 16$; defence lawyers 29.4 per cent, $N = 5$). Among police officers and support officers, participants in NSW reported the highest rate of training (police officers 91.5 per cent, $N = 43$; support officers 93.8 per cent, $N = 15$).

The reported duration of specialised child sexual abuse training ranged from less than one hour to in excess of 1,000 hours.¹⁰ The overall median of the number of hours of training across states and professional groups was 30. On average, participants evaluated their child sexual abuse training as useful – $M = 5.22$ on a scale from 1 (not very useful) to 7 (very useful); $SD = 1.5$).

Dependent measures

The survey consisted of 75 items including four open-ended questions. The survey questionnaire is provided in Supplementary Material 2.2 (online). The items were categorised into the following seven groups:

Text box 3.1

- (a) **Demographic characteristics and experiences**
Thirteen questions regarding professional roles, career experience, frequency of child sexual abuse case involvement, and prior training.
- (b) **Jurisdictional practice**
Eighteen questions regarding the current practice for child and adult complainants of child sexual abuse in the relevant jurisdiction (and participants' views of that practice) including the average duration, in the past 24 months, of waiting times at court before complainants give their evidence.
- (c) **Questioning in CCTV cross-examination**
Two case study vignettes about cross-examination of a complainant via CCTV, seeking participants' views on the age-appropriateness of the questions and the need for – and effectiveness of – a judicial intervention. (Results of the experimental vignette study are presented separately in Study 3.)
- (d) **Participants' views on alternate measures**
Twenty-five questions probing the perceived influence of alternate measures on: (i) the credibility of complainants, evidence-in-chief and responses to cross-examination; (ii) the reliability of complainants' evidence; and (iii) child sexual abuse conviction rates.
- (e) **Legal procedure**
Twelve questions to elicit views on legal procedures in child sexual abuse trials.
- (f) **Expert evidence**
Four questions about experiences of – and views on – expert evidence regarding children's behaviour in child sexual abuse trials.
- (g) **Suggested improvements**
Three questions to gather suggestions on ways to improve child sexual abuse trials.

Most items were answered using a Likert-type scale with response options from 1 (strongly disagree) to 7 (strongly agree) or 1 (least credible) to 7 (most credible). An additional option 'don't know' was provided to avoid guessing responses, but its endorsement was excluded from analysis when necessary. Examples of items are "Evidence via CCTV decreases the quality of evidence" and "Rate the impact of the following procedures on the veracity of a child complainant's cross-examination: CCTV from a remote room on the court premises..."

A few items sought binary yes/no responses, such as "Have you observed expert evidence on children's behaviour in child sexual abuse cases in the past two years?" A nominal scale with three categories was used in some instances for questions such as "Do you think that the use of alternate measures has changed the conviction rate?" with options "Yes, it increased", "Yes, it decreased" or "No". Another example was "This practice is the same as current policy in my jurisdiction", with response options of "Yes", "No" and "Don't know". Open-ended questions sought responses to "What do you see as the advantages of the current practice, if any?" and "Do you have any recommendations to improve procedures for evidence by complainants in child sex abuse cases?"

Results

Supplementary Material 2.3 (online) contains additional tables relevant to the following results.

Alternate measures practice and policy for complainants of child sexual abuse

Further detail on the prevalence of observed use of alternate measures by state and professional group is provided in Table S2.3.1 (child complainants) and Table S2.3.2 (adult complainants) of Supplementary Material 2.3, found online.

Perceived consistency of practice and policy

For child complainants, 89 per cent of participants agreed that the most commonly viewed practice was consistent with policy for how child complainants give their evidence. Only 1 per cent of participants regarded practices in their state as inconsistent with prevailing policy, while 10 per cent stated that they did not know. The results did not differ across the states¹¹ or across professional groups within the states (exact counts and frequencies are provided in Table S2.3.3).¹²

For adult complainants, 78 per cent of participants agreed that the most commonly observed practice was consistent with policy. Only 1 per cent of participants regarded practice as inconsistent with policy and 21 per cent did not know. Overall, these results did not differ across states.¹³ However, 39 per cent of police officers from WA reported that they did not know whether practice and policy were consistent in their state, in contrast to only 18 per cent of NSW police officers and 6 per cent of Victorian police officers (exact counts and frequencies are provided in Table S2.3.4).¹⁴

Reasons for non-use of alternate measures

Participants indicated the extent of their agreement with nine potential reasons for the non-use of alternate measures for child sexual abuse evidence in their jurisdiction, and could propose additional reasons to those on the given list. Overall, the most highly rated reason for non-use of alternate measures was faulty or missing equipment, followed by logistic difficulties. The two most weakly endorsed reasons for

non-use (lowest mean agreement) were that alternate measures can avoid appeal based on jury access to pre-recorded evidence in deliberation, and that alternate measures can be prejudicial to the accused. The average extent of agreement with each of the reasons for non-use is shown in Figure 3.2, and the findings presented by professional group in Figure 3.3. (Exact *M* and *SD* values, overall and by professional group, can be found in Table S2.3.5.)

Figure 3.2 Reasons for non-use of alternate measures in child sexual abuse cases

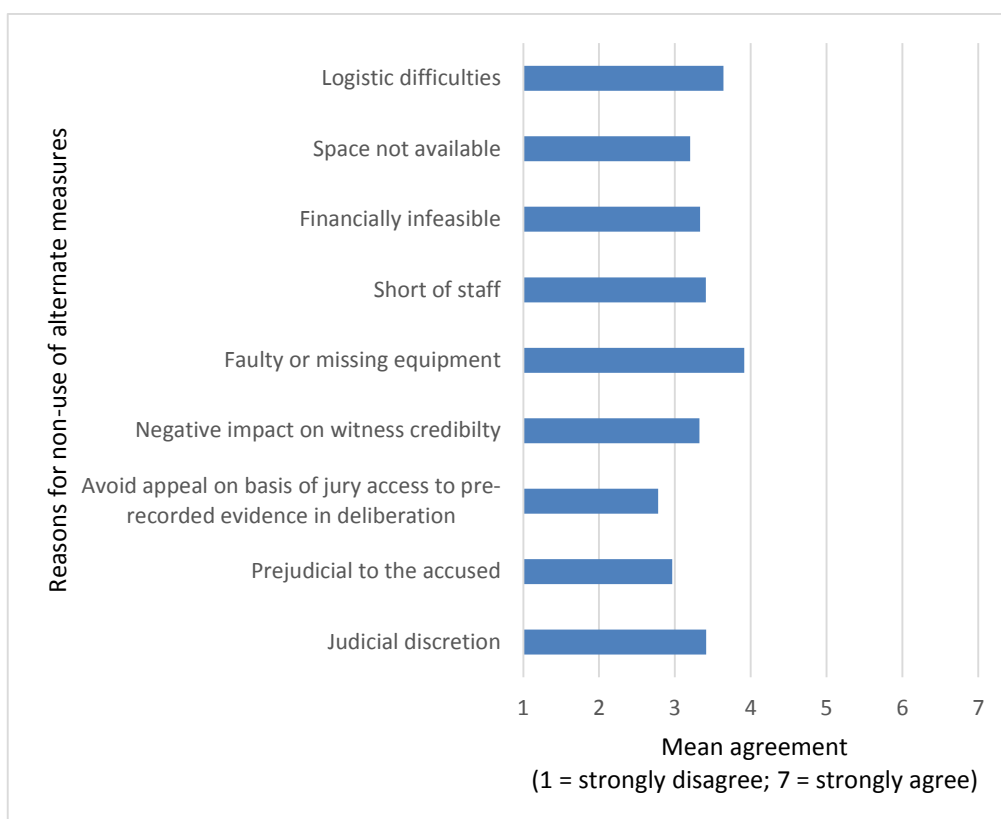
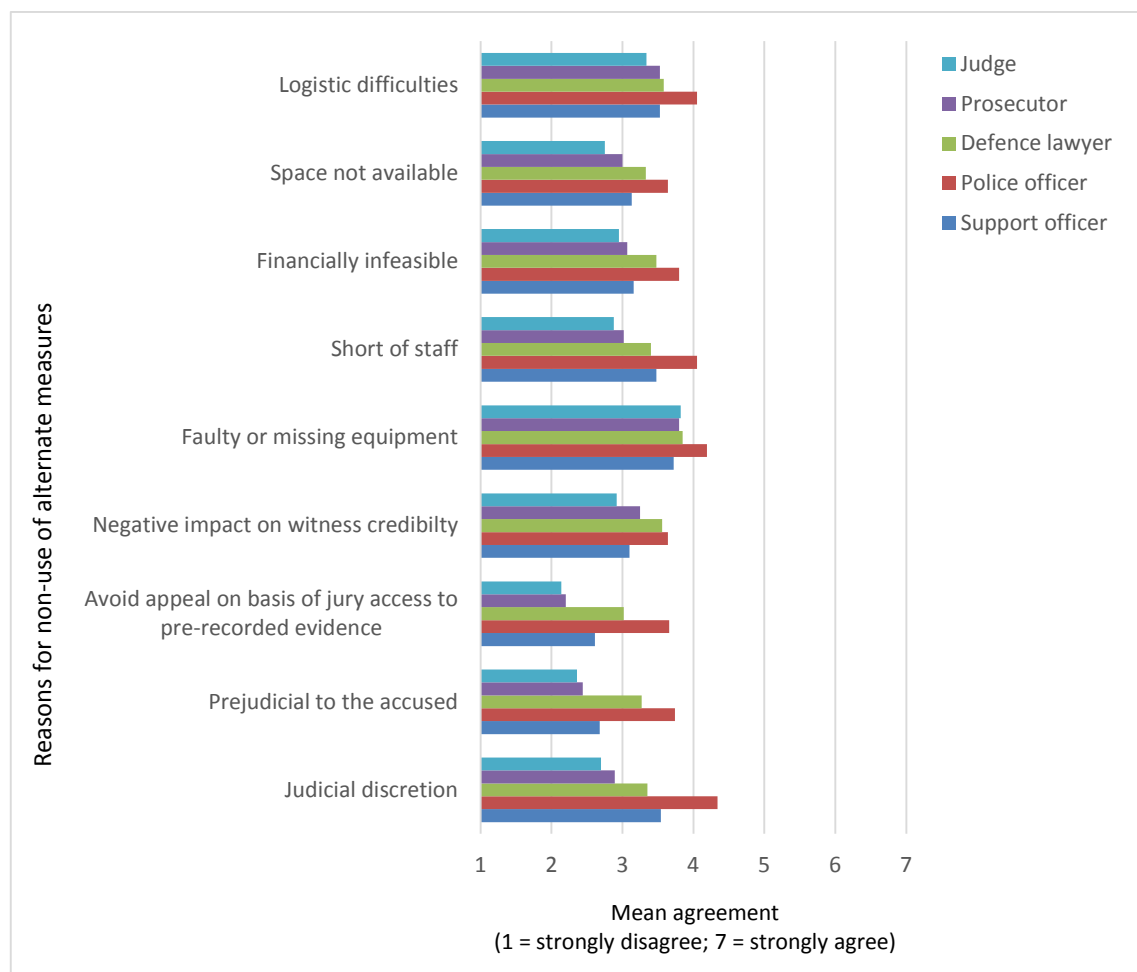


Figure 3.3 Reasons for non-use of alternate measures in child sexual abuse cases, by professional group



All professional groups, with the exception of police officers, agreed that faulty or missing technical equipment was the most likely reason for non-use ($M = 3.91$, $SD = 2.01$), and that avoidance of an appeal based on the jury’s access to pre-recorded evidence in deliberations was the least likely of the given reasons ($M = 2.78$, $SD = 1.52$). Multivariate analyses of variance showed that variability in responses was not explained by jurisdiction¹⁵, but by professional group membership.¹⁶ In other words, explanations for the non-use of alternate measures depended on which professional group was canvassed.

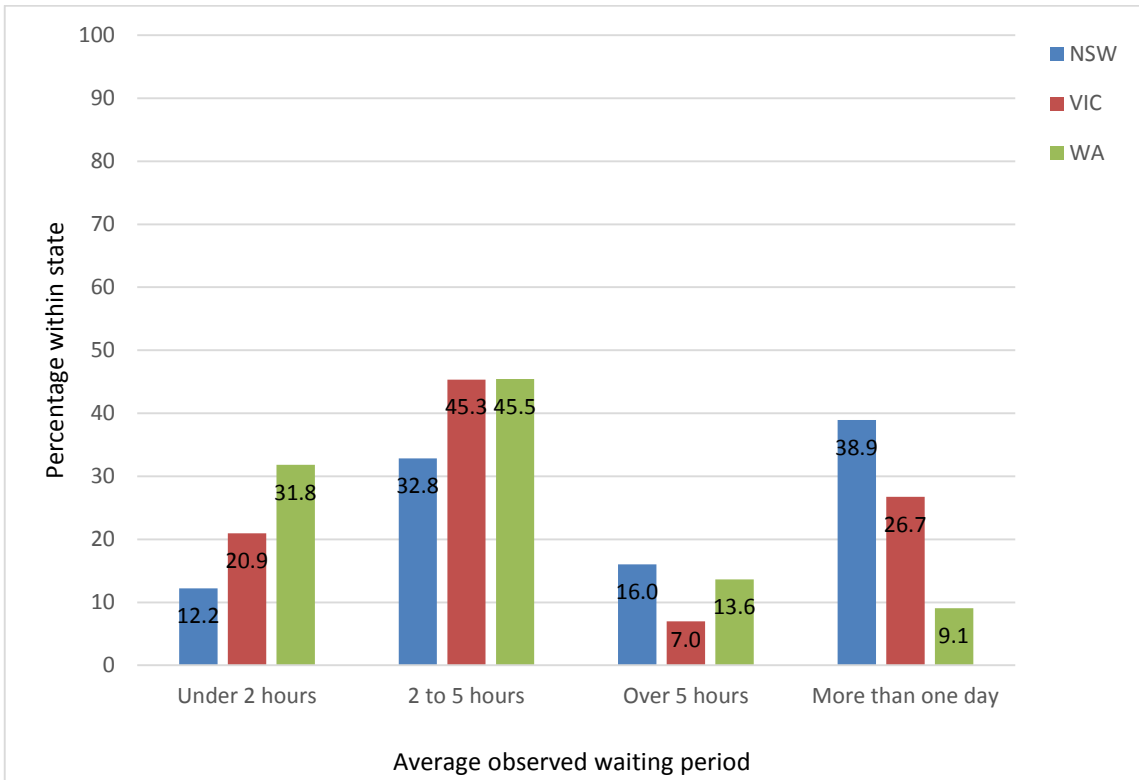
Police officers endorsed all available explanations for the non-use of alternate measures more strongly than did members of other professional groups, while judges endorsed reasons for non-use (with the exception of faulty or missing equipment) to a lesser extent than did members of all other professional groups. Significant differences emerged across the professions for four of the endorsed reasons: staff shortage¹⁷, avoiding appeals based on jury access to pre-recorded evidence in deliberation¹⁸, prejudice to the accused¹⁹ and judicial discretion.²⁰ Defence lawyers endorsed prejudice to the accused as a reason for non-use of alternate measures more strongly than did all other professional groups, except police officers. Judges endorsed the exercise of judicial discretion as a reason for non-use of alternate measures to a lesser extent than members of other professional groups.

The perceived effectiveness of alternate measures

Duration of waiting period before complainants give evidence at court.

Figure 3.4 shows the average duration of waiting periods experienced by complainants, by state. Two-fifths of participants across the states reported that within the past 24 months, complainants waited for an average of two to five hours before giving evidence at a hearing or trial. One-quarter of participants reported that the average waiting period for complainants before giving evidence exceeded one day. Significantly more participants in NSW, compared to Victoria and WA, reported an average waiting time that exceeded five hours or more than one day.

Figure 3.4 Waiting period before complainant gives evidence at court, by state (per cent)



The perceived influence of alternate measures on complainants’ credibility and reliability

The impact of alternate measures on the credibility of child complainants’ evidence-in-chief

Participants rated nine methods of giving evidence-in-chief in terms of their perceived impact on the credibility of a child complainant.²¹ Pre-recorded interviews were perceived to have the least detrimental impact on the credibility of a child complainant ($M = 5.34, SD = 1.59$) whereas in-person

evidence in court with the assistance of an intermediary was perceived as most detrimental ($M = 3.89, SD = 1.80$). For context, no jurisdiction had implemented an intermediary scheme at the time of the survey and any intermediaries were used in very limited circumstances if at all. The mean rating for each alternate measure is shown in Figure 3.5. Multivariate analysis of variance showed that the variability of the responses was not explained by jurisdictional differences²², but by professional group membership.²³ In other words, the professional groups viewed the effects of the nine different methods of evidence in different ways. The mean ratings for each of the methods, by professional group, are shown in Figure 3.6. (Exact M and SD values can be found in Table S2.3.6.)

Figure 3.5 Impact of alternate measures on the credibility of a child’s evidence-in-chief, by measure

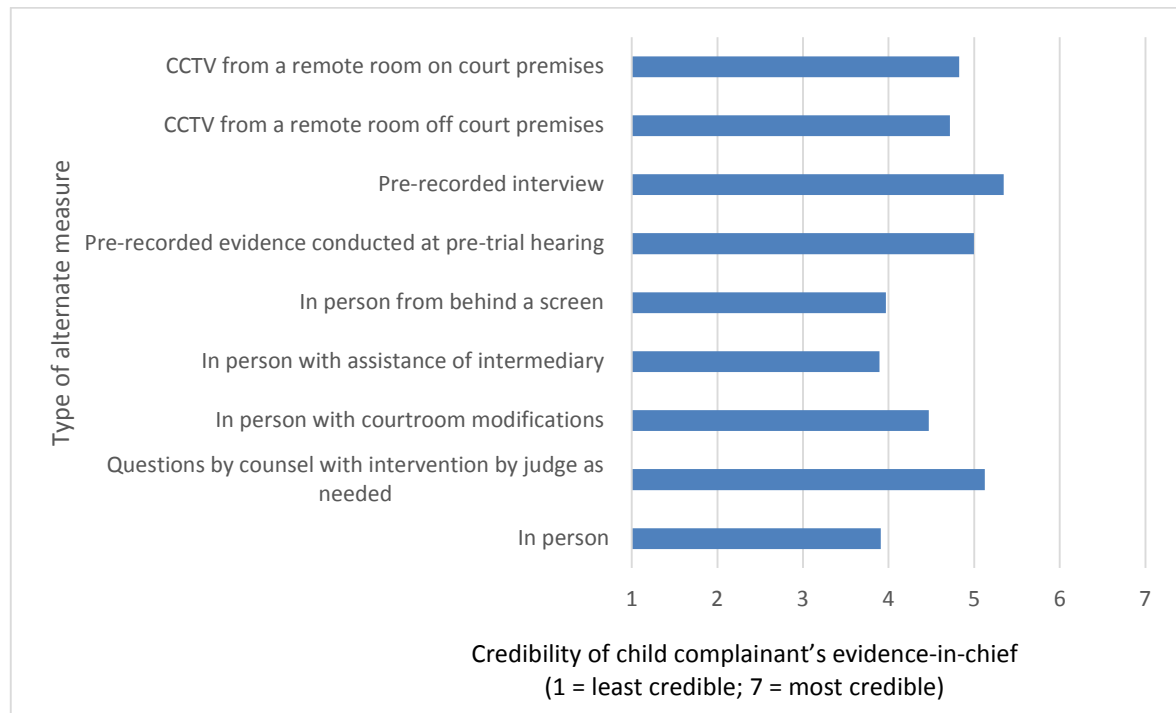
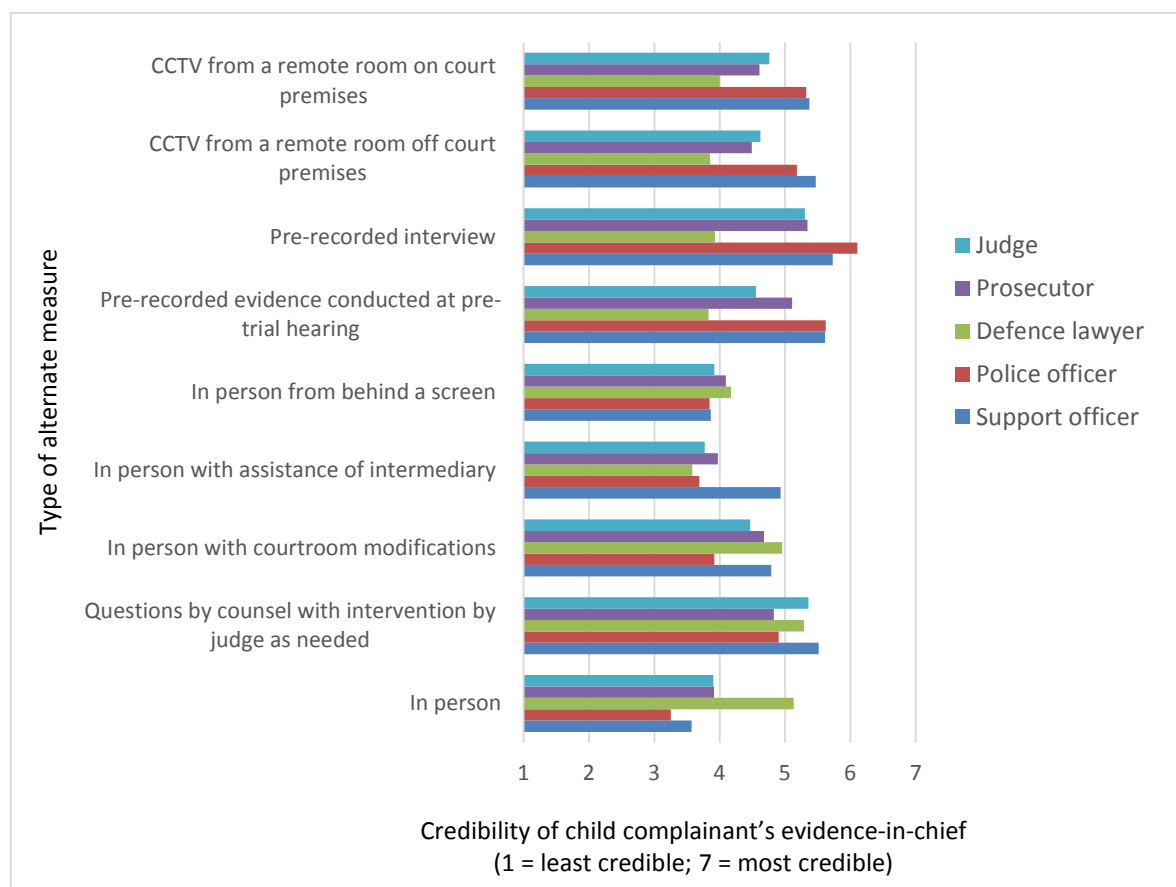


Figure 3.6 Impact of alternate measures on the credibility of a child’s evidence-in-chief, by professional group



Significant differences by professional group emerged for five specific methods of giving evidence: CCTV from a remote room on the court premises²⁴, CCTV from a remote room off the court premises²⁵, pre-recorded interviews of evidence-in-chief²⁶, pre-recorded evidence at a pre-trial hearing²⁷ and in-person evidence given in the conventional way.²⁸ Police officers and witness support officers rated the impact of CCTV (both on and off the court premises) and pre-recorded methods (both pre-recorded interviews and pre-recorded evidence from pre-trial hearings) more favourably than did other professional groups. In contrast, defence lawyers rated in-person evidence in the conventional way much more favourably than other professional groups.

The impact of alternate measures on the credibility of child complainants on cross-examination

Participants rated the impact on a child’s credibility of nine possible methods of giving evidence on cross-examination. Questions by counsel that prompted an intervention by the judge (as needed) were perceived to enhance the child complainant’s credibility on cross-examination to the greatest degree ($M = 5.08, SD = 1.59$), whereas giving evidence in person from behind a screen yielded the lowest credibility ratings ($M = 3.78, SD = 1.63$). Multivariate Analysis of Variance showed that the variability of the responses was not explained by state,²⁹ but by professional group membership.³⁰ In other words, the ‘profiles’ of the nine impact response averages were different across the professional groups. The Mean ratings for each of the methods, by professional group, are shown in Figure 3.8 (exact Mean and SD values can be found in Table S2.3.7).

Figure 3.7 Impact of alternate measures on the credibility of a child complainant in cross-examination, by measure

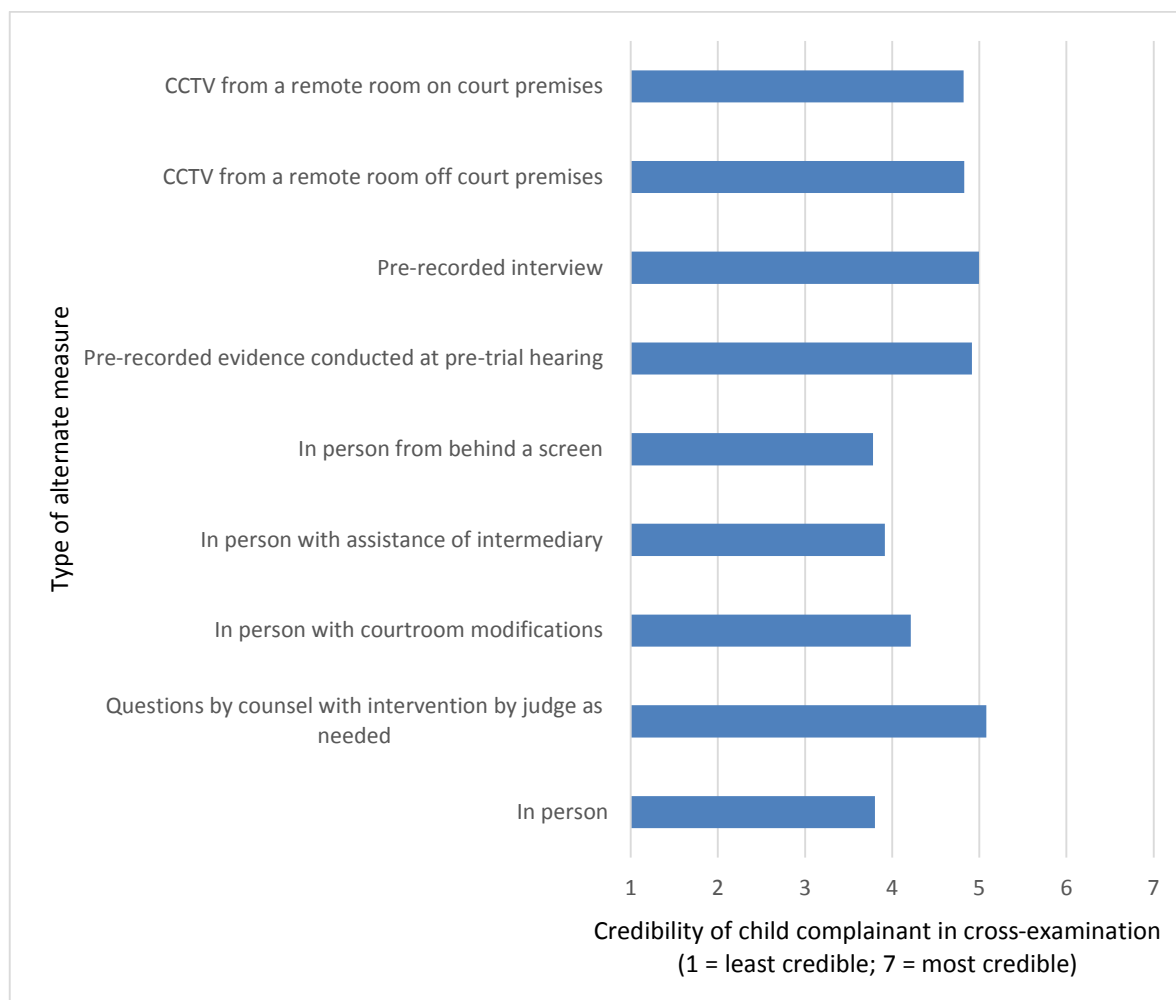
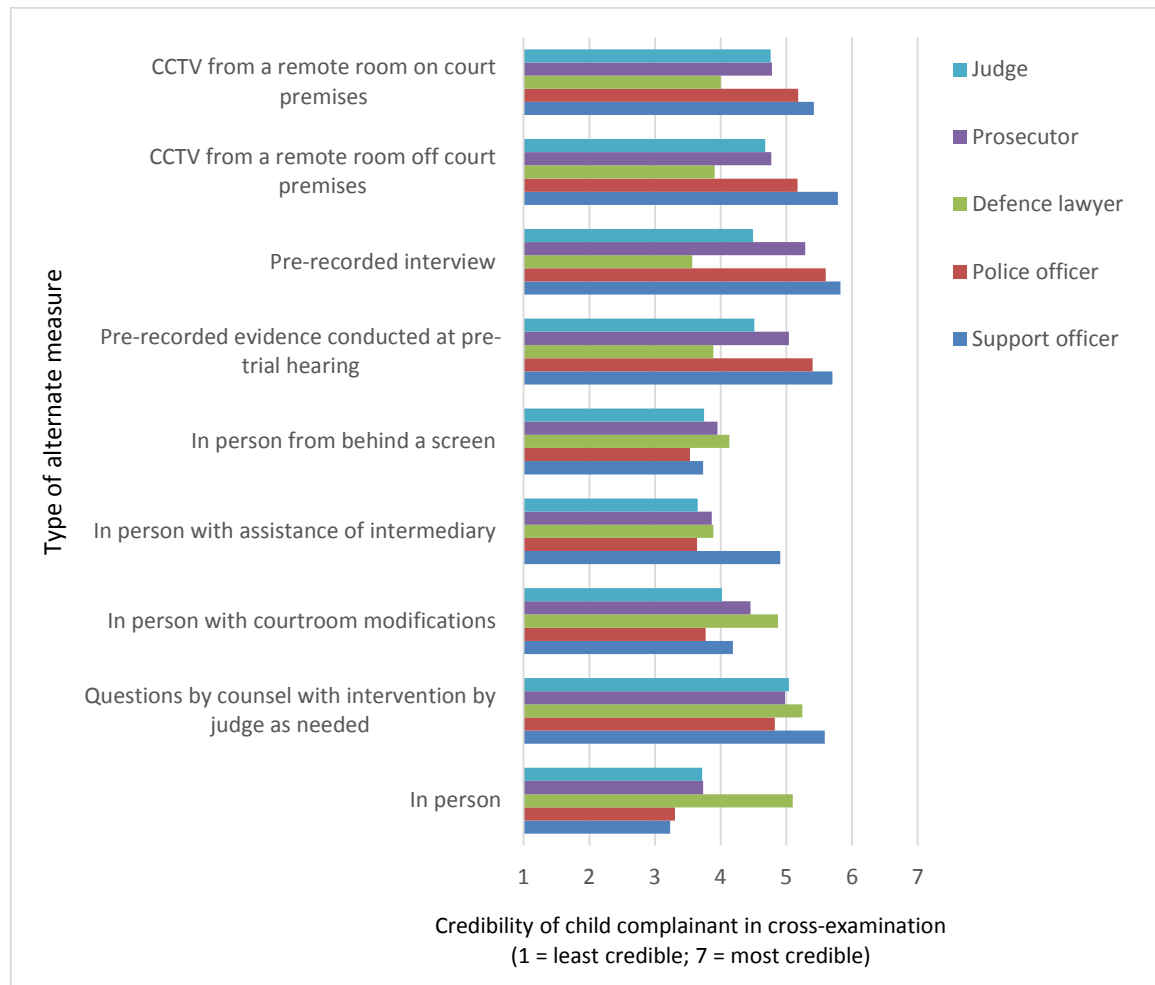


Figure 3.8 Impact of alternate measures on the credibility of a child complainant in cross-examination, by professional group

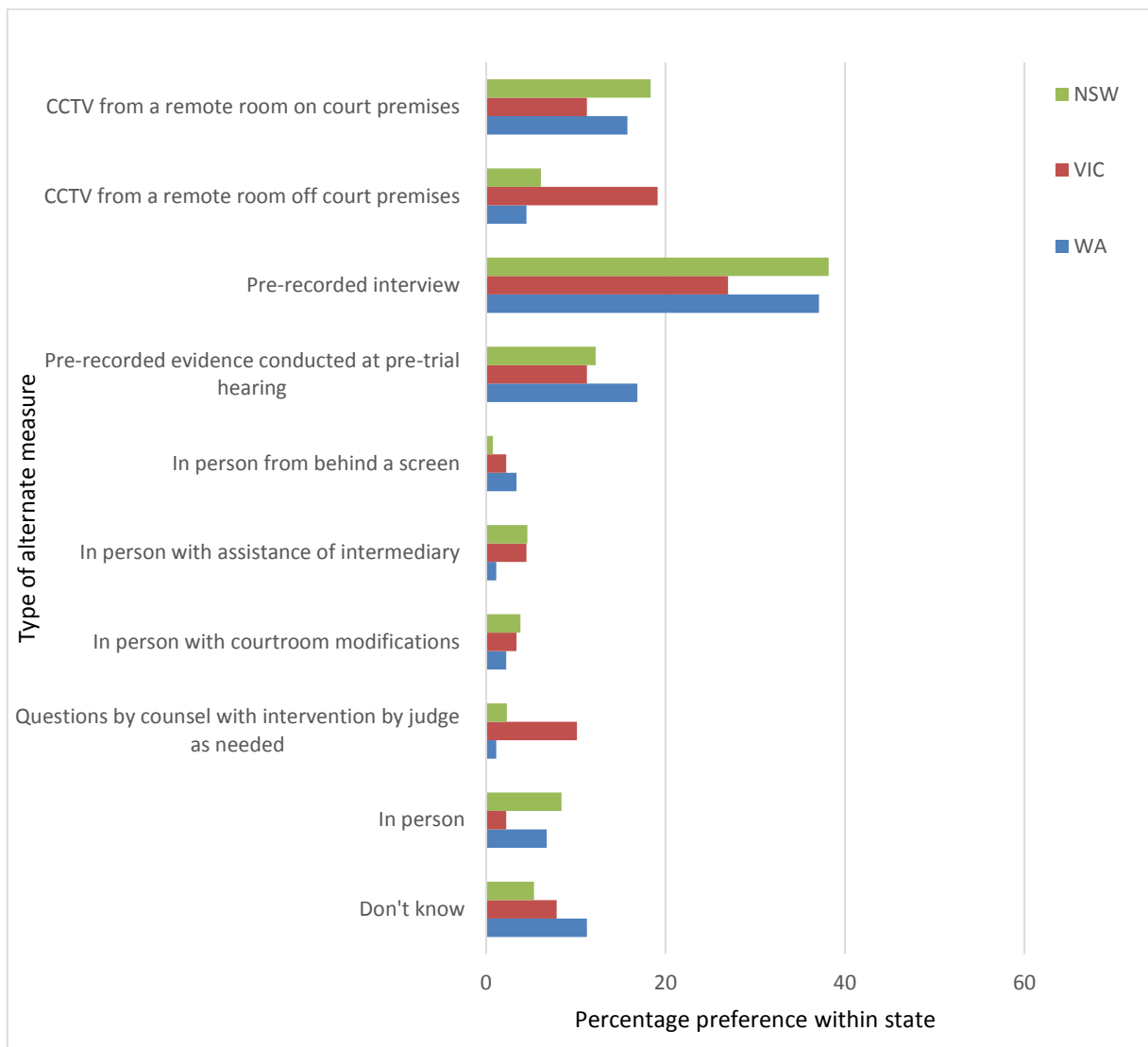


Significant differences emerged across the professional groups for seven alternate measures: CCTV from a remote room on court premises³¹, CCTV from a remote room off the court premises³², pre-recorded interview³³, pre-recorded evidence at a preliminary hearing³⁴, in-person evidence with the assistance of an intermediary³⁵, in-person evidence with courtroom modifications³⁶ and in-person evidence given in the conventional way.³⁷ Defence lawyers differed from other professional groups in the way that they rated questions by counsel (with judicial intervention where necessary) as the alternate measure most favourable to the complainant’s credibility. In contrast, police officers and witness support officers rated CCTV (both on and off the court premises) and pre-recorded methods (both pre-recorded interviews and pre-recorded evidence from pre-trial hearings) more favourably than did other professional groups.

Best procedure overall for the credibility of child complainants’ evidence

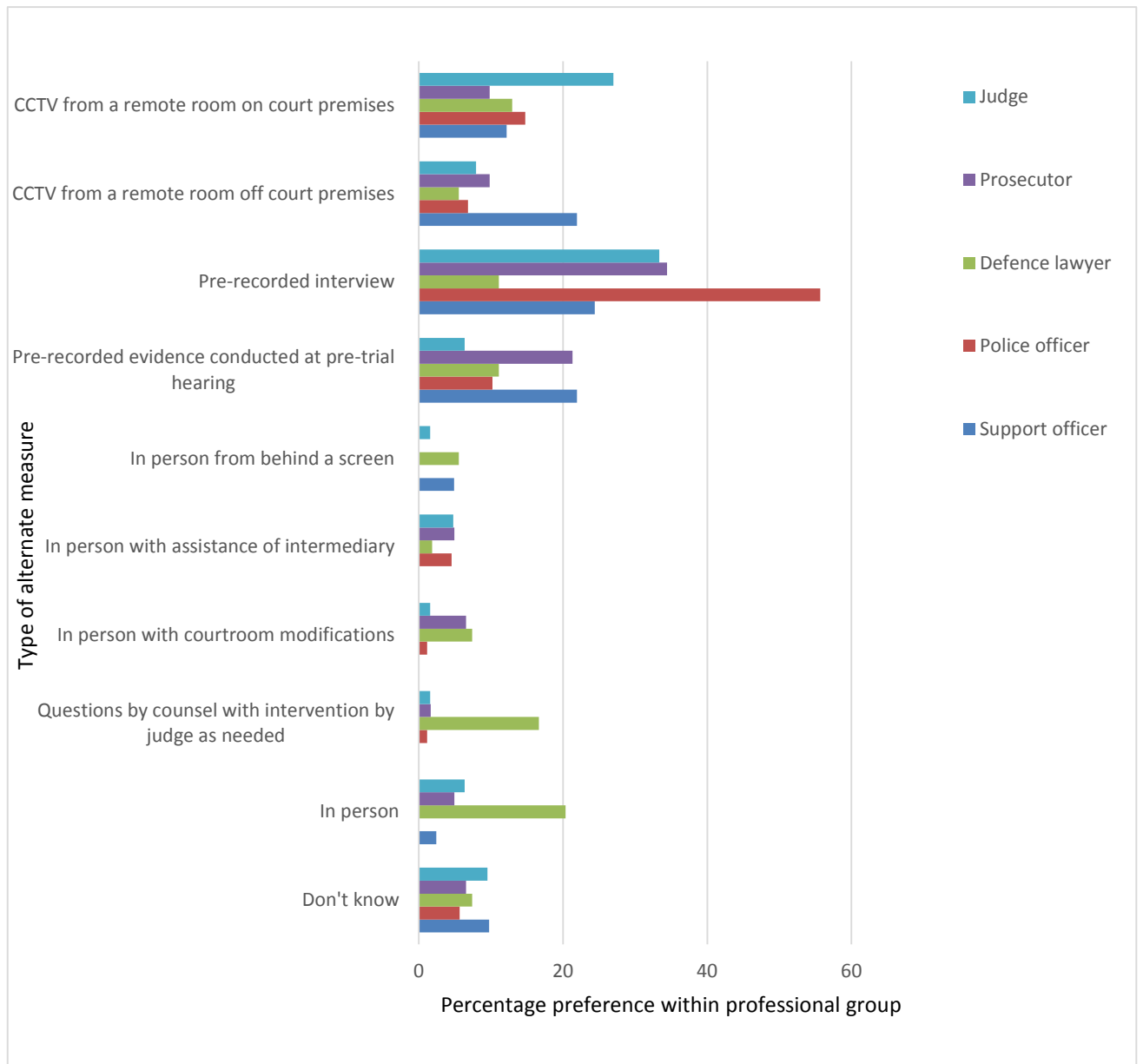
Of the nine possible options to present a child complainant’s evidence at trial, participants selected the one that they viewed as the best procedure overall for the credibility of the complainant. Exact frequencies of endorsement for the ‘best procedure’ are provided in Table S2.3.8. Pre-recorded interviews were most frequently rated as the best procedure in each of the three states, with more than one-quarter of responses in each jurisdiction indicating pre-recorded interviews as the best procedure overall. As shown in Figure 3.9, the degree of consensus was highest in NSW, followed by WA and Victoria.³⁸ The states differed in their second most highly rated procedure, with Victoria showing a higher rating for CCTV from a location off court premises, and NSW and WA rating CCTV on court premises more favourably. These ratings reflected the most common practices in the respective states for CCTV use.

Figure 3.9 Best procedure for the credibility of child complainants, by state



Ratings of the best procedure by professional group are shown in Figure 3.10. One in five defence lawyers regarded conventional in-person evidence as the best procedure for the credibility of a child complainant.³⁹ This exceeded the average by members of all other professional groups by more than a factor of three. Participants' familiarity with a measure may predispose them to rate it more favourably, reflecting a jurisdictional bias towards what is most commonly used in their state.

Figure 3.10 Best procedure for the credibility of child complainants, by professional group



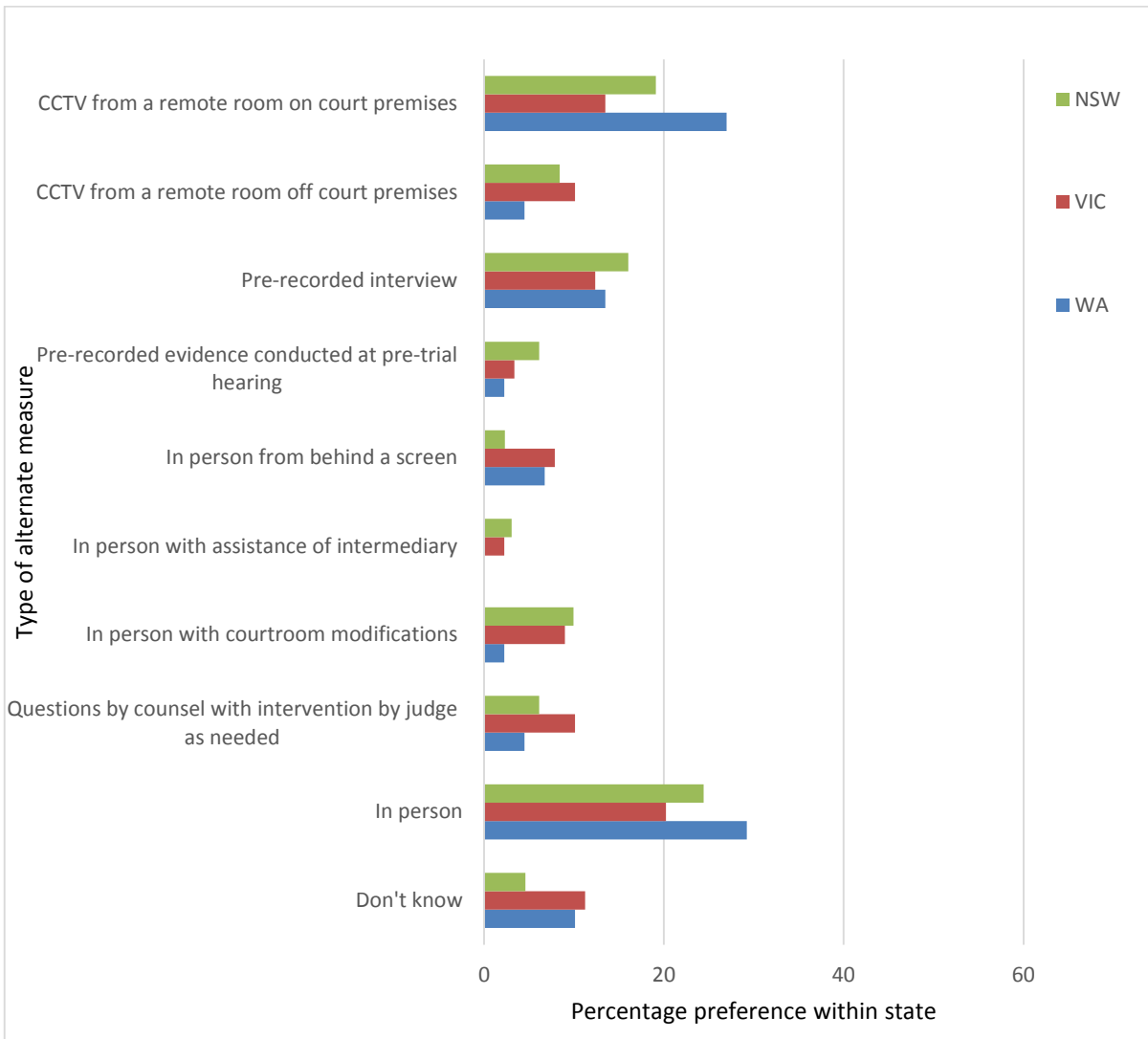
The questionnaire also asked participants to select the second best procedure for the credibility of child complainants. Table S2.3.9 presents a summary of these ratings.

Best procedure for the credibility of an adult complainant

Table S2.3.10 provides exact frequencies of endorsement for the 'best procedure'. Across all jurisdictions, participants most frequently identified in-person evidence as the best procedure for the credibility of adult complainants in child sexual abuse

cases (see Figure 3.11). Although the overall rate of consensus was quite low, this method was endorsed as the best procedure by one-quarter of NSW participants, one-fifth of Victorian complainants and approximately one-third of WA participants. This finding may reflect the fact participants in all three states cited in-person practice evidence as the second most common current practice for adult complainants. Participants' familiarity with a measure may predispose them to rate it more favourably, reflecting a jurisdictional bias towards what is most commonly used in their state.

Figure 3.11 Best procedure for the credibility of adult complainants, by state



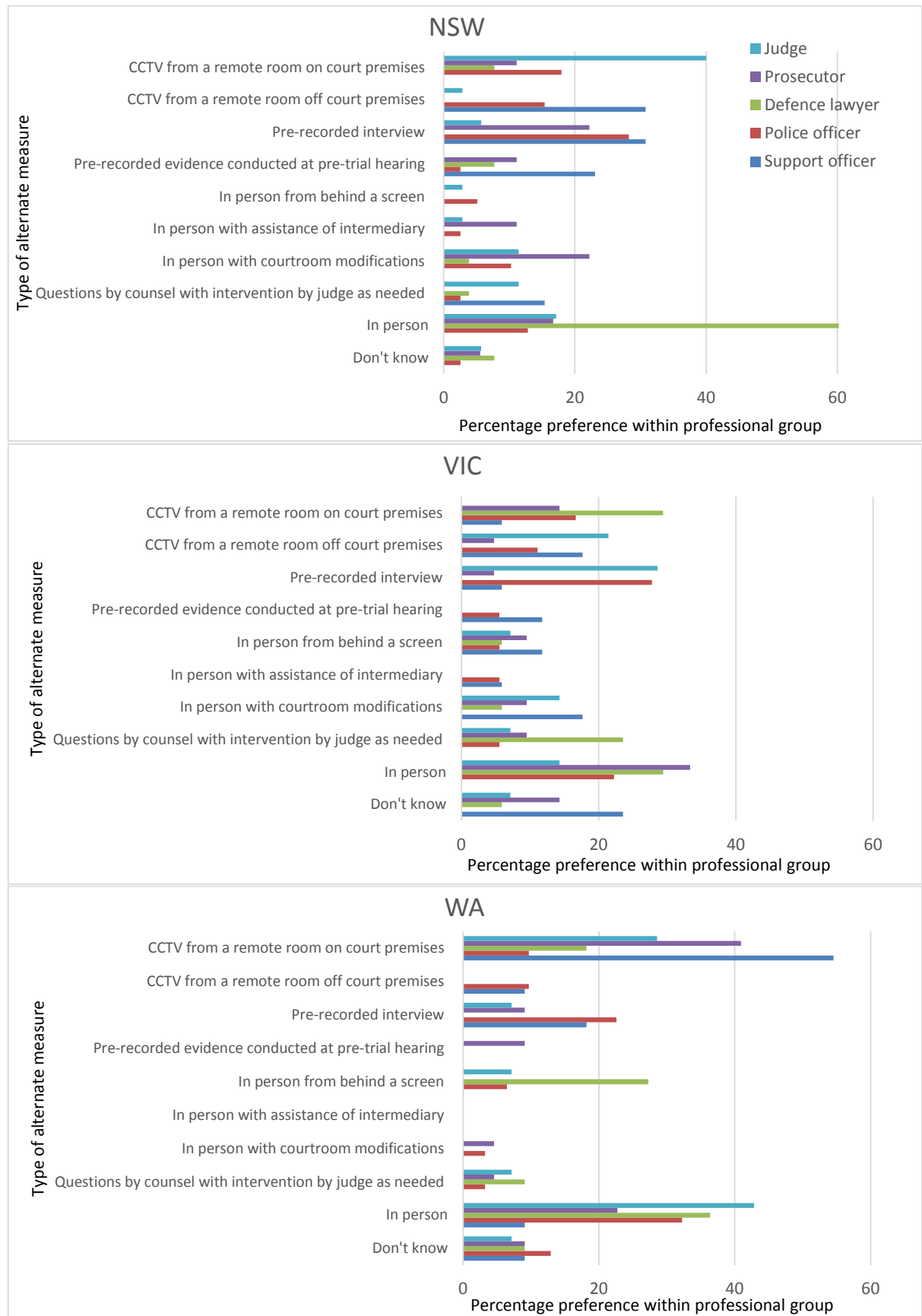
Differences across professional group are depicted in Figure 3.12.⁴⁰ On average, defence lawyers were the professional group most likely to endorse in-person evidence as the best procedure for the credibility of adult complainants, although the extent to which defence lawyers held this view varied across jurisdictions. In NSW, approximately 70 per cent of defence lawyers favoured in-person evidence as the best measure for these purposes, approximately twice the rate of Victoria and WA.

Averaged across jurisdictions, more police officers rated pre-recorded interviews as the best procedure than did any other professional group. This endorsement varied by jurisdiction; approximately two in seven NSW and Victorian police officers endorsed this method, compared to two in nine WA police officers. There were jurisdictional differences in

the methods that judges favoured. In NSW, the method most frequently endorsed by judges was CCTV from a remote room on the court premises (two-fifths). In contrast, Victorian judges most frequently endorsed pre-recorded investigation interviews (two-sevenths) and WA judges most frequently endorsed in-person evidence without alternate measures (one-fifth).

Similarly, the methods that support officers favoured also differed across state. In NSW, support officers most frequently endorsed CCTV from a room off the court premises (approximately 30 per cent), whereas in WA support officers most frequently favoured CCTV from a remote room on the court premises (just over half). In Victoria, support officers most frequently reported that they did not know (one-quarter).

Figure 3.12 Best procedure for the credibility of an adult complainant, by professional group



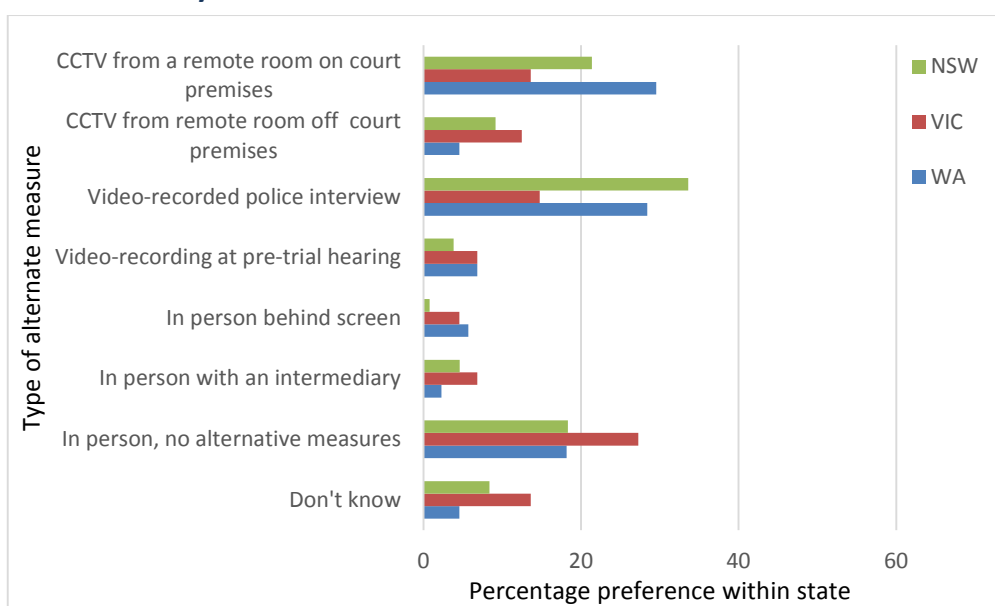
The questionnaire also asked participants to select the second best procedure for the credibility of adult complainants. Table S2.3.11 presents a summary of these ratings.

Alternate measures yielding the most reliable evidence

Participants selected which alternate measure out of the seven listed yielded the most reliable evidence. The results are shown in Figure 3.13. (Table S2.3.12 shows the exact frequencies of endorsement.) Overall, the most frequently selected alternate measure was the pre-recorded police interview, but consensus was

somewhat low – this measure was endorsed by one-quarter of participants. The rating was highest in NSW, where one-third of participants rated pre-recorded police interviews as the most reliable method. Victorian participants most frequently endorsed in-person evidence without any alternate measures as the most reliable method (over one-quarter of participants).⁴¹ In WA, the most frequently endorsed alternate measure was CCTV from a remote room on the court premises, followed closely by CCTV from a remote room off the court premises.

Figure 3.13 Alternate measure yielding the most reliable evidence from complainants, by state

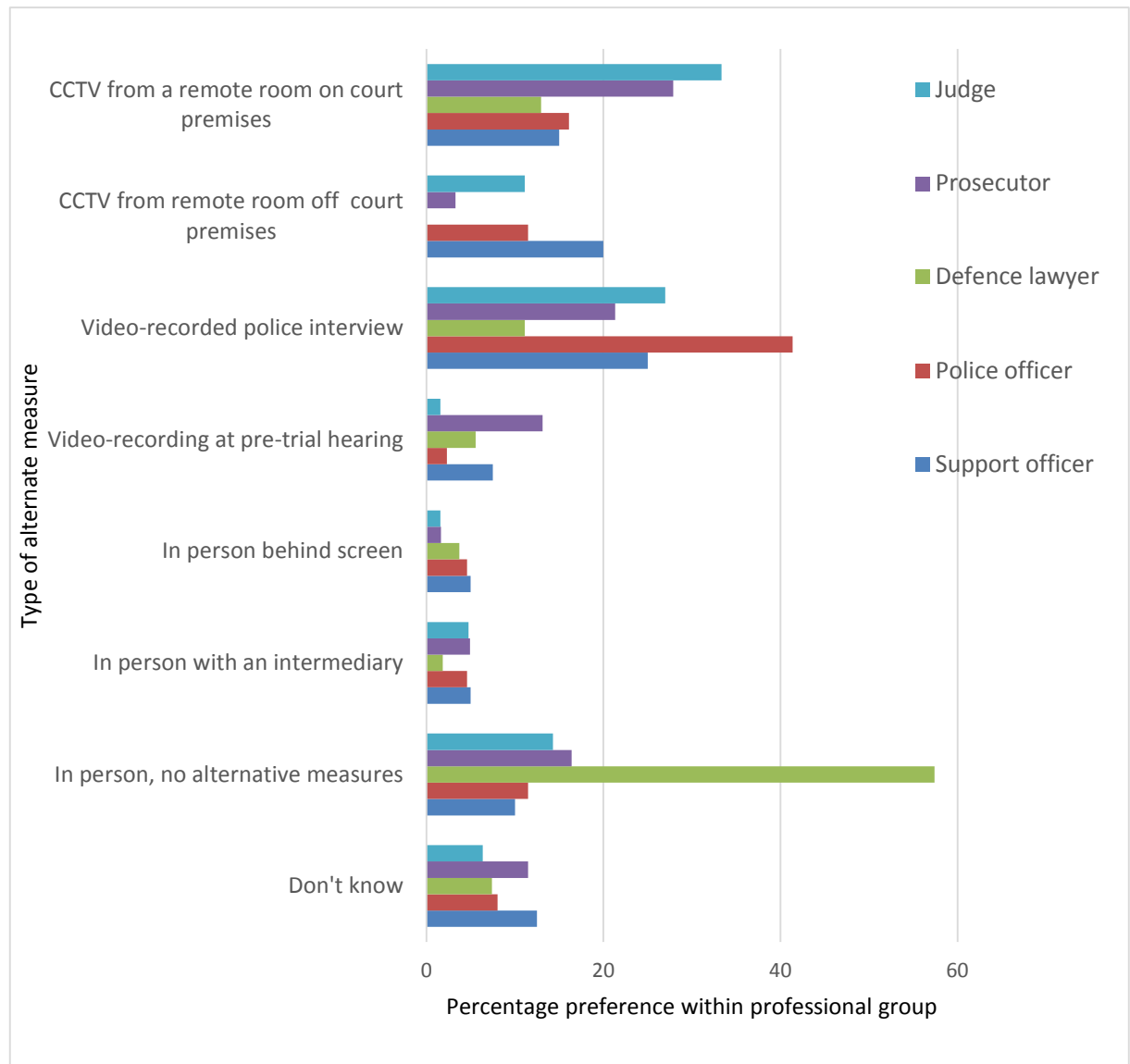


The five professional groups had different observations as to the reliability of the different methods for taking complainants' evidence (see Figure 3.14).⁴² Averaged across state, over half of defence lawyers rated the complainant's reliability as strongest when giving in-person evidence, without the use of any alternate measure. This was more than any other professional group.

Of all professional groups, defence lawyers were the least likely to view the complainant's reliability as strongest when giving evidence via CCTV from a remote room, whether on (one-seventh) or off (none) court premises; via a recorded police interview (one-ninth); via video-recorded pre-trial hearing (one

twentieth); or in person with an intermediary (one defence lawyer). Two-fifths of police officers and one-quarter of witness support officers rated the complainant's reliability as strongest in pre-recorded police interviews. Prosecutors (one-quarter) and judges (one-third) most frequently endorsed the use of CCTV from a remote room on court premises as the most reliable measure. These differences between groups might reflect the frequency with which different professionals work with the respective measures. For example, police officers have more experience with pre-recorded interviews, whereas prosecutors and judges have more experience with CCTV in court.

Figure 3.14 Alternate measure yielding the most reliable complainants' evidence, by professional group



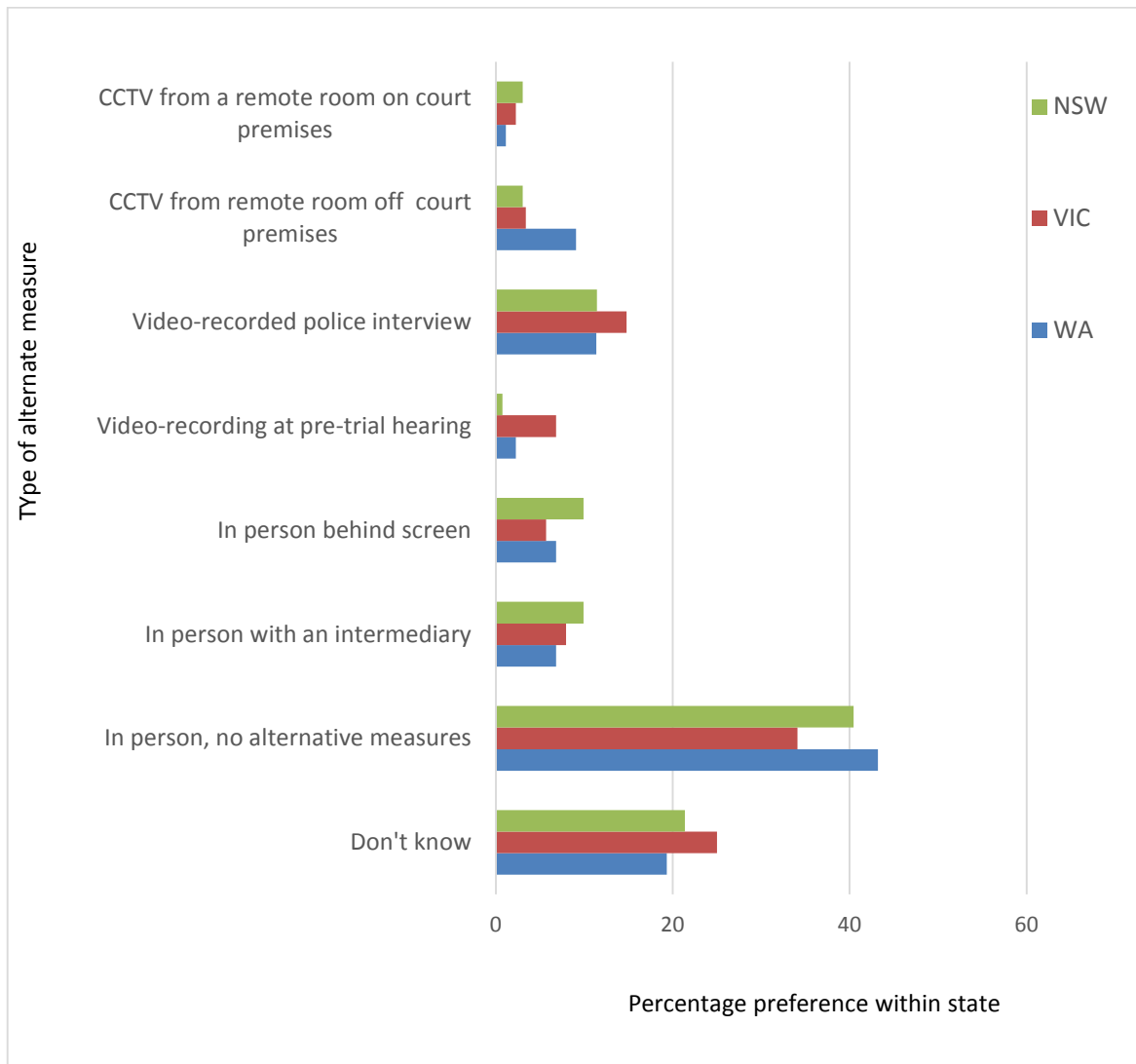
Alternate measures yielding the least reliable evidence

Participants selected which alternate measure out of the seven listed yielded the least reliable evidence. The results are shown in Figure 3.15 (Exact frequencies of endorsement can be found in Table S2.3.13) Participants most frequently identified evidence given in the conventional way – in person at trial – as the measure yielding the least reliable evidence. This view

was congruent across all three states; two-fifths of NSW participants, one-third of Victorian participants and over two-fifths of WA participants rated this method as the least reliable.⁴³

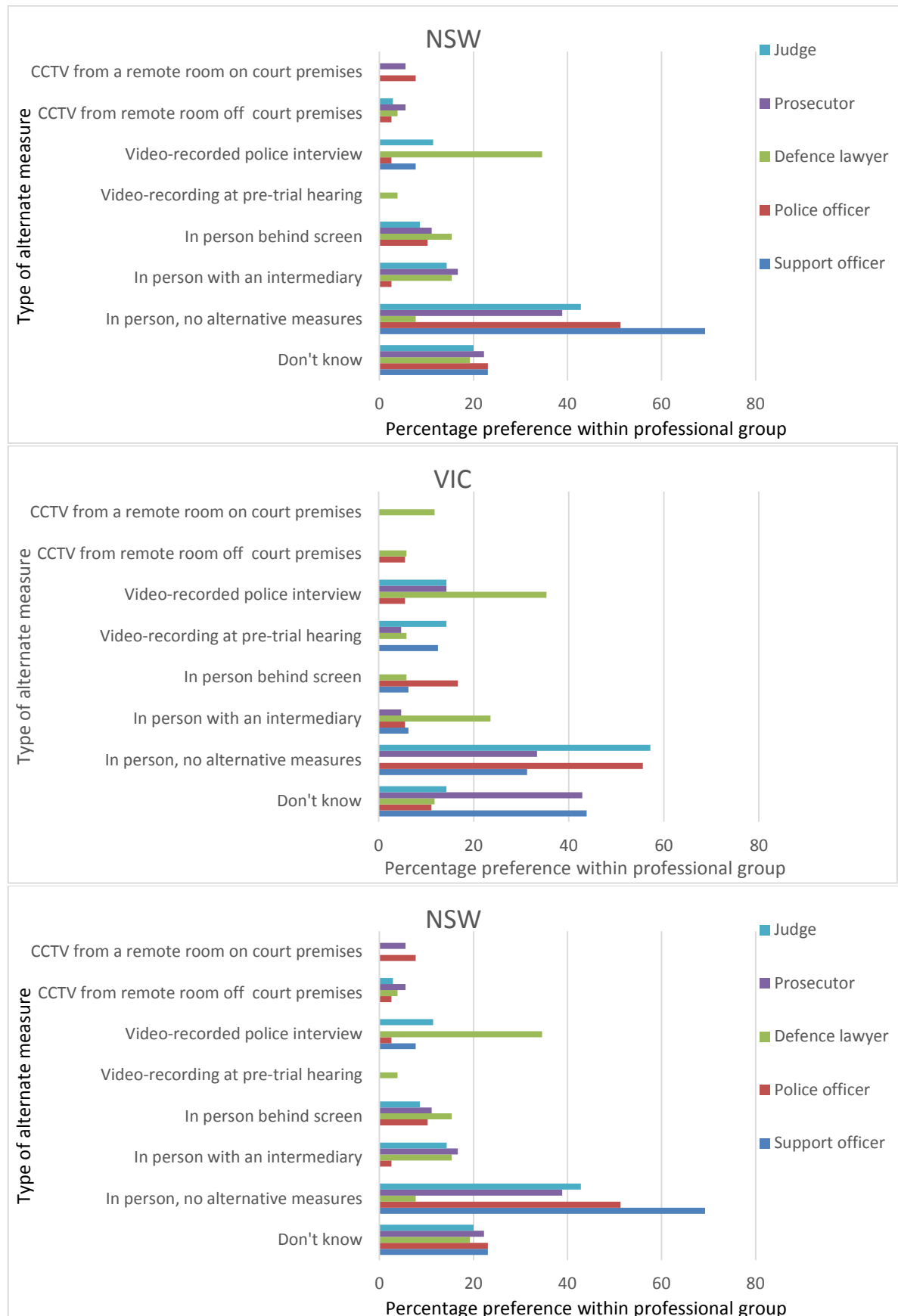
These findings may reflect the participants' familiarity with the view that giving evidence in person in the conventional way is not considered best practice for child complainants in the studied jurisdictions.

Figure 3.15 Alternate measure yielding the least reliable evidence from complainants, by state



In terms of participant views of the least reliable alternate measures, one-half of the participating judges in WA reported that they did not know which method of giving evidence was the least reliable, as did over two-fifths of witness support officers in Victoria.⁴⁴ These differences are shown in Figure 3.16.

Figure 3.16 Alternate measure yielding the least reliable evidence from complainants, by professional group



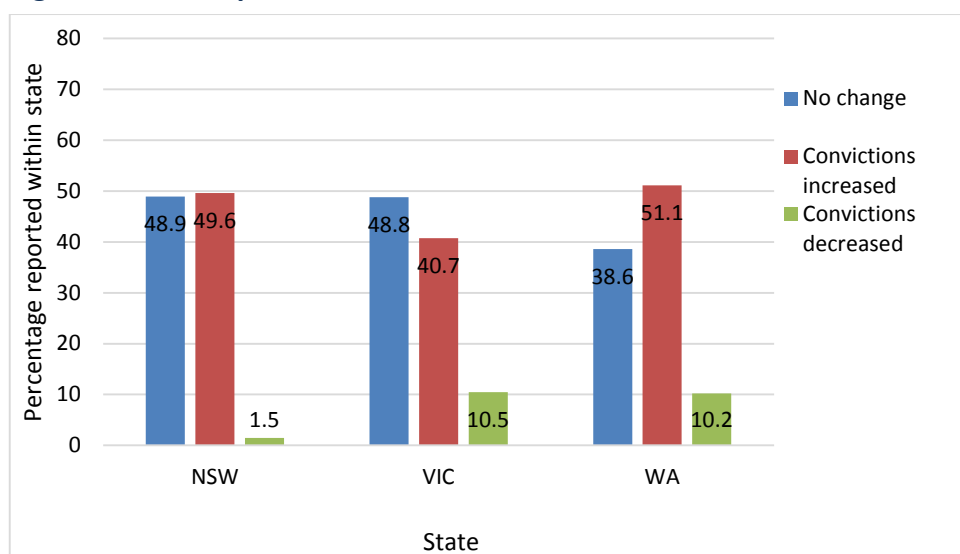
The perceived influence of alternate measures on conviction rates

Averaged across states, the proportion of participants who reported that alternate measures increased conviction rates was roughly equivalent to the proportion who reported no change in conviction rates (just under half for each). A small proportion of

participants, approximately one in 20, believed that alternate measures decreased conviction rates.

The pattern of results differed across states (see Figure 3.17).⁴⁵ In NSW and WA a higher proportion of participants reported an increase in conviction rates than those that reported no change in conviction rates. In Victoria, in contrast, a higher proportion of participants reported no change in conviction rates than those that reported an increase in conviction rates.

Figure 3.17 The perceived influence of alternate measures on conviction rates, by state



Current perspectives

Quantitative analyses

Participants' views of legal procedures used in child sexual abuse trials

Participants gave their views on several legal procedures applied in child sexual abuse trials by rating their agreement with 12 statements. (Exact *M* and *SD* values can be found in Table S2.3.14) Overall, participants expressed a high degree of agreement with the following statements: the duration of the period that complainants are kept waiting before giving their evidence at trial is stressful for complainants; giving evidence via CCTV is less traumatic for complainants than giving evidence in person; and the benefits of video technology outweigh the technical difficulties experienced.

Participants disagreed, overall, with the following statements: the Crown's preparation of the complainant confuses complainants; juries perceive evidence via CCTV or video as unfair to the accused;

and giving evidence via CCTV diminishes the quality of the evidence.

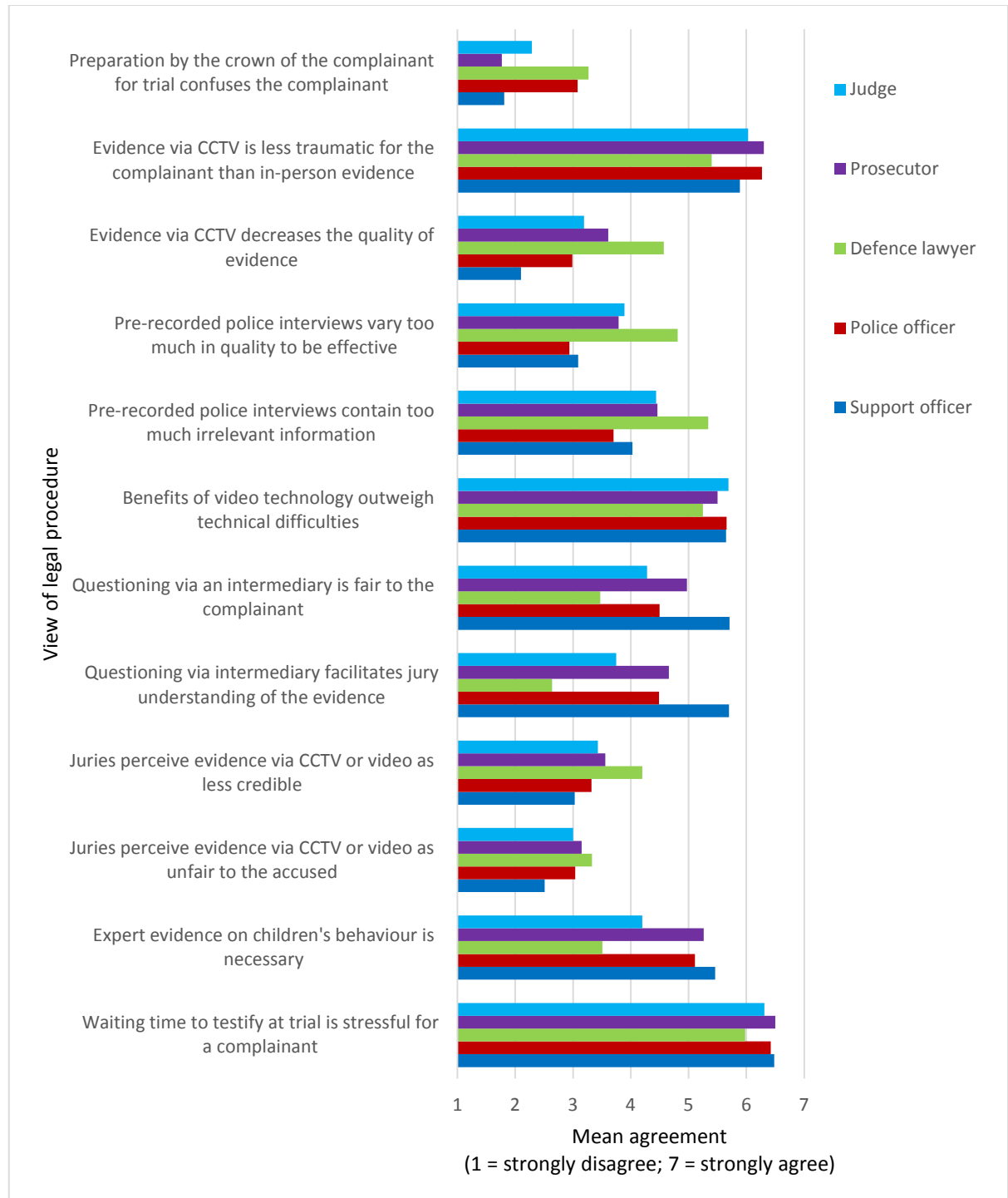
Endorsement of views on legal procedures differed by professional group. As can be seen in Figure 3.18, defence lawyers endorsed the following statements more strongly than did other professional groups: evidence given via CCTV is of a diminished quality; pre-recorded police interviews contain too much irrelevant information and/or vary too much in quality to be effective; juries perceive evidence via CCTV or video as less credible; and juries perceive evidence via CCTV or video as unfair to the accused. Furthermore, compared to all other professional groups, defence lawyers were least likely to agree that the assistance of an intermediary in questioning a complainant facilitates juries' understanding of the evidence or is fair to the complainant.

Witness support officers indicated stronger agreement with the views that questioning a complainant via an intermediary facilitates jury understanding of the evidence and is fair to the complainant than did members of other professional groups. They also provided the lowest level of agreement, compared to

all other professional groups, with the statement that evidence via CCTV decreases the quality of evidence. Prosecutors were least likely to agree that the Crown's

preparation of the complainant confuses the complainant, although the views of witness support officers were similar.

Figure 3.18 Views on the legal procedures used in child sexual abuse trials, by professional group



Use of expert evidence on the behaviour of sexually abused children in child sexual abuse trials

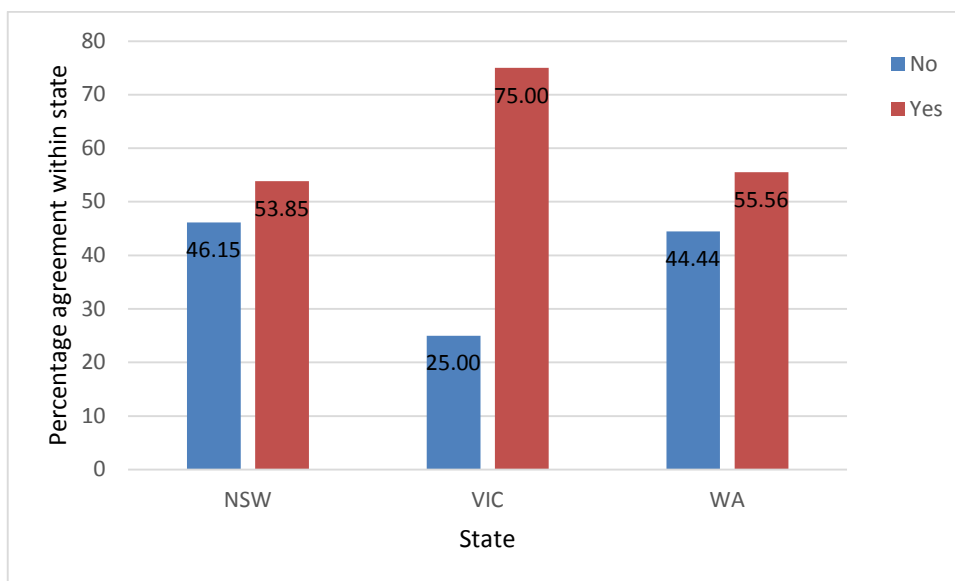
Averaged across jurisdictions, 20 per cent ($N = 61$) of participants reported observing expert evidence in child sexual abuse trials in the past two years on the topic of the behaviour of sexually abused children. These rates were similar in NSW (21 per cent, $N = 27$) and Victoria (27 per cent, $N = 24$), however the rate in WA was lower (11 per cent, $N = 10$).

In terms of participants' professional group, counsel for the prosecution and the defence had more experience in this regard than members of other professional groups: 15.9 per cent of judges ($N = 10$) reported observing this type of expert evidence in the past two years, along with 24.6 per cent of prosecutors ($N = 15$), 31.5 per cent of defence lawyers ($N = 17$), 13.8 per cent of police officers ($N = 12$) and 17.5 per cent of support officers ($N = 7$).

Helpfulness of expert evidence on the behaviour of sexually abused children in child sexual abuse trials

Participants who reported that they had observed expert evidence on children's behaviour in child sexual abuse cases were asked whether they believed expert evidence was helpful to a jury in such cases. These results are summarised in Table S2.3.15. More than three-fifths of the participants endorsed the use of this type of expert evidence as helpful to a jury. Support was higher in Victoria, where 75 per cent ($N = 18$) of participants reported that expert evidence was helpful to a jury, compared to NSW and WA, where expert evidence was rated as helpful by 53.8 per cent of NSW ($N = 26$) and 55.6 per cent of WA ($N = 5$) of participants, respectively. Perceived helpfulness of expert evidence, by state, is presented in Figure 3.19.

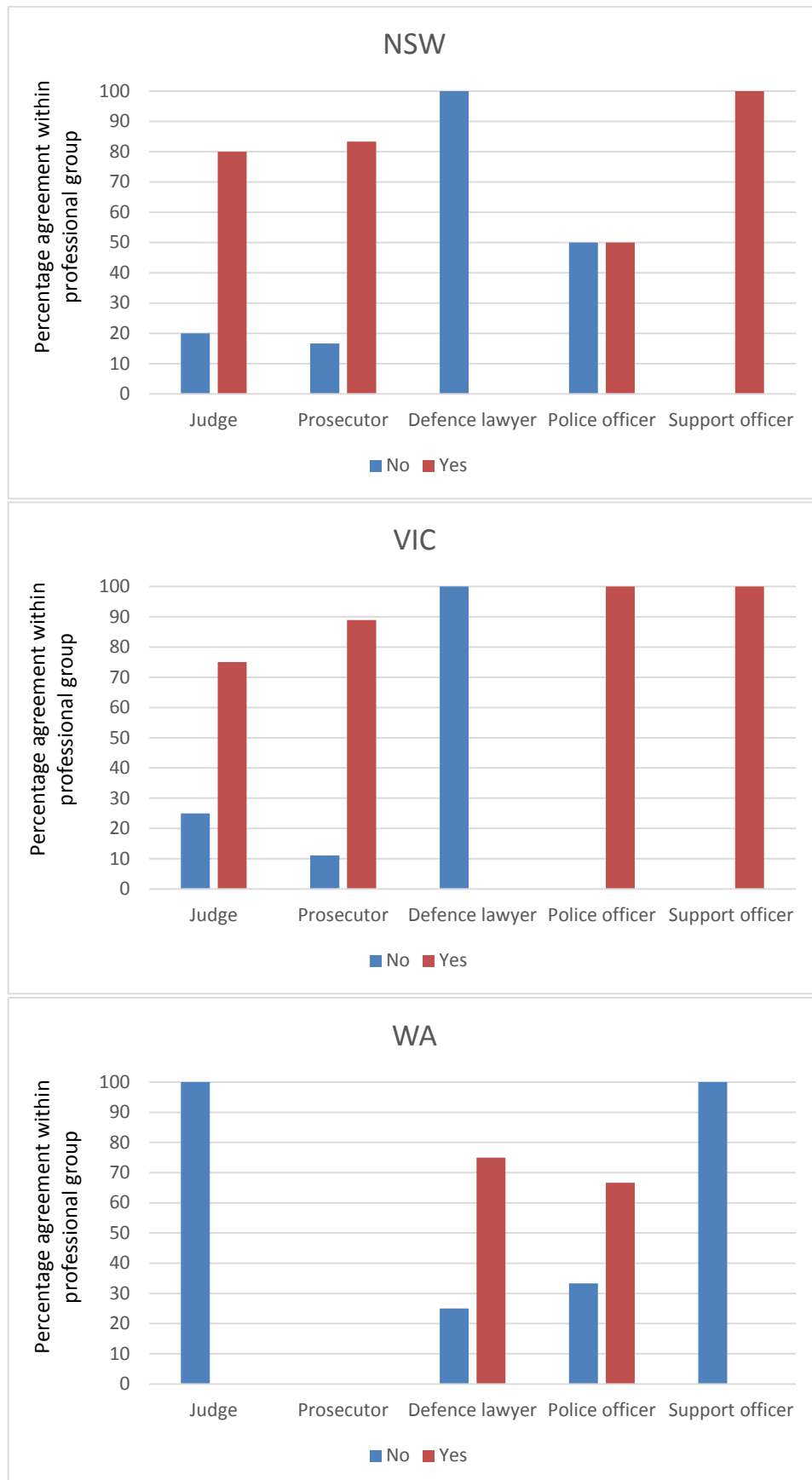
Figure 3.19 Expert evidence on children's behaviour is helpful to juries in child sexual abuse cases, by state



In terms of the perceived helpfulness of expert evidence, by professional group, more prosecutors (one in three) rated expert evidence as helpful than did police officers (one in four) or judges (almost one in five). These trends by professional group were similar across states.

On average, defence lawyers regarded expert evidence on children's behaviour as unhelpful to a jury in child sexual abuse cases. Yet this differed across the states: in NSW and Victoria, all defence lawyers rated expert evidence as unhelpful, whereas in WA only one-quarter rated expert evidence as unhelpful, with the other three-quarters rating it as helpful. These findings are presented in Figure 3.20.

Figure 3.20 Expert evidence on children’s behaviour is helpful to juries in child sexual abuse cases, by professional group



Qualitative analyses

Throughout the survey, participants were asked open-ended questions. Participants' responses to these questions were analysed and categorised based on word frequencies in the content of their open-ended responses, and similarities that emerged in the themes (noting that different elements of a participant's response could be included in multiple categories). For each question, the relative frequencies of responses in each category are shown in Table 3.1. The following subsections then provide examples and further explanations of the most common responses.

Table 3.1 Assessments of the expert evidence as helpful or unhelpful to the jury (relative percentage of responses)

Positive assessments	%	Negative assessments	%
Gives context for the child's behaviour	47.37	Is biased or prejudicial	12.28
Gives context for child complainants with a disability or mental illness	10.53	Too generalised to be useful	10.53
Fact-checks untrue claims of defence	5.26	Unsure if helpful	5.26
Compensates for flaws in system	5.26	–	
Compensates for poor evidence from a complainant	1.75	Adds confusion	1.75
Total	70.17	–	29.82

Positive assessments of expert evidence on the behaviour of sexually abused children

Some examples of comments elaborating the most commonly cited positive reasons are provided below.

Expert evidence gives a context for the child's behaviour

The most frequently cited reason in support of the use of expert evidence, cited in almost half of the participant responses, was that it was helpful to the jury because it provided a context to understand children's behaviour in child sexual abuse cases. In particular, expert evidence dispelled myths and misconceptions about how a child responds given their age or stage of development. These responses emphasised that the expert evidence helped the jury to understand the behaviour of complainants following experiences of sexual abuse, especially when these behaviours might be counterintuitive to a lay person. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.2

Explained a great deal to the jury on delayed reporting and negated defence counter proposals and attempts to damage credibility. (Male Police Officer, Victoria)

How is expert evidence helpful or not helpful to a jury?

Of those who had observed expert evidence, almost all participants explained why they concluded that this evidence was or was not helpful to the jury.

The four most highly cited reasons included two that were favourable assessments of the expert evidence and two that were unfavourable. More than twice as many responses supported the use of expert evidence in jury trials (70 per cent) than did not (30 per cent).

The expert is able to explain to the jury the responses that complainants have to an assault which is often completely at odds with what public perception/opinion is. (Male Police Officer, Victoria)

The expert is perceived as independent and credible, and lay people have a very poor awareness of child development and the way children remember and recall events, and the way they express themselves and respond to questions. (Male Defence Lawyer, WA)

Expert evidence gives context to the jury for child complainants with a psychological injury or disability

The second most common observation in support of expert evidence, cited in 10 per cent of the participant responses, comprised a related subset of the former category. It was deemed helpful to a jury because it provided a context in which to understand the ability of a child complainant with a disability or mental illness to testify in court about the experience of child sexual abuse. Responses in this category emphasised that the jury may lack knowledge about the complainant's abilities, and may doubt that a complainant with a disability or mental illness can provide reliable evidence. Some representative examples in this category included the following:

Text box 3.3

Child had an intellectual disability so it was important to explain to a jury whether children with this kind of disability could be truthful witnesses. (Female Prosecutor, Victoria)

Child victim had mental health issues. Her treating psychiatrist gave evidence – he was the first witness for the prosecution – as to how best to deal with child victim in court. (Female Magistrate, Victoria)

Negative assessments of expert evidence on the behaviour of sexually abused children

Examples of the most commonly cited negative responses are provided below.

Expert evidence is biased or prejudiced the jury

One in eight participant responses indicated that the expert evidence the participants had observed in child sexual abuse trials was unhelpful to a jury because its content was not neutral and objective, but was biased or prejudiced, or elicited prejudice in the jury. Responses in this category emphasised that expert evidence could be biased toward either the prosecution or the defence. Examples of comments in this category included the following:

Text box 3.4

The experts were really pushing for the complainant to be accepted as a witness of truth, regardless of any problems in their evidence. (Female Defence Lawyer, NSW)

Expert evidence was called by the defence, and the information was prejudicial. (Female Witness Support Officer, WA)

Expert evidence was too generalised to be useful

Approximately 10 per cent of responses presented the view that expert evidence in child sexual abuse cases was unhelpful to the jury as it was presented at such a general level that it did not assist the jury in determining the facts in the case at hand. Responses in this category emphasised that the expert evidence merely provided ‘common sense’ explanations of a child’s behaviour. The crown might adequately give such explanations, or the jury might take them as self-evident based on their common knowledge. Some representative examples in this response category included the following:

Text box 3.5

They don't need an expert to point out the obvious. (Female Prosecutor, NSW)

The expert added nothing to the usual direction given by judges as to why there was a delay in complaint. (Male Defence Lawyer, NSW)

Professional training on child sexual abuse

Nature of participants’ professional training on child sexual abuse

Of the 335 participants in the survey, 144 did not report the nature of any professional training that they had received on child sexual abuse. The remaining 191 participants described professional training that fell into seven broad categories, presented in Table 3.2.

Table 3.2 Nature of professional training on child sexual abuse, by professional group (relative percentage of responses)

	Judge	Prosecutor	Defence lawyer	Police officer	Support officer	Total
Degree or diploma	3.57	2.63	20.00	3.08	17.50	7.85
Seminars or workshops	46.43	42.11	20.00	7.69	25.00	25.13
Intensive courses or conferences	7.14	15.79	5.00	16.92	10.00	12.57
Formal on-the-job classes	25.00	15.79	25.00	21.54	20.00	20.94
Continuing education courses	10.71	13.16	15.00	46.15	22.50	26.18
On-the-job experience	7.14	10.53	15.00	4.62	5.00	7.33
Total (N = 191)	28	38	20	65	40	191

Averaged across all participant groups, the most common training type was some form of continuing education course or certificate, often administered through the workplace or affiliated accredited professional bodies such as Continuing Legal Education or the NSW Health Education Centre Against Violence. In particular, a large proportion of police officers' responses listed training in this category, such as training in visual and audio recording of evidence, and in joint investigative response teams. Seminars or workshops were the most frequently cited category for judges, prosecutors and support officers. Notably, only one-third of defence lawyers listed the nature of their training, and of those participants, the highest proportion of responses indicated on-the-job formal workshops (one-quarter).

Participant recommendations for additional training

In addition to reporting the nature of their own professional training, participants were asked what additional types of training they thought could be useful in future. One-quarter of participants responded that they had no particular recommendation, or that no further training was required.

Of the 335 survey participants, 194 gave a specific recommendation for additional training that could be useful to professionals working on child sexual abuse cases. (Table S2.3.16 shows a breakdown by state, gender and professional group of participants who chose to give a recommendation.) Table 3.3 presents the relative frequencies of each category of response.

Table 3.3 Participant recommendations for additional training on child sexual abuse (relative percentage of responses)

Recommended types of training	%
Complainant behaviour and child development	25.00
Updates on psychological research, law and best practice	16.67
Practical on-the-job or peer instruction	9.44
Continued general training and courses	8.33
Other	7.22
Interviewing techniques	3.33
Formal certificated courses or accreditations	2.78
Intensive targeted training	2.78
No recommendation or no further training required	24.44

Examples of the most common types of responses are provided below.

Training in complainant behaviour and child development

The highest proportion of participant responses (one-quarter) recommended additional training for professionals, to increase their understanding of child or adult child sexual abuse complainants' behaviours. Responses emphasised training to understand complainants' psychological responses to trauma, how memory can be affected in child sexual abuse cases, and how to respond sensitively to child complainants throughout trial proceedings. Some examples of statements that reflected this viewpoint included the following:

Text box 3.6

Receive training in relation to dealing with traumatised and vulnerable witnesses, interacting with child witnesses, victims' responses to trauma and

children's brain development. (Female Prosecutor, Victoria)

Training for legal practitioners and general community (potential jury members) on impact of trauma on victims of sexual abuse and the reasons for not discussing abuse when it occurs. (Female Support Officer, Victoria)

Specific training in cognitive and linguistic developmental stages of children and how this impacts on their ability to give evidence. Strategies to assist children who have a disability to communicate while giving evidence. (Female Support Officer WA)

Updates on psychological research, law and best practice

The second most highly cited category of responses, cited in one-sixth of responses, was training to keep professionals abreast of changes in psychological literature, laws and best practice. Responses in this category emphasised that it would be very useful to have continuing education to ensure that

professionals are fully trained in best-practice procedures and are aware of new developments in the psychological literature around complainant memory and trauma. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.7

Continuing updates on the latest developments in research regarding interviewing of children, research regarding memory and reliability, and behaviour of sexual assault victims (particularly victims of child sexual abuse). (Female Prosecutor, WA)

Feedback from DPP, updates on current research re child investigative interviewing, case studies and court outcomes. (Female Police Officer, NSW)

Experts' contemporary knowledge pertaining to child sexual abuse; best practice comparisons with other police jurisdictions regarding interviewing models. (Male Police Officer, NSW)

Practical on-the-job training or peer instruction

The third most highly cited recommendation for training, cited in approximately 10 per cent of participant responses, was practical on-the-job learning or peer instruction. Responses in this category emphasised the value of sharing knowledge between professional groups, sharing case studies to give professionals an understanding of real-world cases and issues, and the outcomes of different courses of action. Responses in this category also emphasised the value of learning through experience in the workplace or court settings. Some examples of statements from professionals reflecting this viewpoint included:

Text box 3.8

I think case studies are beneficial for police. I always learn new skills from what worked for other investigators. (Female Police Officer, NSW)

More face-to-face training with non-legal professionals such as psychologists. (Male Judge, NSW)

The ability to observe other advocates (prosecutors and defence) to see the methods and styles they use. (Male Prosecutor, VIC)

Participant suggestions for improvements to child sexual abuse trials

Participants were invited to respond to three open-ended questions seeking their recommendations on how to improve different aspects of child sexual abuse cases, namely how to improve the prosecution of cases, the defence of cases, and the high rate of acquittal in child sexual abuse cases. Of the 335 participants of the survey, a high proportion ($N = 291$) gave practical suggestions in response to these questions. (Table S2.3.17 shows a breakdown of participants who chose to give practical suggestions, by state, gender and professional group.)

Participant suggestions to improve the prosecution of child sexual abuse cases

The relative frequencies of responses to the question “The prosecution of child sexual abuse cases can be improved by...” are presented in Table 3.4.

Table 3.4 Participant suggestions to improve the prosecution of child sexual abuse cases (relative percentage of responses)

Recommendation	%
Reduce delays and wait times	18.68
Increase or improve training for professionals	16.67
Better communication with and preparation of complainants	16.38
Improve quality of pre-recorded police interviews	13.51
Increase use of expert evidence or jury directions to explain children’s limitations	13.51
Increase use of alternate measures	8.05
Other	7.47
Increase judicial intervention	5.75
Total	100.00

The five most highly cited suggestions to improve the prosecution of child sexual abuse cases fell into two broad areas. First, three recommendations centred on catering better for child complainants by:

- reducing delays and waiting times at different phases of the criminal justice process
- improving communication with complainants to better prepare them
- increasing the use of expert evidence.

Other recommendations were to improve procedures by:

- increasing or improving training for professionals
- improving the quality of pre-recorded police interviews.

Further explanations and examples of the most commonly cited recommendations for improving the prosecution of child sexual abuse cases are presented below.

Reduce delays and waiting times

Almost one-fifth of responses suggested that the prosecution of child sexual abuse cases might be improved by making the pre-trial procedures more efficient. In particular, there was emphasis on the need to reduce waiting times for complainants – both the waiting time between initial investigative interview and appearing in court, and waiting times during the trial. Participants regarded these as unfair and stressful for complainants. Examples of statements reflecting this viewpoint included the following:

Text box 3.9

Ensuring that matters proceed as soon as possible; the charge to trial waiting time is now far, far too great. (Female Prosecutor, NSW)

Reducing delays in bringing matters to a hearing, and having rigidly enforced time frames to ensure matters don't languish. (Male Judge, NSW)

Case management of trials in the District Court including pre-trial mentions to address legal arguments and reduce delays for victims. (Female Support Officer, NSW)

Increase or improve training for professionals

Another common recommendation, cited in one-sixth of responses, was more frequent and higher-quality training for prosecutors, judges and police officers, to improve the prosecution of child sexual abuse cases. The training specified would

- increase understanding of the way child complainants are likely to respond to experiences of abuse and to questions about it, given their age or ability

- increase sensitivity to children's needs and improve awareness of appropriate questioning types (in police interviews and at trial)
- clarify when to intervene during cross-examination (for judges and magistrates).

Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.10

Upskilling more police practitioners and prosecutors about child behaviour and victim behaviour. (Female Police Officer, Victoria)

Specialist training of prosecutors and judges on the dynamics of child sexual abuse as well as the impacts of trauma and abuse on children's memory. (Male Police Officer, Victoria)

More training for everyone, but particularly police officers, prosecutors and defence counsel, and particularly in how to question children. (Female Judge, Victoria)

Better communication among criminal justice professionals and better preparation of complainants

One-sixth of the responses stated that the prosecution of child sexual abuse cases could be improved by better communication among the criminal justice professionals working on these cases – that is, the prosecution, judges and witness support officers. These suggestions included comments that child complainants needed to be better prepared by the prosecution for the intensity of giving evidence at trial, and that they required support to give the best evidence possible. Additionally, many professionals suggested that prosecutors needed to communicate more effectively with complainants about how the courts work, and should spend time developing rapport with and getting to know the complainants before trial. Examples of statements reflecting this viewpoint included the following:

Text box 3.11

Crown prosecutors need to have time available to be flexible enough to conference the child witness at a time and location that suits the child. (Female Prosecutor, NSW)

More conferences with the complainant so that the Crown better understands the personality of the complainant and can better prepare and object during the trial. (Female Prosecutor, NSW)

Better preparation of witnesses and elimination of instances where a witness is asked to provide accounts of what occurred to people who are not professionally trained. (Male Judge, Victoria)

More expert evidence to explain children’s behaviours and responses to child sexual abuse

Another common recommendation to improve the prosecution of child sexual abuse cases, comprising approximately one-seventh of responses, was to including expert evidence and thereby address limitations in the jury’s knowledge of child sexual abuse. Examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.12

Having expert witnesses explain children’s behaviour to a jury, who often have preconceived assumptions on how a sexual assault victim should behave. (Female Police Officer, Victoria)

The use of behavioural experts to examine and explain evidence provided by children. (Male Police Officer, NSW)

Improve the quality of pre-recorded police interviews

An equivalent proportion (one-seventh) of responses suggested that improvements to the prosecution of child sexual abuse cases required higher-quality

pre-recorded police interviews as poor initial questioning of the complainants often hindered cases. Spending additional resources on training for pre-trial investigations could strengthen cases brought before the courts, leading to more efficient trials and more just outcomes. Examples of statements reflecting this viewpoint included the following:

Text box 3.13

Changing the way specialist child interviews are conducted. They are so scripted and difficult to get information out of the child. (Male Police Officer, WA)

Better training of police in interviewing children. The first session is critical, as if there hasn’t been abuse, incorrect interviewing techniques can plant the idea for the child who then believes they were abused. (Female Defence Lawyer, Victoria)

Participant suggestions to improve the defence of child sexual abuse cases

Table 3.5 shows the relative frequencies of participants’ responses to the question of how to improve the defence of child sexual abuse cases.

Table 3.5 Participant suggestions to improve the defence of child sexual abuse cases (relative percentage of responses)

Recommendation	%
Follow age-appropriate questioning of complainant	24.72
Increase or improve training for professionals	20.22
Have earlier access to pre-recorded evidence	5.99
Delay cases to benefit the accused	5.24
Allow cross-examination of child	4.49
Reduce delays and wait times	4.49
Provide expert evidence on child behaviour	4.49
Continue conventional practice	3.00
Reduce practices that are biased towards the child	3.00
Increase Legal Aid for the accused	2.62
Other or don’t know	21.72
Total	100.00

Approximately one-fifth of responses stated that the participant did not know how to improve the defence, or that they did not understand the question. Interpretation of an ‘improvement’ varied, with some participants construing this as a fairer process overall, and others interpreting the phrase to mean an increased chance of acquittal.

The fourth most highly cited response category – delay cases to benefit the accused – underscored the advantage to the defence of delays in proceedings.

Further explanations and examples from the most highly rated recommendations are presented below.

Age-appropriate questioning of complainants

Almost one-quarter of participant responses recommended that more age-appropriate questioning of the complainant would improve the defence of child sexual abuse cases. Responses in this category emphasised the intensity of cross-examination for a child complainant, and recommended less aggressive questioning; avoidance of leading or confusing questions; and questions suited to the age and ability of the complainant. Examples of statements reflecting this viewpoint included the following:

Text box 3.14

Being clear and concise with their questions as they (or anyone in that situation, really) will likely be stressed and anxious already. Questions that are asked should be as clear as possible. (Female Police Officer, Victoria)

Children are often asked long and convoluted questions that are difficult to understand even for an adult. Children are often confronted with a proposition, rather than a question, and asked if they agree with it. This leads to confusion for the child and makes any response of less value. (Male Judge, NSW)

More age appropriate questioning of the child, and questioning that is tailored to younger victims. (Female Police Officer, NSW)

Increase or improve training for professionals

One-fifth of participant responses suggested that increasing or improving the training of professionals involved in the trial process (lawyers, judges, prosecutors, defence counsel and police officers) would improve the defence of child sexual abuse cases. Suggested topics for training were sensitivity or ethical training for defence lawyers conducting cross-examination of a child complainant; understanding of the way child complainants are likely to respond given their age or ability; and training for judges and prosecutors on when to intervene during cross-examination. Examples of statements reflecting this viewpoint included the following:

Text box 3.15

Compulsory training on the psychological sequelae of child abuse should be introduced for all prosecutors, together with child interview training. Cultural training is also appropriate where the children concerned are Aboriginal. (Female Support Officer, WA)

Counsel should need to undergo special training in the interviewing/cross-examination of child witnesses. Only suitably accredited counsel should be able to appear in these cases. (Female Police Officer, Victoria)

Defence counsel undertaking training to learn how to ask age-appropriate questions, the answers to which they can rely on for their arguments to the fact finder, and to be qualified in such an area before embarking on these trials. (Female Judge, Victoria)

Earlier defence access to pre-recorded evidence

Earlier defence access to pre-recorded evidence and the nature of evidence against the accused was recommended in one-seventeenth of responses, as a further way to improve the defence in child sexual abuse cases. Responses in this category emphasised that this access would allow the parameters of the trial to be established earlier and avoid taking 'weak' cases to trial. Examples of statements reflecting this viewpoint included the following:

Text box 3.16

Being advised of contact the witness may have had with other persons earlier and being able to access such documents prior to hearing. Being advised of the course of the investigation. (Male Defence Lawyer, Victoria)

Access to recorded interviews by defence counsel on undertakings rather than time needed to view at DPP or JIRT offices, which can lead to delay. (Female Defence Lawyer, NSW)

Participant suggestions to reduce the high rate of acquittal in child sexual abuse cases

The relative frequencies of responses to the question "The high rate of acquittal in child sexual abuse cases can be improved by..." are presented in Table 3.6.

Approximately 10 per cent of participant responses indicated that the participant did not believe that there was a high acquittal rate in child sexual abuse cases, or disagreed that a high acquittal rate should be improved. Examples of recommendations in the most commonly cited categories are presented below.

Increase public education and professional training

The most common recommendation to improve the high rate of acquittal in child sexual abuse cases, cited in one-sixth of participant responses, was to increase public education about child sexual abuse and to increase education and training of professionals working in such cases. In particular, responses emphasised that increased education of the public would lead to juries with greater understanding of children's behaviour in child sexual abuse cases, and that complainants would be more likely to report offences. Similarly, participants recommended that professionals needed training in specialised techniques to work with child complainants, and general education on the psychology of child sexual abuse complainants to increase their sensitivity and fairness to complainants throughout proceedings. Examples of statements reflecting this viewpoint included the following:

Text box 3.17

Better community education; this is then reflected in jury and tribunal understanding of the culture and circumstances of child sexual assault. I remember up to the 1980s it was difficult to impossible to have a conviction in the higher courts for incest/child sexual assault matters. (Female Judge, NSW)

Community education. The myth that allegations are easy to make but hard to refute needs to be put to rest well and truly. They are anything but easy. Perhaps

some education of Court of Appeal justices – including making them run sex offence trials at least a few times a year. (Female Prosecutor, Victoria)

Greater judicial education about sexual assaults and victim behaviour. Judges have very out-of-date ideas about how a victim should behave, and this comes through in their comments. (Male Police Officer, Victoria)

Table 3.6 Participant suggestions to improve high rate of acquittal in child sexual abuse cases (relative percentage of responses)

Recommendation	%
Increase public education and professional training	16.06
Expert evidence or jury directions	13.03
Reduce delays	11.82
Tailor court procedures to children’s needs	10.30
Substantial reform of current system	6.36
Increase resources and enable better case preparation	5.76
Use alternate measures	5.15
Prosecute only meritorious cases	4.24
Permit tendency/propensity evidence and multiple complainant trials	3.94
Cannot be improved, due to the nature of child sexual abuse cases	3.03
Child evidence and cross-examination live in court	2.12
Disagree with the premise of the question	10.61
Don’t know	7.58
Total	100.00

Expert evidence or jury directions

The second most highly cited response to improve the high rate of acquittal in child sexual abuse cases, cited in approximately one-eighth of participant responses, was to increase the use of expert evidence or special jury directions. Responses in this category emphasised that if juries were unaware of the special needs of child complainants, and their likely behaviours in reporting child sexual abuse (such as delayed reporting or confusion about details), they could be biased against child complainants and view them as unreliable witnesses. Responses suggested that jury awareness could be increased by either greater use of expert evidence or clear jury directions from the judge at the beginning of the trial. Examples of statements reflecting this viewpoint included the following:

Text box 3.18

Briefing by independent expert witnesses not linked to the trial or to the jury. Providing some information on

the psychology of child abuse victims. (Male Police Officer, WA)

Change in directions given to the jury. Less emphasis on delay, memory recall, etc. More balanced approach taking into account expert evidence as to how children recall significant incidents (i.e., why they remember some things but not others). (Female Prosecutor, NSW)

More use of expert evidence on children’s behaviour in child sexual abuse cases so juries and judicial officers can better understand and evaluate a complainant’s evidence. (Male Prosecutor, Victoria)

Reduce delays at all stages in the criminal justice process

More than 10 per cent of participant responses suggested that the high rate of acquittal in child sexual abuse cases could be improved by reducing delays in getting cases to trial, and by reducing waiting times and delays once a trial was underway. Responses

focused on the issue of extended delays leading to decay of memory and inconsistencies in evidence across extended time periods and retellings, making child complainants (and particularly adult complainants of historical cases) appear unreliable. Examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.19

Making it easier for complainants to make a timely complaint so the court is not dealing with evidence that is old and often contradictory or insufficient due to the passing of time. (Female Defence Lawyer, Victoria)

Trial of complaints being held at the earliest opportunity such that particularly young witnesses are better able to give a consistent, accurate account of the incident, untroubled by the impact of delay. (Male Judge, WA)

Shorter wait times. Using the pre-recorded interview and pre-recording cross-examination via CCTV closer to disclosure. (Female Support Officer, NSW)

Participant perspectives on current practice and procedures in child sexual abuse cases

Participants were presented with three open-ended questions asking for their views on current practice and procedures in child sexual abuse cases, in terms of:

- advantages of current practice
- limitations of current practice
- how to improve procedures for the giving of evidence by complainants in child sexual abuse cases.

Of the 335 participants in the survey overall, nearly all (319) participants gave suggestions on how practice in child sexual abuse cases might be improved. (A breakdown by state, gender and professional group of participants who chose to give suggestions is shown in Table S2.3.18).

Advantages of current practice

Table 3.7 sets out the relative frequencies of participants' responses regarding the advantages of current practice.

Table 3.7 Participant views of the advantages of current practice (relative percentage of responses)

Assessment category	%
Decreases complainant distress since they don't have to see the accused	50.00
Allows evidence taken closer to the time of offence, so is more accurate	14.52
Positive description of current practice	8.33
Evidence can be reused, and inadmissible evidence edited out without retrial	7.53
Fairer process for complainant	2.69
Advantageous for defence, reduces gravity of complainant evidence	2.42
More prepared for trial by knowing evidence early	1.61
Showing child at time of alleged offence advantageous	1.61
Increases complainants willingness to give evidence	1.34
No response	6.45
No advantages	3.49
Total	100.00

A number of participant responses (one-twelfth) generally endorsed current practice without specifying any particular benefit or advantage. Descriptions and examples of responses in each highly cited category are presented below.

Decreased complainant distress

Half of all the responses to the question about advantages of current practice in child sexual abuse

cases pointed to less distress to the complainant by avoiding seeing the accused at trial and removing the stress of the courtroom setting. Specifically, responses in this category emphasised that current practice (pre-recorded evidence or CCTV) decreased feelings of intimidation, allowing complainants to give evidence more confidently. Similarly, the advantage of not having to see the accused avoided re-traumatisation as part of the trial experience. Examples of statements reflecting this viewpoint included:

Text box 3.20

Avoid the child reliving the experience. Avoiding the child seeing the accused in person and possibly affecting the way they give evidence. (Male Police Officer, NSW)

Child witnesses report that they feel safer and more comfortable to provide their best evidence in a remote witness facility rather than in the courtroom itself. (Female Support Officer, Victoria)

Children are able to give their account in a comfortable setting with defence able to ask questions of them without a jury or accused present to intimidate the child. (Male Police Officer, WA)

More accurate complainant evidence

The second most frequently cited advantage of current practice (one-seventh of responses) indicated that using pre-recorded interviews and CCTV cross-examination lead to more accurate evidence from child complainants. Responses emphasised that this was the case because pre-recorded evidence was taken much closer in time to the actual offence, leaving less time for memory to decay or become confused. It was also emphasised that complainants gave much more accurate evidence when they felt comfortable and safe, such as in a setting removed from the courtroom. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.21

A video-recorded investigative interview with police allows younger children's evidence to be captured most accurately. Pre-recording their evidence in court (via CCTV) ensures that the child can give evidence at the earliest opportunity. (Female Support Officer, WA)

Pre-recorded [evidence] with children is great for a prosecutor. It gives certainty of account, is captured while memory is clearer, and the account is much more persuasive. Using CCTV improves the quality of the recording of evidence. (Female Prosecutor, NSW)

For children, the evidence is recorded as close as possible to the incident occurring. This means that memory of the event is at its best. These cases can take years to go to court, which seriously impacts victims' credibility and reliability in these cases. (Male Police Officer, WA)

Allows evidence to be reused and edited

The third most highly cited advantage of current practice in child sexual abuse trials (excluding non-specific positive evaluations) was that the recorded evidence from the complainant could be reused at multiple trials or retrials without having to reinterview the complainant (one-fourteenth of responses). Responses in this category further indicated that it was very useful to be able to edit inadmissible evidence from the recordings before they were presented to a jury, reducing mistrials or appeals on this basis leading to a retrial. Some examples of statements reflecting this viewpoint included the following:

Text box 3.22

Evidence of child complainants is recorded by police during investigation and played to the jury. Cross-examination is recorded. Thus, in the event of any re-trial or loss of jury, the child complainant does not have to give evidence again. (Male Prosecutor, Victoria)

It enables editing of the recorded evidence if inadmissible matters emerge. The evidence is recorded and preserved so that it can be used on a retrial, hence reducing the need for the giving of evidence multiple times. (Female Judge, NSW)

For child complainants, pre-recording of all evidence through police VARE and then a special hearing allows for a process whereby complainants only have to give evidence in court once, but with the ability for editing of that evidence to take place where appropriate prior to a jury seeing the evidence. (Female Defence Lawyer, Victoria)

Limitations of current practice

Participants were presented with an open-ended question seeking their views on the limitations of the current practice. The relative frequencies of their responses are presented in Table 3.8.

Table 3.8 Participant views of the limitations of current practices (relative percentage of responses)

Assessment category	%
Alternate measures depersonalise the complainant	16.94
Satisfied with current practice	16.11
Failure of technical equipment	11.11
Poor quality of pre-recorded police interviews	10.83
Too many delays and lack of clarity for complainants	8.33
Cross-examination is unduly stressful	7.78
Needs to be applied consistently and to adult complainants	5.83
Difficult sharing documents or material evidence at remote locations	5.00
Watching pre-recorded interviews re-traumatises complainant	3.33
Systemic limitations curtail utility of alternate practices	2.78
Limiting to defence – accused and accuser should confront each other	1.67
Other	5.56
Don't know	4.72
Total (N = 360)	100.00

Examples from the four most highly cited categories are presented below.

Alternate measures depersonalise the complainant

The highest proportion of participant responses (one-sixth) suggested that current practice of using pre-recorded interviews or CCTV for child complainants depersonalised the complainant. Responses in this category emphasised that presence through a screen was 'less real' to the jury, and could hinder the complainant's case. In their responses, participants also noted that finer cues such as body language or shifting in the seat, which might impact the jury's perception of the evidence, were muted or lost by using alternate measures. Some examples of statements from professionals reflecting this viewpoint included:

Text box 3.23

Juries don't connect with a witness giving evidence either via recorded interview or via CCTV the same way they connect with a complainant who is present in the courtroom. They tend to look at the screen as if they're watching an actor on television rather than a real person. (Female Prosecutor, NSW)

...the jury's assessment of a witness is significantly reduced when the delivery of the complainant's evidence is over a TV screen. An emotional, credible and reliable witness telling a compelling story in person, meters away from the jury, heightens the weight the jury will give to that evidence. (Male Defence Lawyer, WA)

Whilst remote witness facilities protect witnesses, they can be alienating for juries when compared with seeing the complainant in person. (Female Prosecutor, Victoria)

No limitations, satisfied with current practice

The second most frequent category of responses (one-sixth) suggested that participants were satisfied with current practice in the use of alternate measures. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.24

I think the current practice works well. (Female Support Officer, Victoria)

I do not see any limitations to the current practice. It rarely affects the timeliness of prosecutions and should be used more often. (Female Prosecutor, WA)

It is generally a good practice. (Male Judge, NSW)

Failures of technical equipment

More than 10 per cent of responses from professionals noted that a substantial limitation in current practice was the issues with the technical equipment required to apply alternate measures in child sexual abuse cases. Responses in this category emphasised that technical issues were widespread and led to major delays at trial. Additionally, some responses noted that technical deficits, such as a fragmented or halting CCTV feed, hindered the jury's view of a complainant's evidence. A related issue was the unavailability or sporadic availability of alternate measures across all courts, particularly in remote locations. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.25

Breakdowns in the equipment and substandard recordings (poor audio) still occur and result in delays. (Female Judge, WA)

CCTV use can often have practical difficulties, equipment often breaks down or is inadequate for the task, and communication can be difficult. (Female Prosecutor, NSW)

Some limitations could be that some facilities have faulty technology, therefore holding up proceedings. Other limitations could be that there may be no available technology/CCTV at all. (Female Police Officer, NSW)

Text box 3.26

Pre-recorded evidence can be of poor quality; sometimes a scattered and poorly guided account. (Male Prosecutor, Victoria)

In relation to pre-recorded police interviews used for current child and cognitively impaired witnesses, the quality of the interview is often determined by how skilful the police interviewer is at extracting admissible evidence from the witness during the interview. (Female Prosecutor, Victoria)

I believe the police taking CCTV statements often sets the prosecution up for failure as they [complainants] are questioned in such a way that includes leading. A version [of events] is often prompted by the investigating police or welfare officer. Credibility of the complainant is diminished due to the process. (Male Defence Lawyer, NSW)

Poor quality of pre-recorded police interviews

The fourth most highly cited category (one-tenth of responses) included responses suggesting that current practice was limited by the often poor quality of pre-trial recorded investigative interviews. In addition to issues with the technical quality of recordings, participants noted problems with under-trained police officers who conducted interviews using inappropriate question types, which affected the complainants' memory (for example, by using leading questions). Some examples of statements from professionals reflecting this viewpoint included the following:

Participant recommendations to improve procedures for complainants giving evidence in child sexual abuse cases

Participants were asked "Do you have any recommendations to improve procedures for evidence by complainants in child sexual abuse cases?" Approximately 80 per cent of participant responses offered recommendations to improve procedures for giving evidence in child sexual abuse cases. The relative frequencies of their responses are shown in Table 3.9.

Table 3.9 Participant recommendations to improve procedures in child sexual abuse cases (relative % of responses)

Recommendation	%
Fairer questioning and cross-examination	17.75
Increase or presumptively use alternate measures	12.53
Increase professional training	9.92
Reduce delays and wait times	8.88
Improve technology, equipment and facilities	7.57
Improve pre-trial interview quality	6.53
Other	6.53
Significantly reform system and laws	6.27
Protect complainant from seeing accused/remove accused from courtroom	2.61
Have children give evidence in person	2.09
No recommendation	19.32

Explanations and examples of recommendations in each of the four highly cited categories are presented below.

Fairer questioning and cross-examination

A large proportion (over one-sixth) of recommendations for improving evidence in child sexual abuse cases said that the questioning and cross-examination of complainants should be fairer

and less distressing. Responses in this category included points emphasising that judicial intervention and enforcement of rules around questioning need to be stronger. Additionally, responses in this category indicated that the defence counsel need to be less aggressive and more child-friendly in cross-examination. Pre-recorded cross-examination was a recommended potential option to consider. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.27

Age-appropriate questions need to be asked of young witnesses, as there is far too much inequity in cross-examination. The importance of language when being asked questions is paramount also. Witnesses are not lawyers and are often very unfamiliar with formal legal language used in the courtroom. (Female Support Officer, NSW)

Almost universally, witnesses say how the defence cross-examination is distressing. Judges need to be vigilant in preventing the defence unnecessarily badgering the complainant. (Female Support Officer, Victoria)

To not allow defence to be so harsh with questioning young children as they are easily confused and intimidated in the circumstances and may come across as lying but are in fact confused by the questioning. (Male Police Officer, WA)

Increased or presumptive use of alternate measures

One in eight responses recommended the increased use of alternate measures in child sexual abuse cases to improve the giving of evidence. Responses in this category focused on the need to make alternate measures the default method for giving evidence, and the need to extend the use of alternate measures to more cases, particularly for adult complainants of historical child sexual abuse. Additionally, recommendations in this category supported the use of expert evidence and of trauma-informed support officers to accompany children when giving evidence. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.28

For adult complainants of childhood sexual abuse it may be helpful to record their police interview and use this in the same way as occurs for children. (Female Support Officer, WA)

Pre-recording for witnesses entitled to a special hearing under the Criminal Procedure Act 2009 should be treated as the default position, unless the complainant elects otherwise. (Female Prosecutor, Victoria)

Allow pre-recording of the complainant's entire evidence in all sexual assault cases soon after charging so they don't have to wait for a trial date. The pre-recording can then be played to the jury. Extending pre-recorded police interviews to adults in historical matters. (Female Support Officer, NSW)

Increased professional training

The third most highly cited recommendation (10 per cent of responses) was to increase the training of professionals working in child sexual abuse cases. This recommendation included improved training for

judges and lawyers, particularly on working within the abilities of child complainants, and for police officers in conducting pre-trial interviews. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.29

Better training of judges in the operation of the Evidence Act including the provisions which place a positive obligation on judges to intervene; better training on how to manage the complainant's evidence. (Male Judge, NSW)

More training with all members of the profession (and jury members) about childhood sexual abuse and how best to approach questioning, and their responses. (Female Prosecutor, Victoria)

Reduced delays and waiting times

Another common recommendation for improving evidence in child sexual abuse cases (representing one-twelfth of responses) was to reduce delays in child sexual abuse cases. This included recommendations regarding three distinct time periods: the lapse of time between the gathering of the initial evidence and trial dates; delays in taking the complainant's evidence in cross-examination either before the trial or at trial; and delays between a first trial and a retrial. Responses in this category also emphasised the need to improve pre-trial preparations to make the complainants' in-court experience more streamlined and efficient. Some examples of statements from professionals reflecting this viewpoint included the following:

Text box 3.30

Most trials are set months in advance and can sometimes not go ahead on the day due to lack of courts, judges or other legal reasons. The delays for the child increase their distress and prolong the process for the child. (Female Police Officer, NSW)

A fast track system, so the cross-examination occurs close to the initial interview, would assist in the process of justice for both the complainant and accused. This is a DPP and court case management issue. (Female Judge, NSW)

Conclusion

The survey results revealed some similarities in the use and perceptions of alternate measures across states and professional groups. Participants in all three states regarded the current practices in their jurisdiction as consistent with legislated policy, and viewed alternate measures as an effective mechanism to reduce the stress on complainants. Additionally, participants across demographic groups agreed that

delays at trial were distressing for complainants, although the average duration of waiting periods at court were reportedly longer in NSW than in Victoria and WA.

Participants' views on the effect of alternate measures on conviction rates differed by state. In NSW and WA, a higher proportion of participants reported an increase in conviction rates, whereas the opposite pattern emerged in Victoria. Perceptions of the effectiveness of alternate measures also differed by professional group. On average, defence lawyers were three times as likely to rate in-person evidence as the best procedure for eliciting credible evidence from a

child complainant than were members of any other professional group. Furthermore, with the exception of defence lawyers in NSW and Victoria, all participant groups who reported observing expert evidence perceived this evidence as helpful to the jury.

Perceptions regarding the effectiveness of alternate measures differed according to the age of the complainant. On average, while criminal justice professionals perceived children's evidence to be most credible when it was provided via pre-recorded interview, they perceived adults' evidence to be most credible when it was provided in person, without the use of alternate measures.

Endnotes

- ¹ The survey was accessed via the software Unipark, which randomly allocates experimental materials to participants. Participating police officers in Victoria accessed the survey from a software platform managed by Deakin University.
- ² To maintain parallelism in the report, responses from 25 court support volunteers in Queensland are reported separately in Supplementary Materials 2.1 (online) because no other professional groups from that state participated in the survey.
- ³ Hereinafter, for brevity, judges and magistrates are both referred to collectively as 'judges'.
- ⁴ Hereinafter, for brevity, these groups are referred to collectively as 'support officers'.
- ⁵ Upon advice from the Royal Commission, the gender option 'other' was removed.
- ⁶ The range of responses was zero to 5,025 cases.
- ⁷ Seventy-five per cent of participants worked on fewer than 150 child sexual abuse cases; 9.2 per cent reported more than 500 child sexual abuse cases.
- ⁸ In all, 11 witness support officers, seven police officers, five judges, four prosecutors and four defence lawyers reported experience with more than 500 cases.
- ⁹ The range of responses was zero to 750. Overall, a total of 21 professionals reported working on more than 250 historical cases across their careers: witness support officers ($N = 11$); police officers ($N = 3$), judges ($N = 3$), prosecutors ($N = 2$) and defence lawyers ($N = 2$).
- ¹⁰ One defence lawyer and four witness support officers reported attending in excess of 800 hours of child sexual abuse training across their careers. Responses by participants to open-ended questions on the type of training received clarified how these hours were calculated.
- ¹¹ $\chi^2(4, N = 327) = 6.118, p = 0.191$.
- ¹² $\chi^2(2, N = 327) = 1.103, p = 0.576 \sim \chi^2(4, N = 327) = 6.178, p = 0.186$.
- ¹³ $\chi^2(4, N = 329) = 5.734, p = 0.220$.
- ¹⁴ $\chi^2(4, N = 327) = 7.042, p = 0.134$. Police officer group $\chi^2(4, N = 327) = 12.119, p = 0.016$.
- ¹⁵ Wilk's Lambda = 0.906, $F(18, 496) = 1.402, p = 0.125, \eta_p^2 = .048$.
- ¹⁶ Wilk's Lambda = 0.709, $F(36, 931) = 2.482, p = < 0.001, \eta_p^2 = .082$.
- ¹⁷ $F(4, 256) = 4.371, p = 0.002, \eta_p^2 = 0.064$.
- ¹⁸ $F(4, 256) = 13.101, p = < 0.001, \eta_p^2 = 0.170$.
- ¹⁹ $F(4, 256) = 10.117, p = < 0.001, \eta_p^2 = 0.137$.
- ²⁰ $F(4, 256) = 11.191, p = < 0.002, \eta_p^2 = 0.149$.
- ²¹ Perceived impact was measured as no assessment of the ground truth of the evidence was conducted.
- ²² Wilk's Lambda = 0.866, $F(18, 340) = 1.415, p = 0.122, \eta_p^2 = 0.070$.
- ²³ Wilk's Lambda = 0.562, $F(36, 639) = 2.950, p < 0.001, \eta_p^2 = 0.134$.
- ²⁴ $F(4, 178) = 7.015, p = < 0.001, \eta_p^2 = 0.136$.
- ²⁵ $F(4, 178) = 5.781, p = < 0.001, \eta_p^2 = 0.115$.
- ²⁶ $F(4, 178) = 15.098, p = < 0.001, \eta_p^2 = 0.253$.
- ²⁷ $F(4, 178) = 9.579, p = < 0.001, \eta_p^2 = 0.177$.
- ²⁸ $F(4, 178) = 6.283, p = < 0.001, \eta_p^2 = 0.124$.
- ²⁹ Wilk's Lambda = 0.862, $F(18, 342) = 1.461, p = 0.101, \eta_p^2 = 0.071$.
- ³⁰ Wilk's Lambda = 0.591, $F(36, 642) = 2.692, p = < 0.001, \eta_p^2 = 0.123$.
- ³¹ $F(4, 179) = 4.295, p = 0.002, \eta_p^2 = 0.088$.
- ³² $F(4, 179) = 5.919, p = < 0.001, \eta_p^2 = 0.117$.
- ³³ $F(4, 179) = 13.244, p = < 0.001, \eta_p^2 = 0.228$.

- ³⁴ $F(4, 179) = 7.929, p = < 0.001, \eta_p^2 = 0.151$.
- ³⁵ $F(4, 179) = 3.306, p = 0.012, \eta_p^2 = 0.069$.
- ³⁶ $F(4, 179) = 2.860, p = 0.025, \eta_p^2 = 0.060$.
- ³⁷ $F(4, 179) = 4.068, p = < 0.005, \eta_p^2 = 0.083$.
- ³⁸ These differences across the states were statistically significant ($\chi^2 (20, N = 307) = 40.940, p = 0.004$).
- ³⁹ These differences across professional groups were statistically significant ($\chi^2 (40, N = 307) = 123.065, p < 0.001$).
- ⁴⁰ These differences across professional groups were statistically significant ($\chi^2 (36, N = 307) = 83.864, p < 0.001$).
- ⁴¹ These differences across the states were statistically significant ($\chi^2 (14, N = 307) = 29.865, p = 0.008$).
- ⁴² These differences across professional groups were statistically significant ($\chi^2 (28, N = 305) = 91.886, p < 0.001$).
- ⁴³ These differences across the states were not statistically significant.
- ⁴⁴ These differences across professional groups within the states were statistically significant ($\chi^2 (28, N = 305) = 71.411, p < 0.001$).
- ⁴⁵ These differences across the states were statistically significant ($\chi^2 (4, N = 307) = 11.768, p = 0.019$).

Chapter 4
Factors that influence
perceptions of cross-examination
(Study 3)

Chapter 4: Factors that influence perceptions of cross-examination (Study 3)

Restrictions on the nature and scope of cross-examination questions have been introduced as a way to reduce the detrimental effects of conventional cross-examination on child witnesses. Several other studies in this report highlight the importance of these restrictions from the perspective of child developmental psychology (for example Studies 14–16). The current study took a different approach, examining the value of restrictions – and the factors that affect the quality and fairness of cross-examining complainants in child sexual abuse trials – through the eyes of practising criminal justice professionals. Professional perspectives are important because their views shape procedure, sometimes in ways that are unforeseen by those who develop guidelines and procedures.

The aim of this study was to determine whether professionals' perspectives on the appropriateness of cross-examination vary in accordance with factors that are known – from both a legal and developmental perspective – to influence the fairness of cross-examination and thus the need for judicial intervention. The key factors included the child complainants' age and the developmental appropriateness of the questions. The study also explored whether professionals' views varied according to professional group and background factors such as gender and prior training. Importantly, the influence of the factors was examined using a controlled experimental design where professionals reflected on realistic simulated excerpts of CCTV

cross-examination that varied according to the key variables of interest. With proper controls, vignette studies of this kind have been shown to validly indicate the influence of key factors (in isolation from other potential factors) on professionals' behaviour and intentions in the field.¹

Method

Participants, design and procedure

The survey involved 335 practising criminal justice professionals (the same as those used in Study 4) – 44 per cent from NSW ($N = 146$), 27 per cent from Victoria, ($N = 93$) and 29 per cent from WA ($N = 96$). Five different professional groups took part: judges, prosecutors, defence lawyers, police officers and witness support officers. Each group was heterogeneous in terms of their years of experience, how many child sexual abuse cases they had worked on and any specialised training they had received (this information was collated at the time they completed the survey).

The survey was completed online. All the professionals read two brief experimental vignettes that simulated the cross-examination of a complainant at trial by the defence counsel. In each vignette, a child complainant alleged that non-penetrative sexual contact occurred

when the complainant was nine years old. Two different non-penetrative contact offences were used so that no professional read the same vignette twice (although the offence severity was kept constant).

Three independent variables were manipulated as variables between different subjects: complainant age at the time of the trial², the developmental appropriateness of the questions used in cross-examination and whether there was intervention by the judge. Specifically, the professionals were randomly assigned to one of eight different experimental groups, forming a 2 × 2 × 2 design: complainant age (child of 10 years vs adolescent of 16 years) × question type (appropriate vs inappropriate) × level of intervention (judicial intervention vs no intervention). The two cross-examination vignettes were counterbalanced for each condition, so that the first and second vignettes differed on all the varied factors, as well as gender. For instance, if the participating professional first read a vignette featuring a female complainant who was a child questioned appropriately with a judicial intervention, then the second vignette featured a male adolescent complainant who was questioned inappropriately without a judicial intervention. Note that the complainant's gender (male vs female) was counterbalanced in all conditions to control for any possible gender effects, but this variable was not a focus of the analysis.

Immediately after reading each vignette, the professionals responded to questions about the cross-examination and the appropriateness and effect of interventions by the prosecutor and judge. (See 'Materials' below.)

To enable more rigorous examination of the influence of these factors on the perceived effectiveness of alternate measures, statistical modelling was applied to control covariates such as the group of the criminal justice professionals, the length of their relevant experience and the number of prior child sexual abuse cases they had handled. The gender of the professionals and their specialised training were analysed separately.

Materials

The vignettes were excerpts of a transcript of a cross-examination, with different types of questions, answers, and interventions depending on the experimental condition. All transcripts began with a background statement establishing the gender and age of the complainant, the alleged offence and the age of the complainant at the time of the alleged offence. For example: "Suppose that Mark, who is 16 years old, has given evidence-in-chief in the criminal trial against the defendant, Mr Dodson, his priest, alleging that Mr Dodson sexually abused him in the church when he was nine years old." A transcript of a cross-examination conducted via CCTV followed, in which counsel for the defence asked either an appropriately formulated question, such as "You told the police that Mr X opened his pants. Is that true?" or, conversely, an inappropriately framed question on the same topic, such as "Wasn't it that my client was helping you change your clothes, which you mistook for touching your private parts?" Additionally, the judge might intervene or not, for example by stating "That question has been asked and answered. Kindly treat the witness with more respect. Please move on to another topic." Copies of the vignettes are included in Supplementary Materials 3.1 (online).

Professionals indicated "yes" or "no" when asked "Should the prosecutor have intervened?" and if the answer was affirmative, they identified the line in the transcript where this intervention should have occurred. Finally, professionals rated the likely impact of the cross-examination on jury perceptions with the following response options: "The jury will perceive the judge as favouring the complainant/defendant /neither." Table 4.1 provides a full list of the evaluation statements and questions.

Table 4.1 Measures of professionals' perceptions of each cross-examination vignette

Quality of the cross-examination								
Statement	Response options							
The cross-examination...								
...was age-appropriate.	1	2	3	4	5	6	7	8
...confused the complainant.	1	2	3	4	5	6	7	8
Fairness of the cross-examination								
Statement	Response options							
The cross-examination...								
...was unfair to the complainant.	1	2	3	4	5	6	7	8
...was too aggressive.	1	2	3	4	5	6	7	8
...was considerate of the complainant.	1	2	3	4	5	6	7	8
...was in the best interests of the accused.	1	2	3	4	5	6	7	8
Impact on the complainant's evidence								
Statement	Response options							
The cross-examination...								
...reduced the credibility of the complainant.	1	2	3	4	5	6	7	8
...reduced the certainty of the complainant.	1	2	3	4	5	6	7	8
...reduced the reliability of the complainant.	1	2	3	4	5	6	7	8
Impact on the case								
Statement	Response options							
The cross-examination...								
...weakened the account.	1	2	3	4	5	6	7	8
...strengthened the defence.	1	2	3	4	5	6	7	8
The judge's fairness								
Statement	Response options							
The judge was...								
...considerate of the complainant.	1	2	3	4	5	6	7	8
...considerate of the accused.	1	2	3	4	5	6	7	8
The jury will perceive the judge as favouring...	...the complainant			...the accused			...neither	
Necessity of intervention								
Statement	Response options							
Should the prosecutor have intervened?	Yes				No			
Should the judge have intervened?	Yes				No			

Note: Response options 1–7 indicate “strongly disagree” to “strongly agree” on a seven-point Likert-type scale. Response option 8 indicates “I don’t know”.

Results

The influence of three systematic factors (complainant age, question type and judicial intervention) was examined while taking the professional group into account. The sample and cell sizes accommodated separate modelling of each factor. Therefore, the influence of the professional group and each factor was tested in 48 (16 × 3) models.³ Mixed model analysis was conducted where the vignette was a repeated variable, and where the professional group and the factors were variables that differed between subjects. Experience with child sexual abuse cases and the extent of specialised training in these cases were controlled as covariates. Professionals' gender and prior training were tested.

The main findings are briefly presented below. The findings are divided into six categories as follows: quality of the cross-examination; fairness to the complainant and the defendant; impact on the credibility and reliability of the complainant; impact of the account on the defence case; fairness of the judge; and necessity of judicial intervention. The analyses revealed a large number of findings (main effects and interactions), all of which are presented in Supplementary Materials 3.2 (online). Supplementary Materials 3.3 (online) presents a summary of the main findings.

Perceived quality of the cross-examination

Cross-examination with inappropriate questioning was judged as less age-appropriate ($M = 2.57, SE = 0.095$) than cross-examination with appropriate questioning ($M = 3.76, SE = 0.092$). The appropriateness of the question had differential influences on the ratings for judges, prosecutors and defence lawyers than for police officers and witness support officers: $F(4, 322.32) = 3.14, p = 0.015$. Defence lawyers rated the cross-examination as more appropriate ($M = 3.94, SE = 0.18$) than did all other professional groups.

Prosecutors viewed the cross-examination as more appropriate ($M = 3.30, SE = 0.16$) than did judges ($M = 2.84, SE = 0.16$), police officers ($M = 2.83, SE = 0.14$) and support officers ($M = 2.91, SE = 0.19$). The presence or absence of a judicial intervention during inappropriate questioning did not influence these perceptions. There was no interaction effect, indicating that the influence of the complainant's age was the same across the five professional groups.

The above pattern of results in relation to the appropriateness of questions was similar to that for perceived confusion of the complainant. Professionals were more likely to agree that cross-examination confused the child complainant ($M = 5.33, SE = 0.11$) than the adolescent complainant ($M = 4.74, SE = 0.11$): $F(1, 326.21) = 17.71, p < 0.001$. Defence lawyers ($M = 4.13, SE = 0.21$) were less likely to rate the cross-examination as confusing than were members of other professional groups. Whether the judge intervened did not seem to influence the results. When the form of the questions was inappropriate, there was more consensus among professionals that the questions confused the complainant ($M = 5.35, SE = 0.11$) than when the questioning was appropriate ($M = 4.72, SE = 0.11$): $F(1, 326.65) = 20.72, p < 0.001$.

Fairness of cross-examination to the complainant

Professional ratings of unfairness to the complainant varied depending on the professional group ($F(4, 326.842) = 6.378, p < 0.001$, and whether the questioning was appropriate or inappropriate: $F(1, 322.39) = 27.57, p < 0.001$. Neither the complainant's age nor the presence of judicial intervention influenced professionals' perceptions of fairness to the complainant. When the cross-examination featured inappropriate questioning, all professional groups except defence lawyers agreed that it was unfair to the complainant (that is, all mean scores were above the midpoint of 4 on the Likert-type scale).

The use of inappropriate forms of questioning in the cross-examination resulted in greater consensus that the cross-examination was unfair to the complainant.

Police officers ($M = 5.38, SE = 0.15$) and support officers ($M = 5.54, SE = 0.20$) viewed the cross-examination as most aggressive, followed by judges and prosecutors. When inappropriate questioning was used, the cross-examination was perceived (overall) as more aggressive by all professionals ($M = 5.26, SE = 0.11$) than when appropriate questioning was used ($M = 4.38, SE = 0.10$). Defence lawyers ($M = 3.34, SE = 0.16$) viewed the cross-examination as more considerate of the complainant than did other professional groups. Prosecutors ($M = 2.55, SE = 0.14$) were also more likely to perceive that the cross-examination was considerate of the complainant than were police officers ($M = 2.17, SE = 0.12$) or support officers ($M = 2.07, SE = 0.16$). Cross-examination was viewed as more considerate of the complainant when the complainant was older ($M = 2.70, SE = 0.086$) rather than younger ($M = 2.36, SE = 0.089$).

Police officers ($M = 5.14, SE = 0.15$) and support officers ($M = 5.41, SE = 0.21$) were more likely to view the cross-examination as being in the best interests of the defendant than were the other professional groups: $F(4, 325.61) = 12.16, p < 0.001$. Cross-examination was also more likely to be viewed as being in the best interests of the defendant in a case involving a child complainant ($M = 4.70, SE = 0.10$) than an adolescent complainant ($M = 4.42, SE = 0.098$).

The influence of the form of questioning differed across professional groups: $F(4, 317.27) = 3.62, p = 0.007$. Judges ($M = 4.12, SE = 0.22$), prosecutors ($M = 4.51, SE = 0.21$), and defence lawyers ($M = 4.26, SE = 0.23$) showed higher rates of agreement that cross-examination was in the best interests of the defendant when the questioning was appropriate compared to when it was not ($M = 3.66, SE = 0.23$; $M = 3.40, SE = 0.22$; and $M = 3.69, SE = 0.25$, respectively). However, police officers and support officers showed the reverse pattern of effects. For most professional groups, the cross-examination was not viewed as being in the best interest of the defendant when the judge intervened ($M = 4.44, SE = 0.098$), compared to when the judge did not ($M = 4.67, SE = 0.10$). Interestingly, for support officers only, the reverse was true; intervention from the judge increased perceptions that the cross-examination was in the best interests of the defendant.

Police officers ($M = 4.72, SE = 0.14$) and support officers ($M = 5.07, SE = 0.20$) perceived that cross-examination diminished the credibility of the complainant more than did other professionals

(judges: $M = 3.41$, $SE = 0.17$; prosecutors: $M = 3.52$, $SE = 0.17$; defence lawyers: $M = 3.62$, $SE = 0.19$): $F(4, 328.90) = 17.84$, $p < 0.001$. Professionals were more likely to view cross-examination as reducing the credibility of complainants in cases with a child complainant ($M = 4.38$, $SE = 0.094$) than with an adolescent complainant ($M = 3.78$, $SE = 0.091$): $F(4, 326.87) = 6.15$, $p < 0.001$. Only police officers perceived that cross-examination reduced the complainant's credibility more when the form of the questions was inappropriate, than when it was appropriate: $F(4, 321.06) = 5.02$, $p = 0.001$. Professionals were more likely to perceive that the credibility of the complainant was reduced on cross-examination when the judge did not intervene ($M = 4.19$, $SE = 0.095$) than when they did ($M = 3.96$, $SE = 0.092$).

Police officers ($M = 5.14$, $SE = 0.15$) and support officers ($M = 5.43$, $SE = 0.20$) were more likely than the other professional groups to agree that the cross-examination reduced complainant certainty (judges: $M = 3.89$, $SE = 0.18$; prosecutors: $M = 4.19$, $SE = 0.17$; defence lawyers: $M = 4.03$, $SE = 0.20$): $F(4, 329.40) = 13.78$, $p < 0.001$. Professionals were also more likely to report that cross-examination reduced the certainty of child complainants ($M = 4.88$, $SE = 0.10$) compared to adolescent complainants ($M = 4.22$, $SE = 0.096$): $F(1, 321.341) = 32.23$, $p < .001$. Police officers ($M = 4.55$, $SE = 0.15$) and support officers ($M = 4.63$, $SE = 0.21$) stated more than other professional groups that cross-examination severely reduced complainant reliability: $F(4, 328.39) = 8.93$, $p < 0.001$. Professionals were more likely to perceive cross-examination as reducing the reliability of a child complainant ($M = 4.28$, $SE = 0.098$) than that of an adolescent complainant ($M = 3.74$, $SE = 0.096$). All professional groups were less likely to view the complainant as reliable when the judge did not intervene ($M = 4.17$, $SE = 0.099$) than when the judge did intervene ($M = 3.82$, $SE = 0.096$): $F(1, 320.02) = 9.92$, $p = 0.002$.

Impact of cross-examination on the defence case

Support officers ($M = 5.23$, $SE = 0.20$) showed the greatest agreement that cross-examination weakened the complainant's account, followed by police officers ($M = 4.72$, $SE = 0.14$): $F(4, 328.72) = 13.14$, $p < 0.001$. When the complainant was a child, the account was perceived to be weaker following cross-examination ($M = 4.51$, $SE = 0.097$) than when the complainant was an adolescent ($M = 4.00$, $SE = 0.094$). Across all the groups, professionals were more likely to perceive the cross-examination as weakening the complainant's account when the judge did not intervene ($M = 4.42$, $SE = 0.098$), compared to when they did ($M = 4.06$, $SE = 0.095$).

Support officers ($M = 5.12$, $SE = 0.21$) showed the greatest agreement that the cross-examination strengthened the defence case, followed by police officers ($M = 4.61$, $SE = 0.15$). The other three groups (judges, prosecutors and defence lawyers) did not differ from each other, but viewed the cross-examination as less strengthening to the defence than did support and police officers: $F(4, 327.54) = 10.70$, $p < .001$. When the complainant was a child ($M = 4.42$, $SE = 0.095$), professionals agreed that the cross-examination strengthened the defence more than for adolescent complainants ($M = 3.98$, $SE = 0.092$): $F(1, 318.66) = 18.16$, $p < 0.001$. Across all groups, professionals viewed that cross-examination strengthened the defence more when the judge did not intervene ($M = 4.35$, $SE = 0.095$) rather than when they did ($M = 4.04$, $SE = 0.092$): $F(1, 318.85) = 9.51$, $p = 0.002$.

Judicial fairness in cross-examination

Judges ($M = 3.36$, $SE = 0.16$) were much less likely than prosecutors ($M = 3.93$, $SE = 0.16$), defence lawyers ($M = 4.08$, $SE = 0.18$) and police officers ($M = 3.82$, $SE = 0.14$) to agree that the judge in the vignette was considerate of the complainant. By contrast, support officers ($M = 3.72$, $SE = 0.19$) were not significantly different from judges in their views of the fairness of the judge in the vignette: $F(4, 321.83) = 2.79$, $p = 0.027$. The perceived considerateness of the judge decreased when the complainant was a child ($M = 3.64$, $SE = 0.10$) compared to an adolescent ($M = 3.92$, $SE = 0.098$).

The influence of the question form varied depending on the professional group: $F(4, 320.79) = 2.70$, $p = 0.031$. Defence lawyers' assessments of the considerateness of the judge were highly influenced by the form of question used, whereas the prosecutors' and support officers' assessments of fairness did not vary according to the appropriateness of questioning. The judge in the cross-examination was perceived to be more considerate of the complainant when they intervened ($M = 4.34$, $SE = 0.092$), compared to when they did not ($M = 3.14$, $SE = 0.096$): $F(1, 322.69) = 113.015$, $p < 0.001$.

Judges ($M = 4.19$, $SE = 0.15$) and prosecutors ($M = 4.42$, $SE = 0.15$) who saw the judge intervene did not note any difference in how considerate the judge was of the defendant in the cross-examination compared to when the judge did not intervene ($M = 4.23$, $SE = 0.15$ and $M = 4.32$, $SE = 0.15$, respectively). By contrast, defence lawyers ($M = 3.61$, $SE = 0.16$), police officers ($M = 4.70$, $SE = 0.13$) and support officers ($M = 4.37$, $SE = 0.18$) viewed the judge as less considerate of the defendant when the judge intervened in the cross-examination, compared to when they did not

($M = 4.20$, $SE = 0.17$; $M = 5.08$, $SE = 0.12$; $M = 4.89$, $SE = 0.82$, respectively).

Three-quarters of the professionals believed the jury would perceive the judge as neutral, compared to 18.8 per cent of professionals who thought the judge would be regarded as favouring the defendant, and 9.6 per cent who felt that the jury would regard the judge as favouring the complainant. Professionals' views varied depending on whether the judge intervened or not, and the perceived influence of judicial intervention differed across professional groups: $F(1, 636) = 2.59$, $p = 0.036$. When the judge intervened in the cross-examination, more professionals felt that the jury would perceive the judge as favouring the complainant ($N = 57$) than when the judge did not ($N = 7$). Neither the age of the complainant nor the form of questioning influenced perceptions of the judge's fairness.

Necessity of intervention in cross-examination

Defence lawyers (59.5 per cent, $N = 66^5$) were significantly less likely than other professionals (judges: 80.2 per cent, $N = 101$; police officers: 77.4 per cent, $N = 147$) to believe that the judge should have intervened, regardless of the complainant's age: $F(4, 633) = 2.91$, $p = 0.021$. Judges' views did not differ depending on the complainant's age. On the other hand, support officers were significantly more likely to believe that judicial intervention was necessary for child complainants (89.4 per cent, $N = 4,266$) than for adolescent complainants (68.8 per cent, $N = 33$). Only prosecutors deemed that intervention was required more in cases featuring adolescent complainants (80.0 per cent, $N = 52$) than in cases featuring child complainants (72.9 per cent, $N = 43$).

Defence lawyers (54.1 per cent, $N = 60$) were least likely to perceive a need for intervention by the prosecutor. As with the judicial intervention, support officers noted the greatest discrepancy in the need for prosecutorial intervention between child complainants (72.5 per cent, $N = 229$) and adolescent complainants (67.2 per cent, $N = 225$): $F(4, 633) = 3.944$, $p = 0.021$. When the questioning was inappropriate (80.4 per cent, $N = 255$) and the judge intervened (73.8 per cent, $N = 248$), professionals were more likely to agree that the prosecutor should have intervened, compared to when the cross-examination questioning was appropriate (59.6 per cent, $N = 199$) and the judge did not intervene (65.4 per cent, $N = 206$).

Conclusion

In line with a legal and developmental perspective, professionals acknowledged that the age of the complainant should influence the style of questioning during cross-examination. Overall, professionals were most critical of the quality and fairness of the cross-examination – the impact of cross-examination on the case – when the complainant was younger (in middle childhood) compared to an adolescent. The form of the cross-examination questions influenced the perceived fairness and quality of the cross-examination. However, perceptions of the impact of cross-examination questions were within limits. They did not influence the perceived impact of cross-examination on the case or on the complainant's reliability and credibility. Nor were views of judicial fairness influenced by the form of question used.

Among the professional groups, defence lawyers held the most tolerant views of cross-examination strategies. They were less likely to acknowledge any detriment to the quality of evidence or fairness of the examination, even when the complainant was relatively young, the form of the questions was inappropriate, and/or no judicial intervention took place. The three groups of legally trained professionals (judges, prosecutors and defence lawyers) held similar views regarding the impact of the cross-examination on the quality of the complainant's evidence and the case itself. Police officers and support officers were most sensitive to the considerations of the complainant and the perceived fairness of the cross-examination.

Interestingly, for some of the questions perceptions of cross-examination varied according to the participating professionals' gender and level of training. Female professionals agreed more strongly than male professionals that the quality of cross-examination was lower and reduced the complainants' certainty. Prior training influenced professionals' views of how considerate the judge was of both the complainant and the defendant. Professionals with prior training in child sexual abuse matters held more critical views on the fairness of the judge than did their counterparts without this training.

Endnotes

¹ Bieneck, 2009.

² Holding the age of the complainant constant at the time of the alleged abuse, and varying only the age of the complainant at the time of cross-examination, avoided confounding the age at the time of abuse with other variables of interest.

³ Examining effects of all the three factors in a single model along with the professional group factor would enable testing of more complex and realistic influences on perceptions of the quality of cross-examination and its impact. However, this requires a larger sample size than was achieved in the available time period.

⁴ *F* statistics and the denominator degree of freedom in decimal points are the result of a Satterthwaite approximation.

⁵ The frequencies represent repeated responses for the two vignettes presented to each of the participants.

Chapter 5
Prosecution case file review
(Study 4)

Chapter 5: Prosecution case file review (Study 4)

Any law reform process must involve a retrospective evaluation of the actual impact of the reforms.¹ One method of evaluating the effectiveness of legal provisions for the use of alternate measures is to examine how they are considered by prosecutors litigating child sexual abuse trials. Thus, the researchers conducted a manual review of prosecutors' files in three jurisdictions (NSW, Victoria and WA). Manual file reviews, particularly reviews of prosecution and police files, are an effective way of evaluating the extent to which, and in what way, legislative provisions for alternate measures are applied in practice.² While interviews and surveys can provide valuable insight into stakeholders' self-reported perceptions of practices in the implementation of special measures (Studies 1, 2 and 3), supplementing these findings with a qualitative analysis of case files enables a comparison between self-reported use by criminal justice professionals and actual use of these provisions.³ The aim of this study was therefore to examine actual practices in the taking of complainants' evidence in NSW, Victoria and WA. Specifically, the study investigated whether alternate measures are being used at trial, and the reasons for their use or non-use.

Method

Case files

The size and number of prosecutor files can pose a practical barrier to rich qualitative analysis.⁴ Purposive sampling, which involves selecting files on the basis of criteria that best align with the research aims, is therefore the standard method for file selection in reviews of prosecutors' files, and was the method employed in this study.⁵

The Royal Commission requested a review of 20 files from each of the three jurisdictions. Due to the sensitive nature of the files, the Offices of the Directors of Public Prosecutions (ODPPs) requested that the Royal Commission issue notices and summonses seeking:

- 10 of the most recent prosecution files that involved child sexual abuse offences, where the alleged abuse occurred before 2010 and the trial occurred after 2010
- 10 of the most recent prosecution files that involved child sexual abuse offences, where both the alleged abuse and trial occurred after 2010.

In response, the ODPPs in NSW, Victoria and WA produced files for inspection on their premises. These files contained records of telephonic or in-person conferences with or about the complainant, and records of contact between the complainant and other criminal justice professionals (such as police, witness support officers and expert witnesses).

Importantly, these records provided indicators of how prosecutors considered alternate measures, and the timing and circumstances in which they discussed their use.⁶

Coding protocol and procedure

The coding protocol used by Lewis et al.⁷ was adapted for the current study based on a preliminary review of

a random subset of five NSW ODPP files.⁸ The protocol involved coding information in the case files according to whether or not prosecutors considered using specific types of alternate measures at trial. Table 5.1 presents the categories of alternate measures that were coded for, and their corresponding codes.

Table 5.1 Categories of alternate measures coded for, and their corresponding codes

Code	Alternate measure
1	CCTV from a remote room on court premises
2	CCTV from a remote room off court premises
3	Pre-recorded interview
4	Pre-recorded hearing
5	In person behind a screen
6	In person assisted by an intermediary
7	In person with modifications of formal attire
8	Intervention by the judge on the appropriateness of questions
9	Conventional in person in court (no alternate measure)

File reviews and coding were conducted simultaneously at the respective ODPP offices, and involved researchers inspecting every document in each case file.⁹

Thematic analysis

In addition to quantitative coding, in-depth qualitative analyses were conducted. First, the researchers recorded text excerpts from prosecutors' file entries reflecting explicit consideration or use of alternate measures. These excerpts were compiled separately for each complainant where cases involved multiple complainants. Where verbatim comments by criminal justice professionals, complainants or caregivers were available, these were recorded as de-identified quotes.

These excerpts were then subject to a systematic thematic analysis to discern the reasoning behind – and motivating factors underlying – prosecutors' consideration and use of alternate measures in practice.¹⁰ The scope of the qualitative analysis was affected by the size, organisation and overall quality of the documents maintained in each file. Where records of consideration of alternate measures were located without any accompanying explanation, these records were excluded from the thematic analysis as they offered no insight into the prosecutors' reasoning about alternate measures (so a record that merely reflected that the complainant testified at trial via CCTV, without further details, was excluded from the thematic analysis).

The thematic analysis conformed to the six guidelines for best practice in thematic analysis using an inductive approach.¹¹ First, the researchers immersed themselves in the file via repeated reading. Second, the researchers paid attention to each sentence and phrase in the content of the file excerpt, to code notable features and repeated content. Third, coded excerpts were collated and sorted into overarching themes. Fourth, excerpts were re-read to ensure internal consistency within each theme, and that themes represented the data set as a whole. Amendments to the themes were made where necessary to clarify their meaning. Fifth, themes were defined and named, to identify the essence of each theme and the overall narrative they told. Sixth, illustrative examples were drawn together with the research question to capture the essence of each theme.

Finally, researchers conducted a content analysis by calculating how frequently each theme was mentioned per complainant and per file. Aggregate frequencies for each jurisdiction were also calculated. These frequencies were regarded as an indirect measure of the importance of the themes.

Results

Descriptive statistics

The overall sample consisted of 59 case files¹² containing allegations of child sexual abuse by a total of 83 complainants. Most complainants were female (83.1 per cent) and under the age of 18 (60.2 per cent) at the time of trial or special hearing. The majority of the alleged offences (91.6 per cent) took place in non-institutional settings. Approximately nine out of every 10 cases proceeded to trial (88.2 per cent).

Use of alternate measures

Overall, prosecutors considered alternate measures for 92 per cent of complainants ($N = 76$). Sixteen per cent of the files in NSW contained no records reflecting consideration of alternate measures ($N = 4$), while they were considered for all but one complainant in Victoria (96 per cent, $N = 25$), and for all complainants in WA ($N = 32$). Examples of records showing consideration of alternate measures are given below. Where information is known about the method used at trial to present the complainants' evidence, it is provided in parentheses, along with the case disposition.

Text box 5.1

The prosecutor addressed whether the complainant was a vulnerable witness for the purposes of giving evidence in the CCTV room, as she was 16 years old when the charge was laid. The case was delayed until the CCTV facilities at the Local Court in Sydney could be accessed. (NSW 1102, CCTV, acquittal)

Conference notes indicated that the complainant wanted to give evidence from a remote room. The court support officer advised the prosecutor that the complainant would require 'careful handling' due to the complainant's mental health. (NSW 1202, CCTV, acquittal)

The complainant stated that she wanted to testify in person at trial, and notes were made to inform her about the possibility of testifying in person from behind a screen. The witness assistant service room was booked for the complainant in the event that she changed her mind on the day of the trial, which she ultimately did. (Victoria 2003, CCTV, acquittal)

Email correspondence between the ODPP and Child Witness Services (CWS) indicated that the complainant, who turned 18 years old just before the trial, was anxious about giving evidence at court. CWS booked a room for the complainant to give evidence remotely from CWS facilities. (Victoria 2017, CCTV, acquittal)

The state prosecutor submitted an application to the Perth District Court for the complainant to give evidence from a remote facility via CCTV, to be accompanied by a support person while giving evidence, and for the evidence to be video-recorded. The complainant chose to give evidence in person in court, which was formally noted as an exception to s106R of the *Evidence Act*. (WA 3003, CCTV, conviction)

An ODPP internal memo from the prosecutor to trial counsel stated that the complainant participated in a video-recorded interview and cross-examination. An application to the Perth District Court sought admission of the visually recorded interview as the complainant's evidence-in-chief. The prosecutor specified that further evidence and/or cross-examination had to be video-recorded and presented at trial as pre-recorded evidence. The complainant was not required to attend the trial. (WA 3014, pre-recorded interview, conviction)

Alternate measures were considered in the majority of both contemporary and historical cases in all three states (Figure 5.1)¹³, and for most child complainants and the majority of adult complainants (Figure 5.2).¹⁴

Figure 5.1 Consideration of alternate measures for contemporary and historical complaints, by state (%)

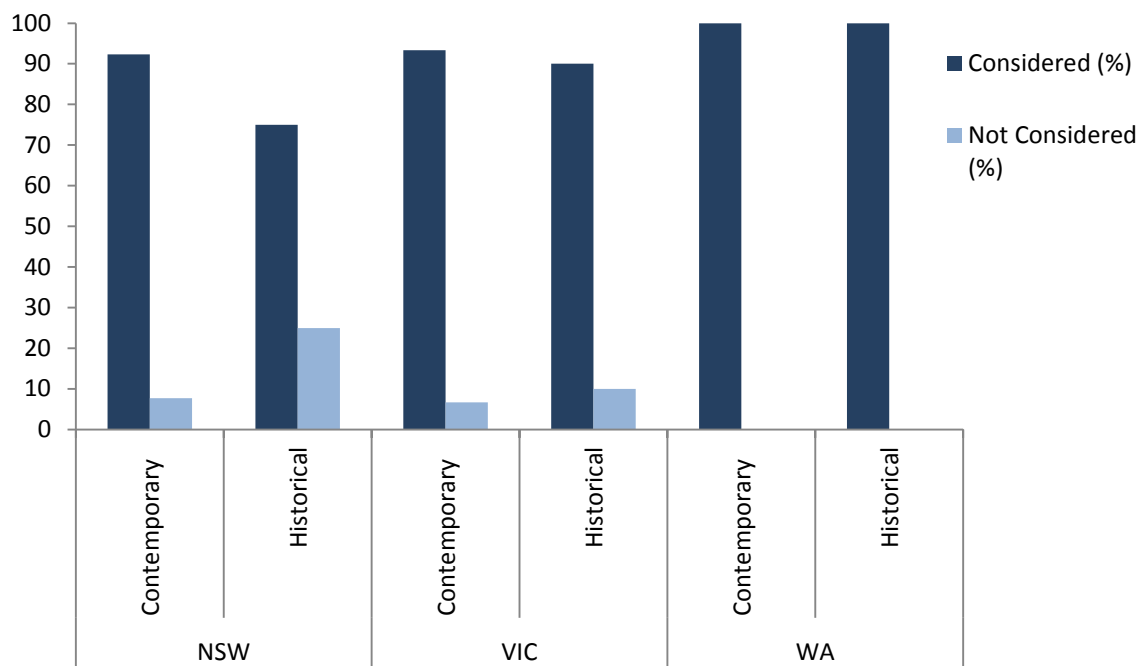
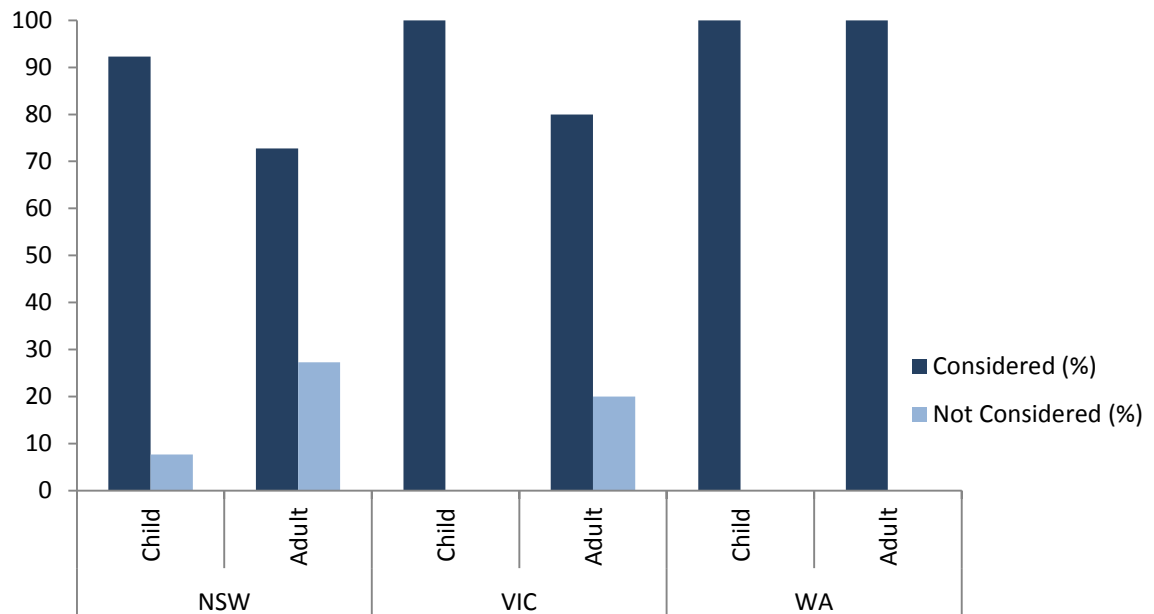


Figure 5.2 Consideration of alternate measures for child and adult complainants, by state (%)



Reasons for use or non-use

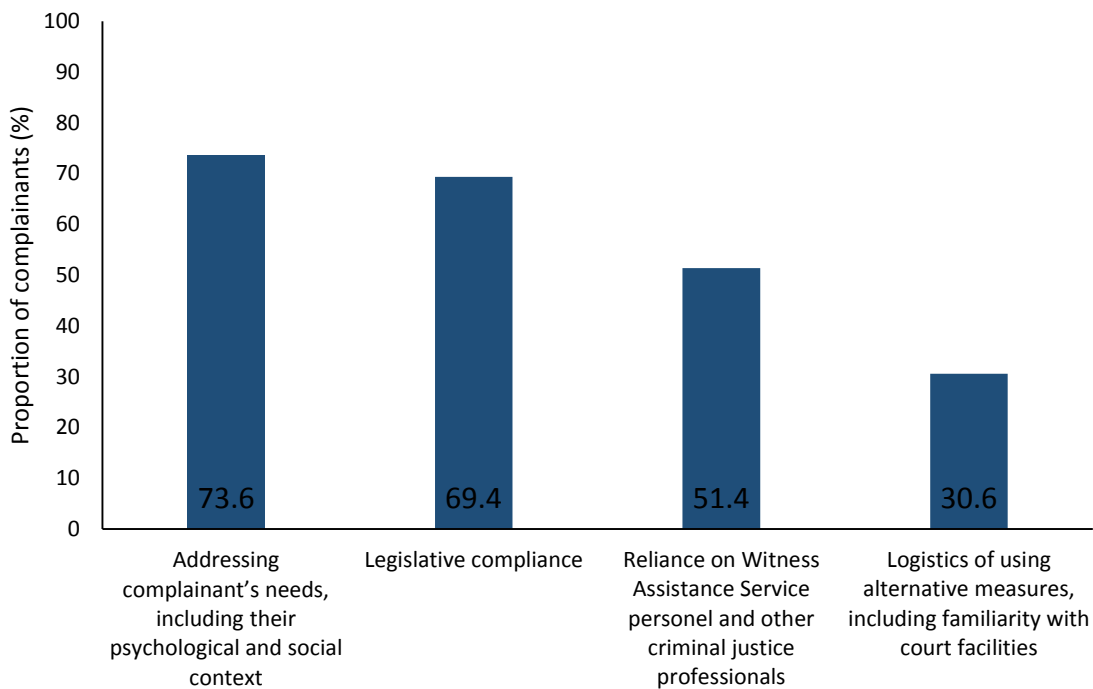
Records for a total of 72 complainants were suitable for the thematic analysis. Results disclosed four distinct themes encompassing the reasoning or motivating factors underlying prosecutors' consideration of alternate measures:

- addressing the complainants' needs, including their psychological and social context
- legislative compliance

- reliance on witness support officers and other criminal justice professionals
- the logistics of using alternate measures.¹⁵

These themes will be discussed in more detail next. The percentage of complainant cases in which these themes were mentioned is shown in Figure 5.3.

Figure 5.3 The percentage of complainant cases in which major themes were mentioned



Four major documented themes on uses of alternate measures

Addressing the complainants' needs

The dominant theme in prosecutors' files regarding the considerations for the use of alternate measures was addressing the complainants' needs. Almost two-thirds of the records within this category were related to the complainants' preferred mode for giving evidence and their psychological wellbeing and social circumstances.

This theme was found for close to three-quarters of the complainants (72.6 per cent, $N = 53$) and attracted the greatest proportion of mentions in the files overall (48.8 per cent; $N = 59$). Further analyses yielded seven distinct subthemes:

- (a) the complainant's preference for alternate measures
- (b) the complainant's mental health
- (c) the complainant's personality or temperament
- (d) tension between the prosecutor and the complainant's caregivers
- (e) the complainant's desire to be isolated from the accused
- (f) other benefits to the complainant of using alternate measures
- (g) the complainant's credibility at trial.

The extent to which each subtheme was mentioned is reported in Table 5.2. Examples of each subtheme are provided next.

Table 5.2 Proportion of subthemes related to the complainant’s needs (%)

Subthemes related to the complainant’s needs	%	Number of mentions
Complainant’s preference	38.8	47
Complainant’s mental health status	24.0	29
Complainant’s personality and/or temperament	9.9	12
Tension between the prosecutor and complainant’s caregivers	8.3	10
Complainant’s desire to be isolated from the accused	7.4	9
Other benefits to the complainant of using alternate measures	5.8	7
Complainant’s credibility at trial	5.8	7
Total	100	121

(a) Complainant’s preference for alternate measures

While the complainant’s preferred method of giving evidence emerged as the most prevalent factor in addressing the complainant’s needs, the extent to which prosecutors took this information into account varied. In many cases, complainants, their parents or guardians were consulted about their preferences and included as active decision makers regarding the presentation of their evidence at trial.

However, when asked about their preferences, some complainants were unsure which available alternate measure best suited their needs. Their uncertainty revealed that more information and guidance should be provided in the first place, and also showed that the process of selecting the most suitable alternate measures required flexibility from prosecutors and support officers. Sometimes this occurred. For instance, for some complainants who chose to give evidence in person at trial, provisions were made for CCTV facilities in the event that the complainants changed their minds. The following email excerpt from the CWS officer to the prosecutor also reflects support for complainants changing preferences:

Text box 5.2

Both girls are undecided about using CCTV or not, but we encouraged them to put that down on their paperwork, saying that they could alter it later if they chose to. (CWS, WA 3011.1; WA 3011.2, CCTV on court premises, acquittal)¹⁶

Complainants changed their preferences in both directions; that is, sometimes complainants initially chose to give evidence via an alternate measure and then switched to giving it in person at trial, and at other times the opposite was true. For instance, in an historical case, arrangements were made for a 35-year-old complainant to give evidence against a family member via CCTV, but the complainant lived in a rural area where the court had no CCTV facility, so the trial venue was moved to Sydney. At trial, the complainant testified in person in court.¹⁷

These examples highlight the need for prosecutors to anticipate and accommodate changes in the complainants’ preferred method of giving evidence.

In some cases, records implied that alternate measures were prematurely implemented without adequately consulting complainants about their preferences. In others, decisions appeared to be made independently of the complainant. Disparities between the complainants’ preferred method of giving evidence and how evidence was given in practice further underscored the need for more extensive consultation and flexibility. For example, one complainant expressed her preference to give evidence using a screen, but at the committal the judge stated:

Text box 5.3

She won’t see him [the accused] anyway; she’s giving evidence from the Remote Witness Facility. (Judge, Victoria 2020, CCTV, acquittal)

Reducing or removing a complainant’s agency to elect the preferred method of giving evidence conflicts with the intent of law reforms which were implemented to improve complainants’ experiences of the criminal justice process.

(b) Complainant’s mental health

In approximately a quarter of the cases, the complainants had mental health issues that affected both their capacity to give reliable evidence and the prosecution of these cases. In certain instances complainants were very fragile, evidenced by comments that described them as ‘suicidal’¹⁸, ‘mentally distressed’¹⁹, or suffering from ‘mental health issues – depression and anxiety’.²⁰ Where evidence of a psychiatric history was available, criminal justice professionals sometimes noted their psychological wellbeing as ‘a major cause for concern’.²¹

For complainants with multiple and complex mental health concerns, effective practice was demonstrated when criminal justice professionals paid ongoing

attention to their mental health and wellbeing throughout the criminal justice process. For example, in one case, a social worker's notes reflected that the complainant had voiced feelings of shame and difficulty in expressing emotion as a result of the abuse she had experienced, and was struggling with low self-esteem and a sense of dislocation from her family unit. Although she demonstrated suicidal ideation, the complainant did not have current or active thoughts of self-harm or suicide. The social worker advised the prosecutor of the importance of avoiding delay in scheduling the trial:

Text box 5.4

Based on my time with [Complainant 1], I believe that being given the opportunity to finalise her involvement with this matter sooner rather than later will assist in her ability to resolve current emotional hardships and reach an earlier sense of closure. (Social worker, WA 3019.1, CCTV, conviction)

However, when criminal justice professionals paid insufficient attention to the complainant's mental health, this hindered the prosecution and had the capacity to re-traumatise complainants. For example, one case in NSW was postponed three times because of the complainant's precarious mental health. This case was fully tried on the prosecution's fourth attempt. Email correspondence between the ODPP and the investigating police officer confirmed that psychological reports and counselling records indicated that giving evidence would be very traumatic for the complainant, and that it was doubtful she would be able to answer questions as required. The complainant's psychologist confirmed that the complainant suffered from more than usual anxiety and discomfort associated with giving evidence in this type of matter:

Text box 5.5

The court process will no doubt trigger extreme anxiety, and when anxious, [Complainant's] ability to access language, recall facts and sequence events could become severely impaired. When feeling threatened [Complainant] can become aggressive or cry uncontrollably. (Psychologist, NSW 1101, pre-recorded interview, CCTV, acquittal)

After a conference with the complainant, the WAS officer in this case advised the prosecutor that it was in the complainant's best interest not to proceed. The support officer was concerned that the stress of a trial would re-traumatise the complainant and be detrimental to her physical and psychological health, and that she would "not make it through cross-examination". Nonetheless, the matter proceeded. At one point during the trial, the complainant fled from the ODPP and was chased down the street by the prosecutor.

(c) Complainant's temperament and personality

Prosecutors noted that some complainants required extra contact and support in preparation for the trial, while others benefited from more limited contact with the criminal justice system. This was documented in one in every 10 cases. Attention to the complainant's personality and temperament ensured that alternate measures used were in line with the complainant's individual interests and needs. For instance, one prosecutor recorded that the complainant was willing to go to court and give evidence, but preferred not to have much contact with the prosecution.²² To ensure more effective presentation of a complainant's evidence, the prosecutors were required to be flexible, to take into account a complainant's temperament and their individual responses to the pressure of criminal proceedings. Some examples from files in both NSW and Victoria reflected how prosecutors took these aspects into account:

Text box 5.6

Shy young woman who is supportive of the prosecution and understands the difficulties that these matters face. (Prosecutor, NSW 1203, CCTV, conviction)

Better to build rapport now and have the complainant as comfortable as she can be before giving evidence next week. (Prosecutor, Victoria 2010.1, pre-recorded interview, CCTV, conviction)

In the latter case, a joint trial was held for two sibling complainants who were young adults giving evidence about intrafamilial sexual abuse that occurred when they were 8–12 years of age. Both testified via CCTV. The trial was vacated due to inconsistencies between one sibling's recall at trial and at the committal hearing. Retrials were conducted separately. The first retrial used recorded CCTV evidence for one complainant with in-person evidence from the sibling whose evidence in the first trial was problematic. The outcome was conviction on all counts. The victim impact statement of the sibling witness stated:

Text box 5.7

Nothing in this life can honestly prepare you to get up in court, in front of a bunch of people whom you have never met, to defend and dissect traumatic events in your childhood that you cannot even comprehend yourself; the weight that each event carries is honestly immeasurable. Reliving those events, and being questioned in that manner was and still is incredibly painful; it will stay with me for a very long time. (Complainant, Victoria 2010.2, pre-recorded CCTV evidence, conviction)

The retrial of her own case resulted in acquittal.

(d) Tension between the prosecution and the complainant's caregivers

In many cases involving child complainants, the complainant's parents and other caregivers were active decision makers regarding the needs of the children. Caregivers were usually protective, and tried to shield complainants from the stress of criminal proceedings. For example, one complainant's mother advised that due to her daughter's young age, she did not wish her daughter to attend any conferences about the case until after her next birthday.²³ In another case, email correspondence between the prosecutor and the complainant's mother showed the intensive involvement of the parent in choosing the alternate measure:

Text box 5.8

Ideally I would like [complainant's] evidence to be pre-recorded prior to the trial, as that is most likely to be least stressful for her. (Prosecutor, WA 3017, pre-recorded interview, CCTV, acquittal)

Prosecutors were therefore required to balance the requirements of prosecuting the case with caregivers' concerns. However, at times, complainants' caregivers damaged the rapport established between the prosecution and complainants. In these cases, prosecutors and witness support officers attempted to bypass the complainants' caregivers to directly discuss the method of giving evidence with the complainants. For example, in one case, during email correspondence between a prosecutor and a CWS officer regarding a retrial, the prosecutor noted that it was "highly desirable for the complainant to give evidence again".²⁴ The CWS officer agreed, but expressed concern that the complainant's mother might discourage her from giving evidence and emphasised that it was important to talk to the complainant directly as the trial date was approaching.

In another case, the prosecutor noted that the complainant's mother dominated and belittled the complainant, and tried to speak for him although he was perfectly capable of speaking for himself.²⁵

Cases involving child or adult complainants with mental impairments required more consultation with and participation from their caregivers. Effective practice was demonstrated in cases where prosecutors explained the upcoming legal procedures to all parties.

(e) Complainant's desire to be isolated from the accused

Records in prosecutors' files revealed that for some complainants, isolation from the accused was

essential for criminal proceedings to ensue, as proximity to the accused was expected to compound the negative experience of giving evidence. Consideration of alternate measures that separated parties physically was intended to facilitate prosecution and improve the complainant's experience.

Several complainants expressed a desire not to see the accused, and also did not want the accused to see them. A prosecutor in NSW recorded a verbatim account of a conversation on this point with the complainant who had been sexually abused by her stepfather on numerous occasions from the age of nine years:

Text box 5.9

Prosecutor: *How do you feel about going to court?*

Complainant: *I don't really want to go with [accused] being there, because I don't really want to see [accused] again.*

Prosecutor: *Can you cope with talking about it?*

Complainant: *I think I can cope with it, but I may be upset. I want for him not to be near me, and to not see him. (NSW 1108, CCTV, conviction)*

Similarly, in a conference with the prosecutor prior to trial in a Victorian case, the complainant asked whether the accused would see her on the screen, and was concerned he might find her later on.²⁶ The prosecutor responded that this was "highly unlikely". In another case, the prosecutor was unable to apply alternate measures to meet the concerns of a 10-year-old complainant who asked to have her face covered when giving pre-recorded evidence so that the accused could not see her. The prosecutor added:

Text box 5.10

Unfortunately there is nothing we can do to stop the accused from seeing [Complainant 2's] face. He is entitled to be in the courtroom during his trial and obviously we want the judge and jury to see her face as she gives evidence. (Prosecutor, WA 3019.2, CCTV off court premises, conviction)

These cases demonstrated that the complainants' needs were not always sufficiently addressed by arrangements for physical separation from the accused, and that additional support from the prosecution and others might be required.

(f) Other benefits to the complainant of using alternate measures

Consensus was expressed among criminal justice professionals that alternate measures generally supported complainants' psychological wellbeing. In particular, cases revealed a prominent view that alternate measures alleviated stressors associated

with the criminal justice process by allowing complainants to give evidence without attending court. This was particularly evident in cases in WA due to the widespread use of pre-trial hearings in that jurisdiction. For instance, a prosecutor explained that the complainant's evidence-in-chief, cross-examination and re-examination would all be presented to the court in the form of a pre-recorded police interview and pre-trial video so that the complainant's presence would not be required at trial.²⁷ The experience of WA prosecutors with pre-trial hearings and pre-recorded evidence suggested that these arrangements benefited complainants, and were an effective practice enhancing the complainants' experience of the criminal justice process and improving the quality of their evidence. This view was expressed in several cases:

Text box 5.11

It has been my experience that children who are given this opportunity perform better when giving evidence as a result of reduced wait times and minimisation of court attendance, which ultimately assists in the reduction of fatigue, distraction and feelings of anxiety for young children. (Social worker, WA 3019.2, CCTV off court premises, conviction)

Ideally, I would like the complainant's evidence to be pre-recorded prior to the trial, as that is most likely to be less stressful for her. (Prosecutor, WA 3017, pre-recorded interview, CCTV, acquittal)

However, sometimes even the use of alternate measures could not adequately protect the complainant's wellbeing. In such circumstances, cases did not proceed to trial.²⁸ For example, in one case a complainant engaged in self-harm as a coping strategy.²⁹ In other cases, repeated questioning before the trial traumatised and frustrated complainants who then became reluctant to provide further evidence.³⁰ This questioning also generated inconsistencies in the complainants' accounts³¹, reduced the complainants' perceived credibility and led to the dismissal of the case or of certain charges.³²

(g) Complainant's credibility at trial

Although documented to a lesser extent, in a small proportion of cases perceptions of complainants' credibility at trial affected consideration of alternate measures. Some prosecutors used alternate measures deliberately to avoid having complainants testify in person before a jury, if, for example, they perceived that a complainant's behaviour might damage the case.³³ This strategy was evident in a few examples involving complainants who were regarded as overly emotional or volatile. For instance, one prosecutor noted that it would be preferable for the complainant with a mental impairment to give evidence via the

Remote Witness Facility, as the complainant initially wanted to give evidence in person so he could give the accused a "verbal spray".³⁴ This complainant was over 18 years of age, and gave evidence via CCTV from a remote facility. Their evidence resulted in a conviction for sexual penetration, indecency and possession of child pornography. In another case, the prosecutor's consideration centred on the risk that the complainant would be unpredictable in the witness box if he gave evidence before a jury.³⁵

However, use of alternate measures as a form of impression management demonstrated ineffective practice, as the resulting loss of voice and agency did not satisfy complainants' expectations of justice. One prosecutor's conference notes about the complainant indicated that CCTV recordings had shown that the complainant was confident and well-spoken enough to be credible if she gave evidence in person.³⁶ This suggested that the prosecutor contemplated persuading the complainant to give evidence in person. Further, it implied that prosecutors sometimes regarded the use of alternate measures before trial as a strategic opportunity to evaluate a complainant's capacity to give evidence in person at trial, even if this was not their preference.

Legislative compliance

The need to comply with legislation was the second most commonly recorded reason for the use of alternate measures, and was mentioned for most complainants (69.4 per cent, *N* = 50). This theme was shown in the form of formal notices to the court about how complainants would give evidence, and in documented bookings of facilities to accommodate them. For example, an email from the Sheriff's office requested CCTV and Remote Witness Facilities for a complainant and child witness to give evidence.³⁷ In the same case, a memo was sent a few weeks before the trial with a note on the prosecutor's 'to do' list to 'make a CCTV room booking'. Later, a booking slip indicated that the CCTV remote witness room at Dubbo Court was booked for trial. In WA, complainants generally submitted an application to the District Court stating their preferred option to give evidence. Copies of these formal applications were usually maintained in the prosecutor's case files. For instance, one male and one female complainant in a joint trial both submitted an application to the Perth District Court requesting that they be declared special witnesses, give evidence from outside the courtroom but within the precinct transmitted via CCTV, submit video-recorded evidence-in-chief and have a support person near to them.³⁸

Criminal justice professionals often specified the factors that rendered a complainant eligible to give evidence under the prevailing legislation. One legal

practitioner described the use of alternate measures as “obvious”³⁹, while others noted complainants’ “automatic” status as special witness or affected children.⁴⁰ A prosecutor in NSW noted that according to the legislation, all incest cases were conducted ‘in camera’ (that is, in a closed court), and a support person could be present if requested by the complainant. Ultimately, the prosecutor requested CCTV for the complainant at trial.⁴¹ Conversely, a prosecutor in WA noted that a complainant’s preference to give evidence was at odds with legislation when she chose to give evidence in person rather than via CCTV, an exception to section 106R of the *Evidence Act 1906* (WA).⁴²

The use of available legal mechanisms to support complainants in any particular case depended on the attitude and motivation of the individual prosecutors. In some instances, effective practice was demonstrated by prosecutors who thoroughly understood the legislation and how it could improve complainants’ experience of criminal proceedings. This was particularly salient for adult complainants, due to the availability of fewer legal provisions to support them.

In one joint case in Victoria, both complainants were referred to CWS and a court closure was ordered, as both complainants were under the age of 18 at the time the accused was charged.⁴³ In another case in WA, the Complainant Support Service queried whether a complainant they had spoken to qualified as a special witness after he requested to give evidence via CCTV. The prosecutor responded:

Text box 5.12

Yes – any complainant in a sexual offence case, (aside from indecent abuse, which is a relatively minor charge) is automatically entitled to it, regardless of age, gender, relationship to the accused, or how long ago the alleged offences occurred. (Prosecutor, WA 3001.1, CCTV, conviction)

In another case in WA, the Trial Listing Hearing specified:

Text box 5.13

[Complainant 1] is an affected child but [Complainant 2] is now 18. Application to declare [Complainant 2] a special witness has been filed. (Prosecutor, WA 3011.1; WA 3011.2; CCTV on court premises, acquittal)

In this case, there was also an email from the prosecutor to a paralegal, requesting that a consent order be drafted for Complainant 2 (who was then an adult) to be declared a special witness.

In certain cases there was confusion or disagreement between members of the prosecution team about best practice in legislative compliance. In one case in WA, for instance, the case supervisor applied for the use of pre-recorded evidence for a nine-year-old complainant.⁴⁴ The prosecutor handling the matter questioned the application draft, and outlined that pre-recorded evidence was not the prosecution’s preferred alternate measure. The case supervisor prevailed by outlining the complainant’s young age and the risk of re-traumatisation if a second interview was conducted.⁴⁵

Reliance on witness support officers and other criminal justice professionals

Records reflecting prosecution reliance on support officers and other criminal justice professionals to implement alternate measures arose for just over half the complainants (51.4 per cent, *N* = 37). This theme refers to the critical liaison between complainants, caregivers, prosecutors and other criminal justice professionals when it comes to the use of alternate measures in a particular case. Witness support officers typically accompanied complainants to legal proceedings, from the commencement of a case to the final stages of the criminal justice process. Prosecutors relied on support officers to maintain contact with complainants, secure complainants’ support for the prosecution and calm negative emotions.

Two subthemes emerged within this category: the central role of support officers, and the interaction between criminal justice professionals prior to the implementation of alternate measures.

(a) Role of support officers

Support officers were effectively used when the support they gave to complainants and their caregivers enabled prosecutors to focus on legal aspects of the case. In WA, for instance, a pre-trial review memo disclosed that although the ODPP case manager had not directly contacted either of the complainants, the CWS in Bunbury was maintaining regular contact with the complainants and their families.⁴⁶

Support officers demonstrated active planning and advocacy across jurisdictions. In NSW for instance, WAS officers were able to conduct court preparation, receive phone calls from the complainant’s father and facilitate the presence of a Korean interpreter at trial.⁴⁷ In WA, CWS officers advised the prosecution that the complainant’s guardian had a drinking problem, and that the guardian refused to contact the

complainant (who was very functional). A CWS officer spoke to the guardian who explained that the complainant did not want to proceed with the trial, as she did not want to speak about the incident. After discussion with CWS, the complainant's guardian allowed CWS to contact the complainant.⁴⁸

In Victoria, a social worker from WAS stated:

Text box 5.14

It would be preferable if counsel could attend [a pre-committal WAS conference] as this complainant is quite anxious – as most sex complainants are with giving evidence. (WAS, Victoria 2010.1, pre-recorded interview, CCTV, vacated).

In other Victorian cases, WAS officers initiated consideration of alternate measures. For instance, an email from CWS to the prosecutor stated:

Text box 5.15

[Complainant] advised that she is not sure whether she'll give evidence in court or in the Remote Witness Facility. (CWS, Victoria 2009, in person, convicted of some charges).

These examples were recorded in the ODPP files as email correspondence from support officers about how the complainant would give evidence. The extent to which support officers influenced the complainant's choice to give evidence is, therefore, unclear from these files.

Sometimes, the failure to effectively use support officers led to a failure to prosecute. This was particularly so in cases of intrafamilial abuse or parental abuse, where the caregivers' support of complainants was influenced by complex family dynamics. Caregivers were often protective of the accused, blamed the complainant and were reluctant to report issues to police.⁴⁹ The complainants in these cases would have benefited from ongoing support officers throughout their interaction with the criminal justice system. Identification of wider support needs and the need for policy guidelines to implement these supports were key factors emerging from the file reviews of discontinued cases.

(b) Interaction between criminal justice professionals

Criminal justice professionals at different levels affected prosecutors' consideration of alternate measures. Sometimes information provided by police at early stages of the case confused complainants both about their status as witnesses and the alternate measures available to give evidence. Extensive conferencing was required to correct misinformation. In a Victorian case, for instance, police reported that

the 19-year-old complainant, who had severe anxiety, was satisfied to testify via AV link about events that took place when she was 17, but that if the rape charges were made and she had to testify in person she would be "upset and angry".⁵⁰ The police appeared to be unaware that the complainant had a right to testify from a remote facility. The prosecution had to rectify this misinformation in numerous conferences before the trial. The complainant gave evidence on all charges via CCTV. In the first trial, the jury was discharged; in the second, the jury was hung. On retrial, the verdict on one penetrative offence was not guilty, and the jury was hung on the second penetrative offence and on the charge of indecency.

In a case in WA, the complainant's mother was informed by a police officer that after the complainant gave her first statement, the evidence was completed. This misinformation confused the complainant's mother, and the ODPP had to explain that the complainant needed to be cross-examined by the defence and to pre-record her oral evidence at trial.⁵¹

In fact, issues with the procedures implemented by police officers appeared in a number of cases that were dismissed prior to trial (50 per cent of cases that did not go to trial, $N = 5$). Foremost was what appeared to be a lack of any clear guidelines for complainants who give evidence via pre-recorded police interviews. For instance, police interviewers conducting multiple interviews due to faulty technical equipment or a complainant's mental state produced inconsistencies in the evidence.⁵² Second, consideration of alternate measures by police officers appeared driven more by the complainant's age than the complainant's needs.⁵³ And communication failures between CWS, Victorian Police and the ODPP at times led to inadequate organisation of CCTV facilities.⁵⁴ In one case, evidence from a complainant was lost.⁵⁵ These factors appeared avoidable, and perhaps the prosecution could have proceeded.

Records of contact between prosecution and defence counsel showed that defence counsel generally supported the proposed use of alternate measures. These measures were not perceived as detrimental to the accused. In NSW for instance, defence counsel communicated to the prosecution that there would be no issues if the complainant gave evidence via CCTV.⁵⁶ In WA, an email from a defence solicitor suggested that videolink was common, and the solicitor went on to state:

Text box 5.16

[I have] never seen any negative difference, from a defence point of view, in evidence, because of CCTV. (Defence lawyer, WA 3005.1; WA 3005.2; WA 3005.3; WA 3005.4, pre-recorded interview, CCTV on court premises, acquittal)

However, defence lawyers' support for the use of alternate measures was not consistent. Late objections and challenges to their scheduled use required prosecutors' constant attention. In a NSW case for instance, one day before evidence via CCTV was scheduled for two female complainants aged 12 and 13, the defence challenged the presence of one complainant's support person. This resulted in the complainant having to give evidence without the support person who had attended the conferences and previous legal proceedings with her. Instead, another WAS officer was nominated at very short notice, and email correspondence between WAS and the prosecutor disclosed that no female or male officer was available. This complainant, who was regarded as an "impressive" and credible witness, was pressured to give evidence on her own and agreed to do so.⁵⁷ Although both the police and prosecutors rated this as a strong case, the accused was acquitted of all charges. The records did not permit an assessment of whether the complainant felt pressured to agree to give evidence.

In a case in WA, the prosecutor applied for the complainant and two witnesses to give evidence by videolink from their hometown in a rural area. Defence counsel stated that they "cannot consent to the complainant giving evidence by videolink in the absence of instructions".⁵⁸ The matter was argued before the judge, and the prosecutor's application to use CCTV was successful for all three witnesses. (The case resulted in acquittal.)

Prosecutors relied on judges' sensitivity to complainants' needs to successfully implement alternate measures. Some judges deviated from formal applications to the court regarding how the complainant would give evidence when it was in the complainant's best interest. This demonstrated an effective understanding by judges of how alternate measures improved complainants' experience and their capacity to give more reliable evidence. For example, in a case in WA, in setting the date for trial, the judge noted that the prosecution had filed a special witness application, not a pre-recording application.⁵⁹ The judge in this case noted that if the prosecution orally requested a pre-recording, he would grant it. Furthermore, in a Victorian case, the complainant considered giving evidence in front of the jury, but requested a screen to block her view of the accused.⁶⁰ Although the defence objected, the judge found the complainant's request could be accommodated if done in an unobtrusive way, and if the accused was far away from the complainant. The accused was acquitted.

Logistics in using alternate measures

Finally, criminal justice professionals considered the logistics involved in using alternate measures, including familiarity of the complainant with court facilities, when deciding which alternate measures to use. This theme arose for approximately one-third of complainants (30.6 per cent, $N = 22$) and accounted for approximately one in 10 mentions regarding alternate measures (11.3 per cent, $n = 28$).

In some cases, the lack of availability or maintenance of CCTV technology hindered complainants' ability to give evidence from a Remote Witness Facility. Prosecutors often referred to unavailable facilities or technical malfunctions when complainants were scheduled to testify. Access to CCTV facilities was a driver of trial schedules, and overbooked CCTV facilities increased complainants' waiting times. In cases where complainants could not give evidence as scheduled, prosecutors had to attempt to minimise the adverse effects to the complainant of limited resources and faulty equipment. In one WA case, defence counsel and the complainant's family had to arrange their schedule around the resource availability of CCTV that would be in use for two days.⁶¹ In a Victorian case, the prosecutor mentioned difficulties in booking a room with CWS for the pre-trial argument that occurred before the special hearing.⁶² A solicitor from the Specialist Sex Offences Unit noted that he did not want to leave the complainant "sitting around", and that the witness order might have to be reshuffled (pre-recorded interview, CCTV; two trials with hung juries, bench trial acquittal.) In NSW, one judge noted that there was a problem with recording the complainant's evidence-in-chief. The complainant had to be re-questioned by the Crown in another courtroom on the second day of the trial regarding that part of the evidence-in-chief.⁶³

In one NSW case, a nine-year-old complainant with psychological trauma was cross-examined via CCTV for two days about multiple events and assaults by an elderly male neighbour. These had started when she was five years old. She had been interviewed by police at length on four separate occasions. She had difficulty following questions based on written transcripts of the interviews and when the defence lawyer asked her to agree that nothing happened, she did. As a result, jurors were directed to return not guilty verdicts on all six charges.⁶⁴ In another case in NSW, the prosecutor initially argued that CCTV would be infeasible for a psychologically impaired complainant due to the extensive evidence on which the complainant was required to comment.⁶⁵ There were four separate pre-recorded police interviews for the complainant, and a large volume of material that might be referred to in evidence, and the complainant would give

evidence for approximately one-and-a-half to two days. Ultimately, the complainant testified via CCTV and the accused was acquitted.

The cost of the AV link was another factor influencing prosecutors' consideration of alternate measures. In one Victorian case, a memorandum in the prosecutor's file indicated that the cost of videolink for one or two hours was significantly more than the cost of flying a witness from Tasmania to Melbourne plus accommodation and local transfers.⁶⁶

Nevertheless, CCTV technology appeared to benefit complainants who lived in rural or remote areas. In WA, for example, a prosecutor applied for the complainant and two witnesses to give evidence by videolink from their hometown in a rural area, avoiding the anxiety and logistical difficulties of travelling.⁶⁷ By comparison, giving evidence across international jurisdictions was not a preferred practice, ostensibly because trial preparation was more challenging for the prosecutor. In a WA case that involved a complainant who was living in Ireland, the prosecutor advised the complainant's caregiver:

Text box 5.17

[Complainant] could give evidence by videolink from Ireland. The advantage of the complainant and yourself coming back to Perth for the pre-recording is that the complainant would get to speak with the prosecutor in person, and develop some rapport. It would be easier to show her the interview she did with police shortly before she will give evidence; she would be in the same time zone and any documents could be easily shown to her as she would be in the court building. (Prosecutor, WA 3017, pre-recorded video evidence, CCTV from overseas, acquittal)

Support officers were usually responsible for familiarising complainants with the court or remote witness facilities. This was consistent with support officers' focus on complainants' psychological and emotional wellbeing. Familiarity with court facilities was effective when procedures were explained, and complainants could acclimatise to the context in which they would give evidence. Familiarity with the court environment affected complainants' comfort while giving evidence, allowing the prosecution to smoothly implement alternate measures. In a case that involved three complainants in NSW, a WAS officer explained CCTV and showed the complainants the courtroom.⁶⁸ In Victoria, the prosecutor advised the complainant of her right to give evidence via remote facilities and introduced her to the CCTV room.⁶⁹

Familiarity with court facilities appeared to improve complainants' experience of criminal proceedings, when the locations remained consistent. In a case in WA that involved two complainants, emails between a CWS officer and the mother and aunt of the

complainants indicated that the complainants' caregivers were concerned that the remote witness room was not in the same building and was close to the trial court, not at the Department of Justice CWS offices where they had been previously taken. A caregiver of one of the complainants stated:

Text box 5.18

It is of serious concern to me because they are far away and not in the same building. (Complainant's caregiver, WA 3019.1; WA 3019.2, CCTV off court premises, conviction)

Conclusion

The NSW Parliament noted when amending alternate measures legislation that "the option for a complainant to give evidence by closed-circuit television ... may mean the difference between proceeding to trial and having to withdraw a prosecution because the complainant is not prepared to give evidence".⁷⁰ The current study revealed general consensus among criminal justice professionals that alternate measures do in fact support the complainant's wellbeing and ability to give reliable evidence. The majority of prosecutors' files showed that alternate measures were considered when preparing cases for trial. Primary consideration was given to the complainant's needs, including the complainant's preference for using alternate measures; the complainant's mental health and temperament; the complainant's desire to be isolated from the accused; the benefits to the complainant of using alternate measures; and the complainant's credibility in court. Other considerations centred on legislative compliance, interactions among criminal justice professionals about the alternate measures, and the logistical issues in implementing them. Adult complainants were more likely to be perceived as ineligible to be a special witness.

Witness and court support officers provided critical liaison services between complainants and other criminal justice professionals, and often accompany complainants to all relevant legal proceedings. Their role increases when they provide emotional support for complainants. Technical difficulties, delays, repeated questioning by police, inadequate witness support and misinformation by police were revealed as significant issues that negatively affected complainants' experiences with the criminal justice system, and need to be addressed. Finally, results showed that improved flexibility and communication between complainants, prosecutors and other criminal justice professionals is necessary to ensure that in their decisions concerning use of alternate measures, prosecutors take into account complainant preferences and the availability of these measures.

Endnotes

- ¹ Jaffe, Crooks and Wolfe, 2003; Righarts and Henaghan, 2010.
- ² Charles, 2012.
- ³ Burton, Evans and Sanders, 2006.
- ⁴ Burton et al., 2006.
- ⁵ Burton et al., 2006.
- ⁶ For an overview of jurisdictional differences in file-keeping practices, see Supplementary Materials 4.1.
- ⁷ Lewis, Klettke and Day, 2014.
- ⁸ For a copy of the protocol, see Supplementary Materials 4.2.
- ⁹ Inter-rater reliability of the coding scheme is presented in Supplementary Materials 4.3. Other results drawing on quantitative analyses of the data are contained in the Supplementary Materials 4.4–6.
- ¹⁰ Braun and Clarke, 2006.
- ¹¹ Braun and Clarke, 2006.
- ¹² The NSW ODPP provided 20 files. One file was removed by the ODPP to respond to an appeal, leaving 19 files for review in NSW. Twenty files were reviewed in VIC and WA respectively.
- ¹³ For exact numbers and percentiles, please see Supplementary Materials 4.7.
- ¹⁴ For exact numbers and percentiles, please see Supplementary Materials 4.7.
- ¹⁵ Themes can also be considered by examining the overall proportion of mentions by case file, rather than by complainant: See Supplementary Materials 4.8.
- ¹⁶ Complainants from the current sample are referred to by state and then a four- to five-digit number as shown below.
- ¹⁷ NSW 1207, convictions for indecency, acquittal for sexual intercourse.
- ¹⁸ NSW 1205.2, CCTV ordered, complainant chose to give evidence in person in court.
- ¹⁹ VIC 2003, CCTV, acquittal.
- ²⁰ VIC 2004, complainant admitted to adolescent recovery program, case discontinued.
- ²¹ NSW 1205.1.
- ²² WA 3009, CCTV on court premises, conviction.
- ²³ WA 3012, police interview, CCTV, conviction.
- ²⁴ Victoria 2009, in person in court, convicted of some charges.
- ²⁵ Victoria 2008, in person in court, acquittal.
- ²⁶ Victoria 2018, police interview, CCTV, convicted of some charges.
- ²⁷ WA 3014, police interview, CCTV, conviction.
- ²⁸ Cases that did not proceed to trial are discussed where relevant in the sections below. A complete analysis of cases that did not proceed to trial is in Supplementary Materials 4.9.
- ²⁹ WA 3011.3, chose to give evidence in person in court, credibility damaged and case discontinued.
- ³⁰ WA 3004.4; WA 3005.1, police interview, CCTV, charges discontinued.
- ³¹ Victoria 2012; Victoria 2013, police interviews, CCTV, inconsistency under cross-examination led to withdrawal before trial.
- ³² Victoria 2011.2; Victoria 2012; WA 3005.3; WA 3005.4; WA 3011.3.
- ³³ Victoria 2008, in person in court, acquittal; Victoria 2014 CCTV off court premises, conviction.
- ³⁴ Victoria 2014, CCTV off court premises, conviction.
- ³⁵ Victoria 2008, in person in court, acquittal.
- ³⁶ NSW 1108, CCTV, conviction.
- ³⁷ NSW 1101, police interview, live in court, acquittal.
- ³⁸ WA 3001.1; WA 3001.2; CCTV and convictions for both complainants.
- ³⁹ WA 3020, police interview, CCTV, conviction.
- ⁴⁰ WA 3017, police interview, CCTV, acquittal.
- ⁴¹ NSW 1206; CCTV unavailable, conviction.
- ⁴² WA 3003, in person in court, conviction.
- ⁴³ Victoria 2006.1; Victoria 2006.2; police interview, CCTV, conviction.
- ⁴⁴ WA 3012, police interview, CCTV, conviction.
- ⁴⁵ WA 3012, police interview, CCTV, conviction.
- ⁴⁶ WA 3011.1; WA 3011.2; CCTV on court premises, acquittal.
- ⁴⁷ NSW 1105, police interview, CCTV, acquittal.
- ⁴⁸ WA 3021, CCTV, acquittal.
- ⁴⁹ Victoria 2011.1.
- ⁵⁰ Victoria 2005, CCTV off court premises, acquittal.
- ⁵¹ WA 3017, police interview, CCTV, acquittal.
- ⁵² WA 3004.4, CCTV, conviction; VIC 2011.2.

- ⁵³ NSW 1208; VIC 2011.2.
- ⁵⁴ Victoria 2013, police interview, CCTV, case discontinued.
- ⁵⁵ WA 3005, CCTV, police interview, acquittal.
- ⁵⁶ NSW 1106.1; NSW 1106.2, CCTV, acquittal.
- ⁵⁷ NSW 1106.2, CCTV, acquittal.
- ⁵⁸ WA 3021, CCTV, acquittal.
- ⁵⁹ WA 3016, police interview, CCTV, acquittal.
- ⁶⁰ Victoria 2020, police interview, CCTV, acquittal.
- ⁶¹ WA 3020, police interview, CCTV, conviction.
- ⁶² VIC 2013, police interview, CCTV, case discontinued.
- ⁶³ NSW 1204, CCTV, outcome unknown.
- ⁶⁴ NSW 1103.
- ⁶⁵ NSW 1101, CCTV, police interview, acquittal.
- ⁶⁶ Victoria 2010.1; 2010.2, CCTV, convicted of some charges.
- ⁶⁷ WA 3021, CCTV, acquittal.
- ⁶⁸ NSW 1101.1; NSW 1101.2; NSW 1101.3, police interviews, CCTV, acquittal.
- ⁶⁹ Victoria 2005, CCTV off court premises, acquittal.
- ⁷⁰ NSW Parliamentary Debates, 2014.

Chapter 6
The use of alternate measures
(Study 5)

Chapter 6: The use of alternate measures (Study 5)

Legislative reforms have enabled the use of alternate measures by complainants of child sexual abuse. These alternate measures are aimed at improving the quality of evidence that is elicited from complainants and reducing the distress associated with giving evidence. Much of the previous research on alternate measures is now outdated; moreover, it relied on subjective methods of data collection, such as qualitative interviews with legal professionals. An examination of objective data from recent trials is thus required to establish which alternate measures are being used by complainants, and the extent to which their implementation is problematic.

This study involved the examination of court transcripts to provide an up-to-date understanding of:

- which alternate measures, if any, child, adolescent and adult complainants of child sexual abuse use when giving evidence
- the nature and prevalence of any challenges that arise with the use of alternate measures at trial.

Method

Sample

This study systematically analysed trial transcripts of child sexual abuse complainant evidence. Courtroom transcripts of this evidence provide a wealth of information that can be systemically analysed to provide robust insights about courtroom practice. Nevertheless (and for good reason), these transcripts are difficult for researchers to access. Complainants'

evidence is treated with sensitivity, and rules of evidence mean that the court is often closed to members of the public – preventing researchers from observing court practices and making it difficult to access transcripts of evidence. As a result little is known about actual practices in the court for eliciting evidence from these complainants. Recognising the importance of obtaining reliable observational data about actual practice, the Royal Commission provided unprecedented access to the transcripts of evidence of both child and adult complainants of child sexual abuse. The sample of transcripts used in this study, and described in detail below, was also used in studies 9 to 17.

Trial transcripts for a 156 cases were obtained under notice or summons issued by the Royal Commission for a mixture of 'historical' (where the alleged abuse occurred before 2010 and the trial occurred after 2010) and 'contemporary' cases (where the alleged abuse occurred after 2010). NSW provided 54 cases, Victoria 51 and WA 51. These cases formed the original sample from which all trial transcript studies were drawn. The other transcript studies often used a subset of this sample (based on the study's design) and hence, the relevant studies provide a description of the subsample selection methods and demographics.

For the present study, transcripts needed to contain, at a minimum, a record of the complainants' evidence-in-chief and cross-examination. These criteria were satisfied for 30 NSW cases, 46 Victorian cases and all 51 cases WA provided.

Thus, suitable trial transcripts were available for 127 cases that all went to trial between 2011 and 2015. The cases involved a total of 169 complainants (NSW = 47 complainants; Victoria = 50 complainants; WA = 72 complainants). Most cases had a single complainant (NSW = 73.33 per cent; Victoria = 91.30 per cent; WA = 68.63 per cent). A substantial

number had two complainants (NSW = 10.00 per cent; Victoria = 8.70 per cent; WA = 21.57 per cent); and the remaining cases had either three (NSW = 10.00 per cent; WA = 9.80 per cent) or five (NSW = 6.67 per cent) complainants. Complainants were predominantly female (80.47 per cent). Details of the complainants' ages are provided in Table 6.1.

Table 6.1 Complainants, by age group

Age group	Number of complainants			Age at trial (in years)				
	NSW	Vic	WA	Minimum	Maximum	Mean	SD	Median
Children	11	4	16	6.87	11.99	9.86	1.57	10.33
Adolescents	12	21	26	12.06	17.92	15.46	1.76	16.11
Adults	24	25	30	18.00	62.58	29.76	11.75	25.91

Note: 'Children' refers to complainants aged under 12; 'adolescents' refers to complainants aged from 12 to under 18; and 'adults' refers to complainants aged 18 and over, at the time of trial.

Transcripts of a complainant's evidence at a second trial were available for 12 complainants including six from NSW (two children, one adolescent and three adults), three from Victoria (one child and two adults), and three from WA (two children and one adolescent). Transcripts of a complainant's evidence at a third trial were available for three complainants including two from NSW (one adolescent and one adult) and one from Victoria (adult). For some complainants for whom transcripts of their evidence were provided, transcripts of trials at which they did not give evidence were also provided. In these instances, only the transcripts of trials at which they gave evidence were included in the analyses.

Coding

The transcripts were first coded for complainants' use of alternate measures. The transcripts were then coded thematically for the presence of problems associated with the alternate measures used by each complainant.

Coding the use of alternate measures

The transcript of each complainant's evidence was coded categorically for the following variables: the method/s used to provide evidence-in-chief, the method/s used during cross-examination, the use of support persons, the clearing of the public gallery, judges' and lawyers' removal of wigs, and judges' and lawyers' removal of gowns. The specific categories comprising each of these variables were identified by reading a subset of the transcripts. Further categories were added throughout the coding process whenever the use of unique combinations of alternate measures was found.

Coding problems associated with the use of alternate measures

A subset of the transcripts was read to identify the types of problems that arose with the use of each alternate measure. Problems were defined as the improper use of the alternate measure, and/or malfunctions in the equipment or procedures used to implement the alternate measure. Descriptions of the problems that were coded are included in Supplementary Materials 5 (online).

Complainants' transcripts were coded dichotomously (problem arose, problem did not arise) for each type of problem the complainant could have encountered, based on the alternate measures they used. For example, problems associated with playing the police interview were only coded for those complainants who used a police interview at trial. If a transcript indicated that a complainant's police interview could not be heard due to inadequate volume, that transcript was coded as 'problem arose' for 'playing police interviews: problems with technology'.

Findings

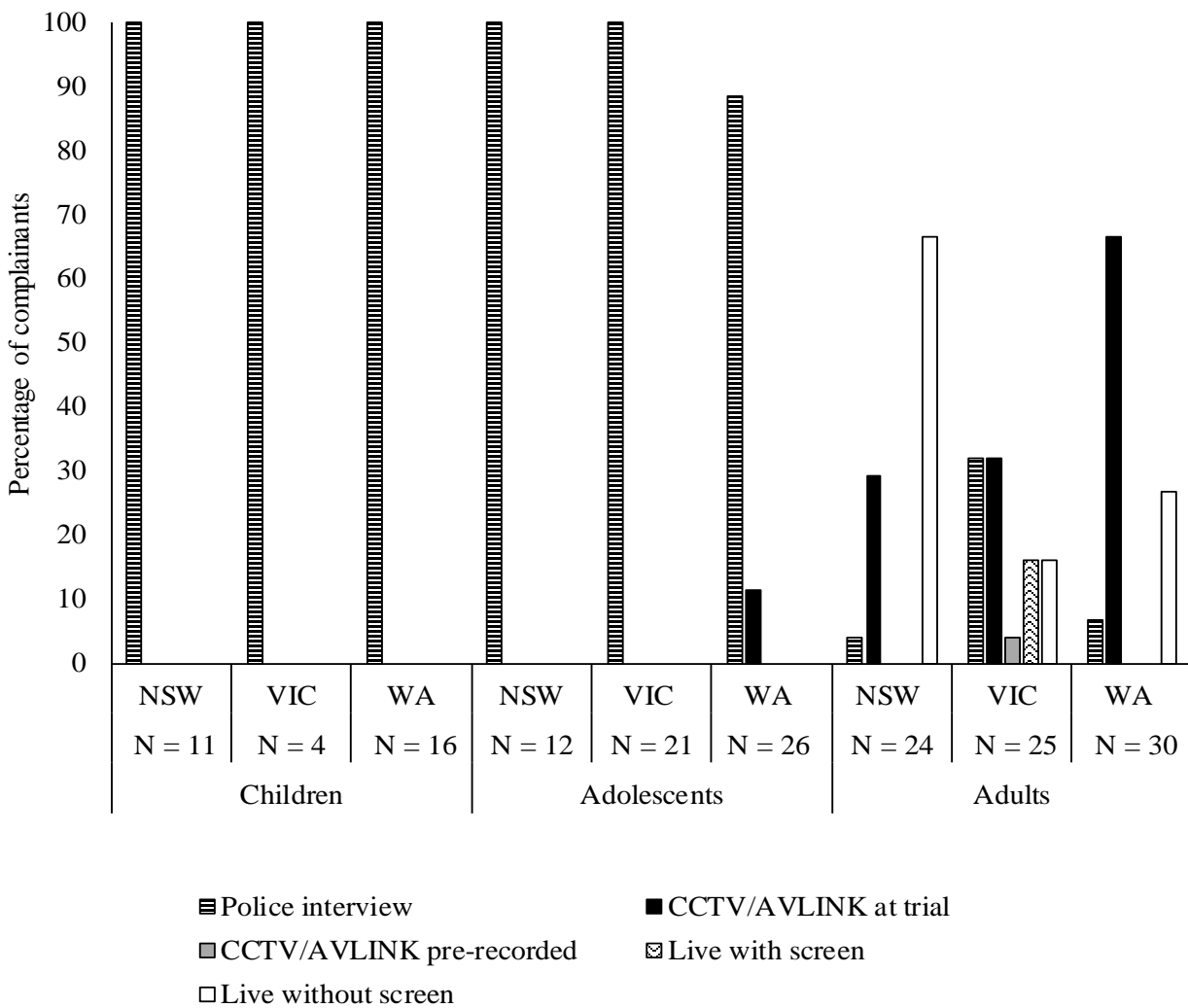
Use of alternate measures

The following sections examine each alternate procedure using a graph to display the prevalence of use followed by a description of the main findings. (For exact percentages and numbers refer to Supplementary Materials 5 (online).)

Evidence-in-chief

The methods used by complainants to present their evidence-in-chief at first trials are depicted in Figure 6.1.

Figure 6.1 Methods used by complainants to present evidence-in-chief at first trials, as a function of jurisdiction and age group



All children and adolescents presented their evidence-in-chief via police interview, with the exception of three WA adolescents (out of 26) who presented their evidence via CCTV or AV link at trial.

More adults gave evidence live without a screen than did children or adolescents.

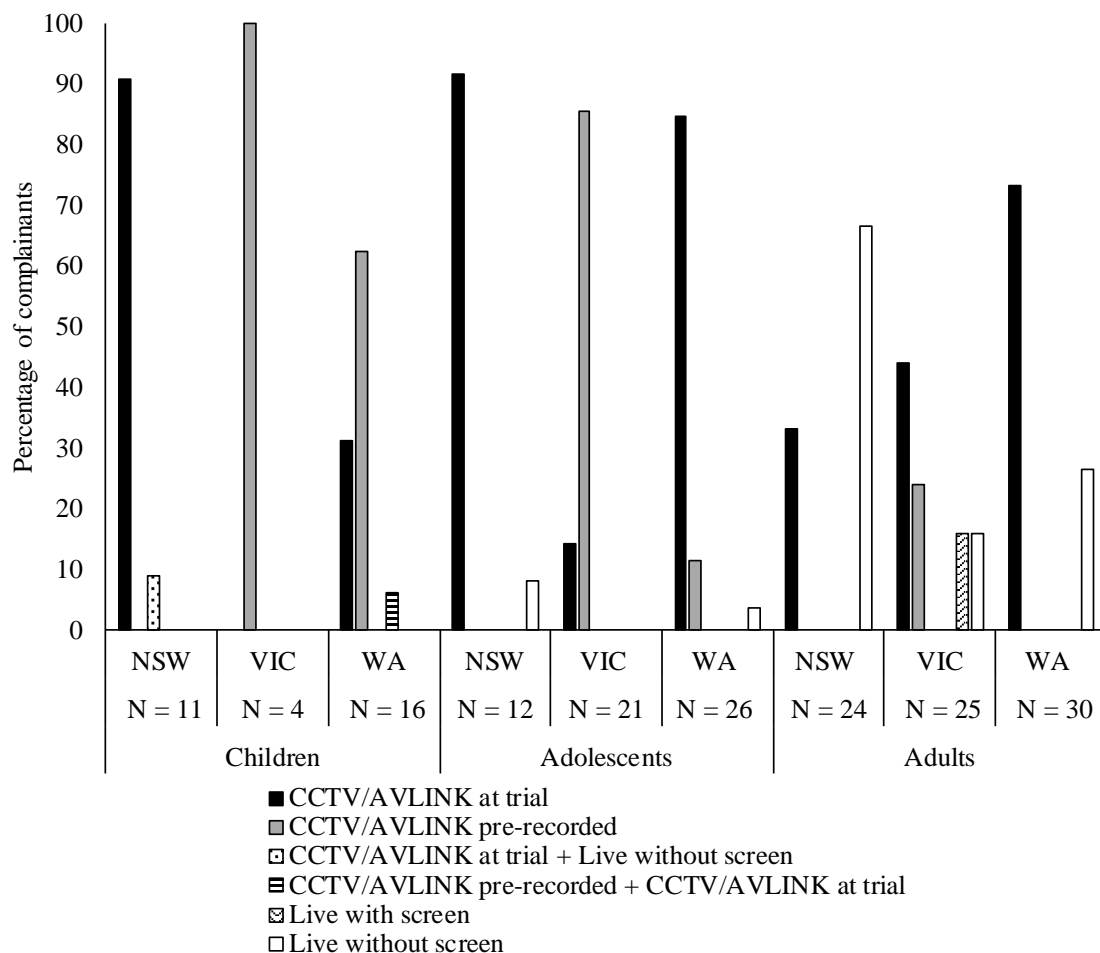
Adults' use of alternate procedures also varied markedly across the states. In NSW, two-thirds of adults gave evidence live in court without the aid of a screen, compared with only one-sixth of Victorian adults and a quarter of WA adults. The most common alternate measure used by adults was CCTV or AV link at trial, which was used by approximately one-third of NSW and Victorian adults, and two-thirds of WA adults. Screens were used rarely, and only by Victorian adults.

At second and third trials, all complainants provided their evidence-in-chief via pre-recordings, using either police interviews or recordings of their evidence-in-chief from previous trial/s.

Cross-examination

Figure 6.2 illustrates the methods used by complainants during cross-examination at first trials.

Figure 6.2 Methods used by complainants during cross-examination at first trials, as a function of jurisdiction and age group



All children used some form of alternate measure while being cross-examined. In NSW, most children were cross-examined via CCTV or AV link at trial, whereas in Victoria and WA, most children were cross-examined via CCTV or AV link at a pre-recorded special hearing.

Most adolescents also used some form of alternate measure during cross-examination. In NSW and WA, most adolescents were cross-examined via CCTV and AV link at trial. In contrast, most Victorian adolescents were cross-examined via CCTV or AV link at a pre-recorded special hearing.

Live cross-examination without the aid of a screen occurred more frequently for adults than it did for adolescents or children. As with evidence-in-chief, adults' use of alternate measures during cross-examination differed across the states. Two-thirds of NSW adults gave evidence live in court without the aid of a screen, whereas only one-sixth of Victorian adults and one-quarter of WA adults were cross-examined in this way. CCTV or AV link at trial was the most frequently used alternate measure for adults, with one-third of NSW and Victorian adults and two-thirds of WA adults using this method. Screens were used infrequently during cross-examination, with only four Victorian adults making use of this alternate measure.

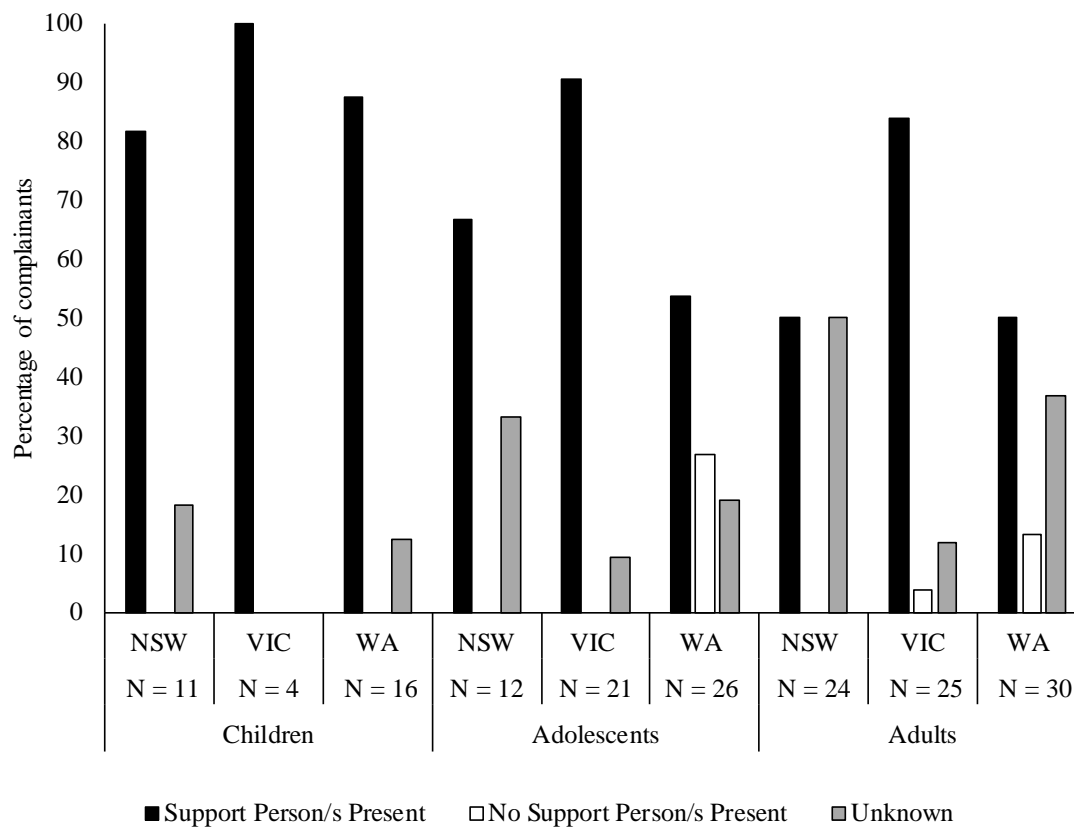
At second and third trials, cross-examination occurred via a variety of methods. For second trials, all complainants used a pre-recorded cross-examination from either a special hearing or a previous trial, with the exception of one NSW adolescent (out of one) who was cross-examined via CCTV/AV link in full at the second trial. One-quarter of those complainants who had their pre-recorded cross-examination played at the second trial were then called to undergo further cross-examination via CCTV or AV link. For third trials, all complainants used pre-recorded cross-examinations from their previous trial/s.

Support persons

Use of support persons

Figure 6.3 depicts complainants' use of support persons at first trials, as evidenced by their transcripts.

Figure 6.3 Complainants' use of support persons at first trials, as a function of jurisdiction and age group



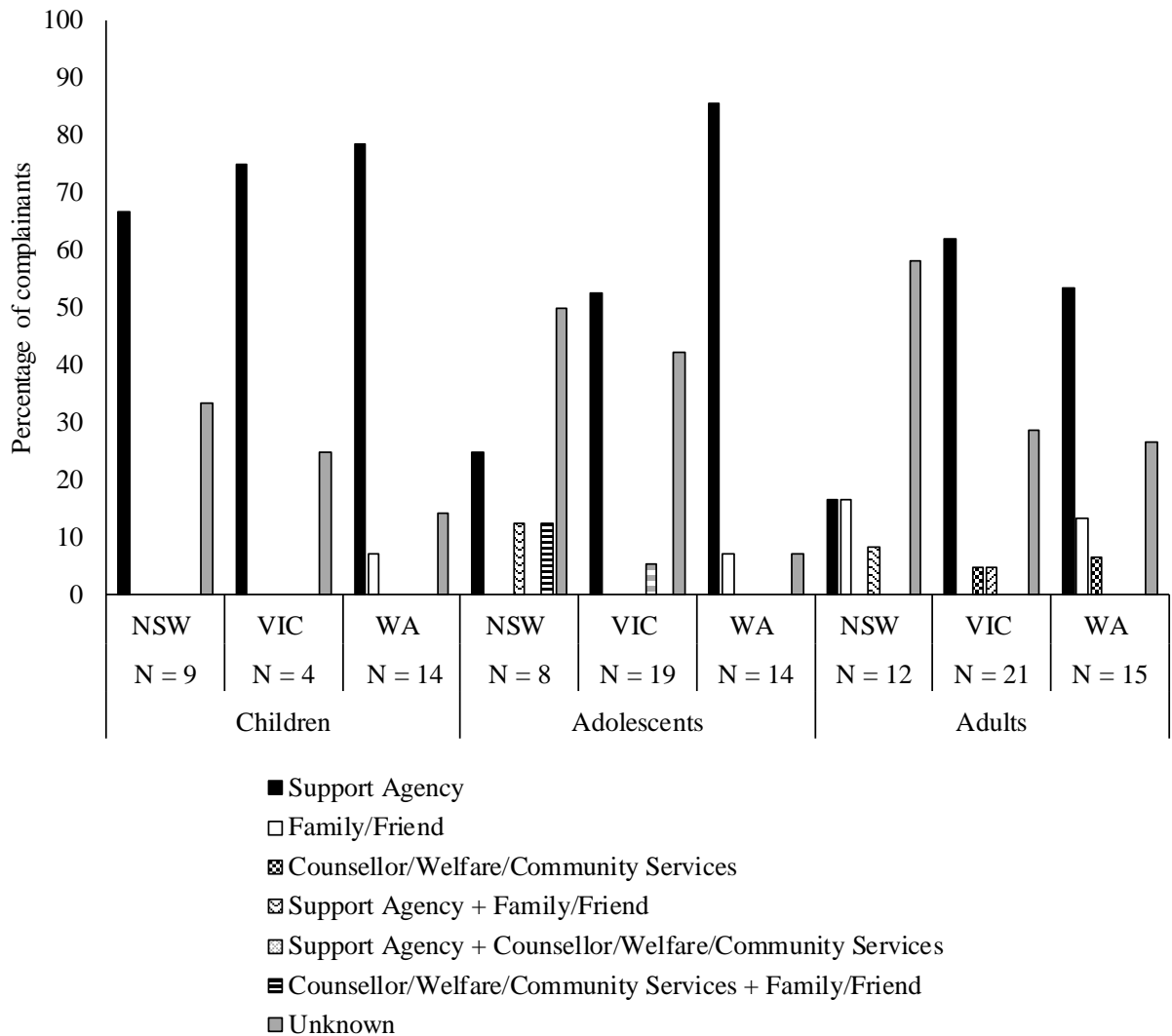
Support persons were used frequently across age groups and jurisdictions. Within each jurisdiction, evidence of using a support person was highest for children, followed by adolescents then adults. Transcripts rarely made explicit reference to support persons not being used. Many transcripts contained no reference to the use or non-use of a support person.

All four complainants who gave further evidence at a second trial used a support person.

Identity of support persons

The identities of the support persons used by complainants at first trials are depicted in Figure 6.4.

Figure 6.4 Identities of support persons at first trials, as a function of jurisdiction and age group



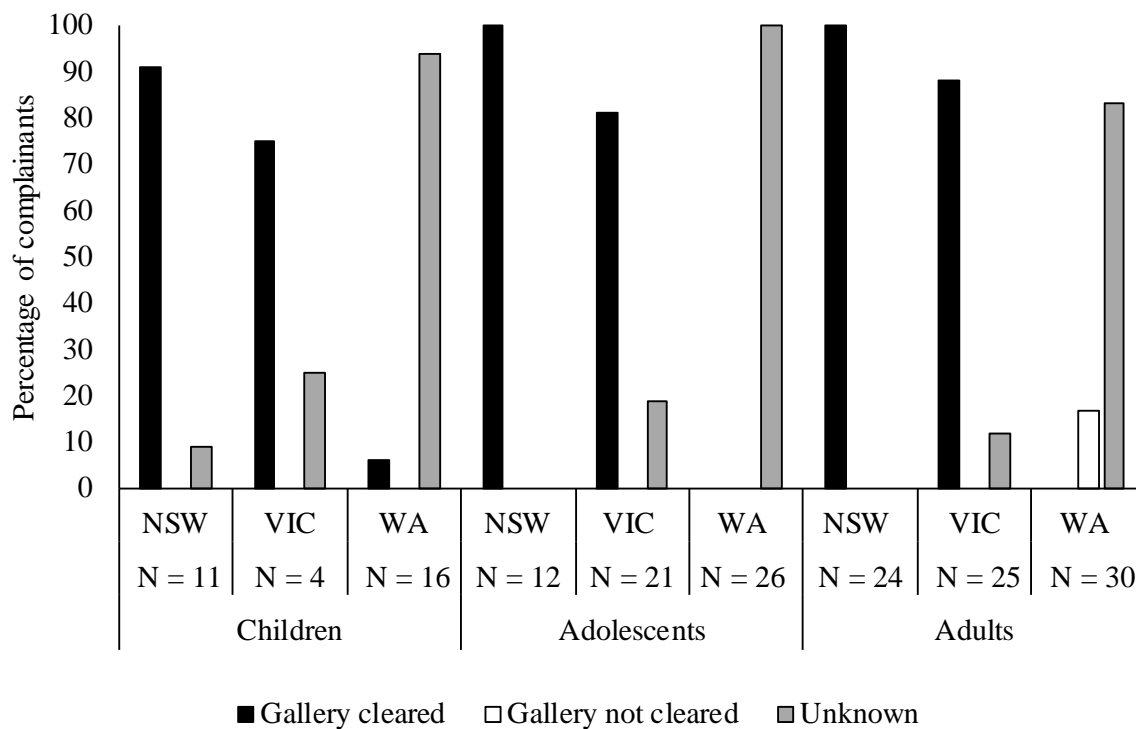
Although the identity of many of the support persons was not specified in the transcripts, those support persons who could be identified were most commonly from a support agency. A small number of complainants used multiple support persons from a combination of sources.

Of the four complainants who gave further evidence at second trials, all used a support person from a support agency.

Clearing the public gallery

Figure 6.5 summarises the evidence available in complainants' transcripts of first trials, regarding clearance of the public gallery.

Figure 6.5 Clearance of the public gallery at first trials, as a function of jurisdiction and age group



There was evidence of the gallery being cleared in the transcripts of all NSW complainants, with the exception of one child (out of 11). The gallery was also cleared frequently in Victoria, with this alternate measure being employed for three-quarters of child complainants, and approximately 80 per cent of adolescent and adult complainants. Reference to this alternate measure only arose in one-sixth of WA transcripts, and in these cases, the gallery was not cleared.

In the transcripts of three of the four complainants who gave further evidence at second trials there was evidence that the public gallery was cleared.

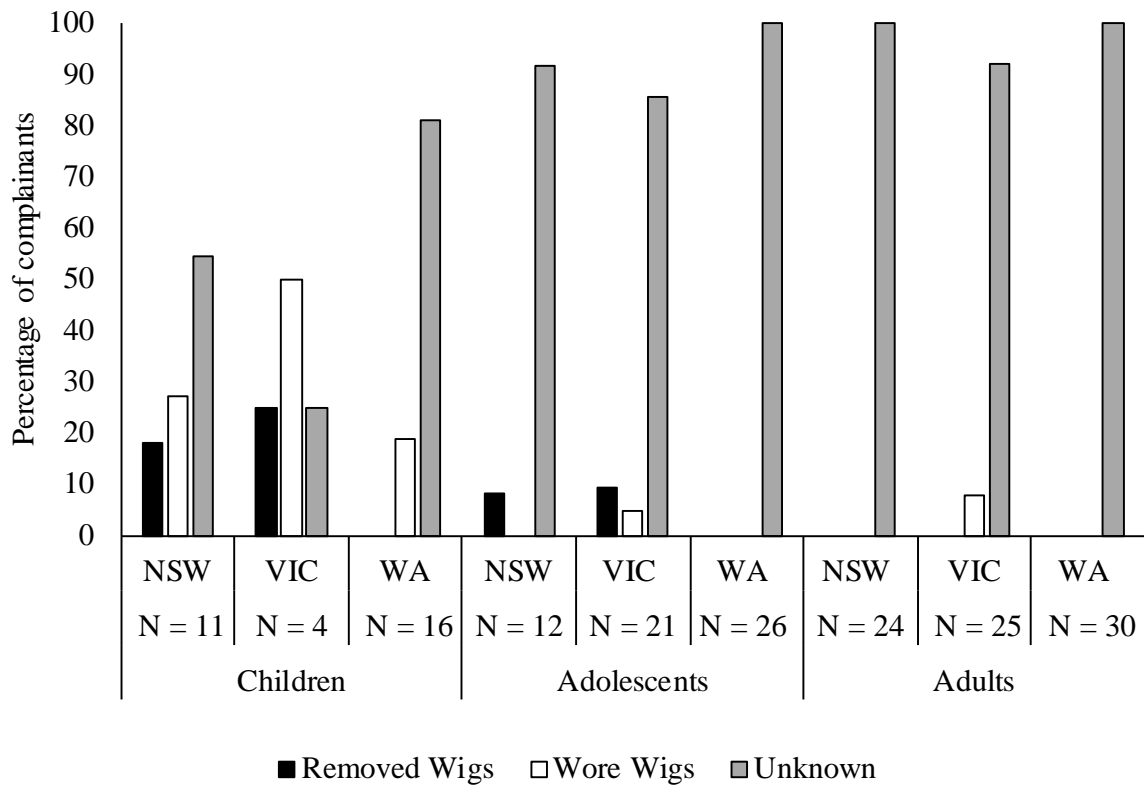
Information regarding whether or not the gallery was cleared was unknown for the remaining complainant.

Judges' and lawyers' removal of wigs and gowns

Removal of wigs

The information available in the complainants' transcripts regarding judges' and lawyers' removal of wigs at first trials is summarised in Figure 6.6.

Figure 6.6 Judges' and lawyers' removal of wigs at first trials, as a function of jurisdiction and age group



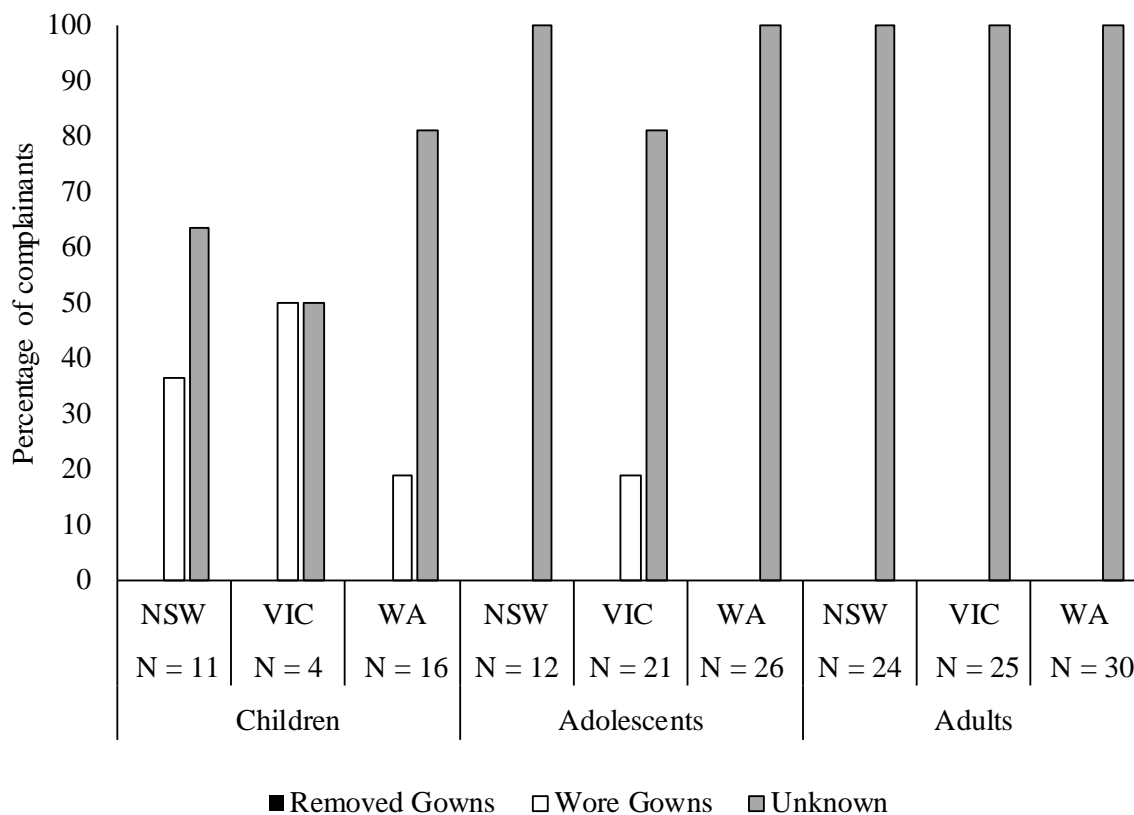
Reference to whether judges and/or lawyers removed or wore their wigs was unavailable in most of the transcripts. There was evidence of judges and/or lawyers removing their wigs for one-sixth of NSW children, one-quarter of Victorian children, one-twelfth of NSW adolescents, and 10 per cent of Victorian adolescents. Overall, however, there was more reference to judges and/or lawyers wearing their wigs than removing them.

This alternate measure was only referenced in one of the four transcripts of second trials, in which instance the judges and lawyers wore their wigs.

Removal of gowns

Figure 6.7 summarises the evidence available from complainants' transcripts of first trials regarding judges' and lawyers' removing their gowns.

Figure 6.7 Judges' and lawyers' removal of gowns, as a function of jurisdiction and age group



Transcripts rarely contained reference to whether judges and/or lawyers removed or wore their gowns. Of those transcripts that did reference gowns, all referenced gowns being worn rather than removed. There was evidence that judges and/or lawyers wore their gowns for one-third of NSW children, half of Victorian children, one-sixth of WA children and one-sixth of Victorian adolescents.

Only one of the four transcripts from second trials referenced this alternate measure, and in that instance judges and lawyers wore their gowns.

Problems associated with using alternate measures

To establish how often each problem arose, complainants who used the relevant alternate measure were selected, and the percentage who encountered the problem calculated. The prevalence of each problem is outlined in the following sections through a description of the main findings, followed

by a graph, where relevant. (Exact percentages and numbers are provided in Supplementary Materials 5 (online).) The nature and impact of each problem is then illustrated via excerpts from the transcripts. Excerpts have been edited to correct grammatical errors and improve readability. Analyses were only conducted on problems that arose at first trials.

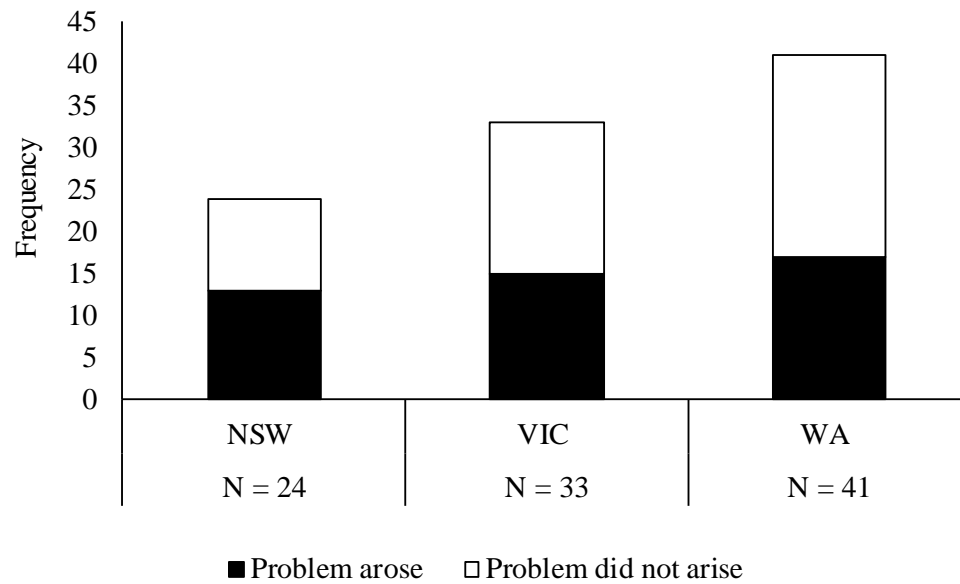
Playing police interviews

All complainants who used police interviews as their evidence-in-chief were included in the following analyses.

Overall problems

As shown in Figure 6.8, problems with police interviews arose most frequently in NSW, with just over half of complainants encountering some type of issue when giving their evidence in this format. Issues with police interviews occurred less frequently, but still often, in Victoria (just under half of complainants) and WA (two-fifths of complainants).

Figure 6.8 Frequency of complainants for whom some type of problem arose when playing their police interviews



Problems with technology

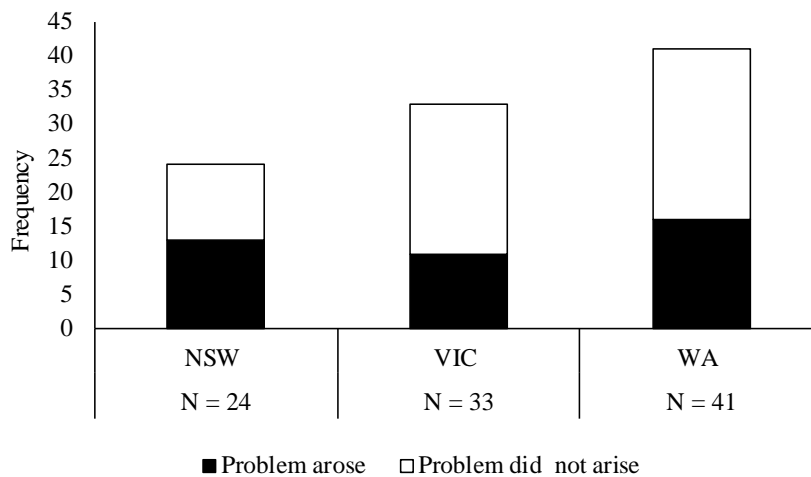
Text box 6.1

Judge: *There's a gremlin in this building and it comes to haunt me and all the other judges.* (Victorian adolescent complainant, 12 years old)

Judge: *There is always a technological failure, and I don't mean it as a pun – but it wouldn't be a trial if there wasn't a failure.* (NSW child complainant, 10 years old)

The problems that arose most frequently when playing police interviews were technological; for example, inadequate volume, difficulties obtaining a clear view of the complainant on the screen and issues operating the DVD player. As depicted in Figure 6.9, just over half of NSW complainants encountered technological issues when presenting their evidence via a police interview. Technological issues occurred less frequently, but still often, in Victoria (one-third of complainants) and WA (two-fifths of complainants).

Figure 6.9 Frequency of complainants for whom problems with technology arose when playing their police interviews



These technological problems in some cases caused substantial delays, disrupted proceedings and/or led to the evidence having to be replayed, as illustrated by the following excerpts from trial transcripts.

Text box 6.2

Prosecutor: We, here in court, are having some technical problems still with that recording so what I'm going to ask the judge to do in a moment is to put this trial over till tomorrow morning and ask you to come back then so that we can fix the problems and you can finish your evidence. Is that okay?

Complainant: Yes.

Prosecutor: Your Honour, that is my application.

Judge: No problem with that, Mr Crown. Ladies and gentlemen, the next procedure is there's a third interview with [Complainant]. You heard Mr Crown say there were technical problems. That's the polite way of saying something didn't work. I am assured that those technical problems will be corrected by tomorrow morning. It's best we proceed in direct order, so I'm going to let you go now.

(NSW adolescent complainant, 16 years old)

Judge: Ladies and gentlemen, I'm just stopping it because that sound that is annoying, that you're hearing coming over, is, I understand, somebody's mobile phone – so that the signal is interacting and, [Prosecution], we can't do anything about getting rid of that sound, is that right?

Prosecutor: No, unfortunately, Your Honour.

Judge: So I'm sorry about that, you'll just have to put up with it, but the parties are agreed as to the accuracy of the transcript through these parts, so that might help you, but anyway, just in case you're wondering, it's not something I've got control over. OK. Thanks, let's keep going...

The following discussion then took place in the absence of the jury in the same case.

Judge: If there's any lessons that are taken by police authorities – arising from efforts to take away from the person being spoken to – it's that a phone is likely to cause that sort of buzzing noise that we have to put up with.

Prosecutor: I agree with that entirely, Your Honour. It's most distracting.

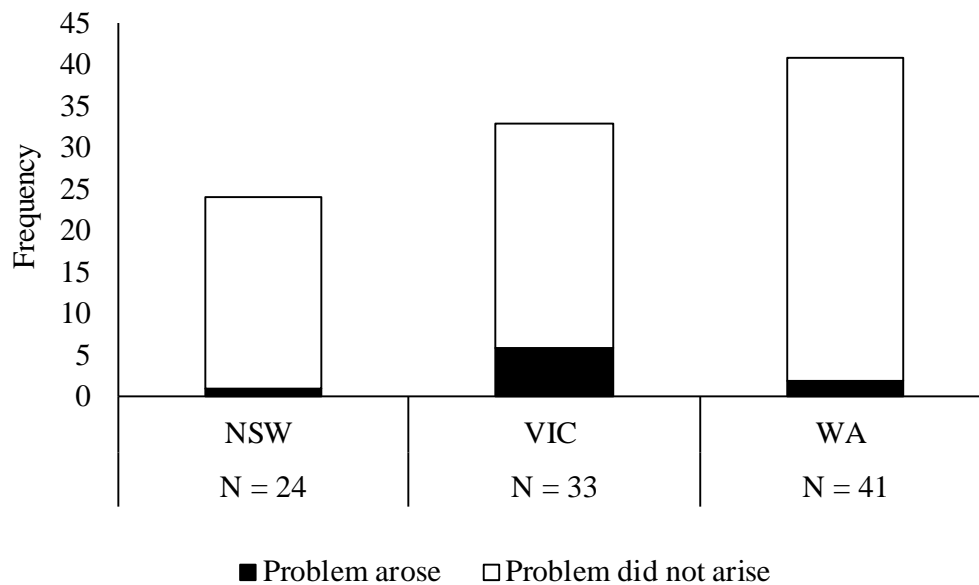
Judge: And it'd be a very good idea if they filmed the person's face, rather than just doing an overall shot from above. These sorts of statements the judges make often don't seem to be acted on by anyone. (Victorian adolescent complainant, 17 years old)

Judge: Members of the jury, thank you again for your patience and for your note which I have discussed with counsel. I appreciate that the recording was very quiet so far as the complainant was concerned and it was difficult to balance it, because the microphone was picking up the interviewer very loudly, so that would have made it very difficult for you to hear what the complainant was saying. The proposal is to take the unusual step of replaying the interview of the complainant, but on this occasion allowing the jury, by reason of their inability to hear the evidence properly first time around, to be assisted with a transcript, which will be a jury aid. I also understand we're going to try and play it through the computer, rather than the court system, which may enhance the audio. (WA child complainant, 6 years old)

Problems with editing

Problems with the editing of police interviews included mistakenly deleting content from the DVD, mistakenly leaving content on the DVD and practical issues with preparing the DVD for trial. These types of problems were most common in Victoria, where they occurred for one-sixth of complainants (see Figure 6.10). These issues arose for approximately one-twentieth of NSW and WA complainants.

Figure 6.10 Frequency of complainants for whom problems with editing arose when playing their police interviews



As illustrated by the following excerpts, in some cases problems with editing led to the judge having to read portions of the complainant’s evidence, substantial delays, and/or disruptions to proceedings.

Text box 6.3

Judge: Ladies and gentlemen, I can just tell you what occurred then. In every case involving a child’s interview with police, judges will always insist that counsel take out of those interviews any material that is not relevant. I have the habit of reading ahead and I just saw something in the transcript which seemed to me like it was irrelevant material and perhaps counsel intended to exclude that. I have been advised that, yes, they did. It was an oversight and had not been excluded, so what will happen is that the transcript will be amended to take out that portion that is irrelevant and we will continue on with the hearing of the questions and answers in the interview. You will not hear the irrelevant material. All right? What we got to was her response to question 197. I will read this out to you and then we will get on with the playing of the interview. This is how it happened in sequence ... [Judge reads portion of the interview]. Then we resume the interview with this question and answer and that can be played now. (NSW child complainant, 11 years old)

Prosecutor: Sorry Your Honour, I didn’t indicate this to Your Honour this morning, but I was being notified that the edits to the VARE have not been completed. I did indicate the other day that it takes 48 hours; it should be shorter. The message coming through this morning after my instructor has no doubt been

harassing those who are in charge of it, is that it’ll be some time today.

Judge: Well that’s all right.

Prosecutor: The advice that my instructor has is, we’ll text you or email as soon as it’s ready. My instructor’s been checking that religiously; nothing’s come through yet.

Judge: Well – and I appreciate you don’t know precisely – but it’s 25 past 12 now; do I send them away or what?

Judge to Jury: Ladies and gentlemen we’ve just struck our first little hiccup. I’ve been informed that there are technical difficulties with the, what’s called the VARE, which is the pre-recording of the complainant’s evidence with the police. That’s going to be the first piece of evidence that you’re going to be confronted with. Unfortunately, through no fault of anyone in this court, it’s uncertain that this technicality is going to be overcome and bearing in mind I’ve got a short afternoon. And also, I think it’s appropriate for you, members of the jury to have the evidence of the complainant, followed by the cross-examination in one go. I’ve come to the view, somewhat reluctantly, but I’m going to allow you to go today and back here at a quarter to 11 on Monday morning. I’m assured that we’ll have a pretty good run from that point of view. I’m sorry for that time but, as I say, I think the sun’s still shining outside and it’s a Friday afternoon. So please – my apologies but look it’s something which I have to balance up and I’ve come to that view and I think that’s the best. (Victorian adolescent complainant, 15 years old)

Prosecutor: Yesterday, the VARE was edited in accordance with the agreed edits between my learned friend and myself and it didn’t turn up in the mail this morning – in the express post – and subsequent

enquiries have revealed that it was mistakenly sent to the Latrobe Valley. This is not good enough, I appreciate, Your Honour, but the fact is another copy is being made and sent up here. We won't have it before tomorrow. Now, it doesn't mean we can't empanel the jury and have the opening and response but we can't go any further than that today.

Judge: Yes.

Prosecutor: I regret the situation, Your Honour, but ...

Judge: Well, we're all dependent on other people doing their job properly.

Prosecutor: Apparently, it was a junior clerk in the mail room who made the slip, Your Honour. It is now in the hands of ...

Judge: It's always a junior clerk.

(Victorian child complainant, 11 years old)

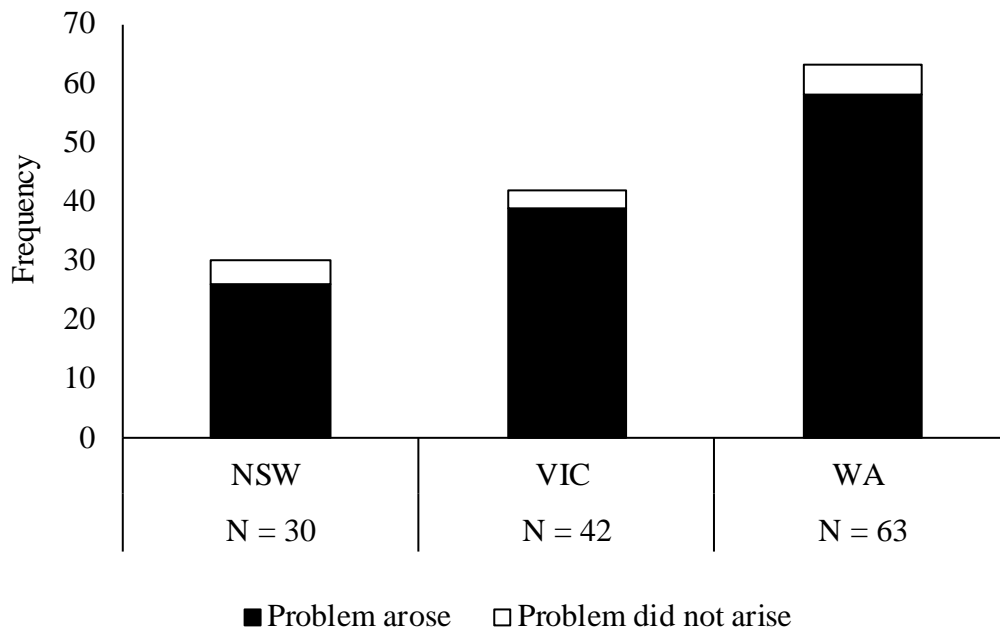
CCTV and AV links

All complainants who used CCTV or AV links at some stage of their evidence were included in the following analyses.

Overall problems

As shown in Figure 6.11, more than four-fifths of complainants in all jurisdictions encountered some type of problem when giving their evidence via CCTV or AV link. Problems were most common in Victoria, followed closely by WA and NSW.

Figure 6.11 Frequency of complainants for whom some type of problem with CCTV or AV link arose



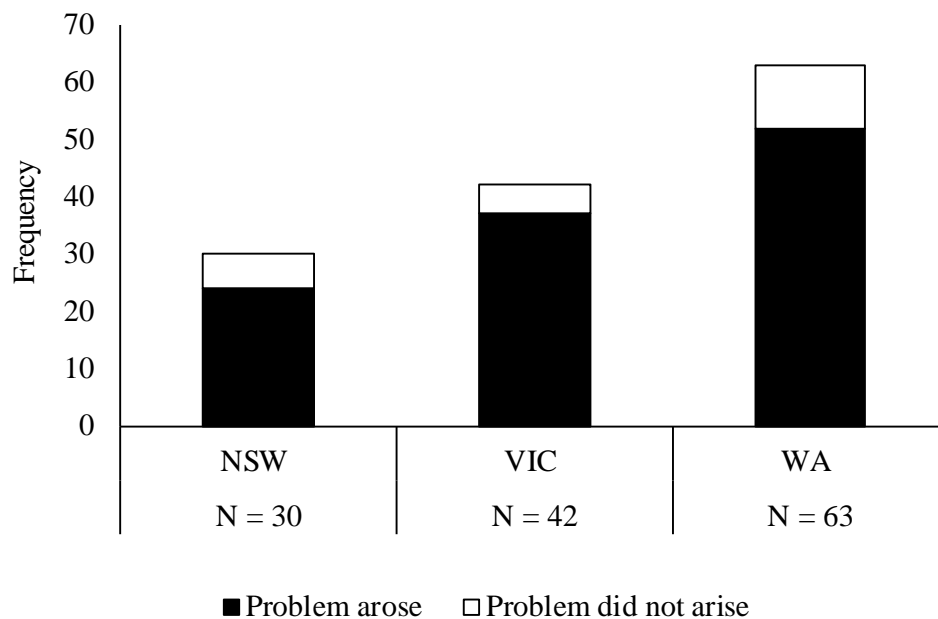
Problems with technology

Text box 6.4

Judge: Although we can put people on the moon, it's difficult to get a link between one place and another. (Victorian adult complainant, 19 years old)

Technological problems with CCTV and AV links included difficulties establishing the CCTV or AV link connection, inadequate volume, and difficulties syncing the audio and visual content. These types of problems arose frequently in all states, occurring for over four-fifths of complainants (see Figure 6.12).

Figure 6.12 Frequency of complainants for whom problems with technology arose when providing their evidence using CCTV or AV link



Technological problems with CCTV and AV links in some cases led to disruption during a critical part of cross-examination, the need to change courts and a complainant mistaking the defence for the prosecution. These types of problems are illustrated by the transcript excerpts provided below.

Text box 6.5

Defence: Let me suggest to you, [Complainant] that there was never any sexual relationship.

Judge: We've lost the transmission. Can you hear me, [Complainant]?

Complainant: Yes.

Judge: I'm sorry we just momentarily lost the transmission. We're now back online so counsel will keep questioning you.

(Victorian adult complainant, 27 years old)

Judge: Ladies and gentlemen, you may have thought until recently that I was harping on about the problems we're facing with the running down of facilities, but that painful example is probably still lingering in your ears. If it happens again I will get you out. If it happens again I will go even more ballistic than I've just gone, and we have another court available to us. Whether that court is any better than this one, I have absolutely no idea, so, I apologise. My ears are still ringing so I presume yours are as well. I won't even say "Please don't sue us". There's a couple of good lawyers in court if you need one, but please wait till after the trial.

When the issue recurred the trial was moved to a different court.

Judge: Welcome to [other court], ladies and gentlemen. The acoustics are better in this court but it's a court designed for cases where there are many accused so it's quite a different setup. Unfortunately we have lost nearly half the day.

(NSW adolescent complainant, 16 years old)

Complainant: I'm sorry about that, I thought – thought the other lady was you. The other – the – the – the pro ... the defence lawyer was you. I – I thought that for about – until – until I came here again after my break. I thought the defence lawyer was you.

Defence: I'm very flattered by that, sir. [The Crown] is far more attractive ...

Prosecutor: Okay. So you've got a little picture of us in the screen in the corner?

Complainant: Yeah.

Prosecutor: And for some part of that questioning you thought it was me?

Complainant: Yeah.

(WA adult complainant, 54 years old)

One particularly disruptive technological problem occurred at a trial involving a NSW adult complainant (20 years old) who, as a result of the technological difficulty, did not end up testifying at that trial. In this case, the prosecution opened on the basis that three complainants would be providing evidence, with one complainant planning to give evidence via a CCTV and AV link connection due to an illness that made her unable to travel to the court. As the court did not have appropriate AV facilities, plans were made for the complainant to present her testimony via Skype. When the Skype connection failed, it was suggested

the complainant travel to the court, against medical advice. When it became clear that the complainant would be unable to travel to the court, the jury was discharged after four days and after hearing the evidence of the two other complainants. An excerpt of the judge's comments to the jury is provided below.

Text box 6.6

Judge: *Members of the jury, this courthouse, unlike most other courthouses in New South Wales, does not have the basic facility of an audio-visual link from this court to other places. That creates problems for the court. There are frequently occasions when a person needs to be present in the courtroom other than being physically present. So most courtrooms in New South Wales have an audio-visual link. Now, representations have been made by the court and by the legal profession to state government to increase or to bring this courtroom up to the bare minimum of what is appropriate for a courtroom in the 21st century, without success. That has a major impact on the way trials are conducted.*

In this case, three complainants have made allegations. [One of the complainants] cannot travel. She has a number of illnesses ... Now of course, if we'd had an AVL, it would not have been a problem. The Crown sought to overcome the problem by relying on Skype technology. A number of tests were undertaken by the Crown in good weather, which worked. In poor weather, Skype just doesn't work. The Crown and [the defence] expected that each of those three complainants would give their evidence to you. As things have transpired over the last few days, you would have picked up [one of the complainants] is not going to be able to give evidence to you in any form whatsoever, either by Skype or in person. You might think to yourselves "Well, let's just conclude this trial on the basis of the witnesses we have heard". We've heard two complainants. But if you think about it just for a minute, you can see the danger of such a course because the Crown has told you that there's a young lady who has made serious allegations against

[Defendant], and that's been put before you in the Crown's opening. She should be here to give evidence of that, otherwise that allegation should never have been raised with you.

Because she cannot come, because this has only emerged in the course of the weekend, the position has been reached where the trial cannot proceed. I am satisfied in my own mind that the Crown took the steps it did in totally good faith. If Skype had worked, the Crown's decision would have been correct.

You have been inconvenienced. No doubt about that. You have had to put aside four days, you've had to concentrate, you've had to listen to material you probably didn't want to hear, and it's no doubt been a great inconvenience to you. I hope I've explained to you how it's arisen, but the fact that this problem has arisen leads to only one conclusion: that this trial must be aborted.

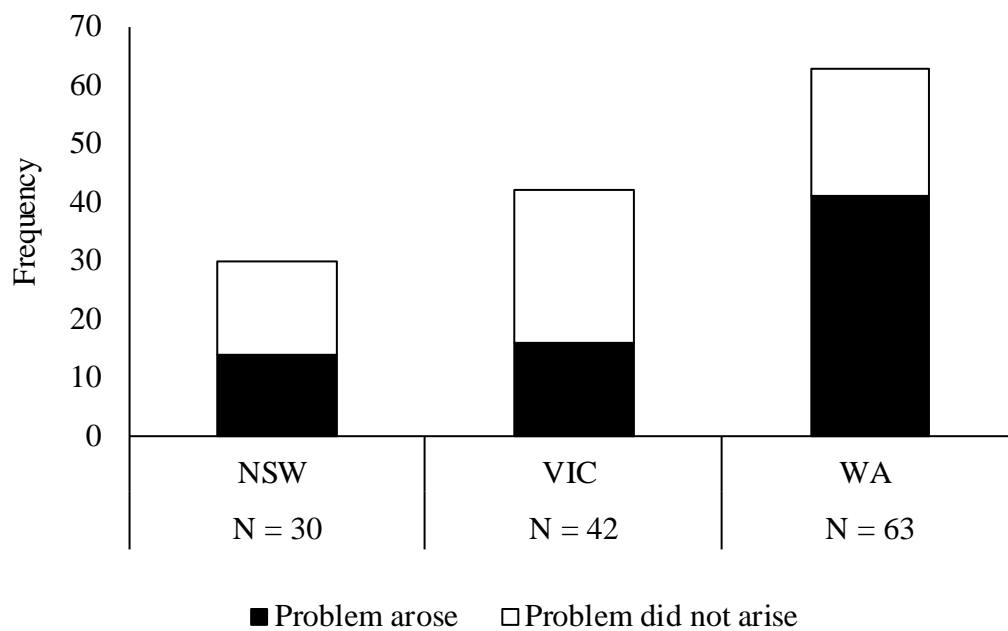
Your time in the Court hasn't actually been wasted, funnily enough, because in the retrial that is to come, the two complainants who have given evidence won't have to go through that again. It's been recorded, and in cases such as we're dealing with at the moment there is special legislation that says that the evidence of the complainants shall be recorded, and if there is a retrial, that's played to the next jury.

*So it hasn't been a complete waste of your time. Those young ladies won't have to give evidence again.
(NSW adult complainant, 20 years old)*

Problems with presenting exhibits

Problems with presenting exhibits to the remote room included difficulties operating the document camera, and unscheduled delays while documents were ushered to and from the remote room. As can be seen from Figure 6.13, these problems occurred most frequently in WA (two-thirds of complainants), followed by NSW (half of complainants) and Victoria (two-fifths of complainants).

Figure 6.13 Frequency of complainants for whom problems with presenting exhibits arose when providing their evidence using CCTV or AV link



As demonstrated in the transcript excerpts below, problems with presenting exhibits to and from the remote room disrupted proceedings and, in one case, led to a complainant accessing documents without permission.

Text box 6.7

Judge: Is a copy of that document up there?
Prosecutor: No, Your Honour. We do have a copy that could be sent up.
Judge: This is another impossible demand on our court officer. She has got to now physically go up, otherwise the witness will be left alone in the room. It's not a criticism of [defence] or the Crown, it's probably an oversight; we didn't think about it.
Judge: Were there any other exhibits needed while we are here, to save the court officer going up again? Do you want any?
Defence: It appears she has already gone, Your Honour.
Judge: No, the court officer is waiting ... Just bear with us [complainant], we are just sorting out a few working issues ... our court officer will come up shortly and hand over the documents.
 (NSW adolescent complainant, 13 years old)

Prosecutor: I'll just put this up on the document camera, Your Honour, and feed that through to the witness. Yes. If we could just ... Can you see a sketch?
Complainant: No.
Judge: Just bear with us while we try and get it to you.
Prosecutor: Can you see a sketch now?
Complainant: No. Yes.
Judge: Well, sorry ... we've lost sight of the witness.

Prosecutor: Well, I was just going to get him to explain the part of the map and then we'll put him back on. I don't think this is in dispute, Your Honour.
Judge: It may not be, but I'd like to see him on the screen, rather than the map.
Prosecutor: Very well.
Judge: Can you get a copy of the map taken round to him?
Prosecutor: We can.
Judge: And he can describe it for us while we can see it?
Prosecutor: Yes.
Judge: And he'll have it in front of him.
Prosecutor: But won't we lose picture?
Judge: We'll lose – well, we can get around that by perhaps photocopying the plan for the jury.
Prosecutor: All right.
Judge: But I think we really need to see the witness.
Prosecutor: Very well. There is a way to get him in the bottom half of the screen.
The Clerk of Arraigns: Yes. It's not working, though.
Prosecutor: All right.
Judge: Technology only goes so far sometimes ... Sorry, [complainant]. We've now got a picture back of you. We'll get that plan brought round to you.
 (WA adult complainant, 23 years old)

Prosecutor: I just want to put on record that we gave the documents to the court officer to take up; we assumed, as in every other matter that no access is given to those documents.
Judge: The court officer could correct me, but I think it probably originates out of the fact that, as is apparent from the first minute of today, that there is no other court officer there in the room. We would normally

have one, and regrettably the cuts have meant that the staff are down and [complainant] may have been left to her own devices during the break.

Defence: Yes.

Prosecutor: It would appear that was the case, Your Honour.

Judge: Trained officers are usually with complainants and they would make sure of these things.

Defence: Those days are gone.

Judge to Jury: I ask for your patience when things don't go overly smoothly. We have to put up with what we're supplied with. In the olden days the chair that you can see behind the witness was usually occupied by an experienced court officer, but as you know there have been wide ranging cuts, so consequently we're making do with what has been provided to us. It's absolutely nothing to do with anyone's fault in this particular courtroom, and I apologise for it. You may recall before lunch the witness indicated that she'd read her statement. Now that is obviously not appropriate, as you can glean, but it's not the fault of the witness. In normal circumstances there would have been a trained court officer sitting in a chair who would have instructed the witness whenever we take an adjournment. We are making do with the technology that we are provided with. But I apologise again, ladies and gentlemen, it must be terribly frustrating, as it is for all of us. (NSW adult complainant, 38 years old)

Judge: Have you clarified the question of the notes?

Prosecutor: Yes. The originals are with us. So we will need to get them to the Child Witness Service, which is a different location to the court but walking distance.

Prosecutor: Sorry, Your Honour, we're just working out logistics of getting those notes down to Child Witness Services.

Prosecutor: Well, those notes are being run down to her now. That might take five minutes for the journey. We'll need to interrupt her to get them into the room at some point.

Judge: I'll leave the Bench for a short time and you can indicate to me when you're in a position to proceed. (Victorian adolescent complainant, 14 years old)

Problems with recording

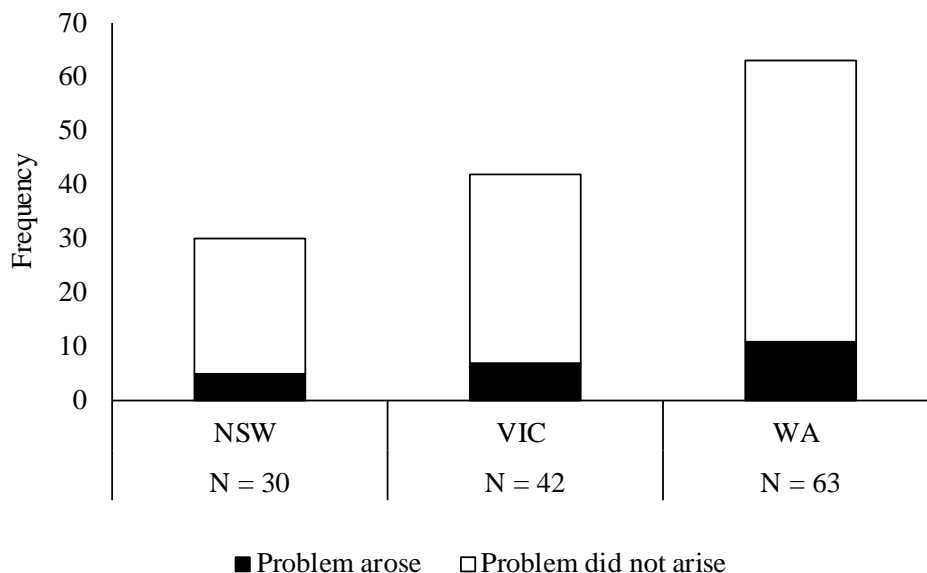
Text box 6.8

Judge: Modern technology can be a wonderful servant but a cantankerous mistress.

(WA adolescent complainant, 12 years old)

Issues with recording evidence via a CCTV or AV link included difficulties operating the recording equipment and malfunctions with it. As can be seen from Figure 6.14, these issues arose in approximately one-sixth of cases, across each of the jurisdictions.

Figure 6.14 Frequency of complainants for whom problems with recording evidence arose when providing their evidence using CCTV or AV link



For one WA child complainant (10 years old), her cross-examination at her special hearing stopped recording part way through. This recording was played to the jury at trial and she was required to undergo further cross-examination from the point at which it

cut out. In the case of one NSW adult complainant (23 years old), her evidence regarding two of the counts was not recorded due to a failure to put the equipment in operation and, as such, she was asked about these counts again. Other issues with recording

led to trials being delayed, to complainants giving un-recorded evidence and to cross-examination being interrupted, as evidenced by the following transcript excerpts.

Text box 6.9

The Clerk of Arraigns: Excuse me, judge? The recording is not ticking over.

Judge: Isn't it?

The Clerk of Arraigns: No.

Judge: Okay. Just bear with us for a moment [Complainant]. We've got a little technical glitch here ... I think we're still working on the problem, are we not?

The Clerk of Arraigns: Yes, judge.

Judge: Is it working now? Okay, all right. Okay. [Complainant], we've got a technical hiccup. These things do occur sometimes and what we want to do is we want not only to take your evidence, but to record it. And at the moment, it's not recording and I just want to get somebody to look into it. So I'll just turn the link off for the moment.

Complainant: Okay.

Judge: Counsel, I'm told by staff that we're not recording.

Prosecutor: Yes, I heard, Your Honour. It's obviously important to do so.

Judge: And it was tested this morning prior to the court starting?

Prosecutor: Yes.

Judge: And we were recording, but we're not now and we don't know why. So perhaps we'll need a few moments. Every now and then, ladies and gentlemen, gremlins take a role in proceedings and it appears to be happening now which is really annoying, because, of course, we've got the witness waiting and you're waiting, everyone's waiting. What we'll do is we'll adjourn for as short a time as we possibly can and we'll get one of our technical people in, somebody aged about five, I suspect, to try and deal with the problem which we adults can't deal with. So, if you'll leave us now and we'll have you back as soon as we can.

(WA adult complainant, 20 years old)

Judge: We'll fix that as quickly as possible. We have to adjourn again, members of the jury. This is regrettably not uncommon, these sorts of technological problems. It was better in the old days when we used VHS tapes and tape recorders and things. Would you please go to the jury room?

Judge: All right. Now, apparently the link is working this time but not the recording, so we're going to press on without recording this evidence. Let's just put on the record that if, God forbid, this girl ever has to testify again she can blame the technology in this building. We'll have the jury back, please. We'll have the complainant back too, please.

(WA adolescent complainant, 12 years old)

Judge: Now, before you continue, I am loathe to interrupt cross-examination, but my tipstaff told me a minute ago we've got three minutes left on this DVD.

Defence: Right.

Judge: And so I think we will just have a short break, gentlemen. It won't take long. We can remain in court, can't we, just while he changes the tapes?

Defence: Yes, Your Honour.

(Victorian adult complainant, 35 years old)

Inappropriate communication

Incidents of inappropriate communication between the complainant and others in the remote room were rare. They occurred for two (out of 30) NSW complainants, both of whom were children, and two (out of 63) WA complainants, including one adolescent and one adult. There was no evidence of such issues arising for any Victorian complainants. Excerpts illustrating the inappropriate communication in the remote room are provided below.

Text box 6.10

Prosecutor: How old are you now?

Complainant: Fourteen.

Prosecutor: And where do you live?

Complainant: [street number] – yes. [street number] – no. That's not where I live. Where do I live?

Prosecutor: [Complainant]?

Complainant: Yes.

Prosecutor: I need you to answer the question as best you can. So don't worry about who else is in the room. Don't ask them about anything that I ask you.
(WA adolescent complainant, 14 years old)

Judge: You know, don't you, [complainant], that [defence] wants to hear your answers, not [support person's] answers, or not the court officer's answers. The only answers that [defence] is really interested in, are your answers, okay?
(NSW child complainant, 8 years old)

Complainant distractibility

Incidents of complainant distractibility in the remote room included complainants playing with toys inappropriately or having trouble staying in their seats. Such incidents occurred infrequently, arising for only two (out of 30) NSW complainants and two (out of 63) WA complainants, all of whom were children. There were no incidents of complainant distractibility in the transcripts of any Victorian complainants.

The impact of complainant distractibility on the running of a trial is best illustrated by excerpts from one NSW child's transcript. This child's distractibility disrupted the trial repeatedly and to the extent that she was eventually brought into the court to complete her cross-examination live, rather than via CCTV or AV link. Examples of her distractibility are provided in the excerpts below.

Text box 6.11

Defence: I'm not trying to make this more difficult for the witness, but I have an issue with the large monkey being in the room. There's been no issue raised if the kid is playing with playdough, but given that she's already waved the monkey at the screen, I just have an issue with it.

...

Prosecutor: Maybe we could ask that the monkey just stay off-screen.

Judge: Yes, if the monkey sits in a chair and she can look at the monkey.

Defence: It was just her playing with the monkey.

Prosecutor: Yes, it is a distraction.

...

Judge: [Complainant]?

Complainant: Yes.

Judge: You've got something stuck in your hair, have you?

Complainant: Yes.

Judge: Maybe don't put the playdough in your hair; it will get stuck.

Complainant: Okay.

Judge: Please sit up, [complainant].

Complainant: Yes.

Judge: Could you sit up. It's very hard for us to hear when you're talking down near the floor. Thank you very much. You've picked your things up, found some keys?

Complainant: Yeah.

Judge: Thank you. Maybe put them down. The court officer might take those.

Judge: Back on the chair, please. Thank you, [complainant]. We'll have a break soon. Okay, thank you very much.

Judge: Is the court officer there?

Court Officer: Yes, Your Honour.

Judge: Are you able to put her on the chair please?

Court Officer: She is just at the back of the equipment.

Judge: Could she be guided to the chair please? [Complainant]?

Support Person: Your Honour, would you like me to help as the support person?

Judge: Yes, please. [Complainant], just come to the chair ...

Judge: Would it make a difference – I know this is perhaps not desirable and some people might be surprised I'd suggest it, but if she came into court?

Prosecutor: That's been suggested, Your Honour, and I'm happy to try it. She might run amok, and I say that with great respect, but it may be that the trappings of formality rather than being in a room where it's removed, she might suddenly be impressed – probably not the right word – but she might be impressed into a position.

Judge: Yes.

Prosecutor: We would like her to come into court now. That was suggested by her support person yesterday and I kind of thought no at that stage, but I think the stage is reached where we need to try that last position.

Judge: I think that should perhaps be tried before looking at the application that [defence] might wish to make.

Prosecutor: Yes. Could I have a moment to ask my instructor to have [complainant] brought to court?

Judge: Yes. I'll go off. She can come over and if she refuses to come in then we'll deal with that, but I think that should be tried, because – anyway, it's obvious to everybody – I don't think it's fair to the accused, nor to the jury – to anybody – to continue with this.

Prosecutor: I think, with the greatest of respect, both my learned friend and I, all of us at the bar table, would say that Your Honour has gone to the nth degree to assist in this part of the proceedings.

Judge: I don't think there's a problem in telling the jury we are going to see if she'll come into court, because she either will and they'll see that or she won't and then I'll be explaining other things in any event.

Prosecutor: Indeed, Your Honour.

Judge: Because she's in another building it will take a couple of minutes for her to get here. She probably should have the opportunity of coming in here and looking at it before coming in and the jury and everyone is here.

Prosecutor: She's been court-prepped before, but I think, yes, we'll just show her where everyone sits.

Judge: I can even come and speak to her and ascertain whether she's prepared to sit in the witness box and answer questions. If she's not, then we'll take it from there, but all of that will probably take 15 or 20 minutes. If you let [the jury] know if they'd like to go upstairs. I don't want them to think it will be five minutes when we all know it will be longer. That will infuriate them even more.

Prosecutor: Just on Your Honour's point about the jury, being so close to them I could hear audible sighs of exasperation.

Judge: Yes.

Prosecutor: One could understand that.

Following the cross-examination live in court, the discussion below took place.

Prosecutor: Does Your Honour have a note of what time we came back with [complainant] into the courtroom?

Judge: Yes. 11.14.

Prosecutor: So we did probably 44 minutes.

Judge: We should have thought of this days ago.

Defence: We effectively lost basically a day, with the difficulties with that young person's evidence. (NSW child complainant, 8 years old)

Problems with location

Concerns about the proximity of the remote room to other areas, such as the defendant's waiting area or noisy parts of the courthouse, were raised infrequently. Such problems arose for only three Victorian complainants (out of 42), all of whom were adults. There was no evidence of these problems arising in NSW or WA. Examples of the concerns that were raised are provided in the excerpts below.

Text box 6.12

Complainant: ... Sorry, there's just a bit of noise outside the door here that's distracting me.

Judge: I'll just point out, I've got a monitor screen here that shows me a full shot of the room and there is a noise that I can hear too, [someone saying] "The door isn't opening"?

Complainant: Yeah, that's correct.
(Victorian adult complainant, 32 years old)

Prosecutor: The point that I was going to make, Your Honour, is that the remote witness room here is on the same floor as the smokers' area, and I would ask perhaps that [defence] stay away from that area whilst the complainant is present at court.

Defence: I'm a smoker. It will take me half an hour getting in and out of security if I have to go outside to have a smoke. I will go to the far end. I'm not looking to – I don't want to see her, Your Honour.

Judge: Hold on. I'm sure the informant, the Crown instructor and the defence instructor can organise that. Is she a smoker?

Prosecutor: No, but if you know the layout of the floor ...

Judge: No, I've never been there.

Prosecutor: No. The remote witness room is just down past the smokers' area, and so it's a most unfortunate ...

Judge: Look, what you've put is obviously what must occur. I've got to balance it with knowing how long it takes to come in and out of this building with security. Can she be put in an interview room immediately after she gives evidence?

Prosecutor: There's an anteroom, as I understand it, down there, but ...

Judge: If we can get her moved to another floor – can that happen? The four remote witness rooms are all on that floor ...

Judge: We will come back in 20 minutes. And one thing, if the Crown instructor sees if there could be some arrangement worked out where the complainant can go to the anteroom if [defence] is going to have his addiction to cigarettes sorted.

(Victorian adult complainant, 35 years old)

Insufficient availability

Problems with the availability of the remote room arose infrequently. They occurred for three NSW complainants (out of 30), all of whom were children giving evidence in the same case. They also occurred for three Victorian complainants (out of 42), including one child and two adults. There was no mention of insufficient availability of the remote room in any of the WA transcripts. Insufficient availability of remote rooms led to delays in proceedings, as evidenced by the following transcript excerpts.

Text box 6.13

Judge: Members of the jury, we will need to take just a break but we will probably end up taking 15 or 20 minutes because we need to get the next young child into that room and [previous complainant] out of that room, because there is only one room that can be used, so I could pretend it will only take five minutes and have you wait longer, or, go for a walk to the jury room. We will have you back as soon as we can.

Judge to lawyers: Because the witness assistance officer or person who is looking after each complainant endeavoured to keep the girls separate and not cross one another's paths, she [next complainant] is not outside the room. It is apparently going to take 20 minutes to transfer and effectively have her in.

Prosecutor: I know that the witness assistance officer was very mindful of that. I think she [next complainant] was up at the office with the DPP.
(NSW child complainants, 8–10 years old)

Prosecutor: Your Honour, I'm instructed that, as of this morning, no remote room was available for the complainant, and she won't be attending court today, but further information is that a remote room will be available for tomorrow, although there's been a request that we indicate what time she would be required.

(Victorian adult complainant, 27 years old)

Other problems

Other problems with the use of CCTV and AV links arose for two NSW complainants (out of 30), including one child and one adolescent. For the child complainant (eight years old), there were difficulties getting her to return to the remote room after a break. For the adolescent complainant, two other problems associated with the remote room arose; first, those in the remote room locked themselves out and second, the complainant left the remote room and did not return, leading the judge to abort the trial. These problems are illustrated by the excerpts below.

Text box 6.14

Defence: Your Honour, the court officers very kindly advised us that it appears that they've managed to lock themselves out of the room upstairs.

Judge: Yes, I know.

Defence: It would appear that that may be still be the situation.

Judge: If that's the case, my patience is about to be exhausted. See if we can resume. Can we resume at 10 to 2?

Defence: That's convenient to me, Your Honour.

Judge: The jury can have their lunch. This is just the first instalment, ladies and gentlemen, of your experience of the Court system. I don't think it's got anything to do with the wigs and gowns we wear, but sometimes we think things are very last century when it comes to using technology.

Defence: I think things worked better last

century, actually.
Judge: I think they did. But we'll take the luncheon adjournment. Hopefully, we can resume at 10 to 2 and do what we can, but the timetable for trial unfortunately has been put out by what we've lost this morning. We'll just see what we can do. All right.
 ...
Defence: Well, why didn't you say on [date] "Yeah, I don't know?" Why did you proffer the time 10.30?
Complainant: I don't know. You've already asked me that question. Please ask a different question that you haven't already asked.
Defence: [Complainant], I hate to tell you this, but I ask the questions that I want to ask; you don't tell me the ones that you want me to ask. Do you understand that? ... Would your Honour allow me to seat myself?
Judge: Yes
Defence: Thank you.
Judge: We'll have to have a quick break, ladies and gentlemen. We'll investigate what's happening.
Defence: Would Your Honour mind putting on the record what happened.
Judge: Yes. The complainant, in response to your response to her question, left the seat, followed by her support worker.
Defence: Thank you, Your Honour.

Judge: All right, ladies and gentlemen, we'll have to have an investigation into what's going on. It's one of the problems of having a remote witness room. I think you should go back to the jury room and we'll let you know as soon as we're in a position to resume the trial.
 (NSW adolescent complainant, 16 years old)

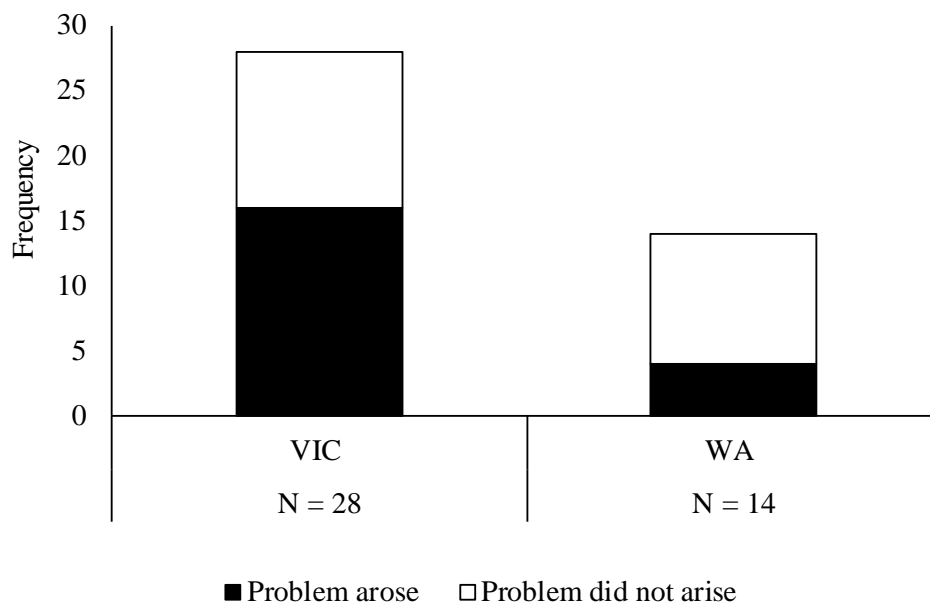
Playing evidence recorded via CCTV or AV link

In the following analyses, all complainants were included whose evidence, played at trial, had been recorded via CCTV or AV link. No complainants from NSW used this technology at their first trial, thus, none are included in these analyses.

Overall problems

As can be seen in Figure 6.15, problems with playing evidence that had been recorded via CCTV or AV link arose more frequently in Victoria (three-fifths of complainants) than WA (less than one-third of complainants).

Figure 6.15 Frequency of complainants for whom some type of problem arose when playing evidence recorded via CCTV or AV link

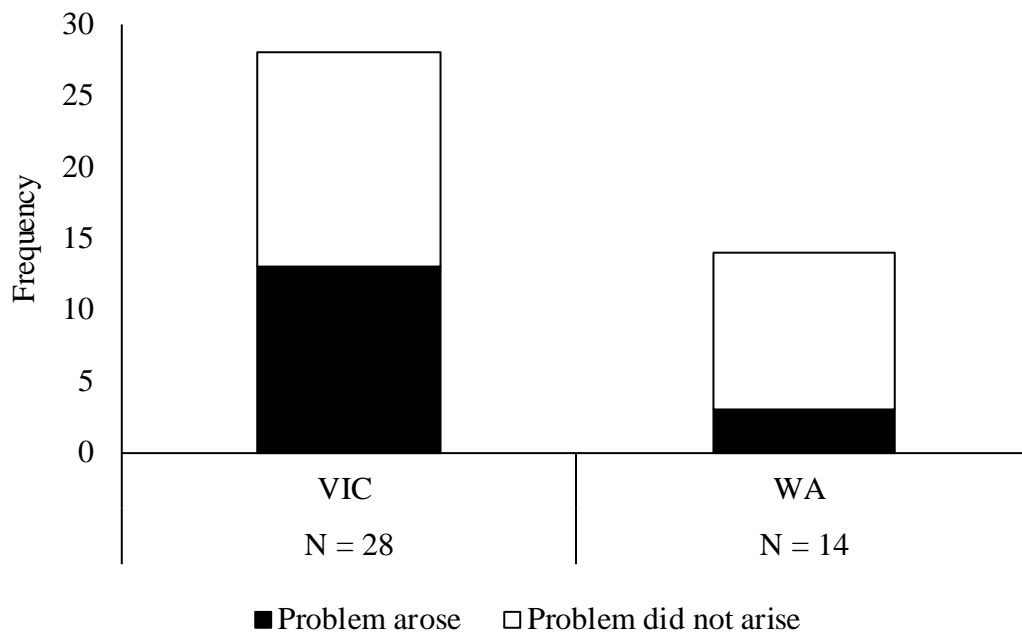


Problems with technology

Text box 6.15
Judge: At your workplaces, all of this would happen with the blink of an eyelid. However, the fact that I'm wearing 17th- or 18th-century garb is probably an indication of the level of technology we've got to deal with.
 (Victorian child complainant, 10 years old)

Technological problems with playing evidence that had been recorded via CCTV or AV link included inadequate volume, difficulty obtaining a clear view of the complainant (or lawyers or judge), and issues operating the DVD player. As shown in Figure 6.16, technological issues arose more frequently in Victoria (just under half of complainants) than in WA (one-fifth of complainants).

Figure 6.16 Frequency of complainants for whom problems with technology arose when playing evidence recorded via CCTV or AV link



As shown by the following transcript excerpts, technological problems often led to delays in proceedings.

Text box 6.16

Judge: *That disc has frozen.*
Associate: *Yes, Your Honour.*
Judge: *Take it back.*
 [Video played to court]
Judge: *Is there a way of unfreezing it, Mr Tipstaff? Should we stand down? Or are we happy to give it a go now? No? Well, you make the call.*
 [Video played to court]
Judge: *No. Sorry. Just stop it there, please, Mr Tipstaff. What we might do is stand down, ladies and gentlemen, for a moment. The technology that we've got to deal with here doesn't permit us to go very selectively to places on the disc. It's just the technology that we've got to deal with it. And once we have lost our spot in it, it's quite hard to get back to the spot we need to be. It might take us two or three minutes or it might take us 10 minutes. So just be patient with us, please.*
 (Victorian child complainant, 10 years old)

Unidentified speaker: *It's not at the start.*
 [DVD played to court]
Judge: *Wait. Wait. Wait.*
 [DVD played to court]
Judge: *Okay. Can we rewind it to the beginning, please?*
 [DVD played to court]
Judge: *Push – sorry. Hang on.*

...

Judge: *Yes. So push play, please.*
 [DVD played to court]
Judge: *Okay. Push stop now, please. Okay, what we're going to try to do now, members of the jury, is put on a disc which will just show [complainant]. In other words, the image or the view from the bottom right hand. So let's see if we can manage that.*
 [DVD played to court]
Judge: *Okay. Okay. Now, we need to do some fast forwarding. Yes, fast forward. Just let her rip.*
Defence: *14:34:01.*
Judge: *Okay, thanks. Okay. Well, just do your best. Would you like to go to the jury room, please, members of the jury?*
 ...

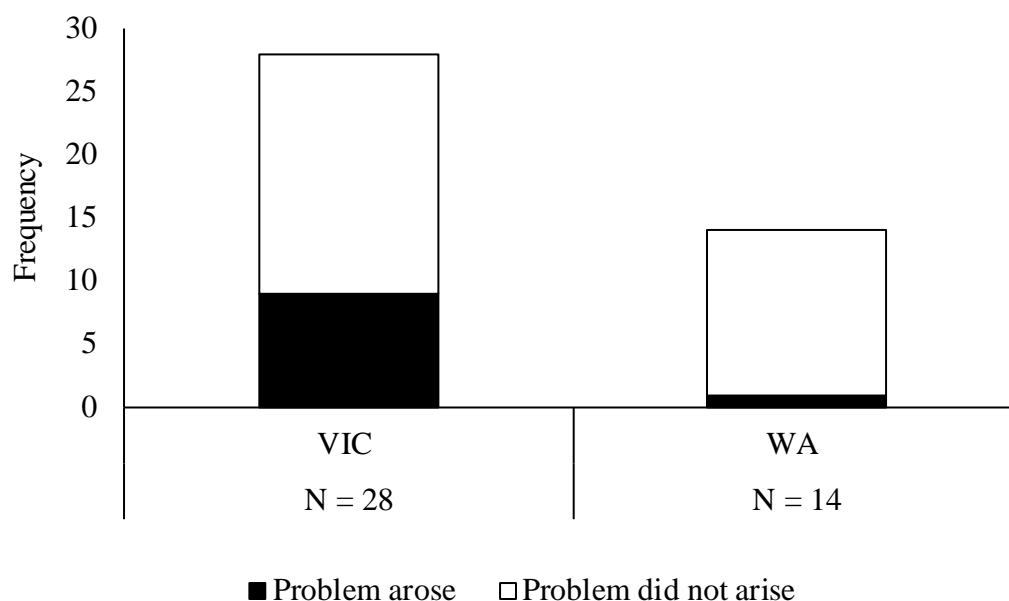
Judge: *So it's going forward at a second every three seconds.*
Defence: *Yes, it's on quarter speed, sir. You can see from the index on the right side.*
Judge: *Goodness me. I'm just going to go somewhere else. Will someone let me know when we're ready to call some evidence?*
Defence: *Very well.*
 (WA child complainant, 9 years old)
Judge: *If we can just pause there, please. Ladies and gentlemen, you may barely be able to hear what is, in fact, my voice there. For some reason, I must have been speaking away from the microphone, or something like this. We will just continue.*
 [DVD played to court]
Prosecutor: *Your Honour, if I could just ...*
Judge: *Yes, we will just pause it now.*
Prosecutor: *I find that hard to hear myself.*

Judge: You are probably not the only one.
Prosecutor: There was a test run yesterday where it was louder, so I wonder if it can be turned up a bit. [DVD played to court]
Judge: I take it that is a bit difficult to hear, is it?
Foreman: Very difficult.
Judge: No, well, that's not good enough. We will have to get some technical assistance in and try and rectify that. What I will do at this stage is just ask you to go back into your room.
 (Victorian adolescent complainant, 17 years old)

Problems with editing

Issues associated with editing evidence previously recorded via CCTV or AV link included mistakenly deleting content from the DVD, mistakenly leaving content on the DVD and practical issues preparing the DVD for trial. These issues arose for one-third of Victorian complainants, compared with only one-thirteenth of WA complainants (see Figure 6.17).

Figure 6.17 Frequency of complainants for whom problems with editing arose when playing evidence recorded via CCTV or AV link



Problems with editing caused disruption to proceedings and in some cases led to delays in playing evidence and to judges having to read in the admissible evidence. Examples of such disruption are illustrated in the excerpts below.

Text box 6.17

Prosecutor: Your Honour, despite the best efforts of the audio-visual technician, the equipment has failed – essentially through overuse. There were ...
Judge: I see.
Prosecutor: The number of edits that had to be done in Warrnambool and then had to be re-done has exhausted the equipment, so although the edits have been completed, when it came to editing the special hearing it was the importing phase that failed, so the disc is no longer court-compatible. Your Honour, the technician said in court that there were two options available. He can drive back to Melbourne today and complete the task – which will take some hours in Melbourne – and have it couriered to Warrnambool tomorrow – which we would expect to receive tomorrow afternoon or early Friday

morning – or alternatively, we could place enormous responsibility on Your Honour's tipstaff and stop at the relevant portion, send the jury out, fast-forward, bring the jury back in, and still have the hearing ultimately made court-compatible over the long weekend, in the event that the jury wish to take the disc with them into their deliberations. They are the two options. I understand my learned friend has a preference for one over the other.
Judge: Can I ask you a couple of questions first?
Prosecutor: Yes.
Judge: If it goes back to Melbourne, when would we have it?
Prosecutor: Friday.
Judge: Friday, all right. The next question is, how many edits are there, in the sense of how many times would Mr Percy have to stop and start?
Prosecutor: Twice.
 ...
Defence: Yes, Your Honour, I'm sorry. Your Honour, when the prosecutor came to me, I didn't realise there were only two. In those circumstances, I'm happy for your tipstaff to do it manually, Your Honour. He could practise out here, otherwise we just lose a day unnecessarily.

Judge: Yes. He has done it before. He is pretty good with the stop button.

Defence: He is unbelievable, Your Honour. He's got great talents in this area. If it's only two, I – rather than lose a day – I'd trust to his fair hand, Your Honour.
(Victorian adult complainant, 18 years old)

Prosecutor: The special hearing [tape] ... there's no ETA. The resources of audio-visual are limited and we're in a queue.

Judge: Yes, thank you.

...

Judge: Has an indication been made about when the edited special hearing tape will be available?

Prosecutor: No. As I understood it, they had to put it up in real time. They can't fast-forward to relevant parts. There's a couple of hours there. It is being done, I understand. We are to check back at lunchtime. They couldn't give us an ETA at the moment at all.

Judge: So, what do you want to do at this stage?

Prosecutor: The Crown would like to empanel and even open. I guess we would be sending the jury away pretty early then.

Judge: [Defence]?

Defence: Your Honour, it is our preference that the jury be empanelled and we proceed to opening and then proceed into the case. I'm not keen on there being a gap between an empanelment and an opening and then the evidence. It is likely to be a long gap.

Judge: [Prosecutor], my experience has been that it is preferable to have everything in place before we start.

Prosecutor: It is.

Judge: Because there can be delays through no fault of anyone, but I just believe that that is preferable insofar as the jury is concerned. What about if I stand this matter down till 2.15, or should it be earlier? Are you likely to get any indication before 2.15?

Prosecutor: Some time over lunch, say between 1.00 and 2.00.

Judge: So if I stand it down to 2.15, then you can let me know.

Prosecutor: Yes.

....

Judge: [Prosecutor]?

Prosecutor: Your Honour, the latest is, as of five minutes ago, the special hearing disc has not yet been finalised but they are presently working on it.

Judge: Presently working on it?

Prosecutor: The Crown would still like at least to empanel today.

Judge: [Defence], what is your view?

Defence: Whatever Your Honour's ruling is, effectively. I share Your Honour's concern that sometimes things go wrong and if it is not finished now, we assume it will be finished perhaps this afternoon, but things go wrong, as Your Honour said earlier today. That's the only concern I have.

Judge: [Prosecutor], you have been told that they are working on it.

Prosecutor: I have been told that, and of course tomorrow morning if there is any problem they will have a couple of hours in the morning to continue working on it.

Judge: I'm inclined to empanel the jury because ours is the only matter that they have been brought in for. If we don't empanel, they will have to bring the whole panel back tomorrow so I think perhaps we will empanel.

Prosecutor: Thank you, Your Honour.

(Victorian adolescent complainant, 14 years old)

Judge: Could you just have a look at 41? I just wasn't sure. You see, that's when we had the discussion on the last occasion. Has that been edited out or you're not sure? Just hang on, members of the jury, just one minute, okay. I just want to talk to the lawyers about one thing. Sorry, Madam Jury Officer, just something came up at the last second.

Defence: I don't know whether it's edited or not. I haven't seen the disc. But what I can suggest, Your Honour, is that when we get to the end of page 40 I just ask if the link can be paused. We could just stop it there, Your Honour.

Judge: Yes, I appreciate that, [defence]. That's the way we can do it but I'm just wondering whether it's been done.

Defence: No, the reason I say that, Your Honour, is there is a bit at page 47 where Your Honour asks a couple of questions and I wondered whether Your Honour would be prepared to, in effect, let that go to avoid the hassle of trying to cut and paste if the edit hadn't been made. At 47 you just asked some clarification questions about how old she thought she was in grade seven but I think to be ...

Judge: I think, well, I'm not keen to delete evidence like that, I can tell you. But I can just read it.

Defence: Yes, Your Honour.

Judge: If everyone was happy I could read that part.

Defence: Absolutely. Absolutely. Yes.

Prosecutor: Yes.

(WA adolescent complainant, 16 years old)

Alternate measures during the provision of live evidence

Problems with recording

All complainants who presented at least part of their evidence live in court were included in this analysis. Problems with recording live evidence arose for only one Victorian complainant (out of eight), who was an adult. There was no evidence of problems with recording live evidence in either NSW or WA. As demonstrated by the excerpt below, the problem with recording the evidence of the Victorian complainant led to substantial delays in proceedings.

Text box 6.18

Jury: It's now 10 past 11 so the jury have been waiting for 40 minutes and I'm anxious about the complainant waiting as well. It's quite unfair to have that sort of delay. I'm told that the reboot that we were hoping would make the equipment operate has failed and another hour at least would be needed. I'm not sure that there's any guarantee that the system will work within an hour. Obviously, I'm concerned about the jury sitting out the back. So I've made an enquiry about getting another court room – I don't know what the outcome of that's likely to be.

Prosecutor: Your Honour, the reality is if we hadn't had this delay ... [Defence] and I both felt pretty confident that the evidence would be completed in its entirety today.

(Victorian adult complainant, 27 years old)

Problems with using screens

Only the four Victorian complainants who used a screen were included in this analysis. Issues regarding the use of screens arose for all of these complainants. Two of the four Victorian complainants were giving evidence in the same case; in this instance, the defence was concerned about screens being used, and proceedings were delayed as there were difficulties placing the screen in the correct position. This is shown in the excerpt below.

Text box 6.19

Judge: *I have never found it a big problem. The last trial I did involved a screen, and I suspect the jury didn't even notice. You're concerned about how it looks, I take it?*

Defence: *Yes, Your Honour, I ...*

Judge: *You are in a bad position. I don't know what you're going to do about it.*

Defence: *Well, if the complainants are concerned, there are other alternate means such as giving evidence by way of the remote facility.*

Judge: *Yes. I didn't get to consider that on this case. Look – we'll set it up for you. I will let you have some input into where it should be.*

Defence: *And, well, in essence, as far back as possible, such that it still retains the ...*

Judge: *Yes, I think we can take it right back to the end of the Bench and we'll see how it looks and we'll make sure that it blocks the vision of the ...*

Defence: *Sure, and I'll assist.*

Judge: *Yes, all right. How does that seem to you?*

Defence: *Yes, as long as that's still ...*

Judge: *Can your client fit – can your client sit any further to his right? Probably not, there's no chair.*

Defence: *There is no chair.*

Judge: *Those chairs are solidly placed, are they? Statically placed, are they? Yes.*

Defence: *I can only see the last chair, from here.*

Judge: *The chair ...*

Defence: *On the right, yes.*

Judge: *Right at that end, and you can ...*

Defence: *Perhaps the second last chair, I should say, there's one outside the ...*

Judge: *You can't see the accused man? And you could see the accused man when it was pushed in harder against the wall, could you? Just move it out then.*

Judge: *You can't see him there. Well is that right? Can't see him. All right, well, I don't think the jury would make much of that. Do you want to say anything?*

Defence: *No, clearly I don't have any grounds to object to it, because of the legislation.*

Judge: *No.*

Judge to Jury: *Sorry you were kept waiting, we had to make some necessary arrangements for the taking of the evidence.*

(Victorian adult complainants, 20 and 28 years old)

In the case of a further Victorian adult complainant, insufficient warning was given regarding the use of the screen, to have this alternate measure implemented properly in a timely manner. This is demonstrated in the excerpt below.

Text box 6.20

Prosecutor: *Your Honour, one matter that should be raised is that as I understand it the complainant wishes to give evidence in court, which is why the screen has been brought into court.*

Judge: *I didn't know about this and I don't think my court officer knew about it. My practice in these circumstances is to set up a monitor in the dock so that the accused can see the witness when she is giving evidence. It seems to me that there is an unfairness to the accused if he can't see the complainant giving her evidence. The monitor that we set up, it enables him to see her giving evidence. He can then give instructions to his counsel and solicitors about the giving of the evidence or about any demeanour or anything of that kind that may be relevant. That has got to be set up by VGRS, I think. Just excuse me, will you? Normally they want 24 hours' notice to do this. So it's a pity that you didn't mention this before. I'll have my court officer ring them now. They might be able to come at lunchtime and set the thing up.*

Prosecutor: *I apologise that notice was only given this morning, Your Honour.*

(Victorian adult complainant, 24 years old)

Problems with support persons

Problems with the identity of the proposed support persons

All complainants were included in this analysis, as problems with the identity of proposed support persons could be raised irrespective of whether support persons were used. Such problems arose infrequently, occurring for only one NSW complainant (out of 47) and three WA complainants (out of 72), all of whom were adolescents. There were no issues raised about the identity of proposed support persons in any of the Victorian transcripts.

For the NSW adolescent, concerns were raised regarding the appointing of her father as support person. After lengthy discussion, it was decided that her father would be her support person during evidence-in-chief, as there was insufficient time to find a suitable replacement. An alternative support person was then found and was used during her cross-examination.

Two of the WA adolescents for whom there were problems with the identity of proposed support persons were giving evidence in the same case. As a result of the concerns raised, neither of these complainants used a support person, as shown in the excerpt below.

Text box 6.21

Judge: *Who are the support people that ...*

Prosecutor: *There was a support person who is a family friend whom the two children had hoped to have with them. My friend's raised some issues with*

that so they've both indicated they'd simply prefer not to have a support person if that's the case.

Judge: I think one's 12 and one's 14?

Prosecutor: That's right, Your Honour, yes.

Judge: Yes, so they won't have any support person? So it'll just be the court officer in the remote room with them.

Prosecutor: Yes. Thank you, Your Honour.

Judge: [Defence], does that cause any difficulties as to how [prosecution] intends to proceed?

Defence: No, not at all. I had informed [prosecution] we'd be happy for a support person from Child Witness Services but if the children choose not to do that, that's up to them.

(WA adolescent complainants, 12 and 14 years old)

Improper use of support persons

All complainants who used a support person were included in this analysis. Incidents of improper use of support persons included inappropriate communication between the complainant and the support person. Such incidents occurred rarely, but were most common in NSW, where they arose for one child complainant, one adolescent complainant, and two adult complainants (out of 29). The improper use of support persons was also evident in the transcripts of one Victorian complainant (out of 44) who was an adult, and one WA complainant (out of 43) who was a child. Examples of improper behaviour by and towards support persons are provided in the following excerpts.

Text box 6.22

Judge: Just because the record won't indicate this accurately I should put on the record that at a particular point of the evidence that the witness just gave, a woman sitting at the back of the court – I don't know who she is, was she the witness support officer?

Unidentified speaker: No, Your Honour, she's a support person.

Prosecutor: Not with the Director's office.

Judge: Well it is a bit of a shame really because when the witness said that the accused said to her "We don't baptise bastards here" there was an audible intake of breath indicting that she was, one might say shocked and appalled by that response. The record should indicate that that occurred and it was audible and could have been heard by anybody, including the jury. If in fact she is a witness support officer, someone should talk to her about professionalism.

Prosecutor: As I say, she is not with the Director's office, Your Honour.

Judge: And if she's a friend, well I don't know – who is she with?

Prosecutor: I don't know. I will find out over lunch.

Unidentified speaker: Sorry, Your Honour, she is with [complainant] to support her. I have already spoken to her outside.

Judge: Okay, well she's a friend, she's a supporter but she's not a witness support officer. Was there no DPP witness support officer with this witness, Mr Crown?

Prosecutor: Cutbacks mean they're dividing the time between other courts; there just aren't enough of them to go round. Usual story.

Judge: Okay, well look, you know, I am good but don't do ESP; a woman walks in with [complainant] and sits in the back of the court in the spot where the witness support officer normally sits. I would appreciate someone telling me what's going on so that I can make appropriate orders, exemptions from the closed court, make sure she's an appropriate person to be there as a support. If she's a friend, it's hard to imagine that she hasn't heard all this before from her. If she hasn't, so be it. If she is a friend and she's heard it all before, that was staged. It's all inappropriate whichever way it goes.

Prosecutor: As the Crown Prosecutor, I'm sorry that I embarrassed Your Honour. I should have made those enquiries myself.

Judge: There are outbursts in court all the time and that's no evidence, and no doubt the jury won't even remember it so long as no one reminds them of it. But it had to be put on the record so that the record indicates exactly what happened and it certainly could be heard and was heard by the jury because everybody including me looked up and looked at her. (NSW adult complainant, 59 years old)

Judge: What did she have? What did you eat, [complainant]?

Support person: Egg and bacon roll.

Complainant: Egg and bacon roll.

Judge: It's really important, [support person], that you don't answer any question. No matter how simple that little question might be, you must not answer the questions. All right, I know it's sometimes hard when a little girl looks at you for an answer, but you can't answer a question. That's really important. (WA child complainant, 6 years old)

Judge: I don't know what happened with the support person but she left court halfway through the cross-examination. My court officer has just indicated that he escorted the complainant to a group of people that he understood are her family who were waiting for her.

Prosecutor: Yes, she has her sister out there.

Judge: Okay. But I think you ought to inquire if I authorise someone to be present to support her, and [complainant] was then crying when she was walking out and that's when you need that person to do their job; so I don't know where the lady is but if she's authorised to do that job she should be here to do it.

Prosecutor: Yes, Your Honour.

Judge: If she comes from the OPP Witness Assistance Service then you've got some control over that. Thank you

...

Judge: [Prosecution] I did ask you to make inquiries about the support person who left court during the witness's evidence and then wasn't here at the end of her evidence when she was most needed because the witness was distressed. What is the explanation for that?

Prosecutor: Your Honour, there are three members of staff that were available yesterday at the Witness Assistance Service. The Witness Assistance Service was

unable to cover the existing appointment load they had. [Support person] had another appointment she had to get to at the end of the day.

Judge: To do with the case you mean?

Prosecutor: Not to do with this case, no; to do with another case.

Judge: That is just simply a totally unsatisfactory situation. If a person from the Witness Assistance Service is authorised to provide emotional support under the Act, then that person must be here. If they're not here, there should be another person. If there is to be another person, that person needs to be identified and authorised. This is not a trivial matter.

Prosecutor: Inquiries were made to see if another person could be found from Court Network; none was available yesterday.

Judge: But she must have known she had the other appointment, and that should have been identified as a potential issue. It is quite unsatisfactory.

[Complainant], you will understand that the person I authorised wasn't here when you finished your evidence yesterday afternoon. I know you were distressed because I said to you there were a couple of hours to go.

Complainant: Yes.

Judge: I apologise for the absence of that person and for any discomfort caused to you by her absence. But you have just heard what I have had to say about it.

Complainant: Yes.

Judge: Is [support person] here and available for the rest of the witness's evidence?

Prosecutor: Until 1 o'clock, Your Honour, which I expect will cover the rest of the witness's evidence.

Judge: That is assuming that she is finished by 1 o'clock. What if she isn't, is there someone else available?

Prosecutor: I will have to make inquiries as to what could happen.

Judge: I don't want the same thing to happen again.

Prosecutor: Yes, Your Honour.

Judge: These arrangements are set up to give confidence and support to witnesses in the position of the complainant. It is quite unsatisfactory if they don't work the way they're meant to work. Thank you.

(Victorian adult complainant, 24 years old)

Conclusion

Child and adolescent complainants had ready access to alternate measures when giving their evidence-in-chief, with almost all using police interviews. Although most adults also used alternate measures to provide their evidence-in-chief, there was more variability in the types of measures they used, and more adults gave evidence live in court than did children or adolescents. Similar patterns were found for the use of alternate measures during cross-examination. Almost all children and adolescents used CCTV or AV links during cross-examination (either live or at a pre-recorded special hearing), and although most adults also used CCTV or AV links (rarely at a pre-recorded special hearing), more adults were cross-examined live in court than were children or adolescents. These findings indicate that some adult complainants may have insufficient access to alternate measures.

Support persons were used by most child and adolescent complainants and at least half of the adult complainants. Further, the public gallery was cleared for most NSW and Victorian complainants, but information on this alternate measure was rarely available for WA complainants. There was little evidence available that judges and lawyers removed their wigs, and none that they removed their gowns.

Problems associated with alternate measures were referenced frequently in the transcripts. Of particular prevalence were technological problems associated with playing police interviews, CCTV and AV links, and playing evidence recorded via CCTV and AV links. These problems appeared to frustrate judges and lawyers, and may have increased complainants' stress. Furthermore, when these problems arose, they disrupted the trial and at times led to substantial delays, with some complainants being required to give evidence at a later date due to technological failings. These delays are counter to one of the key means by which alternate measures aim to improve the quality of evidence and reduce complainant distress; namely, expediting the legal process. The current study shows that although complainants are using alternate measures, the problems associated with their use may limit their effectiveness in some cases.

Chapter 7
Review of NSW Sexual Assault
Review Committee minutes
(Study 6)

Chapter 7: Review of NSW Sexual Assault Review Committee minutes (Study 6)

Starting in the mid-1980s, the NSW state legislature reformed the procedures according to which complainants give evidence in child sexual abuse cases. Little research has been conducted on the day-to-day ramifications of alternate measures in NSW. Furthermore, the views and experiences of the relevant criminal justice professionals who work most closely with alternate measures in NSW child sexual abuse cases have remained largely unexplored.

The present study aimed to fill this gap in the literature, and to identify areas in which the implementation of alternate measures can be improved. Due to the diverse membership of the Sexual Assault Review Committee (SARC), the minutes of the meetings provided an insight into the activities and attitudes of multiple agencies that deal with alternate measures in NSW. SARC was not founded specifically to consider legislative reforms and the practical ramifications regarding alternate measures in child sexual abuse cases, so discussion of these matters in SARC meetings reflected their prominence within the broader sexual abuse reform process. The two-decade span of the meetings offered an historical overview of developments in the implementation of alternate measures, as well as changes in institutional attitudes towards their use over time.

Method

NSW Sexual Assault Review Committee

SARC is convened by the NSW Office of the Director of Public Prosecutions (ODPP). It was founded in 1993 and generally meets quarterly – in February, May, August and November. The Committee brings together representatives from multiple government and non-government agencies, including the NSW ODPP, NSW Police, the NSW Judicial Commission, Joint Investigation Response Teams (JIRT), NSW Health, Child and Adolescent Sexual Assault Counselling (CASAC), the NSW Department of Family and Community Services (FACS), Legal Aid, Women’s Legal Services (WLS), the Witness Assistance Service (WAS) and academics.

Collaboratively, SARC aims to improve the litigation of sexual abuse cases through roundtable discussions about legislative reforms and their practical impacts; research projects on sexual abuse; and updates from members and stakeholders in the criminal justice sector about cases encountered in the regular course of their professional duties. Direct action complements these discussions. Although SARC was not specifically convened to evaluate the use of alternate measures, their implementation and use fall within its wider ambit of evaluating legislative reforms, research projects and case studies about sexual abuse.

Sources of information

The aim of this desk review was to identify and describe the experiences and practices of institutional criminal justice stakeholders involved in the practical administration of alternate measures. Information was extracted from SARC minutes dated 1993 to 2014. Copies of official meeting minutes maintained by the ODPP provided an overview of research projects, legislative reforms, case studies and recommendations regarding the litigation of sexual abuse matters. Generally, each of the SARC minutes began with a recap of the previous meeting and any actions taken since that meeting. Members then proceeded to discuss the agenda topics for the current meeting, and each agency (OPDD, NSW Police Force, NSW Health, court workers and WAS) provided its report. The report constituted an oral review summarising what each agency had observed or experienced in the previous three months. At times, members discussed specific cases. From these reports the Committee devised future actions. Meeting minutes therefore provided a useful source of information for examining attitudes and actions taken in regard to alternate measures from the time when SARC was first convened in 1993 until the most recently available minutes of the Committee in 2014.

Procedures

Data collection

Minutes of SARC meetings for the period 1993 to 2014 were produced pursuant to a notice issued to the NSW ODPP and reviewed by members of the research team on site at the Sydney offices of the ODPP. The research team systematically tabulated the year, minute number, report and any noteworthy comments recorded about alternate measures. Copies of minutes were obtained where the content appeared relevant to the practical implementation of alternate measures. Examples included reports about complainants who might be especially vulnerable because of their mental health status, and the availability of support for sexual abuse complainants at trial.

Data analysis

Copies of the SARC meeting minutes containing reports relevant to the practical implementation of alternate measures were analysed using an inductive qualitative framework. After immersing himself in the minutes via repeated reading, one researcher identified noteworthy topics related to alternate measures without specifically focusing on a research question, thus allowing novel themes to emerge. The researcher then organised and reorganised the noteworthy topics under these overarching themes. The Committee's discussions were ultimately classified

within four broad categories: technical or administrative difficulties; practice issues regarding the use of alternate measures; law reform; or other.

'Technical or administrative difficulties' encompassed practical problems encountered with police recordings, CCTV equipment and closed courts. Subcategories included video image quality; audio quality; suitability of alternate facilities; lawyer, judge and court officer training in the use of alternate measures; and delays caused by any of the above difficulties.

'Practice issues regarding the use of alternate measures' covered reports of various stakeholders' actions in the administration of alternate measures. Stakeholders under consideration were judges and magistrates; private and public defence lawyers; NSW Police officers; WAS officers; NSW Health representatives; the NSW ODPP; and the families of child sexual abuse complainants.

'Law reform' incorporated discussions about legislative developments governing the use of alternate measures by child sexual abuse complainants. Discussions were subcategorised according to whether they related to reforms of Acts, Bills, regulations or agency guidelines.

A residual category, 'other', encompassed discussions of research reports pertaining to the use of alternate measures and additional miscellaneous matters. The full table of findings is attached in Supplementary Materials 6 (online).¹

Results

Chronology of uses of alternate measures in NSW

The use and implementation of alternate measures formed a focal point of most SARC meetings in the period under review, despite the fact that the Committee was not convened specifically to examine these developments. Matters pertaining to alternate measures were reported frequently, in three out of four meetings (76.13 per cent, $N = 67$).

Of meetings where the use of alternate measures was raised, half of the discussions related to practices of criminal justice professionals involved in practically implementing the measures (50.74 per cent, $N = 34$), and 46.27 per cent related to technical difficulties ($N = 31$). Legislative or regulatory developments were also discussed in 46.27 per cent of meetings where alternate measures were raised ($N = 31$).

Overall, discussion of alternate measures in the meetings became more frequent from the early 2000s and remained a constant topic of discussion from that point. This was likely due to an increase in the use of alternate measures during this period. By June 1998, it was reported that CCTV was being used in child sexual abuse cases in Campbelltown, Gosford, Sydney and Wagga Wagga.² By July 2001, the Committee noted that approximately 96 CCTV systems had been installed in 63 courts across NSW.³ In the same month, WAS officers reported that solicitors had become more familiar with CCTV, and that there was a general assumption that children would use CCTV facilities to give evidence at trial.

The meetings of the Committee traced a number of developments in the way child sexual abuse complainants were able to give evidence. For instance, the NSW Child Sexual Assault Specialist Jurisdiction Pilot became a focal point of meetings following its establishment in March 2003 in the Sydney West District Court Registry and its expansion to Dubbo and the Sydney District Court Registry in 2005.⁴ The pilot aimed to alleviate some of the difficulties in prosecuting child sexual abuse cases by making the physical environment of these courts less stressful for children; upgrading CCTV technology; making the use of alternate measures a presumption; and educating judges and prosecutors in child development and child sexual abuse. Furthermore, in November 2013, SARC noted that it was seeking further information on a report conducted on Witness Intermediaries – now known as Children’s Champions – an alternate measure available to child complainants in the United Kingdom.⁵ The *Criminal Procedure Amendment (Child Sexual Offences Pilot) Act 2015* (NSW) has since established a pilot program to enable child sexual abuse complainants to have access to Children’s Champions, based on the UK Witness Intermediary Scheme. Children’s Champions will assist child witnesses in the pilot program by ensuring questions given to – and answers provided by – child witnesses are understood by all participants.⁶

Technical or administrative difficulties

Corresponding with the apparent increase in the use of alternate measures, discussions of technical or administrative difficulties became more prevalent from 2000. Prior to 2000, technical difficulties with alternate measures were raised at four meetings (12.9 per cent of meetings prior to 2000), compared to 26 meetings from 2000 onwards (46.4 per cent of meetings from 2000). The concerns in early reports appeared to focus on problems with the equipment itself, whereas later reports centred on a lack of training by court staff in how to use the equipment, or

delays in the availability of equipment due to the time taken to complete repairs. The sections below discuss this topic further.

Quality of pre-recorded police interviews

Technical difficulties with video-recorded police interviews comprised more than half of the instances in which technical or administrative difficulties with alternate measures were raised in SARC meetings (54.84 per cent, $N = 17$). The complaints related to three main areas: audio quality, video quality and content prejudicial to the accused.

Audio quality

Analysis of the minutes revealed five instances where stakeholders reported that the audio in police interviews and pre-recorded statements was of poor quality (29.41 per cent of meetings where technical difficulties with pre-recorded interviews were noted).

Investigation of the source of the poor audio quality in police interviews revealed that it was attributable to the use of handheld recorders.⁷ Thereafter, strategies were implemented for police to use lapel microphones when interviewing child complainants.⁸ The last reference to this topic was in 2009 when this solution was noted to be unpopular with police interviewers, because children were distracted by the lapel microphones, and tended to fiddle with them during the interview, interfering with the audio quality.⁹

In the Child Sexual Assault Jurisdiction Pilot Program¹⁰, the provision of headphones to the jury when electronic statements were of poor quality had successfully compensated for this circumstance; however, an example was provided of one case in 2004 in which a pre-recorded statement remained inaudible even with the use of special headphones.¹¹

Video display and quality

In 35.29 per cent of SARC meetings where technical difficulties with police interviews were noted, stakeholders documented that video technology for pre-recorded interviews was problematic ($N = 6$). All of these records were between 2000 and 2002. In one case, poor video quality in the recordings was reported.¹² In another, CASAC observed that in one case the speed at which the interview was taped was too fast¹³, so the child complainant could not understand it when it was played back. In some matters, child complainants were unable to view their interview during the trial due to a lack of facilities, reportedly making cross-examination difficult for them.¹⁴ Stakeholders also documented that some child complainants were placed in the courtroom to view their interviews due to the inadequacy of facilities.¹⁵ Previously, court equipment lacked the capacity to display the pre-recorded interview in both

the court and remote witness room at the same time. Hence, two copies of the video were required to simultaneously show the interview at both locations, apparently causing difficulties in coordinating playback.¹⁶ The absence of any discussion of video technology for police interviews in the past 14 years suggested that these early problems had been remedied.

Prejudicial content and interviewing techniques

A further reported early difficulty with some pre-recorded police interviews was that they were at times rendered inadmissible because of their prejudice to the accused (17 per cent of meetings noted CCTV technical or administrative difficulties, $N = 3$). In one case, a judge refused to permit a pre-recorded interview to be played as evidence-in-chief, in part because more than half of the interview was about irrelevant matters.¹⁷ This was due to the investigator's tactic of interspersing light-hearted conversation to build rapport and thereby keep the complainant on topic. The presiding judge believed that removal of these sections of the conversation from the interview tape would ultimately be confusing. As a result, the judge deemed the police interview prejudicial to the accused. The circumstances in which the investigator conducted the interview were also a contributing factor: the video depicted the complainant playing with toys in a colourfully decorated room. The judge believed that the visual display of "an attractive girl playing with toys as she described gross crimes" would cause prejudice to the accused. In His Honour's opinion, judicial directions could not ameliorate this prejudice. Moreover, His Honour deemed the investigator's frequent repetition of the complainant's assertions to be prejudicial. This was because the repetition of the allegations constantly emphasised them as if they were fact. Managing lawyers in Gosford and the ODPP both reported experiences with police interviews that had been deemed inadmissible because of this style of police questioning.¹⁸ Stakeholders in Wollongong also reported concerns about the standard of interviewing and the use of leading questions.¹⁹ At three other SARC meetings, the nature of police training on interviewing techniques was discussed.²⁰ However, the topic of police interview techniques was not raised after the early 2000s.

CCTV display and quality

Two-thirds of the meetings where technical difficulties were raised described logistical or technological difficulties with CCTV (67.74 per cent, $N = 21$). The prominent problems were multiple image displays, inadequate screen size, poor audio quality of CCTV testimony, inappropriate CCTV facilities, insufficient staff and resources, and inadequate staff training.

Multiple image displays

Overall, SARC discussed the benefits and drawbacks of multi-image screen displays (split screens) in 19.05 per cent of meetings in which technical difficulties with CCTV were raised ($N = 4$). The first case that reported technical difficulties with multiple image displays arose in 1995.²¹ The use of a wide-angled lens on the camera placed in the CCTV room meant that only the top of the child complainant's head was visible to the jury. At the time, SARC members noted that the presiding judge could have remedied this display to the jury if he had toggled the display so that it transmitted to his own second screen. In other words, the end users were unaware of the means afforded by the technology to select between two optional camera angles, both of which were connected to the screen display.

Prior to 2005, stakeholders reported that the use of multiple image displays posed recurring problems.²² One SARC member from NSW Health identified the use of split screens as one of the two most disappointing elements of the child sexual abuse pilot.²³ She was concerned about the potential stress placed on children because of the juries' ability to observe the child complainants in the remote witness box while their evidence was played in the courtroom. Another member raised the possibility that the display of multiple images on a single screen might distract jurors from watching the complainant's actual video evidence. In March 2003, SARC recommended that the use of multiple image displays be abandoned.²⁴ Since 2004, only a view of the complainant's head and shoulders has been presented.²⁵ The most recent NSW Department of Police and Justice operational guidelines for the use of video facilities prohibit multiple images of the complainant to be displayed in court.

Inadequate screen size

Up until the early 2000s, two complaints about the inadequate size of the screens used to display CCTV evidence in court were noted in the meetings (in 9.52 per cent of meetings where technical or administrative difficulties with CCTV were noted).²⁶ In July 1999, the ODPP requested the installation of bigger screens in courtrooms, indicating that the size of the screens in use was problematic.²⁷ Crown prosecutors had previously argued that courtroom

televisions were too small and placed too far from the jury.²⁸ There was some indication that the small screen size and thus smaller image display fuelled reluctance on the part of Crown prosecutors to apply for CCTV usage.²⁹ By the time the Sydney West Child Sexual Assault Specialist Jurisdiction Pilot had commenced, dual 42-inch plasma screens had been installed in two Parramatta courts.³⁰ The timing implied that these technological updates were implemented in response to these expressed concerns.³¹

Audio quality

Audio quality appeared to be less problematic with CCTV equipment than with pre-recorded evidence. Only one meeting documented audio issues with CCTV equipment (4.76 per cent of meetings where technical or administrative CCTV problems were mentioned). In 2011, in that case, a child giving CCTV evidence in court was inaudible due to the use of fixed microphones. The child's small size meant that he was placed either too close or too far away from the microphone for high-quality audio recording.³² From the minutes, it was unclear whether lapel microphones were subsequently adopted for child complainants giving CCTV evidence, as was the case for pre-recorded police interviews.

Inappropriate CCTV facilities

In the past five years, no issues with CCTV facilities were recorded. Prior to that, CCTV facilities were reported to be inappropriate in one-third of the minutes where technical difficulties with CCTV evidence were documented (33.33 per cent, $N = 7$). Some CCTV rooms were rendered unsuitable because they were being used for storage³³ or located in corridors of the court.³⁴ A record from 2011 reflected that one available facility was installed in a police station room where suspects were interviewed.³⁵

SARC also noted difficulties in accessing CCTV rooms.³⁶ In one case when access to the room was obstructed, the sheriff officer replied that "this room has been used for the last 20 years", indicating that the problem was long-standing.³⁷

Stakeholders also encountered insufficient soundproofing of CCTV rooms. The Committee noted that this problem was particularly serious given that it could result in a mistrial³⁸ if those in the waiting area, or those associated with other cases, could hear the child in the remote witness room. Practitioners also reported problems with the seating arrangements in some CCTV facilities.³⁹ Occasionally, WAS officers accompanying the complainant were unable to sit in sight of the complainant in the CCTV facilities because regulations required that these officers be visible to the judge and jury.⁴⁰

Staffing or resource shortages

At five meetings, none of which took place in recent years, occasions were documented where courts had insufficient resources and staff allocated to CCTV facilities (23.81 per cent of meetings where CCTV technical or administrative difficulties were discussed). In one court, for example, lawyers reported competing for the use of CCTV facilities. Due to ongoing problems of this nature, it appeared that the CCTV facilities may have been underused in certain courts, and as a result, the scheduled trial in many child sexual abuse matters was delayed until an opening was available at a court where CCTV facilities were functional.⁴¹

Lack of staff training

A lack of court staff training reportedly contributed to problems in the use of CCTV in one-third of the minutes where CCTV technical difficulties were raised (33.33 per cent, $N = 7$). During the initial stages of the Child Sexual Assault Specialist Jurisdiction Pilot, court staff apparently lacked confidence in using the technology because of their inexperience.⁴² Moreover, it appeared that the CCTV equipment was too complex to operate without specific technical training.⁴³ Due to long periods between the use of the equipment, some court staff had also forgotten how to operate the system when it was needed, even if they had received prior training.⁴⁴ The source of the problems appeared to be that operating the technology was never part of the court officer's job description, which was subsequently amended to rectify this issue.⁴⁵ The lack of established standards and consistency in courtroom procedures for CCTV was documented as an ongoing problem as recently as February 2012.⁴⁶

In one instance, SARC documented a lack of training as having serious ramifications for the complainant.⁴⁷ In that case, a court officer installed the wrong lens in the courtroom. Consequently, an image of the accused was projected to the complainant throughout the hearing. The support officer was reportedly unable to intervene, and the child refused to give evidence as a result.

Delays in proceedings (police interviews and CCTV)

Although delays in the trial schedule and the rescheduling of trials are known to create a hardship for child complainants and vulnerable complainants in child sexual abuse cases, over the years, numerous delays in advancing legal proceedings or giving evidence as scheduled were reported as a result of technical and logistical issues associated with the use of alternate measures (7.95 per cent of meetings, $N = 7$).⁴⁸ The types of delay that were documented fall into two categories: delays in hearing timetables

because of a backlog of cases, and delays on the scheduled dates of the hearings because of technical issues. In one case in the first category, the entire hearing or trial was rescheduled for a later date so that it could be relocated to a court with CCTV facilities to enable the child witness to use this alternate measure when giving evidence.⁴⁹ The meetings also described a matter where the hearing was delayed because the case was allocated to a court without CCTV facilities. This was despite the fact that a solicitor had informed the court, in advance, of the need for CCTV for the complainant.⁵⁰ In one of the cases where the delay resulted from technical difficulties on the date scheduled for the hearing, a complainant's testimony was pushed back a day because the CCTV equipment was not functional.⁵¹ The giving of evidence was delayed a second time on the following day, again due to technical failures. Other specific cases where the complainant encountered delays on the day of the hearing included instances where the ODPP failed to serve a notice for the use of pre-recorded, videotaped evidence within the required 14-day time period in advance of trial⁵², and where the presiding magistrate was unfamiliar with the relevant legislation.⁵³

This finding pointed to a discrepancy between the aims in using alternate measures such as CCTV, and their use in reality. While most of the foregoing problems arose in the earlier years, in 2010, the Committee reiterated the need for alternate measures in child sexual abuse cases to overcome chronic delays in the courts.⁵⁴ In practice, delays resulting from technical and administrative difficulties in implementing alternate measures were short in duration (amounting to hours or days).

Closure of the court

A recurring issue was the presence of school students at child and historical sexual abuse trials (25.81 per cent of meetings where technical or administrative difficulties were raised, $N = 8$). In December 1999, support officers reported that a Penrith Local Court judge refused a request to close the court while the child was giving evidence, and allowed school students to observe.⁵⁵ WAS officers in Sydney reported in November 2001 that sexual abuse matters were disrupted by groups of school students and "a busload of Japanese tourists".⁵⁶ The nature of the disruption was unclear. The presence of school students in child sexual abuse trials reportedly continued to be a problem in August 2003.⁵⁷ In October 2003, SARC acknowledged that court closure was an ongoing problem because it was at the discretion of the judiciary, and was often not exercised for adult complainants who testified in historical sexual abuse trials.⁵⁸ In May 2004, SARC acknowledged that court closure was rare in Gosford even when a child complainant gave evidence.⁵⁹ Apparently, judicial

officers contended that since the child typically gave evidence via CCTV, the complainant was unaware of the members of the public who were present in the courtroom. In response, SARC expressed concern that judicial officers were losing sight of why courts ought to be closed even in these cases. The presence of schoolchildren in child sexual abuse hearings was recognised as a continuing a problem as recently as June 2014.⁶⁰

Practice issues regarding the use of alternate measures

The minutes revealed diverse practices by the relevant stakeholders regarding the use of alternate measures. The practices of various stakeholders were documented in 38.63 per cent of meetings ($N = 34$), indicating that these were a prominent topic of discussion.

Judges and magistrates

Five of the SARC meetings included a discussion of judicial reticence in the use of alternate measures (5.68 per cent of meetings). In one Newcastle proceeding, a judge reportedly complained about children requesting breaks, and questioned the need for the presence of WAS officers.⁶¹ In a later Sydney West proceeding, the presiding judge ruled video evidence inadmissible because it was prejudicial to the accused.⁶² In a Taree Local Court matter, the magistrate indicated that he was unaware of the relevant legislation for the giving of pre-recorded evidence, which resulted in a delay in proceedings.⁶³ In another case, the magistrate did not permit two 11-year-old complainants to listen to their interview while it was played in court.⁶⁴ The magistrate deemed it "totally inappropriate" for the complainants to refresh their memory before giving evidence, and was unaware of any Act that permitted the complainant to do so by viewing their pre-recorded interview in court. Furthermore, WAS officers reported in 2007 that two judges in the Campbelltown Local Court would not use the court where the CCTV equipment was situated because of "OH&S issues", resulting in many sexual abuse matters being relocated to other courts.⁶⁵ In March 2014, SARC noted that Crown requests for pre-trial hearings were being denied at the same rate as before the relevant legislative reforms in 2013.⁶⁶ In the same meeting, SARC reported that the CCTV protocol had been removed from the Judicial Commission website. These guidelines have since been uploaded again.⁶⁷

Defence

Defence lawyers did not actively participate in SARC meetings. However, in 2001 managing lawyers recognised that defence objections to CCTV were rare, and perhaps exclusive to Wollongong Local Court. Despite this, two cases that were described in the minutes in that time period documented strenuous defence objections to the use of alternate measures (2.27 per cent of the meetings).

In the first case, a 16-year old complainant who was six months pregnant gave evidence by CCTV.⁶⁸ Only her head was visible. The defence applied for the CCTV arrangements to be altered in order to view the complainant from the waist up, arguing that it was important for the jury to analyse her body language. This was consistent with accepted best practices for CCTV transmission, which require witnesses to appear life-size in the courtroom.⁶⁹ The camera angle could not be altered, and the only way to achieve a wider shot of the complainant was to position her further away from the camera. However, this would have meant that the complainant was placed too far away from the microphone and monitors. The trial was eventually aborted, partly because the design of the CCTV facilities did not allow for transmission of a waist-up view of the complainant. While it was never mentioned explicitly, the participating WAS officers assumed that the defence was seeking a waist-up view so that the jury could see the complainant was pregnant.

In the second matter, the defence objected to the complainant listening to her pre-recorded evidence in the courtroom because doing so would refresh her memory.⁷⁰ This reportedly caused a delay. As a result, the complainant had to return a month later for the conclusion of the hearing. However, the minutes did not indicate that these kinds of defence objections were a regular occurrence, or had continued.

WAS officers

WAS officers were consistently active at SARC meetings in supporting the use of alternate measures for child sexual abuse complainants. Most of the reports of technical difficulties in the use of alternate measures, or the reluctance of other stakeholders to encourage them, came from WAS officers.⁷¹ By February 2008, WAS officers presented alternate measures to child complainants as a statutory entitlement.⁷² By March 2003, they had developed a database for recording precedents for vulnerable adult victims of sexual abuse who had been granted alternate measures, such as CCTV.⁷³

From 2000, it appeared that WAS officers undertook an increasingly crucial role in the administration of alternate measures in NSW courts. In 1997, the Royal Commission into the NSW Police Force recommended that WAS be involved in all child sexual abuse matters.⁷⁴ In November 2000, it was reported that the use of alternate measures had been a “learning process” for WAS officers, indicating that they were acclimating to their new role.⁷⁵ By February 2006, WAS officers had noted a significant increase in the demand for their services, corresponding with the increase in the total number of adult complainants using CCTV.⁷⁶ The frequent reports by WAS officers detailing barriers in the administration of alternate measures indicated that they became an integral part of the practical implementation of these measures from this time onwards.⁷⁷

Prosecution

Five meetings detailed instances where prosecutors appeared to discourage complainants’ use of CCTV or pre-recorded statements (7.46 per cent of meetings).⁷⁸ The temporal span of these meetings indicated the long-standing reluctance of some prosecutors to apply for alternate measures.

Crown prosecutors’ reluctance to permit complainants’ use of CCTV was first documented in November 1998⁷⁹ and March 1999⁸⁰. This was said to be for various reasons including the technological inadequacies of the available CCTV facilities.⁸¹ In December 2001, WAS officers in Sydney noted that Crown prosecutors were particularly hesitant to make applications in response to requests by adult sexual abuse victims for alternate measures, such as closed courts and screens.⁸² Crown prosecutors’ reluctance to push for CCTV usage for child witnesses other than the complainant was further documented in November 2005.⁸³ In February 2008, WAS officers reported that Crown prosecutors and lawyers had often talked complainants out of using CCTV.⁸⁴ Many Crown prosecutors reportedly adhered to the belief that it was better for a complainant to give their evidence in court in person, despite research conducted by the Australian Institute of Criminology that disputed this claim.⁸⁵ However, SARC noted that Crown prosecutors in regional areas appeared to be more amenable to the use of CCTV than were Sydney prosecutors. Instances where private barristers who present the prosecution case in court on behalf of the ODPF tried to talk the complainant out of using CCTV were again noted in November 2010.⁸⁶ As a result, training was to be provided to all Crown prosecutors on the benefits of the use of CCTV, as of February 2011.⁸⁷

NSW Police Force

SARC members extensively discussed police practices in the implementation of alternate measures in relation to police interviews (see above).

NSW Health

NSW Health historically had poor attendance at SARC meetings, as noted by the Committee in April 1995.⁸⁸ The only meeting of interest where NSW Health expressed its observations was in March 2003. At that time, a representative of the organisation noted its dissatisfaction with the use of multiple-image screen displays.⁸⁹

Complainants' families

In 2014, CASAC noted that many families and victims did not want to proceed with child sexual abuse matters.⁹⁰ Beyond this, the SARC minutes did not provide any indication of the influence of complainants' families on the use of alternate measures. However, two meetings documented families' difficulties in the use of alternate measures (2.99 per cent of meetings). In 2003, WAS officers reported two occasions where children were denied access to their parents and siblings while giving evidence.⁹¹ Moreover, it appeared that some of the complainants' families had difficulties attending sentencing hearings.⁹² In one case, the Crown prosecutor had failed to make contact with the families of any of the three complainants.⁹³

Conclusion

The desk review found that many issues arose when alternate measures were introduced, especially in the early years. These included technical problems with pre-recorded interviews and CCTV, the accessibility of

CCTV and court staff being unfamiliar with the equipment. The SARC minutes suggested that these issues have not persisted.

Historically, some stakeholders were biased against alternate measures based on personal beliefs that in-person evidence was more advantageous for the complainant's credibility at trial. While concerns about bias of this nature appear to have abated, changes in use of alternate measures based on Committee recommendations were driven by anecdotal examples and assumptions about jury responses, rather than evidence-based policy or best-practice standards. For example, since 2007, juries have been prohibited from viewing or hearing the child in the remote witness room while pre-recorded evidence is broadcast in court.⁹⁴ Use of multiple-image screen displays was discontinued on grounds that they distracted jurors from attending to the evidence.

More contemporary discussions in the Working Group have focused on three main areas. First, SARC advocated urgent reforms to allow pre-recorded evidence-in-chief, to overcome delays at court caused by deficits in case management and ongoing technological problems. Second, the increased responsibility for WAS officers to implement alternate measures reflected the absence of an explicit triage system for coordinating and resolving issues involving the use of alternate measures for complainants whose cases might proceed more quickly, or who might have complex needs and require intensive support.⁹⁵ Third, SARC recommended monitoring the new pilot program involving Children's Champions, and posed questions as to whether it might assist WAS and court officers in coordinating the administration of support services for complainants in the future.

Endnotes

¹ Findings for 'law reform' and 'other' are not discussed in the report, since they fall outside the scope of the research question addressed by this study.

² 30/06/98.

³ 03/07/01.

⁴ 07/06/05, 11/05/04, 2/03/04, 19/08/03 and 04/08/03.

⁵ 26/11/13.

⁶ Role Description: Children's Champion, n.d.

⁷ 03/06/03.

⁸ 03/06/03.

⁹ 17/02/09.

¹⁰ 11/05/04.

¹¹ 24/08/04.

¹² 21/05/02.

¹³ 20/07/02.

¹⁴ 18/09/01.

¹⁵ 03/07/01.

¹⁶ 28/11/00.

¹⁷ 04/12/01.

¹⁸ 21/05/02.

- ¹⁹ 03/02/98.
- ²⁰ 27/03/01, 17/04/97 and 24/02/97.
- ²¹ 14/11/95.
- ²² 24/08/04, 18/03/03 and 07/12/99.
- ²³ 18/03/03.
- ²⁴ 18/03/03.
- ²⁵ NSW Department of Police and Justice, 2014.
- ²⁶ 22/07/99 and 24/11/98.
- ²⁷ 22/07/99.
- ²⁸ 24/11/98.
- ²⁹ 24/11/98.
- ³⁰ 04/08/03.
- ³¹ 24/11/98 and 04/08/03.
- ³² 14/11/95.
- ³³ 22/02/11.
- ³⁴ 21/05/02.
- ³⁵ 09/09/97.
- ³⁶ 22/02/11 and 28/08/07.
- ³⁷ 28/08/07.
- ³⁸ 22/02/11 and 04/08/03.
- ³⁹ 17/02/09 and 24/08/04.
- ⁴⁰ 17/02/09.
- ⁴¹ 07/12/99.
- ⁴² 04/08/03.
- ⁴³ 27/11/07.
- ⁴⁴ 26/02/08.
- ⁴⁵ 26/02/08.
- ⁴⁶ 28/02/12.
- ⁴⁷ 07/12/99.
- ⁴⁸ 14/11/95, 25/08/95, 22/07/99, 28/11/00 and 24/09/02.
- ⁴⁹ 30/05/06.
- ⁵⁰ 19/08/03.
- ⁵¹ 30/05/06.
- ⁵² 24/09/02.
- ⁵³ 04/12/01.
- ⁵⁴ 27/08/10.
- ⁵⁵ 07/12/99.
- ⁵⁶ 04/12/01.
- ⁵⁷ 19/08/03.
- ⁵⁸ 29/10/03.
- ⁵⁹ 11/05/03.
- ⁶⁰ 17/06/14.
- ⁶¹ 07/12/99.
- ⁶² 04/12/01.
- ⁶³ 04/12/01.
- ⁶⁴ 24/08/04.
- ⁶⁵ 27/02/07.
- ⁶⁶ *Criminal Procedure Act 1986 (NSW)*, s 139; amended by the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* Sch 1[4].
- ⁶⁷ NSW Department of Police and Justice, 2014.
- ⁶⁸ 28/08/07.
- ⁶⁹ Burton, Evans and Sanders, 2006; Doherty-Sneddon and McAuley, 2000; Hamlyn, Phelps, Turtle and Sattar, 2004.
- ⁷⁰ 04/12/01.
- ⁷¹ 28/11/00, 07/12/99, 30/05/06, 28/02/06, 26/02/08, 28/08/07, 27/02/07, 27/02/07, 29/11/05 and 07/06/05.
- ⁷² 26/06/08.
- ⁷³ 18/11/03.
- ⁷⁴ 09/09/97.
- ⁷⁵ 28/11/00.
- ⁷⁶ 28/02/06.
- ⁷⁷ 30/05/06, 28/02/06, 26/02/08, 28/08/07, 27/02/07, 27/02/07, 29/11/05 and 07/06/05.
- ⁷⁸ 23/11/10, 26/02/08, 29/11/05, 09/03/99 and 24/11/98.
- ⁷⁹ 24/11/98.
- ⁸⁰ 09/03/99.
- ⁸¹ 24/11/98.
- ⁸² 04/12/01.
- ⁸³ 29/11/05.
- ⁸⁴ 26/02/08.
- ⁸⁵ 26/02/08.
- ⁸⁶ 23/11/10.
- ⁸⁷ 22/02/11.
- ⁸⁸ 07/04/95.
- ⁸⁹ 18/03/03.
- ⁹⁰ 17/06/14.
- ⁹¹ 19/08/03.
- ⁹² 28/08/07.
- ⁹³ 29/11/05.
- ⁹⁴ *Criminal Procedure Act 1986 (NSW)* s 306U; inserted by *Criminal Procedure Amendment (Vulnerable Persons) Act 2007 (NSW)* Sch 1 [13], and amended by *Evidence (Audio and Audio Visual Links) Amendment Act 2007 (NSW)* Sch 2.3.
- ⁹⁵ Heenan, M. J., 2013.

Chapter 8
Non-verbal analysis of video and
CCTV evidence
(Study 7)

Chapter 8: Non-verbal analysis of video and CCTV evidence (Study 7)

Pre-recorded police interviews and CCTV evidence are the most widely used alternate measures for presenting the complainant's evidence in child sexual abuse cases. Yet numerous concerns have been raised about the quality of this evidence¹, and how it affects the ability of the courts to assess complainants' evidence.

It was beyond the scope of the current study to assess the effects of low-quality recordings on trial outcome, due to the myriad other factors that can affect the verdict. These factors could not be controlled or measured in the present sample. Nevertheless, it has been suggested that poor-quality recordings or video feeds can obstruct the judicial process if they impede the judge or jury in assessing the evidence fairly.² Thus, the aim of this study was to provide an objective and descriptive assessment of how pre-recorded and CCTV evidence is displayed to the courts in two Australian jurisdictions.

Method

Materials consisted of 102 electronic tapes of video-recorded evidence (65 pre-recorded police interviews and 37 recordings of CCTV evidence) given by complainants at pre-trial hearings or at trials in child sexual abuse cases in NSW (58 per cent) and

Victoria (42 per cent). These recordings were associated with a subset of the trials referred to in Study 5. Most complainants (81 per cent) were female. Approximately one-third (36 per cent) were 11 years of age or under; 46 per cent were 12–17 years old; and 18 per cent were 18 and older. No differences emerged between the attributes of complainants' pre-recorded interviews that were selected for use as evidence at trial and those that were not.

The recordings were systematically rated by a team of trained researchers in terms of the overall quality of the recording, audio clarity, image clarity, camera perspective, screen display conventions, features of the physical setting and impressions of the complainants' evidence. To identify nonverbal features of the recordings and CCTV video displays, coders recorded the speaker's posture, whether the speaker was frozen or restless, emotional expressions, tone of speech, eye contact, and whether the speakers were mainly silent observers or interacted during the questioning. A copy of the coding protocol is presented in Table 8.1. Coding was conducted by five raters. Fleiss' kappa was used to calculate the inter-rater reliability, which ranged between 0.374 and 0.700 for categorical variables.

Table 8.1 Coding scheme

Demographics	ID	Case ID
	Participants	Complainant, interviewer
	Coder	Initials
	State	1 = NSW, 2 = Victoria and 3 = WA
	Video type	1. Police (initial) interview 2. Pre-trial supplementary hearing 3. In-court evidence
	Gender	1 = male, 2 = female, 3 = both genders
	Age range	1 = pre-school child, 2 = pre-adolescent, 3 = adolescent, 4 = young adult, 5 = middle-aged and 6 = older person
Video and audio quality	Image resolution	1. Poor, out of focus 2. Moderate 3. Good
	Frame rate	Rate on a scale to distinguish bad (1) from good (5) synchronisation of sound and image
	Display	0. No people in the screen 1. One person on the screen 2. Group (camera shot of room with multiple persons) 3. Number of group images simultaneously visible on screen 4. Individual (one person appears per screen) 5. Number of individual images simultaneously visible on screen
	Camera angle	0. none 1. Face 2. Face and upper body 3. Entire person 4. Entire room
	Audio	1. Very poor – sound makes it difficult to follow the conversation and/or there is background noise 2. Poor – some speakers can be heard more clearly than others 3. Satisfactory or average 4. High quality – can hear all parties very well
	Video quality	Rate on scale your overall or global impression: 1 = low quality and 5 = high quality

Results

Descriptions of quality

Ratings of the overall quality of the videos showed that less than one-quarter of the recordings were of high quality (23 per cent), about one-half were of moderate quality (51 per cent) and one-quarter were of sub-standard quality (26 per cent). The frame rate in a small minority of recordings (3 per cent) – all involving younger complainants under 18 years of age – was problematic (sound and video display were not synchronised), detracting from their usability. Audio clarity, the most important feature in using alternate measures, was high in a majority of recordings (58 per cent), and the remainder were of moderate (25 per cent), poor (10 per cent) or substandard (8 per cent) quality. Image clarity was high in only 39 per cent of recordings, and either moderate (44 per cent) or substandard (16 per cent) in the remainder.

Table 8.2 Ratings of audio and image resolution quality

	Audio (%)	Image (%)
High	57.7	39.4
Moderate	25.0	44.3
Poor or substandard	17.3	16.3

Overall, 63 per cent of police interviews simultaneously displayed a mix of individual and group images, but that number dropped to 39 per cent for the youngest complainant group. Pre-trial and in-court CCTV recordings displayed a single image (the complainant) 49 per cent of the time, irrespective of the complainant’s age. Table 8.3 presents the video camera angle features, collapsed across police interviews and CCTV, with respect to the display of the complainant in the frame, and with specific attention to whether facial expressions could be viewed effectively.

The camera angle used in most of the videos (82 per cent) was centred on the complainant, displaying only the complainant's face (11 per cent); face and upper body (44 per cent); or entire body (27 per cent). Less than one-fifth of the videos showed the entire room (17 per cent), in one case without any image of the complainant. The camera angle proximity for effective viewing of the complainant's facial expressions was satisfactory in approximately one-half of the recordings (54 per cent), with the camera angle either too distant (28 per cent), or too close up (18 per cent) for effective viewing in the remainder.

Table 8.3 Camera angle and proximity to complainant's face

Display composition	%
Face only	10.6
Face and upper body	44.2
Entire body	26.9
Entire body and entire room	17.3
No image of complainant	1.0
Camera proximity to face	%
Too close	18.3
Expressions visible	53.8
Too distant	27.9

Overall, available display features were rarely used to convey non-verbal features of communication. The quality of video-recorded interviews and CCTV recordings was variable and could be improved to meet best-practice standards in the provision of alternate measures.³

One case example of a police recorded interview, before and after editing by the prosecution, showed that editing markedly diminished the video quality. This was the sole example of a recording before and after editing in the study sample.

Comparison of pre-recorded and CCTV videos

The researchers compared videotaped pre-recorded police interviews and CCTV evidence. Key factors included the complainants' age, the display, global

quality, audio quality and the image resolution for the complainants. The two types of videos varied substantially on these dimensions.

Pre-recorded police interviews included significantly more complainants under the age of 18 years [$\chi^2 (2, N = 102) = 24.00, p < 0.001$] than did the CCTV evidence. The CCTV and police interview videos differed significantly in terms of their overall global quality [$\chi^2 (2, N = 102) = 8.06, p = 0.018$], audio quality [$\chi^2 (2, N = 102) = 9.5, p = 0.009$] and video resolution [$\chi^2 (3, N = 102) = 21.00, p < .001$]. Global quality and image resolution were more likely to be assessed as low for the police interviews than for the CCTV, but the reverse was true for audio quality.

Conclusion

Wide disparities observed in the image and audio quality of the video-recorded sample of complainants' evidence – and variations by age of the complainant – demonstrated the need for best-practice standards that address these features. Videotaped evidence varied depending on the camera angle used. Many recordings failed to capture images of the complainant that allowed for an adequate assessment of demeanour, by omitting an image of more than just the complainant's face, or by placing the camera at such a great distance from the complainant that the complainant's facial expressions were not adequately displayed.

Results of the analysis of complainants' pre-recorded police interviews and recorded CCTV evidence revealed a number of differences. Although the study sample was not representative, pre-recorded police interviews were more common for child complainants (under 18 years of age) than recordings of CCTV evidence, as would be expected. The overall quality of videotaped evidence, including audio quality and image resolution, varied significantly. More than three-quarters of all recordings were of moderate or substandard quality. Audio clarity varied substantially, and image clarity was high in less than half of all recordings, with the remainder of moderate or poor quality.

Endnotes

¹ Burrows and Powell, 2014a; McConachy, 2002; Powell and Wright, 2008.

² Burrows and Powell, 2014a.

³ See Supplementary Materials 7 (online).

Chapter 9
Police interviewing practices
(Study 8)

Chapter 9: Police interviewing practices (Study 8)

A wide range of factors determines the evidential quality of any child witness statement of abuse, including children's developmental age and abuse history. Yet a well-conducted, open-ended, non-leading interview can be considered the great equaliser. Indeed, Michael Lamb, one of the leading international academic experts on police interviewing recently said that "findings concerning individual differences underscore the need for interviewers to adhere to best practice guidelines".¹ This statement broadly summarises three decades of research on forensic interviewing of victims and boils it down to a simple fact: obtaining good evidence is largely attributable to good interviewing behaviour.² Even among interviewees with markedly different abilities (such as very young children, mature adults and people with intellectual disabilities), differences in response accuracy are negligible when interviewees are questioned well.³

Overall, there is considerable consensus among academics around how child victims of sexual abuse should be interviewed.⁴ Relevant government bodies in countries such as England and Wales, Scotland, Finland, Norway, the USA, Canada and New Zealand have adopted guidance documents that promote the use of practices recommended in the literature.⁵ Where they have been adopted, interview guidance and protocols are advisory only and acknowledge that minor variation in approaches may be justifiable in particular situations. Guidance frameworks do not constitute a legally enforceable code of conduct. They are designed to inform or support the development of training-related activities and encourage the adoption of more uniform evidence-based police interview practice.

In the current chapter, police interviewing in three Australian jurisdictions (NSW, Victoria and WA) is evaluated in relation to the guidance literature. The focus is on five broad consensus recommendations, which have featured in research discussions and practice guides. Note that while some of the recommendations discussed in this chapter are included in the Australian police interviewing frameworks reviewed in Appendix B, the interviews evaluated in this chapter pre-dated this (December 2014) review. The practice guide cited throughout this chapter is the most recent edition of the guide endorsed by the UK Ministry of Justice (for England and Wales).

Method

Sample

The sample included all available police interview transcripts ($N = 118$) that were associated with trials referred to in Chapter 6. Thirty-three transcripts were provided by NSW, 31 transcripts came from Victoria and 54 transcripts were provided by WA. A small number of children across all three states were interviewed on more than one occasion, so the number of interview transcripts was greater than the number of children interviewed: 27 children were interviewed in NSW, 28 in Victoria and 40 in WA. All interviewees were child complainants (alleged victims under the age of 18 as opposed to non-abused children who witnessed the alleged offence). Within each jurisdiction, there was a good representation of ages, gender and timing of interviews. These are presented in Table 9.1.

Table 9.1 Descriptive information of police interviews across NSW, Victoria and WA

		NSW	Vic	WA
		N (%)	N (%)	N (%)
Year conducted	2001	0 (0.0)	0 (0.0)	3 (5.6)
	2009	1 (3.0)	1 (3.2)	0 (0.0)
	2010	2 (6.1)	0 (0.0)	5 (9.3)
	2011	4 (12.1)	4 (12.9)	2 (3.7)
	2012	12 (36.4)	16 (51.6)	24 (44.4)
	2013	14 (42.4)	7 (22.6)	19 (35.2)
	2014	0 (0.0)	3 (9.7)	1 (1.9)
Complainant gender	Female	29 (87.9)	25 (80.6)	47 (87.0)
	Male	4 (12.1)	6 (19.4)	7 (13.0)
Age group	4–7 years	9 (27.3)	0 (0.0)	6 (11.1)
	8–10 years	7 (21.2)	4 (12.9)	19 (35.2)
	11–14 years	13 (39.4)	17 (54.8)	16 (29.6)
	15–17 years	4 (12.1)	10 (32.3)	13 (24.1)

Results

The following subheadings evaluate five core recommended practice measures. For each recommendation, a description and brief review is offered, followed by the evaluation of the 118 interview transcripts listed in Table 9.1.

Open-ended rapport building

Recommended practice

The relationship or interpersonal connection between an interviewer and interviewee (hereby referred to as ‘rapport’) can have a major impact on interviewees’ willingness to disclose sensitive information.⁶ Current literature suggests that good rapport is established through open-ended questioning. For example, the UK interview guidance *Achieving Best Evidence* recommends that interviewers commence the interview by briefly asking neutral, predominantly open-ended questions unrelated to the alleged event.⁷ This approach, known as a ‘practice narrative’⁸, has wide-ranging benefits on children’s responsiveness to open-ended questions about the abusive event.⁹ From a linguistic perspective, the practice narrative primes the child for a style of interaction that is conducive to detailed reporting. In one study, open-ended rapport building resulted in two and a half times as many details and words about the target event compared to rapport building that consists of a series of disjointed closed questions.¹⁰ Furthermore, several Australian prosecutors have reported that the inclusion of a practice narrative in the electronically recorded interview that is played in court as evidence-in-chief can enhance jury members’ ability to relate to the child.¹¹

Actual practice

Across all three Australian jurisdictions, the inclusion of a practice narrative was rare. Although 51 interviewers attempted to build rapport by asking children questions about happenings in their lives, only four children (one in NSW and three in WA) were encouraged to provide a free narrative on the rapport topic. Instead, interviewers typically adopted a question-and-answer format, where children provided one- or two-word responses about school or family composition. This style of interaction early in the interview primes children to do the exact opposite of what practice narratives are intended for. Interestingly, there were no rapport-building questions whatsoever in any of the Victorian interviews. In this jurisdiction, there is an initial ‘disclosure’ interview done off camera, so it may be that such questions were included there. Nonetheless, even if rapport-building questions were conducted in a pre-interview and they were open-ended, there is no evidence to suggest whether or not they would have any linguistic benefit. The time window for tasks that prime language responses can be quite limited.¹²

Clear simple ground rule instructions

Recommended practice

Ground rules are instructions about the communicative expectations of the interview – for example, to not guess at answers, to correct interviewers’ mistakes and to signal miscomprehension. Although there is some debate as to how much benefit they actually confer, most social science and child development researchers agree that ground rules are useful to include because they highlight the role of the child (rather than the interviewer) as the expert in the interview.¹³ To be

effective, instructions must be short and concise, use simple language and make it clear to children what is expected of them.

The interview guidance endorsed by the UK Ministry of Justice recommends instructing the interviewee to make it known if they have trouble understanding the interviewer or knowing how to answer the question. This guidance also recommends informing interviewees that they may take a break at any time, and that it is important to provide elaborate detail.¹⁴

Table 9.2 provides a full list of rules commonly included in interview guides, and examples of (recommended) simple phrases along with the word count. Note that while practice is known to help children of all ages apply the ‘don’t know’ rule (for example “If I said [nonsensical question], what would you say?”)¹⁵, the type, nature and amount of practice required for more challenging rules is still an issue of contention. Thus, for ease of presentation, the analyses will focus on which rules are delivered and whether they are worded simply and appropriately.

Table 9.2 Examples of interviewers’ ground rules

Rule	Example wording (number of words uttered)
Don’t know	<i>If I ask you a question and you don’t know the answer, just say “I don’t know”. (17)</i>
Don’t understand	<i>If I ask you a question and you don’t understand, just say “I don’t understand”. (20)</i>
Don’t remember	<i>If I ask you a question and you don’t remember the answer, just say “I don’t remember”. (17)</i>
Correct me	<i>Sometimes I might say things that are wrong. You should tell me because I don’t know what’s happened. (18)</i>
Break	<i>You may take a break at any time. (8)</i>
Taking notes	<i>I will write things when you talk. It helps me remember what you say. (14)</i>
Use any words	<i>You may use any words that you want when we are talking. (12)</i>

Actual practice

Sixty-seven children (57 per cent) received at least one ground rule (four on average). Fifty-one (43 per cent) received none at all. Nearly all of the interviewers in NSW and Victoria delivered at least one ground rule, whereas only four interviewers in WA gave any ground rules at all. The ‘don’t know’ and ‘don’t understand’ rules were the most frequently delivered. Interestingly, 29 NSW interviews contained an additional (not typically recommended) ground rule hereby referred to as the ‘don’t want to disclose’ rule – for example “If I ask you a question and you don’t want to tell me, just say ‘I don’t want to tell you’. It’s okay to say that, but I may need to ask some questions about why you don’t want to tell me”.

Some interviewers were very concise in delivering ground rules, whereas others gave lengthy explanations. For the 67 children who received at least one ground rule, on average 33.36 words were used per rule ($SD = 17.62$), with a range of 7–103 words. See Table 9.3 for the average number and range of words used to deliver each ground rule. As can be observed by comparing Tables 9.2 and 9.3, delivery of the rules in the current sample was, on average, about twice as wordy as the examples given. Giving practice examples for the rules (such as “If I asked you what’s my dog’s name, what would you say?”) would have increased word counts over the examples in Table 9.2 but these were extremely infrequent (only 1.15 per cent of all questions were practised; all related to the ‘correct me’ rule).

Table 9.3 How many words it took to explain each rule

Rule	Average words (SD)	Range
Don’t want to disclose	62.17 (20.39)	27–103
Correct me	33.33 (4.93)	30–39
Don’t remember ^a	32.00 (0.00)	N/A
Taking notes	31.45 (13.47)	10–61
Break	29.59 (15.32)	7–82
Don’t understand	28.16 (10.37)	14–59
Don’t know	27.84 (10.24)	14–68
Use any words	12.67 (1.16)	12–14

^a Only one interview contained a ‘don’t remember’ rule.

The 'don't want to disclose' rule appeared the most complex to deliver, with interviewers using an average of 62.17 ($SD = 20.39$) words. Children tended not to understand how to respond when faced with this rule, thus requiring further explanation from the interviewer. In contrast, the 'use any words' rule was delivered, on average, in only 12.67 ($SD = 1.16$) words. The other six rules were delivered in approximately the same number of words, ranging from 27.84 to 33.33 words.

There was no relationship between complainant age and the average number of words used to deliver ground rule instructions: $F(2, 58) = 0.67, p = 0.57$. That is, interviewers did not adjust the length of their explanations of ground rules as a function of complainant age.

Use questions that encourage narrative responding

Recommended practice

A core principle underpinning all interview protocols is the need to maximise narrative detail by using open-ended questions.¹⁶ Open-ended questions are those that encourage elaborate and coherent responses but do not specify what information is required.¹⁷ In contrast, specific questions dictate what specific details are required and narrow the child's response options. They include the following types: 'cued recall' (the wh- questions – who, what, when, where and why – and how); 'forced choice' (a set of options); or 'yes/no' (where yes or no are the only options). A brief overview of the main benefits of open-ended questions is provided below. These benefits are so robust (even for child witnesses who have limited memory and language abilities) that the proportion of open-ended questions is the single most important measure used in interviewer training evaluations.

Benefits of open-ended questions compared to specific questions

Text box 9.1

Open-ended questions:

- elicit longer responses¹⁸
- elicit more detailed responses¹⁹
- elicit more accurate responses²⁰
- maximise victim credibility²¹
- maximise narrative language²²
- increase the number of temporal and contextual attributes provided, such as references to sequencing, dating, number of occurrences, duration and frequency²³
- improve witness perceptions of being heard and not judged²⁴
- assist in detecting deception.²⁵

The interview guidance endorsed by the UK Ministry of Justice recommends that interviewers commence questioning with open-ended questions, using them predominantly throughout the interview, and only move to specific questions if necessary.²⁶ There is no recommended or agreed 'ideal' number of open-ended questions. Instead, the general advice offered is that such questions should be prioritised, and be used almost exclusively during the early stages of the interview.²⁷ To provide some context around adequate amounts, untrained interviewers typically ask between 3 and 20 per cent open-ended questions, whereas well-trained interviewers (those conducting interviews where the majority of questions of any type are defensible) tend to ask between 40 and 70 per cent open-ended questions, depending on the particular context and study.

Good performance, however, is just as much about selection of open-ended questions as it is about the number of them. Different question stems have different functions and should be used interchangeably to direct the flow of conversation.²⁸ For example, broad invitations are useful early in the process to encourage elaborate recall (such as "Tell me everything that happened when ... Start at the beginning"). Other types of open questions encourage the child to keep reporting in sequence (for example "What else happened?" and "What happened next?"), whereas others use previously reported details as cues to provide further elaboration (such as "Tell me more about the part where [activity stated by child]." or "What happened when [activity stated by child]?"). A good interviewer can carefully craft open questions in a natural way, to provide scaffolding or structure that helps children relay what happened and gently direct them to important evidential detail. The simplest (crude) way of measuring basic skill in using a variety of open-ended questions is to count the number of different types of question stems.

Actual practice

The average proportions of open-ended questions used by interviewers from each state are presented in Table 9.4. The Victorian interviewers used significantly more open-ended questions (18 per cent) than both NSW (13 per cent; $p = 0.03$) and WA (10 per cent; $p < 0.001$) interviewers. There was no significant difference between WA and NSW interviewers ($p = 0.39$). Irrespective of the differences across jurisdictions, the rate of open-ended questions is comparable to that of interviewers who have not been trained at all. The interviewers across all three states typically commenced the interviews appropriately, by using a broad open-ended question to launch the child's narrative. However, after just one or two consecutive open-ended questions, interviewers quickly reverted to a style that relied predominantly on specific questions.

Table 9.4 Mean proportions of open-ended questions

State	M	SD	Range
NSW	0.13	0.05	5–80
Vic	0.18	0.09	0–79
WA	0.10	0.09	3–84

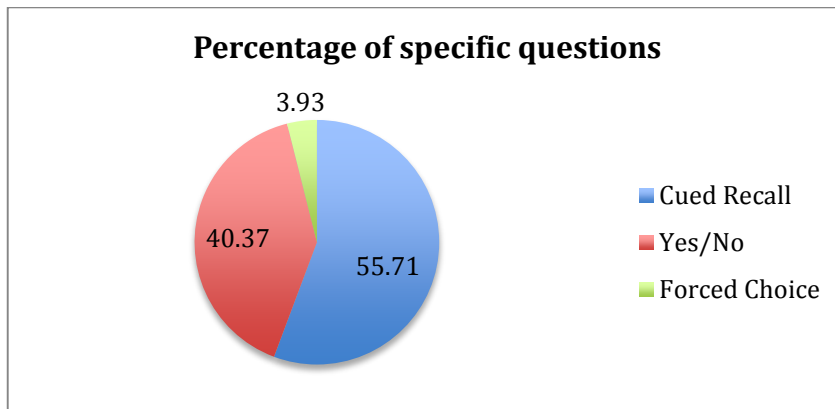
Note: Range refers to raw number of open questions.

When open-ended questions were adopted, interviewers tended to use the same one or two questions repeatedly. Just 14 interviewers across all three states frequently used a variety of at least three different types of open-ended questions throughout their interviews.

The NSW interviewers demonstrated an especially low variety of open-ended questions; all relied on just one or two formats of open questions. Even though some Victorian interviewers employed a wide variety of question stems, questions asked by 24 Victorian interviewers who did not use a variety of open-ended questions were extremely repetitive (making Victorian interviewers as a group the most repetitive of the three states). For example, in one interview, an interviewer used the question stem ‘Tell me about...’ more than 50 times.

The lack of opportunity interviewers provide for a complainant to give narrative detail is further compounded by the high proportion of questions that restrict the response to yes/no or to a choice of response options (for example “Did he use his left hand or his right hand?”). Of the total 24,201 questions asked across all 118 transcripts, 7,833 (32.4 per cent) encouraged a yes/no response and 763 (3.15 per cent) restricted the child to a choice of response options. Nearly half of all the cued recall questions (44.9 per cent) yielded only a one or two word response (such as “What colour was his shirt?”). See Figure 9.1 for a breakdown of specific question types asked across all jurisdictions. The use of proportions underestimates the sheer number of specific questions in these interviews, which ranged from 14 to 875. Eight interviewers in WA and NSW asked more than 400 specific questions. Irrespective of the jurisdiction, there was no compensation given for the fact that younger children are more prone to error in response to specific questions compared to older children. When the interviewees were divided into five age categories (3–5 years, 6–8 years, 9–11 years, 12–14 years and 15–17 years) there was no significant difference in the proportion of specific questions used by interviewers: $F(4, 117) = 1.15$, $p = 0.34$, $\eta^2 = 0.0$.

Figure 9.1 Different types of specific questions asked across all three states



Avoidance of leading questions

Recommended practice

Leading questions are defined as questions that presume or include a specific detail that was not previously mentioned by the child (such as “What colour was the man’s beard?” when the child had not described the man as having a beard). The use of these questions in police interviews should be minimal, if not completely absent. For example, the UK *Achieving Best Evidence* interview guidance

explicitly recommends avoiding the use of leading questions unless absolutely necessary, and warns interviewers never to be the first to suggest to the witness that a particular offence was committed.²⁹ Similar to specific questions, leading questions increase the risk of inaccuracies and errors being reported by children, as the child may incorporate the interviewers’ suggestions into their account.³⁰ During cross-examination, defence lawyers highlight such errors as evidence of the child’s unreliability, in order to cast doubt on the allegations.

Actual practice

On average, 11 per cent of all questions were leading. This relatively high percentage – similar to that observed among interviewers not trained to use a semi-structured interview protocol³¹ – is even more concerning when converted to a raw number: 2,163 leading questions were asked of children who subsequently ended up in the court system. Only one interviewer did not employ any leading questions throughout the interview. The average number of leading questions per interview was 18.49 (range: 1–88).

While appropriately trained interviewers still ask some suggestive questions, even in the range of 5–14 per cent of all prompts these numbers are not comparable to what was observed in the current sample. For example, in an early training study, 8 per cent of prompts were suggestive after training, but because more non-leading open-ended questions were posed, and fewer questions were asked overall, the raw average per interview was 4.62³², which is less than one-quarter of the suggestive questions observed in the current sample.

Age did not have an effect on the proportion of leading question asked, irrespective of the state: NSW $F(3, 28) = 1.45, p = 0.24, \eta^2 = 0.18$; Victoria $F(3, 27) = 0.69, p = 0.57, \eta^2 = 0.07$; WA $F(4, 49) = 0.56, p = 0.70, \eta^2 = 0.04$. That is, young children (aged 3–5 years), who are known to be highly susceptible to leading information and interviewer suggestion, were asked the same proportion of leading questions as older children (aged 15–17 years).

An analysis revealed that Victorian interviewers asked significantly more leading questions (13 per cent) than both NSW (9 per cent; $p = 0.04$) and WA (8 per cent; $p < 0.001$). In two of the Victorian interviews, more than 25 per cent of the questions were leading. One interview contained 88 leading questions; these predominantly involved the interviewer making an assumption about what occurred during the abusive incident and asking the child to provide information about the stated assumption (for example asking what the accused had said during the abuse, when the child had not reported that the accused said anything). The list below provides examples of leading questions extracted from the interview transcripts.³³ It is important to note that while these details could be forensically important, there are other far more appropriate (and less risky) ways to elicit the answers.

Examples of leading questions

Text box 9.2

Someone told me that at your nanny and grandpa's house, [accused] hurt you. Tell me about that. [Child had not disclosed that the accused hurt her, or that she was hurt at her nanny and grandpa's house.] (C27, 5-year-old, NSW)

Did he put his hand inside your clothes? [Child had not reported that the accused touched her inside her clothes.] (C81, 5-year-old, NSW)

Who comes to visit you at [suburb]? [Child had not mentioned anyone visiting her.] (C84, 6-year-old, NSW)

How did he force you to touch his doodle? [Child had not disclosed that she had been forced to touch the accused's doodle.] (C69, 7-year-old, NSW)

Had it been a school day or a weekend? [Child had not disclosed that the abuse occurred during the school term, as opposed to during the holidays.] (C42, 9-year-old, NSW)

Who else have you told? [Child had not disclosed that she had told anyone.] (C40, 11-year-old, NSW)

So you think this happened in winter? [Child had not reported or suggested that the event occurred in winter.] (C114, 13-year-old, NSW)

Were you at school? [Child had not disclosed that the abuse occurred on a school day.] (C131, 13-year-old, NSW)

Does he wear glasses? [Child had not disclosed that the accused wears glasses.] (C82, 14-year-old, NSW)

What did you say to him? [Child had not reported that she had said anything.] (C112, 15-year-old, NSW)

When he's tried to touch your boobs, tell me what he's done with his hands? [Child had not disclosed that the accused tried to touch her boobs, only her 'bum'.] (C64, 12-year-old, Victoria)

That night prior to this happening, did you see [accused] drinking at all? [Child had not disclosed that the accused was drinking.] (C90, 14-year-old, Victoria)

Did you have underwear on? [Child had disclosed wearing pyjamas, but had not mentioned underwear.] (C110, 14-year-old, Victoria)

So he wanted to [penetrate you] then and there? [Child had disclosed that the accused had said he intended to penetrate her eventually.] (C128, 14-year-old, Victoria)

So [you were wearing] boardies? [Child had disclosed he was wearing shorts, not boardies.] (C108, 15-year-old, Victoria)

What did mum say? [Child had not reported that her mother had said anything.] (C129, 15-year-old, Victoria)

Now, I understand that you did some babysitting for [accused]. Tell me about that. [Child had not disclosed babysitting for anyone.] (C87, 17-year-old, Victoria)

So who gave you the alcohol? [Child had not reported that anyone gave her the alcohol.] (C130, 17-year-old, Victoria)

What did you notice about his penis? [Child had not disclosed that she had noticed anything about the accused's penis.] (C51, 17-year-old, Victoria)

Did you tell [witness] about what happened? [Child had not disclosed that she told the witness about the abuse.] (C88, 17-year-old, Victoria)

Who else was in the house? [Child had previously reported there was no one else present.] (C70, 5-year-old, WA)

What happened yesterday after school when mum picked you up? Did you go home? Did you go swimming? [Child didn't mention what he did after school.] (C96, 6-year-old, WA)

Did [accused] take your shorts off? [Child had not disclosed that her shorts had been removed, or that the accused removed them.] (C8, 7-year-old, WA)

Where was his mum? [Child had not disclosed that the accused's mother was present during the abuse.] (C73, 10-year-old, WA)

Who does [accused] live with? [Child had not reported that the accused lived with anyone.] (C18, 9-year-old, WA)

And that was the last time that it happened? [Child had not reported that this occurrence was the last time he experienced the abuse.] (C5, 9-year-old, WA)

Do you remember it ticking into August? [Child had reported arriving at the accused's house on 20 July and staying for one week, thus leaving on 27 July.] (C25, 13-year-old, WA)

Did mum ever drop you? [Child had disclosed that the accused always picked her up/dropped her off.] (C124, 14-year-old, WA)

So that's why it stopped, because you jumped straight up? [Child had not reported at this point in her narrative that the abuse had stopped.] (C126, 16-year-old, WA)

Where was your uncle sitting? [Child had not reported that her uncle was sitting.] (C17, 16-year-old, WA)

Leading questions were observed at all stages of the interviews, even at the point of eliciting a disclosure. In eight interviews (spread across all three jurisdictions) the interviewer needed to raise information from the child's case file because the child was unaware of the reason for the interview. In each of these interviews, the child was asked to elaborate on the prior information without checking with the child that the prior information was correct.

Avoiding non-verbal aids

Recommended practice

Considerable controversy remains regarding the extent to which non-verbal aids can be of utility in forensic interviews.³⁴ The overriding conclusion from research with such aids is that there is little evidence to suggest that they yield any additional benefits over verbal recall alone when interviews are conducted in an open-ended narrative manner³⁵, and they may increase error rates among some children.³⁶ As a result of the research, some interview guidance – such as *Achieving Best Evidence* in the UK – advises interviewers to proceed with considerable caution when using non-verbal aids such as dolls, body diagrams and drawings.³⁷

If cues and props are to be introduced, they should ideally not be used before open-ended questioning has been exhausted.³⁸ Specifically, there are three major risks associated with introducing non-verbal aids early in the interview: they can increase reports of both true and false information;³⁹ when interviewers use non-verbal tools they become poorer interviewers – that is, the reliance on the non-verbal aids reduces the quality of the questions they ask;⁴⁰ and the use of props is associated with interviewer confirmatory bias, such that interviewers may be more likely to follow up early non-verbal reports with inappropriate, leading questions about touch.⁴¹

Actual practice

Positively, no interviewers introduced anatomical dolls into the interview. However, free drawing and body diagrams were introduced a total of 53 times and 20 times, respectively, across all 118 transcripts. These were most common in NSW. Children were most frequently asked to draw a map of a location, or a room or house layout. In direct conflict with the evidence-based literature and associated guidance

documents, all of the props were introduced towards the start of the recollection of each occurrence of abuse when the interviewer had interrupted the child's narrative to ask specific questions. One interviewer used free drawing eight times in her interview with a 14-year-old. The use of free drawing was significantly higher with children aged 3–7 than with children aged 11 and above [$F(3, 113) = 3.12, p = 0.03$]. The use of free drawing with children aged 8–10 did not differ significantly from the other two age groups ($p = 0.43$).

Keep interviews short

Recommended practice

Because every child differs in the amount of detail that they can recall, and every case differs in complexity, guidance documents do not provide a definitive time frame for the length of interviews. With regard to children's attention spans, generally speaking the younger the child, the less time they will be able to focus on the task at hand.⁴² So interviewers should be particularly mindful of interview length with young children, and should aim to keep interviews short to minimise distraction.⁴³

Interview guidance such as *Achieving Best Evidence* suggests careful consideration of the child's developmental level when deciding the quantity of questions, and structuring these questions into manageable topics based on the witness's own recall of the event, rather than asking a longwinded series of predetermined questions.⁴⁴

Actual practice

The research team calculated the length of each interview from the recorded start and end times (excluding any breaks). Some transcripts did not include recording length (NSW = 6, Victoria = 9, WA = 9), leaving a total of 95 interviews where length

could be measured. On average, interviews ran for 61 minutes ($SD = 37.72$) and there was no significant difference in interview length between states $F(2, 90) = 2.50, p = 0.09$. Furthermore, there were no relationships between interview length and children's age (children were categorised into one of five age groups: 3–5, 6–8, 9–11, 12–14 and 15–17). In other words, interviewers did not adjust the length of their interviews to suit the child's age and attention span. The shortest interview – 18 minutes – was held to clarify some previously disclosed information. Thirty-nine interviews (42 per cent of the 93 where length could be recorded) were held for at least an hour. Three of these interviews went for over two hours and three went for well over three hours (two in NSW and one in WA). One NSW interview was held for three hours and 20 minutes with only a 15-minute break.

A question that arose during this evaluation is whether any of the questions could have potentially been omitted in order to make the interview time shorter. Although the UK *Achieving Best Evidence* does not provide explicit text on this issue, a series of recent focus groups with Australian Crown prosecutors provides one perspective.⁴⁵ Specifically, Table 9.5 summarises the prosecutors' guidance about when they would follow up information in various evidential categories. The table also indicates the percentage of interviewers in the current study who attempted to elicit details in each category, and of those, the proportion whose questioning would be considered useful, based on the prosecution perspective. The degree of extraneous questioning (according to the prosecutor focus groups) is also presented graphically in Figure 9.2.

What is evident from Table 9.5 and Figure 9.2 is that there could potentially be substantial reduction in the length of interviews without a loss of critical evidential detail.

Figure 9.2 Percentage of interviewers who sought further evidential information and percentage who did so appropriately

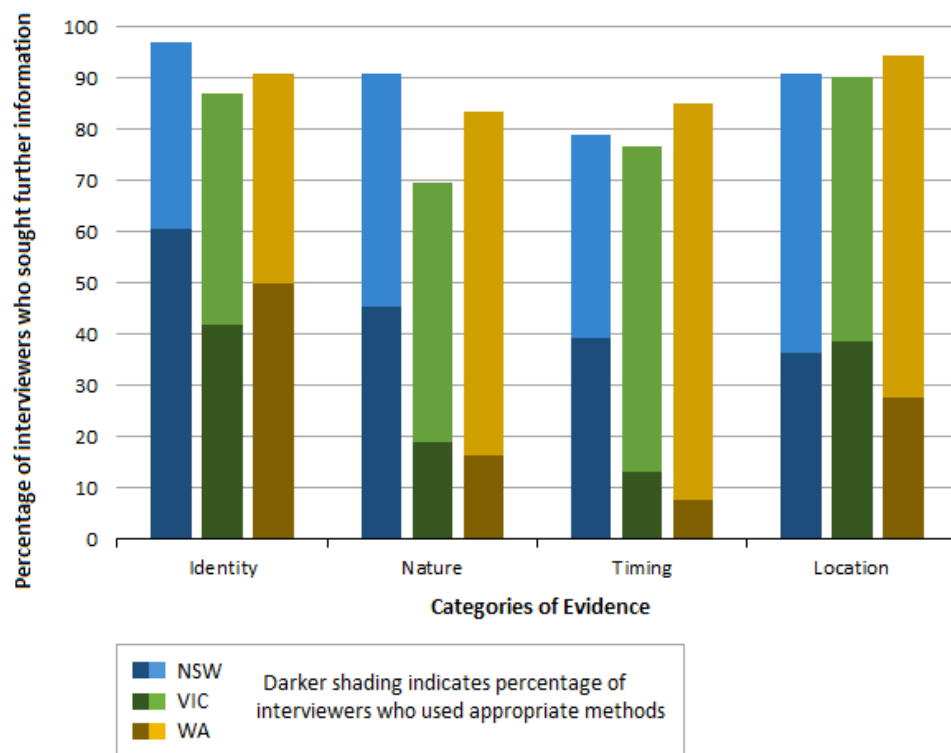


Table 9.5 Prosecutors’ recommendations on eliciting essential evidentiary information, and number of appropriate attempts made in current practice

Type of detail	Prosecutor recommendation	Attempts made to elicit information N (%)	Attempts consistent with recommendations N (%)
Identity of accused	If the accused is known to the child, the interviewer should seek only so much information as is required to demonstrate the child’s basis or grounds for recognition of the accused. If the accused is not known to the child, the interviewer should attempt to seek descriptive information from the child to assist with the investigation of the case.	108 (91.53)	60 (55.56)
Nature of offence	Any colloquial names that children use when referring to genitalia and that would be understood by a layperson do not need to be followed up in the interview. This category also refers to the need to avoid asking for the direction the accused/child was facing, or the position their bodies were in.	98 (83.1)	7 (7.14)
Timing of offence	An exact date, day and time for when the alleged abuse occurred is not required. While a date range of up to two years may be sufficient for some prosecutions, prosecutions will still require some level of particularity regarding the offending, and some evidence to indicate that the complainant is able to generally identify a particular incident of offending, even if not a date (such as “when we were at the holiday house” or “the day of the school swimming carnival”).	95 (80.51)	31 (32.63)
Location of offence	If the location is known to the child, the interviewer should confirm the grounds for the child’s recognition. If the location is unknown to the child (for example, a house never visited before), the interviewer should attempt to seek a comprehensive description from the child to assist with the investigation of the abuse.	109 (82.37)	39 (35.78)

Conclusion

The current study demonstrates that the interviewers sampled for this report were not consistent with the guidance literature on how to interview child complainants. While some of the interviews included elements that were consistent with the literature cited at the beginning of each section⁴⁶, some interviews did not. Overall, the interviews were characterised by a low proportion of open-ended prompts; high numbers of specific, leading and developmentally inappropriate questions; rare delivery of ground rules with examples; and almost a complete absence of open-ended practice narratives. From a child developmental perspective, it appears that despite the best of intentions, the interviewers had strayed from being relatively passive receivers of children's information, and instead played a major role, albeit inadvertently, in shaping the children's accounts.

Importantly, the patterns observed in these interviews are not new or limited to the current sample. The major evaluations of child interviewer training programs over the past 15 years reveal that one of the biggest issues facing evaluators has been closing the gap between recommended and actual practice.⁴⁷ That gap is reported to be a global and longstanding concern⁴⁸ – a conclusion supported by the similarity of the current findings and those of prior interviewer performance evaluations from the jurisdictions that featured in the current evaluation.⁴⁹

The assessment in this chapter, and the discussion in Appendix B, suggest that adopting better guidance and addressing issues in skill development and quality assurance may improve police interview practices in Australian jurisdictions.

Endnotes

- ¹ Lamb, Malloy, Hershkowitz and La Rooy, 2015, at p. 484.
- ² See also Bull, 2010.
- ³ Agnew and Powell, 2004.
- ⁴ That is 'best practice'. See Malloy, Johnson and Goodman, 2013; Newlin et al. 2015; Powell, 2013.
- ⁵ Association of Chief Police Officers, 2013; Justis-og beredskapsdepartementet, 2015; Ministry of Justice, 2011; New Brunswick, Canada, 2005; New Zealand Ministry of Justice, 2011; Scottish Executive, 2011; State of Michigan Governor's Task Force on Child Abuse and Neglect and Department of Human Services, 2011; Taskinen, 2003.
- ⁶ Collins, Lincoln and Frank, 2002; Hershkowitz, 2009.
- ⁷ Ministry of Justice, 2011.
- ⁸ See for example, Anderson, Anderson and Gilgun; Lamb, Orbach, Hershkowitz, Horowitz and Abbott, 2007; Lyon, 2005; Newlin et al., 2015; Yuille, Cooper and Hervé, 2009.
- ⁹ For a review see, Roberts, Brubacher, Powell and Price, 2011.
- ¹⁰ Sternberg et al., 1997.
- ¹¹ Benson and Powell, 2015a.
- ¹² Branigan, Pickering and Cleland, 1999.

- ¹³ For a review see, Brubacher, Poole and Dickinson, 2015.
- ¹⁴ Ministry of Justice, 2011.
- ¹⁵ Danby et al., 2015.
- ¹⁶ For a consensus document, see Newlin et al., 2015.
- ¹⁷ Powell and Snow, 2007.
- ¹⁸ Dent and Stephenson, 1979; Hershkowitz, 2001; Lamb, Hershkowitz, Sternberg, Boat and Everson, 1996; Lamb, Hershkowitz, Sternberg, Esplin, et al., 1996; Sternberg et al., 1997.
- ¹⁹ Hershkowitz, 2001; Lamb et al., 2003; Sternberg et al., 1996; Sternberg et al., 1997; Sternberg et al., 1999.
- ²⁰ Lamb and Fauchier, 2001; Lamb, Orbach, Hershkowitz, Horowitz and Abbott, 2007.
- ²¹ Feltis, Powell, Snow and Hughes-Scholes, 2010.
- ²² Feltis, Powell, Snow and Hughes-Scholes, 2010.
- ²³ Orbach and Lamb, 2007.
- ²⁴ Eastwood and Patton, 2002.
- ²⁵ Vrij, Granhag and Porter, 2010.
- ²⁶ Ministry of Justice, 2011.
- ²⁷ Carmans and Patiny, 2015; Katz, 2015; La Rooy et al., 2015; Poole and Lamb, 1998; Powell, Fisher and Wright (2005); Tudor-Owen and Scott, 2015; Westera, Zajac and Brown, 2015; Yi, Jo and Lamb, 2015.

- ²⁸ Powell and Guadagno, 2008.
- ²⁹ Ministry of Justice, 2011.
- ³⁰ Ceci and Bruck, 1993.
- ³¹ See Lamb, Hershkowitz, Orbach and Esplin, 2008.
- ³² Orbach, Hershkowitz, Lamb, Sternberg, Esplin and Horowitz, 2000.
- ³³ Examples of leading questions were extracted randomly with the constraint that there was a variety of complainant ages and an even distribution of examples across jurisdictions.
- ³⁴ Newlin et al., 2015; Poole, Bruck and Pipe, 2011.
- ³⁵ Brown and Lamb, 2015.
- ³⁶ For example, see Brown, 2011; Poole, Dickinson, Liberty, Brubacher and Kaake, 2014.
- ³⁷ Ministry of Justice, 2011.
- ³⁸ Duke, Uhl, Price and Wood, 2016; Lamb, Orbach, Hershkowitz, Horowitz and Abbott, 2007; see Poole and Bruck, 2012, for review of aids; Newlin et al., 2015.
- ³⁹ As confirmed by analogue research; see Poole and Bruck, 2012.
- ⁴⁰ Poole and Bruck, 2012.
- ⁴¹ Bruck and Ceci, 2015.
- ⁴² See Cornish, Scerif and Karmiloff-Smith, 2007, for trajectories of attention across the lifespan.
- ⁴³ American Professional Society on the Abuse of Children, 2012.
- ⁴⁴ Ministry of Justice, 2011.
- ⁴⁵ Benson and Powell, 2015a; Burrows, Powell and Anglim, 2013.
- ⁴⁶ Malloy, Johnson and Goodman, 2013; Newlin et al. 2015; Powell, 2013.
- ⁴⁷ Aldridge and Cameron, 1999, Cederborg, Alm, de Silva Nises and Lamb, 2013; Cyr and Lamb, 2009; Dion and Cyr, 2008; Freeman and Morris, 1999; Lamb, Sternberg, Orbach, Esplin and Mitchell, 2002; Lamb, Sternberg, Orbach, Hershkowitz, Horowitz and Esplin, 2002; Myklebust and Bjorklund, 2006; Powell, Fisher and Hughes-Scholes, 2008a; Powell, Fisher and Hughes-Scholes, 2008b; Powell, Guadagno and Benson, 2014; Price and Roberts, 2011; Rischke, Roberts and Price, 2011; Warren, Woodall, Thomas, Nunno, Keeney, Larson, et al., 1999.
- ⁴⁸ Powell, 2008b.
- ⁴⁹ An evaluation of the Victoria Police interview procedure (based on 2002–2006 interviews) reported a similarly low proportion of open-ended questions ($M = 0.16$ as compared to $M = 0.18$ in the current report) along with high reference to details not yet mentioned by the child (Powell, 2008a). McConachy's (2002) and Cant et al.'s (2006) reports, based in NSW and WA respectively, cited problems of leading questions, lengthy interviews and an abundance of irrelevant information.

Chapter 10
Courtroom discussions about
police interviews
(Study 9)

Chapter 10: Courtroom discussions about police interviews (Study 9)

Prosecutors, defence lawyers and judges perceive that using the police interview as a complainant's evidence-in-chief has improved the court process for complainants in many ways (see Study 1). However, they also raised numerous concerns about the use of police interviews as evidence-in-chief.¹ Such concerns (which include poor questioning, the elicitation of excessive and minute detail, long interviews and poor audio-visual quality) have typically arisen through qualitative interviews with these stakeholders. An additional method of evaluating this issue is to review how these professional groups explicitly refer to the interviews at the time of the trial. The current study provides such an evaluation. The aim is to better understand how well the process is working and the extent to which any issues or challenges are amenable to change from a police interviewing perspective.

It is important to note that dialogue about the police interview may be limited at the trial stage. This is because prior to the trial – the ultimate forum – there are a number of opportunities for issues to be addressed (such as before charges are laid, when deciding to prosecute and during pre-trial hearings). Nevertheless, trial discussions provide an important supplement to qualitative stakeholder feedback.

Method

Trial transcripts

The original sample consisted of 96 child sexual abuse trial transcripts, which included 40 child (aged 6–11), 40 adolescent (aged 12–17) and 40 adult (18 and over) complainants from each of the three jurisdictions. Of these, 35 complainants were excluded on the basis that they did not give evidence using a police interview. The final sample comprised 85 complainants: 24 from NSW (four male), 28 from Victoria (seven male) and 33 from WA (eight male). The age range of complainants across all three states was 6.87 to 18.78 years at trial or pre-recording²: ($M = 13.56$, $SD = 3.34$). The means and standard deviations for additional demographic information are presented by state in Table 10.1.

Table 10.1 Means and standard deviation for demographic variables

	NSW		VIC		WA	
	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>	<i>M</i>	<i>SD</i>
Age (years) at trial or pre-recording	12.37	0.70	15.46	0.46	12.82	0.58
Number of charges	4.41	0.68	3.62	0.54	2.67	0.40
Number of interviews	1.52	0.15	1.24	0.11	1.48	0.14
Days between first and last interviews	53.96	22.45	61.50	38.66	240.52	138.18
Number of questions ^a	285.96	43.48	112.63	12.34	320.28	37.56
Length of interviews (minutes) ^a	67.31	10.93	35.46	3.71	61.36	5.60
Length of interview per occasion (minutes) ^a	40.41	3.91	26.23	2.77	38.75	3.21

Note: Demographic information is given per complainant, not per trial.

^a These variables are a composite measure for all police interviews undergone by the complainant.

Data management and analysis

The researchers read the trial transcripts and recorded any discussions between legal professionals concerning the police interview. The data was then subjected to open coding³, which involved a line-by-line analysis of the discussions (reduction) and identification of topics or issues raised therein. Discussions concerning similar topics were grouped together. The data was then re-examined for statements that supported the identified topics and issues. Thus, the identification of core topics helped to reduce the large volume of data into meaningful and discrete units of analysis.⁴

Results

Prosecutors, defence counsel and judges mentioned the complainant’s police interview in three different contexts: first in terms of their usefulness as evidence-in-chief; second during legal discussions about judicial directions and the admissibility of evidence; and third in the context of planning and organising the trial. The primary focus of this section will be on issues surrounding the usefulness of the police interview as evidence-in-chief, because these are the issues that are amenable to change from a police interviewing perspective. Discussions around legal matters and trial planning will be examined briefly.

Usefulness of the complainant’s police interview as evidence-in-chief

Discussions between legal professionals regarding the usefulness of the complainant’s police interview as evidence-in-chief revolved around three broad topics: the structure of the interview, the interview

procedure and technological issues. The following section will examine these topics in more detail.

The structure of the police interview

The structure of the police interview was discussed in all jurisdictions for a total of 21 complainants out of 85 (nine in NSW, four in Victoria and eight in WA). Legal professionals expressed exasperation at the lack of clarity in the interviews, which at times resulted in confusion during both cross-examination and voir dres. Interviews were described as “very poorly structured”, “jumping from place to place” and having “things all over the place”. They were also criticised for not following any chronological order, not clearly relating to the charges on the indictment, and being overly long.

Trial transcripts showed that in some cases, the lack of structure in a complainant’s interview led to objections and arguments over whether any evidence containing necessary elements and particulars had even been gathered from the interview. At other times, defence lawyers used the opportunity provided by poorly structured police interviews to confuse complainants through complicated and confusing cross-examination (see text box 10.1). The prosecutor in the following case was able to intervene and argue that this was highly problematic due to the fundamental importance of the complainant understanding the questions put to them during cross-examination.

Text box 10.1

Prosecutor: *Your Honour, the toing and froing in the questioning of the complainant in the particular interview is confusing in one sense, but, more importantly, to cross-examine based on a series of questions which in themselves are confusing – and to refer to those questions – adds unnecessary complication. And what I’d be submitting is that for the purpose of cross-examination it’s fundamentally*

important that the complainant understand an event and be able to give evidence about an event rather than crisscrossing the transcript by way of questions put by a police officer seeking to ascertain facts. And I would respectfully submit that my friend, subject to what you say and what her view is, confine herself to a particular event so that the complainant can grapple with and understand that event. It's fundamentally important, Your Honour, otherwise the witness becomes confused and it's patently obvious that that's what's happening. (C58, Victoria)

The trial transcripts also revealed that long and convoluted interviews created difficulties in some cases because complainants could not remember all of their evidence and thus could not be effectively cross-examined. In the following case, for example, the defence lawyer attempted to cross-examine the complainant on whether or not she put her clothes on a speaker, but the complainant could not remember or answer questions about this aspect of her interview.

Text box 10.2

Judge: *I think the other problem is when she can't remember now – it's a long interview. To say "Do you generally remember the concept of participating in an interview?" "Yes, I do, but the specifics of it, no, I don't" – and to be quite honest, even for an adult, if you said "Is there a reference in there to putting clothes on a speaker?" we'd all have to probably turn all of the pages to satisfy ourselves to make such a concession. I don't think she can remember what she did or didn't say, and that's the problem ... (C68, NSW)*

Long interviews were also seen as problematic because they resulted in complainant and juror fatigue, at times necessitating breaks to ensure that jurors and complainants remained awake and attentive. In the following two cases, long interviews led to one judge halting the complainant's evidence-in-chief because a juror had fallen asleep, and another judge planning for the eventuality of having to stop the complainant's interview midway due to the complainant's own restlessness.

Text box 10.3

Prosecutor: *[in opening address] You heard from his Honour that [complainant] participated in an interview where she gave her account of what happened. Now, that interview is rather lengthy and we'll spend most of today, if not all of today, watching that interview. It goes for about four-and-a-half, five hours ...*

Judge: *[To the jury during complainant's evidence] Ladies and gentlemen, as I said, this is more difficult than watching someone in the witness box so I think what we'll do is that we'll take an early lunch and we'll resume at two o'clock [the jury retired]. [To Counsel] Just by way of explanation, one of the ladies was nodding off. (C25, WA)*

Judge: *Paying attention to the interview is quite demanding for his age, given the length of the recorded interview. I don't know if there is any difficulty with telling the jury that I will still be seeing [complainant] on screen [during the break] ... I only say it because then it explains to the jury if we need to take a break, if his mind's wandering, he's swinging around the shower, or whatever he might be doing, which is what can happen, it's three hours, and I think we just need to take five minutes. (C28, NSW)*

Finally, legal professionals discussed the length of interviews in the context of trial planning. These discussions arose when deciding when interviews should be played, and whether the complainant had had the opportunity to refresh their memory. Apart from interview length, factors taken into consideration when deciding when to play interviews included the number of complainant interviews, when the complainant would be cross-examined, and whether the jury would need a break while watching the evidence. When discussing the need to refresh the complainant's memory of their interview, legal professionals differed over what they deemed an acceptable time frame between the complainant watching their interview and having to give evidence in court. In some cases, complainants watched their interview on the day of the trial, in others, they watched their interview a week or more earlier. There was no uniform view as to what time frame was ideal; some prosecutors expressed concern that too much time had passed since the complainant had watched their interview, while others deemed similar time frames (for example a week) completely acceptable.

Interview procedure

Interview procedure was another broad theme that arose from trial discussions about the usefulness of the interview as evidence-in-chief. This theme arose for 29 complainants out of 85 (four in NSW, 17 in Victoria and eight in WA). Subthemes within this topic included police interviewer questioning, and the behaviour and actions of the police interviewer and complainant.

Problems in police interviewer questioning included mistakes such as putting the wrong version of events to the complainant in the interview, and mixing up details across incidents of abuse. Such mistakes often caused confusion for the complainant during cross-examination, and cross-examinations were usually stopped to clarify children's responses or to highlight interviewer error. In one case, for example, the interviewer moved so rapidly between incidents of abuse under discussion that the complainant ended up stating that the accused did not tell her to "suck his rude part", even though this act had in fact constituted a charge. This resulted in the defence arguing that the charge should be dropped. In another case, the police interviewer put an incorrect version of

events to the complainant, which he (the complainant) failed to correct, resulting in the defence attacking the complainant's reliability during cross-examination. After the cross-examination was stopped, the judge pointed out that in reality, this was not a criticism of the witness but a criticism of the police interviewer.

Text box 10.4

Judge: *When the police have put something to him that's wrong he hasn't picked them up, so you say that reflects adversely on his reliability of recollection.*

Defence: *When it's put to him twice in quite a short time frame ... then that is of some concern.*

Judge: *Well, it's a criticism of the police interviewer, more than a criticism of the witness, it seems.*

Defence: *But it is also a criticism of the witness. The prosecution is putting up what is said in that interview and what's accepted by this witness in that interview as being the evidence for the prosecution, and in those circumstances if he does say something or he's unwilling to correct the police officer, then that is of concern. (C20, WA)*

Other questioning errors by police concerned queries as to whether certain elements of the offence (such as penetration) had been established, or whether sufficient particularisation or detail of an offence had been obtained. In at least one case, police interviewers were criticised for using leading questions to "do a repair job", which could not be edited out of the evidence.

Text box 10.5

Prosecutor: *There are portions of the pre-recording where the interviewing officer almost seems to be trying to do a repair job, for want of a better expression, which includes leading statements. But the converse of that is that the defence can address the jury in that regard and tell them what a leading statement is so that there's no real point in trying to edit that out [the officer's leading statement] because it's in. And that was my only concern about the interviewing of the complainant by a police officer, which is that it always seems to be fraught with difficulty; with suggestions and leading questions. But given that that can be put to the jury, I don't think it can be excised and I think it has to stand. (C102, WA)*

Although judges did not frequently critique interviewers, sometimes comments were made which reflected irritation with the behaviour of the interviewers and the effect of this on the child. For example, criticism was made of interviewers interrupting a child's train of thought and jumping to an irrelevant topic just after the child disclosed an act of abuse.

Text box 10.6

Judge: *If I can just direct your attention again to page 4 of that second interview; she says "...he did with his rude part to me. He told me to suck it first. I told him no. He forced me to." Of course, this happens with these interviewers who want to continually interrupt the train of thought of a child, and so we have this question "Q. Tell us what your mother said. A. Well, she said he mightn't go to gaol because we don't have enough evidence to prove it." (C42, NSW)*

In addition to judging the behaviour of police interviewers during interviews, legal professionals also discussed the behaviour of the complainant. The child's actions and demeanour during an interview were often referred to as a way to determine the veracity of their claims. In fact, when addressing the jury at the end of the trial judges usually gave the instruction to regard the child's demeanour and behaviour carefully to help the jury come to its decision. Although a complainant's demeanour can be relevant in assessing the veracity of their claims, in a number of cases, the child's behaviour was used by the defence as ground for arguing that a reliability warning should be given about that particular child. Warnings about children being unreliable witnesses as a class have been outlawed, but such warnings may still be given about particular child witnesses if deemed necessary on the facts of the case. Some of the circumstances in which the defence have argued for a reliability warning in this sample of cases included the manner in which the child disclosed during the interview (giggling and laughing), and the child's behaviour during an interview break (playing with the interview equipment in the absence of the police interviewer).

Text box 10.7

Defence: *I'm paraphrasing somewhat, but it [the section of the statute which allows a reliability warning to be given in certain circumstances] requires a party to make an application, and that party has to satisfy the court that there are particular circumstances, in this particular case, particular to this particular child, aside from age, which merit such a warning being given.*

And the grounds that I rely on are this ... in the interview, in particular, [the complainant] smiles, she laughs, she giggles at different points, which might be seen as inconsistent with the substance of what she's disclosing, and also, ultimately, that the disclosure – or the event – is said to have happened when she's asleep, or sleepy or just been woken ...

Judge: *Yes, well I'm not persuaded by ... the argument about her demeanour ... But in relation to the matters of inconsistency, I think that that's probably a matter that would go to highlight that the jury need to be cautious, and I'm happy to give them a warning in*

relation to exercising caution when viewing the interview, in the context of reliability and credibility. (C55, VIC)

Judge: *He is – and I’m just thinking out loud – a child who didn’t have boundaries, and that – if ever it was demonstrated – was during the course of the record of interview when the police officer went off to consult and came back to find, as we saw, a mischievous child playing with the equipment ... You’ve got a child here who is technically savvy, on any view, and has no compunction about playing with equipment as demonstrated by ... what we saw during the course of the interview.*

Prosecutor: *One ought not to attribute to the child that aspect in relation to his savvy-ness; the fact that he tinkers with a unit which is sitting beside him and which he’s seen the police officer playing with.*

Judge: *No, it’s not just that. That he would do that in a police station and also at his own home ...*

Prosecutor: *That, Your Honour, doesn’t necessarily lead to a fair and reasonable inference that he’s the sort of person who will invent a story of this nature, bearing in mind his relationship with his mother and the feelings he had for his mother about which he speaks both on the interview and in evidence in cross-examination. So, Your Honour, these are difficult areas and I don’t for one moment suggest they’re not. But the question of you tailoring a direction in relation to unreliable evidence is one fraught with difficulty and danger in this case, save and except that the jury are entitled to be warned or, if not warned, reminded of that aspect and it being left to them to determine in those circumstances what sort of reliance can be placed on his evidence. (C58, VIC)*

Finally, it was often the case, especially in Victoria, that the child’s gestures and expression were discussed as means of understanding their evidence and assessing their competence. This was then used to decide whether or not an actual competency test was needed at trial.

Text box 10.8

Judge: *Gentlemen, I’ve read the recorded interview and of course had the advantage of the short discussion with the complainant. It seems to me very obvious from the interview, and also from the complainant’s responses, that she is able to give an intelligible account of events, and I would have thought, having regard to her age and her responses, is able to take the oath. (C73, WA)*

Technological and transcription issues

A key issue from previous literature is the prevalence of technological issues, such as difficulties with sound quality, visual quality and editing. These were present in every state (for five complainants in NSW, 10 in Victoria, six in WA and 21 complainants overall out of

85), although one comment by a judge suggested that visual quality was better in Victoria than NSW.

Text box 10.9

Judge: *Can someone in the Victorian police please talk to someone in NSW? The quality of the recording is better than anything I’ve seen in NSW. (C114, NSW)*

Consequences of technological issues included delay in court proceedings and inability to fully understand the complainant’s testimony. The latter factor was sometimes exacerbated when transcripts of the complainant’s interview provided to the court by police contained transcription errors.

Text box 10.10

Judge: *There are a number of errors in the interview transcript that I have noted and I probably haven’t got them all, but at p 11, question 121, “So tell me more about Uncle; what do you guys do together?” rather than “what do guys do together?” The word “you” to my hearing was missing [from the interview] and that’s a significant difference. Not that it may make a terrible difference in respect of an interview which...*

Prosecutor: *Yes, Your Honour. (C84, NSW)*

Legal issues

Police interviews were frequently discussed in the context of legal issues such as the admissibility of interview topics and the necessity of judicial directions. In terms of directions, the majority of discussions centred on directions about uncharged acts evidence (context, tendency and relationship), inconsistent statements and reliability warnings.

The admissibility of topics mentioned in police interviews was usually raised in the context of an application by the defence to edit out questions or sections of the interview. In most cases, edits were agreed between prosecution and defence, and judges were simply informed of these. The majority of agreed edits were made on the basis that they lacked relevance, and judges usually informed the jury of this fact. However, sometimes prosecutors and defence counsel did not reach an agreement and judges were required to make a ruling on what should be edited from the interview. Topics that were the basis of discussions around editing included evidence of the accused’s motive, tendency and relationship to the complainant; context evidence; and competency testing conducted by police.

In a number of cases, the defence made an application to cross-examine the complainant on older or other police interviews, and a ruling had to be made as to whether these were admissible. The grounds on which defence argued that such interviews were relevant

included the need to demonstrate the complainant's sexual abuse history (which might give rise to a reasonable doubt about the offender's identity), and to demonstrate that the complainant had a history of making complaints.

Text box 10.11

Defence: *I wish to cross-examine [complainant] about her previous sexual assaults ... This is a separate interview ... And you'll see that at question 58: "[complainant], has anyone other than [accused] ever touched you on your rude part?" Answer: "Yes, in Sydney". (C8, WA)*

Defence: *I'll be seeking leave to cross-examine [complainant] on her prior sexual experience. Now, some time ago it came to me that the stepbrother may have something to answer with respect to what has been alleged by the complainant in relation to my client ... I've been disclosed today, by the DPP, an interview which [the complainant] underwent ... That interview discloses that a person of interest is the stepbrother. (C70, WA)*

Defence: *Your Honour, the defence makes an application in relation to two prior complaints and the use of evidence from those when cross-examining the complainant in the matter ... The defence position is that this particular young lady has a fascination about men and that there are increasing claims once she gets somebody's attention. What evidence do we say supports that? Well, in relation to the February complaint, we have the fact that there's a first interview about an occasion and then she comes back for a second bite of the cherry with a second interview. Now, in that second interview she does exactly the same as she does on this occasion. Right at the end of that interview, she then starts saying "It wasn't just the individual times that I've talked to you about. It was lots of times. We started having sex regularly several times a week". There's this inflation of what she says on each occasion. (C15, WA)*

Trial planning

The final context in which police interviews were discussed was trial planning. Much of the discussion here centred on jury issues. Juries were provided with transcripts of the complainant's interview in nearly every case; however, some judges preferred to provide these before, and others after, the recording of the interview had been played in court. A more contentious issue was whether or not juries could watch the complainant's interview a second time, and, if so, whether they could take the recording into the jury room. Whether or not this was allowed appeared to hinge on the circumstances of the case, as well as the inclinations of the judge in the trial.

In a number of cases police interviews had been lost, which caused delays in trials and concerns about the security of this highly sensitive material. In at least

two trials there were issues with the use of express post to transport edited interviews, with one judge expressing concern about the practice.

Text box 10.12

Judge: *Anyway, so the edited interview is coming back by ...*

Prosecutor: *Express Post.*

Judge: *Express Post. Oh goodness, you're making me nervous now.*

Prosecutor: *I know, but in [assistant's] long experience, it's never failed, he tells me. It can even be tracked by the internet.*

Defence: *Almost never fails.*

Judge: *And when we track it and we find that it's been sent to Bairnsdale ... No doubt all these things make sense to your instructor but even that copy can't be sent through the mail, as far as I'm concerned. I'm a bit interested to hear about interviews going through Express Post, as well. I wonder whether that's what should be happening. I know it's practical but they are what they are. They're pretty significant things to be entrusting to post.*

Prosecutor: *I suppose that's right, Your Honour. (C110, VIC)*

What emerged quite clearly from the trial transcripts was the lack of knowledge some judges have about the process of using interviews as evidence-in-chief, and the procedure for vulnerable child witnesses in child sexual abuse cases more generally.

Text box 10.13

Judge: *So what happens now? When you had these special hearings the judge used to speak to young complainants about horses and wigs and silly things like that; do we still do that? (C108, VIC)*

Judge: *Can I say at the outset that it has been a long time since we've done a trial with a [police interview] and a pre-trial – a special hearing – and the like, so I'll just need to be guided carefully through the various procedural requirements, Mr [Prosecutor], if you don't mind, and Mr [Defence].*

Defence: *Mr [Prosecutor] will be on top of it, Your Honour. (C87, VIC)*

Conclusion

Judges, prosecutors and defence lawyers across all three jurisdictions explicitly recognised and discussed problems with using police interviews. Concerns were raised about their usefulness in three different contexts: as evidence-in-chief, during legal discussions and in planning the trial. Discussions surrounding the usefulness of the police interview as evidence-in-chief concerned the structure of the interview, interview procedure and technological issues. Although these issues were explicitly raised in few cases (as one would expect in this forum), for the cases in which

they were raised it was clear the issues were having an impact on complainant memory, credibility, and reliability, as well as delaying proceedings and creating confusion.

These findings – that there are issues with interview structure and procedure as well as technological issues – are consistent with findings from previous research concerning the quality of police interviews, interviewer training, and prosecutor perspectives on using the police interview as evidence-in-chief.⁵ This prior research suggests that if the interviewers had adhered to evidence-based practice these downstream effects in the trial may not have been as evident.

Other issues that emerged from this study are still under contention and deserve further research and debate. This relates particularly to the use of relationship and other uncharged acts evidence, which was a major topic of dispute during discussions about admissibility, judicial directions and editing. Given that some jurisdictions such as Victoria are increasingly seeking such details in their interviews, this issue calls for careful reflection on the use of this evidence, from a holistic perspective.

Endnotes

¹ See, for example: Study 8; Burrows and Powell, 2013a, 2013b; Burrows and Powell, 2014a; Burton, Evans and Sanders, 2006; Davis, Hoyano, Keenan, Maitland and Morgan, 1999; Powell and Wright, 2009.

² The complainant's age was recorded at the time they were cross-examined; this may have been at a preliminary hearing, or at trial.

³ Strauss and Corbin, 1990.

⁴ Miles and Huberman, 1984.

⁵ Benson, 2016; Burrows and Powell, 2013b; Burrows and Powell, 2014a, 2014b, 2014c, Burton et al., 2006; G. Davies, Wilson, Mitchell and Milsom, 1995; Davis et al., 1999; Lamb, Malloy, Hershkowitz and La Rooy, 2015; Lamb, Orbach, Hershkowitz, Esplin and Horowitz, 2007; McConachy, 2002; Pipe, Orbach, Lamb, Abbott and Stewart, 2013; Powell and Wright, 2009; Read and Powell, 2011; Westera, Kebell and Milne, 2013.

Chapter 11
The labelling of repeated
occurrences
(Study 10)

Chapter 11: The labelling of repeated occurrences (Study 10)

Many child sexual abuse cases concern multiple abuses.¹ For an offender to be charged and convicted of multiple incidents of perpetrating child sexual abuse, the complainant must specify one or more individual acts of abuse with respect to time, place, type of abuse and other unique contextual details, and then link those details to a particular occasion.² A label used to specify an act or incident of abuse can refer to precise date and time (for example “Let’s talk about what happened the afternoon of 12 July 2007”). Alternatively, labels can be qualitative, by referring to contextual information (such as “the time at the holiday house” or “the first time”).³ Qualitative labels are generally more useful than labels that refer to date and time. This is especially true for children whose understanding of time is generally more limited than that of adults.⁴

However, not all qualitative labels are useful. Irrespective of their nature, effective labels must have several criteria. First, they need to be meaningful. There is little value in saying “Let’s call this [offence] ‘the time at the apartment’” if the child refers to an apartment as a flat. Second, labels need to be unique. “The time at the apartment” won’t be an effective label if the abuse occurred multiple times at the apartment. The best chance of identifying unique and meaningful labels is to let them be generated in witnesses’ own words, from their own perspective or recollection of the events. From a very young age, humans build powerful memory structures for organising repeated events in their minds. Indeed,

children as young as four can identify consistent and variable details across multiple experiences of an event, and they can identify memories from different (but clearly labelled) occurrences at above-chance levels.

Third, to be useful, labels need to be used consistently within and across interviews about the same event. Most errors when recalling a repeated event tend to be due to the intrusions of detail from other occurrences (such as the complainant incorrectly saying the offender used a camera when this happened at another time). Aside from the issue of clear communication (making it clear to a child which occurrence is recalled), a contextual cue contained within a label has an important memory function. It helps complainants to distinguish the target occurrence from other occurrences, thus facilitating accurate and detailed recall.

This study aimed to evaluate the use of labels from the initial investigative (police) interview through to the questioning at trial. It examines the source of the label (whether child- or interviewer-generated) and whether a given label is used consistently throughout the process.

Method

Sample

The sample consisted of the police interviews and trials of 23 complainants alleging multiple incidents of child sexual abuse. The complainants each experienced between one and four police interviews ($M = 1.57$, $SD = 0.84$). Thus, the final sample included 36 police interviews and 22 trials (two children were in the same trial). The children were aged five to 15 years old ($M = 12.13$, $SD = 2.87$) at the time of their police interviews, and six to 17 years old ($M = 13.39$, $SD = 3.12$) at the time of their trial. All interviews and trials took place in WA, as trial transcripts from NSW and Victoria did not include all aspects of the trial (such as opening statements).

Of the 23 children, 13 (57 per cent) had experienced less than five occurrences of abuse, and nine children (39 per cent) had experienced five or more occurrences. For one child, it was impossible to tell how many times abuse had occurred. Each complainant described between two and five occurrences of child sexual abuse ($M = 2.78$, $SD = .90$) during their police interviews, totalling 61 child sexual abuse occurrences across the 23 complainants – of these 52 resulted in charges. The alleged perpetrator was found not guilty of all charges in 29 occurrences (55.77 per cent), and was convicted on at least one charge in 23 occurrences (44.23 per cent).

Coding

Labels were categorised under the following five mutually exclusive categories.

- *Temporal labels* – such as “the first time” and “the one on Monday” – include temporal information about the incident.
- *Locational labels* – such as “the time at his house” and “the time under the doona” refer to the location of the incident.
- *Abuse-related labels* – such as “the time he kissed me” and “the time he smacked my bum” – refer to an abusive act performed on that occasion.
- *Situational labels* – such as “the time dad’s friend was over” and “the time my little brother was awake” – refer to a contextual detail about the incident.
- *Mixed labels* combine multiple types of label information. “The last time he kissed me”, for example, combines temporal and abuse-related information.

For each label, the researchers noted whether it was generated by the child, the police interviewer, the prosecutor, the defence lawyer or the judge. The stage of the investigation in which the label was generated was also recorded. These included the police interview, the prosecutor’s opening statements, the defence lawyer’s opening statements, the complainant’s evidence-in-chief, cross-examination of the complainant and the judge’s closing statements. No labels were ever used in the judge’s opening statements.

The researchers subsequently recorded when someone applied a new label to an incident. For example, one interviewer temporally labelled an incident “the last time” during the police interview, but during cross-examination of the complainant the defence lawyer referred to the same incident with a locational label: “the incident at the table at his house”. The researchers recorded these replacement labels, classifying them by type – temporal, locational, abuse-related, situational or mixed – and noted who provided the replacement label and during which stage of the investigation.

Results

Of the 61 incidents discussed during police interviews, 59 were labelled at some stage during either the police interview or the trial. In total, 177 labels were generated for these 59 occurrences, 118 of which were replacing an existing label for the occurrence. Each particularised occurrence received between zero and eight labels throughout the course of the investigation ($M = 2.90$, $SD = 1.78$).

Source of the label

The prosecution and defence lawyers created most of the 177 labels used in the sample. Judges and children created labels least frequently. The police interviewer was most commonly the first person to label an occurrence, whereas defence lawyers most commonly created replacement labels. Table 11.1 demonstrates the frequency of total, first and replacement labels created by each person. Further analysis regarding the types of information used by different people to label occurrences is presented in Supplementary Materials 10 (online).

Table 11.1 Frequency of labels created by each person

Creator	Total labels		First labels for an occurrence		Replacement labels	
	Frequency	%	Frequency	%	Frequency	%
Child	23	12.99	11	18.64	12	10.17
Interviewer	36	20.34	27	45.76	9	7.63
Prosecutor	46	25.99	17	28.81	29	24.58
Defence lawyer	54	30.51	4	6.78	50	42.37
Judge	18	10.17	0	0.00	18	15.25
Total	177	100.00	59	100.00	118	100.00

As shown in Table 11.1, only 13 children created any labels (six children created one, four created two and three created three, for a total of 23). Children most often created labels during their police interview (10 child-created labels) and their cross-examination (nine child-created labels). The remaining four child-created labels were created during evidence-in-chief.

Consistency of label use

Labels were most frequently created during the complainant’s police interview (46/177, or 25.7 per cent) and cross-examination (58/177, or 32.4 per cent). Table 11.2 shows the frequency of total labels created at different stages, and the proportion replaced.

Table 11.2 Frequency of labels created at each stage of the investigation

Stage	Total labels		First labels for an occurrence		Replacement labels	
	Frequency	%	Frequency	%	Frequency	%
Police interview	46	25.99	37	62.71	9	7.63
Prosecutor’s opening	27	15.25	12	20.34	15	12.71
Defence’s opening	5	2.82	0	0.00	5	4.24
Evidence-in-chief	15	8.47	4	6.78	11	9.32
Cross-examination	58	32.77	5	8.47	53	44.92
Re-examination	8	4.52	1	1.69	7	5.93
Judges’ closing	18	10.17	0	0.00	18	15.25
Total	177	100.00	59	100.00	118	100.00

Labels were more likely to originate during the police interview than at any other time: $z_s = \geq 4.67$, $p_s = < 0.001$. Conversely, replacement labels were most often created during the cross-examination of the child complainant. The proportion of replacement labels created during cross-examination was significantly higher than the proportion of replacement labels created during any other investigation phase: $z_s = \geq 4.97$, $p_s = < 0.001$. Police interviewers and defence lawyers each replaced their own prior labels more frequently than expected, while defence lawyers replaced children’s labels more than expected: $p = 0.001$.

Evidence-based guidance from research on children’s memory and general cognitive development recommends generating labels in the police interview so that children know precisely which occurrences are being discussed, and then using them consistently thereafter.⁵ The research team specifically examined the progression of labels from the police interview through to the end of the trial. Of the 46 labels

generated during the police interview (including first labels and replacements), 28 were never repeated at any point during the case, and 36 were replaced with a different term. In other words, only 10 labels that were created during the police interview were retained through to the end of the trial. The largest percentage of replacements happened in cross-examination ($n = 12$; 26.1 per cent of police interview label replacements).

Conclusion

Children in the current study rarely created labels themselves. Only 13 per cent of children in the current sample created their own labels – a remarkably low figure compared to some other research. For example, in the study by Brubacher et al., children aged five to 13 created 48 per cent of all labels.⁶ Given that their study included children who were interviewed in accordance with guidance from the research literature (that is, using a high proportion of open-ended questions), and found that child-generated labels tend

to occur in response to open-ended questions, the low rate of child-generated labels observed here is best understood as a consequence of the high rate of specific questions. As shown in Study 8, approximately 80 per cent of questions used by police interviewers in this sample were specific questions, which limit narrative reporting.⁷

The current study also showed that labels were frequently replaced with alternate labels for the same incident; on average, three different labels were

created per occurrence. In fact, after the first labels had been established for occurrences, labels were just as likely to be replaced as they were to be used again. Defence lawyers replaced labels most often, changing both the labels they had created and the labels created by the child complainants. Given that children struggle to correctly associate specific details with the occasions on which they were present, frequently changing the labels is likely to add to their confusion and the difficulties of cross-examination.

Endnotes

¹ See for example, Connolly and Read, 2006.

² Guadagno, Powell and Wright, 2006; *S v R* (1989).

³ See Brubacher, Malloy, Lamb and Roberts, 2013.

⁴ Friedman, 2013.

⁵ Brubacher, Powell and Roberts, 2014; Orbach and Pipe, 2011.

⁶ Brubacher et al., 2013.

⁷ Powell and Snow, 2007.

Chapter 12
Judges' instructions to child
complainants
(Study 11)

Chapter 12: Judges' instructions to child complainants (Study 11)

The trial is an unfamiliar forum for children. Lawyers' questioning of children, and the rules of court, are different from children's usual conversations and interactions with adults.¹ As such, providing child complainants with guidance as to what is expected of them is likely to be beneficial. The utility of such conversational rules or instructions is a complex area of literature²; nonetheless, developmental psychologists recommend providing some form of instruction in a forensic or courtroom interview.³ Legal bench books such as the one produced by the Australasian Institute of Judicial Administration also recommend this practice.⁴ Instructions can reduce the authority imbalance between child and adult, and teach the complainant that "I don't know" and "I don't understand" are acceptable responses, thereby lowering suggestibility.⁵ To be effective, instructions to children must be short and concise, use simple language and make it clear to children what is expected of them.⁶

In addition to informing the child about expected behaviour, clear, child-centred instruction can help orient the child in the court and enable them to settle in. When adults can show children that their needs are being met, and that the interaction is targeted at their developmental level, it can also help to lower anxiety about giving evidence.⁷ Questioning also primes the child to the nature of the interaction expected (for example, whether the child's task is to answer a series of closed questions, or to answer more open-ended questions that require deeper processing).⁸ Thus, irrespective of whether professionals have established before the trial that the child understands the conversational rules, trial judges' interactions immediately prior to the child giving evidence warrant careful evaluation.

In sum, this study provides a comprehensive examination of how judges instruct children to behave and respond to questions in a trial. Specifically, it examines the type of instructions given by judges and the manner in which the judges relay these instructions and establish (if at all) the child's understanding.

Method

Sample

The researchers obtained randomly selected transcripts from 52 trials with 57 unique child complainants (all under 18 years of age) concerning allegations of child sexual abuse perpetrated between 2011 and 2015. There were 13 complainants from NSW, 19 from Victoria and 25 from WA. These included a subset of the complainants whose trials are referred to in Study 5. There were 16 male and 41 female complainants aged 7.01 to 17.54 years ($M = 12.56$, $SD = 3.18$). Sixty-one per cent ($N = 35$) were younger than 13, the maximum age included in previous research.

Coding

First, the researchers identified 11 different categories of instructions delivered by judges. Length of instructions was coded as a measure of the wordiness of the judge's instruction. Table 12.1 lists the rules and examples of each, worded in a simple, concise manner. These examples are provided to give the reader a sense of what a brief instruction in each category might look like.

Table 12.1 Judges' instructions

Rule	Example wording	Length of example (words)
Don't know	<i>I might ask a question and you don't know the answer. Just say "I don't know".</i>	16
Don't understand	<i>If I say something and you don't understand, just say you don't understand.</i>	13
Correct me	<i>If someone says something that's wrong, please tell me.</i>	9
Naiveté	<i>We don't know about all the things that may have happened to you.</i>	13
Don't remember	<i>If someone asks you something and you can't remember, just say "I don't remember".</i>	14
Break	<i>Just tell us if you need a break.</i>	8
Embarrassing or rude words	<i>You might be asked some questions that are embarrassing, but please know that we are not embarrassed.</i>	17
Can't hear	<i>If you can't hear something the lawyer is saying, please say so.</i>	12
Loud and verbal	<i>Make sure to say your answers out loud, and use a big voice.</i>	13
Intermediary can't help	<i>We need to hear your answers, not [the intermediary's].</i>	9
Any questions?	<i>Do you have any questions for me?</i>	7

Second, the researchers counted and coded practice examples of these instructions.

Judges sometimes used practice examples and feedback in addition to delivering the instructions to help the children learn what is expected of them. An example of a practice example for the 'don't understand' rule was "I might ask 'What is your

tentative assessment of that proposition?' What would you say to me?"

Third, the researchers coded the format of each question into one of seven mutually exclusive categories. These are provided in Table 12.2. For all questions, the child's response was also coded.

Table 12.2 Question formats

Format	Description and example
Recall	Questions that require the respondent to generate a response: <i>What should you say when you don't agree with something?</i>
Forced choice	Questions that present two or more options, from which a respondent can choose: <i>Will you tell us you don't know, or will you guess?</i>
Yes/No	Questions that present yes or no as the only options: <i>Will you tell us when you want a break?</i>
Yes/No tag	Questions that present yes or no as the only options and presume that one option will be chosen: <i>You'll let us know when you don't understand, won't you?</i>
Statement	Instruction with no question or rising intonation: <i>I wasn't there, so I don't know what happened.</i>
Statement + okay	Instruction with rising intonation or verbalised question (such as "okay?" or "all right?"): <i>When you answer, please speak loudly, okay?</i>
Statement + do you understand	Instruction ending with yes/no question confirming understanding: <i>She can't give you any help, do you understand?</i>

Results

Overall use of ground rule instructions

In 52 trials with 57 child complainants, judges delivered 214 instructions, plus an additional 32 practice example questions for the 'don't know', 'don't understand' and 'correct me' rules. Thirty-eight children received at least one, but 19 (33 per cent) received none of the 11 rules in Table 12.1. Judges

posed an average of 2.39 ($SD = 2.58$) different categories of rules to each complainant (range: 0–10; maximum possible: 11). The number of different rule categories delivered was not related to children's age: $r(55) = 0.007, p = 0.96$. This finding means that judges did not give more instructions or questions to children of specific ages. Considering only the 38 children who received at least one ground rule, judges delivered an average of 6.47 ($SD = 5.32$) rules per complainant.

Jurisdictional differences

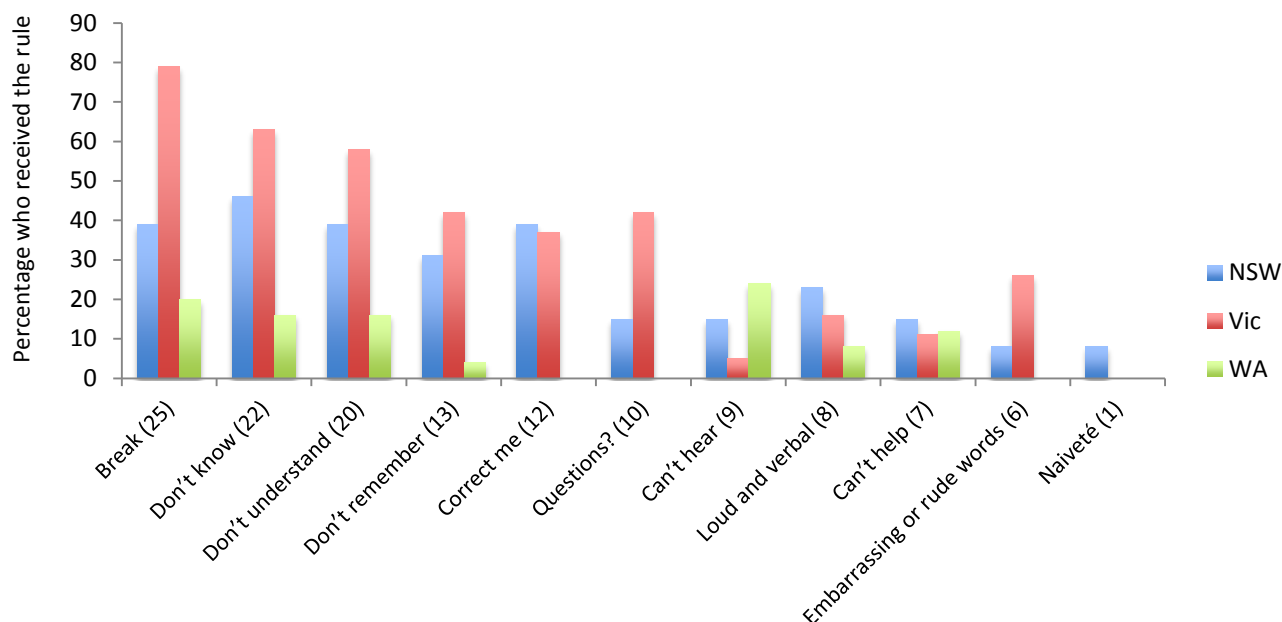
Table 12.3 presents the percentage of complainants in each jurisdiction who received at least one instruction. Judges in Victoria were most likely to give at least one rule, and gave the greatest number of rules per

complainant. Judges in NSW used significantly more words to explain each rule than judges in either Victoria or WA: $F(2, 37) = 4.59$; $p = 0.017$. The prevalence of each instruction is presented by jurisdiction in Figure 12.1.

Table 12.3 Rule delivery by jurisdiction

Rule delivery	NSW	Vic	WA
Percentage of complainants to receive at least one rule	54	90	56
Average number of rule categories per complainant (maximum: 11)	$M = 2.77$ $SD = 3.44$	$M = 3.79$ $SD = 2.47$	$M = 1.12$ $SD = 1.30$
Average number of words per rule	$M = 36.11$ $SD = 14.31$	$M = 24.29$ $SD = 8.00$	$M = 24.49$ $SD = 7.54$

Figure 12.1 Instructions in each jurisdiction



Note. Values in parentheses indicate the total number of complainants (out of 57) who received each rule.

Length of the rule

The length of instructions varied. Sometimes judges provided these rules with few words, and other times they used many words to convey the rules. After attempting to deliver the 'correct me' rule and becoming aware of a child complainant's confusion, one judge astutely noted "I've taken a long time to get to where I'm trying to get to, and it's hard to break the habits of a lifetime".

For the 38 complainants who received at least one rule, judges spoke an average of 180.97 ($SD = 187.86$) words to deliver the rules, with a range of 13 to 831

words. It might have been expected that some children would require lengthier explanation (younger children, for example). There was, however, no relationship between complainant age and the average number of words used to deliver instructions: $r(55) = -0.08$, $p = 0.64$. Judges did not adjust the length of their explanations when delivering rules to younger children. Furthermore, since so few children received practice examples with feedback, the argument cannot be made that judges were using more words in some situations in response to individual needs (such as lack of understanding).

To control for the different numbers of rules children received, the researchers divided the number of words spoken by judges to deliver rules by the total number of rules (including practice examples) delivered to each complainant. The average number of words per rule was 26.54 ($SD = 10.11$) with a range of 13 to 65 words. The reader can consult the word

counts in Table 12.1 for comparison purposes, where brief rule examples can be found. The average number of words used by judges was sometimes more than twice that of the simplified form. See Table 12.4 for word count averages and ranges for each rule, in decreasing order by average number of words needed to explain the rule.

Table 12.4 How many words it took to explain each rule

Rule	Average words*	Range (words)
Correct me	116 (81)	49–282
Embarrassment or rude words	60 (34)	13–91
Don't understand	59 (49)	9–201
Loud and verbal	55 (33)	7–117
Break	48 (35)	13–158
Don't know	36 (17)	17–89
Intermediary can't help	32 (11)	15–48
Don't remember	29 (18)	12–73
Can't hear	23 (7)	14–40
Any questions	19 (14)	7–47
*Naiveté	67	N/A

Note: Standard deviations in parentheses.

*Only one judge referred to being naïve about the child's experience, so no standard deviations or ranges are provided.

Judges had by far the most difficulty conveying the 'correct me' rule, and some of them even commented on the "absurdity of explaining this rule to a child". Part of the challenge may stem from the fact that judges appeared to be trying to extract their explanations from the law, rather than simply explaining that errors might happen. Many judges struggled in attempts to translate legal words or sentence structures. One judge gave examples of erroneous statements to a 10-year-old, and then said:

Text box 12.1

When I asked you those two questions, they had what lawyers call a proposition in them. That means I suggested the answer to my question in the question. Do you follow? (Judge to 10-year-old complainant)

'Don't understand' instructions were also challenging to deliver. The average number of words per rule and the ranges observed suggest that a significant amount of time is being spent giving these instructions in a manner that is potentially confusing and fatiguing. When telling children that they could have a break, many judges gave numerous examples of why a break might be needed, for example:

Text box 12.2

You might be thirsty or you might just think you feel a bit tired and you might need to have a break. You might need to go to the toilet. You might get upset. You might get emotional. But maybe none of those things will happen. I've really got no idea. But if they do happen, that's again perfectly all right and if you need a break, you just tell us and I'll give you a break? (Judge to 17-year-old complainant)

These examples drove the high average word count for the 'break' instruction.

Question formats

Table 12.5 presents the most common question formats used to deliver each instruction. In most cases, it was a statement followed by "okay?" or "all right?" Statements ending with a comprehension check (such as "Do you understand?") or simple statements without intonation were also very common. Recall questions were so uncommon that they could not be analysed.

Table 12.5 Common question formats and percentage use of recall questions

Rule	Most common question format	Recall questions (%)
Don't know	Statement + okay (38%)	3
Don't understand	Statement+ okay (49%)	6
Correct me	Statement-OK (46%)	0
Naiveté	Yes/No tag (100%)	0
Don't remember	Statement (33%)	0
Break	Statement + okay (62%)	3
Embarrassing or rude words	Statement + do you understand (42%)	0
Can't hear	Yes/No, Yes/No tag (both 33%)	0
Loud and verbal	Statement + okay (36%)	0
Intermediary can't help	Statement + okay (56%)	0
Questions	Yes/No (77%)	0

In contrast to recommendations that children should only be given one instruction at a time, judges in the current sample delivered numerous instructions in a multiple format, meaning that they uttered a series of questions or statements before stopping for a response from the complainant. This behaviour was very common for the 'don't know', 'don't remember' and 'don't understand' rules, and was most common in Victoria. Judges sometimes delivered multiple rule categories in the same utterance, commonly 'don't know' and 'don't understand' (for example, "So if you don't know or you don't understand what is being asked, you must say that you don't know or don't understand, okay?").

Judges rarely used practice examples (13 per cent of all questions were to practice the rule). The majority of the practice examples that were employed were not recall-based questions, so they did not actually encourage any practice. The most common rule to be associated with practice questions was the 'correct me' rule; half of the 12 complainants who received the instruction were given some type of practice.

In 98 per cent of cases (214/217), children merely replied "yes" or "okay" when given an instruction that only permitted those options. It was rare for children to verbalise that they did not understand, although one complainant did so. She was delivered a series of 10 questions and statements instructing her to let the lawyers or judge know if she disagreed with something someone said. At the end, when the judge asked her if she understood, she said "No, because I forgot what you said". This case example highlights the difficulty at least one complainant had with the introductory process.

Conclusion

An overriding conclusion to draw from this study is that the incidence, nature and method of instructions vary substantially. Not all trials include judges' instructions; only two-thirds of cases had any instruction at all, and the number varied within and across jurisdictions. Some children were given practice to establish that they understood or derived some benefit from the judges' explanations, although in the large majority of cases judges assessed children's understanding of the rules with questions or statements that simply required acquiescence (such as "Do you understand?"). The most common instruction was that children should signal when they needed a break; however, 'don't know' and 'don't understand' instructions were also prevalent. While some judges seemed more developmentally appropriate in their language than others, the majority delivered instructions in quite a wordy manner. Whatever the reason underlying these differential patterns, it is clear that the way judges orientate children to the trial interaction process might be improved by incorporating research findings and recommendations from developmental psychologists and some law professors. Specifically, instructions could be briefer, use clearer and simpler language, and be accompanied by practice examples with feedback.⁹

It is not possible to say whether variations in judges' instructions had any tangible influence on the justice process. Nevertheless, legal professionals have raised significant concern about wordy and longwinded delivery of instructions in police interviews confusing and fatiguing children and thereby reducing the accuracy and detail of subsequent recall.¹⁰ It is likely (but has not been empirically tested) that wordy delivery of instructions by judges would have similar effects on children in court. Because judges almost exclusively assessed children's understanding of the rules with questions or statements that simply required acquiescence, there is no way of knowing the extent to which children understood or benefited from the instructions.

Endnotes

¹ Lamb and Brown, 2006; Poole and Lamb, 1998.

² See Brubacher, Poole and Dickinson, 2015, for review.

³ For example, Ahern, Stolzenberg and Lyon, 2015; Lamb, Orbach, Hershkowitz, Esplin and Horowitz, 2007.

⁴ Ahern, Stolzenberg and Lyon, 2015; Australasian Institute of Judicial Administration, 2015.

⁵ Brubacher et al., 2015.

⁶ See, for example, Lamb, Malloy and La Rooy, 2011.

⁷ Lamb and Brown, 2006.

⁸ See, for example, Roberts, Brubacher, Powell and Price, 2011.

⁹ For example, Ahern, Stolzenberg and Lyon, 2015; Brubacher et al., 2015; Lamb and Brown, 2006; Lyon, 2005; Saywitz, Camparo and Romanoff, 2010.

¹⁰ Benson and Powell, 2015a.

Chapter 13
Assessing truth/lie competency
(Study 12)

Chapter 13: Assessing truth/lie competency (Study 12)

In order for a child to give sworn evidence a judge may need to establish whether or not that child has the capacity to understand¹ (or does understand)² that they are under an obligation to give truthful evidence. This legislation may lead to a judge testing the competency of the child. Although children as young as three or four have a good general idea of what constitutes the truth versus a lie and the seriousness of lying, many of the tests for assessing competency are criticised for underestimating children's true abilities.³ It is unrealistic to expect children to define 'truth' and to explain the difference between truth and lies.⁴ Furthermore, asking children to indicate whether a statement made by the interviewer is the truth or a lie (for example by asking "If I said my shirt was red, is that the truth or a lie?" or "If I said you came here in a helicopter is that the truth or a lie?") requires the child to call the questioner a liar in order to answer correctly. These tests do not focus on the issue of intent to deceive, which is critical for determining the occurrence of a lie.⁵

Irrespective of how developmentally appropriate truth/lie questions are, children's responses to these questions are not, in any case, a good indicator of the accuracy of their subsequent or preceding testimony about an event.⁶ In fact, older children who are better able to answer such questions are also more cognitively able to lie.⁷ There is evidence, however, that asking the child to promise to tell the truth may promote truth-telling behaviour in some situations.⁸ As a result, developmental psychologists recommend eliminating truth/lie competency testing entirely and instead suggest that children are simply asked "Will you promise to tell the truth [today/in court]?"

Several English-speaking countries like Canada and Scotland have adopted this recommendation.⁹

This chapter provides a snapshot of common truth/lie competency approaches (from a developmental psychology perspective) in three Australian states.¹⁰ The research team aimed to find out what kinds of questions judges ask – to which children – and whether children can respond appropriately. If judges pose inappropriate questions about truth and lies that children struggle to answer, children feel confused and appear less credible before they have even begun to give evidence. Finally, the team assessed how often the 'promise' questions developmental psychologists recommend are posed.

Method

Sample

The research team coded competency questions posed by judges in 51 trials with 56 unique child complainants (all under 18), concerning allegations of sexual abuse. All trials were conducted between 2011 and 2015, in three Australian states (NSW, Victoria and WA). They represented a subset of the trials in Chapter 6. There were 15 male and 41 female complainants, aged 7.01 to 17.54 ($M = 12.64$, $SD = 3.15$). Sixty-four per cent ($N = 36$) of the children in the study were younger than 14.

The law in the three states

In Australia, many jurisdictions require competency testing for qualifying child witnesses. Section 13(3) of the *Evidence Act 1995* (NSW) (the NSW Act) and the *Evidence Act 2008* (Vic) (the Victorian Act) renders an otherwise competent person not competent to give sworn evidence if the person does not have the capacity to understand that in giving evidence he or she is under an obligation to give truthful evidence. Where a person is subject to that provision, then under s13(5) of these two Acts, they are competent to give unsworn evidence if the court has told the person, among other things, that it is important that he or she tells the truth.

In Western Australia, s106B of the *Evidence Act 1906* (WA) (the WA Act) provides that a child under 12 is competent to give sworn evidence if, in the opinion of the court or the person acting judicially, the child understands, among other things, that he or she has an obligation to tell the truth when giving evidence.

Where a child under 12 is not competent to give sworn evidence, s106C of the WA Act provides that the child may give unsworn evidence if the court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events they have observed or experienced. There is no expressly stated 'truth' requirement.

Coding

The researchers coded truth/lie competency questions for format and category. Three question formats were identified: recall (wh- questions), yes/no and forced choice (where there are two or more options presented in the question, such as "Is it true or not true?"). The researchers also noted whether the question was presumptive, such as "You know the difference between truths and lies, right?" or "So you'll tell the truth today then?". Findings in psychological research suggest presumptive questions are inappropriate for use with any witnesses because they suggest the correct response.¹¹ These types of questions are particularly problematic for children, who are more likely than adults to go along with the suggested answer.

The research team derived categories of competency questions from Evans and Lyon's 2012 study.¹² There were four meaning-based questions and four morality-based questions (see Table 13.1).

Table 13.1 Truth/lie competency question category

	Category	Example question
Meaning-based	Definition	Requests explanation of terms. For example: "What does the truth mean?"
	Identification	Exemplars of a concept. For example: "If I were to say my hair was green, would that be the truth?"
	Example	Requests complainant to generate an exemplar. For example: "Give me an example of a lie."
	Difference	Asks for differences or comparisons. For example: "What's the difference between truth and lie?"
Morality-based	Evaluation	Asks about importance or virtuousness of truths and lies. For example: "Is it good or bad to tell a lie?"
	Consequence	Asks about outcomes of truths or lies. For example: "What do you think will happen if you tell a lie?"
	Prior occurrence	References previous occasions of truth or lie telling. For example: "Have you ever told a lie?"
	Obligation or promise	References the child's duty, intent, plan or promise to tell truth in court. For example: "Will you tell the truth today?"

Results

How prevalent were truth/lie competency questions?

In all trials, judges ultimately decided children were competent to testify, either sworn or unsworn. They posed one to 20 (seven on average) competency

questions to 36 children (64 per cent), and zero competency questions to 20 children (36 per cent).

See Table 13.2 for an overview of the prevalence of each category. Across all trials, only one time was a child asked to provide an ‘example’ of truth or lie, so this category is not considered further.

Table 13.2 How prevalent was each type of competency question?

Category	N ^a	Range	M ^b	SD
Definition	10	1–6	2.50	1.78
Identification	20	1–6	2.55	1.23
Difference	18	1–2	1.33	0.49
Evaluation	25	1–7	3.12	1.69
Consequence	10	1–6	2.50	1.72
Prior occurrence	5	1–3	2.60	0.89
Obligation or promise	20	1–4	1.65	0.88

^a Number of children asked at least one question.

^b Mean number of questions (and *SD*) calculated from children who were asked at least one question.

‘Evaluation’ questions were the most common type observed and are consistent with the provisions contained in s13 of the NSW and Victorian Acts.

The asking of ‘obligation’ questions is consistent with developmental psychologists’ recommendations that children’s truth/lie competency be addressed through the use of a promise.¹³ Seven of the 20 children who were posed questions in this category were asked some version of the promise to tell the truth. The remainder were asked questions such as “Are you planning to tell the truth today?”, “Will you only tell what really happened and not make up any stories?” and “When you’re asked questions today what are you going to do?” (after a discussion about truth-telling).

Age differences in prevalence and type of competency questions

Judges asked fewer competency questions as children aged, $r(54) = -0.58, p < 0.001$. This finding suggests that the younger the child, the more questions judges asked about competency. In other words, judges are more likely to extensively test the competency of younger children.

Psychological research suggests that certain categories of questions are more developmentally appropriate than others for young children.¹⁴ ‘Identification’ questions are the most developmentally suitable, whereas ‘definition’ and ‘difference’ questions are likely to be more challenging for children.¹⁵ Independent-sample *t*-tests comparing the mean age

of children who were posed a competency question to the mean age of children who were not posed a competency question indicated that the former group were significantly younger for all question categories ($t_s = \geq 2.35, p_s = \leq 0.023$, Cohen’s $d_s = \geq 0.59$) except ‘definition’: $t(54) < 1, p = 0.36$, Cohen’s $d = 0.34$.

Did judges test sworn and unsworn children differently?

Only nine children did not take an oath or affirmation even though the majority were under 14 years old. Of the remaining children, 22 took an oath and 24 were affirmed (and data was missing for one child). A one-way ANOVA ($F[2, 54] = 8.83, p < 0.001, \eta_p^2 = 0.25$) indicated that children who did not take the oath or affirmation were significantly younger ($M = 9.05, SD = 1.62$) than children who were affirmed ($M = 13.12, SD = 2.94$) or sworn ($M = 13.43, SD = 2.93$); the latter two groups not differing (Bonferroni $p < 0.05$).

On average, unsworn children were asked 8.33 competency questions ($SD = 6.19$), which was significantly more than children who were affirmed ($M = 3.50, SD = 4.10$) or took the oath ($M = 4.09, SD = 4.82$): $F(2, 55) = 3.52, p = 0.037, \eta_p^2 = 0.12$. This finding suggests that judges are testing competency in an attempt to give children the opportunity to give sworn rather than unsworn evidence.

Judges were more likely to ask unsworn children ‘evaluation’ and ‘prior occurrence’ questions: $\chi^2_s = > 7.65, p_s < 0.022$. For the other categories,

there were no differences in the likelihood of being asked these types of competency questions as a function of having been sworn or not ($\chi^2s = \leq 5.35$, $ps = \geq 0.069$). Of the seven children asked a format of the 'promise' question, only two gave unsworn testimony (and all promised to tell the truth).

Format of competency questions and children's ability to answer

Developmental psychologists recommend that truth/lie competency questions should not be asked of children, so there is no recommended format for these questions. They do, however, provide suggested wording for the 'promise' question. Specifically they suggest that interviewers ask "Do you promise that you will tell the truth today?"¹⁶, because it is simple and concise, and appropriate for both older and younger children.

The research team coded the format of the questions; see Table 13.3 for question formats of each category of competency question. Judges most commonly commenced 'definition' questions with wh-, such as "What does telling the truth mean?" Only 36 per cent of the time were children able to provide a reasonable response to such questions. This finding is unsurprising given that defining concepts like truth and lies is difficult for most anyone, and recall-based questions are the only types of questions that require people to produce (rather than recognise or agree with) answers.¹⁷ As such, they are more challenging, but provide a better assessment of children's knowledge (see Study 11).

Judges most often worded 'identification' questions as forced choice, such as "If I said I was wearing a floppy hat, would that be the truth or a lie?" Children

answered every forced choice question in this study accurately, as would be expected because forced choice questions (usually) contain the correct answer within the question. Children answered all identification questions very accurately (80 per cent overall). Research has shown that this category is easiest and can be answered by the youngest children.¹⁸

Difference questions were overwhelmingly yes/no, and in many cases they were presumptive. The most common format was "You know the difference between the truth and a lie, don't you?", to which children said "yes" every single time. Half of the time, judges followed up these "yes" responses by asking a recall question (such as "What is the difference?"), and children provided a reasonable response only 63 per cent of the time. In other words, children always said they knew the difference, but could not always explain it.

Evaluation questions were also commonly worded as yes/no questions (such as "Is it important to tell the truth?") and were sometimes presumptive. Once again, children agreed with all of these questions, but when judges followed up with recall questions (such as "Why is it important?"), they provided reasonable answers only 48 per cent of the time. 'Obligation or promise' questions were almost exclusively yes/no, and children always agreed; however, yes/no is the format that developmental psychologists recommend for the 'promise' question. As children aged, the competency questions posed to them were increasingly likely to be presumptive ($r [36] = 0.49$, $p = 0.003$). Across all categories there were 40 presumptive questions posed, and children acquiesced to everyone.

Table 13.3 Descriptive data for question format by competency category

Category	Wh-	Yes/No	Forced choice	Presumptive ^b
Definition ($N = 10$)	0.60 (0.44) ^a	0.38 (0.46)	0.02 (0.06)	–
Identification ($N = 20$)	0.20 (0.27)	0.37 (0.37)	0.44 (0.39)	0.03 (0.10)
Difference ($N = 18$)	0.25 (0.35)	0.75 (0.35)	–	0.33 (0.49)
Evaluation ($N = 25$)	0.19 (0.27)	0.75 (0.32)	0.05 (0.21)	0.15 (0.26)
Consequence ($N = 10$)	0.51 (0.37)	0.48 (0.35)	0.02 (0.05)	0.08 (0.18)
Prior occurrence ($N = 5$)	0.13 (0.18)	0.87 (0.18)	–	0.07 (0.15)
Obligation ($N = 20$)	0.11 (0.28)	0.83 (0.34)	0.06 (0.23)	0.20 (0.34)

^aStandard deviations in parentheses. Proportions are calculated out of total for each question category (the first three columns sum to 1.00).

^bProportion presumptive is calculated out of the total for each question category.

Jurisdiction differences

There were some differences in the categories of competency questions used across jurisdictions but the number asked did not differ significantly: $F(2, 53) = 1.06, p = 0.35, \eta_p^2 = 0.04$ – NSW ($M = 3.92, SD = 4.72$), Vic ($M = 3.42, SD = 4.91$) and WA ($M = 5.52, SD = 5.08$). Nor did the proportion posed in a presumptive manner: $F(3, 32) = < 1, p = 0.41, \eta_p^2 = 0.05$. ‘Identification’ questions were most commonly asked in WA and almost never asked in NSW – $\chi^2(2, N = 56) = 6.95, p = 0.031$ – and ‘evaluation’ questions were asked more often than would be expected by chance in WA and less often in Vic – $\chi^2(2, N = 56) = 7.00, p = 0.03$ – which corresponds to the different Evidence Acts used in these states.

Conclusion

Judges in three Australian states posed truth/lie competency questions to two-thirds of the children aged seven to 17 years old in their courts. To these children, they asked an average of seven questions each (with one child receiving 20) in an attempt to establish competency. For nine of the 56 children competency was not established, and the child gave unsworn evidence. These children were younger on average than children who gave sworn evidence. These findings highlight that in relation to competency testing, the courts are requiring more, intellectually, of younger than older witnesses.

Endnotes

¹ s13 Evidence Act 1995 (NSW); s13 Evidence Act 2008 (Vic).

² s106B Evidence Act 1906 (WA).

³ Bussey and Grimbeek, 2000; Lyon, 2000; Talwar, Lee, Bala and Lindsay, 2002; Westcott and Kynan, 2006.

⁴ Bala, Lee, Lindsay and Talwar, 2010; Walker, 1999.

⁵ Lyon and Saywitz, 1999.

⁶ Talwar and Crossman, 2012.

⁷ See Bala, Lee, Lindsay and Talwar, 2010; Talwar and Crossman, 2012, for reviews of the development of lie-telling and approaches to truth/lie competency testing.

⁸ Talwar, Lee, Bala and Lindsay, 2004; Lyon and Dorado, 2008.

⁹ Bala et al., 2010; Lyon, 2011.

The most common category of competency question was ‘evaluation’ (such as “Is it important that you tell the truth today?”), followed by ‘identification’ and ‘obligation’. While developmental psychologists recommend the elimination of truth/lie competency questioning¹⁹, the use of evaluation questions is consistent with the NSW and Victorian Acts, and ‘identification’ questions are the most developmentally appropriate.²⁰

Only seven children in the sample were delivered a ‘promise’ question in the format recommended by developmental psychologists: “Will you promise to tell the truth?”²¹ Overall, out of 250 competency questions posed, 174 were posed in a way that children could simply acquiesce to, and they did so 88 per cent of the time. To recall-based questions, children provided reasonable responses only 51 per cent of the time.

In sum, competency testing is placing extra cognitive demands on younger complainants, who are (for developmental reasons) less able than older complainants to cope with these demands.²² Specifically, when judges are testing children’s competency they are asking questions that require generating (rather than accepting) answers about truths and lies. Children’s performance when responding to these types of questions is likely to be poor, potentially jeopardising credibility or making the children confused before they even begin to give their evidence.

¹⁰ Regardless of what the current law in each of the jurisdictions requires in terms of competency testing.

¹¹ Bruck and Ceci, 1999.

¹² Evans and Lyon, 2012.

¹³ Bala et al., 2010; Lyon, 2000.

¹⁴ For example Lyon and Saywitz, 1999.

¹⁵ For example Lyon and Saywitz, 1999.

¹⁶ Lyon, 2000; Lyon and Evans, 2013

¹⁷ Craik and Lockhart, 1972.

¹⁸ Bala et al., 2010; Lyon, 2011.

¹⁹ For example Bala, 2014.

²⁰ Bala et al., 2010.

²¹ For example Lyon, 2000.

²² Bala, 2014; Lyon and Saywitz, 1999; Talwar and Crossman, 2012.

Chapter 14
Court questioning
(Study 13)

Chapter 14: Court questioning

(Study 13)

The types of questions lawyers and judges ask have a strong influence on the accuracy and detail of responses that complainants of sexual abuse can provide to the court.¹ Complainants are more likely to have errors in their reporting when answering questions that are leading, complex and repeated.² The detrimental effect of these questions applies to all witnesses, but particularly to children due to developmental factors. Children are also likely to tire more quickly than adults, so are less able to withstand lengthy questioning.³ To minimise errors in evidence, lawyers and judges should avoid using problematic questioning methods with all witnesses, especially children. This view is supported by judicial bench books and by guidelines on court questioning.⁴

The aim of this study was to evaluate the extent to which lawyers and judges are:

- adapting the length of their questioning to compensate for the developmental needs of children
- using leading, complex and repeated questioning types
- adapting the types of questions they use to compensate for the developmental needs of children.

To achieve this aim, the study examined court transcripts of lawyers' and judges' questioning of complainants of child sexual abuse from three different age groups (children, adolescents and adults). Researchers analysed the transcripts for the length of questioning and the types of questions asked. This study also measured the types of responses complainants gave, to examine the effects of these questions on the trial process.

Method

Selection of court transcripts

The researchers analysed transcripts of the evidence given by 63 complainants of child sexual abuse from three age groups – a subset of the sample described in Study 5. To obtain a representative sample from each of the three jurisdictions (NSW, Victoria and WA), the complainants were matched for age (within one year of each other's age) at the time of the trial.

Complainants aged under 12 years were classed as 'children' ($N = 21$, $M = 8.95$ years, $SD = 1.65$, range = 6–11); complainants aged from 12 to under 18 years were classed as 'adolescent' ($N = 21$, $M = 14.52$ years, $SD = 1.54$, range = 12–17); and complainants aged 18 years and over were classed as 'adults' ($N = 21$, $M = 22.07$ years, $SD = 12.07$, range = 21–62). The majority of complainants in each group were female — there were four male complainants in the child sample (19.1 per cent), six male complainants in the adolescent sample (28.6 per cent), and six male complainants in the adult sample (28.6 per cent). All defendants were male, except for one female defendant in the child sample and one female defendant in the adolescent sample.

Coding scheme

Researchers coded the types of questions that prosecuting lawyers, defence lawyers and judges asked complainants and the responses that complainants gave. The coding scheme used was based on that developed by Zajac, Gross and Hayne,⁵ which forms the basis of best-practice guidelines on court questioning.

Question types

Each question asked by the prosecutor, defence lawyer or judge was classified into one or more of seven categories, as shown in Table 14.1.

These categories included questions that the literature has shown to maximise the chance of accurate evidence (non-leading open questions), as well as questions that are likely to create errors in complainants' — especially children's — reports of events (complex, repetitive and leading questions).

Of note is that the questioning categories differ from those used in police interviewing research because court questioning has the specific purpose of eliciting admissible evidence. The current study used definitions comparable to those used in other court questioning research.⁶ A more liberal definition of open questions (reflecting the more restrictive approach to eliciting evidence due to rules around admissibility) is the primary difference between these definitions and those used in police interviewing guidance. Each question was coded as 'open', 'closed' or 'leading', and complexity and repetition codes were added if present.

Table 14.1 Descriptions of codes for question type

Category	Explanation	Example
Open	Open invitations, and input-free utterances used to elicit free-recall responses.	<i>Q. What happened there?</i>
	Directive open-ended questions that focus the complainant's attention, mostly using 'Wh-' utterances.	<i>Q. What do you mean by hard?</i>
Instructions	Giving the complainant instructions, usually about the trial process.	<i>Q. I'm going to have to start at the beginning due to the interruption, okay?</i>
Closed	Yes/No or forced-choice questions.	<i>Q. Did anything happen during those stays?</i>
Leading	A statement to agree with, or tag question.	<i>Q. You had been separated from your father.</i>
Complex language	Multi-part question	<i>Q. So between moving to [family friend's] house and going to the police station on [date], you would have spoken to your mum about what was going on?</i>
	Abrupt change of topic	<i>Q. How old were you then?</i> <i>A. Six.</i> <i>Q. What do you do on Sundays?</i>
	Uses legal jargon	<i>Q. You recall that we spoke about two main incidents that occurred.</i>
	Uses complex non-legal language	<i>Q. Is the playroom adjacent to the kitchen?</i>
	Embedded clauses	<i>Q. And the one that's got red on it, that would be your sister's bed.</i>
	Inappropriate negation	<i>Q. Because they were watching boys' programs, weren't they?</i>
Complex sense	References to measurement (such as height or time).	<i>Q. And that was really, in timing wise, about April 2012?</i>
	Ambiguous question	<i>Q. You said that your pop came into your bedroom one day and did something to you.</i>
	Fragment	<i>Q. What about your sister?</i>
Repeat question	Grammatical error or fumble	<i>Q. Okay. So the – can you see the bed that has white posts on it?</i>
	Repetition of the question or answer	<i>Q. When did you last see her?</i> <i>A. Last year.</i> <i>Q. Last year?</i>

Type of complainant responses

Where there is no compensation made for the developmental needs of children, there should be evidence of a detrimental impact on how children respond. To explore this possibility, researchers coded the responses complainants gave to each question into one or more of seven categories (see Table 14.2).

These categories included adaptive strategies (such as asking for clarification, seeking clarification and resisting leading), as well as potentially unhelpful strategies (such as compliance, misunderstandings and changing evidence). Responses that did not fit into any of these categories were coded as 'other' and not included in the analyses.

Table 14.2 Description of codes for complainant response type

Code	Explanation	Example
Complies	Agreeing with leading or closed questions	<i>Q. Were there any customers in the shop that day?</i> <i>A. Yes.</i>
Resists	Resistance to leading or closed questions	<i>Q. I suggest that didn't happen.</i> <i>A. It happened.</i>
Gives clarification	Giving more information than is required to answer the question	<i>Q. Did she ask you that?</i> <i>A. She asked all of us that.</i>
Seeks clarification	Seeking clarification from the questioner	<i>Q. Well you've grown up in two years since then, haven't you?</i> <i>A. Sorry, what was that?</i>
Misunderstands	Clear misunderstandings of the question	<i>Q. What was the rude thing that he said?</i> <i>A. He'd be gay and I'd say no.</i>
Expresses uncertainty	Saying that they are unsure or do not know	<i>Q. Did he whisper it or say it in a loud voice?</i> <i>A. I don't know.</i>
Changes evidence	Changing earlier evidence	<i>Q. What I'm suggesting to you is that at no stage did you tell the police that the accused restrained you.</i> <i>A. No. Yeah, I agree.</i>

Inter-coder agreement

To calculate inter-coder agreement, a second researcher coded 20 per cent of the transcripts. The two researchers had 85 per cent agreement on the question type coding and 93 per cent agreement on the response type coding. Coding disagreements were resolved by discussion, after which one researcher coded the remaining transcripts.

Analysis

The data was analysed using a combination of ANOVAs and *t*-tests depending on what was most appropriate. Due to the small sample sizes, post-hoc testing was conducted using the more conservative Bonferroni testing.

Only findings directly relevant to the research questions are reported. The differences are statistically significant unless otherwise stated.

Results

Are judges and lawyers adapting the length of their questioning with children?

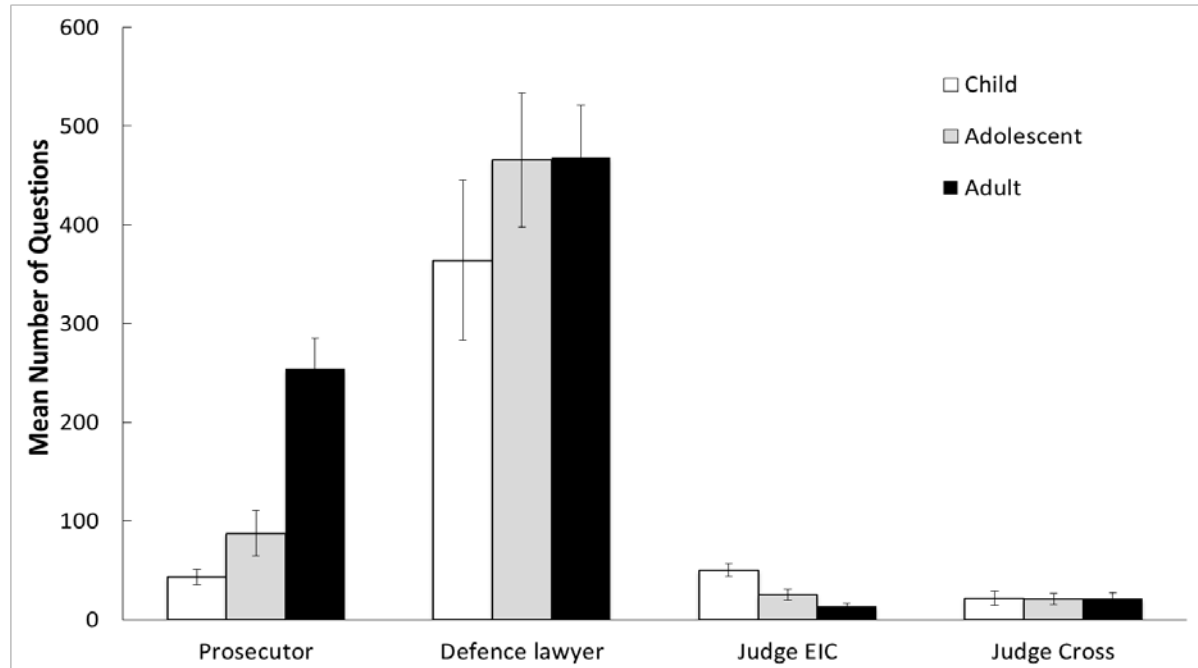
As Figure 14.1 shows, defence lawyers did not adapt the number of questions asked to compensate for differences in age group. While defence lawyers asked slightly fewer questions of children than of adolescents or adults, this difference was not statistically significant: $F(2, 60) = 0.76, p = 0.47$, as can be seen by the overlap of the black error bars.

During evidence-in-chief the number of questions judges asked varied according to the complainant's age group: $F(2, 60) = 11.89, p < 0.001, \eta^2 = 0.28$. Children were asked twice as many questions as adolescents and over three times as many questions as adults (Bonferroni, $p < 0.05$). This could be due to judges asking young children questions to test their competence to give evidence. During cross-examination the number of questions judges asked did not vary according to the complainant's age: $F(2, 60) = 0.002, p = 0.998$.

The number of questions prosecutors asked varied as a function of age: $F(2, 60) = 24.15, p < 0.001, \eta^2 = 0.45$. Prosecutors asked adults more questions than they did children and adolescents (Bonferroni, $p < 0.05$). This finding is likely to be due to the use of the police video interview as evidence-in-chief, which means police, not prosecutors, are essentially eliciting the evidence-in-chief with children. The length of questioning did not vary according to jurisdiction (all $ps < 0.087$).

The next sections evaluate the types of questions asked by prosecutors, defence lawyers and judges, and how complainants responded to this questioning. Proportional values are used to control for the variation in the total number of questions asked by each party. Because some of the courtroom questions and complainant responses could be assigned to more than one category, the sums of question type and response type may be greater than one.

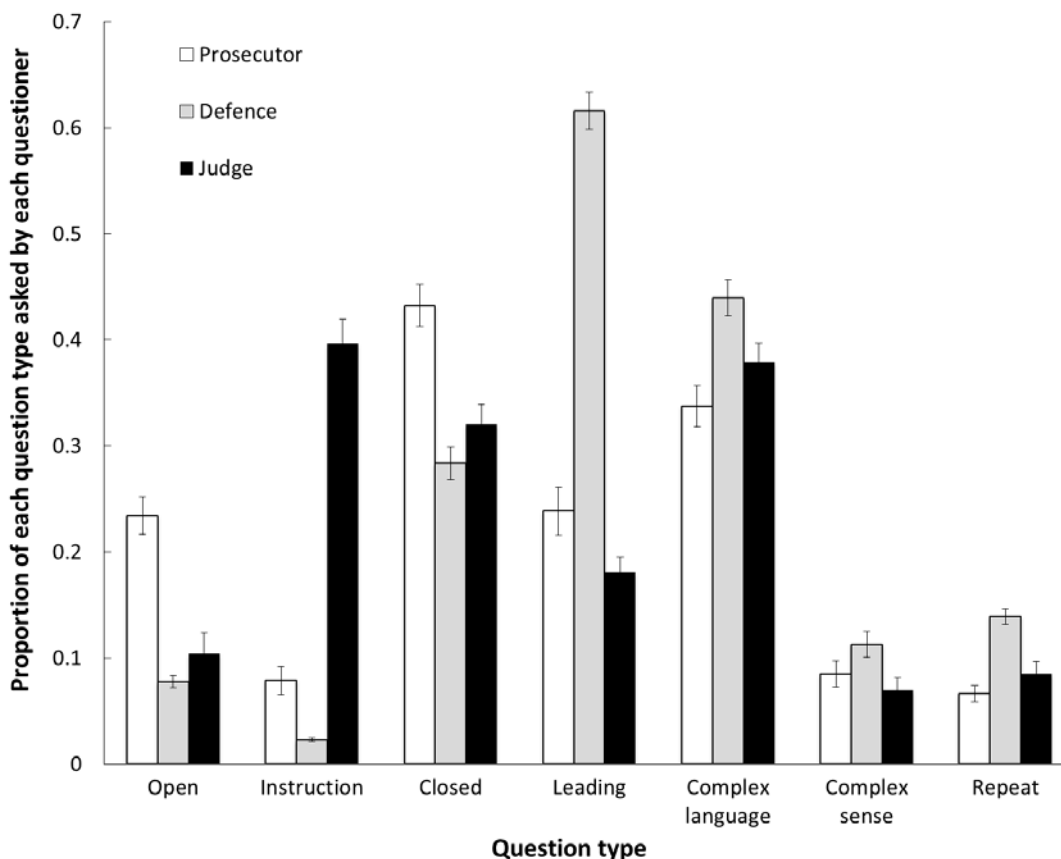
Figure 14.1 Mean number of questions by age group



Are judges and lawyers using leading, complex and repeated questions?

Statistical testing found the types of questions asked varied as a function of the questioner – $F(6.43, 385.86) = 86.88, p < 0.001$ – and there were differences in the types of questions asked by prosecutors, lawyers and judges. Separate analyses on questioner and question type found there were no differences according to jurisdictions (all $ps > 0.153$).

Figure 14.2 Proportion of each question type asked by each lawyer



As Figure 14.2 shows, prosecutors used some types of questions more than others: $F(3.47, 208.33) = 71.22$, $p < 0.001$. Prosecutors tended to ask closed questions. They used leading questions (the least desirable type of questions) as much as they used open questions (the most desirable types of questions). Prosecutors used complex language in about a third of all questions, but they seldom used complex sense and repeat questions. The following excerpts from the transcripts show examples of the complex language questions:

Text box 14.1

Prosecutor: *[Complainant], in that interview that you had with [interviewer], we just heard you tell him that you were wearing a nightie, this is answer 129 for the jury's benefit; that your nightie was pink and it's got a yellow thing and it said 'every' – I can't remember – you said it had the word 'every'. If you look at the second photograph, is that the nightie you were talking about? Sorry, you have to say the word?* (8-year-old)

Prosecutor: *Do you remember when we were playing the interview yesterday that [interviewer] showed you a diagram and you drew on that diagram?* (6-year-old)

Prosecutor: *That's about the matter that is before the court, is that correct?* (15-year-old)

Defence lawyers also used some types of questions more than others: $F(2.71, 162.52) = 296.14$, $p < 0.001$. Given that more than 60 per cent of defence lawyers' questions were leading, and less than 10 per cent were open, their questioning is most likely to result in errors in reporting when compared with judges' and prosecutors' questioning. Compounding these problems, 44 per cent of all questions asked by defence lawyers used complex language. Furthermore, one in 10 questions was a repeated question, and one in 10 questions was a 'complex sense' question. Examples of the complex language questions include:

Text box 14.2

Defence: *That's right? You don't remember today? Though, the second time you went back to speak to [detective] – question 79 – you thought you were wearing a dress?* (8-year-old)

Defence: *When you saw [accused] walking around in the church – and when I say church I mean including outside – you used to run up and playfully punch him and kick him, didn't you?* (6-year-old)

Defence: *And when you said that you had to clarify something, it was because you needed to tell the Crown that there was a discrepancy between your*

evidence in one of your interviews and another interview, is that correct? (16-year-old)

Defence: Well I – I put it to you that when you – when you say that he was drunk or he may have had a drink of his home beer – his home – home-brewed beer, but he didn't – he wasn't drunk, he didn't – he hadn't drunk whiskey or – or other – or other beer from – that he purchased? (23-year-old)

any, and she's there to help – you have just fallen out – there were are – she's there to help with the management of the court down there so from time to time she might give some documents or the like, all right? (16-year-old)

Judge: Well, we're just getting copies, Ms [complainant], and my tipstaff works the recorder and if I touch it or my associate, you wouldn't know what would happen. We're not technical. So she will get copies so you can see the document Mr [Prosecutor] is referring to. (36-year-old)

Judges also used some types of questions more than others: $F(3.63, 217.47) = 75.85, p < 0.001$. Overall, judges tended to give instructions and use closed questions. Leading questions were present in nearly one-fifth of all questions, and open questions were seldom used. Judges used complex language in just over one-third of all questions, but used complex sense and repeated questions less frequently. Examples of the complex language questions include:

Text box 14.3

Judge: And you are going to see, shortly, you are going to see a recording of the video that you gave a couple of years ago and tomorrow you are going to see the evidence you gave last year, right? (6-year-old)

Judge: That's good. Who's the – Mrs X is my associate, you'd say my secretary, for want of a better term, she might think that's a little bit drab, but it's as good as

Do judges and lawyers adapt the types of questions they use with different age groups?

The types of questions the complainant was asked also varied as a function of both the questioner and the complainant's age group – $F(13, 386) = 3.75, p < 0.001$ – in the sense that prosecutors, defence lawyers and judges used different types of questions with different age groups. The types of questions asked by each questioner were examined to see how the questioning differed according to the complainant's age.

Table 14.3 Prosecutors' use of question types by age of complainant

Question type	Under 12	12–17	Adult
Open*	0.200 (0.027)	0.170 (0.026)	0.333 (0.026)
Instruction**	0.110 (0.028)	0.102 (0.028)	0.024 (0.006)
Closed	0.414 (0.040)	0.444 (0.038)	0.439 (0.025)
Leading	0.288 (0.043)	0.284 (0.048)	0.204 (0.020)
Complex language**	0.373 (0.083)	0.371 (0.037)	0.269 (0.019)
Complex sense	0.099 (0.025)	0.069 (0.019)	0.086 (0.019)
Repeat question**	0.053 (0.014)	0.046 (0.011)	0.100 (0.013)

* $p < 0.001$; ** $p < 0.05$

The types of questions prosecutors asked varied as a function of age: $F(6.94, 208.33) = 3.22, p = 0.003$. As Table 14.3 shows, prosecutors' questioning methods conflicted with those known to promote accuracy. Prosecutors asked children and adolescents fewer open questions and more complex questions than they asked adults. Of note, in post-hoc testing the

differences in complex questions did not meet the threshold of significance, children: $p = 0.082$; adolescents, $p = 0.89$. More positively, prosecutors asked children and adolescents fewer repeated questions and gave more instructions than they did to adults (Bonferroni, $p < 0.05$).

Table 14.4 Defence lawyers' use of question types by age of complainant

Question type	Under 12	12–17	Adult
Open	0.085 (0.012)	0.078 (0.009)	0.069 (0.007)
Instruction	0.025 (0.003)	0.025 (0.005)	0.019 (0.003)
Closed*	0.330 (0.029)	0.244 (0.028)	0.277 (0.019)
Leading*	0.560 (0.020)	0.653 (0.030)	0.635 (0.020)
Complex language*	0.396 (0.034)	0.433 (0.026)	0.490 (0.024)
Complex sense	0.114 (0.023)	0.104 (0.016)	0.120 (0.025)
Repeat question	0.153 (0.016)	0.126 (0.010)	0.139 (0.010)

*all p s = 0.07 (marginally significant)

The types of questions defence lawyers asked varied as a function of age: $F(5.42, 162.52) = 2.29, p = 0.04$. As Table 14.4 shows, defence lawyers' question types were marginally significant according to age group. A comparison of the means indicates that defence lawyers used fewer leading questions with children

than with adolescents and fewer complex questions with children than with adults. The high number of leading and complex questions for all age groups, however, negates the ability to draw meaningful interpretations of these age differences in terms of their effect on complainant accuracy.

Table 14.5 Judges' use of question types by age of complainant

Question type	Under 12	12–17	Adult
Open*	0.149 (0.022)	0.083 (0.023)	0.074 (0.020)
Instruction*	0.312 (0.032)	0.423 (0.031)	0.455 (0.047)
Closed*	0.409 (0.026)	0.301 (0.030)	0.250 (0.033)
Leading*	0.130 (0.018)	0.193 (0.026)	0.221 (0.027)
Complex language	0.415 (0.029)	0.384 (0.036)	0.339 (0.025)
Complex sense	0.058 (0.012)	0.083 (0.022)	0.069 (0.024)
Repeat question	0.084 (0.017)	0.067 (0.019)	0.105 (0.022)

* $p < 0.05$

The types of questions judges asked varied as a function of age: $F(7.25, 217.47) = 3.72, p = 0.001$. As Table 14.5 shows, consistent with practice that promotes accuracy, judges asked children fewer leading questions than they asked adults, and more open questions than they asked adolescents and adults (in follow-up testing the differences in open questions by age were only marginally significant: $p = 0.06$). Judges also asked children more closed questions than they did adolescents and adults, and gave fewer instructions than they did to adults (Bonferroni, $p < 0.05$).

Is there evidence that complainants' responses are influenced by the questioning used?

The high prevalence of leading and complex questions found in this study is likely to play out in the responses complainants, especially children, give. The researchers analysed complainants' responses to explore this possibility.

Table 14.6 Complainants' responses to lawyers' and judges' questions

Response type	Under 12	12–17	Adult
Complies leading*	0.736 (0.043)	0.750 (0.047)	0.562 (0.018)
Resists leading	0.044 (0.012)	0.097 (0.040)	0.084 (0.010)
Gives clarification**	0.129 (0.018)	0.116 (0.021)	0.271 (0.015)
Seeks clarification*	0.011 (0.005)	0.021 (0.010)	0.027 (0.007)
Misunderstands	0.007 (0.006)	0.000 (0.000)	0.003 (0.001)
Expresses uncertainty	0.014 (0.005)	0.012 (0.005)	0.049 (0.010)
Changes response	0.011 (0.008)	0.003 (0.001)	0.004 (0.001)

* $p < 0.05$; ** $p < 0.001$

The types of responses complainants gave varied as a function of age: $F(3.89, 116.55) = 9.30, p < 0.001$. As shown in Table 14.6, children and adolescents complied more often with leading questions and gave fewer clarifications than adults. Children also sought clarification less than adults (Bonferroni, $p < 0.05$).

Conclusion

The results suggest the need for improvement in the type and quality of questions asked by judges and lawyers, particularly with children. The length and complexity of questioning is clearly not being tailored to the age of the complainant, and leading questions are frequent, particularly among defence lawyers. While leading questions increase the efficiency with

which undisputed evidence is given, they reduce the child and adult complainants' perception of being valued and the reliability of their evidence.⁷

It was not possible to determine precisely how the use of complex and leading questions influenced the complainant's reliability in the cases examined.⁸ However, findings from experimental psychology studies show that these types of questions likely increased reporting errors (especially for children) due to situational compliance and developmental-related misunderstandings.⁹ The use of these question types – even among professionals whose role is to maximise the evidential quality (prosecutors) and ensure fairness of proceedings (judges) – suggests the need for general up-skilling in relation to questioning of child witnesses.

Endnotes

¹ Lamb, Hershkowitz, Orbach and Esplin, 2011; Poole and Lamb, 1998; Powell, Fisher and Wright, 2005.

² Lamb et al., 2011; Poole and Lamb, 1998; Powell et al., 2005.

³ Cornish, Scerif and Karmiloff-Smith, 2007.

⁴ Australasian Institute of Judicial Administration Incorporated, 2015; District Court of Western Australia, 2010; Judicial College of Victoria, 2016; Judicial Commission of New South Wales, 2014, 2015.

⁵ Zajac, Gross and Hayne, 2003.

⁶ For example Zajac et al., 2003.

⁷ For example Lamb et al., 2011; Poole and Lamb, 1998; Powell et al., 2005; Powell and Cauchi, 2013.

⁸ The ground truth of what actually happened is not known.

⁹ In these experimental studies, accuracy of reporting can be tested because the ground truth is known. For example Ceci and Bruck, 1993; Hutcheson et al., 1995; Lipton, 1977; Loftus and Palmer, 1974; Poole and White, 1993; Waterman, Blades and Spencer, 2001.

Chapter 15
Non-normative assumptions in
cross-examination
(Study 14)

Chapter 15: Non-normative assumptions in cross-examination (Study 14)

Defence lawyers have a duty to test the evidence against the accused. In sexual abuse cases this involves the difficult task of cross-examining the complainant, who is often the central source of evidence. Experts in social, developmental and legal psychology have expressed concerns about the content and form of the language in cross-examination, particularly with regard to children's evidence.¹ In the past, defence lawyers' questions often implied that the child was an unreliable witness due to their age. This type of questioning may mislead jurors to incorrectly assume the complainant's evidence is unreliable, even though a plethora of research suggests children can be reliable when questioned properly.² Due to this conflict, legislative changes now prohibit questioning that suggests children are unreliable solely because of their age (though defence lawyers can, as is appropriate, imply a particular child is unreliable).³

Researchers have also expressed concerns that defence lawyers' questions often exploit incorrect normative assumptions about victim behaviour⁴ and human memory.⁵ This study aims to investigate whether the questions used in cross-examination in contemporary child sexual abuse cases still imply children are an unreliable class of witness, and whether defence lawyers use other assumptions that violate robust findings from psychological literature.

Method

Transcripts

The researchers analysed 120 transcripts of complainant evidence from 94 child sexual abuse cases ($N = 40$ children aged 12 years and under; $N = 40$ adolescents aged over 12 and under 18; $N = 40$ adults aged 18 and over) heard in three Australian jurisdictions ($N = 38$ complainants in NSW; $N = 34$ complainants in Victoria; and $N = 48$ complainants in WA). These are the transcripts obtained under notice or summons referred to in Study 5. The majority of complainants were female ($N = 91$ female; $N = 29$ male). The vast majority of defendants were male ($N = 94$ male; $N = 2$ female), and there was one case with three accused.

The child complainants ranged from 6.87 to 12.89 years old at the time of the trial ($M = 10.44$ years, $SD = 1.77$ years, median = 10.82 years). Adolescent complainants' ages ranged from 13.23 years to 17.54 years at the time of the trial ($M = 16.01$ years, $SD = 1.11$ years, median = 16.24 years). Adult complainants' ages ranged from 18.02 years to 54.33 years at the time of the trial ($M = 27.24$ years, $SD = 8.93$ years, median = 21.51 years). All accused were adults at the time of the offence. In cases where the defendant's precise age was known ($N = 55$) the defendant's age ranged from 22 to 76 ($M = 47.09$ years, $SD = 13.38$ years, median = 46 years).

The relationship between the complainant and defendant varied. The vast majority of complainants knew the defendant prior to the offence; only three accused were strangers to the complainant before the offending occurred. For 27 complainants, the defendant in their case was an extended family member. For 36 complainants, the defendant in their case was an immediate family member (living with the complainant). The other fifty-four complainants knew the defendant in their case, as an acquaintance, family friend or professional.

Analytic approach

A thematic analysis looked at the transcripts inductively, rather than deductively based on a pre-existing theory or concept.⁶ This approach enabled the researchers to obtain a detailed and holistic understanding of defence lawyers' strategies when cross-examining child sexual abuse complainants.

Two researchers conducted the thematic analysis by independently analysing a subset of the transcripts then meeting and agreeing on the common themes. There was a strong agreement between the researchers. The two researchers then read and made notes on about half of the remaining transcripts each, discussing new themes as they arose. The study reports on the common themes of cross-examination and provides quotes to illustrate these themes. Quotes have been edited to de-identify all complainants, and corrected to remove grammatical errors and improve readability.

Results

The thematic analysis revealed that this sample of defence lawyers used strategies that were inconsistent with the three key robust findings from psychological research, namely that:

- children are capable of giving reliable evidence⁷
- errors about minor details do not indicate the central allegation is wrong⁸
- victims respond to abuse in many ways.⁹

The remainder of this section explains the literature supporting each of these assumptions, describes the lines of questioning defence lawyers use in relation to these assumptions, and provides quotes from the transcripts to illustrate questioning.

Children are capable of giving reliable evidence

Previous research suggested that defence lawyers rely on questioning that implies children (as a group) are prone to mistake an imagined or discussed event for

their own experience.¹⁰ This is not true. While pre-schoolers are particularly vulnerable to suggestive questions¹¹, the difference in suggestibility is a matter of degree, as all age groups – including adults – are vulnerable to misleading suggestions and to source monitoring errors (where a person is mistaken about the source of the memory).¹² Furthermore, three decades of research supports the unequivocal conclusion that when questioned appropriately, children as young as four can be accurate and informative witnesses.¹³ Tactics that focus on attacking children's credibility simply because they are children are inconsistent with the evidence from hundreds of scientific studies.¹⁴

Encouragingly, defence lawyers in the current sample did not overtly suggest that children, as a group, were not able to give reliable evidence. However, it was sometimes implied in more subtle ways. When questioning the complainant, defence lawyers sometimes referenced the complainant's creativity or imagination, suggesting that they had accidentally confused real life with something imagined. This strategy was brought up infrequently, and did not seem to be a core strategy for cross-examining children in sexual abuse cases.

Text box 15.1

Q. *[The reason] that you didn't tell them about this, is because that didn't happen?*

A. *It did. I've already said.*

Q. *You're just letting your imagination run away with you. That's what happened, isn't it?*

A. *Oh yeah – um, no, it didn't happen. I wasn't lying. I don't really mind if you think I'm lying anyway.*

(C48, 11-year-old male, Victoria)

Q. *So do you say that when this started happening, you know what you say happened, do you say that you were asleep at the time that it started?*

A. *Yes.*

Q. *All right. [Complainant], is it possible that all of this was something that you dreamed whilst you were asleep?*

A. *No.*

Q. *Well, did you say in the interview some things about thinking it might have been a dream?*

A. *Yes.*

(C71, 10-year-old female, WA)

Q. *Yes. And your favourite subject you said was writing?*

A. *Yes.*

Q. *Is that story writing or is that handwriting?*

A. *Story writing.*

Q. *OK. And you like writing stories? Making up stories? Is that right?*

A. *Yes.*

(C53, 10-year-old female, Victoria)

Errors in relation to minor details should not be taken to mean the central allegation is wrong

When remembering an event, some details are easier to recall than others. The likelihood of a person remembering a specific event detail depends on several factors including the salience and distinctiveness of the detail; what other related or competing information is present; the level of attention paid to the detail; the person's social motivations; the presence of stress or trauma; and the prior knowledge and experience of the person.¹⁵ Empirical research suggests that errors or inconsistencies in a few minor details do not reliably predict overall accuracy or deception.¹⁶

If the same event has happened multiple times in a similar way, errors in minor details about a particular incident are more likely. Take for example, a child who was repeatedly abused by their father over a number of years. That child is likely to have a good memory that the abuse happened, but may not be able to reliably remember temporal and contextual details of each incident of abuse, when they happened, or on how many occasions the abuse happened. In a similar way someone who goes to the same café every week will likely be able to reliably remember that they go to that café but may not be able to remember what they had to eat on a particular occasion or how many times they had been to that café.

Nevertheless, this type of reasoning was routinely employed in the courtroom. Defence lawyers frequently suggested that poor memory for minor details indicated that the central allegations were wrong; for example, if the complainant was not able to put the offending into its temporal or contextual background. While sometimes this may have been case relevant, often it was not. For example, the complainant in the following case alleged repeated abuse by a family friend. Even though the complainant said on multiple occasions that she did not remember when it happened or details surrounding the offence, the defence continued to ask her a series of specific questions about the timing of the incident.

Text box 15.2

Q. And can you remember anything about what you were wearing on that time?

A. No.

Q. Can you remember what the weather was like?

A. No.

Q. Can you remember if there was ...?

A. Wait, it was winter I think.

Q. Okay. You think?

A. Yes.

Q. Not sure about that.

A. Yes.

Q. Sorry?

A. It was winter.

Q. Are you sure about that?

A. Yes.

Q. All right. And you – sorry, just to go back, you don't remember what, if anything, was on television?

A. Yes. I don't remember.

Q. All right. And do you remember what you had done that day?

A. No.

Q. Do you remember what you did before that – sorry, before you say that this happened?

A. No.

Q. And do you remember what you did after you said this happened?

A. No.

Q. OK. All right. You don't remember really anything about that day?

A. No.

(C53, 10-year-old female, Victoria)

By taking the complainant back through their evidence and focusing on contextual details, the defence sometimes created inconsistencies in their evidence. If this happened, or if the complainant's answers were already inconsistent with their own previous statement or another source, the defence used the inconsistencies to suggest the central allegations were wrong.

The defence highlighted minor inconsistencies in a clear and structured way. First they asked the complainant about the detail in question and got the complainant to commit to their answer (saying they were sure), then they contrasted this with the other source and asked them to explain the difference. Finally, they suggested that the reason for this difference was because the complainant was lying or mistaken about the central allegation. These practices are consistent with guidelines on cross-examination (written for lawyers by lawyers), and have been found to produce inaccuracies even with adult witnesses.¹⁷

Text box 15.3

Q. Okay. Now, you told us – and this is presumably – you – you help us with this – something that's seared upon your memory?

A. Yes.

Q. The details of this are seared upon your memory?

A. Yes.

Q. Burnt into your memory?

A. Yes.

Q. Okay. And you told us that when he touched your boob, as you described your breast, you said, "It was my right boob and he used his right hand"?

A. Yes.

Q. And is that – that's obviously a detail that – that sticks in your mind?

A. Yes.

Q. Okay. It's just that, you see in your interview, when you described this same event, you said it was your left boob and he used his left hand?

A. Okay.

Q. So just explain the apparent discrepancy in your recollection, if it's burnt into your memory?

A. Well, if I'm looking at myself, this is my left and this is my right. But if someone else is looking at me, this is my left, this is my right. So it's a little hard to ...

Q. It wasn't because this was an invention and you didn't remember what you'd said?

A. No, it was a ...

Q. Wasn't something you were – you were making up and therefore got the detail wrong?

A. No, it was correct.

(C17, 18-year-old female, WA)

Defence lawyers questioned complainants about minor inconsistencies relating to the time of the offence, including what the complainant and accused were wearing, the season, the month, the time of day, the sequence of offences on a particular day, and what was happening in the house at the time or immediately after – including things like what was on television or what the complainant had for breakfast the following day. These types of details are unlikely to be remembered by a witness and were often not explicitly relevant to the case.

Text box 15.4

Q. Okay. The truth of the matter is that you – you couldn't remember what the colour or the pattern or anything of the bed was?

A. That's 'cos it's irrelevant really.
(C7, 27-year-old female, WA)

Q. But you see, memories of true events don't alter, do they?

A. I don't know.

Q. In other words, if that was – if this is a true event and you truly, during the course of this true event, recalled, in [month] 2011, wearing your favourite dress, your pink dress with flowers down one side – yes?

A. Mm hmm.

Q. That's a true memory, isn't it, if this event is a true description? Would you accept that?

A. The event is true. What I was wearing, I'm not ...

Q. Well, how is it then, if you could be highly specific as to what you were wearing even down to the fact that you told those ladies "I had my hair up" ... that you can't recall it today, even after the beneficial effects, on your recall, of counselling? Explain that for us?

A. What do you mean?

Q. Well, why is that you cannot remember today an associated detail of what you were wearing at the time your uncle pulled up your dress and abused you and invited you to partake in the events that you describe in the tickling incident? How is that you cannot recall what you were wearing when you describe it to us today?

A. The pink dress was my favourite dress at the time.
(C17, 18-year-old female, WA)

Defence lawyers also suggested complainants were inconsistent if they mentioned something in court they had not said previously. This is inconsistent with the well-understood memory phenomenon of reminiscence; that is, repeated attempts at retrieval will produce new and often accurate information.¹⁸

Text box 15.5

Q. Okay, if I was to suggest to you that that movie wasn't released on DVD in Australia until [day] [month] 2008, would that change your view as to whether you could have watched that movie when you say this was happening to you in the earlier part of 2008?

A. No, because he had downloaded it off the internet and it was on his laptop.

Q. So it was on his laptop? So he was just playing it through the laptop, an electronic file. Is that correct?

A. I'm pretty sure he – we – he set it up on his laptop for me to watch or he had put it on a disc so I could watch it on the TV, but I can't exactly remember what I watched it off.

Q. All right. And when you sat down to do a statement on [day] [month] this year, where you said that the movie had Pink in it and it was a horror movie, did you mention anything in that statement about it being on a laptop and being downloaded from the internet?

A. No, I didn't.

Q. Is that something, [complainant], you've just made up now to counter the information I've just given you about the release date of the DVD?

A. No, it's not.

(C123, 16-year-old female, WA)

All complainants were questioned on the same level of minor contextual details regardless of their age or the length of time that had passed between the offending and the complainant giving evidence. This type of questioning implied that complainants would have discrete memories for each episode of abuse and be able to put these into temporal context. This expectation is lofty even for adult witnesses, given that defence strategies are based on inaccurate principles of memory.¹⁹

Victims respond to abuse in different ways

Victims of sexual abuse respond to abuse in many ways. While some victims might resist, or report to authorities immediately, this is often not the case.²⁰ In fact, research has shown that many victims do not physically resist the abuse or show physical signs of abuse; are not visibly upset immediately after the offence or when discussing the offence; delay reporting for a number of years; and show continued loyalty to the offender.²¹ Child sexual abuse is often perpetrated by someone that the victim knows and trusts and/or relies on for safety and shelter. Offenders build trust over a significant time period

and at the same time normalise the abuse through grooming the victim. Many factors – such as the victim–offender relationship and the victim’s expectations about beliefs and consequences of reporting – will affect when, whether and how abuse is disclosed.²² In some cases, victims do not expect to be believed, or they expect that negative consequences such as removal from the home or damage to family ties will ensue.

Defence lawyers often employed strategies that suggested there was one typical way that victims respond to abuse, and if the complainant had not responded in this way it indicated the offending had not occurred. One strategy the defence used was to suggest that the complainant had not done enough to prevent the offence, such as verbally or physically resisting or attempting to flee the situation. A corollary of this line of questioning was that they would have sustained physical injuries from the abuse, and someone would have seen these injuries.

Text box 15.6

Q. *I'd suggest to you that that would be a reaction if there was a set of circumstances that you've given – that you would scream as loud as you could or you'd get out of the bed and run away from the bedroom?*

A. *So you're assuming that's how I would react, because I have not once said that that's how I would react.*

(C33, 17-year-old female, NSW)

Q. *You certainly don't say that before, during or after that you yelled?*

A. *No.*

Q. *Screamed?*

A. *No.*

Q. *Tried to flee?*

A. *No.*

Q. *Or fought him off in any way?*

A. *No.*

(C50, 16-year-old female, Victoria)

Q. *You mentioned in your interview that [the accused] was holding your wrist very hard, do you remember that?*

A. *Mm hmm.*

Q. *You said words to the effect "It was so hard that it hurt"?*

A. *Yes.*

Q. *And you were trying to push or pull away from him?*

A. *Yes.*

Q. *But it hurt even more?*

A. *Yeah.*

Q. *Did you have any bruises on your wrist as a result of him holding you so hard?*

A. *No, my jumper – I wore a jumper.*

Q. *But there were no marks on your wrist at all after the event?*

A. *No.*

(C71, 10-year-old female, WA)

The defence also questioned the complainant’s lack of visible emotional response, from immediately after the offence up to when they were giving evidence in court, yet the psychological literature shows that demeanour is not a reliable indicator of a witness’s credibility.²³

Text box 15.7

Q. *And you say that after this happened, this first incident, you didn't feel even, you didn't even feel a little bit uneasy afterwards as a 14-year-old who hadn't masturbated before?*

A. *No I –*

Q. *You didn't even feel a little uneasy?*

A. *I don't recall.*

Q. *You don't recall? You didn't feel a little bit, it was all a bit creepy? You didn't think that afterwards? They're my words, my descriptor, creepy. Creepy. Did you think that afterwards?*

A. *I didn't recall, I don't recall that.*

Q. *You don't recall whether it was creepy or not having – being at your mate's place and out of the blue his father coming in and asking you to expose your penis and masturbate in front of him? You don't recall whether you thought that was creepy or not at the time?*

A. *No.*

Q. *In fact you told the police at paragraph 11 of your statement "I didn't think there was anything wrong with what we were doing, so I was happy to pull my penis out". Is that what you told the police?*

A. *Yes.*

(C32, 35-year-old male, NSW)

Q. *So, effectively what you're saying is after that incident, what you did was just go and play with [brother], ride your bikes and so forth ...?*

A. *What?*

Q. *... as if nothing had happened?*

A. *Did – did I say "straight after I walked out and went for a ride"?*

Q. *Yes, you said "Well I went for a ride on the bikes, [brother] and me and the kids".*

A. *That doesn't mean ...*

Q. *That happened?*

A. *That doesn't mean I just walked out like nothing happened.*

(C48, 11-year-old male, Victoria)

The defence also suggested that if the offending had happened the complainant would have immediately told someone about it.

Text box 15.8

Q. *No. Isn't it more plausible for you to have said something – you could have said to your mum "Look, mum, daddy did this to me", but you never said anything of that nature, did you?*

(C22, 27-year-old female, WA)

Q. *You didn't try and go to someone and say "Look, I've just been raped, I need help"?*

A. *Did I go to anyone straightaway? No. I didn't want to tell anyone. It's shameful; it is disgusting; it is a violation.*
(C77, 16-year-old female, WA)

This line of questioning was used even in cases where the complainant had reported within minutes. For example, in one case where a stranger had allegedly abused a child at a swimming pool, the child told his guardian about the abuse within minutes of the offence ending. However, the defence lawyer still asked the complainant why he did not immediately report the abuse to a lifeguard he passed on the way to the changing rooms.

Text box 15.9

Q. *Did you pass any of the lifeguards or staff to the pool as you went to the change rooms?*

A. *I'm not sure.*

Q. *You didn't speak to any of the staff from the pool and tell them what had happened?*

A. *No.* (C108, 16-year-old male, VIC)

If the complainant showed loyalty to the accused or continued any sort of relationship with them after the first offence, this was used to suggest the offending had not occurred.

Text box 15.10

Q. *And what I would suggest to you is that if these things had happened you wouldn't have gone back, you would have done everything you could not to go back?*

(C105, 16-year-old female, Victoria)

Q. *See, what I want to suggest to you is that for a long time you and your sisters wanted to see your dad [accused], didn't you?*

A. *Can't remember.*

Q. *Can't remember. Do you remember you wrote him lots of letters?*

A. *Yes.*

Q. *You told him you loved him?*

A. *Yes.*

(C59, 14-year-old female, Victoria)

Although these lines of questioning employ normative assumptions about how victims behave it was not possible to work backwards from the suggestions

Endnotes

¹ Aldridge and Lutchjenbroers, 2007; Brennan, 1994; Brennan and Brennan, 1988; Davies, Henderson and Seymour, 1997; Ellison, 2001; Wescott and Page, 2002; Zajac and Cannan, 2009.

² See Brown and Lamb, 2015.

made by defence lawyers to see what they expected of complainants. What defence lawyers suggested was 'typical' varied markedly between cases. For example, it was suggested that the complainant had not told someone quickly enough even in cases where the complainant had reported within minutes. These strategies operated both descriptively and prescriptively, and it was sometimes suggested that by not reacting in a certain way the complainant was partially culpable for any offending that had occurred.

Text box 15.11

Q. *You could have stopped [the offending] by telling your uncle what happened, correct?*

(C35, 12-year-old male, NSW)

Conclusion

Defence lawyers' questions did not explicitly suggest that children were part of a category of witness that was unreliable. There were instances where questioning *implied* that cognitive immaturity could be undermining the complainant's reliability or credibility (for example, that a young complainant had a tendency to confuse dreams or imagined events with reality). However, references to developmental level were uncommon and usually not explicit. Changes to this practice possibly stem from general societal changes in attitudes towards children; the abundance of literature since the early 1980s declaring children's ability to give reliable and accurate reports of their experiences; and legislative changes prohibiting the dismissal of children's evidence based on age.

Of greatest concern were questions implying poor complainant reliability or credibility based on incorrect and antiquated concepts of human memory and reactions to sexual abuse. John H. Wigmore famously called cross-examination the "greatest legal engine ever invented for the discovery of truth".²⁴ Based on questions in the current sample, it is clear that cross-examination can also uncover fragilities of mundane, everyday memory, and varied reactions of victims, which are not in any way diagnostic of truth.

³ See, for example, s41(3)(d) of the *Evidence Act 2008* (Vic).

⁴ Eastwood, Patton and Stacy, 1998.

⁵ Zajac, O'Neill and Hayne, 2012.

⁶ Strauss and Corbin, 1990.

⁷ See Brown and Lamb, 2015.

⁸ Fisher, Vrij and Leins, 2013.

- ⁹ Castelli and Goodman, 2014; Cossins, Goodman-Delahunty and O'Brien, 2009; Johnson, 2004; London, Bruck, Ceci and Shuman, 2005.
- ¹⁰ Brennan, 1994.
- ¹¹ Ceci and Huffman, 1997.
- ¹² Ceci, Kulkofsky, Klemfuss, Sweeney and Bruck, 2007; Johnson, Hashtroudi and Lindsay, 1993.
- ¹³ Brown and Lamb, 2015.
- ¹⁴ See Brown and Lamb, 2015; Spencer and Lamb, 2012.
- ¹⁵ Powell, Garry, and Brewer, 2013.
- ¹⁶ Fisher, Vrij and Leins, 2013.
- ¹⁷ For example Valentine and Maras (2013).
- ¹⁸ See La Rooy, Lamb and Pipe (2008) for a review.
- ¹⁹ See also Epstein, 2007.
- ²⁰ London, Bruck, Ceci and Shuman, 2005.
- ²¹ Castelli and Goodman, 2014; Cossins, Goodman-Delahunty and O'Brien, 2009; Johnson, 2004; London, Bruck, Ceci and Shuman, 2005.
- ²² Pipe, Lamb, Orbach and Cederborg, 2007.
- ²³ Vrij, 2000; DePaulo, 2003; Memon, Vrij and Bull, 2003.
- ²⁴ Cited in Epstein, 2007.

Chapter 16
Cross-examination strategies
(Study 15)

Chapter 16: Cross-examination strategies (Study 15)

There are widespread concerns that the strategies and tactics used by defence lawyers when cross-examining child sexual abuse complainants are unfair and can leave complainants feeling confused, humiliated and re-victimised.¹ These concerns are primarily based on anecdotes from those who have experienced the process (such as victims, legal professionals and researchers conducting observations of trials). While defence lawyers have a duty to test the complainant's evidence, there are varied ways they can do this. One example is to ask the complainant about motivations for making a false complaint. Another (arguably less reasonable) tactic is to ask the complainant why they did not physically resist the alleged sexual abuse.

An essential step in understanding what reforms, if any, can improve the fairness of cross-examination, is to critically evaluate the actual nature and prevalence of the tactics that defence lawyers use when questioning the complainant. The aim of this study was to conduct such an evaluation using a large and representative sample of courtroom transcripts.

Method

Transcripts

The sub-sample used in this study is the same as that used in Study 14 (see Study 14 for information on case selection and demographics).

Coding scheme

The coding scheme used was based on that developed by Zydervelt, Zajac, Kaladelfos and Westera² for examining the cross-examination of complainants in adult sexual abuse cases. The scheme was adapted for the current sample of child complainants based on a thematic analysis of the cross-examination strategies identified in the courtroom transcripts used in the current study. This analysis involved continuous backwards and forwards engagement with the transcripts, to modify and refine the themes to reflect how the strategies were used in qualitatively different ways with child sexual abuse complainants than with adult sexual abuse complainants. Table 16.1 lists descriptions of the identified strategies and corresponding tactics (substrategies).

There are three important things to note about the coding scheme. First, the researchers coded the tactics used for each line of questioning rather than for individual questions. For example, if the defence lawyer asked five questions about what the complainant was wearing at the time of the offence and then asked 10 questions about why they did not immediately tell someone, these would be coded as two tactics – one for each of the different lines of questioning. Second, to capture the complexity of cross-examination, each line of questioning could be coded into more than one tactic. For example, the question “You’re lying or confused about this aren’t you?” was coded both as suggesting that the complainant was lying and that their memory was unreliable.

Finally, the inferred intention of the defence lawyer's line of questioning was coded, rather than the complainant's response to it. For example, if a defence lawyer suggested that the complainant still gave the accused hugs after the offending occurred, this would receive a continued relationship code, even if the complainant denied that they had hugged the accused.

Two researchers independently coded 20 per cent of the transcripts and agreed on 80 per cent of the tactics used. Disagreements were resolved by discussion. The two researchers coded half of the remaining transcripts each.

Table 16.1 Description of the strategies and tactics identified

Strategy	Tactic	Example from the transcripts
Reliability	Memory	<p>Q. <i>When you try and recollect now about what happened back then, you would agree that your memory is very vague, isn't it?</i></p> <p>A. <i>No.</i></p> <p>Q. <i>You would agree that on occasions, you're guessing as to what you think may have happened?</i></p> <p>A. <i>No, I am not.</i> (C8, 27-year-old female, WA)</p>
	Environmental factors at the time of the offence	<p>Q. <i>On every occasion when you were asleep – about which we've spoken – you did not see, or you agree that you might not have seen the person who was touching you?</i></p> <p>A. <i>Yep.</i> (C119, 17-year-old female, NSW)</p>
Credibility	Suggestion that the complainant is lying	<p>Q. <i>See, I'm saying to you that isn't true that [accused] said that. You say it is, do you?</i></p> <p>A. <i>Yes.</i> (C24, 10-year-old female, WA)</p>
	Motivation to create false account	<p>Q. <i>Well I suggest you were just telling mum what she wanted to hear; what do you say?</i></p> <p>A. <i>Um ...</i></p> <p>Q. <i>Is that right?</i></p> <p>A. <i>No.</i> (C57, 12-year-old male, Victoria)</p>
	Previous 'bad character' or dishonesty	<p>Q. <i>And you've been taught about lies at home haven't you?</i></p> <p>A. <i>Yeah.</i></p> <p>Q. <i>What's the truth and what's a lie?</i></p> <p>A. <i>Yeah.</i></p> <p>Q. <i>And you know the difference partly because you've been in trouble for lying at home haven't you?</i></p> <p>A. <i>Once or twice, yes.</i> (C104, 11-year-old female, NSW)</p>
Plausibility	Resistance at time of the offence	<p>Q. <i>At no stage did you say to the police, either during or after, that you pushed him?</i></p> <p>A. <i>No.</i></p> <p>Q. <i>That you fought him?</i></p> <p>A. <i>No.</i></p> <p>Q. <i>Or that you struggled?</i></p> <p>A. <i>No.</i> (C50, 16-year-old female, Victoria)</p>
	Delayed reporting	<p>Q. <i>So you're saying that you didn't say anything to anybody for more than a year, is that right?</i></p> <p>A. <i>Yeah.</i> (C5, 10-year-old male, WA)</p>

Strategy	Tactic	Example from the transcripts
Plausibility	Lack of emotionality	<p>Q. <i>And you stood there and watched, did you, whilst first [co-complainant] penetrated his father's anus with his penis, is that correct?</i></p> <p>A. <i>Correct.</i></p> <p>Q. <i>You stood there and watched?</i></p> <p>A. <i>I was in the room, watching, yes.</i></p> <p>Q. <i>Do I take it from the way you've given your evidence, what you've told us so far, that you did so – and this is my phraseology – you watched matter-of-factly? "Oh, yes, there's Matthew penetrating his father with his penis". Is that basically how it unfolded?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>You stood there dispassionately, there it is, you had – there was no reaction from you?</i></p> <p>A. <i>Not that I'm aware of, no.</i> (C32, 35-year-old male, NSW)</p>
	Continued relationship	<p>Q. <i>I was asking you, you've told us about this occasion when something happened in the kitchen and then in the bedroom on a night shortly after you first went there, and I asked you how you felt about that. Can you tell us how you felt about it?</i></p> <p>A. <i>Um, not very happy.</i></p> <p>Q. <i>If you weren't very happy, why did you keep going there after that?</i></p> <p>A. <i>Um, I dunno.</i> (C57, 12-year-old male, Victoria)</p>
	Other plausibility	<p>Q. <i>Now, back then in 2012, mid-2012, were you a bit chubbier then?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>You would have had difficulties putting your legs near your face, wouldn't you?</i></p> <p>A. <i>Pardon?</i></p> <p>Q. <i>Back in 2012, June of 2012, you would have had difficulty putting your legs next to your face?</i></p> <p>A. <i>Can you put that in an easier way?</i></p> <p>Q. <i>All right. You had a chubby stomach?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>You would have had difficulty bringing your legs up past your stomach to put them beside your head?</i></p> <p>A. <i>No.</i> (C24, 10-year-old female, WA)</p>
Consistency	With own report	<p>Q. <i>And you said that you know it was [accused] because you saw him. Do you remember saying that to the prosecutor a few minutes ago?</i></p> <p>A. <i>Um.</i></p> <p>Q. <i>Before the break?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>Okay. [Interviewer] asked you about whether you could see [accused], in the interview, didn't she?</i></p> <p>A. <i>Pardon?</i></p> <p>Q. <i>All right. Perhaps I – perhaps to make it easier I'll just read you the question and answer. And this is at page 33 of the interview, Your Honour, page 39 of the brief, down the bottom of that page. Do you remember [Interviewer] asking you this question: "Could you see", let's assume the word is [accused] for the moment, "Could you see [accused] from where you were on the couch?" And you said "No, not really. It was just a blur".</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>Did you say that to her?</i></p> <p>A. <i>Yes.</i> (C71, 10-year-old female, WA)</p>

Strategy	Tactic	Example from the transcripts
Consistency	With another witness	<p>Q. Okay, so just to be very clear, what I'm suggesting is that your mum and [stepdad] are outside, and [stepdad] says to you "Does [accused] do anything else?" And you say "No"?</p> <p>A. That's not true, (indistinct).</p> <p>Q. All right. And then what I'm suggesting to you is the next thing that happens is that your mum goes inside. What do you say to that?</p> <p>A. No. That's not true either because it happened that they were smoking, and then mum went inside, and that's when [stepdad] said "Does he do anything else to you".</p> <p>Q. Now, I'm going to take you to some evidence that your mum has given in court before, Okay?</p> <p>A. Mm hmm.</p> <p>(C53, 10-year-old female, Victoria)</p>
	With other evidence	<p>Q. You got to [accused's] place, according to your interview, at about 10.30, correct?</p> <p>A. Yes.</p> <p>Q. And that's on the morning of 6 February 2013, correct?</p> <p>A. Yes.</p> <p>Q. And at 11 o'clock on [day] [month] 2013 you made a phone call to your brother, from [suburb], is that correct?</p> <p>A. Yes.</p> <p>Q. Well according to you, you were at [accused's] house at 10.30ish, weren't you?</p> <p>A. But it was a long time ago, I don't remember.</p> <p>(C26, adolescent, NSW)</p>
	With accused	<p>Q. You told us that [accused] on one occasion was wearing a black T-shirt?</p> <p>A. Possibly.</p> <p>Q. He didn't have plain black T-shirts did he?</p> <p>A. No, I don't think so.</p> <p>(C104, 11-year-old female, NSW)</p>
Indiscriminate: can target either reliability or credibility	Suggestions the complainant is wrong	<p>Q. He never touched you in the way you've described, did he?</p> <p>A. Yes, he did.</p> <p>Q. He was always very good to you, wasn't he?</p> <p>A. No.</p> <p>(C56, 11-year-old male, Victoria)</p>
	Co-complainant collusion and contamination	<p>Q. And I put it to you that you had no problems at all about [accused] until [co-complainant] started speaking to you in the car that day?</p> <p>A. No.</p> <p>(C117, 14-year-old male, WA)</p>
	Custody dispute between complainant's parents	<p>Q. Has your mother indicated to you that she needs your support to try and head off any contact or access claim that [stepdad/accused] might have in relation to [sister] and [brother]?</p> <p>A. No.</p> <p>Q. No?</p> <p>A. No.</p> <p>(C91, 18-year-old female, VIC)</p>
	Complainant's mental health	<p>Q. How many slashes did you do, on your evidence, how many do you say you – how many cuts did you inflict on yourself?</p> <p>A. Do I really have to answer that?</p> <p>(C33, 17-year-old female, NSW)</p>
	Prescription and illicit drug use (including alcohol use)	<p>Q. So the question was how long have you been drinking for?</p> <p>A. Ever since I've been drinking alcohol. I can't remember exactly what date, I'm sorry, but for about two, three years.</p> <p>Q. Two to three years. And you're 16 now?</p> <p>A. Yes.</p> <p>Q. So that take you back to when you were 11 or 12?</p> <p>A. 12, 13.</p> <p>(C77, 16-year-old female, WA)</p>

Strategy	Tactic	Example from the transcripts
Indiscriminate: can target either reliability or credibility	History of sexual abuse (including family history of sexual abuse)	<p>Q. <i>Now did your mother ever tell you about something that happened to her as a girl?</i></p> <p>A. <i>I don't think so; she might've, but if she did I can't remember.</i></p> <p>Q. <i>Did she tell you about a friend of her father's; something that happened with a friend of her father's?</i></p> <p>A. <i>I don't think so.</i></p> <p>(C104, 11-year-old female, NSW)</p>

Further thematic analysis of each tactic

A further thematic analysis was conducted to investigate the variation within each tactic, and how this variability was related to the facts of the case. One researcher re-examined the lines of questioning that had been coded into each tactic above, and listed the types of arguments made within each tactic.³ This researcher and another researcher then discussed these findings and reached an agreement on the core ways that each tactic was used. The findings of this analysis are presented below with case examples from the transcripts.

Analysis

This study used a variety of statistical methods. Chi-square tests of significant difference were used to determine if there were differences between groups (for age or jurisdiction) in the proportion of complainants with whom defence lawyers used a strategy or tactic. ANOVAs and t-tests were used to determine if there were significant differences between groups in the mean number of strategies or tactics used with each complainant. The researchers also sought to explore factors associated with the use of different strategies and tactics by defence lawyers during cross-examination. (These findings are not reported in this chapter but are available in Supplementary Materials 15 (online)).

Results

The following section examines the prevalence of each strategy or tactic used (that is, the percentage of defence lawyers who used the strategy or tactic at least once with a complainant) and the frequency with which the strategy or tactic was used (the average number of strategies or tactics used with each complainant).

What types of broad strategies did defence lawyers use?

As Table 16.2 shows, five different broad strategies – reliability, credibility, plausibility, consistency or indiscriminate – were each used with at least 8 out of ten complainants. In other words, defence lawyers used every strategy to cross-examine the complainant in nearly every case.

With each complainant, defence lawyers used (on average) 96.52 lines of strategy-based questioning ($SD = 68.97$). The number of lines of questioning did not vary according to the complainant's age group: $F(2) = 1.27, p = 0.286$. In other words, defence lawyers used a similar number of lines of questioning with children ($M = 82.72, SD = 57.03$), adolescents ($M = 106.68, SD = 89.29$) and adults ($M = 99.90, SD = 53.80$).

Further analyses were conducted to explore the proportion of complainants that had each strategy used in their case, and the mean number of lines of questioning for each strategy across both jurisdiction and complainant age group categories. As Table 16.2 shows, there were only two associations found. First, defence lawyers used plausibility-related lines of questioning more often with adolescents and adults than with children. Second, defence lawyers used more lines of questioning on consistency in NSW than in Victoria and WA.

Table 16.2 Rate of cross-examination strategies, by jurisdiction and age category

	Jurisdiction				Test (df)	p value	Age category			Test (df)	p value
	All complainants	NSW	Vic	WA			Under 13 years	13–17 years	Adult		
Reliability (%)	90.0	84.2	91.2	93.8	$\chi^2(2) = 2.22^a$	0.330	87.5	95.0	87.5	$\chi^2(2) = 1.67^a$	0.435
Reliability (M, SD)	12.03 16.19	15.42 22.91	12.56 16.75	9.10 6.84	$F(2) = 1.61$	0.250	10.36 13.40	14.43 20.44	11.23 13.73	$F(2) = 0.69$	0.504
Credibility (%)	85.8	78.9	88.2	89.6	$\chi^2(2) = 2.20$	0.333	77.5	92.5	87.5	$\chi^2(2) = 3.84$	0.147
Credibility (M, SD)	9.45 12.75	10.91 17.45	10.15 12.16	7.85 8.33	$F(2) = 0.66$	0.518	7.85 11.31	11.08 13.11	9.38 13.81	$F(2) = 0.63$	0.534
Plausibility (%)	95.0	92.1	100.0	93.8	$\chi^2(2) = 2.62^a$	0.270	90.0	97.5	97.5	$\chi^2(2) = 3.16^a$	0.206
Plausibility (M, SD)	12.96 12.03	15.48 2.58	11.59 9.19	12.46 10.85	$F(2) = 0.74$	0.481	7.90^b 6.27	15.15 13.87	15.77 13.00	F(2) = 5.59	0.005
Consistency (%)	97.5	94.7	100.0	97.9	$\chi^2(2) = 2.10^a$	0.351	97.5	97.5	97.5	$\chi^2(2) = < 0.01^a$	1.000
Consistency (M, SD)	27.60 24.15	36.44^b 30.17	22.62 16.42	24.48 22.30	F(2) = 3.703	0.028	22.49 21.95	30.18 28.38	30.05 21.14	$F(2) = 1.31$	0.274
Indiscriminate (%)	96.7	94.7	100.0	95.8	$\chi^2(2) = 1.72^a$	0.424	95.0	97.5	97.5	$\chi^2(2) = 0.52^a$	0.772
Indiscriminate (M, SD)	13.58 12.16	16.83 12.07	13.41 14.95	11.27 9.42	$F(2) = 2.20$	0.115	12.15 12.98	12.38 10.95	16.26 12.35	$F(2) = 1.42$	0.246

Note: Bold indicates significant difference found between variables.

^a Expected frequencies = < 5.

^b Mean is significantly different.

Specific tactics used in cross-examination

The following section separately examines the tactics that were used within each cross-examination strategy. The prevalence and frequency of each tactic is examined, followed by analyses of the associations between each tactic and age category. Case examples are provided to illustrate how these tactics were used.

What types of tactics were used to test reliability?

Table 16.3 Rate of reliability tactics, by age

	All complainants	Age category			Test (<i>df</i>)
		< 13 years	13–17 years	Adult	
Memory error (%)	90.0	87.5	95.0	87.5	$\chi^2(2) = 1.67^a$
Memory error (<i>M</i>)	11.24	9.92	13.10	10.64	$F(2) = 0.45$
(<i>SD</i>)	15.58	12.96	20.25	12.35	
Environment error (%)	18.3	15.0	25.0	15.0	$\chi^2(2) = 1.78$
Environment error (<i>M</i>)	0.78	0.44	1.33	0.59	$F(2) = 1.60$
(<i>SD</i>)	2.38	1.17	3.35	2.04	

^a Expected frequencies = < 5.

As Table 16.3 shows, questioning the complainant about memory errors was the most commonly used tactic for determining reliability. Defence lawyers used this tactic with 90 per cent of complainants, with an average of 11 lines of questioning. When using this tactic, defence lawyers sometimes targeted potential memory errors for details central to the event. For example, the defence lawyer asked the complainant about possible memory contamination, additional disclosures of abuse over time, or an absence of detail for central elements of the offence. However, defence lawyers also frequently questioned the complainant about minor details of historical events, to suggest that the complainant was unreliable about the central allegations. These details often overlapped with the consistency strategy – defence lawyers implying that inconsistencies in minor details meant that the complainant had a poor memory for events. Sometimes these tactics were used regarding details that were directly related to the alleged offending, but often they were not. See below for examples of the range of minor details targeted.

Examples of minor details targeted

Text box 16.1

The colour of the sheet on the bed where the offence occurred. (C6, 31-year-old female, 21 years since last offence, WA)

Whether there were one or two mattresses in the room that the complainant and her co-complainants

slept in. (C36, 21-year-old female, four years since last offence, NSW)

Whether the complainant had a bath on the night of the incident. (C59, 14-year-old female, four years since last offence, Victoria)

Whether the accused put his hand up the complainant's shorts or down her pants. (C7, 26-year-old female, 20 years since last offence, WA)

How many fingers the accused used to touch the complainant, and which fingers these were. (C52, 19-year old female, 12 years since last offence, Victoria)

Specific sequence of events within an incident of abuse: whether, on the third incident of abuse, the accused touched the complainant's breasts or kissed her first. (C42, 11-year-old female, two years since last offence, NSW)

Whether the alleged offence happened for two or for three minutes. (C24, 10-year-old female, two years since last offence, WA)

Whose car the complainant and accused drove in before one incident of abuse. (C28, 12-year-old male, three years since last offence, NSW)

Frequency, timing and detail of conversations the complainant had with her parents about the abuse. (C39, 7-year-old female, one year since last offence, NSW)

Where the accused's TV was positioned in their lounge. (C45, 38-year-old female, 27 years since last offence, NSW)

Whether anything was on television while the offence occurred. (C53, 10-year-old female, two years since last offence, Victoria)

What type of pyjamas the complainant wore during the offence. (C8, 17-year-old female, nine years since last offence, WA)

Specific words the accused used: "vagina" or "between your legs". (C16, 17-year-old female, four years since last offence, WA)

Whether the accused took three or six pictures of the complainant's vagina. (C17, 18-year-old female, eight years since last offence, WA)

The complainant not correcting the police interviewer's misleading question about whether the accused went out the back or out front to smoke. (C20, 15-year-old female, one year since last offence, WA)

Whether the complainant was under a doona or a sleeping bag when the abuse occurred. (C21, 12-year-old male, one year since last offence, WA)

The complainant using anatomical names for body parts in court, when they did not use these terms in the police interview. (C22, 27-year-old female, 18 years since last offence, WA)

The day of the week on which a particular offence had occurred, in a series of offences within a week. (C25, 14-year-old female, two years since last offence, WA)

The fact that the complainant used the words "I think" and "sort of" in a police interview. (C29, 14-year-old male, three years since last offence, NSW)

The specific number of times abuse occurred when the complainant alleged he was regularly abused by the accused over a number of years. (C30, 33-year-old male, 22 years since last offence, NSW)

Whether or not the dogs were with them on holiday when the offence occurred. (C50, 16-year-old female, one year since last offence, Victoria)

How long the complainant's favourite show goes for, with no mention of this in relation to the offence. (C67, 8-year-old female, one year since last offence, NSW)

The other reliability tactic defence lawyers used was raising environmental factors. This was used with 18 per cent of complainants. Such factors may be relevant to proving the identity of the offender in circumstances where the offender is unknown to the complainant. However, environmental factors were often raised in ways that were not obviously relevant. For example, in one case the defence lawyer asked several questions suggesting the complainant could not know that the accused had pulled her pants down, because she was covered with a sheet and could not see this action (C15, 10-year-old female, WA). In another case – where the complainant alleged she was repeatedly sexually abused by her uncle from the age of five until she was 14 years old – the defence lawyer suggested that because it was dark during some of the incidences of abuse, the complainant had falsely assumed it was her uncle who was abusing her for 11 years (C119, 17-year-old female, Victoria).

What types of tactics were used to test credibility?

Table 16.4 Rate of credibility tactics across age

	All complainants	Age category			Test (<i>df</i>)
		< 13 years	13–17 years	Adult	
Lying (%)	60.8	55.0	72.5	55.0	$\chi^2(2) = 3.43$
Lying (<i>M</i>)	3.46	2.92	4.25	3.21	$F(2) = 0.60$
(<i>SD</i>)	5.66	4.37	7.68	4.25	
Motive (%)	70.8	67.5	72.5	72.5	$\chi^2(2) = 0.323$
Motive (<i>M</i>)	3.64	2.90	3.85	4.15	$F(2) = 0.62$
(<i>SD</i>)	5.19	3.49	4.07	7.29	
Previous dishonesty (%)	37.5	32.5	42.5	37.5	$\chi^2(2) = 0.85$
Previous dishonesty (<i>M</i>)	2.35	2.03	2.98	2.03	$F(2) = 0.44$
(<i>SD</i>)	5.18	5.36	5.47	4.76	

^a Expected frequencies = < 5.

As shown in Table 16.4, defence lawyers' most common credibility tactic was to question the complainant about the motivation to make a false allegation. Defence lawyers used this tactic with 70.8 per cent of complainants, and there was an average of three-and-a-half lines of questioning. Questioning tended to be tailored to the context of the case or to suggest motivations consistent with stereotypes about each age group. For example, for children the motive was often pressure from a guardian or family member, for adolescents it was to gain independence and for adults it was for financial gain.

The next most common credibility tactic was to suggest that the complainant was lying. Defence lawyers used this tactic with 60.8 per cent of complainants with, on average, three-and-a-half lines of questioning. This finding is unsurprising, as lawyers have a duty in cross-examination to put their case to a witness where it contradicts the witness's evidence.⁴ Defence lawyers varied in how they executed this duty: sometimes they put a few overall challenges to the complainant near the conclusion of cross-examination; in other instances, at every point where the complainant's account diverged from the

accused's account, they repeated the allegation that the complainant was lying. For example, in a case where a 15-year-old gave evidence against her uncle, the defence lawyer asked the complainant on 34 occasions whether she was lying. (C113, NSW).

Defence lawyers questioned 37.5 per cent of complainants on their prior dishonesty or bad character. Prior dishonesty or bad character was sometimes related to the offence; for example, where the defence lawyer suggested that the complainant had denied or recanted the current abuse or had previously made false allegations. Sometimes defence lawyers used unrelated behaviour to suggest the complainant had lied about the abuse. For example, in one case the defence lawyer highlighted the complainant's poor performance and disruptive behaviour at school (C25, 14-year-old female, WA). In another case, the defence lawyer used the fact that the complainant had answered "yes" – to the judge's question during competency testing about whether she had ever told "a little lie" – to suggest the complainant was lying about the offence (C24, 10-year-old female, WA).

What types of tactics were used to test plausibility?

Table 16.5 Rate of plausibility tactics, by age

	All complainants	Age category			Test (df)
		< 13 years	13–17 years	Adult	
Resistance (%)	45.8	32.5	60.0	45.0	$\chi^2(2) = 6.11$
Resistance (M)	1.71	0.92	2.45	1.74	$F(2) = 2.52$
(SD)	3.06	1.70	4.08	2.77	
Emotionality (%)	31.7	27.5	27.5	40.0	$\chi^2(2) = 1.93$
Emotionality (M)	0.63	0.62	0.38	0.90	$F(2) = 1.55$
(SD)	1.33	1.18	0.70	1.83	
Delayed report (%)	70.0	47.5	82.5	80.0	$\chi^2(2) = 14.13$
Delayed report (M)	3.39	1.69^{a,b}	3.73^a	4.74^b	$F(2) = 6.14$
(SD)	4.08	2.61	4.36	4.48	
Continued relationship (%)	44.2	35.0	57.5	40.0	$\chi^2(2) = 4.53$
Continued relationship (M)	2.24	1.46	2.38	2.87	$F(2) = 0.97$
(SD)	4.53	2.73	3.79	6.31	
Other (%)	84.2	82.5	90.0	80.0	$\chi^2(2) = 1.63$
Other (M)	4.99	3.21	6.23	5.51	$F(2) = 2.24$
(SD)	6.69	2.74	8.58	7.03	

Note: Bold indicates significant difference = < 0.05.

^{a,b} Significant difference between means.

As Table 16.5 shows, general plausibility was the most common plausibility tactic raised. Defence lawyers used this tactic with 8 out of 10 complainants, with an average of five lines of questioning. The general plausibility tactic included defence lawyers questioning the complainant about how their version of events did not fit with “common sense” (for example, regarding other people’s reactions, the accused’s character or the physical likelihood of an event taking place). An example is the suggestion made by defence that because the walls were thin in the house where the offending took place, someone would have heard if anything had happened.

Questioning on delayed reporting was also a highly prevalent tactic. Defence lawyers used this tactic on 70 per cent of complainants, with an average of three lines of questioning. Delayed reporting was more likely to be raised – and on average raised more often – with adolescent or adult complainants than with children. The length of the delay about which defence lawyers questioned complainants varied markedly, from decades to minutes.

Text box 16.2

The complainant alleged that a stranger inappropriately touched him at a public pool. The complainant told his guardian about the abuse while they were still at the pool, and they immediately spoke to the pool staff and the police. Defence questioned the complainant about not telling the lifeguards whom he passed on his way to the bathroom. (C108, 16-year-old male, Victoria)

The complainant alleged that a family friend abused him on a camping trip. After the camping trip he was dropped off at home by the accused and his uncle. As soon as they left his house, the complainant reported the abuse to his mother. Defence questioned the complainant about not telling his mother as soon as the accused walked in the door. (C35, 12-year-old male, NSW)

The complainant alleged that she woke up to find a family friend sexually abusing her while she was staying at his house. The accused drove her home the next day, stopping to get petrol in a suburb the complainant did not know. The defence questioned the complainant about not immediately reporting the sexual abuse to the petrol attendant. (C77, 16-year-old female, WA)

Defence lawyers questioned nearly half of all complainants about a lack of resistance. Adults and adolescents were more likely than children to be questioned on their resistance. This tactic was often used to imply that the complainant should have vigorously resisted the offender – verbally and physically – or fled. Defence lawyers also questioned complainants about why they did not sustain visible physical injuries if they had been abused. The use of

this tactic implies to jurors that the complainant had a duty to prevent the abuse and is therefore blameworthy. Below are some examples of excerpts from the transcripts where this tactic was used.

Examples from the transcripts

Text box 16.3

Q. *I’ll ask that again just so that you’re clear. What I’m suggesting to you is at no stage did you tell the police that at any time before, during or after that incident that [accused] restrained you. Do you agree with that proposition?*

A. *No. Yeah, I agree.*

Q. *You don’t say that he in any way prevented you from leaving the bedroom?*

A. *No.*

Q. *Or that you tried to fight him off in any way?*

A. *No.*

(C50, 16-year-old female, Victoria)

Q. *You never said to your uncle [accused] “Stop, don’t do that” or call out?*

A. *I never said – used to say anything.*

Q. *But you agree with me that there were lots of people around?*

A. *At the swimming pool, you mean?*

Q. *Yes.*

A. *There was probably people around, yes. It was a swimming – public swimming pool.*

(C13, 26-year-old female, WA)

Q. *I’d suggest to you that in the circumstances that you’ve given in your evidence that you would’ve screamed blue murder if somebody was in your bed and put their arm around you?*

A. *I didn’t say that in my evidence.*

Q. *No, I’m suggesting to you that the evidence that you’ve given about the circumstances of what you say has occurred – in those circumstances the real response would’ve been that you would’ve screamed out?*

A. *Why do you say that? You’re making an assumption of how you think I would react.*

Q. *I’m suggesting to you that you wouldn’t stay there mute; that you would scream out loud and clear to get some help from somebody?*

A. [No verbal reply]

Q. *I’d suggest to you that that would be a reaction if there was the set of circumstances that you’ve given; that you would scream as loud as you could or you’d get out of the bed and run away from the bedroom?*

A. *So you’re assuming that’s how I would react, because I have not once said that that’s how I would react.*

(C33, 17-year-old female, NSW)

Q. *How old were you?*

A. *I was 15 turning 16.*

Q. *So you’re going to be 16 the next day?*

A. *Yes.*

Q. *So you’re reasonably, at that stage, big and strong, aren’t you?*

A. *I’m big, yes. I’m big. But I’m not that strong.*

Q. *And you could pull a hand away and scream?*

A. Yes.

Q. But you didn't?

A. I tried to.

(C99, 18-year-old female, WA)

Q. And see, on what you say to the police, and what you say yesterday, there's no, there's no monsterring of you by [accused], there's no threat for you to do this. That's been your evidence, is that right?

A. That's right.

Q. And by this stage, and we'll get onto the next count very soon, there'd been no suggestion based on your evidence-in-chief, your cross-examination so far and your statement to police in 2011, by this stage there had been no suggestion of coercion or force whatsoever on the part of [accused], is that right?

A. Correct.

(C32, 35-year-old male, NSW)

Q. Because it wouldn't have been causing a problem, would it, [complainant], to have got up and gone and slept in the other room with your brothers?

A. For all I know, he could have followed me. How do I know what's going to happen?

(C20, 15-year-old male, WA)

Q. You mentioned in your interview that the [accused] was holding your wrist very hard, do you remember that?

A. Mm hmm.

Q. You said words to the effect "it was so hard that it hurt"?

A. Yes.

Q. And you were trying to push or pull away from him?

A. Yes.

Q. But it hurt even more?

A. Yeah.

Q. Did you have any bruises on your wrist as a result of him holding you so hard?

A. No, my jumper – I wore a jumper.

Q. But there were no marks on your wrist at all after the event?

A. No. (C75, 11-year-old female, WA)

Defence lawyers questioned 44.2 per cent of complainants about maintaining an ongoing relationship with the accused. Defence lawyers would often suggest to the complainant that if the offending had occurred, the complainant would have completely ceased contact with the accused. This tactic was used regardless of the level of control complainants had over this relationship. For example, one complainant had told her mother that she did not want to stay at her father's (the accused's) house, but was often forced to visit her father due to an agreement between her parents, or a court order. Despite these circumstances, the defence lawyer suggested that if the offending had occurred the complainant would have done more to avoid her father (C21, 27-year-old female, WA). This tactic was also used with complainants who said they still enjoyed spending time with the accused in circumstances where they felt safe. For example, one complainant who alleged repeated abuse by a family friend said he still enjoyed going to the accused's family home but not staying over, and described the accused and his wife as "awfully nice people" in his police interview (C21, 12-year-old male, WA). In cross-examination, defence suggested it was implausible that he could simultaneously dislike the abuse while still liking the abuser.

Lack of emotion was raised with 31.7 per cent of complainants. Defence lawyers used this tactic to suggest that victims would be visibly distressed immediately after sexual abuse and when discussing the abuse. For example, a defence lawyer suggested it was implausible that the complainant would have gone out to play after an incident of abuse. This tactic was also used to critique complainants' behaviour in their police interviews or at trial, by implying their behaviour was implausible if they were not visibly distressed at the time of giving evidence.

What types of tactics were used to test consistency?

Table 16.6 Rate of consistency tactics, by age

	All complainants	Age category			Test (<i>df</i>)
		< 13 years	13–17 years	Adult	
Complainant (%)	90.8	92.5	92.5	87.5	$\chi^2 (2) = 0.80$
Complainant (<i>M</i>)	12.03	9.38	14.73	11.90	$F (2) = 1.37$
(<i>SD</i>)	14.42	8.22	20.09	11.98	
Witness (%)	86.7	85.0	87.5	87.5	$\chi^2 (2) = 0.14$
Witness (<i>M</i>)	9.90	9.92	9.20	10.59	$F (2) = 0.18$
(<i>SD</i>)	10.26	12.99	8.06	9.37	
Accused (%)	47.5	40.0	40.0	62.5	$\chi^2 (2) = 5.41$
Accused (<i>M</i>)	3.95	2.95	3.05	5.87	$F (2) = 2.71$
(<i>SD</i>)	6.40	4.91	5.78	7.88	
Other evidence (%)	33.3	12.5	47.5	40.0	$\chi^2 (2) = 12.23$
Other evidence (<i>M</i>)	1.78	0.23^a	3.20^a	1.87	$F (2) = 7.00$
(<i>SD</i>)	3.71	0.84	5.15	3.16	

Note: Bold indicates significant difference < 0.05

^{a, b} Significant difference between means.

As Table 16.6 shows, questioning the complainant about inconsistencies within their own account/s was the most common consistency tactic used. Defence lawyers used this tactic with nine out of 10 complainants with an average of 12 lines of questioning. When using this tactic, defence lawyers sometimes questioned complainants on major discrepancies between accounts; for example, if the complainant had previously denied the abuse or given contradictory statements about whether the accused penetrated her vagina. However, questioning on consistency commonly targeted minor details that were not obviously relevant to proving whether offending had occurred and the particulars of that offending. These inconsistencies often related to the temporal and contextual background of the offence, including questions about what the complainant and accused were wearing; the season, month or time of day; the sequence of offences on a particular day; and what was happening in the house at the time or immediately after the offence.

Questioning the complainant about inconsistencies with other witnesses was the next most common tactic. Defence lawyers used this tactic with 86.7 per cent of complainants with an average of 10 lines of questioning. Also prevalent was questioning regarding inconsistencies between the complainant's account and the accused's account (raised with nearly half of all complainants), and between the complainant's account and other evidence (raised with a third of all complainants). Further analyses found that other evidence was more likely to be used to question consistency in the evidence of adolescent and adult complainants than it was used to question consistency in the evidence of children. Adolescents were also asked more lines of questioning about such inconsistencies than were children.

What types of tactics were indiscriminate in the issues defence lawyers were testing?

Table 16.7 Rate of indiscriminate tactics, by age

	All complainants	Age Category			Test (df)
		< 13 years	13-17 Years	Adult	
Collusion or contamination (%)	30.8	30.0	30.0	32.5	$\chi^2(2)=0.08$
Collusion or contamination (M)	1.46	1.67	1.20	1.51	$F(2) = 0.19$
(SD)	3.40	4.18	2.70	3.24	
Custody (%)	10.0	5.0	10.0	15.0	$\chi^2(2)=2.22^a$
Custody (M)	0.24	0.10	0.18	0.44	$F(2) = 0.97$
(SD)	1.11	0.45	0.59	1.79	
Mental health (%)	6.7	0.0	15.0	5.0	$\chi^2(2)=7.50^a$
Mental health (M)	0.27	<0.01	0.60	0.21	$F(2) = 2.35$
(SD)	1.26	<0.01	1.84	1.13	
Psychotropic substance (%)	16.7	2.5	20.0	27.5	$\chi^2(2)=9.48$
Psychotropic substance (M)	0.85	0.03	0.73	1.80	$F(2) = 4.19$
(SD)	2.79	0.16	1.65	4.42	
Sexual history (%)	12.5	10.0	12.5	15.0	$\chi^2(2)=0.46$
Sexual history (M)	0.34	0.18	0.58	0.26	$F(2) = 0.68$
(SD)	1.60	0.60	2.60	0.75	
Wrong (%)	94.2	95.0	92.5	95.0	$\chi^2(2)=0.303^a$
Wrong (M)	10.43	10.18	9.10	12.05	$F(2) = 0.80$
(SD)	10.49	11.66	9.14	10.60	

Note: Bold indicates significant difference = < 0.05.

Indiscriminate strategies were those in which it was unclear as to whether defence lawyers were testing the complainant's reliability or credibility. As Table 16.7 shows, the most common tactic used was to suggest the complainant was wrong. Defence lawyers used this tactic with 94.2 per cent of complainants, with an average of 10 lines of questioning. There was variability in how defence lawyers used this tactic. Some defence lawyers explained to the complainant that it was part of their job to ask them these questions, and that they did not have to agree with their suggestion. Other defence lawyers, however, did not explain the purpose of these challenges that may explain why some complainants appeared confused or distressed when repeatedly told that they were wrong. Defence lawyers also varied in how often they suggested the complainant was wrong – from once to multiple times (in one extreme example they did so 57 times).

Just under a third of complainants were cross-examined about co-complainant collusion or contamination. Often there was no indication from the facts of the case that either had taken place. For example, even brief discussions between

co-complainants about the alleged offending were used to suggest the complainants had colluded with or contaminated each other. Sometimes, when co-complainants stated they had not discussed the offence, the defence lawyer would suggest this was implausible too, given the closeness of their relationship.

Defence lawyers questioned 16.7 per cent of complainants about their use of (legal and illicit) psychotropic substances and 6.7 per cent of complainants about their mental health (including all references to diagnosable mental disorders, suicidal ideation and self-harming behaviour). These tactics were more likely to be used with adolescent or adult complainants than with children. Adults were also asked more lines of questioning about use of psychotropic substances than were children or adolescents. These tactics were sometimes used to test the complainant's reliability at the time of the offence. For example, in one case the defence highlighted that the complainant's medication for depression sometimes made her feel confused (C49, 15-year-old female, Victoria). Other times, defence lawyers used these tactics in ways that appeared to

test credibility and were unrelated to the offence. For example, in one case the defence lawyer asked a 16-year-old complainant how long she had been drinking for; when she responded “A couple of years” he said “But you’re just a kid” (C77, 16-year-old female, WA).

Defence lawyers questioned 12.5 per cent of complainants about their sexual history or their family’s history of sexual abuse. This tactic was often used to suggest the complainant was either confused between sexual experiences or had used the past experience to create a false account. Defence lawyers sometimes tested the complainant on this point even when the complainant did not agree that there had been previous offending. For example, one complainant was asked multiples times if a “similar thing” had happened to her before, even though she said it had not (C1, 11-year-old female, WA). Another complainant was asked about her mother’s history of sexual abuse, but had no knowledge of this abuse (C7, 26-year-old female, WA).

One in 10 complainants were questioned about custody disputes. This tactic was sometimes used where the complainant was clearly aware that there was a custody dispute between their parents. However, custody disputes were sometimes raised when the complainant was not aware that there was a custody dispute or where the accused was not involved in this dispute. For example, in one case where the accused lived with the complainants’ father, it was suggested that the complainants’ mother had set up the allegation so that the complainants would not have to visit their father’s house any more (C18 and C19).

Endnotes

¹ Aldridge and Lutchjenbroers, 2007; Brennan, 1994; Brennan and Brennan, 1988; Davies, Henderson and Seymour, 1997; Ellison, 2001; Goodman, et al., 1993; Wescott and Page, 2002. Zajac and Cannan, 2009.

² Zydervelt, Zajac, Kaladelfos and Westera, 2016.

³ Strauss and Corbin, 1990.

⁴ *Browne v Dunn*, 1893, 6 R 67.

Conclusion

The study demonstrated that defence lawyers consistently use a broad range of tactics to discredit child sexual abuse complainant evidence. Some of these tactics are legitimate lines of questioning, such as asking about motivations to make a false allegation or about contradictions between the accounts given by the complainant that were directly relevant to establishing the elements or particulars of the offence. But many of the tactics relied on unfounded stereotypes about memory and complainant behaviour (such as memory for minor details, lack of resistance, and behaviour before and after the offence). These tactics were used frequently; often when they were not directly relevant to establishing the charges. These findings suggest that some defence lawyers are questioning the complainant to propagate and reinforce unfounded stereotypes in an attempt to unfairly damage complainant reliability and credibility. Lawyers are likely to be adopting these tactics because they perceive that some jurors will be influenced by these stereotypes when deciding on verdict.

Another finding is that irrespective of the case, defence lawyers used every available opportunity to discredit the complainant (whether with reference to reliability, credibility, plausibility or consistency), even without any clear aim. As a result of the broad use of tactics, complainants endured prolonged questioning – on average, nearly a hundred different lines – regardless of age. While some of the tactics seemed appropriate to the circumstances of the case, many were clearly not. The indiscriminate use of tactics and prolonged cross-examination is likely to make the evidence-giving process more onerous on complainants than a targeted approach.

Chapter 17
Cross-examination on
inconsistencies
(Study 16)

Chapter 17: Cross-examination on inconsistencies (Study 16)

This study provides an in-depth examination of defence lawyers' cross-examination of complainants about inconsistencies in the complainants' evidence. Studies 14 and 15 revealed a heavy focus on inconsistencies during cross-examination, both within a complainant's account and between details provided by the complainant and other evidence. Closer examination of the use of inconsistencies is warranted because the reason for inconsistencies, and the degree to which they are useful for testing complainant reliability (from a psychological perspective) can vary markedly. Sometimes inconsistencies can signal intentional deceit or errors about central case-related issues, and should therefore be questioned by defence. But sometimes inconsistencies merely signal the normal fragility of human memory. From a human memory perspective, inconsistencies are a common occurrence for details that are easily forgotten (such as memories of what one was wearing on a specific date two years ago), but inconsistencies are less likely when it comes to remembering whether an entire event occurred or not.¹ Furthermore, inconsistencies can signal unintentional errors arising from miscommunication between the complainant and interviewer (such as the complainant complying with an interviewer's false suggestion or responding honestly to a misunderstood question).²

Issues highlighted in previous studies that could potentially compound the occurrence of inconsistencies include the poor framing of questions by lawyers and judges (Studies 12 and 13), complainants having to repeatedly recall events and extensive delays between these recall attempts.³ There was also strong consensus between criminal

justice professionals in Study 1 that poor police interviewing practices were contributing to the generation of inconsistencies, but this perception has not been empirically tested. Specifically, this study analysed cross-examination strategies that target inconsistencies, to determine the nature of these inconsistencies (such as whether they relate to details central to proving the elements of the offence), and the degree to which they are generated in the criminal justice process (such as in the police interview or from the complainant repeatedly reporting events at trial).

Method

Transcripts

This study used the same subsample of transcripts described in Study 14.

Coding scheme

Each of the cross-examination strategies coded as 'inconsistency' in Study 15 were coded in relation to five features:

- the nature of the inconsistency
- the significance of the inconsistency to proving the elements of the offence
- the content of the evidence relating to the inconsistency
- the type of inconsistency
- the source of the inconsistency within the complainant's own account.

Each of these is now described in turn.

Nature of the inconsistency

For this category, the same codes were used as in Study 12, which also included this category in its analyses. There were four subtypes for this category: inconsistencies in the complainant's own statement; inconsistencies between a complainant's statement and another witness's statement; inconsistencies between a complainant's statement and the accused's statement; or inconsistencies between a complainant's statement and other evidence.

Significance of the inconsistency in proving the elements of the offence

For this new category, two legal researchers with experience analysing these cases coded each inconsistency as 'central' or 'peripheral' based on its usefulness in proving that the offence occurred based on the facts of the particular case. Inconsistencies were coded as central if they related to content that could prove one of the elements of the offence (such as identification, *mens rea* and *actus reus* of the offence); directly corroborate the offence (such as a

witness to the offence or absence of offending); provide alibi or physical evidence; or provide evidence of an initial complaint. Particularised temporal and contextual details for each offence were coded as central if they met the definition of central according to the circumstances of the case. For example, phone records that contradicted the complainant's account of what time she was at the accused's house were coded as central because they corroborated the accused's account that the complainant was not there at that time. The complainant's exact age at the time of the offences is another example of a detail that could be central or peripheral depending on the context of the case. If an inconsistency about the complainant's age at the time of the offence meant the age element of the offence could not be established, this was coded as central, otherwise it would be coded as peripheral. While the coders took the facts of the case into consideration, this division of central and peripheral details may have resulted in some particulars (that need to be established legally) being coded as peripheral rather than central. For examples of each code, see Table 17.1.

Table 17.1 Significance of inconsistency in proving the elements of the offence

Category	Example from transcripts
Central: An inconsistency that is about something central to proving that the offence occurred	<p>Q. Okay. And you told us when you gave evidence here today, that about two weeks later you told your mum and she went to the Child Protection Agency and told them [about abuse by accused]?</p> <p>A. Yes.</p> <p>Q. Okay. But – and – and then your dad asked you about it and you've said to him nothing happened, is that right?</p> <p>A. I said that – or I – I didn't actually say that nothing happened. I kind of lied to them and told them that it wasn't true.</p> <p>Q. So what wasn't true?</p> <p>A. That he'd actually done it</p>
Peripheral: An inconsistency that is peripheral to proving the offence occurred	<p>Q. On the day that you say that you were touched on the – touched on the private parts, you now say you were wearing a dress?</p> <p>A. Yes.</p> <p>Q. You did tell the people who interviewed you, though, that you were wearing jeans?</p> <p>A. Yes.</p> <p>Q. Remember that?</p> <p>A. Yes.</p> <p>Q. You were wrong about that?</p> <p>A. Yes.</p>

Content of the evidence relating to the inconsistency

For this category, the codes were identical to those developed by Burrows, Powell and Anglim (2013)⁴ working in consultation with Australian Crown prosecutors. An explanation of these codes (with examples from the transcripts) is provided in Table 17.2.

Table 17.2 Content of the evidence relating to the inconsistency

Category	Explanation	Example from the transcripts
Offence	Information relating to the sex offence – such as the nature of the act, body positions, body movements, and if clothing was on or off.	Q. <i>You said that he took his finger out of your vagina at one stage and then put it back in?</i>
Timing	Information relating to the timing of the offence – such as when the sex act happened, and the frequency of offending.	Q. <i>You say that was around November, is that right?</i>
Location	Information relating to where the offence occurred – such as furniture, and descriptive information about the location.	Q. <i>You went to sleep on the couch, didn't you?</i>
Witness	Information relating to witnesses or potential witnesses. This also includes anyone the child told about the offence.	Q. <i>And who was in the lounge room then?</i>
Physical evidence	Information requested for the purpose of acquiring DNA – such as descriptions of clothing and the location of the clothing.	Q. <i>And what about the doona? Did it have any patterns on it?</i>
Offender identification	Information determining who the offender was, including descriptions of the offender.	Q. <i>Now, on this first occasion where you had sexual intercourse with him, did you know his name?</i>
Other	Anything not placed in another category.	Q. <i>Did you smoke a cigarette?</i>

Type of inconsistency

Researchers coded the type of inconsistency in accordance with three mutually exclusive categories: contradiction, omission or addition. These codes are explained (with examples from the transcripts) in Table 17.3.

Table 17.3 Type of inconsistency

Type of inconsistency	Example from transcripts
Contradiction: Previous account contradicted in court account	<p>Q. <i>Okay. Now, you said to me, when I asked you about the colour of the car, you indicated that the car was <u>white</u>?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>And if you go to page 94 of that second interview, at question 30 ...?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>... where it says, "So what window could you see out of?" Your answer "I didn't see out of the window. It was a <u>red car</u>. It was like an Excel. It didn't have a window when the back was up."</i></p>
Omission: Previous account included the information, but was omitted from statement in court	<p>Q. <i>Okay. Now, do you agree that at least as of when you first spoke to the police, what you told them at that stage was that, [accused] put his hand between your legs? You <u>tried to force your legs closed but he used his hands to open them</u>. Yes?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>Now, <u>that – that's not what you've told us yesterday, is it?</u></i></p> <p>A. <i>No.</i></p> <p>Q. <i>Or today?</i></p> <p>A. <i>No.</i></p> <p>Q. <i>Do you agree that's different again?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>Were you making up these details for the police just to get – to – to have something to say to them? What were you doing?</i></p> <p>A. <i>No.</i></p>

Type of inconsistency	Example from transcripts
Addition: Previous account did not include the information, but it was added in court	<p>Q. <i>And – what – you stayed on the computer, playing the computer, until he fell asleep, did you?</i></p> <p>A. <i>Yeah, when he walked off.</i></p> <p>Q. <i>You didn't want to run out of the room?</i></p> <p>A. <i>I did. But then I couldn't move.</i></p> <p>Q. <i>So you say – what – you couldn't move once he was on the couch?</i></p> <p>A. <i>Yeah, I was, like, paralysed.</i></p> <p>Q. <i>Paralysed with fear?</i></p> <p>A. <i>Yeah.</i></p> <p>Q. <i>Didn't tell the police that?</i></p> <p>A. <i>Pardon?</i></p> <p>Q. <i><u>You didn't tell the police that?</u></i></p> <p>A. <i>No.</i></p> <p>Q. <i>But you didn't get up and leave the room?</i></p> <p>A. <i>No.</i></p>

Source of the inconsistency within the complainant's own account

To explore where inconsistencies within the complainant's own account/s were generated, researchers created a new source category. An explanation of these codes (with examples from the transcripts) is provided in Table 17.4. Of note, child and adolescent complainants typically have their

police interview video-recorded, and this record is later used as the basis for their evidence-in-chief. In contrast, adults typically have a police officer record their interview in a written statement, and later give live evidence-in-chief to the court. Due to these differential processes, sources of inconsistencies were examined for each age group separately, as described in Table 17.4.

Table 17.4 Source of the inconsistency within the complainant's own account

Inconsistencies	Example from the transcripts
Within the video-recorded police interview (under 18)	<p>Q. <i>You told the police in your interview that [accused] did what you say he did to you – the sucking – for, your words "<u>a second or a minute</u>". Do you remember saying that to the police?</i></p> <p>A. <i>I think – I think so.</i></p> <p>Q. <i>This might seem very simplistic or a silly question, but a second is a very, very short time. Do you agree with that?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>And a minute is still not a long time but much longer than a second.</i></p> <p>A. <i>Yeah. I was little when I said that so I probably didn't really know. So I reckon – I think now about probably 30 seconds.</i></p>
Within the written statement made to police (adult)	<p>Q. <i>You say that there were also incidents at [place], that [accused] would come into your bedroom?</i></p> <p>A. <i>Mm hmm.</i></p> <p>Q. <i>Make you expose your breasts and your vagina and would again masturbate. Was [accused] at that stage <u>standing</u> or <u>kneeling</u>?</i></p> <p>A. <i>It was either one of them.</i></p>
Within the evidence-in-chief (adult)	<p>Q. <i>You just mentioned a moment ago [in evidence-in-chief] that you said that you <u>were scared</u> of your father. Is that right?</i></p> <p>A. <i>That's right.</i></p> <p>Q. <i>Do you remember saying to the prosecutor yesterday or the day before that you were <u>not scared</u> of your father?</i></p> <p>A. <i>Yes.</i></p>

Inconsistencies	Example from the transcripts
Within the cross-examination (all ages)	<p>Q. <i>And on the telephone you – your evidence [in cross-examination] yesterday was that you <u>told your mother</u> that your uncle had molested you, is that right?</i></p> <p>A. <i>To be honest with you, I can't remember whether I told my mum but I do know that she came back the next few days and she asked me ...</i></p> <p>Q. <i>Well, that's not what you said yesterday, Ms [complainant]. Yesterday you were adamant that you told your mother, and you said "That's why she came home, because I told her"?</i></p> <p>A. <i>Yeah, and – well, from what I can remember, I don't know whether [witness] told my mum or if I told my mum.</i></p>
Between the police interview (under 18) and another police interview	<p>Q. <i>And that – did that first interview lady ask you if anything [offence] had happened?</i></p> <p>A. <i>Yeah, she just – she just talked to me about anything then she asked me if anything's happened to me that I don't feel comfortable with, yeah.</i></p> <p>Q. <i>And you said "No" didn't you?</i></p> <p>A. <i>Yep, cos I didn't want it to be true and then once I heard that it happened to my brother I got really sad.</i></p>
Between the police interview and evidence-in-chief (under 18)	<p>Q. <i>Okay. And you told us that when he touched your boob, as you described your breast, you said "It was my <u>right boob</u> and he used his right hand"?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>And is that – that's obviously a detail that – that sticks in your mind?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>Okay. It's just that, you see in your interview, when you described this same event, you said it was your <u>left boob</u> and he used his left hand?</i></p> <p>A. <i>Okay.</i></p> <p>Q. <i>So just explain the apparent discrepancy in your recollection, if it's burnt into your memory?</i></p> <p>A. <i>Well, if I'm looking at myself, this is my left and this is my right. But if someone else is looking at me, this is my left, this is my right. So it's a little hard.</i></p>
Between the police interview and cross-examination (under 18)	<p>Q. <i>You <u>told, I think, your sister</u>, didn't you? Was she the first person you ever told?</i></p> <p>A. <i>About?</i></p> <p>Q. <i>Any of these allegations against your uncle.</i></p> <p>A. <i>No. It would be my mum.</i></p> <p>Q. <i>That was in relation to the shower?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>It's just that you were asked when you were videoed "Who was the first person you told?" And you said your sister?</i></p> <p>A. <i>Yep.</i></p> <p>Q. <i>All right. So the first person you told was your sister, was that right about anything?</i></p> <p>A. <i>Yes, <u>sorry, it would be my sister</u>. I told her on the train, but the exact same day I told my mum.</i></p>
Between the police interview and other source (under 18) – such as a conversation with a doctor or counsellor	<p>Q. <i>But when you first told [teacher] what had happened you said it was a one off; do you remember that?</i></p> <p>A. <i>No, I don't remember the whole conversation between us; I just remember little bits of it.</i></p> <p>Q. <i>All right. Because what you've ultimately told the interviewer is that it's not a one off; it's a four episode package. Would you accept that?</i></p> <p>A. <i>Yes.</i></p>
Between the police statement and another police statement (adult)	<p>Q. <i>It's not something you recalled or mentioned in the 17-page statement that you gave – I've mentioned this before, but your 17-page statement on [day] December 2011?</i></p> <p>A. <i>No, it's not.</i></p> <p>Q. <i>That wasn't recalled or recollected there, was it?</i></p> <p>A. <i>No</i></p> <p>Q. <i>In fact that was recalled and recollected and found its way into a statement signed by you for the first time on 23 August, wasn't it?</i></p> <p>A. <i>Mm hmm.</i></p> <p>Q. <i>So a few – a few days ago in effect?</i></p> <p>A. <i>Yes.</i></p> <p>Q. <i>As part of your third statement?</i></p> <p>A. <i>Yep.</i></p>

Inconsistencies	Example from the transcripts
Between the police statement and evidence-in-chief (adult)	<p>Q. Now, in both that first statement and the second statement, at no stage is there any mention of the words “labia majora”?</p> <p>A. Yes.</p> <p>Q. Do you agree with that?</p> <p>A. Yes.</p> <p>Q. But yesterday you used those words a number of times?</p> <p>A. Yes.</p> <p>Q. Where did you learn those words?</p> <p>A. [Prosecutor].</p>
Between the police statement and cross-examination (adult)	<p>Q. Do you say that on the first time that he abused you, you <u>were at the dairy</u>, and, after the milking in the evening, you walked down to the house with him?</p> <p>A. Yes</p> <p>Q. Well, what I put to you is that you didn't say anything like that in your statement. What you said was this, and you can look at the statement if you wish: “It was one evening when I was having a bath, we would help out all day on the farm. [Accused] came into the bathroom. [Accused] didn't have anything to do with bathing me.” <u>You didn't mention anything about being at the dairy immediately before; that's what I'm putting to you?</u></p> <p>A. I don't remember everything that I do during the day.</p>
Between the police statement and another source (adult)	<p>Q. I want to suggest that you told [police in pre-statement discussion] that [accused] had <u>never touched you in an inappropriate manner?</u></p> <p>A. I don't remember that.</p>
Between the evidence-in-chief and cross-examination	<p>Q. All right. Well, the <u>second visit</u> that you say that you went there, was that Christmas time?</p> <p>A. Yes. I think so. Yes.</p> <p>Q. Right. And is that the occasion on which you said [accused] first did something untoward to you?</p> <p>A. I'm not sure that time. No. <u>I think it was the next time.</u></p> <p>Q. All right. So you're saying you don't think it was at the second visit, the Christmas, whatever year it was?</p> <p>A. No. No.</p>
Between the evidence-in-chief and another source	<p>Q. So this is the episode on the couch with the kissing and the nipples and the rubbing. All right? You – you know the incident we're talking about?</p> <p>A. Yes.</p> <p>Q. Okay. Now, <u>you didn't tell [counsellor] about that incident, did you?</u></p> <p>A. No.</p>
Between the cross-examination and another cross-examination	<p>Q. Do you agree with me that before you spoke to the police lady the first time, you had spoken to your mum, hadn't you?</p> <p>A. Yes.</p> <p>Q. And she'd asked you lots of questions, hadn't she?</p> <p>A. Yes.</p> <p>Q. Things like “Did [accused] tell you not to tell anyone?” She asked you questions like that, didn't she?</p> <p>A. <u>No, I said that to her.</u></p> <p>Q. Well, when I asked you the same question in January, I asked you this: “And she – did she ask you questions like “Did [accused] tell you not to tell anyone?”” And you said “Yes”?</p> <p>A. Okay, yes.</p> <p>Q. So did mum ask you questions like “Did [accused] tell you not to tell anyone?”</p> <p>A. <u>Yes, I think she did.</u></p>
Between two other sources	<p>Q. All right, I want to ask you about being spoken to by the Department of Child Protection officers?</p> <p>A. Yeah.</p> <p>...</p> <p>Q. Your mum and [accused] <u>had separated</u> by that point, hadn't they?</p> <p>A. <u>No</u>, they hadn't.</p> <p>Q. Well, did you tell the interviewers in that interview “<u>Now mum rarely talks to him</u>”?</p> <p>A. I don't recall that.</p>

Police interview quality

To examine the relationship between the quality of the police interview and the use of inconsistencies as a cross-examination strategy, the quality of the police interviews in the cases examined were rated on a scale of 1 (poor quality) to 5 (high quality). This score was generated by the assessor using objective criteria representing an amalgamation of skills (based on academic consensus) about evidence-based practice. This included adherence to recommended methods of eliciting a disclosure of abuse; maximising open-ended questions; and the avoidance of leading questions, coercive interview techniques and questions about unnecessary minutiae. (See Study 8 for a more detailed description of these skills and the empirical evidence-base behind them.)

Reliability

One of the researchers coded all of the transcripts for consistency content. Another researcher independently coded 20 per cent of the transcripts for inconsistency content producing a Cohen's Kappa coefficient of 0.88 for inter-rater reliability. Disagreements were resolved by discussion. Two researchers each coded the transcripts for inconsistency significance and type. They also both independently coded 20 per cent of the transcripts. Inter-rater reliability was substantial, with 93 per cent agreement (kappa coefficient of 0.74) for significance and 94 per cent agreement for type (kappa coefficient of 0.75). Disagreements were resolved by discussion.

Analysis

Researchers examined all results in two ways: based on the proportion of complainants for whom each inconsistency was raised; and based on the average number of lines of questioning relating to each inconsistency across all complainants. A variety of statistical methods were used. Chi-square tests of significant difference were used to determine if there were differences between groups (such as age group or jurisdiction) in the proportion of cases that used a strategy or tactic. ANOVAs and t-tests were used to determine if there were significant differences between groups in the mean number of strategies or tactics used in each case.

Results

Are the inconsistencies relevant to the central issues of the case?

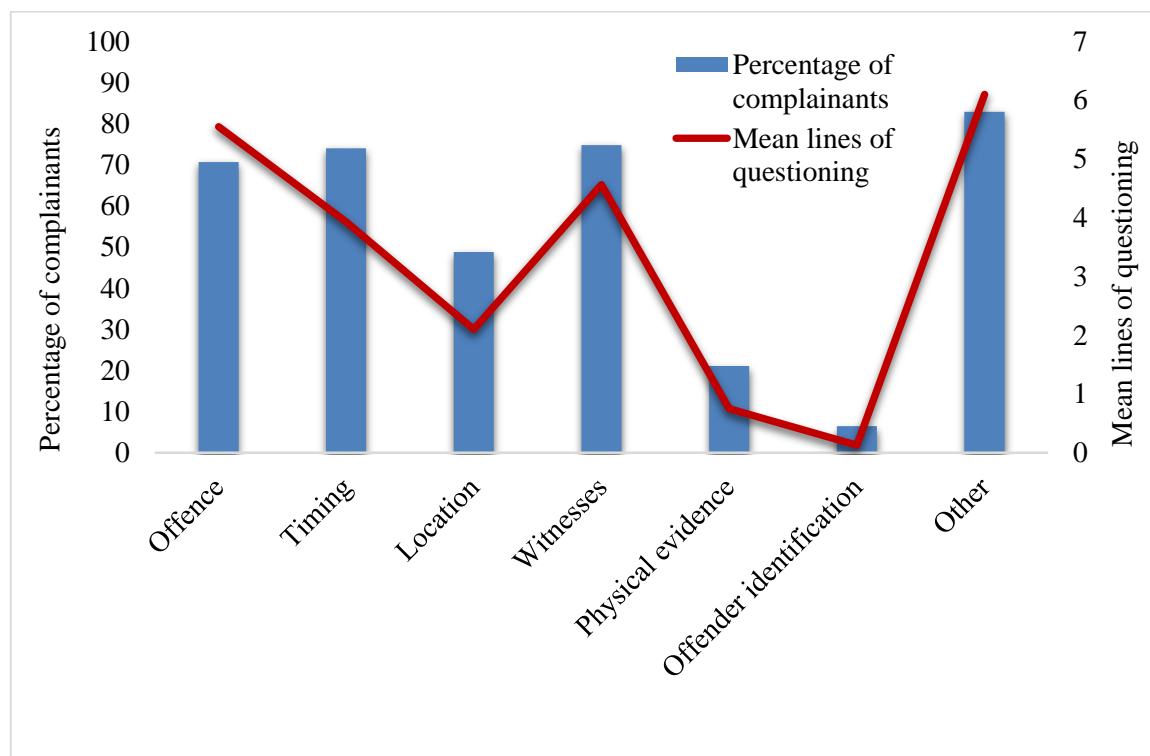
An important factor to consider when assessing a complainant's evidence is whether inconsistencies in reported details are central to proving elements of the offence. Defence lawyers raised inconsistencies that were central to the case for 72.4 per cent of complainants, using an average of 4.89 lines of questioning ($SD = 8.25$). However, there was an even greater focus on inconsistencies that were not central to proving the offence.⁵ Defence lawyers raised such inconsistencies with 98.4 per cent of complainants, using an average of 17.85 lines of questioning ($SD = 16.15$).

Further analyses were conducted to explore the relationship between the relevance of the inconsistencies and the complainant age group and jurisdiction. There were no differences for age group. However, inconsistencies about non-central details were more often raised in NSW ($M = 23.98$, $SD = 22.03$), than in Victoria ($M = 14.26$, $SD = 9.91$) and WA ($M = 15.35$, $SD = 12.47$): $F(2) = 4.57$, $p = 0.012$.

What content of evidence do the inconsistencies relate to?

To explore the nature of the inconsistencies that were targeted in cross-examination, analyses were conducted on how frequently they reflected six main evidential areas of a case, as shown in Figure 17.1. As the blue bars show, defence lawyers raised inconsistencies – in relation to the offence, the timing of the offence and other witnesses – with around three-quarters of complainants. Defence lawyers raised inconsistencies that did not relate to any of the key evidential areas with 82.9 per cent of complainants (see the definition for the 'Other' category above).

Figure 17.1 Content of the evidence related to the inconsistencies



Further analyses explored the relationship between a) the content of the evidence related to the inconsistencies and b) the complainant age group and jurisdiction. The only significant effect was a difference in prevalence of location-related inconsistencies across jurisdictions: $\chi^2(2) = 8.48$, $p = 0.014$. Inconsistencies regarding the location of the offence were more often a focus of cross-examination in NSW (67.0 per cent of complainants) than in Victoria (37.1 per cent of complainants) and WA (41.7 per cent of complainants). This may be related to the heavy use of drawings during the interviews in NSW, where children were frequently asked to draw a map of a location, or a room or house layout (refer to Study 8).

What are the types of inconsistencies raised?

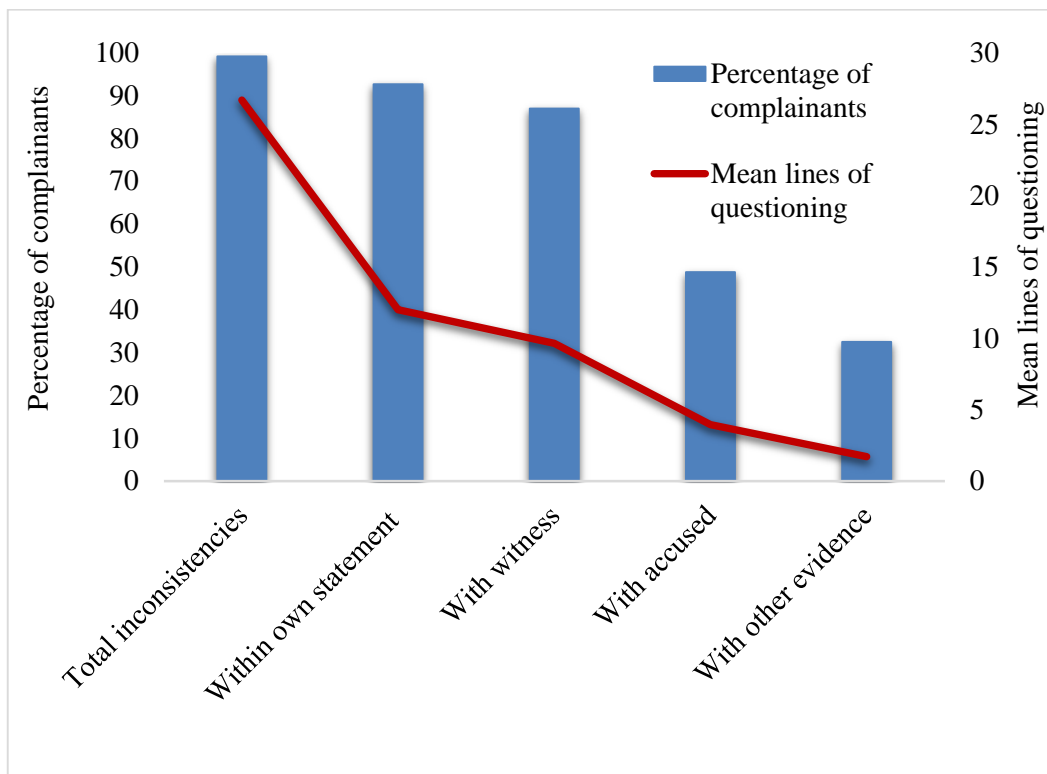
The most common type of inconsistency raised by defence lawyers was contradiction (that is, where two details conflict and at least one must be incorrect). This was raised with nearly every complainant (98.4 per cent), using an average of 18.46 lines of questioning ($SD = 16.20$). Addition (that is, where the complainant reported new details that had not

previously been mentioned) was raised with 50.4 per cent of complainants, using an average of 2.91 lines of questioning ($SD = 4.69$). Omission (where details reported previously are not reported again) was least common (29.3 per cent) with an average of 0.92 lines of questioning ($SD = 2.09$).

What was the complainant's evidence being compared with?

As shown in Figure 17.2, the inconsistencies most commonly raised by defence lawyers were those within the complainant's own evidence. Defence lawyers used this tactic with more than 90 per cent of complainants using an average of almost 12 lines of questioning. Inconsistencies between the complainant's and another witness's evidence were also common and were raised with more than 80 per cent of complainants, using an average of 10 lines of questioning. Inconsistencies between a complainant's evidence and other evidence in the case were more likely to be raised with adults (40.0 per cent of complainants) or adolescents (45.2 per cent of complainants) than with children (12.2 per cent of complainants): $\chi^2 = 11.93$, $df = 2$, $p = 0.003$.

Figure 17.2 Nature of the inconsistencies



What was the source of the inconsistencies within a complainant’s own evidence?

A defence lawyer typically identifies inconsistencies by comparing and contrasting the information a complainant has given at different points within the criminal justice process (such as the police interview, evidence-in-chief and cross-examination). The researchers analysed the main sources or phases of the criminal justice process that formed the basis for the inconsistencies within the complainant’s evidence.

As Table 17.5 shows, for children and adolescents (whose police interviews are video-recorded), defence lawyers most commonly targeted inconsistencies between the complainant’s police interview and cross-examination. This source of inconsistency was raised with 74.7 per cent of complainants using an average

of five lines of questioning. With nearly half of all complainants, defence lawyers also raised inconsistencies within the police interview and within cross-examination.

For adults whose police interviews are not video-recorded (but are provided in the form of a written statement produced by the officer), inconsistencies were most commonly found between the police statement and each of cross-examination, evidence-in-chief and other sources (such as counselling or doctors’ notes, and comments on social media). Each was raised on average with four out of 10 complainants. For adults, defence lawyers also commonly raised inconsistencies between evidence-in-chief and cross-examination (37.5 per cent of complainants). The targeting of inconsistencies by defence lawyers within cross-examination itself was common for all complainants (37.4 per cent of complainants).

Table 17.5 Source of inconsistency within complainant’s own evidence

Source of inconsistency	% of complainants	Mean lines of questioning	SD
Within the ...			
Police interview (under 18 years)	44.6	2.33	7.66
Police statement (adult)	20.0	0.48	1.20
Evidence-in-chief (adult)	15.0	0.25	0.63
Cross-examination (all ages)	37.4	1.14	1.97
Police interview and ...			
Other police interview	18.1	0.96	3.14
Evidence-in-chief	12.0	0.41	1.55
Cross-examination	74.7	4.86	7.23
Other source	12.0	0.46	1.61
Police statement and ...			
Other police statement	7.5	0.35	1.51
Evidence-in-chief	40.0	3.10	5.69
Cross-examination	42.5	1.28	2.08
Other source	40.0	0.35	1.17
Evidence-in-chief and ...			
Cross-examination	37.5	0.95	1.72
Other source	12.5	0.45	1.26
Cross-examination (all ages) and ...			
Other cross-examinations	1.6	0.07	0.51
Other source	13.8	0.53	1.89
Between two other sources (all ages)	8.9	0.35	1.75

Table 17.6 Source of inconsistency, by complainant age and jurisdiction

	Age			Test	Jurisdiction			Test
	Child	Adolescent	Adult		NSW	Vic	WA	
Within police interview (under 18 years)								
%	56.1	33.3		$\chi^2 (2) = 4.35^*$	60.0	33.3	41.2	$\chi^2 (2) = 3.80$
□ (SD)	1.78 (2.38)	2.86 (10.55)		T (81) = -0.64	2.56^a (2.96)	0.75^a (1.22)	1.08 (1.82)	F (2) = 5.32**
Within cross-examination (all age categories)								
%	51.2	35.7	25.0	$\chi^2 (2) = 6.02^*$	50.0	31.4	31.3	$\chi^2 (2) = 4.02$
□ (SD)	1.83^b (2.55)	1.05 (1.77)	0.53^b (1.13)	F (2) = 4.79*	1.98^{bc} (2.63)	0.63^b (1.11)	0.92^c (1.59)	F (2) = 5.88**
Between police interview and cross-examination (under 18 years)								
%	73.2	76.2		$\chi^2 (2) = 0.10$	68.0	79.2	76.5	$\chi^2 (2) = 0.90$
□ (SD)	4.10 (4.78)	5.60 (9.00)		t (81) = -0.94	7.04 (10.50)	3.67 (6.04)	2.10 (1.23)	F (2) = 1.69
Between police statement and cross-examination (over 18 years)								
%	Not applicable				40.0	9.1	71.4	$\chi^2 (2) = 9.86**$
M (SD)	Not applicable				1.27 (1.67)	0.55 (1.86)	1.86 (2.57)	F (2) = 1.25

^a Frequency significantly different than expected.

^{b, c} Games-Howell post-hoc indicates that the means are significantly different

* < 0.05

** < 0.01

*** <0.001

As Table 17.6 shows, the study explored the most frequent sources of inconsistency to determine if there were any associations with complainant age or jurisdiction. The age of the complainant was associated with two sources. First, inconsistencies within a single police interview were raised more with children (just over half of complainants) than with adolescents (a third of complainants). But there were no differences in the average lines of questioning between the two age groups. Second, inconsistencies within cross-examination were also raised more with children (just over half of complainants) than with adolescents (just over a third of complainants) and adults (a quarter of complainants). Children were also subjected to more lines of questioning about this issue than adults.

Researchers found three differences between jurisdictions. First, there were (on average) more lines of questioning about inconsistencies within the police interview in NSW than in Victoria. Second, there were on average more lines of questioning about inconsistencies within cross-examination in NSW than in both Victoria and WA. Finally, for adults, inconsistencies between the police statement and cross-examination were raised more in WA and NSW than in Victoria.

Is police questioning associated with cross-examination on inconsistencies?

The study examined the relationship between the police interview and the number of lines of questioning that defence lawyers dedicated to inconsistencies at trial. Note that this could only be examined for the 83 cases where the complainant was under the age of 18 years and interview data was available. The police interview variables examined were the total number of questions across all interviews, and a score out of five for the overall quality of the interviews (1 = poor-quality interview; 5 = high-quality interview).

Table 17.7 shows that as the number of questions asked by police at interview increased, so did the lines of questioning that defence lawyers used when cross-examining the complainant on both central and peripheral inconsistencies.

Table 17.7 Correlations between police interview variables and inconsistency variables

	Total questions	Interview quality
Significance		
Central	0.28*	-0.08
Peripheral	0.36**	-0.20
Type		
Addition	0.18	-0.04
Contradiction	0.35**	-0.23*
Source		
Own evidence	0.37***	-0.07
Witness evidence	0.04	-0.20
Accused evidence	0.48**	-0.27
Other evidence	0.31**	-0.02
Source within own statement		
Within police interview	0.32**	-0.15
Between multiple police interviews	0.22	0.07
Between interview and other	0.18	0.06
Within cross-examination	0.20	0.11
Between cross-exam and interview	0.32***	0.02
Between cross-exam and other	0.18	-0.21
Between other sources	0.01	00.06
Total inconsistent	0.35**	-0.19

* $p < 0.05$

** $p < 0.01$

*** $p < 0.001$

The types of inconsistencies were also found to be associated with police interview variables. (Due to the low rate of use, omissions were not included in the analysis.) In particular, the lines of questioning defence lawyers used to target contradictions increased as both the quality of the interview decreased and the number of questions asked by police increased. These findings suggest that better-quality interviews are associated with fewer contradictions being raised at trial.

There were also associations between the number of questions asked during the police interview and the source of the inconsistencies. As the number of questions in the police interview increased, so did defence lawyers' lines of questioning about inconsistencies within the complainant's own evidence, with other evidence and with the accused's evidence. As the number of questions in the police interview increased, so did inconsistencies within the police interview and between the police interview and cross-examination (where the inconsistency was within the complainant's own evidence).

Association between inconsistency and case outcome

Where the outcome of the case was available, cases were coded as a dichotomous variable and classified as either guilty of at least one offence ($N = 50$) or acquitted of all charges ($N = 55$). Researchers explored the correlations between the case outcome and all inconsistency variables and found no significant associations. This suggests that the number of inconsistencies raised by defence may not be associated with the outcome of the case; however, it could also mean that other case factors are working in interaction with the inconsistencies (such as age of the complainant and complexity of the case). Further analyses with a larger sample size would be needed to explore this possibility.

Endnotes

¹ For a review see Fisher, Brewer and Mitchell, 2009.

² Jones and Powell, 2005.

³ Powell et al., 2013.

⁴ Burrows, Powell and Anglim, 2013.

Conclusion

A typical cross-examination tactic is to discredit complainants by questioning them in a way that elicits and highlights inconsistencies in their accounts. This includes inconsistencies about details within complainants' own accounts and inconsistencies about details between complainants' accounts and other evidence. From a psychological perspective, targeting inconsistencies about well-remembered details or those central to proving the offence is legitimate. However, this study found that a large focus of cross-examination was on inconsistencies about details that are not typically well-remembered or central. On average, complainants were asked 18 lines of questioning about peripheral inconsistencies – four times as many as those relating to inconsistencies about central details.⁶ From a cognitive psychology and child developmental perspective, it would appear that defence lawyers are prolonging cross-examination by extensively questioning complainants of child sexual abuse about the types of inconsistencies likely to be generated by unintentional memory errors or miscommunication.⁷

The police interview was the most common source of inconsistencies in complainants' own evidence; inconsistencies were evident within the police interview itself or between it and cross-examination. By virtue of its immediacy and investigative focus, the police interview can capture a broad range of detail. The more detail captured in this interview the more material available on which to cross-examine the complainant.

Lower-quality interviews and lengthier questioning by police were found to be associated with more cross-examination on contradictions within complainants' accounts.⁸ While these associations could be due (in part) to extraneous factors such as case complexity, the possibility of a causal relationship warrants empirical investigation. Judges, prosecutors and defence lawyers have expressed concerns that the large amount of irrelevant detail generated by poorly conducted police interviews only serves to prolong cross-examination of the complainant (see Study 1).⁹

⁵ As defined by this study.

⁶ As defined by this study.

⁷ See Fisher et al., 2009; Jones and Powell, 2005.

⁸ As defined by this study.

⁹ Also see Chapter 8; Burrows et al., 2013; Stern, 2010; Westera, Powell and Milne, 2015.

Chapter 18
Judicial interventions
(Study 17)

Chapter 18: Judicial interventions

(Study 17)

Study 13 revealed that prosecutors and defence lawyers commonly used complex questions. Such questions may be considered ‘improper’ and create grounds for a judge to intervene,¹ or for prosecutors to object during cross-examination. Intervention or objection would arguably be stronger with younger children (as opposed to adolescents or adults) because young children are less able to respond accurately to complex questions or to seek clarification when faced with questions they misunderstand.

The purpose of this study is to evaluate:

- whether and to what extent judges and lawyers are intervening during complainant questioning
- whether judges and lawyers intervene more with children (as opposed to adolescents and adults)
- the reasons for judges’ and lawyers’ interventions.

Method

Transcripts

The sample comprised the 120 transcripts of complainant evidence from 94 child sexual abuse cases ($N = 40$ children; $N = 40$ adolescents; $N = 40$ adults) described in Study 14.

Coding scheme

The researchers conducted a thematic analysis of the types of interventions present in the transcripts², with a view to quantifying the types of interventions that

occurred during courtroom questioning. The coding scheme was developed with guidance from current rules of evidence codified in Australian legislation and current guidelines for judges from the three jurisdictions in our sample (NSW, Victoria and WA).³

One researcher initially read through half of the transcripts and discussed these with another researcher. As a result, further refinements to the coding scheme were made. The researchers conducted backwards and forwards engagement with the text as themes developed and were refined. Six broad themes of interventions were identified, as presented in Table 18.1.

Intervention was defined as a discussion between judge and lawyer(s), or between the lawyers themselves, that broke the flow of the complainant giving evidence. The researchers coded any interventions that occurred from the time the complainant began giving their evidence until they were excused from court.

The intervener was coded into one of four categories: the judge in evidence-in-chief, the defence lawyer, the judge in cross-examination and the prosecutor. It is important to note that only interventions that clearly fitted into one of the themes identified by the coding scheme were coded. Purely routine interventions or interventions that were unrelated to the questioning of the complainant were not coded. For example, the researchers did not code interventions to admit exhibits, to suggest routine breaks (such as lunch breaks), to address technological difficulties, or when a judge or lawyer simply did not hear the answer to a question.

A hierarchy was applied when coding intervention types for cases where an intervention could potentially fit into multiple categories. The researchers were interested in the operation of legislation and guidelines that allow judges to intervene when ‘improper’ questions are asked.⁴ Therefore any interventions that could fit into these categories (such as misleading or repetitive questions)

were as coded such. ‘Matter of law’ – such as relevance – was considered a lower-order category, and interventions were only coded into this category if they did not fit into any of the higher-order categories. This hierarchy in effect meant that judges or lawyers intervening on the basis of improper questioning may have been over- rather than under-represented.

Table 18.1 Types of interventions by judges and lawyers

Code	Explanation	Examples from the transcripts
Question form	Vague question	Defence: Now, in your interview in relation to that, you said that you went there by yourself. That can't be right, can it? Complainant: What are you talking about? The computer room? Judge: I think you have to explain to him what the interview is you're talking about.
	Misleading question	Defence: And you had already had your shower? Complainant: No, I had a bath. Judge: Yes, you ... Defence: Well, bath, sorry. I keep saying shower. Judge: I know. You slipped that one in, but he picked you up on it.
	Complex non-legal language	Defence: Was that a separate bedroom that [the accused] had? Complainant: I don't know Judge: Separate may not be a word that she understands.
	Complex legal language	Defence: Okay. And then, I'm going to suggest to you that in April ... Judge: So – so if you say to him, “I suggest to you”, perhaps explain what you mean by that.
	Complex sentence structure	Defence: When you went out from the house at nanny and grandpa's I take it you would have always gone out with an adult, would that be fair? Judge: Rephrase that question, I think. That was too complex for her.
	Inconsistency	Judge: Cross-examining children is a very difficult thing, Mr [Defence]. Defence: Yes, of course. Judge: I sympathise utterly with the position you find yourself in, but this is not only a young witness but she's young for her age. Now the jury are conscious of the fact that she's given inconsistent answers here. Do you want to put to her generally that she's making it up or something? Because I really think that asking her to focus on particular questions is not going to be productive. But that being said, you are the cross-examiner and you are entitled to a considerable degree of leeway.
Question manner	Repetitive questioning	Judge: Can I just ask, this is repetitious? Defence: Yes, Your Honour. Judge: Unless it goes to another point, I won't permit repetition. Defence: No it goes to ... Judge: No you don't need to tell me what it goes to, I'm just simply saying I won't permit unnecessary repetition. It's not fair to the witness. Defence: I understand it's ... Judge: Not fair to the jury. If you're going to go back to something you've examined the witness upon, you need to get to the point. Defence: Yes.
	Speed of questioning	Defence: All right. Now, Ms [Complainant], just for the purpose of the transcript, I'm just going to try and describe ... Judge: Can we just slow it down. That's better, thanks.

Code	Explanation	Examples from the transcripts
Question manner	Interrupting the complainant	<p>Prosecutor: Your Honour, I'm just going to object again. Judge: Why? Prosecutor: If [Defence] could please not interrupt? He is answering the question and just let him answer the question. Judge: Yes. Prosecutor: It's hard enough, Your Honour. Judge: Right. Defence: I'm suitably reprovved, Your Honour, and I'll ... Judge: Yes. Defence: ... try and avoid doing that. Sorry [Complainant], I was interrupting you.</p>
	Changing topics abruptly	<p>Judge: Were you not asking the witness about the incident in the computer room? Defence: No, I was asking about ... Judge: I thought that's what led to this ... Defence: No. Prosecutor: I also understood it was about the computer room. Defence: I'm asking now about the episode in the bedroom and your description of it in the first statement. Judge: That's why I intervened and asked very clearly for you to clarify that with the witness.</p>
Question substance	Oppressive or harassing questions, questions based solely on stereotypes	<p>Defence: I see, there's no more? But you just remembered? Any more you've just remembered now? In our cross-examination just now? Complainant: We've already spoken about numbers. Defence: No more? No more numbers? Prosecutor: I object to that. Defence: I withdraw that. Prosecutor: It's harassing the witness; it's gone on long enough, Your Honour. Judge: Mr [Defence] Defence: Thank you, Your Honour.</p>
Matter of law	Discussion between lawyers and/or judge and lawyers about legal decisions. Includes all other issues of relevance, introduction of sexual history evidence and editing of the police interview.	<p>Prosecutor: Because it was suggested to her that that was the reason why she had the break and that's not ... Judge: She can be asked that. It's an open-ended question. I don't see the difficulty. Prosecutor: I think it's unfair to [Complainant], because she's being asked to remember something that happened four months ago. Judge: Madam Crown, that's the difficulty if you call child witnesses. I mean, there's nothing that says that child witnesses can't be asked these kinds of questions, just because they may have difficulty remembering something that happened four months ago. But it's not an unfair question in my view. Prosecutor: As Your Honour pleases.</p>
Complainant care	Suggesting breaks	<p>Defence: Okay. Now, are you saying that nobody ever asked you about [Accused] when you were young? Complainant: No. I don't – I don't know. Defence: Okay. Well ... Judge: Do you want a break? Complainant: Yeah, actually.</p>
Complainant directions or questions	Complainant directions	<p>Judge: Right, [Complainant]. Just wait for Ms [Defence] to answer – to put the question – and then you answer it, otherwise if you talk over her, then she doesn't get to put her question and we don't get ...</p>
	Clarifying complainant's answers or asking novel questions of the complainant	<p>Defence: So it was before this happened, are you sure about that? Complainant: I'm reasonably sure. Judge: So you're saying the motel incident was before the incident at [place]? Complainant: As far as I can recall, yes.</p>

Inter-rater reliability

The first researcher and another researcher then independently coded 20 per cent of the transcripts from each age group. Across the age groups a Cohen's kappa coefficient of 0.80 was obtained. Disagreements were resolved through discussion, after which one researcher coded the remaining transcripts.

Analysis

The data was analysed using a combination of ANOVAs and t-tests depending on what was most appropriate. Tukey's post-hoc testing was conducted where required. Only those findings directly relevant to the research questions are reported. The differences are statistically significant unless otherwise stated.

Results

Are judges and lawyers intervening during complainant questioning?

As Table 18.2 shows, interventions were most common in cross-examination and by judges, who intervened nearly four times as much as prosecutors.⁴

Are judges and lawyers intervening more with children than adults?

Analyses were conducted to explore how the number of interventions differed as a function of the complainant's age, intervention type and jurisdiction.

Table 18.3 shows the average number of interventions for each intervener by age. There are two important findings. First, there was a significant interaction for intervener and age: $F(2.45, 135.97) = 3.07, p = 0.039$. This was explained by defence lawyers intervening more with adults than children: $F(2, 117) = 3.22, p = 0.044$. This finding may be due to the ability prior

to trial to edit a child's pre-recorded evidence-in-chief, which is not possible with adults because they give evidence live. But in contrast to expected practice, the number of interventions by judges (in evidence-in-chief or cross-examination) and prosecutors did not differ as a result of the complainant's age (all $ps = > 0.12$).

Second, there was a significant main effect for jurisdiction: $F(2, 111) = 4.23, p = 0.017$. More interventions occurred in NSW than WA, but there were no other differences. There was also a significant interaction for complainant age and jurisdiction: $F(4, 111) = 2.45, p = 0.047$. With children and adolescents, there were more interventions in NSW (children: 6.21 times, $SE = 2.17$; adolescents: 6.53 times, $SE = 1.88$) than in Victoria (children: 8.10 times, $SE = 1.37$; adolescents: 2.99 times, $SE = 1.29$) and WA (children: 2.33 times, $SE = 1.22$; adolescents: average, 2.78 times, $SE = 1.27$). With adults, there were more interventions in Victoria (6.84 times, $SE = 1.60$) than in WA (2.79 times, $SE = 1.42$) and NSW (2.68 times, $SE = 1.37$).

Table 18.2 Number of interventions by judges and lawyers

Intervener	Total interventions	Mean (standard deviation)	Range
Judge (evidence-in-chief)	262	2.18 (4.81)	0–45
Defence lawyer	110	0.9 (1.48)	0–26
Judge (cross-examination)	1,293	10.78 (4.41)	0–162
Prosecutor	344	2.87 (4.40)	0–26
Total	2,009	16.74 (22.24)	0–169

Table 18.3 Average number of interventions, by complainant age and jurisdiction

Intervention by	Age of complainant	NSW	Victoria	WA	Total
Judge (evidence-in-chief)	Child	2.13 (1.18)*	0.33 (1.87)	2.00 (1.05)	1.80 (0.39)
	Adolescent	2.25 (1.62)	1.12 (1.11)	1.20 (1.18)	1.38 (0.32)
	Adult	1.20 (1.18)	7.91 (1.38)	2.14 (1.22)	3.38 (1.21)
Defence lawyer	Child	0.80 (.38)	0.50 (0.59)	0.26 (0.33)	0.50 (0.17)
	Adolescent	1.75 (0.51)	0.47 (0.35)	1.00 (0.36)	0.93 (0.23)
	Adult	1.53 (0.38)	1.36 (0.44)	1.07 (0.39)	1.33 (0.28)
Judge (cross-examination)	Child	25.87 (4.70)	19.67 (7.42)	6.53 (4.17)	15.75 (4.60)
	Adolescent	14.63 (6.43)	8.06 (4.41)	7.00 (4.97)	8.96 (1.66)
	Adult	4.00 (4.96)	13.82 (5.48)	6.57 (4.86)	7.60 (1.53)
Prosecutor	Child	3.60 (0.80)	4.33 (1.70)	0.53 (0.96)	2.25 (0.67)
	Adolescent	7.50 (1.47)	2.29 (1.01)	2.29 (1.01)	3.20 (0.80)
	Adult	4.00 (1.07)	4.27 (1.25)	1.36 (1.11)	3.15 (0.62)
Total		5.77 (0.90)	5.35 (0.99)	2.63 (0.77)	

*Standard errors are in parentheses.

Do the reasons for judges' and prosecutors' interventions reflect known problems with cross-examination?

Next, the researchers explored the reasons for judges' and prosecutors' interventions during cross-examination. Interventions in evidence-in-chief were not included in this analysis due to their low prevalence. To control for the variation in the number of interventions by each party, proportions were used for each party's intervention type.

Table 18.4 shows the reasons for interventions, according to the age of the complainant. Note that the interventions for question substance were so low they were not included in any further analyses.

Analysis found that there was no interaction between the intervener, the reason for intervention and age: the reasons for judges' and prosecutors' interventions did not differ according to complainant age: $F(5, 282) = 0.64, p = 0.66$.

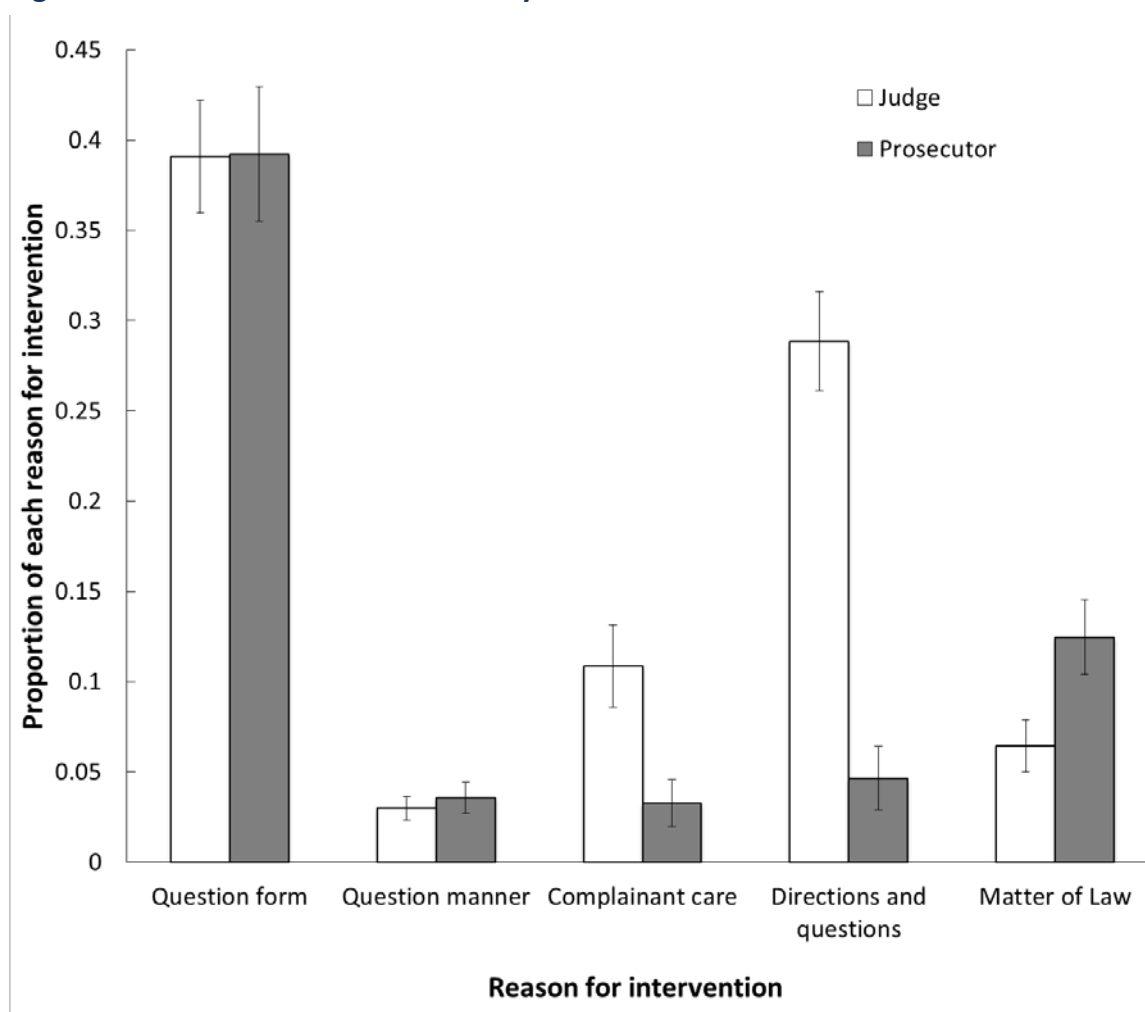
There were differences in the overall proportions of each reason for intervention: $F(5, 307) = 79.40, p < 0.001$. Together, judges and prosecutors intervened more about question form, followed by giving directions or asking questions, matters of law, complainant care and question manner (Bonferroni corrected, $p < 0.001$).

Table 18.4 Reason for interventions in cross-examination, by complainant age

Reason for intervention	Judge			Prosecutor		
	Under 13	13–17	Adult	Under 13	13–17	Adult
Question form	0.343 (0.050)*	0.374 (0.053)	0.456 (0.058)	0.348 (0.068)	0.395 (0.063)	0.434 (0.065)
Question manner	0.021 (0.009)	0.041 (0.014)	0.027 (0.011)	0.030 (0.013)	0.048 (0.018)	0.029 (0.013)
Question substance	0.001 (0.001)	0.002 (0.002)	0.001 (0.001)	0.000 (0.000)	0.001 (0.001)	0.005 (0.003)
Complainant care	0.147 (0.043)	0.102 (0.042)	0.076 (0.032)	0.041 (0.026)	0.020 (0.013)	0.036 (0.026)
Complainant directions or questions	0.374 (0.050)	0.269 (0.048)	0.222 (0.041)	0.020 (0.017)	0.053 (0.035)	0.066 (0.037)
Matter of law	0.039 (0.017)	0.061 (0.024)	0.092 (0.032)	0.087 (0.035)	0.132 (0.034)	0.155 (0.039)

*Standard errors are in parentheses.

Figure 18.1 Reason for intervention by intervener



As Figure 18.1 shows, there were no significant differences in the proportion of times judges and prosecutors intervened regarding the question form. Judges intervened more than prosecutors for complainant care and to give the complainant directions or to ask questions (Bonferroni corrected, $p < 0.01$).

Conclusion

One of the core roles of the judge is to facilitate the administration of justice. To perform this role effectively, judges are likely to have to intervene more in cross-examination – where the most problematic questioning of complainants occurs – than in evidence-in-chief. Judges in this study did so, which suggests they are recognising that more regulation is required in this phase of the trial process. Prosecutors at times also intervened to address some of the problems arising in cross-examination, but to a lesser extent than judges. There was, however, no evidence that judges and prosecutors are intervening more with children than with adults, even though previous studies have shown the frequent use of problematic questions (such as complex and repetitive questions) with children.

With all age groups, when judges and prosecutors did intervene, it was most often regarding the question form (nearly 40 per cent of all interventions). This suggests that judges and prosecutors are aware of the difficulties that poor questioning can pose for a complainant.

However, the actual number of interventions for question form (172) was low compared to the total number of complex questions defence lawyers asked (432). This could be due to a range of factors, such as the judge not wanting to appear as though they were favouring the prosecution, or deciding that the complainant understood the question despite its complexity. Another explanation is that judges and prosecutors need up-skilling in how to identify the types of questions that are likely to decrease the accuracy of complainants' responses.

Interestingly, interventions regarding question substance made up less than 1 per cent of all interventions. This finding suggests that judges and prosecutors are not regulating question substance even though defence lawyers are frequently using questions that are based on stereotypes about complainant behaviour (see Studies 14 and 15). These types of stereotypes may fall outside of legal guidelines that restrict questioning based on stereotypes such as the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability. Judges and prosecutors may also be reluctant to intervene because they perceive that the adversarial process should allow defence lawyers to test the evidence as they see fit (see Study 1).

Endnotes

¹ Section 41 of the *Evidence Act 1995 (NSW)*; s41 of the *Evidence Act 2008 (Vic)*; s26 of the *Evidence Act 1906 (WA)*.

² Strauss and Corbin, 1990.

³ Australasian Institute of Judicial Administration Incorporated, 2015; District Court of Western Australia, 2010; Judicial College of Victoria, 2016; Judicial Commission of New South Wales, 2014, 2015.

⁴ Section 41 of the *Evidence Act 1995 (NSW)*; s41 of the *Evidence Act 2008 (Vic)*; s26 of the *Evidence Act 1906 (WA)*; Australasian Institute of Judicial Administration Incorporated, 2015; District Court of Western Australia, 2010; Judicial College of Victoria, 2016; Judicial Commission of New South Wales, 2014, 2015

⁵ Judges interventions were more common in cross-examination than evidence-in-chief. This finding may in part be because all parties can make arguments about the admissibility of the pre-recorded interview with children and adolescent complainants.

Chapter 19

General discussion

Chapter 19: General discussion

This report investigated whether the alternate measures and restrictions on courtroom questioning that are currently available in Australia are enabling complainants of child sexual abuse to give evidence effectively. The ultimate aims were to examine the utility of alternate measures for complainants in child sexual abuse proceedings; to evaluate the quality and usefulness of evidence obtained from these complainants (with special regard to how they are questioned); and to provide an evidence base on which to guide any reform to promote fairer process and justice outcomes.

The research arose within the context of concerns about low prosecution and conviction rates in these cases. Although the current research builds on a large body of prior research on child sexual abuse complainant evidence, it is unique in its holistic approach. Across three jurisdictions, unprecedented access was granted to entire case data from different agencies within the criminal justice system (such as prosecutor case files, court transcripts, police interviews and video files) and from complainants of a wide range of ages. The research team was multi-disciplinary and had the diverse expertise to study a broad corpus of issues: child development, memory, investigative interviewing, the trial process, eyewitness evidence, assessing credibility and reliability, stereotypes about sexual abuse, and cross-examination. What this report provides is a

comprehensive multi-method examination of how the justice system has been operating as a whole – from police interview to trial. It examines how various components of the system are interrelated, and where changes to practice are most urgently needed.

A primary focus of this project, and the subject which initiated this tender, was the use of alternate measures. Anecdotal evidence had suggested that criminal justice professionals might be resistant to the use of alternate measures, and that complainants in child sexual abuse cases were not getting the access to these measures that legislation provides. These concerns were generally not supported. Alternate measures were employed as a matter of course with child complainants, although less so with adult complainants (Studies 2 and 5). Children most commonly gave their evidence-in-chief via a pre-recorded police interview and were cross-examined via CCTV – either live during trial or through a pre-recording. Adults tended to give their whole evidence either via CCTV or live, and screens were seldom used.

Qualitative interviews and surveys with criminal justice professionals (Studies 1 and 2) showed that they were generally very supportive of using alternate measures. Defence lawyers were least supportive of alternate measures, on the basis of faulty or missing technical equipment and the perception that CCTV prejudiced

the accused (Studies 2 and 3). Prosecutors only occasionally elected not to use alternate measures, most usually with adults, on the basis of personal beliefs that in-person evidence would make the complainant more credible at trial (Study 6). Nearly half of the surveyed criminal justice professionals perceived alternate measures as having a positive impact on conviction rates, while beliefs regarding their effect on a complainant's credibility depended on the age of the complainant. The pre-recorded police interview was seen as the most credible measure for children, while live evidence was perceived as being most credible for adults (Studies 2 and 3).

Overall, the findings suggest that criminal justice professionals support the use of alternate measures and perceive that they improve the process of eliciting complainant evidence without impeding the rights of the accused. However, a range of factors reduced the effectiveness of the measures in achieving the purposes for which they were designed. Five major areas for improvement were identified, namely:

- overcoming obstacles to using technology
- aligning police interviews with evidence-based practice guidance
- improving the quality of court questioning
- making alternate measures more available to adults
- reducing delays and streamlining the prosecution process.

For each area, the findings and impact will be discussed with reference to the current data and broader literature. The implications of these findings will then be reviewed in terms of justice outcomes. Finally, possible explanations for the findings will be offered, and solutions identified.

Overcoming obstacles to using technology

A recurring theme in the studies was the prevalence of problems in using the technology associated with alternate measures. Interviews with stakeholders (Study 1), reviews of the SARC committee meetings and prosecution files (Studies 4 and 6), a review of court transcripts (Study 5), the review of pre-recorded videos (Study 7) and an examination of discussions of the police interview (Study 9) all highlighted problems with both the use of CCTV/AV links and pre-recorded interviews. Problems were widespread. Poor video and audio quality were prevalent; the review of video interviews revealed that less than one-quarter of video recordings were of high quality, and at times audio and visual displays were not synchronised. Screen displays and camera angles were inadequate; only half the recordings in the video review enabled the complainant's facial expressions to be seen.

Technological issues are neither new nor restricted to Australia; problems with hearing and seeing the complainant on pre-recorded video and via CCTV have been consistently highlighted as areas of concern in Australia since their introduction over a decade ago¹ and have also been raised in other countries.²

The technological problems appeared to have a substantial effect on trials – delaying proceedings and extending trial times. At times they led to complainants having to give evidence at a later date, or trials being relocated to different courtrooms (Study 5). Such occurrences may cause substantial distress to complainants, counteracting two of the key purposes for which alternate measures were introduced: to reduce waiting times and to minimise stress. Considering the broader literature on anxiety, stress and memory, it is likely that technological failings are damaging the reliability and completeness of the evidence elicited from complainants.³ In addition, given that juries place weight on demeanour and expressions⁴, poor image and sound quality may reduce the credibility of complainants.

The precise reasons for the prevalence of these technological failures were not apparent from the studies conducted. Based on limited comments recorded in prosecutor files and trial transcripts, the issues seemed to be multi-faceted, including equipment that was outdated or missing, or with which court personnel lacked familiarity (Study 5), and a lack of access to technological facilities and resources (Study 4). While the broader literature on common technological pitfalls in educational settings suggests that insufficient testing and planning play a key role⁵, the present studies were unable to assess the planning (or lack thereof) that occurred before a trial. To identify the exact cause of these problems, directed inquiries into the use of technology by those working in the legal system are warranted.

Aligning police interviews with evidence-based practice guidance

For criminal justice professionals, the most problematic aspect of how evidence was both gathered and presented was the video-recorded police interview. These professionals generally regarded the use of the police interview as a complainant's evidence-in-chief as a highly effective reform because it allowed fresher and more complete evidence. Yet the usefulness of this reform was reportedly compromised by the style of police questioning (Study 1). Interviews were described as cluttered with irrelevant details, incoherent, and peppered with suggestive or leading questions. The professionals were concerned that these features were exacerbating the degree of cross-examination about irrelevant details and were also prolonging proceedings.

Furthermore, in nearly a quarter of cases, judges, prosecutors and defence counsel raised concerns with police interviews (including inappropriate questioning and behaviour) during courtroom discussion (Study 9). Analysis of the sample of police interviews used as evidence-in-chief revealed that interviewers across all jurisdictions are not conducting interviews consistently with the recommended guidance from the academic literature adopted in some overseas jurisdictions on how to interview child complainants (Study 8). The rate of open-ended questions (regarded internationally as the best indicator of good investigative interviewing) was low, and no higher than if interviewers had been untrained. Furthermore, interviewers did not adjust their use of specific questions or the length of interviews based on the child's age, and leading questions and non-verbal aids such as maps and body diagrams were prevalent. Low use of open-ended questions was associated with a low proportion of child-generated labels for individual offences in cases of repeated abuse, which likely impeded the child complainant's ability to give quality evidence about abusive incidents (Study 10).

A unique contribution of the current research is the empirical evidence it found in support of judges' and lawyers' concerns about the downstream effects of police interview practice on child complainants' experiences during the trial process (studies 1, 8, 10, 14, 15 and 16). Police are the first criminal justice professionals to elicit evidence from complainants, so their interaction with the complainant directly impacts the integrity of that evidence throughout the prosecution process. Greater deviation from recommended guidance was associated with more extensive cross-examination on contradictions within the complainant's evidence (Study 16). Defence lawyers commonly questioned complainants about inconsistencies that were often irrelevant to proceedings (studies 14 and 15). More research is required to examine the precise relationship between police interviewing practice and cross-examination before any firm conclusion can be drawn. However, together the findings suggest that the current style of police interviewing that uses high numbers of specific questions (questions that direct complainants to particular details and restricted their response options) are unduly extending cross-examination (studies 1 and 8), making the trial process longer and more onerous on complainants.⁶

Statistical evidence of a relationship between police interview quality (according to guidance literature) and prosecution outcome (verdict) could not be examined in this report because the questioning of complainants was consistently poor; sufficient variation in police interview quality is needed to detect any effects. However, the implications of the police questioning style are known to be much broader than the current

trial data was able to show. For example, a recent Australian study showed that higher-quality interviews are associated with higher confession rates (thereby influencing whether a case proceeds to trial).⁷ Another showed that victims' experiences of feeling heard, listened to and not interrogated in the investigative interview help create perceptions of a fair justice process (irrespective of outcome) and increase the likelihood of complainants going to trial.⁸ Furthermore, Pipe et al. (2013)⁹ showed that police interviews that adhere to evidence-based interviewing practice have higher prosecution and conviction rates.

The gap between police practice and evidence-based interviewing guidance is neither new nor unique to Australia.¹⁰ In fact, the discrepancy has been raised in numerous Australian government-funded evaluations¹¹ and is the most talked about issue in the investigative interviewing literature across the globe.¹² Research has extensively investigated the reason for the discrepancy between recommended and actual police practice.¹³ Based on that prior work and an examination of the investigative interviewer policy and training in all Australian police services (see Appendix B) the problem clearly stems from inadequate training. Police training regimes do not have the fundamental elements required to develop skilled interviewers. The content of police training manuals shows that police and human service organisations have limited recognition of the basic elements shown to be necessary for effective interviewer training. These elements include practice sessions spaced over time, regular evaluation of interviewer performance by someone with requisite interviewing expertise, and clear instruction on how to apply a narrative-based interview framework.¹⁴ Most training courses currently run by police tend to focus on the theory behind child development and memory, and on auxiliary interview tools, at the expense of foundational questioning skills. In the interviewer training manuals, most of which were over 150 pages long, only five lines (on average) were devoted to applying open-ended questions.

Fortunately, the gap between knowledge and practice can be addressed. International child interviewing experts Deirdre Brown and Michael Lamb (2015) concluded that the answer lies in the willingness of organisations to embrace new styles of training where highly specialised instruction is streamed to participants' workplaces via web-based activities. A recent program evaluation published in a US policy law journal supports their conclusion.¹⁵ The evaluation (the first of its kind, implemented in two Australian jurisdictions between February 2013 and November 2014) showed that blended models combining evidence-based and web-based activities with supervision (via Skype or in person) can result in sustained adherence to all best-practice interview measures. This is the case even among large cohorts of

interviewers spread over vast geographic regions. One of the Australian jurisdictions that featured in the 2013–14 evaluation was a jurisdiction also included in the current report. The fact that the benefits of the new training were not observed in this report is a reflection of the lengthy time lapse between investigative interviews and the same cases reaching court.¹⁶

It is now well understood that the traditional classroom-style training does not provide (in its inherent structure) opportunity for ongoing individualised practice and feedback, which are central components of learning skills.¹⁷ Furthermore, investigative interviewing is highly specialised work requiring specialised training. When police allocate internal staff to design and deliver core material when they are not abreast of the recent literature on how to interview and teach interviewing, they miss the opportunity to implement a robust evidence-based training program. There have been numerous calls for a national best-practice interview framework with centralised delivery of core (common) activities and shared resources.¹⁸ At present, however, each of the Australian jurisdictions is independently responsible for writing and administering the training and for assessing interviewer performance.¹⁹

Improving the quality of court questioning

Problems with questioning are not limited to police interviewers. The current research strongly suggests that judges' and lawyers' questioning of complainants is also a significant problem. Judges and lawyers recognised the need to adapt the length and complexity of their questioning to the age of the complainant (Study 3), yet neither group was able to put this into practice (Study 13). In fact, prosecutors asked a greater number of complex questions of children than of adults. When judges tested the competency of child complainants or explained to them the court's expectations of giving evidence, their questioning was not informed by empirical evidence on what promotes truth-telling in children, nor by an understanding of child development (studies 11 and 12). Rather, these questioning sessions were conducted in a manner likely to confuse and fatigue child complainants before they even gave evidence. The requirements of current law and the difficulty of the task placed on judges to meet these requirements are both likely contributors to this problem.

Cross-examination was by far the most concerning aspect of courtroom questioning. In surveys and interviews with the researchers, criminal justice professionals identified as issues of concern the use, with children, of developmentally inappropriate questioning, and the aggressive and demeaning

questioning of adults (studies 1 and 3). These concerns were supported by the analysis of cross-examination in court transcripts (studies 14, 15 and 16). Questioning during cross-examination was the most complex and extensive of all court questioning sessions, and it was often not clearly targeted at any particular issue.

The strategies employed by defence lawyers often relied on antiquated concepts of human memory and reactions to sexual abuse, which are not consistent with the empirical literature.²⁰ Complainants were asked to remember the minutiae of events from years past, provide discrete memories for each episode of abuse and to put these into temporal context (Study 15). When complainants could not meet these unreasonable expectations, defence lawyers suggested that they were lying or unreliable. Even minor peripheral inconsistencies, unrelated to the abusive incident, were used repeatedly in nearly every case to undermine the complainant's credibility and reliability, despite the fact that empirical literature has shown that errors regarding these sorts of details are not indicative of the veracity of the central allegation.²¹ When complainants had not reacted to the alleged abuse – or to questioning – in the way that victims of abuse were expected to react, it was suggested that they were lying (Study 14).

Despite the fact that reforms now allow judges to intervene to prevent certain forms of inappropriate questioning of complainants (such as complex questions), an analysis of judicial interventions revealed that judges seldom intervened. They did so mostly on the basis of the form of the questions, but rarely on the basis of the content of the questions (Study 17).

Together the findings about cross-examination indicate a clear conflict between current practice and what the psychological literature has found are diagnostic indicators of reliability and credibility.²² Many of the tactics used by defence are propagating unfounded assumptions about complainant behaviour and memory, and are likely to have a significant emotional impact on complainants.²³ These findings raise the critical question: to what extent do the courts have an ethical obligation to regulate questions asked in cross-examination that are solely based on unfounded social assumptions about sexual abuse?²⁴ And if they do have this obligation, how if at all, can the adversarial criminal trial effectively regulate cross-examination? Public debate on these questions will help to determine if a balance can be met that makes the process fairer for complainants without jeopardising the rights of an accused to a fair trial.

The current findings suggest that at the core of other court questioning problems are deficits in questioning skills, specifically with regard to phrasing questions in developmentally appropriate ways. This problem can

be addressed through training.²⁵ Questioning children is a specialised area, and it is one that is currently underrepresented in Australia's criminal justice system. Judges and lawyers must learn to question appropriately. There is an abundance of research on how questioning skills are – and are not – acquired. Learning good questioning habits is akin to learning a second language; interpreters and dictionary apps can help but they are no match for fluency. Nor can questioning skills be achieved through brief forums or workshops. Judges and lawyers urgently need practice-based training in appropriate questioning.

For child complainants who wish to give evidence, problems with court questioning include process issues such as the competency testing undertaken by judges. There is no evidence that competency testing has any impact on the likelihood that the child will tell the truth.²⁶ In fact, a simple promise to tell the truth is the only factor that has been empirically shown to impact the likelihood of truth-telling by children.²⁷ Competency testing has been eliminated in some countries (such as Canada and Scotland). This advance means that a child's cognitive resources are conserved and are available to be used during subsequent questioning sessions such as cross-examination.

Making alternate measures more available to adults

Current use of alternate measures reflects legislation; these methods are used routinely with children, yet are less predictably available to adults with whom more legal discretion exists. Alternate measures are less likely to be considered for adult complainants (studies 1, 2 and 4), and an analysis of court transcripts showed that adults were more likely to give evidence live in the courtroom than were children or adolescents (studies 4 and 5). Neither video-recorded police interviews nor support persons were routinely used with adults. These findings indicate that currently, in the three jurisdictions examined, adult complainants have restricted access to alternate measures.

Victims of child sexual abuse are likely to be vulnerable for reasons other than age (including problems with their mental, developmental and physical wellbeing).²⁸ These vulnerabilities – and the nature of the evidence victims must give – mean that even adult complainants are likely to find the process of giving evidence more distressing than are other types of witnesses. Furthermore, memory research shows that the accuracy and completeness of an adult's evidence is influenced by the nature of the questions asked and the time delay between the event and reporting.²⁹ This suggests that adults are likely to benefit in the way children do if their police interview is video-recorded and used as pre-recorded evidence.³⁰ Such reforms

have already been made in Tasmania, the Northern Territory, New Zealand, England and Wales. Increased access to support persons and pre-recorded cross-examination may also assist many of these complainants, and increasing the availability of alternate measures to adult complainants could help improve their access to justice.

If the decision is made to introduce such reforms in other jurisdictions, problems with technology and police interviewing should be anticipated, as the issues are likely to generalise to all witnesses.³¹ Careful planning and evaluation will help maximise the effectiveness of these reforms.

Reducing delays and streamlining the prosecution process

Problems with delays to and within proceedings – and the lack of a streamlined prosecution process – consistently arose as themes in the studies (even though they were not the direct focus of this report). The concerns raised by judges and lawyers regarding areas for improving the evidence-giving process were the long delays before a matter would result in trial (often years), the rescheduling of proceedings, the reassigning of the trial venue, and the length of time complainants waited at court prior to giving their evidence (studies 1 and 2). Notes on the prosecution files (Study 4) and from the NSW SARC meetings (Study 6) suggested that such problems commonly occurred.

These problems are likely to have a major impact on the quality of evidence a complainant can provide to the courts. The longer the delay between the crime event and the trial, the less likely the complainant will be able to give detailed and reliable evidence.³² Long waiting times at court and rescheduling of proceedings (studies 1 and 4) may increase the complainant's anxiety, stress and fatigue. Identifying the exact causes of these problems and finding solutions to address them will improve the experience of complainants in the criminal justice system and the quality of their evidence.

Concluding comment

The overriding message from this report is that while implementing alternate measures has been a major step forward in improving the trial process for complainants of child sexual abuse, limitations in the system are reducing the value of these measures, and impeding their intended purpose and benefits. Collectively, the research in this report has pointed to two systemic problems: obstacles to using technology; and poor-quality questioning, both in police interviews and in court.

These problems are in no way new or isolated to Australia. They are inherent to many countries (not only those that practise English Common Law) and have featured in the conclusions of numerous similar government evaluations across the globe over the past two decades.³³ Their prevalence is likely due to many factors, one of which may be a lack of awareness of the full extent of the problems and their contribution to unsuccessful and unjust prosecutions for complainants. The ‘holistic approach’ adopted in this report has revealed new and important links between what, up to now, may have been regarded as separate problems. A second factor might be an underestimation of the specialisation involved in learning how to question complainants. There is an inherent myth that questioning can be taught via brief instruction, rather than by spaced and ongoing practice. Until recently, there had been no successfully trialled alternatives to the ineffective classroom-based training model.

Australia is now at the global forefront of new technologies and evidence-based web activities, and organisations are less constrained in their ability to make evidence-based decisions about training policy and procedure.

Such favourable circumstances mean there is no better time to provide complainants of child sexual abuse – whose trials have the lowest prosecution rates of all indictable offences – the opportunity to tell their story in a way that enables the most reliable and credible evidence to be obtained, from police disclosure to trial. According to Lord Denning, “The law never stands still. It goes on apace. You have to run fast to keep up with it”.³⁴ Arguably, the law has changed to take into account developments in social science. Now is the time for practice to keep pace.

Endnotes

¹ Cashmore and Trimboli, 2005, 2006; Eastwood and Patton, 2002; Powell and Wright, 2008; Burrows and Powell, 2014a.

² Criminal Justice Joint Inspection, 2012; Plotnikoff and Woolfson, 2009; Stern, 2010.

³ Such as Christianson, 1992.

⁴ Fisher, 2015; Porter and Ten, Brinke, 2009.

⁵ Walsh, 2014.

⁶ Kassin and Gudjonsson, 2004.

⁷ Benson and Powell, in press.

⁸ Powell and Cauchi, 2013.

⁹ Pipe, Orbach, Lamb, Abbott and Stewart, 2013.

¹⁰ e.g., Cederborg, Orbach, Sternberg and Lamb, 2000; Johnson et al., 2015; Lamb, in press; Schreiber Compo, Gregory and Fisher, 2012

¹¹ Powell, 2008a; McConachy, 2002; Cant, Darrell, Simpson and Penter, 2006.

¹² Brown and Lamb, 2015; La Rooy et al., 2015; Lamb, in press.

¹³ See Powell, 2008b, for a review.

¹⁴ Powell, 2008b.

¹⁵ See Benson and Powell, 2015b.

¹⁶ The current report was well underway as the interviews that were part of that evaluation were starting to get to court. Specifically, only three of the post-training interviews made it into the cohort provided for the current evaluation and these were interviews conducted for the purpose of clarifying a few details in a prior interview, not an initial investigative interview. Clarifying interviews, even when they adhere to best practice, are not conducted for the purpose of eliciting a lengthy narrative account per se.

¹⁷ Lamb, in press; Powell, Fisher and Hughes-Scholes, 2008.

¹⁸ Powell, 2008a, 2008b; Powell and Steinberg, 2012; Powell, 2013; Powell, Wright and Clark, 2010; Powell, 2005; Powell and Barnett, 2015.

¹⁹ Under the South Australian Disability Justice Plan reforms, specialist training (similar to that reported by Benson and Powell 2015) is currently being delivered to some police involved in the investigative interviews of vulnerable witnesses (50 per year for a two-year period, with optional one year extension).

²⁰ e.g., Katz, Hershkowitz, Malloy, Lamb, Atabaki and Spindler, 2012.

²¹ Fisher, Vrij and Leins, 2013.

²² For example, see Fisher, Brewer and Mitchell, 2009.

²³ Lees, 2002; Konradi, 1999.

²⁴ Craig, 2014.

²⁵ Benson and Powell, 2015b; Powell, Fisher and Wright, 2015; Pipe, Lamb, Orbach and Cederborg, 2007.

- ²⁶ Lyon and Saywitz, 1999.
- ²⁷ Talwar and Crossman, 2012.
- ²⁸ Browne and Finkelhor, 1986.
- ²⁹ Powell, Garry and Brewer, 2013.
- ³⁰ Westera, Kebbell and Milne, 2013a, 2013b.
- ³¹ Stern, 2010; Westera et al., 2013a, 2013b; Westera, Powell and Milne, 2015.
- ³² Read and Connolly, 2007.
- ³³ Criminal Justice Joint Inspection, 2012; Australian Law Reform Commission, 1992, 1995, 1997; Burton, Evans and Sanders, 2006; Cashmore and De Haas, 1992; Cant, Henry, Simpson and Penter, 2006; Cashmore and Trimboli, 2005; Charles, 2012; Crime and Misconduct Commission, 2003; Criminal Justice Joint Inspection, 2012, 2014; Davies, Henderson and Hanna, 2010; Davies, Hoyano, Keenan, Maitland and Morgan, 1999; Davies, Wilson, Mitchell and Milsom, 1995; Eastwood and Patton, 2002; Flin, Kearney and Murray, 1996; Hanna, Henderson, Crothers and Rotherman, 2010; Hamlyn, Phelps, Turtle and Sattar, 2004; Heslop, 1991; McConacy, 2002; New Zealand Law Commission, 1996; New Zealand Law Commission, 2012; NSW DCS, NSW Police Service and NSW Health, 2002; Plontikoff and Woolfson, 2009; Powell, 2008a; S. Richards, Morris, E. Richards, and Siddall, 2007; Richards, 2009; Scottish Court Service, 2015; Schollum, 2006a, 2006b; Stern, 2010; United Kingdom Ministry of Justice, 2014; Victorian Law Reform Commission, 2004.
- ³⁴ Denning, Rt Hon Lord, 1984, p vi.

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Appendices

Appendix A: Literature Review of alternate measures

Introduction

Children and adults who give evidence in child sexual abuse trials face many barriers.¹ The experience of testifying in court is highly stressful and anxiety provoking for complainants who may already be vulnerable due to the nature of the offences they allege.² Adding to these negative experiences, the delays between disclosure and trial are frequently lengthy, resulting in constant anxiety for victims and memory decay.³ Furthermore, the number of cases that are successfully prosecuted is very low, creating a disincentive for victims to continue with their case.⁴

Reforms to both evidence law and procedure have attempted to address some of the barriers that make it difficult for complainants to give evidence.⁵ Alternative modes of giving evidence – such as allowing vulnerable witnesses to give evidence via closed-circuit television (CCTV), pre-recorded investigative interviews or testifying behind screens – have been key components of procedural reforms. In this review, these alternative modes are referred to as ‘alternate measures’.

This review is part of a body of work commissioned by the Royal Commission into Institutional Responses to Child Sexual Abuse, examining how complainants currently give evidence in child sexual abuse cases in Australia, and the extent to which alternate measures are employed. The review aims to determine the prevalence or actual use of alternate measures in Australian jurisdictions, and whether these measures are effective.

The review is presented in five sections. First, the review identifies alternate measures that are available to child sexual abuse complainants in Australian jurisdictions. Second, it describes studies that have examined the actual use of alternate measures both in Australia and overseas jurisdictions. Third, it summarises the findings of studies that have assessed the impact or effectiveness of alternate measures for victims and defendants. Next, it reviews the potential impact of alternate measures on conviction rates in child sexual abuse cases. Finally, the report discusses modifications of conventional trial procedures that have been introduced – and can be used in lieu of, and in addition to, alternate measures – namely restrictions on cross-examination of the complainant, expert evidence and judicial instructions.

Types of alternate measures

Alternate measures are innovative trial procedures that aim to help complainants give evidence, while maintaining the right of the accused to a fair trial. Table A.1 provides an overview of the alternate measures currently available in Australian jurisdictions.

Table A.1 Alternate measures currently available in Australia

Alternate measure	Description
CCTV	A complainant gives evidence via CCTV from a remote room located on or off the court premises. This allows the complainant to give evidence without facing the accused and away from the physical presence of the jury and others in court.
Pre-recorded investigative interview	A police interview of the complainant is recorded and submitted as part or all of the complainant's evidence-in-chief.
Pre-recorded cross-examination	The cross-examination and re-examination of a complainant are recorded at a preliminary hearing, and this recording is submitted in court.
Alternative arrangements for the physical layout of the courtroom	The physical layout of the courtroom is altered to facilitate the giving of evidence by a complainant, using screens to block the accused from the complainant's view, clearing the public gallery during the complainant's testimony, requiring members of the judiciary to remove wigs and gowns, and/or using alternative seating arrangements.
Child intermediaries ⁶	Intermediaries paraphrase difficult questions for child complainants and paraphrase children's evidence to the court.

Other modifications to conventional legal procedures that have developed to aid complainants include practical guidelines to support lawyers questioning complainants in child sexual assault proceedings; legislative restrictions on aggressive cross-examination; and the use of expert evidence or judicial directions to explain to the jury any counterintuitive conduct by the complainant.

Review method

An online search was conducted of legal, psychological and criminological databases (including Australian Criminology Database, AGIS Plus Text, ProQuest Criminal Justice, Web of Science and Scopus) for qualitative and quantitative empirical studies addressing uses and the potential impact of alternate measures. Studies were included if they were conducted within the last 25 years in countries with an adversarial legal system, and excluded if they were written in a language other than English. These search criteria resulted in a total of 63 studies being included in the current review. Attached in this appendix (following the Reference list) are two tables that provide an overview of each reviewed study (including the method and findings). Studies concerning the use of alternate measures are in Table A.2, while studies concerning the effectiveness of alternate measures are presented in Table A.3. Table A.3 is split into three sections: Studies concerning alternative procedures (video and audio recording of evidence, CCTV, intermediaries, one-way glass, clearing of court and replay of evidence); studies examining cross-examination of children and adults; and studies examining jury directions and expert evidence. All studies in Appendices A and B are listed in alphabetical order.

The use of alternate measures

A relatively small number of studies have examined the extent to which alternate measures are used in child sexual abuse cases. Studies conducted in Australian states and territories are reviewed first, followed by studies conducted in overseas jurisdictions. Issues that influence the use of alternate measures are discussed where relevant.

Use in Australian jurisdictions

Only a limited number of studies have examined the extent to which alternate measures are actually employed in Australian jurisdictions. The findings revealed marked differences in the use of the measures across jurisdictions, and the fact that the alternate measures are not always used effectively.

The majority of research has been conducted in NSW, where the use of alternate measures has increased steadily over the past 25 years. In the early 1990s, a survey of prosecutors disclosed that although the available alternate measures of support persons for the complainant and court closure were quite frequently employed, screens and CCTV were rarely used.⁷ This study examined 517 child sexual abuse cases – 254 dealt with by committal or summary disposal in the local courts, and 263 dealt with by trial in the higher courts. In these cases, court closure was applied for and granted in 48 per cent of local court proceedings and 31 per cent of trials. Support persons were present in 94 per cent of local court matters and 91 per cent of trials. Applications for screens were made only in 18 per cent of cases in the local courts and 6 per cent of trials, while CCTV was applied for in

6 per cent of local court cases and 2 per cent of trials. Overall, screens and CCTV were used more frequently for older than younger children.

By 2002 the proportion of children giving evidence by CCTV in NSW appears to have risen, with one study reporting 57 per cent of complainants used CCTV at trial (although the small sample size of nine NSW complainants makes it difficult to generalise this finding).⁸ Yet screens were still seldom used. None of the children who were refused access to CCTV were allowed to give evidence behind a screen.⁹ Victim satisfaction with the court process was low, with only 33 per cent of victims confirming that they would report again if the abuse recurred.

In response to the high attrition rates in child sexual abuse cases, and the significant stressors still faced by child sexual abuse complainants, the NSW Government established a child sexual abuse specialist jurisdiction on a pilot basis in late 2002. One of the features of this jurisdiction was a presumption in favour of the use of alternate measures. An evaluation of this pilot program entailed the observation of 17 child sexual abuse trials; 11 in the specialist jurisdiction and six in a conventional comparison registry.¹⁰ All 17 complainants testified via CCTV and their pre-recorded investigative interview was used as all or part of their evidence-in-chief. The results revealed a substantial increase in the use of these measures when compared to that reported in 2002. However, no differences emerged in the use of alternate measures between the specialist jurisdiction and the comparison registry. The presence of the researchers may have stimulated an increase in the use of alternate measures. Given the small number of trials observed, these trends are unlikely to be representative of the alternate measures across the state.

In addition to uses in NSW, Eastwood and Patton¹¹ examined the use of alternate measures in WA and Queensland. The researchers reported that out of all three states, children in WA had the most complete access to alternate measures. Thirty per cent of all WA children in the study pre-recorded their entire evidence-in-chief and cross-examination months before the trial, and the remaining 70 per cent gave evidence at trial with the aid of CCTV. Children in Queensland had the least access to alternate measures; none testified via CCTV, and about half used screens. Only 44 per cent of children in Queensland said they would report abuse again, compared with 64 per cent of children in WA. Oliver¹² has contended that despite legislative changes, the reality in Queensland is that trial practice has not changed significantly. One of the main barriers identified by Oliver was a lack of access to CCTV facilities in rural courtrooms and in Brisbane, resulting

in children being compelled to testify in open court. Oliver further reported that some judges still believed that pre-recorded investigative interviews should not be admitted, and thus used their discretionary powers to prevent lawyers from submitting children's pre-recorded investigative interviews as part of their evidence-in-chief.

In Victoria, the Victorian Law Reform Commission (VLRC) reported similar concerns about judicial discretion and practical limitations.¹³ The availability of CCTV did not appear to be problematic; however, judicial resistance to alternate measures and a mismatch between reform and practice were identified as issues of concern.¹⁴ While no precise figures on the use of alternate measures in Victoria were available, submissions to the VLRC prior to the introduction of the *Evidence Act 2008* (Vic) suggested that electronically recorded statements were infrequently admitted as evidence, and child complainants were frequently required to testify in court.¹⁵ No studies have examined whether the situation has improved since 2004.

Further research in Australia is necessary in all states and territories, to identify the available alternate measures, whether they are employed consistently and what factors affect their utility. The next sections examine research of this nature undertaken in the United Kingdom and New Zealand, to illustrate broader issues surrounding the use of alternate measures.

Use in overseas jurisdictions

In the UK, a large-scale comprehensive study investigated the use and effectiveness of alternate measures.¹⁶ The methodology included witness interviews, interviews and surveys of different stakeholders, and observation of contested court cases. (Further details of the research methodology can be found in Table A.2.) This research focused on all Vulnerable and Intimidated Witnesses (VIWs), not solely child sexual assault victims, and thus does not distinguish between sexual and non-sexual offence cases, victims and witnesses, and adults and children. Nonetheless, this study was helpful in evaluating the impact of alternate measures due to its large sample size and comprehensive repeated measures design.

Specifically, the UK study demonstrated that the most frequently used alternate measures are CCTV (39 per cent) and videorecorded evidence-in-chief (42 per cent), although a significant proportion of VIWs did not use these, but would have liked to have done so (34 per cent live link and 28 per cent recorded evidence). A significant proportion of witnesses would also have preferred to use screens (31 per cent), although only 8 per cent actually used screens. Around

25 per cent of witnesses would have liked the public gallery cleared, but this only occurred in 10 per cent of cases; and 12 per cent would have liked wigs and gowns removed (this occurred in 15 per cent of cases). Least common were intermediaries, who were employed in only 4 per cent of cases. The finding that the most sought-after and used alternate measures were CCTV and video-recorded evidence was replicated in subsequent studies in the UK¹⁷ and New Zealand¹⁸, although these later studies showed that screen use was somewhat more frequent.

The statistics reported in these UK and NZ studies are likely to reflect the demographics of their samples. A consistent and statistically significant finding was that CCTV tends to be used for younger children, whereas screens tend to be used for older children (over 13 years of age) and adults¹⁹, perhaps because older children are generally regarded as capable of testifying in court without assistance.²⁰ CCTV is also used more often when a child is testifying against a family member than when they are testifying against a non-family member.²¹

These findings suggest that CCTV is regarded as the most effective means of shielding vulnerable victims from re-traumatisation at trial. However, it must be noted that CCTV and pre-recorded investigative interviews are often criticised on the basis of a high rate of technical problems, including poor sound and visual quality, which is perceived by legal and academic professionals to detract from the testimony of the witness.²²

Are alternate measures effective?

The effectiveness of alternate measures can be assessed in a number of ways. The following section considers the effectiveness of alternate measures in terms of improvements to the complainants' experience of testifying (for example, by reducing stress and anxiety), and the impact of these measures on the jurors' perceptions of complainants, defendants and trial outcomes. Whether alternate measures are effective is contentious. For example, Richards²³ claimed that due to a failure to translate legislative changes into practice, and the considerable discretion exercised by judges, "provisions introduced to assist child complainants have been ineffective in improving children's experiences and increasing rates of conviction". In contrast, Hamlyn and colleagues in the UK²⁴ reported that alternate measures had a positive impact, leading to a significant increase in witness satisfaction (from 64 per cent to 69 per cent) and a significant decrease in anxiety (from 77 per cent to 70 per cent). These differences in conclusions may

be due to the differing witness groups examined (for example, all VIWs compared to children only), different alternate measures examined, or differences in methodologies.

The following section examines the results of experimental and qualitative studies conducted for each special measure, and evaluates their impact on the experiences of witnesses; the jury's perception of the child and adult witnesses; and the defendant's right to a fair trial.

Closed circuit television (CCTV)

CCTV is one of the most frequently used alternate measures, as noted in Section 3 above. Thus, the most research has been undertaken to examine its effectiveness.

Witnesses' experiences

CCTV appears to benefit victims who testify in child sexual abuse trials. Field and laboratory studies have both shown that children testifying via CCTV are significantly less anxious than children testifying in open court²⁵, and that they find the experience less stressful than children testifying in court.²⁶ This finding extends to being cross-examined, with one child victim noting that being cross-examined via CCTV was less stressful than live examination because it created a greater barrier to the defence barrister. Another child victim noted that being cross-examined via CCTV was easier because someone "yelling at you through the TV ... is not as bad as someone yelling at you from like five feet away".²⁷

Importantly, children are also less likely to refuse to testify if they have the opportunity to do so over CCTV.²⁸ Some parents reported that their child may not have managed without the assistance of CCTV.²⁹ Misuses of CCTV reported in some earlier studies – such as the positioning by defence counsel of the accused so that they were in view of the child, or magnifying the CCTV image so that the child's eye filled the entire screen – have not been reported in recent studies, and no longer appear to be a problem.³⁰

The main reason given by both child and adult sexual abuse complainants for preferring CCTV is that they do not have to meet or see the defendant while testifying.³¹ Although some witnesses find the distance from the courtroom created by the use of CCTV confusing and frustrating³², this sense of remoteness from the defendant appears to be important to others.³³ However, the benefit is compromised when the CCTV room is located within the court precinct, and victims meet the defendant accidentally on their way to or from the CCTV room or

in the waiting room.³⁴ Some jurisdictions (notably the NSW child sexual abuse specialist jurisdiction) use a remote CCTV room, which reduces the risk of accidental meetings between the child witness and the defendant. These rooms may also be furnished more comfortably than conventional courtrooms, further putting the child at ease³⁵, although this is not always the case.³⁶ Indeed, one child witness from the UK commented that “The TV link room was like a cupboard”.³⁷

CCTV may benefit child witnesses in more subtle ways. Laboratory studies have shown that younger children (aged 5–6 years) make fewer errors while testifying via CCTV than in open court, because they are less prone to suggestion.³⁸ However, these studies employed samples of non-abused children who were questioned about a neutral event within two weeks of its occurrence, so it is unclear whether these findings generalise to children who testify about sexual abuse months or even years after its occurrence. CCTV may also influence the behaviour of legal professionals in a positive manner. An ACT pilot study revealed that when a child was being questioned via CCTV, magistrates intervened significantly more often, and prosecutors were significantly more supportive of the child.³⁹

Given that CCTV evidence appears to be widely endorsed by witnesses as a positive alternative measure for their testimony, it is important to consider how CCTV evidence is received by a jury, and what (if any) effect the use of CCTV has on the rights of the defendant. These issues are addressed next.

Perception of child witnesses

As children become more comfortable giving evidence via CCTV, the quality of their evidence seems to improve.⁴⁰ However, this positive consequence may be negated by the impact that CCTV appears to have on how child witnesses are perceived by observers.⁴¹ The majority of the research suggests that the use of CCTV biases juries against child witnesses. For example, Orcutt et al.⁴² found that a large sample of 987 mock jurors from the community perceived children testifying via CCTV as significantly less accurate, attractive, intelligent and honest than children testifying live, and more likely to have made up their story. Similarly, research indicated that children in a laboratory setting seen via CCTV were perceived to be less credible and to provide less detailed and confident statements than children seen live.⁴³ CCTV did not, however, appear to have any actual impact on mock jurors’ ability to assess witness veracity or the accuracy of their statements.⁴⁴

The negative influence of CCTV on perceptions of child witnesses may be due to limitations in observing body

language and other visual cues over CCTV⁴⁵, or the perceived distance between child and fact-finder when CCTV is employed.⁴⁶ Some Queensland and NSW prosecutors cited the latter point as a reason for avoiding CCTV in child sexual abuse cases.⁴⁷ For example, they said “You actually get better depth with the interaction between the accused and the victim in the box” and “I just don’t think there’s enough personal rapport built up between the jury and victim [when using CCTV]”.⁴⁸ An additional concern is that CCTV prevents the jury from accurately perceiving and appreciating the size of the child, which may impact on their assessment of the vulnerability of the child compared to the size of the accused.⁴⁹

In only one study in which the use of CCTV and screens was assessed, witness credibility was found to be unaffected. Ross et al.⁵⁰ presented a taped version of a child sexual abuse trial to mock jurors, in which the child testified either in court, from behind a screen or via CCTV. Jurors rated the child’s credibility in each of the three experimental conditions. No significant differences emerged between groups. If the negative effect of CCTV on jurors’ perceptions of children is due to the distance experienced when watching the child on screen, any differences between ‘live’ and CCTV testimony depicted in the filmed trial were likely to disappear since both conditions were viewed on videotape.

Jurors appear to be unaware of any bias against child witnesses seen on CCTV. When questioned about their impressions of this alternative measure, the majority (90 per cent) of jurors questioned after the conclusion of four child sexual abuse trials in Sydney stated that CCTV was “quite fair” or “very fair” to the child.⁵¹ As such, it is unlikely that juror biases will be remedied by a jury direction of the type usually given in these cases⁵², explaining that CCTV is a standard procedure in child sexual abuse cases and should not influence jury assessments of the child witness.

Perception of adult witnesses

Just as for child witnesses, concerns have been raised as to how jurors perceive adult witnesses testifying with the aid of alternate measures. In the Stern Report, alternate measures were heavily criticised by many professionals with experience of jury trials.⁵³ Alternate measures were seen as detrimental to the success of the case, with one professional stating “Juries prefer theatre to film”.⁵⁴ However, experimental research on this issue is scarce. There are no empirical studies examining the impact of alternate measures on adult witnesses in cases of historical child sexual abuse, and only two studies have examined alternate measures for adult complainants in rape cases. Both of these studies concluded that presentation mode (live, CCTV and pre-recorded evidence) does not differentially impact

mock-juror perceptions of the complainant, and that pre-existing juror attitudes towards rape are much more important to the outcome of rape trials than how the evidence is presented.⁵⁵

Closer inspection of the findings by Ellison and Munro, however, raises doubt about their conclusion, as they were based solely on a qualitative analysis of mock-jury deliberation and questionnaire data.⁵⁶ No statistical tests were conducted on pre- or post-jury deliberation verdicts or variables indicating how the complainant was perceived. The authors noted that more guilty votes were recorded in the control condition (37 per cent) than any of the experimental conditions (live link: 8 per cent; video: 21 per cent; screen: 12 per cent); the complainant was perceived as more emotional in the control condition (87 per cent) than the other trial conditions (live link: 82 per cent; video: 66 per cent; screen: 65 per cent); and the complainant was perceived as most credible in the live link condition (41 per cent compared with 37 per cent in the control and video conditions, and 32 per cent in the screen condition). These results suggest that the presentation mode may affect the perception of adult complainants. Without quantitative analysis, it is impossible to know whether any of these differences are statistically significant. Far more empirical research is needed before determining what impact, if any, alternate measures for adult complainants have on jurors.

Fairness to the defendant

It is “the challenge for law- and policy-makers [to make reforms] without compromising the rights of the accused persons to a fair trial”.⁵⁷ This need to balance the rights of the accused with those of the witness – and a perceived fear that alternate measures may breach this right (especially a right to ‘confrontation’) – is arguably the reason why alternate measures are not employed in more child sexual abuse cases.⁵⁸ When interviewed about the impact of alternate measures, only defence lawyers in a 1996 study (not judges, magistrates, prosecutors, ODPP lawyers, child sexual abuse counsellors or witness assistance officers) thought these arrangements were unfair to defendants.⁵⁹

Empirical research does not support the concern that alternative measures are unfair to the accused. The few studies that have examined the effect of CCTV on the rights and perceptions of the accused by the jury have found no evidence that the use of CCTV negatively impacts on the defendant.⁶⁰ Mock jurors are no more likely to believe the defendant is guilty when evidence is given via CCTV⁶¹, and some legal professionals in NSW and WA even suggested that CCTV minimised the prejudice experienced by the accused because the quality of the child’s evidence improved. The only real concern is that CCTV may aid

the prosecution as cross-examination cannot be as vigorous via CCTV as live in court⁶², and magistrates might intervene more often to clarify questions by legal counsel.⁶³

Pre-recorded investigative interviews

This section examines the effectiveness of using a complainants’ pre-recorded investigative interview as part or all of their evidence-in-chief. Results are reviewed in terms of their implications for witness experiences, jury perceptions, fairness to the defendant, professionals’ views and the quality of investigative interviews.

Witnesses’ experiences

Pre-recording victims’ police interviews to be used in part or whole as their evidence-in-chief has been demonstrated to be an effective means of reducing the stress of testifying in person at trial.⁶⁴ In one mock jury study, children were significantly less nervous when testifying about an innocuous event if their testimony was pre-recorded rather than given live to an adult mock jury.⁶⁵ In another study involving the administration of questionnaires to professionals before and after the implementation of videotaped evidence-in-chief for children, judges, barristers, police officers and social workers rated children as significantly less anxious when interviewed on tape compared with live in court.⁶⁶ Moreover, pre-recorded testimony appears to reduce anxiety even more than CCTV testimony, as demonstrated by Wilson and Davies.⁶⁷ These researchers conducted a large study in England and Wales 1993–94, in which they observed 93 child sexual abuse trials involving 150 child witnesses aged 5–17. Eighty-eight per cent of the children were alleged victims, and 73 per cent of the children used their videorecorded interview as evidence-in-chief. The researchers rated the observed demeanour of the child witnesses and invited them to respond to questionnaires after they had testified. Children who pre-recorded their testimony were rated as significantly less anxious than children who testified via CCTV. Furthermore, out of 17 children who responded to the questionnaire, the majority wanted to pre-record their evidence.

Researchers in the large UK study described above (in Section 3) questioned witnesses who used pre-recorded investigative interviews as part of their evidence-in-chief regarding the reasons they found it helpful to pre-record.⁶⁸ The witnesses responded that pre-recording was useful because it meant they did not have to appear in court (43 per cent of respondents), it made it easier to say things (22 per cent), they were less scared (13 per cent), it helped them to remember (12 per cent) and they were in a

comfortable environment (9 per cent). Pre-recorded interviews were also considered more beneficial by respondents because victims do not have to tell their story numerous times; can give their evidence closer to the time of the alleged offence rather than waiting months or years to give evidence; can view the videotape prior to trial to refresh their memories; and do not have to spend as much time being questioned by the prosecutor in court.⁶⁹

Quality of the pre-recorded interview

Despite the many benefits of using the complainant's police interview as evidence-in-chief, researchers and legal professionals have indicated that there are significant problems with the practice. Frequently, police interviews are too long and contain too much detail or inadmissible information⁷⁰, resulting in witness and juror fatigue, and providing more opportunities for defence counsel to challenge the account of the witness. Police questioning is often poor, reducing the evidentiary quality of the interview and requiring supplementary questioning at trial.⁷¹

Perception of child witnesses

Similar to testimony via CCTV, it appears that jurors perceive pre-recorded investigative interviews as less positive than live testimony. Field and experimental studies have both found that children testifying on video are perceived as providing less confident and convincing statements than children testifying live⁷², are regarded as less honest⁷³ and evoke less empathy.⁷⁴ Again, these findings may be due to a perceived distance between a child witness and the jury when pre-recorded video evidence is employed.⁷⁵ Jurors' perceptions of child witnesses on video do not, however, translate into any actual differences in jurors' ability to determine children's veracity⁷⁶, or the accuracy of their testimony⁷⁷, which is poor irrespective of the evidence presentation mode.

Results of a number of experimental studies have suggested that the perceived credibility of child witnesses appearing on video is moderated by jury deliberation. Eaton et al.⁷⁸ found no significant main effect for child witness credibility, but reported a significant interaction between perceived child witness credibility and the deliberation stage: credibility increased after deliberation. This improvement in credibility after jury deliberation was replicated by Goodman et al.⁷⁹, who reported a significant difference compared to perceived child witness credibility pre-deliberation. Children testifying via video were regarded as less credible than those testifying live, but this effect disappeared post-deliberation. It is unclear why video testimony negatively impacted child witness credibility when assessed pre-deliberation in one study and not the other. Possible explanations include jurors' differing

preconceptions of child witnesses⁸⁰; cultural differences in perceptions of child witnesses between the US⁸¹ and Australia⁸²; differences in the measures used in the questionnaire administered to mock jurors to assess their perceptions of the child witness; or even differences in the camera shot used to videotape child witnesses (long or short), which can influence how children are perceived.⁸³

Perception of adult witnesses

As noted above, findings in studies by both Taylor and Joudo⁸⁴ and Ellison and Munro⁸⁵ suggested that alternate measures do not impact jurors' assessment of adult complainants. However, this conclusion is tentative for pre-recorded interviews: Ellison and Munro conducted no statistical analyses to support their contention, and Taylor and Joudo reviewed a videotape of the complainant's examination-in-chief and cross-examination (as in the live condition) rather than a videotape of the complainant's police interview. Most videorecorded evidence-in-chief is the complainant's police interview, which is rarely followed by a pre-recorded cross-examination, thus the ecological validity of this experiment – and consequently the generalisability of the results – is limited. Further research is needed on how alternate measures impact the perception of adult witnesses before any firm conclusions can be drawn.

Fairness to the defendant

The effect of pre-recorded investigative interviews on the perception of the defendant remains unclear. Eaton and colleagues⁸⁶ asked mock jurors to rate defendant credibility and guilt after a mock child battery trial, and found that pre-recorded video testimony did not influence perceptions of defendant credibility but did increase perceptions of the defendant's guilt. In contrast, no other studies reported unfavourable effects of the presentation mode on perceptions of the defendant.⁸⁷

A separate but related issue is the replay of pre-recorded investigative interviews, which 10 per cent of jurors in the study by Cashmore and Trimboli⁸⁸ found helpful during deliberations. Lawyers have submitted that replay of videotaped interviews may lead the jury to place undue weight on the evidence of the child and insufficient weight on the defendant's evidence, which may lead to a miscarriage of justice.⁸⁹ Nonetheless, some lawyers have recommended that videotaped interviews should not be available to juries during deliberation, and if replayed in court, the judge should also remind the jury of the content of cross-examination and re-examination.⁹⁰ These contentions have not been empirically tested.

Professionals' views

Professionals' opinions regarding the utility and effectiveness of pre-recorded investigative interviews are mixed. Most prosecutors and defence lawyers questioned about the use of pre-recorded investigative interviews in the NSW specialist jurisdiction pilot program viewed them positively; prosecutors because they thought it introduced the child's evidence more clearly, and defence lawyers because they could hear the evidence-in-chief before trial.⁹¹ Similarly, 88 per cent of the 24 participants (15 prosecutors, five victim advisors and four defence counsel) in a focus group study⁹² supported pre-recorded interviews, as did a majority of participants in a study of criminal justice professionals⁹³ (99 per cent of Joint Investigation Response Team officers; 88 per cent of WAS officers and child sexual abuse counsellors; 83 per cent of prosecutors; and 82 per cent of judges and magistrates). However, only 33 per cent of defence lawyers supported this provision.⁹⁴ Prosecutors have also expressed disparate views on whether pre-recorded interviews constitute credible and persuasive evidence⁹⁵ – for example, supporting pre-recording in principle, but not in relation to the cases they were prosecuting, in which they preferred to have the child give their testimony live.⁹⁶

These mixed findings reflect the conflict reported above; that children and other vulnerable witnesses find pre-recorded evidence helpful, but juries prefer evidence given by children in person in court. Legal professionals have to balance many factors. On the one hand, there are factors such as the welfare of the witness; the benefit of capturing and recording the witness' statement early and accurately⁹⁷; the ability to re-use that same evidence in re-trials if necessary⁹⁸; and the ability to edit statements.⁹⁹ On the other hand, there are concerns regarding the quality of the pre-recorded interview; the fact that the child will have to be cross-examined 'cold' months or even years after recording their evidence-in-chief¹⁰⁰; and the finding that recorded evidence is less persuasive and has less emotional impact than live testimony.¹⁰¹ This balancing act is frequently discussed with respect to pre-recorded evidence, but is also applicable to other alternate measures, such as the use of CCTV and screens.

Pre-recorded cross-examination

In a few jurisdictions (such as WA), prosecutors can apply to have the whole of a child's evidence (including cross-examination and re-examination) videorecorded at a pre-trial hearing. No studies have specifically examined what issues arise when the entirety of a child's evidence is pre-recorded. It is likely that this practice will overcome some issues of using pre-recorded evidence-in-chief only – notably

that children do not go into cross-examination 'cold' a significant time after their police interview, and that children usually do not then have to attend trial.¹⁰² However, issues regarding how children are perceived over video are likely to persist.

Alternative arrangements for the physical layout of the courtroom

Research evaluating the effectiveness of alternative courtroom arrangements in improving complainants' experience in court is limited. The following sections review studies that have examined the impact of screens, the removal of wigs and gowns, and clearing of the public gallery.

Screens

Screens have been found to be "of variable quality and usefulness."¹⁰³ VIWs in a large UK study found screens helpful¹⁰⁴, but professionals from the Crown prosecution service, Crown courts, the police and witness agencies found them less useful.¹⁰⁵ Although prosecutors and police in that study thought screens would increase witness confidence, this benefit was undermined by the "common practice" of applying for a screen on the day of the trial (which occurred in 80 per cent of cases). Not knowing whether they would have access to a screen prevented witnesses from obtaining the full benefit of this measure. Additionally, not all courtrooms are designed to accommodate screens, and different types of screens (including heavy notice board type screens, wheeled screens and curtains) are differentially effective.¹⁰⁶

The effect of screens on juries is unclear; in one study, a social worker suggested that "the jury often feel sympathy for the child when a screen is used as it highlights the powerlessness of the child", while a defence lawyer criticised the measure for implying the guilt of the defendant: "In my view it very much goes against the presumption of innocence".¹⁰⁷ In contrast, Ross et al.¹⁰⁸ reported that screens had no effect on witness credibility. Ultimately, more research is required to understand the impact of screens in child sexual abuse trials.

Removal of wigs and gowns, and clearing of the public gallery

These two alternate measures are not often used, and there is very little research considering their impact. In the large UK study, nearly all VIWs who were asked whether they would like judges to remove their wigs and gowns declined the offer.¹⁰⁹ However, in the 15 per cent of cases where this measure was used, witnesses found it helpful.¹¹⁰ Clearing the public gallery is a rarely utilised measure, occurring in only one trial in the Home Office study. It is possible that

its lack of use in Australian states is due to concern that clearing the gallery “conflicts with the principle of open justice”.¹¹¹ Alternatively, it could simply be that it is not considered a very effective measure.

Child intermediaries

Intermediaries are appointed to assist a witness to give evidence by acting as a ‘go-between’, ensuring that all questions put to the witness are in a form that is developmentally appropriate (in the case of a child) and capable of being understood.¹¹² However, there is limited research on the effectiveness of child intermediaries in child sexual abuse cases.

In one field evaluation of intermediaries in England, the “feedback from witnesses ... was uniformly enthusiastic”.¹¹³ Benefits included increasing the number of cases that went to trial, and facilitating neutral communication at trial by ensuring witnesses understood lawyers’ questioning and providing explanations when they did not. One limitation was that judges intervened less during inappropriate questioning because of the presence of the intermediary. Although this study did not focus exclusively on child witnesses (14 per cent were children, and 54 per cent victims of a sexual offence), similar results were obtained in a NZ study concerning children. In that study it was concluded that intermediaries might indeed effectively improve the quality of children’s evidence.¹¹⁴ Possible issues arising from the use of intermediaries include reduced control of questioning by counsel, and lack of shared understanding between lawyers and intermediaries as to what constitutes ‘good’ questioning practice.¹¹⁵

In Australia, the possibility of implementing an intermediary scheme has not been greeted with equivalent enthusiasm. Twenty-five professionals who had extensive experience working with child sexual abuse victims and other vulnerable witnesses expressed concerns about the practical limitations of such a scheme when interviewed about the possibility of using intermediaries in child sexual abuse trials.¹¹⁶ Although generally open-minded to the new reform, these professionals were concerned about adding further complications to the current system. In their view, improving the effectiveness of current measures – specifically the quality of the investigative interview – was a priority before considering the addition of a new measure.

Alternate measures and conviction rates

This review has revealed that there are benefits for children and vulnerable witnesses using alternate

measures in child sexual abuse trials, and that these benefits do not appear to come at a cost to the defendant. However, have these alternate measures had any impact on conviction rates? A number of experimental studies have shown that mock juries are more likely to convict defendants after hearing children live in court compared to when they hear children via CCTV, on videotape or from behind a shield.¹¹⁷ (Further details on these studies can be found in Table A.3.) This finding is consistent with the findings reported above that juries prefer live testimony.

However, most of the literature suggests that alternate measures do not influence conviction rates. Two experimental studies found that the defendant is no more likely to be convicted in the CCTV condition compared to a live condition or videotape condition.¹¹⁸ More importantly, none of the studies that have examined conviction rates in actual child sexual abuse cases found that these have any significant effect on case outcome.¹¹⁹ These studies included cases involving child complainants¹²⁰, adult victims of sexual assault¹²¹ and vulnerable victims in general¹²², as well as cases heard in both lower and higher courts.¹²³

Other measures that assist child sexual abuse complainants at trial

A review of the empirical literature on alternate measures has demonstrated that these are relatively effective in assisting complainants in child sexual abuse cases (for example, by reducing anxiety and stress while testifying). However issues remain, particularly with respect to cross-examination, complainant credibility and low conviction rates. This section will examine three additional modifications, which have been introduced to aid complainants in child sexual abuse cases. These include restrictions on cross-examination, expert evidence and judicial instructions. Further details on the studies reviewed in this section can be found in Table A.3.

Restrictions on cross-examination

Conventional cross-examination is detrimental to the accuracy of testimony given by both children and adults.¹²⁴ This reduced accuracy is due to the high proportion of complex, oppressive, intimidating, confusing, leading, closed, and credibility- and truth-challenging questions usually used during cross-examination.¹²⁵ Reforms have therefore been introduced in all Australian states and territories to

restrict the questions that can be put to a witness during cross-examination, and the manner in which cross-examination can be conducted. For example, in Uniform Evidence Act jurisdictions, the judge must disallow a question put to a witness if it is “misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive”. A judge must also disallow questions asked in a belittling or insulting manner.¹²⁶

It remains unclear what impact, if any, these reforms have had on the practice of cross-examining witnesses in child sexual abuse trials. In the NSW child sexual abuse specialist jurisdiction, the linguistic style of defence lawyers was still poorly matched to the child’s linguistic style in terms of vocabulary, sentence structure and sentence length.¹²⁷ Only two defence lawyers were found to match their linguistic style to the developmental level of the complainants, and conducted their cross-examination using a “simple and effective style of questioning”.¹²⁸ Judicial interventions during cross-examinations (to protect the child) occurred in 21 per cent of cases, though most of these – 72 per cent – occurred in four trials: two in the specialist jurisdiction and two in the comparison registry. Some examples of positive judicial interventions included “No, I reject that question. She has already said [name of another witness] was not in the room with her and the accused. You are not drawing that distinction” and “Be fair to her, she’s only 11. That’s why we have it on the CCTV ... you’ve got to treat her with a bit more respect, do you understand?”¹²⁹ Overall, analysis of the interviews with professionals and review of court transcripts revealed considerable variability in the extent of judicial intervention, with some judges intervening more frequently than others.

Research conducted in New Zealand has similarly examined reforms aimed at improving questioning practices. Analyses of court transcripts revealed that defence lawyers continued to ask a large proportion of closed, complex and credibility-challenging questions, including questions with double negatives, complex vocabulary and multiple subordinate clauses.¹³⁰ In one study, judges intervened a total of 38 times in 10 out of 16 cases.¹³¹ These results suggest that reforms will not by themselves result in a significant change in practice, although it must be noted that in New Zealand, judicial intervention in these cases is discretionary, whereas in many states in Australia, judicial intervention is mandatory. Further research is therefore needed in Australia to investigate whether reforms here have had the desired effect on cross-examination practices.

Expert evidence

Jurors hold many misconceptions about child sexual abuse that influence their assessment of complainant and defendant credibility, and ultimately defendant guilt.¹³² Expert evidence is one legal mechanism that has been proposed as a way of countering these misconceptions, by increasing juror knowledge about child sexual abuse and thus creating a less biased environment in which the claims of the complainant can be assessed.¹³³

Uniform Evidence Act jurisdictions now allow experts on child development and child sexual abuse to testify in child sexual abuse proceedings.¹³⁴ Experimentally, expert evidence has been shown to be effective in reducing child sexual abuse misconceptions¹³⁵ and increasing complainant credibility.¹³⁶ However, findings regarding the effect of expert evidence on conviction rates are mixed. In one study, mock jurors who watched a simulated adult sexual assault trial on video were more likely to convict if expert testimony was given than no expert testimony.¹³⁷ In another, mock jurors were no more likely to convict after reading trial transcripts of a child sexual abuse case with an expert witness than a parallel child sexual abuse trial without expert testimony.¹³⁸ These different outcomes are most likely due to differences in methodology (presentation of the trial via video or transcript); the different subject matters of the trials (adult compared to child sexual assault); and differences in the content and nature of the expert evidence itself. For example, Freckelton distinguished five different types or categories of counterintuitive evidence regarding the reactions of a child victim to sexual assault.¹³⁹

Broadly, there are two types of expert evidence that can be presented at trial: educative and specific.¹⁴⁰ An expert giving educative evidence will explain the impact of sexual abuse on children, without expressing any explicit opinion as to whether the complainant in the case at hand was or was not sexually abused. Educative expert testimony may address some of the misconceptions that jurors hold about child sexual abuse.¹⁴¹ In contrast, an expert giving specific evidence will often approach the task more diagnostically, interview the child victim, and then apply psychological knowledge about child sexual abuse to express an opinion about whether a particular complainant was sexually abused.¹⁴² Studies examining the effect of educative and specific testimony on jurors have shown that jurors are more strongly influenced by specific testimony¹⁴³, and that this influence is particularly potent when the demeanour or reactions of the child witness are congruent with the testimony of the expert.¹⁴⁴ Gabora and colleagues¹⁴⁵ reported that when specific expert testimony was presented, mock jurors voted for

conviction in 73 per cent of cases, significantly more often than when educative testimony (59 per cent) or no expert testimony (56 per cent) was presented.

Lastly, the effectiveness of expert evidence may depend on whether it is based on scientific or clinical expertise. Some studies suggest that expert evidence based on clinical expertise leads to significantly higher complainant credibility ratings and higher conviction rates than expert evidence based on scientific expertise.¹⁴⁶ The credentials of an expert, however, have been found to have no impact on juror perceptions of the complainant.¹⁴⁷

Judicial instructions

Judicial instructions can act in the same way as expert evidence, reducing misconceptions in child sexual abuse cases, and educating the jury about typical behaviour of child abuse victims. Research undertaken by Goodman-Delahunty and colleagues¹⁴⁸ suggests that judicial instructions will reduce child sexual abuse misconceptions whether given before the child testifies or in summation, but to have an impact on complainant credibility and verdict, are best presented before the complainant testifies.¹⁴⁹ Educative information presented in judicial directions was just as effective at reducing child sexual abuse misconceptions as expert evidence, but less effective at increasing complainant credibility. However, the impartiality of the judge was compromised by providing educative information; that is, the judge was perceived as biased towards the prosecution.¹⁵⁰ These findings indicated that expert witnesses rather than judges should present educative information.

Conclusion

This review has examined the use and effectiveness of alternate measures in child sexual abuse trials. The review suggests that the most widely used alternate measures are the pre-recorded investigative interview and CCTV, and that witnesses generally find these helpful. At times, however, a lack of access to CCTV facilities and judicial resistance against the use of pre-recorded interviews still results in children giving evidence in person in court. Pre-recorded cross-examination is highly valued by child witnesses, but is only commonly used in one Australian jurisdiction. In contrast, alternative arrangements for the physical layout of the courtroom and child intermediaries are used less frequently, possibly because they are not perceived to be as effective as CCTV and pre-recorded interviews.

The effect of alternative measures on the perceived credibility and veracity of child witnesses is less positive than that of children giving evidence live; the

majority of studies suggest that jurors regard evidence on screen in less positive terms than in-person 'live' evidence. Similar outcomes have been documented in cases where adults give evidence with the help of alternate measures, but further research is required before a more definitive conclusion for adults can be reached. The use of alternate measures does not appear to influence conviction rates, nor do alternate measures appear to have any negative consequences for the accused. However, the latter issue is still raised by some legal professionals. Future research on consequences for the defendant is needed to inform these concerns.

The main issues that remain to be overcome for child witnesses are cross-examination, the quality of the police investigative interview, and the negative views still held by some jurors and legal professionals about children's credibility. Although reforms have been implemented to restrict aggressive cross-examination, it is unclear whether these are having any effect. Significant issues remain with the quality of the pre-recorded investigative interview, which is frequently too long and includes too many irrelevant details. Jury directions and expert evidence have been proposed as ways to reduce misconceptions about child sexual abuse and thus increase complainant credibility, and studies have shown that these measures are relatively effective. As these mechanisms are not yet widely implemented in Australian jurisdictions, adopting them may help to address the problem of low complainant credibility in child sexual abuse cases.

Table A.2 Studies on the use of alternate measures

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Main outcomes and findings
Burton, Evans and Sanders, 2006	Home Office	Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies	Observational and qualitative	CCTV; pre-recorded evidence; screens; clearing of gallery; removal of wigs and gowns	42 police, 42 Crown Prosecution Service (CPS), 89 Witness Service representatives; 15 Crown Courts representatives surveyed. 4 police, 4 CPS, 8 Witness Service, 10 court officials and 8 judges interviewed. Approximately 500 'vulnerable and intimidated witnesses' from 4 different areas.	191 prosecution cases tracked through the decision-making process. 26 contested cases observed in court to observe how the special measures were implemented.	<p><i>Applications for special measures:</i></p> <ul style="list-style-type: none"> Problems included lack of adequate or supporting information/evidence from police; the need to balance the victim's and defendant's interest; lack of resources within CPS (for example, prosecutors had insufficient time to review video evidence); and tight time scales. The judiciary was, on the whole, supportive of applications. The majority (11/15) of respondents to the court survey thought the prosecutions made applications in all or most cases where it was appropriate. The CCTV link is rarely granted in cases involving older children. This is because older children are thought of by judge and jury as fully capable of giving evidence in court without any assistance. Screens (in contrast) are most commonly considered as a special measure for adult (not child) witnesses. It is rare for applications for special measures to be contested. Overall, there are a significant number of witnesses for whom the most useful special measure was not applied. <p><i>Videorecorded evidence</i></p> <ul style="list-style-type: none"> It was found that despite three-quarters of police viewing recorded evidence as 'very effective', and helping to put the child at ease, they are relatively rare. Possible reasons are that video interviews always perform multiple functions (designed to investigate and provide evidence) and thus are not the same as a barrister's narrative construction at trial; the interview quality itself is variable (regarding both technical aspects and competency of interviewer). When sound quality is poor, the jury is given the transcript, but cannot retain this beyond the duration of the interview. Another disadvantage: witness goes into cross-examination 'cold', and a long time after giving their evidence-in-chief. Judges and prosecutors rated video evidence less highly than police did, and viewed it as having less impact. <p><i>CCTV</i></p> <ul style="list-style-type: none"> Live link was rated by respondents as the most effective measure, because witnesses did not have to enter the courtroom or come into contact with the defendant. <p><i>Screens</i></p> <ul style="list-style-type: none"> These have been found of variable quality and usefulness. They were seen by prosecutors and police to give confidence to witnesses. Sometimes they can be less effective (when not able to screen witness completely). <p><i>Removal of wigs and gowns</i></p> <ul style="list-style-type: none"> This measure is not often used – it was only used in 15% of cases.

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Cashmore and Trimboli (2006)	<i>Contemporary Issues in Crime and Justice</i>	Child sexual assault trials: A survey of juror perceptions	Observational	CCTV; pre-recorded evidence	277 jurors from 25 juries (54% male, 74% Australian born, 17% born in a non-English speaking country). Child complainants in trial were mostly female (88%), average age at trial 12.3 years. All defendants were male.	Administered a short structured survey to jurors at the end of a child sexual abuse trial conducted at four district courts in Sydney 2004–5.	<ul style="list-style-type: none"> Possibly this is because it is not seen as significant. In several observations, judges gave child witnesses the option of removing wigs/gowns, but this was nearly always refused. This is the most ineffective measure. <p><i>Clearing the courtroom</i></p> <ul style="list-style-type: none"> Practitioners feel uneasy about this, which appears to conflict with the principle of open justice. There was only one attempt to clear the public gallery. Overall, all agencies feel that reforms have helped significantly. In 22 out of 25 trials a pre-recorded interview was played in court as part of the child's evidence in chief. Most jurors (79.4%) indicated the tape was the 'right' length, 18% said it was too long (including all jurors from one trial where tape was 100 minutes long). 84% of jurors stated the pre-recorded tape helped 'a lot' (44.6%) or 'quite a bit' (39.4%) in understanding the child's evidence. 10.2% of jurors said the tape was played several times during their deliberations and helped them to go over the evidence to clarify issues (this was found helpful). All child complainants gave evidence via CCTV. Most jurors saw this as 'quite fair' or 'very fair' to the child complainants (90.3%) and to the defendants (88%). <p><i>Problems with technology</i></p> <ul style="list-style-type: none"> Jurors had more problems seeing/hearing child on pre-recording than via CCTV, 32% had problems seeing or hearing the pre-recorded statement because of poor quality sound/visuals. 14.5% of jurors reported problems with image/sound of CCTV. Problems with camera placement, lighting in witness room, image distortion, and problems with microphones were also noted. <p><i>Court closure</i></p> <ul style="list-style-type: none"> Applied for in 124 local court proceedings and 93 trials; refused in one case by magistrate (local court) and in 9 cases by judge. Support persons: children did not have/request support persons in 17 local court matters and 23 higher court cases. <p><i>Screens and CCTV</i></p> <ul style="list-style-type: none"> Whether or not applications were made were influenced by the type of hearing involved, and the age of the child. For both measures, applications were infrequently made; they were more frequent in local courts than in higher courts, and for younger than older children. Overall, there were applications for screens or CCTV made for 20.1% of children in local courts and 6.1% of children in higher courts. The applications for CCTV at trial were for children under 10; in the local court, 82% of children were under 12. Applications for screens were more frequent in older children but the majority were still under 12 (60% in local courts, 75% in trials). Applications for CCTV that were made were granted; most applications for screens
Cashmore (1995) Australia	<i>Australian and New Zealand Journal of Criminology</i>	The prosecution of child sexual assault: A survey of NSW DPP Solicitors	Observational	Court closure; support persons; screens; CCTV	168 child complainants gave evidence in the local court (aged 3–17, $M = 12.5$); 145 children gave evidence in the higher courts (aged 5–17, $M = 13.1$).	Administered surveys to DPP solicitors dealing child sexual assault cases in NSW courts between 1991–2. Covered a total of 254 cases.	<ul style="list-style-type: none"> Applied for in 124 local court proceedings and 93 trials; refused in one case by magistrate (local court) and in 9 cases by judge. Support persons: children did not have/request support persons in 17 local court matters and 23 higher court cases. <p><i>Screens and CCTV</i></p> <ul style="list-style-type: none"> Whether or not applications were made were influenced by the type of hearing involved, and the age of the child. For both measures, applications were infrequently made; they were more frequent in local courts than in higher courts, and for younger than older children. Overall, there were applications for screens or CCTV made for 20.1% of children in local courts and 6.1% of children in higher courts. The applications for CCTV at trial were for children under 10; in the local court, 82% of children were under 12. Applications for screens were more frequent in older children but the majority were still under 12 (60% in local courts, 75% in trials). Applications for CCTV that were made were granted; most applications for screens

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Davies, Wilson, Mitchell and Milsom, 1995	Home Office	Videotaping children's evidence: An evaluation	Qualitative	Videotaped evidence	Judges, barristers, police and social workers.	Administered questionnaires to court and child protection professionals before and after the implementation of an act allowing the admission of videotaped evidence-in-chief for children.	<ul style="list-style-type: none"> were granted. There seemed to be little impact on outcome. In local court matters, the committal/conviction rate was 79.5% with screens, 81.3% with CCTV, and 87% with neither. For higher courts, conviction rate was 50% for screens, 35% for no measure, and 3 cases with CCTV resulted in conviction. Judges (82%), barristers (43% defence, 50% prosecution), police officers (39%) and social workers (62%) all believed that the main benefit of allowing videotaped evidence in court was the reduced stress on child witnesses. Evidentiary quality was satisfactory. Children interviewed on tape were rated less anxious and the interviewers more supportive and accommodating to the child's linguistic style than were those examined in person at court. Main disadvantages (police and social workers): witness may still have to attend court, and cross-examination still needs to take place. Main disadvantages (judges and barristers): problems due to poor interviewing technique, false allegations less likely to be detected. There were no significant differences between the proportion of guilty verdicts delivered for videotaped evidence as opposed to live examination-in-chief.
Hamlyn, Phelps, Turtle and Sattlar (2004)	Home Office	Are special measures working? Evidence from surveys of vulnerable witnesses	Observational	CCTV; pre-recorded evidence; screens; clearing of gallery; removal of wigs and gowns	552 witnesses were in phase 1 (before introduction of the act)(57% female); 569 witnesses in phase 2 (after Act's introduction) (40% female). 42% of witnesses were aged under 17 (so sample includes adults); of those, 15% were victims of a sexual offence.	<ul style="list-style-type: none"> 552 vulnerable and intimidated witnesses (VIWs) were interviewed before, and 569 VIWs after, the introduction of the <i>Youth Justice and Criminal Evidence Act 1999</i> (which is aimed at improving testimony by VIWs). 	<ul style="list-style-type: none"> Found a statistically significant increase in witness satisfaction between phase 1 and phase 2 (from 64–69%). The amount of anxiety experienced at any stage of being a witness declined between the two phases, from 77% to 70%. Anxiety at court reduced from 27% to 17%. <p><i>Special measures</i></p> <ul style="list-style-type: none"> Witnesses using special measures rated them very highly. 91% of victims supported videorecorded evidence-in-chief because they did not have to appear in court (43%), it was easier to say things (22%), they were less scared (13%), it helped witness remember (12%) and it was a friendly/comfortable environment (9%). 83% of witnesses used live TV link. 90% said they found it helpful (mainly because they could give evidence without having to see the defendant or anyone else in court). 9 witnesses aged under 17 gave evidence in court with a screen; it was generally found helpful. Clearing the public gallery and removal of wigs and gowns was also found to be helpful.
Hanna, Davies, Crothers and Henderson	Psychiatry, Psychology and Law	Child witnesses' access to alternative modes of testifying in New	Observational	CCTV; pre-recorded evidence; screens	134 children (age 5–17; 23 male, 110 female). Of these, 114 were complainants, and	Obtained applications for alternative modes filed by prosecutors in NZ on behalf of 134 children between 1 March 2008	<ul style="list-style-type: none"> Found that 44% of applications sought CCTV, and 56% sought screens. CCTV was sought for younger children, while screens were sought for older children. This difference was statistically significant ($p < 0.000$), and existed despite all witnesses and complainants (adult and child) being eligible for the measures. CCTV was more often sought when child was testifying against a family member

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(2012)		Zealand			20 witnesses.	and 27 Feb 2009. Administrators at the Crown Solicitor's offices filled out questionnaires regarding alternative modes sought, those contested, and demographic information of the child.	<ul style="list-style-type: none"> Defence lawyers contested 22% of the CCTV applications and 19% of the screen applications, which might indicate that they believed these were detrimental to their clients. (p = 0.004).
Hanna, Davies, Henderson, Crothers and Rotherham (2010)	<i>Institute of Public Policy: An Institute of AUT university</i>	Child witnesses in the NZ Criminal Courts: A review of practice and implications for policy	Observational	CCTV; screens; pre-recorded evidence	71 children who testified in 46 trials. (77% of children were complainants; 75% were female; age range 6–16, M = 13.7).	<p>Anonymised data on the administration of the trials was collected.</p> <p>Questionnaires were also administered.</p>	<ul style="list-style-type: none"> Across all regions, the modes of evidence used were (out of 71 child witnesses): forensic interview as evidence-in-chief and CCTV (45%); forensic interview as evidence-in-chief and screen (21%); screen only (18%); ordinary way (14%); and CCTV only (1%). All younger children (20 aged under 13) gave their evidence-in-chief via recorded interview and CCTV; the modes used by older children (51 aged over 13) were more varied. Pattern suggests CCTV is used for younger and screens for older children. The 10 children who gave evidence the ordinary way were all 15 years old. Benefits of pre-recorded interview include the prosecutor and children being able to view it before trial. For children, this might refresh their memories. In the current sample, this was not the case in quite a high number of cases.
Plotnikoff and Woolfson (2009)	<i>National Society for the Prevention of Cruelty to Children (Report)</i>	"The trial" in measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings	Observational	Pre-Recorded evidence; live link; screens; clearing the court	182 young witnesses (of whom 172 gave evidence), and the parents of the 172 children.	<p>Compared young witness policies and guidance with children's experiences in order to measure whether improvements have been achieved.</p> <p>Conducted interviews with 182 young witnesses and 172 parents.</p> <p>Information also received from 52 managers of witness services.</p>	<p><i>Pre-recorded evidence</i></p> <ul style="list-style-type: none"> 55% of victims made visually recorded evidence. Of those who made a recording, it was used as their evidence in chief in 95% of cases: 85% of those said that playing their recording as evidence was helpful. Recordings were sometimes not used because of equipment failure and were sometimes rejected due to poor technical quality or failure to review content, which was ruled inadmissible. <p><i>Live link</i></p> <ul style="list-style-type: none"> 75% used a live link, of whom 7% used a remote link away from the court building. <p><i>Screens</i></p> <ul style="list-style-type: none"> 25% gave evidence in the court room, 12% in open court, and 13% with a screen. <p><i>Clearing the court</i></p> <ul style="list-style-type: none"> 41% of young witnesses were eligible for this provision, but the public was only excluded for one witness in this study (who gave evidence behind a screen). Many parents and witnesses mentioned the pressures caused by the presence of the defendants' family and friends. <p><i>Wigs and gowns</i></p> <ul style="list-style-type: none"> 57% (38) of witnesses were asked if they would like wigs and gowns removed. Of these, 24 wanted them to be worn, and 11 removed.

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							<p><i>Young people's views</i></p> <ul style="list-style-type: none"> • 82% were content with the arrangements for them to give evidence. • 39% would have been unwilling to give evidence any other way. • Many young people were unaware about options, particularly screens. • 15% did not give evidence the way they wanted. • 9% of those who used the live link would have preferred to give evidence in the courtroom, and 10 of these wanted to be screened; 40% of those who testified in the courtroom were unhappy with this. <p><i>Equipment problems</i></p> <ul style="list-style-type: none"> • There was an 'unacceptably high' incidence of equipment problems; 40% of witnesses described a problem with live links, playing recorded evidence or the lack of screens.

Table A.3 Experimental studies on the impact and effectiveness of alternate measures

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
<i>Alternative procedures (video and audio recording of evidence, CCTV, intermediaries, one-way glass, clearing of court and replay of evidence)</i>							
Applegate (2006)	<i>International review of Victimology</i>	Taking child witnesses out of the crown court: A live link initiative	Qualitative	Live link	Professionals (2 judges, 3 court clerks, 3 court ushers, 4 police officers, 1 Crown Court/Police liaison officer, 4 CPS members, two NSPCC support workers, 1 barrister), and 3 parents and 3 children.	Conducted semi-structured interviews with child witnesses, parents and professionals employed in the court process. Interviews were taped and transcribed.	<ul style="list-style-type: none"> Technology overall was seen as easy to use and reliable; however, some of the judges had difficulty with the technology. Barristers were seen as being 'okay' with the use of the live link. Links from a remote location were seen as "helping the prosecution, because (cross examination) can't be so vigorous". The location of the remote link wasn't seen as problematic as long as it was away from court. The professionals did not see any procedural or legal problems in having the witness in a building other than court. The live link virtually eliminated the likelihood of the witness coming in contact with others involved in the case. The live link rooms were seen to be very conducive to the comfort and welfare of the child witness. Overall, the professionals supported the offsite facilities. Children's and parents' views mirrored those of professionals (though as there were so few participants, this can't be overgeneralised). Children felt comfortable in the room. The link was seen as softening the traditional adversarial system, and making it more likely that children will give evidence. However, children still found giving their evidence 'scary'. So although the live link does not eliminate the trauma, it does reduce it.
Cashmore and Trimboli (2005)	<i>NSW Bureau of Crime Statistics and Research</i>	An evaluation of the NSW child sexual assault specialist jurisdiction pilot	Qualitative	Child-friendly remote witness suite; CCTV; recorded interview	10 child complainants (3 Male, 14 Female; aged 7–17). 10 parents, 15 defence lawyers, 15 prosecuting lawyers, 6 WAS officers, 1 technician.	Compared 11 trials in specialist jurisdiction to 6 trials in Sydney District Court. Conducted interviews to determine whether the physical environment and the way in which evidence is given in child sexual abuse prosecutions was now less intimidating, and the extent to which special technological measures played a role in this.	<ul style="list-style-type: none"> Remote witness suite reduced risk that child would 'run into' the defendant, which was found to be advantageous to children. Children who did not use the remote suite were distressed when they ran into the defendant in the court precinct (even though they didn't give evidence in the court room). Remote rooms were more comfortable than CCTV rooms in court. <p><i>Recorded evidence</i></p> <ul style="list-style-type: none"> There were some technological issues, resulting in a transcript (rather than a video) being given to the jury in some cases. There was confusion about the legal requirements regarding videotaped evidence (whether child was required to be present). Professionals generally view pre-recorded evidence as positive; prosecutors found that the pre-recorded evidence introduced the evidence more clearly, whereas the defence preferred it because they knew the substance of the tape before trial. However, no evidence was found to suggest the tape encourages defendants to plead guilty. Main issues were technical and legal difficulties and the variable quality of both interviewing and the tapes. <p>CCTV</p>

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
Coughlan and Jarman (2002)	<i>Families in Society</i>	Can the intermediary system work for child victims of sexual abuse?	Qualitative	Intermediary via CCTV	10 social workers (9 female). Average length of service 9.8 years. 8 had received formal training; for 4 this consisted of a single workshop. The other 2 were only briefed about their role. All intermediaries were no longer willing to offer their services.	10 semi-structured interviews were conducted with intermediaries (social workers) working in a major urban court (East London) in South Africa.	<ul style="list-style-type: none"> Most senior prosecutors and defence lawyers believed that a good child witness had a greater impact in court than via a TV screen. Parents believed that CCTV helped their children a lot, and that they may not have managed without it. Intermediaries were anxious, affected by the children's trauma. They questioned whether the system protected the children at all (mediated cross-examination is not necessarily less brutal than conventional cross-examination). Intermediaries had no access to formal supervision/debriefing, thus negative emotions compounded with each experience. All intermediaries were volunteers (and had other full-time jobs). They found that the way in which the courts carry out the child sexual abuse trials, and the impact on the children, made being an intermediary untenable. Court process was unpredictable, thus intermediaries could not properly prepare children. Intermediaries gave up because "the impact on the worker is enormous and the system does nothing to lessen this effect, while the outcome for the child does not appear to be improved in any significant way".
Davies and Hanna (2013)	<i>Australian and New Zealand Journal of Criminology</i>	Pre-recording testimony in New Zealand: Lawyers' and victim advisors' experiences	Qualitative	Videorecorded hearing	15 prosecutors, 5 victim advisors and 4 defence counsel.	Focus groups, interviews and a questionnaire were used to elicit perceived advantages and disadvantages, issues in the preparation for hearings, conducting the hearings and showing the pre-recordings at trial.	<ul style="list-style-type: none"> 21 of 24 participants described pre-recorded hearings positively with only two prosecutors and one defence counsel expressing concern about increasing the use of pre-recording in the future. Advantages include earlier capture of evidence; increasing the chances of guilty pleas/charges being dropped or indictment changed after the pre-recorded hearing; making trials more efficient; reducing stress for witnesses; dealing with inadmissible evidence more easily; and capturing evidence on DVD for retrials if necessary. Disadvantages include loss of immediacy and drama at trial; concerns that DVD emotionally distances the jury from the evidence; and concerns about jury maintaining concentration when watching a long DVD.
Doherty-Sneddon and McAuley (2000)	<i>Applied Cognitive Psychology</i>	Influence of video-mediation on adult-child interviews: Implications for the use of the live link with child witnesses	Experimental	Face-to-face versus video	32 6-year-olds and 32 10-year-olds.	A trained adult interviewed the children either face-to-face or across a live video link.	<ul style="list-style-type: none"> Face-to-face and video interviews did not differ in terms of total correct information, relevant information given during narrative recall or the style of questioning required. Significantly more incorrect information was given during specific questioning in the face-to-face interviews, and younger children were significantly more resistant to leading questions in the video condition. Older children produced more information during free narrative recall in face-to-face interviews.

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Doherty-Sneddon et al., (1997)	<i>Journal of Experimental Psychology: Applied</i>	Face-to-face and video-mediated communication: A comparison of dialogue structure and task performance	Experimental	Face-to-face versus audio versus video	64 undergraduates	Pairs of participants had to complete the <i>Map Task</i> , which required dialogue, either face-to-face, only being able to hear each other, or see and hear each other via video.	<ul style="list-style-type: none"> Face-to-face dialogues are more effective because speakers use visual cues to judge that communication is proceeding smoothly, hence the need to elicit verbal feedback less often; and listeners are more confident and check their understanding of messages less often. High-quality video communication did not deliver the same efficiency benefits as face-to-face communications: "Visual signals that VMC provided did not facilitate listener understanding in the same way as visual signals in face-to-face interaction".
Eastwood and Patton (2002)	<i>Trends & Issues in Crime & Criminal Justice</i>	The experiences of child complainants of sexual abuse in the Criminal Justice System	Qualitative	CCTV; video; screens	63 child complainants (61 females, aged 8–17); 16 Crown prosecutors; 7 defence lawyers; 4 judicial officers.	In-depth interviews with children are combined with data gathered from parents, Crown prosecutors, defence lawyers, court support personnel and members of the judiciary.	<ul style="list-style-type: none"> Some Qld and NSW prosecutors indicated a reluctance to use CCTV. They believed that "you actually get better depth with the interaction between the accused and the victim in the box"; "I don't think there's enough personal rapport built up between jury and victim". Prosecutors and judicial officers in Qld and NSW reported difficulties with poor equipment and lack of funding. In NSW and WA (where CCTV was frequently used), a range of legal professionals agreed that CCTV actually minimises the prejudice to the accused and benefited the child. Defence lawyers from WA believed that CCTV did not affect convictions. Not one Qld child was allowed to use CCTV; about half used screens. In NSW 43% were refused CCTV and none were permitted the use of screens. 30% of children in WA pre-recorded their evidence-in-chief and cross-examination months prior to the trial, while the remaining 70% were all permitted to use CCTV. Children who were able to give evidence-in-chief via CCTV or a pre-recording found the experience less stressful than children who were forced to appear in the courtroom with the accused. Cross-examination via CCTV: "It's easier because it's like if someone is yelling at you through the TV there, it's not as bad as someone yelling at you from like five feet away." (WA child, 16 years old).
Eaton, Ball and O'Callaghan (2001)	<i>Journal of Applied Social Psychology</i>	Child-witness and defendant credibility: Child evidence presentation mode and judicial instructions	Experimental	Open court versus video versus CCTV	108 participant jurors (N = 108, aged 18–52). Of these, 92 were undergraduate students, and 16 citizens.	Participants viewed a simulated child sexual abuse trial videotape. Examined presentation mode (video deposition, video link, in-court testimony) on child-witness perceived credibility and guilty verdict.	<ul style="list-style-type: none"> Child witnesses were seen as significantly less credible when testimony was given via video link, rather than in court or by video deposition ($p < 0.01$). There was no significant difference between court-given and video deposition testimony. Defendants were seen as more 'definitely guilty' when evidence was provided via video deposition or video link (rather than in court). Defendant credibility was not affected by the modes of evidence presentation.
Ellison and Munro (2014)	<i>Social & Legal Studies</i>	A 'special' delivery? Exploring the impact of screens, live-links and	Experimental and qualitative	Screens; live links; video-recorded evidence	Self-selected members of the public, eligible for jury service. There were	Rape trial was role-played in 4 experimental groups (live link, screen, video and control). Each trial was observed by 38–42	<ul style="list-style-type: none"> Found no significant differences in 'trial' outcomes between the different means of testimony delivery. The substance of the jury deliberations suggests that the differences above were due to views held by jurors about physical resistance of rape victims.

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
		video-recorded evidence on mock juror deliberation in rape trials			between 38 and 42 participants per condition, streamed into 5 'juries'.	participants who were then streamed into 5 different juries and asked to undertake verdict deliberations. The jury deliberations were transcribed and examined (but no statistical analysis conducted).	
Goodman et al (1998)	<i>Law and Human Behavior</i>	Face-to-face confrontation: Effects of closed-circuit technology on children's eyewitness testimony and jurors' decisions	Experimental	CCTV versus open court	186 Children aged 5-6 and 8-9. 1,201 mock jurors – participants from community.	Children individually participated in a play session with an unfamiliar male confederate. Approximately 2 weeks later children individually testified (by CCTV or in court) about the event.	<ul style="list-style-type: none"> • Testifying in open court was associated with children experiencing greater pre-trial anxiety. Child witnesses were less suggestible and anxious via CCTV than in open court. • Younger and older children had similar rates of error (commission and omission) when testifying via CCTV in response to misleading questions, but the error rate was higher for younger children in open court than for older children. • Younger children testifying in regular trials made more errors of omission than their age mates who testified via CCTV. Thus, the effect of CCTV was to reduce younger children's suggestibility. • Closed-circuit technology did not diminish fact finders' abilities to discriminate accurate from inaccurate child testimony, nor did it directly bias jurors against the defendant. • However, CCTV biased jurors against child witnesses; CCTV lowered children's credibility in the eyes of the jurors. • Children who were asked to testify in open court were more likely to refuse to take the stand. • Jurors were not found to be biased for or against CCTV in terms of believing the defendant is guilty (no more likely to be convicted in the CCTV condition than live condition). • Jurors did not view CCTV as more or less fair to the defendant.
Goodman et al (2006)	<i>Law and Human Behaviour</i>	Hearsay versus children's testimony: Effects of truthful and deceptive statements of jurors' decisions	Experimental	Live versus videotape versus hearsay	12 children (6 male; aged 5-7). 12 social workers (3 male, 9 female; aged 27-53). 370 adults (54.3% female, aged 18-86) acted as mock jurors.	Child participants experienced either a mock crime or were coached to say they experienced the crime when in fact they had not. During elaborate mock trials involving community member jurors, children's testimony was presented either: live, on videotape, or via a social worker (hearsay).	<ul style="list-style-type: none"> • Jurors found children testifying live as more credible and had greater empathy towards them. • Jurors found live testimony fairest towards the child. • Child visibility predicted jurors' perceptions of child testimony, which, in turn, predicted their confidence in the defendant's guilt. • Trial condition did not significantly influence jurors' abilities to discern child witness accuracy (which was poor in all conditions).

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Hanna, Davies, Hendersen and Hand (2013)	<i>Psychiatry, Psychology and Law</i>	Questioning child witnesses: Exploring the benefits and risks of intermediary models in New Zealand	Qualitative	Intermediaries	2 judges, 3 prosecutor, 3 defence lawyers, 2 experienced forensic interviewers, a legal scholar, a speech therapist and a paediatrician.	Mock examinations of a 'child' witness (role-played by an adult) with specialists in children's language taking the intermediary roles; legal and non-legal participants observed the proceedings. Child gave evidence via intermediary via CCTV.	<ul style="list-style-type: none"> There were some reservations, but generally broad consensus that intermediaries might be an effective means of improving the quality of children's evidence. The topic-by-topic model was perceived as more effective than the other models considered.
Krähenühl, 2011	<i>Child Abuse Review</i>	Effective and appropriate communication with children in legal proceedings according to lawyers and intermediaries	Qualitative	Intermediaries	19 intermediaries (age M = 50, experience M = 3.4 months) 12 lawyers (9 male, 3 female, age M = 40, experience M = 12).	Participants examined transcripts of a mock investigative interview and cross-examination of a child, and noted questions they perceived to be inappropriate.	<ul style="list-style-type: none"> Intermediaries found twice as many expressions inappropriate (19.4%) compared to lawyers (8.3%). In all 'inappropriate expressions', there was an agreement of more than 40% in both groups in only 9.9% of cases. The groups explained their decisions on the basis of linguistic structure and vocabulary, question format, developmental and conceptual issues, emotional reaction and procedural issues.
Landstrom and Granhag (2010)	<i>Applied Cognitive Psychology</i>	In-court versus out-of-court testimonies: Children's experiences and adults' assessments	Experimental	Two-way CCTV; video	108 Swedish children (65 boys, 43 girls, aged 10-11) acted as witnesses. 240 adult observers (65 males, 175 females, aged 18-65).	Child witnesses were interviewed about an event that they had either experienced or imagined; adult mock jurors watched the children's testimonies (3 weeks after actual/imagined event) either live, via CCTV or via a pre-recorded video. Adults were asked to respond to a questionnaire about the child's statement.	<ul style="list-style-type: none"> A MANOVA found a significant effect of presentation mode. Children seen live were perceived as providing more detailed statements than the children seen via two-way CCTV. Children seen live were perceived as providing a more confident statement than children seen via CCTV and video. Children in the live condition were seen in more positive terms than children in the CCTV condition, while children in the CCTV condition were perceived in more positive terms than children in the video condition. The largest difference was between live and video, the smallest between live and CCTV. Fewer children who testified on video were nervous than children interviewed live or via CCTV ($p = < 0.01$). The children in the live condition reported that they found the interview more difficult than the children in the CCTV and video conditions ($p = < 0.05$).
Landstrom et al. (2007)	<i>British Psychological Society</i>	Children's live and videotaped testimonies: How presentation mode affects observers' perception, assessment and	Experimental	Live versus videotape	14 children (aged 10-11), and mock and juror.	Children either experienced an event or learned about the event by hearsay. Two weeks later, the children testified about the event as if they had all experienced it. Mock jurors watched the children's testimonies either	<ul style="list-style-type: none"> The live observers perceived the children in more positive terms and rated the statements as being more convincing than did video observers. The observers rated the lying children as having to think harder than the truth-telling children. Both live and video observers' ability to assess the children's veracity was mediocre. Live observers had a better subjective and objective memory of the children's statements than video observers.

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
Landstrom et al. (2008)	<i>Psychology, Crime & Law</i>	Children's truthful and deceptive testimonies: How camera perspective affects adult observers' perception and assessment	Experimental	Videotaped testimonies	14 children (8 boys, 6 girls, aged 8–9). 256 mock jurors (undergraduate students, 84 male, 172 female, aged 18–54).	live or on video. Truth-telling and lying children were interviewed and videotaped simultaneously by four cameras, each taking a different visual perspective. Mock jurors watched the videotaped testimonies and rated their perception of the children's statement and appearance, and assessed the children's veracity.	<ul style="list-style-type: none"> Children seen in long shot were perceived as more neutral and relaxed, and children seen in close-up were perceived as having to think harder. Variations in camera shot were influential (variations in camera focus not influential). Children in the long shot and close-up were seen in equally positive terms (no significant difference). The adult's deception detection accuracy was at 'chance level'.
Landstrom, Grantham and Hartwig (2005)	<i>Applied Cognitive Psychology</i>	Witnesses appearing live versus on video: Effects on observers' perception, veracity assessments and memory	Experimental	Live versus video	12 undergraduate students (5 males, 7 females) aged 19–36 acted as witnesses. 122 undergraduates (82 female 40 male, aged 19–48) acted as observers.	3 weeks after seeing a staged accident, 6 truth-telling and 6 lying witnesses testified about the event. Mock jurors viewed the witnesses' testimony either live or on video, and rated their perception of the witnesses' statement and appearance as well as the credibility of the witnesses.	<ul style="list-style-type: none"> Live observers rated the witnesses' appearance in a more positive way and perceived them as being more honest than did video observers. Truth tellers were rated as having to think less hard than liars. Observers were not better than chance in assessing veracity, regardless of presentation mode. Live observers incorrectly believed they had a better memory of the witnesses' statements than video observers. Observers who had watched truthful statements showed a significantly better memory performance than observers who had watched deceptive statements.
McAuliff and Kovera (2012)	<i>Psychology, Crime & Law</i>	Do jurors get what they expect? Traditional versus alternative forms of children's testimony	Experimental	Live versus support person versus CCTV versus video	261 US citizens (M age = 42)	Participants completed a survey on what they expected about a child sexual abuse case. Survey manipulated age of child, type of abuse alleged, whether abuse had occurred and presentation mode of testimony.	<ul style="list-style-type: none"> Participants believed it was easiest to determine a child's truthfulness and fairest to the defendant when the child testified live in court, but that this form of testimony was the most stressful and unfair to the child. Participants expected a child providing traditional live in-court testimony to be more nervous, tearful and fidgety, and less confident and cooperative than a child providing alternative forms of testimony. They also expected the child to maintain less eye contact, to be less fluent, and to provide shorter responses when providing traditional versus accommodated testimony. Participants expected a child providing alternative testimony to be more confident and cooperative, to provide longer responses, and to be less fidgety than a child providing traditional testimony. However, previous research indicates these changes simply do not occur. Thus negative evaluations of children's alternative testimony may be the result of expectancy violation.
McConachy (2002)	<i>Report – NSW Police</i>	Evaluation of the electronic recording of	Qualitative	Electronically recorded statement	Approx. 300 professionals: District Court	Professionals were interviewed; approx. 350 cases were accepted prior to	<ul style="list-style-type: none"> Most professionals (apart from defence lawyers) were supportive of the tendering of electronically recorded statements. Overall, professionals (except defence lawyers) and members of the jury were

Authors (year)	Journal	Title	Type of study	Special measures (audio or video)	Participants	Method	Outcomes and findings
		children's evidence		(audio or video)	judges, magistrates, Crown prosecutors, ODPD lawyers, defence lawyers, Joint Investigative Response Team officers, child sexual abuse counsellors, and witness assistance services officers.	the introduction of video-recording, and 350 cases after introduction, were tracked. Feedback received from some children and parents.	<p>confident the provision (allowing such statements) would serve in the interests of the child and justice.</p> <ul style="list-style-type: none"> The provision was seen as reducing stress for the child.
Nash et al (2014)	<i>Psychology, Crime & Law</i>	Remembering remotely: Would video-mediation impair witness' memory reports?	Experimental	Video-mediated communication	77 university students (65 females, M age = 20.71).	Participants viewed a crime film and were interviewed either one day later via video link, one day later face to face, or 1–2 weeks later face to face.	<ul style="list-style-type: none"> Video-mediation didn't influence the detail or the accuracy of participants' reports, or their ratings of the quality of the interviews. Participants who were interviewed via VMC reported just as much correct detail as those interviewed via a traditional face-to-face approach, with no additional incorrect detail, and indeed without incurring any peripheral cost in terms of interview duration. However, participants who underwent video-mediated interviews after a short delay gave more accurate, detailed reports than participants who waited longer to be interviewed face to face.
Orcutt, Goodman, Tobey, Batterman-Faunce and Thomas (2001)	<i>Law and Human Behavior</i>	Detecting deception in children's testimony: Factfinders' abilities to reach the truth in open court and closed-circuit trials	Experimental	CCTV vs open court	70 children (aged 7–9); 53% female. 987 adults acting as mock jurors (aged 18–65; 49.7% female).	Children were assigned to three conditions (guilty, not guilty and deception). Mock jurors viewed child participants testify either in court or via one-way CCTV. Jurors filled out a pre- and post-deliberation questionnaire.	<ul style="list-style-type: none"> Testimony in open court was associated with more negative ratings of child witnesses than testimony in court. Jurors were more likely to convict defendants after hearing testimony from children testifying in open court compared to CCTV. Children testifying via CCTV were seen as significantly less accurate than children testifying in court. Children testifying in court were seen as significantly more attractive, intelligent and honest; and significantly less likely to have made up the story than children testifying via CCTV. Mode of presentation did not have a significant impact on verdict post-deliberation and jurors were not found to reach the truth better in open court versus CCTV.
Pipe and Henaghan (1996)	<i>Criminal Justice and Behavior</i>	Accommodating children's testimony: legal reforms in New Zealand	Qualitative	Videotaped evidence, CCTV, screens, one-way glass	22 district court judges, 46 High Court judges, 52 Crown prosecutors, 137 police, 116 doctors, 120	Administered a survey to lawyers, judges, police, social workers and other child professionals to determine whether the provisions are seen to be 'working'.	<p>Results of survey (significance level $p < 0.01$). Participants thought:</p> <ul style="list-style-type: none"> Special provisions significantly reduce the trauma for the child witness. Special provisions are not seen to reduce the quality or truthfulness of the evidence; there was no significant difference in truthfulness/quality between different modes of giving evidence (exception: defence lawyers). Professional groups except defence lawyers viewed giving evidence in court as

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
					social workers, 100 defence lawyers.		<p>unfair to the child, and alternative modes more fair for the child (for the defence lawyers the opposite was true).</p> <ul style="list-style-type: none"> Only defence lawyers viewed alternative arrangements as unfair to defendant. CCTV and videotaped evidence were viewed as more useful for younger children, whereas giving evidence in court as more useful for older children. CCTV and videotaped evidence disadvantage = distance from judge and jury, which lessened the effect of the child's evidence. Screens and one-way glass were not seen as more/less useful to different age groups. Screens were seen as difficult to place in courtroom; defence lawyers were concerned that screens imply that there is guilt/threat on the part of the defendant. Participants thought special measures made it more likely that case would reach court and defendant would be found guilty (no significant difference between groups). Remaining issues were the way children are interviewed/questioned in court.
Plotnikoff & Woolfson (2007)	<i>Ministry of Justice Research Summary</i>	The 'go-between': Evaluation of intermediary pathfinder projects	Qualitative	Intermediaries	Police officers, CPS personnel, advocates, judges, intermediaries, witnesses and parents or carers.	<p>Conducted 169 interviews with police officers, CPS personnel, advocates, judges, intermediaries, witnesses and parents or carers.</p> <p>Also conducted 2 surveys of intermediaries (in 2004, 29 respondents, and in 2006, 56 respondents), and a survey of criminal justice personnel and external organisations (67 respondents).</p>	<ul style="list-style-type: none"> Potential benefits of intermediaries include assistance in bringing offenders to justice, increasing access to justice (participants estimated that at least half of 12 cases would not have reached trial without the intermediary), and facilitating communication at trial. Challenges include the difficulty identifying eligible witnesses (vulnerable witnesses are not reliably identified), and lack of appropriate intervention in questioning (including judges not intervening because the intermediary was present).
Ross et al (1994)	<i>Law and Human Behavior</i>	The impact of protective shields and videotape testimony on conviction rates in a simulated trial of child sexual abuse	Experimental	Open court, video evidence, shield	300 psychology students (150 male) acted as mock jurors.	<p>Mock jurors watched a videotape simulation of a 10-year-old child witness testifying either in open court, behind a shield, or via recorded evidence. In experiment 1, they watched the whole trial, in experiment 2, the trial was stopped after the child had testified.</p>	<ul style="list-style-type: none"> No significant differences between conditions in experiment 1. In experiment 2, the modality of the child's testimony had a significant impact on conviction rates. Participants in the open court condition were more likely to convict the defendant than participants in the screen and videotape conditions.
Swim, Borgida and	<i>Journal of Applied Social</i>	Videotaped versus in-court	Experimental	Videotaped versus in-court	143 psychology students (63	Mock jurors watched a video of a mock trial of a child	<ul style="list-style-type: none"> There were a few marginally significant effects of presentation mode, suggesting that videotaped deposition had unfavourable effects on the

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
McCoy (1993)	<i>Psychology</i>	witness testimony: Does protecting the child witness jeopardize due process?		testimonies	men, 80 women, aged 17-33).	sexual abuse case where the child gave evidence either by video or in court.	<ul style="list-style-type: none"> defendant's testimony. However, lack of statistical significance between effects of the two conditions suggests that the medium is not prejudicial. More guilty verdicts when the child testified in court, although this was only significant during pre-deliberation.
Taylor and Joudo (2005)	<i>Australian Institute of Criminology Research and Public Policy Series</i>	The impact of pre-recorded video and CCTV by adult sexual assault complainants on jury decision-making: An experimental study	Experimental	Face-to-face; CCTV; pre-recorded evidence	210 mock jurors (mean age 50, range 18-75; 108 female 102 male).	Jurors were randomly allocated to each of the juries and each of 6 conditions (3 modes of testimony – face-to-face, CCTV, video – and 2 emotionality of testimony – neutral or emotional – conditions). They then watched a mock sexual assault case played by professional actors.	<ul style="list-style-type: none"> Immediately following the trial, but before jury deliberation, mode of presentation of a complainant's testimony (face-to-face, CCTV or pre-recorded videotape) did not impact differentially on juror perceptions of the complainant or the accused, or the guilt of the accused. 16 of the 18 juries were hung. There was a diverse spread of juror views within all juries relating to credibility, empathy and guilt in all conditions. Concluded: "The findings in this study do not suggest that mode of presentation per se impacts detrimentally in any meaningful or consistent way on jury outcomes for either the complainant or the accused. Rather, the findings suggest that what may be much more important than the manner in which testimony is presented are the pre-existing attitudes, biases and expectations that jurors bring with them into the courtroom."
Westcott, Davies and Clifford (1991)	<i>Adoption and Fostering</i>	The credibility of child witnesses seen on closed-circuit television	Experimental	Video link; face-to-face	32 children (16 aged 7-8, 16 aged 10-11). 32 mature students.	<p>1) Half the children were taken on an excursion and then all interviewed and videotaped. 'Observers' saw tape and rated truthfulness.</p> <p>2) Children were entertained at school by a theatre group, and were questioned 1 week after the event, either face-to-face or via video link.</p>	<ul style="list-style-type: none"> Observers could discern true from false statements about 59% of the time, slightly but significantly better than chance. No significant differences were found between conditions for appearance, action and room details reported by children.
Westera, Kebbell and Milne (2013)	<i>Psychology, Crime and Law</i>	It is better, but does it look better? Prosecutor perceptions of using rape complainant investigative interviews as evidence	Experimental and qualitative	Videorecorded interviews	30 prosecutors	<p>Prosecutors rated excerpts from mock interviews (adult sexual assault), in two conditions: inappropriately closed and appropriately open.</p> <p>They were then interviewed about perceptions of videorecorded interviews.</p>	<ul style="list-style-type: none"> When questioning was closed and leading, compared to open, prosecutors rated the complainant as less accurate and less credible. When questioning was closed and leading prosecutors were less likely to recommend a police charge. Prosecutors perceived the main benefit of recorded interviews as the increased accuracy, detail and completeness of the complainant's testimony. Prosecutors disagreed on whether the investigative interview was credible and persuasive evidence. The main concern was that the interview format is less persuasive than traditional testimony, and that the interview is often long and rambling in nature.
Westera, Kebbell and Milne, 2013	<i>Criminal Law Review</i>	Losing two thirds of the story: A comparison of the	Qualitative	Videorecorded evidence-in-chief; live	Rape complainants aged 19-74.	Examined differences in format and content between live testimony and video-	<ul style="list-style-type: none"> Two-thirds of the details relevant of consent and the alleged sexual/violent offending were omitted in the live evidence-in-chief. Details lost include physical action, verbalisation, emotion, cognition, and

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
		video-recorded police interview and live evidence of rape complainants		testimony		recorded interviews for adult rape complainants. Compared 10 trial transcripts with video-recorded interviews for the same complainants.	<ul style="list-style-type: none"> person/object description details. All were statistically significant losses. Found no statistically significant difference in the length of police interviews and live testimony (possibly due to low sample size). Average length of the police interview was 124.42 minutes; average length of live evidence was 90.43 minutes. Thus, the live evidence was three-quarters the length of the police interview.
Wilson and Davies, 1999	<i>European Journal on Criminal Policy and Research</i>	An evaluation of the use of videotaped evidence for juvenile witnesses in criminal courts in England and Wales	Experimental	CCTV, video-taped evidence-in-chief	1,621 child witnesses involved in 948 trials (M age = 11.5, range 4–17; 75% female).	Observed 93 trials in 1993–4, in which videotaped evidence was submitted. Observers rated interviewing skills and demeanour of child. Child witnesses were also given a questionnaire.	<ul style="list-style-type: none"> 73% of children had their videotaped interview used as evidence in chief. No significant difference was found for witness credibility across conditions. The children on videotape were rated as significantly less anxious than children on the live link. No significant differences were found for credibility of child's account between CCTV and video evidence modes. In videotape trials, 60% resulted in a conviction compared to 55% in live link trials, a non-significant difference. Thus the method of evidence presentation did not influence the verdict.
Cross-examination							
Fogliati and Bussey (2014)	<i>Legal and Criminological Psychology</i>	The effects of cross-examination on children's reports of neutral and transgressive events.	Experimental	Cross-examination	120 children: kindergarten (M = 6 years) and grade 2 (M = 8 years).	Children witnessed an adult commit a transgression and were then interviewed twice about it. Children first underwent a direct-examination interview followed by either a direct- or cross-examination interview.	<ul style="list-style-type: none"> Children's reports of neutral events were significantly less accurate during cross-examination than direct examination, whereas children interviewed twice with direct examination were equally accurate in both interviews. Cross examination also led children to make a considerable number of changes to their reports of neutral events (compared with children interviewed twice directly). Younger children were as accurate in their reports of neutral events as older children when asked non-misleading direct questions. There were also no age differences for cross-examination for natural events. Cross-examination was no more effective than direct examination at eliciting a truthful disclosure of a witnessed transgression. Cross-examination negatively impacted older children's disclosure of a transgression. Fewer older children disclosed the transgression in the cross-examination than in the initial direct examination. The likelihood of children making a disclosure change (from interview 1 to 2) was greater for children who underwent cross-examination. Cross-examination undermined some children's disclosures and promoted others.
Stolzenberg and Lyon (2014)	<i>Psychology, Public Policy, and Law</i>	How attorneys question children about the dynamics of sexual abuse and disclosure in criminal trials	Experimental	Cross-examination	Children (aged 6–16) from 72 child sexual abuse cases who testified in court. All charges involved	Examined attorney question type and children's response type, suspect's conversations with children and children's prior disclosure conversations. Coded who asked the question, the testimony	<ul style="list-style-type: none"> Defence attorneys were more leading than prosecutors. Both defence and prosecutor attorneys predominantly asked yes/no questions, to which children provided unelaborated answers. This probably decreased the accuracy of responses. Prosecutors asked more about the suspects' statements than the defence.

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O'Neill and Zajac (2013)	<i>British Journal of Psychology</i>	The role of repeated interviewing in children's responses to cross-examination-style questioning	Experimental	Cross-examination	abusing a child under 14. 82 5–6-year-old children. 103 9–10-year-old children.	Children took part in a surprise event and were then interviewed using an analogue of direct examination. Either 1 week or 6 months later, half of the children underwent cross-examination, half underwent direct examination again.	<ul style="list-style-type: none"> Children's accuracy decreased in the second interview, regardless of format (direct or cross-examination). However, children who were cross-examined made more changes to their direct examination responses, changed a greater proportion of their correct responses, and obtained lower overall accuracy scores than those who were merely asked the direct examination questions again. Thus, the nature of the interview exerts the primary influence on children's accuracy.
Righarts, O'Neill and Zajac (2013)	<i>Law and Human Behaviour</i>	Addressing the negative effect of cross-examination questioning on children's accuracy: Can we intervene?	Experimental	Cross-examination	77 5–6-year-old and 87 9–10-year-old children.	Children took part in a staged event and were then interviewed with analogues of direct examination and cross-examination. Some of the children participated in a brief intervention with practice and feedback of cross-examination questionnaires.	<ul style="list-style-type: none"> Relative to control children, those who underwent this preparation intervention made fewer changes to their direct-examination responses under cross-examination, changed a smaller proportion of their correct responses, and obtained higher ultimate accuracy levels. Merely drawing children's attention to the possibility that the interviewer might be incorrect is insufficient to improve cross-examination performance. Practice and feedback is necessary for children's performance to be enhanced.
Valentine and Maras (2011)	<i>Applied Cognitive Psychology</i>	The effect of cross-examination on the accuracy of adult eyewitness testimony	Experimental	Cross-examination	32 students (aged 18–44, 18 female).	'Witnesses' watched a video of a staged theft, either in pairs, or individually. After approximately 4 weeks all participants were cross-examined by a trainee barrister.	<ul style="list-style-type: none"> 73% of witnesses changed an answer under cross-examination. As many as 84% of witnesses accepted at least once that they may be mistaken, and 68% made this concession on 2 or 3 occasions. Witnesses were no more likely to make commission or omission errors under cross-examination. There were no differences between groups (exposed to misinformation or not) regarding how many answers they changed.
Zajac and Hayne (2003)	<i>Journal of Experimental Psychology: Applied</i>	I don't think that's what really happened: The effect of cross-examination on the accuracy of children's reports	Experimental	Cross-Examination	46 5–6-year-old children (25 girls, 21 boys).	Examined the effects of cross-examination on children's accuracy of a contrived event (excursion to police station). 30 of the group were exposed to misleading information.	<ul style="list-style-type: none"> 85% of children made at least one change to their earlier report during cross-examination; one-third of children changed all of their previous responses. Children changed their responses irrespective of accuracy. Children who were not exposed to misinformation were still susceptible to the negative effects of cross-examination.
Zajac and Hayne (2006)	<i>Applied Cognitive Psychology</i>	The negative effect of cross-examination style questioning on children's accuracy: Older children are not immune	Experimental	Cross-examination	23 9- and 10-year-old children (11 girls, 12 boys).	Children went to trip to police station and 11 were exposed to misleading information 4 weeks after their visit. 6 weeks later, they underwent a direct examination, and 8 months after that, underwent a cross-examination interview.	<ul style="list-style-type: none"> Found that 9- and 10-year-old children were less vulnerable to misinformation than younger children (5- and 6-year-olds). Compared to younger children, older children made fewer changes to their direct examination reports when cross-examined. Older children were more significantly likely to change an incorrect response than a correct one under cross-examination. Nonetheless, cross-examination resulted in a significant decrease in the accuracy scores of the 9- and 10-year-old children. They also changed over 40% of their correct responses, resulting in a significant decrease in accuracy.

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
Zajac and Cannan (2009)	<i>Psychiatry, Psychology and Law</i>	Cross-examination of sexual assault complainants: A developmental comparison	Field study	Cross-Examination	15 child complainants aged 5–12 years. 15 adult complainants aged over 18.	Examined court transcripts to investigate the questions asked during cross-examination, and the responses given, depending on whether complainant was an adult or child.	<ul style="list-style-type: none"> Although cross-examining lawyers appeared to make some concessions for children, they asked complainants in both age groups a high proportion of very challenging questions. Adult complainants were not immune to the negative effects of cross-examination on their testimony. All adult complainants made at least one change to their earlier testimony under cross-examination, and adults made just as many changes as children. Many changes occurred in response to credibility challenging and leading questions.
Zajac, Gross and Hayne (2003)	<i>Psychiatry, Psychology and Law</i>	Asked and answered: Questioning children in the courtroom	Field study	Cross-examination	18 examinations-in-chief and re-examinations. plus 21 cross-examinations for children aged 5–13 (M age = 9.5 years).	Analysed court transcripts in which 5–13-year-old children gave evidence in child sexual abuse trials.	<ul style="list-style-type: none"> Defence lawyers conducting cross-examination asked a higher proportion of complex, grammatically confusing, credibility-challenging, leading and closed questions than prosecution lawyers. In responding to defence lawyers' questions, child witnesses rarely asked for clarification and often attempted to answer questions that were ambiguous or did not make sense. Over 75% of children changed at least one aspect of their testimony during the cross-examination process.
Hanna et al., 2012	<i>Psychiatry, Psychology and Law</i>	Questioning child witnesses in New Zealand's criminal justice system: Is cross-examination fair?	Field study	Cross-examination	18 children aged 9–17 at time of trial. Trials involved allegations of physical and/or sexual assault.	Analysed court-transcripts of 18 children's evidence. Includes 13 interviews by forensic interviewers, 16 examinations by prosecutors and 16 by defence lawyers.	<ul style="list-style-type: none"> Found that 84% of questions posed by defence lawyers during cross-examination were closed or leading, compared with 26% of forensic interviewers, and 52% of prosecutors'. This is probably due to the greater freedom to use leading questions during cross-examination. Language of cross-examination was "characterised by other potentially error-inducing features such as high proportions of utterances containing complex vocabulary, double negatives, multiple forms of complexity, and multiple subordinate clauses". Judges have discretion to control inappropriate questioning, and in the current sample, judges intervened in 10 out of 16 cross-examinations, 38 times in total. The <i>Evidence Act 2006</i> (NZ) includes within the category of "unacceptable questions" ones "expressed in language that is too complicated for the witness to understand" – though disallowing questions is discretionary, rather than mandatory. Study suggests that proper control of cross-examination was inadequately exercised, both in relation to control of complex language and tactics used (such as tactics that 'trip children up').
<i>Jury directions and expert evidence</i>							
Brekke and Borgida (1988)	<i>Journal of Personality and Social Psychology</i>	Expert psychological testimony in rape trials: A social-cognitive analysis	Experimental	Expert evidence	208 psychology undergraduates (98 men, 110 women).	Tested the effect of type of expert testimony (standard and specific hypothetical) and timing of presentation (expert first and last) against	<ul style="list-style-type: none"> Jurors can use an expert's testimony if its implications for a case are fairly clear (that is, testimony is linked with facts of the case). Mock jurors exposed to expert evidence (general and specific) rated the complainant as more credible, were less likely to believe she consented and were more likely to convict.

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
Crowley et al. (1994)	<i>Law and Human Behavior</i>	The juridical impact of psychological expert testimony in a simulated child sexual abuse trial	Experimental	Expert evidence	144 participants; 72 psychology undergraduates and 72 jury-eligible citizens.	Mock juries watched a videotaped simulation of a child sexual abuse trial in which the age (6, 9 and 12) and sex of the child – and presence and absence of expert testimony – were manipulated.	<ul style="list-style-type: none"> Jurors were less influenced by the standard expert testimony, which didn't link the evidence to the facts of the case. Expert evidence is more effective if given before the complainant's testimony than after. If given before, it had a (non-significant) impact on the trial outcome. Expert testimony did not cause jurors to be more empathetic towards the complainant, or more negative towards the defendant. Found significant effect for exposure to expert testimony on jurors' perceptions of the child on the factors explained by the expert: memory expertise, susceptibility to suggestion and reality monitoring ability. Did not find any differences in child credibility between age and sex of child victims. No significant increase in conviction rates, and no relationship between increased credibility perceptions and verdict.
Gabora, Spanos and Joab (1993)	<i>Law and Human Behavior</i>	The effects of complainant age and expert psychological testimony in a simulated CSA trial	Experimental	Expert evidence	352 psychology undergraduates (192 male, 160 female).	Mock juries watched 1 of 6 videotaped trials (2 levels of age, 3 levels of expert), then deliberated to a verdict and filled out questionnaires.	<ul style="list-style-type: none"> Jurors voted for conviction significantly more often where expert testimony was linked explicitly to the case at hand and included an opinion (73%), rather than when either general expert testimony (59%) or no expert testimony (56%) was given. Jurors who saw an expert testify became less accepting of child sexual abuse misconceptions, and there was no difference between specific and general expert evidence in this regard. Specific (but not general) expert testimony influenced perceptions of the defendant's credibility but had no effect on perceptions of the complainant's credibility. Thus, expert testimony may bias the jury against the defendant. Found that judicial directions and expert evidence were equally effective at reducing child sexual abuse misconceptions and no single intervention was more effective than the others. Mock jurors who received a judicial direction either before the child testified or in summation were less susceptible to misconceptions about the reliability of children's testimony in child sexual abuse cases than mock jurors who did not receive any specialised information. Mock jurors who received a judicial direction before the child testified rated the child complainant as significantly more consistent, credible and able to distinguish fact from fantasy than mock jurors who did not receive specialised information about child sexual abuse. Ratings of the complainant's credibility by mock jurors who received information in the form of judicial direction in summation or from an expert psychologist did not differ significantly from those by mock jurors who did not receive any information about child sexual abuse cases. Contrary to expectations, conviction rates did not differ significantly between the trial conditions; the specialised information about child sexual abuse cases did not significantly increase the conviction rate.
Goodman-Delahunty, Cossins and O'Brien (2010)	<i>Behavioral Sciences and the Law</i>	Enhancing the credibility of the complainants in child sexual assault trials: The effect of expert evidence and judicial instructions	Experimental	Expert evidence; Judicial instructions	130 community volunteers (M age = 50.6 years, range 19–79; 65% female).	Mock jurors read trial transcripts of a child sexual abuse trial. There were 4 conditions (2 levels of expert evidence and 2 levels of judicial instructions). Filled out a child sexual abuse misconceptions questionnaire before and after the 'trial'.	<ul style="list-style-type: none"> Found that common misconceptions about child sexual abuse could be countered by specialised child sexual abuse knowledge presented either by an
Goodman-Delahunty,	<i>Australian and New</i>	A comparison of expert evidence	Experimental	Judicial instructions;	118 psychology undergraduate	Child sexual abuse misconceptions	<ul style="list-style-type: none"> Found that common misconceptions about child sexual abuse could be countered by specialised child sexual abuse knowledge presented either by an

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
Cossins and O'Brien (2011)	<i>Zealand Journal of Criminology</i>	and judicial directions to counter misconceptions in child sexual abuse trials		expert evidence	students.	questionnaire was administered to students. These then served as mock jurors in simulated trial. Clinical and scientific expert evidence was presented at two different points in time (that is 4 experimental conditions) and a control condition. The students then completed the misconceptions questionnaires again.	<p>expert or in a judicial direction. All four interventions significantly increased jurors' child sexual abuse knowledge.</p> <ul style="list-style-type: none"> No difference found between experts presenting information based on clinical expertise versus information based on scientific expertise. However, conviction rate following clinical psychological expert evidence was significantly higher than scientific expert evidence. No difference in relation to timing of judicial instruction for reducing child sexual abuse misconceptions (before the testimony of the child witness, and at conclusion of trial). However, the credibility of the child was significantly enhanced by a judicial direction presented before the child testified. Thus, perceived victim credibility fully mediated the effect of child sexual abuse knowledge on verdict. Information presented via expert testimony or judicial directions enhanced perceptions of victim credibility, which in turn increased convictions.
Goodman-Delahanty, Cossins, and Martschuk (2014)		Persistent misconceptions about child sexual abuse: The impact of specialized educative information and deliberation in a simulated trial	Experimental	Expert evidence	885 non-empelled excused jurors (58% men, aged 18-74).	Examined the effectiveness of educative interventions (a specially crafted judicial direction or expert testimony by either an experimental or clinical psychologist) on child sexual abuse misconceptions, witness credibility and verdict. Examined differences between deliberating and non-deliberating jurors.	<ul style="list-style-type: none"> Found that without any educative interventions, juror misconceptions about child sexual abuse increased significantly after viewing the video trail, but they stayed steady or decreased when specialized info was presented. Educative information presented by the clinical psychologist (who interviewed the complainant) increased perceived complainant credibility, but educative info by the experimental psychologist or trial judge did not. Perceived credibility of the complainant among deliberating jurors stayed constant in all experimental conditions. For non-deliberating jurors, perceived credibility was highest in the clinical expert condition and lowest in the control condition. Child sexual abuse knowledge gain, together with perceived complainant credibility and perceived corroborating witness' credibility were associated with verdict. Jury deliberations did not reliably reduce juror errors and misconceptions. Deliberations mitigated the effect educational interventions from judicial directions or expert had on complainant credibility and conviction rate. Thus, special information is better presented by an 'expert' than judge.
Greene (1988)	<i>Journal of Applied Social Psychology</i>	Judge's instruction on eyewitness testimony: Evaluation and revision	Experimental	Judicial instructions	Experiment 1: 127 students. Experiment 2: 139 people waiting for jury duty.	Experiment 1: Mock jurors viewed videotaped trial, with or without jury instruction on reliability of eyewitnesses. Two eyewitness conditions: strong and weak. Experiment 2: jurors watched video trial with original and altered jury instruction.	<ul style="list-style-type: none"> Jurors who heard the instruction were no more sensitive to factors known to be problematic to eyewitness identification than jurors who had no instruction. Experiment 2 showed that simplified cautionary instruction can affect jury decision making. Revised instructions led to a higher percentage of not-guilty verdicts.
Klettke and Powell	<i>Psychiatry, Psychology</i>	The effects of evidence,	Experimental	Expert evidence	49 females and 47 males aged	Participants acted as a mock jury in groups of 12, read a	<ul style="list-style-type: none"> Expert credentials had negligible impact on outcome. The strength of evidence presented by an expert in a child sexual abuse case has

Authors (year)	Journal	Title	Type of study	Special measures	Participants	Method	Outcomes and findings
(2011)	<i>and Law</i>	coherence and credentials on jury decision-making in CSA trials			18–61 from the community.	child sexual abuse case, and gave a rating as to whether the defendant was guilty or not guilty.	<p>more impact on jury decision-making (that is, led to more guilty verdicts) than their credentials or the coherence of testimony.</p> <ul style="list-style-type: none"> Suggests that when participants deliberate as a group, they are more conservative in their judgments compared to participants responding individually.
Klettke, Graesser and Powell (2010)	<i>Applied Cognitive Psychology</i>	Expert testimony in child sexual abuse cases: The effects of evidence, coherence and credentials on juror decision making	Experimental	Expert evidence	16 male and 48 female undergraduate students.	Mock jurors read 8 different cases of child sexual abuse, followed by experts' testimony and rated guilt of the defendant, effectiveness of the expert testimony and credibility of the victim. Expert credentials, strength of evidence and coherence of testimony were manipulated.	<ul style="list-style-type: none"> Found that the evidence strength and coherence impacted on jury decision making, specifically guilt of offender, effectiveness of the expert and credibility of the victim. The credentials of the expert had no effect on juror's perceptions or decision making.
Kovera et al. (1997)	<i>Journal of Applied Psychology</i>	Does expert psychological testimony inform or influence juror decision making? A social cognitive analysis.	Experimental	Expert evidence	Undergraduate students (141 men, 157 women, aged 18–46).	Participants watched a simulated sexual abuse trial in which the child witness had been prepared for her testimony or unprepared, and different levels of expert testimony were given (none, standard, repetitive, and concrete).	<ul style="list-style-type: none"> 'Standard testimony' is a summary of the research, 'repetitive' is a standard testimony plus a second summary of the research, and 'concrete' is a standard testimony with a hypothetical scenario linking the research to the facts. Found that participants were significantly more likely to convict when the child was prepared, and standard or repetitive expert testimony was presented. Conviction was also more likely for concrete expert testimony when the child was less prepared. Thus, expert testimony and child witness demeanour interact with each other, and this interaction is complex.

Endnotes

¹ Cossins, 2010.

² Hamlyn, Phelps, Turtle and Sattar, 2004.

³ Henderson, 2011.

⁴ Friedman and Jones, 2005.

⁵ Friedman and Jones, 2005; Rowden, 2013.

⁶ Legislation on child intermediaries was recently implemented in New South Wales and South Australia..

⁷ Cashmore, 1995.

⁸ Eastwood and Patton, 2002.

⁹ Eastwood and Patton, 2002.

¹⁰ Cashmore and Trimboli, 2005.

¹¹ Eastwood and Patton, 2002.

¹² Oliver, 2006.

¹³ Victorian Law Reform Commission, 2004.

¹⁴ Victorian Law Reform Commission, 2004.

¹⁵ Victorian Law Reform Commission, 2004.

¹⁶ Burton, Evans and Sanders, 2006; Hamlyn, Phelps, Turtule and Sattar, 2004.

¹⁷ Plotnikoff and Woolfson, 2009.

¹⁸ Hanna, Davies, Henderson, Crothers and Rotherham, 2010; Hanna, Davies, Crothers and Henderson, 2012.

¹⁹ Burton, Evans and Sanders, 2006; Hanna, Davies, Henderson, Crothers and Rotherham, 2010; Hanna, Davies, Crothers and Henderson, 2012.

²⁰ Burton et al., 2006; Pipe and Henaghan, 1996.

²¹ Hanna et al., 2012.

²² Cashmore and Trimboli, 2005; Cashmore and Trimboli, 2006; Criminal Justice Joint Inspection, 2009; Eastwood and Patton, 2002; Plotnikoff and Woolfson, 2009.

²³ Richards, 2009.

²⁴ Hamlyn et al., 2004.

²⁵ Australian Law Reform Commission, 1992; Cashmore and De Haas, 1992; Flin, Kearney and Murray, 1996.

²⁶ Eastwood and Patton, 2002; Landstrom and Granhag, 2010.

²⁷ Eastwood and Patton, 2002.

²⁸ Goodman et al., 1998.

²⁹ Cashmore and Trimboli, 2005.

³⁰ Westcott, Davies and Spencer, 1999.

³¹ Burton et al., 2006; Flin, Kearney and Murray, 1996; Hamlyn et al., 2004; Rowden, 2013.

³² Hall, 2007.

³³ Rowden, 2013.

³⁴ Cashmore and Trimboli, 2005; Rowden, 2013.

³⁵ Applegate, 2006; Cashmore and Trimboli, 2005.

³⁶ Rowden, 2013.

³⁷ Plotnikoff and Woolfson, 2004.

³⁸ Doherty-Sneddon and McAuley, 2004; Goodman et al., 1998.

³⁹ Cashmore and De Haas, 1992.

⁴⁰ Cashmore, 1990.

⁴¹ Cashmore, 2002.

⁴² Orcutt, Goodman, Tobey, Batterman-Faunce and Thomas, 2001.

⁴³ Goodman et al., 1998; Landstrom and Granhag, 2010.

⁴⁴ Nash, Houston, Ryan and Woodger, 2014; Orcutt, Goodman, Tobey, Batterman-Faunce and Thomas, 2001.

⁴⁵ Burton et al., 2006; Doherty-Sneddon and McAuley, 2000; Hamlyn et al., 2004.

⁴⁶ Cashmore and Trimboli, 2005; Pipe and Henaghan, 1996.

⁴⁷ Eastwood and Patton, 2002.

⁴⁸ Eastwood and Patton, 2002, p. 94.

⁴⁹ Australian Law Reform Commission, 1997.

⁵⁰ Ross et al., 1994.

⁵¹ Cashmore and Trimboli, 2006.

⁵² See, for example, Judicial Commission of New South Wales, 2014.

⁵³ Stern, 2010.

⁵⁴ Stern, 2010, p. 16.

⁵⁵ Ellison and Munro, 2014; Taylor and Joudo, 2005.

- ⁵⁶ Ellison and Munro, 2014.
- ⁵⁷ Friedman and Jones, 2005.
- ⁵⁸ Burton et al., 2006; Bennett, 2004; Goodman, Quas, Bulkley and Shapiro, 1999; Reid Howie Associates, 2002.
- ⁵⁹ Pipe and Henaghan, 1996.
- ⁶⁰ Davies, 1999.
- ⁶¹ Bennett, 2004; Goodman et al., 1998.
- ⁶² Applegate, 2006; Australian Law Reform Commission, 1992.
- ⁶³ Cashmore and De Haas, 1992.
- ⁶⁴ Eastwood and Patton, 2002.
- ⁶⁵ Landstrom and Granhag, 2010.
- ⁶⁶ Davies, Wilson, Mitchell and Milsom, 1995.
- ⁶⁷ Wilson and Davies, 1999.
- ⁶⁸ Hamlyn et al., 2004.
- ⁶⁹ Eastwood and Patton, 2002; Hanna et al., 2010.
- ⁷⁰ Burrows and Powell, 2013; Burrows and Powell, 2014; McConachy, 2002; Read and Powell, 2011; Westera, Kebbell and Milne, 2013a.
- ⁷¹ Burrows and Powell, 2014; Davies, Wilson, Mitchell and Milsom, 1995; Lamb, Orbach, Hershkowitz, Esplin and Horowitz, 2007.
- ⁷² Landstrom and Granhag, 2010; Landström, Granhag and Hartwig, 2007.
- ⁷³ Landström, Granhag and Hartwig, 2005.
- ⁷⁴ Goodman et al., 2006.
- ⁷⁵ Pipe and Henaghan, 1996.
- ⁷⁶ Landström, Granhag and Hartwig, 2005; Landström, Granhag and Hartwig, 2007.
- ⁷⁷ Goodman et al., 2006.
- ⁷⁸ Eaton, Ball and O'Callaghan, 2001.
- ⁷⁹ Goodman et al., 2006.
- ⁸⁰ Taylor and Joudo, 2005.
- ⁸¹ Goodman et al., 2006.
- ⁸² Eaton, Ball and O'Callaghan, 2001.
- ⁸³ Landström and Granhag, 2008.
- ⁸⁴ Taylor and Joudo, 2005.
- ⁸⁵ Ellison and Munro, 2014.
- ⁸⁶ Eaton et al., 2001.
- ⁸⁷ Swim, Borgida and McCoy, 1993.
- ⁸⁸ Cashmore and Trimboli, 2006.
- ⁸⁹ Corns, 2004.
- ⁹⁰ Corns, 2004.
- ⁹¹ Cashmore and Trimboli, 2006.
- ⁹² Davies and Hanna, 2013.
- ⁹³ McConachy, 2002.
- ⁹⁴ McConachy, 2002.
- ⁹⁵ Westera, Kebbell and Milne, 2013b.
- ⁹⁶ Danby, Burrows and Powell, 2012.
- ⁹⁷ Burrows and Powell, 2014; Davies and Hanna, 2013; Westera, Kebbell and Milne, 2013a.
- ⁹⁸ Davies and Hanna, 2013.
- ⁹⁹ Danby, Burrows and Powell, 2012.
- ¹⁰⁰ Burrows and Powell, 2014; Burton et al., 2006; Davies et al., 1995; Tinsley and McDonald, 2011.
- ¹⁰¹ Burton et al., 2006; Davies and Hanna, 2013; Westera et al., 2013a.
- ¹⁰² Eastwood and Patton, 2002.
- ¹⁰³ Burton et al., 2006, p.57.
- ¹⁰⁴ Hamlyn et al., 2004; Pipe and Henaghan, 1996.
- ¹⁰⁵ Burton et al., 2006.
- ¹⁰⁶ Criminal Justice Joint Inspection, 2009.
- ¹⁰⁷ Pipe and Henaghan, 1996, p.393.
- ¹⁰⁸ Ross et al., 1994.
- ¹⁰⁹ Burton et al., 2006.
- ¹¹⁰ Hamlyn et al., 2004.
- ¹¹¹ Burton et al., 2006, p.59.
- ¹¹² Hanna, Davies, Henderson and Hand, 2013; Krähenbühl, 2011.
- ¹¹³ Plotnikoff and Woolfson, 2007.
- ¹¹⁴ Hanna, Davies, Henderson and Hand, 2013.
- ¹¹⁵ Hanna et al., 2013; Krähenbühl, 2011.
- ¹¹⁶ Powell, Bowden and Mattison, 2014.
- ¹¹⁷ Orcutt et al., 2001; Ross et al., 1994; Swim, Borgida and McCoy, 1993.
- ¹¹⁸ Goodman et al., 1998; Wilson and Davies, 1999.

- ¹¹⁹ Cashmore, 1995; Cashmore and Trimboli, 2005; Davies et al., 1995; Ellison and Munro, 2014; Hamlyn et al., 2004.
- ¹²⁰ Cashmore, 1995; Cashmore and Trimboli, 2005; Davies et al., 1995.
- ¹²¹ Ellison and Munro, 2014.
- ¹²² Hamlyn et al., 2004.
- ¹²³ Cashmore, 1995.
- ¹²⁴ Davies, 1999; Valentine and Maras, 2011; Zajac, Gross and Hayne, 2003; Zajac and Hayne, 2003; Zajac and Hayne, 2006; Spencer and Lamb, 2012.
- ¹²⁵ Burton, Evans and Sanders, 2007; Davies and Seymour, 1998; Hanna et al., 2013; Rigg, 2014; Stolzenberg and Lyon, 2014; Zajac and Cannan, 2009; Zajac, Gross and Hayne, 2003.
- ¹²⁶ Section 41(1).
- ¹²⁷ Cashmore and Trimboli, 2005.
- ¹²⁸ Cashmore and Trimboli, 2005, p. 47.
- ¹²⁹ Cashmore and Trimboli, 2005, p. 56.
- ¹³⁰ Hanna et al., 2013; Zajac and Cannan, 2009; Zajac et al., 2003.
- ¹³¹ Hanna et al., 2013.
- ¹³² Cossins, 2008; Cossins and Goodman-Delahunty, 2013; Tabak and Klettke, 2014; Shackel, 2007; Shackel, 2008; Shackel, 2009.
- ¹³³ Cossins and Goodman-Delahunty, 2013; Goodman-Delahunty, Cossins and O'Brien, 2010; Seymour, Blackwell, Culvert and McLean, 2014; Tabak and Klettke, 2014.
- ¹³⁴ Cossins and Goodman-Delahunty, 2013.
- ¹³⁵ Gabora, Spanos and Joab, 1993; Goodman-Delahunty, Cossins and O'Brien, 2010; Goodman-Delahunty, Cossins and O'Brien, 2011.
- ¹³⁶ Brekke and Borgida, 1988; Goodman-Delahunty, Cossins and Martschuk, 2014; Klettke, Graesser and Powell, 2010.
- ¹³⁷ Brekke and Borgida, 1988.
- ¹³⁸ Goodman-Delahunty et al., 2010.
- ¹³⁹ Freckelton, 1997.
- ¹⁴⁰ Seymour, Blackwell, Culvert and McLean, 2014.
- ¹⁴¹ Cossins and Goodman-Delahunty, 2013.
- ¹⁴² Brekke and Borgida, 1988.
- ¹⁴³ Brekke and Borgida, 1988; Gabora, Spanos and Joab, 1993; Goodman-Delahunty, Cossins and Martschuk, 2014.
- ¹⁴⁴ Kovera, Borgida, Gresham, Gray and Regan, 1997.
- ¹⁴⁵ Gabora et al., 1993.
- ¹⁴⁶ Goodman-Delahunty et al., 2014; Goodman-Delahunty et al., 2010.
- ¹⁴⁷ Klettke, Graesser and Powell, 2010; Klettke and Powell, 2011.
- ¹⁴⁸ Goodman-Delahunty et al., 2014.
- ¹⁴⁹ Goodman-Delahunty et al., 2010; Goodman-Delahunty, Cossins and O'Brien, 2011; Goodman-Delahunty et al., 2014.
- ¹⁵⁰ Goodman-Delahunty et al., 2014.

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Appendix B: Police organisational responses to interviewing

Purpose and approach of the review

The aim of this review was to examine current police organisational practices in light of what constitutes evidence-based practice, and to offer constructive and innovative solutions to help police organisations achieve evidence-based practice when interviewing complainants of sexual assault. We sought to answer the following questions:

- What systemic factors, if any, account for a lack of police adherence to evidence-based practice in interviewing complainants of sexual assault?
- How, if at all, can police organisations improve their practice?

This review focused on aspects of police practice that are common to many organisations (policing and other professional bodies that conduct these types of interviews) both in Australia and internationally.

The findings set forth below draw on our detailed understanding of contemporary research on investigative interviewing of child and adult sexual assault complainants, and current organisational interview practices in all nine policing jurisdictions in Australia: ACT Policing, Australian Federal Police, New

South Wales Police Force, Northern Territory Police, Queensland Police Service, South Australia Police, Tasmania Police, Victoria Police, and Western Australia Police Service. To make the findings as salient as possible to inform practice, we examined the research on investigative interviewing (and interviewing for evidentiary purposes), and the science of human learning. From our collaborations with police organisations across Australia, we brought to the task a detailed understanding of contemporary police practice in all jurisdictions based on our experience delivering training, writing training and guidance manuals, and in providing advice on police interview policy and practice.

To supplement our pre-existing knowledge, in late 2014 we wrote to the eight organisations responsible for policing the nine Australian jurisdictions (ACT Policing is a business unit of the Australian Federal Police) and invited them to provide us with information on their current policy and practice for child and adult complainants of sexual abuse in relation to:

- the interview methods used to gather evidence from complainants
- the organisational role, training and ongoing professional development of those who conduct these interviews.

Seven out of eight organisations responded to this invitation. Of these, two responded in writing and five responded by arranging to meet in person with one or more of the researchers. At these meetings the representative/s of each organisation discussed their current policies and practices in detail, and arranged for us to receive copies of official documents related to their interview policies, procedures and training. We received 22 documents of varying types from the different organisations, including training curricula, and protocol and guidance documents on investigative interviewing (totalling 1,203 pages).

We use examples from these documents to articulate factors that are working well or likely to inhibit police from achieving evidence-based practice, and to justify the recommended changes. Table 2 displays a breakdown of each jurisdiction’s adherence to these criteria as at December 2014. Of note, due to the delays between the police interviews and trial, the police interviews analysed in the main body of the report (Chapter 9) predate this organisational practice review. Organisations may have made changed practice since this research was conducted, and likewise since the review that is presented below.

Analysis of police adherence to evidence-based practice

For agencies (such as child protection, police and the courts) to respond effectively to sexual assault, they need a coherent, accurate and complete account of the incident(s) from the complainant. Police play a pivotal role in eliciting, recording and presenting this account. This report examines four main areas that underpin the ability of police organisations to undertake this complex task:

- the interview framework
- opportunities for skill development
- quality assurance for interviewer and organisational performance
- recording and presentation of evidence.

In each of these four areas we briefly review evidence-based criteria of best practice, and identify common limitations across the different jurisdictions that appear to inhibit adherence to best-practice interviewing. An overview of the key criteria for evidence-based practice is provided in Table 1 below, and described in more detail in subsequent sections. Adherence to these key criteria will ensure both program efficacy and effectiveness.

Table 1 Key criteria of evidence-based practice

Criteria	Elements of evidence-based practice
Interview framework	<p>An interview framework that focuses on maximising narrative detail about the alleged offending and includes clear guidelines for, and examples of:</p> <ul style="list-style-type: none"> • different types of questions (including subtypes of open-ended questions), and how and when they are applied • relevant evidentiary information required for sexual assault offences (including when and when not to pursue more detail).
Opportunity for skill development	<p>A skills development regime that adopts an incremental approach to learning skills by:</p> <ul style="list-style-type: none"> • defining what constitutes best practice in questioning, and explaining why • developing knowledge through instruction about how to identify different question types, and how and when they are applied • developing knowledge through instruction about the relevant evidentiary information required • developing the sub-skills related to questioning • the opportunity to practice in a regime that includes the following features: <ul style="list-style-type: none"> ○ multiple practice sessions spaced over time (with breaks between) ○ immediate feedback about how to improve practice from a validated expert in interviewing who is trained in giving task-orientated feedback ○ individually tailored training that provides the trainee with the opportunity to make errors and learn to correct them in a controlled environment (such as by using actors or a computer-generated witness) ○ the opportunity to practice with a range of challenges commonly encountered in the field.

Criteria	Elements of evidence-based practice
Quality assurance of interviewer and organisational performance	<p>A quality assurance regime that enables police to specify current levels of performance with sexual assault complainants, as well as areas for improvement. This regime should include:</p> <ul style="list-style-type: none"> • a standard, reliable, valid measure of interviewer performance that includes the use of open-ended questions and the elicitation of the required evidentiary detail • a process to monitor the competence of individual interviewers • a process to monitor organisational performance in interviewing and investigations.
Recording and presentation of evidence	<p>An evidence-based framework that prioritises complainant interviews for videorecording and:</p> <ul style="list-style-type: none"> • extends the access of videorecorded interviews to a wider variety of complainants based on need • policy that identifies the circumstances and characteristics of complainants whose interview should be videorecorded.

The interview framework

Evidence-based interview frameworks

Scholars have developed interview protocols for interviewers to use as guiding frameworks with specific population groups.¹ Two guiding principles derived from scientific research on eyewitness memory collectively define best-practice investigative interviews with witnesses.

Maximise relevant narrative responses

The first guiding principle is that the questioning style needs to maximise the elicitation of narrative detail. Specifically, the interviewer should elicit a comprehensive and coherent narrative account, using open-ended questions, prior to using specific (more short-answer) questions.² Open-ended questions encourage elaborate detail without dictating what specific information is required.³ Open-ended questions minimise individual differences in response accuracy due to variability arising from memory, language and social skills.⁴ All witness groups respond with high accuracy to open-ended questions, whereas witnesses respond with less accuracy to specific questions (such as ‘what’, ‘where’, ‘when’, ‘who’ and ‘how’), especially when the witness is vulnerable. The benefits of open-ended questions are broad. They elicit longer responses⁵, encourage witnesses to play an active role in the interview process⁶, enhance witnesses’ perception that they have been heard⁷, maximise story-grammar and victim credibility⁸, elicit more temporal attributes⁹, reduce the negative consequences of interviewer confirmation bias¹⁰ and assist in detecting deception.¹¹

However, not all open-ended questions are equally effective at eliciting accurate narratives. An open-ended leading question that incorporates a falsehood (such as asking a witness “Tell me what happened when Joe hurt you?” when it has not been established that the witness was hurt by Joe) is *more* likely to lead to a false account than a yes/no question (such as “Did Joe hurt you?”).¹² This is because the open-ended

question presumes the false detail is correct and asks the witness to generate a response.¹³ With specific questions, the process of providing a response is much more superficial; the witness may assent to the question without even hearing or understanding the question. Furthermore, the broader scope of open-ended questions encourages a witness to draw on existing memories when generating an account of what occurred. If the open-ended question is leading, this effortful process makes the witness more susceptible to developing a false memory.

The best open-ended questions, coupled with non-verbal encouragement, direct the witness to provide the evidentiary detail required, minimise defensiveness and anxiety, overcome the witness’s natural tendency to suppress information, prevent interviewers from incorporating information that has not yet been established, and encourage coherence and elaborate detail.¹⁴ Over a decade ago experts thought that children’s responses to open-ended questions were lacking in detail, but subsequent research had indicated that gentle persistence with well-phrased, non-leading, open questions can yield elaborate accounts, even among very young children. Research has also highlighted the danger of using cues and props (such as anatomical dolls) or clinical methods (like dolls and timelines).¹⁵ Additional tools may enhance memory recall (mnemonics), but these methods are usually poorly used in practice and increase errors as well as correct responses regardless whether a cue is in the form of a specific question, instruction, timeline or physical prop (such as a doll, demonstration aid or scale model).¹⁶ Maximising narrative detail must therefore form the basis of interview protocols, even for witnesses with limited memory and language abilities.¹⁷

Minimise irrelevant detail

The second guiding principle of investigative interviewing relates to the content of the narrative account. Scholars and police previously sought to maximise the amount of detail recalled regardless of

relevance. This is counterproductive when interviewing sexual assault complainants. As a result of prosecutors' continued concerns that police interviews with child witnesses are often too long and incoherent, and contain large numbers of irrelevant details¹⁸, recent research has examined how police interviews can better meet evidential requisites.¹⁹ Prosecutors have raised similar concerns about excessive and incoherent details in adult sexual assault complainant interviews.²⁰ High levels of detail about irrelevant matters not only reduce the coherence of the account, but provide a source of material that defence counsel can use to undermine the credibility of the witness during cross-examination.²¹ When these details are elicited through specific questions, the lower accuracy of the responses is likely to exacerbate these problems.²²

The objective of a police interview with a sexual assault complainant is to maximise coherence and relevant details, not to increase the overall quantity of the detail. Use of open-ended questions that encourage a narrative of events rather than descriptive detail can avoid these problems (such as "Tell me more about the part where ..." instead of "Tell me about the room").²³ Best-practice guidelines for interviewing sexual assault complainants should therefore include guidance to help the interviewer pursue relevant evidentiary information (such as the nature, location and timing of the offence) in an appropriate manner, and to avoid pursuit of irrelevant details.²⁴

Current police interview frameworks

Each police organisation is independently responsible for developing and implementing its own regime for investigative interviewing. All police organisations in Australia use interview protocols or methods that focus on obtaining a narrative account from complainants, and recognise this important aspect of evidence-based practice. The language in the policy and guidelines for interviewers in Australian policing agencies supports this approach by identifying the value of open-ended questions, and problems associated with leading and specific questions. The guidance appropriately focuses on narrative as the central form of evidence, not on using diagnostic techniques such as cues or props.²⁵ The guidance specific to child sexual abuse or adult sexual assault interviews or investigations also specifies legislative requirements to establish what type of crime, if any, may have been committed – that is, the prima facie elements of particular offences.

Our comparison of current police practice and the criteria derived from the evidence base on how to interview effectively identified three main areas where police can improve practice.

Streamline definitions for interviewing methods

First, police can streamline definitions of questioning and interviewing methods, which are usually formulated differently in the protocol and training materials for interviewing children versus adults, and non-sexual versus sexual crimes. Consistency in these definitions will make it easier and less time-intensive for trainees to learn advanced interviewing skills. At present, officers selected to attend specialist training to investigate child or adult sexual assault complainants have usually attended interview training as a recruit and as an investigator or a trainee detective. In these training courses they were exposed to interview methods and terminologies (such as the PEACE interviewing framework) that are qualitatively different from those they subsequently learn in child or adult sexual assault interviewer training. In one jurisdiction general adult witness guidance uses the terms 'closed questions (appropriate)', 'probing questions', 'forced choice questions', 'inappropriately closed questions' and 'reflective probing questions' to describe closed or specific questions, but the child witness guidance uses the terms 'specific questions' with subcategories of 'cued recall', 'yes/no questions' and 'forced choice questions'.

The different interviewing methods and terminologies are often contradictory. For example, in one jurisdiction the child guidance defines an open-ended question as a question that "elicits an elaborate response and does not specify what information to recall"; in the adult witness guidance an open-ended question is defined as one that "encourages people to express their thoughts, feelings, views, experiences and observations". Examples of open-ended questions provided in the adult witness guidance were defined as specific questions in the child witness guidance. For example, "Where could you find out more about this?" is an example of an open-ended question in the adult guidance that would be a specific question in the child guidance because it elicits a narrow response and dictates the information required.

Trainers are probably unaware of these conflicts because different trainers from different parts of the organisation separately teach child and adult interviewing. The inconsistent definitions are a problem for police because child interviewers need to spend time learning new questioning skills rather than building on prior knowledge. Furthermore, habits formed from contradictory previous knowledge and experience inhibit the acquisition of new skills.²⁶ Conflicting definitions and terminology are generally less of a problem for officers who interview adult complainants of sexual assault because the specialist course for these interviewers relies on prior interview training and does not provide specific guidance on the interview process.

Provide guidance on how to apply different question types

The second area police can improve their interviewing response is to incorporate more detail in guidance and training about the definitions and application of different question types. To effectively learn questioning skills, interviewers need to be familiar with various types of open questions; how they differ from others that may appear similar; why they are important; and how they can be applied to obtain a useful, coherent narrative account.

For child interviewing, only two jurisdictions provide trainees with sufficient guidance to enable them to effectively learn questioning skills. No guidance materials in any jurisdictions included sufficient information about how to question adult sexual assault complainants. The definitions of question types in police guidance are at best crude and at worst incorrect. Different question types are inadequately distinguished and guidance incorporates only broad examples, which are unlikely to help trainees to distinguish one question type from another. For example, one guide contained only the following examples of open-ended questions: "Tell me more" questions (like "Tell me about the part when ..." and "What happened next?") and no guidance on how to apply open-ended questions in the context of an interview.

Often absent from this guidance are: examples of different types of open-ended questions; explanations of how open-ended questions can be framed in a leading way, resulting in the reporting of unreliable information; and how to use open-ended questions to elicit a coherent narrative account (for example by focusing on the actions of past events, and keeping questions as simple as possible within a developmental framework). This problem is exacerbated by the fact that the definitions of question types are often confusing and sometimes wrong. In one guide, open-ended questions are described as those considered to be the least leading type of questions, whereas open-ended questions can be leading, and when they are leading, they are more damaging than a specific or narrow leading question). At its most extreme, misinterpretations of the evidence base reflected in current guidelines could lead interviewers to adopt behaviours that are counterproductive to eliciting a narrative. Indeed, in one guide, specific 'what', 'where', 'when', 'who' and 'how' questions were incorrectly described as reducing a child's suggestibility, when in reality these types of questions can lead to an increase in errors.²⁷

Police can improve in practice by dedicating a majority of the guidance on interviewing to describing the importance of open-ended questions and how to carefully craft questions to obtain a coherent and evidentially relevant narrative. Instead, guidance on interviewing children is often cluttered with information that is superfluous to understanding the core skills required for interviewing – notably, dense content on child development and memory theory, and additional interview tools. For example, in one police guide for interviewing children, as few as seven lines out of 132 pages were dedicated to open-ended questions. Available police guidelines for interviewing adult sexual assault complainants are generally devoid of specific advice or guidance on questioning.

Interviewers usually rely on their earlier training on the Cognitive Interview, where much of the guidance is devoted to the interview structure, and use of mnemonics (memory aides), rather than questioning per se. Research has indicated that these mnemonics are seldom used in practice.²⁸ One guide on interviews with adult witnesses contained as few as three out of 174 pages focused on questioning, and a total of 14 lines dedicated to open-ended questions. Overall, this high level of extraneous content is likely to distract trainees from learning the basics of interviewing.²⁹

Define investigative and evidentiary goals

The third area that police organisations can address to improve their interviewing response is to implement guidance that clearly defines the investigative and evidentiary goals of interviews specific to sexual assault cases. Current guidance typically encourages interviewers to gather as much detail as possible without defining the relevance of detail. This approach leads prosecutors to express concerns about the excessive detail in the records of interview. This problem is especially pronounced in guidelines for interviewing adults, which often contain direct instructions to report trivial or unimportant details. Indeed, one guide contained the following instruction: "Do not miss anything, no matter how immaterial it may seem, as every piece of information is vital." Incorporating clear guidance on when to follow up to secure details and when not to will help interviewers make the records of interview more useful for investigative and evidentiary purposes. For example, when the child says "he touched my private part", does the interviewer need to seek elaboration as to what is meant?³⁰

Opportunity for skill development

Evidence-based practice to develop interview skills

In recent years, the evidence base on how to learn interviewing skills has advanced to the extent that we now know the core components of an effective training regime.³¹ The most difficult skill to learn is also the most important: using open-ended questions to elicit a narrative account that contains the required evidentiary detail.³² Like any other complex skill, an incremental approach to learning is required for trainees to learn to use the skills effectively.³³ Specifically, trainees must learn the knowledge and subskills that underpin the complex skill of questioning before they progress to practice sessions in applying the complex skill set.³⁴ Research findings have specified the training activities to be learnt and the order in which they should be learnt to produce proficient interviewers. First, trainees must receive clear, explicit instruction on the knowledge that underpins the skills, so that they understand what constitutes best practice in questioning, and why.³⁵ Next, they need to develop the ability to identify different question types and to know how to apply them in practice³⁶; coding question types in interview transcripts is one of the most effective methods to learn this subskill.³⁷ Interviewers then need to remember the various question stems³⁸ and to learn how to apply them to elicit the types of information relevant to the investigation and prosecution of the case.³⁹

Once equipped with the subskills for effective questioning, trainees need repeated, focused practice opportunities to facilitate incremental skill development.⁴⁰ It is vital that this practice incorporates a number of key features to make it effective. Failure to do so can result in a decline in skill level.⁴¹ Practice is most effective when spaced across multiple sessions, dispersed with rest over a period of months rather than days.⁴² Practice should address the trainee's specific learning needs, depending on their level of competency. It should be sufficiently challenging to give the trainee an opportunity to make errors and to learn to correct these errors in a controlled environment.⁴³ For trainees to learn from their errors, they need corrective feedback explaining why specific behaviours are problematic, and instruction on alternative strategies that they can use.⁴⁴ This feedback is only effective when the person providing it has expertise in evidence-based practices for interviewing, and on giving task-orientated feedback.⁴⁵ If the instructor lacks this expertise, feedback may result in a decline in the trainee's performance.⁴⁶ Finally, practice should expose trainees in a controlled way to common challenges

that arise in the interview process. Using actors (or computer simulated avatars) who simulate the behaviours of witnesses in mock interviews can achieve this type of controlled practice.⁴⁷ The actors need special training on how to provide standardised responses to certain interviewer behaviours, and how to tailor the level of difficulty of the interview to the needs of the individual trainee.⁴⁸ The research is clear that mastery of interviewing child and adult sexual assault complainants requires a sophisticated, evidence-based learning regime.

Current police interview training regimes

All jurisdictions in Australia acknowledge the complexity of skills required to interview child complainants, and have strict policies on who can interview child complainants of sexual assault, often making specialist training a mandatory prerequisite. The comparable policy on who can interview adult complainants of sexual assault is less stringent. Specialist training is not usually a prerequisite for conducting these interviews, and the training that is available for adult sexual assault investigators seldom incorporates guidance on how to interview these types of complainants. All training regimes that we received that are aimed at learning interviewing skills provide the opportunity for interviewers to practice the skills and receive feedback about their performance, showing that the importance of practice is recognised to some degree. However, these regimes are generally insufficient to facilitate the incremental approach required to learn and master interviewing skills. Two organisations' training regimes for interviewing children were an exception to this trend, as we discuss below. All other training regimes consisted of a face-to-face block of training courses (ranging from three days to four weeks) hosted in-house by police trainers. Research has shown that short, intensive block-training regimes are ineffective, as gains made in the classroom in these circumstances are typically short-lived.⁴⁹

The science that underlies enduring skill development suggests that police organisations can improve the effectiveness of its training regimes by incorporating two key design features.

Teach questioning subskills before interview skills

First, training regimes should incorporate instruction and learning activities focused on developing the knowledge and subskills that underpin more complex questioning skills.⁵⁰ Conversely, current training courses often spend the majority of training time imparting knowledge to trainees on law and policy, the science behind the interviewing methods, communication skills and the interview process. For example, in one child interviewing course, three days

out of four-and-a-half are devoted to learning knowledge, with only one two-hour session on question types, and no examples of how to apply these methods.

The misplaced emphasis of the training is most pronounced in adult sexual assault training, which is generally dedicated to information about sexual assault investigations (such as offence types and experiences of victims), but does not address the interview process with complainants. Almost the entire curriculum in these courses is dedicated to knowledge acquisition, often without any sessions on how to question adult sexual assault complainants. For example, in a five-day adult sexual assault investigators training course, none of the curriculum is dedicated to how to interview adult sexual assault complainants.

Interviewing adult sexual assault complainants presents unique challenges distinct from interviews with other types of adult witnesses, and requires specialist training. Without learning the subskills that underpin effective questioning, it is unlikely that interviewers who complete these training courses will develop mastery in questioning skills.

Increase opportunities for practice in interviewing skills

Second, police training regimes should incorporate more opportunities for evidence-based practice sessions.⁵¹ In most organisations, there are inadequate practice opportunities to develop mastery of the skills needed to interview sexual assault complainants. Practice opportunities are usually provided towards the end of the training course, over a maximum of two days, with one or two practice interviews per trainee. For example, in a three-day child witness interview course only a half day is spent practising interviewing skills, and in a four-week specialist sex crime training course no time is spent practising interviewing skills for adult sexual assault complainants. Furthermore, there are usually no follow-up opportunities for practice after attending the training course. Without opportunities spaced over time (that is, months) to practice and progressively develop these complex skills, interviewers are unlikely to master interviewing.

Practice opportunities in police interview training need to incorporate the elements required for effective practice.⁵² Generally, the current police training regimes include practice sessions with feedback from a trainer or experienced practitioner who had previously completed the same interview training course. Given the weaknesses in the training regime and interview framework in use, it is unlikely that these trainers are equipped with the skills to provide 'expert' feedback. Instead, they may be

reinforcing errors in practice, resulting in a decline in interviewer performance.⁵³ Some organisations have incorporated into their training feedback from supervisors or peers, but it is unlikely that these people have an in-depth understanding of evidence-based practice in interviewing, and how to give effective feedback. Adding to this problem, organisational rules around tenure – which usually specify that a person can remain in the specialist investigation role for no more than a two- or three-year period – curtail the time interviewers have to master their interviewing skills.⁵⁴ A quality assurance regime for trainers and others who provide feedback would alleviate some of these problems.

Police can further improve the quality of practice sessions by using actors trained with a script designed to present interviewers with opportunities to practice dealing with challenges they will likely confront in the field.⁵⁵ Currently, most practice sessions scheduled during training are completed with other participants in the course, or children from a local school or kindergarten who play the role of the witness. These mock interviewees are not specially trained to work to a script that clearly outlines how they should respond to the interviewers' prompts. This makes it difficult to tailor the practice sessions to the individuals' training needs and to introduce common challenges that are likely to arise in the field.

In the two organisations with regimes that reflect evidence-based practice, trainees complete 15 computer-based modules over a period of months. These modules include instruction, quizzes, coding exercises and exemplars of practice, to provide the knowledge and develop the subskills needed to interview effectively.⁵⁶ Trainees also participate in multiple mock interviews – in different sessions spaced over time – with a specially trained actor working to a script either over the telephone or via Skype. A recent evaluation of these regimes indicated positive outcomes of the training, including: interviewers asking a higher proportion of open-ended questions, adherence to the interview protocol, improved coverage of evidentially relevant information and a reduction in interview duration.⁵⁷

Quality assurance for interviewer and organisational performance

Evidence-based quality assurance systems

Quality assurance is essential to the effectiveness of any evidence-based program. Police interviews of complainants in sexual assault cases should be no exception. Effectiveness in this context refers to how well police field interviews align with evidence-based practice, and meet investigative and evidentiary needs.

Evaluate interviewer and organisational performance

Quality assurance is necessary to continuously improve service delivery.⁵⁸ The two main purposes of quality assurance for interviewing sexual assault complainants⁵⁹ are: to evaluate the performance of individual interviewers and thus enable effective supervision by identifying and addressing their professional development needs; and to evaluate organisational performance, training, policy and other processes to identify how to improve the provision of this service. Effective quality assurance for interviewing involves comparing current performance against objective, valid and reliable standardised measures of evidence-based practice.⁶⁰ Without a mechanism that objectively measures current standards of service, organisations will not have the ability to identify patterns of poor performance, the factors contributing to these patterns, or effective strategies to overcome these problems.

The scientific evidence base suggests several key components to effective quality assurance. Participants' ratings of their own performance are poor indicators of actual performance⁶¹, so organisations need to compare interviewer performance to a standardised, objective and evidence-based measure.⁶² The basis for this measure should be adherence to the features of the interview framework discussed above, focusing on open questions and evidentiary requirements. For this evaluation to be reliable and valid, the person who administers it must have demonstrated expertise in interviewing, and the organisation should provide regular inter-rater reliability and moderation sessions when multiple evaluators are used.⁶³

An important factor in achieving quality assurance is the timing of the evaluation. Ideally organisations should evaluate interviewer performance against objective measures: before the interviewer attends training (to obtain an objective benchmark of performance); immediately after the training (to determine if the training has been effective); after the interviewer has conducted field interviews (to determine if the skills learnt in training have transferred to the field); and at regular intervals in the field when interviewing these types of witnesses (to determine if the skills are maintained and because performance declines over time without monitoring).⁶⁴ Standardising the context of the evaluation by controlling the witness's behaviour, for instance, tests the interviewer's application of core skills. It is an approach calculated to provide organisations with the most valid and reliable indicators of performance (for example with a specially trained actor who works from a script).⁶⁵ Organisations can use the results of the evaluation to identify where individual performance can be

improved, and where commonalities in sub-optimal performance indicate the need for broad organisational change.

Track case progress

Case tracking, or mapping the progress of a case as it goes through the criminal justice system, is another useful quality assurance mechanism that can help police working with other criminal justice agencies to make evidence-based decisions about how to improve policy and procedure.⁶⁶ While many past evaluations of child protection and criminal justice systems rely on retrospective data collection, this data provides limited insights because the multiple agencies that are involved do not have common, interlinked databases (like child protection, the police and courts) and do not uniformly identify and code individual case information.⁶⁷

The type of information captured in the tracking system – and how it is recorded – is integral to the success of the evaluation. Contemporaneous case tracking enables researchers to move beyond descriptive analyses, to examine the inter-relationship between variables in determining evidence quality and case outcomes. This tracking can capture a wider range of case-related details such as abuse and referral type; victim and suspect relationship and demographics; onset and frequency of abuse; agencies involved; case outcomes; and speed of case processing.⁶⁸ A case-tracking system facilitates effective review of interviewer performance by providing supervisors with output measures for their staff (such as number of interviews, case outcome and number of cases).⁶⁹ Tracking the progression of cases across multiple agencies requires clearly defined variables to be uniformly implemented by all agencies that use the database (police, child safety services, the courts and academics), supported by clear policies and audits of data entry accuracy.⁷⁰

Current police quality assurance systems

Without information about the effectiveness of their current practice, police cannot improve. Most Australian police organisations do currently not have an evidence-based quality assurance regime. Two organisations are exceptions to this trend, and only insofar as child interviews are concerned. One of these organisations has a robust evidence-based external quality assurance regime for child interviews, which includes a case-tracking system and regular evaluation of individual interviewer performance against a standardised measure.⁷¹ The other has a quality assurance regime for child interviewers during training, but this regime does not extend to evaluate subsequent performance in the workplace.

Implement a quality assurance system

Police organisations can improve interviewing practice by implementing a robust quality assurance regime for monitoring interviewer and organisational performance, and identifying areas for improvement. Some organisations have introduced other processes to address quality assurance, such as supervisory file reviews, peer review of interviews and formal feedback from the public prosecution agency. Unfortunately, these processes are not evidence-based. A common problem in these regimes is the absence of any mechanism to validate the expertise of those administering the quality assurance or to provide effective feedback. Supervisors – who are often responsible for other aspects of an interviewer’s performance management – do not often have the requisite level of interviewing expertise to effectively conduct quality assurance.⁷² Prosecutors are integral to developing the criteria for the evidentiary measures incorporated into this evaluation, but are unlikely to have expertise in interview methods. A robust quality assurance regime is necessary for police to improve the interviewing of complainants of sexual assault.

Recording and presentation of evidence

Evidence-based methods for recording interviews

A strong evidence base indicates that the most reliable, complete and transparent method for recording an interview is videorecording.⁷³ This form of recording preserves the complainant’s exact words, behaviour and demeanour, as well as the methods used by the interviewer to elicit those responses from the complainant. In contrast, a written statement prepared by an interviewing officer – the historical method relied on to generate a record of interview – is not a verbatim record of the complainant’s account.⁷⁴ A written statement is incomplete and unreliable because it relies on the officer’s memory about what was said; memory is a reconstructive process that is prone to error.⁷⁵

A written record of interview does not provide a transparent record of the interview process, making it impossible to effectively evaluate interviewer performance and to examine how the interview process may have influenced the reliability of the complainant’s account.⁷⁶ Adding to these problems, the process of taking a statement encourages the interviewer to pay less attention to the complainant and instead focus on controlling the flow of information by resorting to methods that are likely to decrease the reliability of the information provided (such as repetitive, specific and leading questions).⁷⁷ These methods are likely to make a complainant feel

disbelieved and frustrated during an interview that is already prolonged due to the need for the officer to take notes and then write out the statement for the complainant to sign.⁷⁸ A videorecorded interview not only benefits the complainant, it also improves the quality of evidence elicited and enables effective review of the quality of interview.

Videorecording the interview has additional benefits at trial. When legislation allows, the video can be used as the basis for a complainant’s evidence-in-chief.⁷⁹ The detrimental effects of delay on memory quality and quantity – and the more relaxed social environment of the interview – means that video evidence is likely to be more complete and reliable than live evidence in court.⁸⁰ Using the police interview as evidence reduces the complainant’s stress during a trial proceeding.⁸¹ Furthermore, when police take a written statement, the inaccuracies or omissions in the statement are likely to generate inconsistencies with live testimony, creating opportunities for defence counsel to discredit the complainant’s credibility on cross-examination.⁸²

Children are especially likely to benefit from the transparency and reliability provided by videorecording the interview – due to the developmental issues limiting their ability to report detailed information over time, and their heightened vulnerability to suggestion.⁸³ Nevertheless, the reconstructive nature of memory and deterioration of memory over time means these issues also affect adult sexual assault complainants.⁸⁴ Adult complainants, who are often vulnerable due to psychological and developmental issues, are particularly likely to benefit from having their interview videorecorded.

Current police methods for recording interviews

In recognition of the evidence base, all jurisdictions in Australia routinely videorecord interviews of child complainants of sexual assault, and adult complainants with an intellectual disability. These witnesses are most vulnerable to stress and suggestion, and research supports the priority of making available alternative measures for their evidence over that of other witnesses. This approach is consistent with legislative provisions that provide these complainants with the added benefit of using the police record of interview as evidence-in-chief.

However in most jurisdictions, police are less likely to videorecord an interview with some types of children – such as adolescents and witnesses in remote areas where videorecording equipment is more difficult to access. Police do not consistently offer adult sexual assault complainants the opportunity of a

videorecorded interview. Only one jurisdiction that we reviewed routinely videorecords interviews with adult complainants; others do so occasionally depending on the circumstances of the particular case. In recognition of the research, police organisations in several jurisdictions indicated that they were considering making videorecording more consistently available for all adult sexual assault complainants.

Police organisations could target two main areas to better align their practice with evidence-based methods.

Extend the use of videorecording to all sexual assault complainants

First, police should work with other criminal justice agencies to extend the option of videorecording the interview to all complainants of sexual assault. Videorecording is likely to benefit complainants, and promote more effective decision making by investigators, legal professionals and other tribunals of fact – even when that interview is not used as evidence. Where police extend the use of video recorded interviews, they should adopt a considered and careful approach to avoid the problems that affected videorecorded child interviews being used as evidence-in-chief – such as concerns about overly long accounts, too many irrelevant details and insufficient evidentiary content. Countries that take a similar approach to that used in most Australian jurisdictions (cognitive interview training in a 5–10 day course as part of PEACE interview training) have been criticised by legal professionals about the poor quality and utility of their interviewing methods.⁸⁵ These deficits can be overcome if police organisations use interview methods learnt through an evidence-based training regime that meets the unique needs of sexual assault complainants. Failure to do so may render videorecorded interviews counterproductive to just outcomes in these cases. In addition, without a videorecording it is impossible to evaluate interviewer performance and improve police practice for interviewing adult complainants of sexual assault.

Provide policy guidance on when to videorecord interviews

Second, a consistent response by police to complainants of sexual assault requires clear policy as to the types of complainants who should have their interview videorecorded. Instead, anecdotes from police organisations suggest a lack of any formalised rationale for videorecording an interview, resulting in inconsistent service delivery. For example, in one organisation, officers can choose to videorecord the interview if it is a ‘complex’ or ‘unusual’ matter, but these terms are undefined. Police in another organisation stated that an inarticulate complainant was a reason to videorecord (because this process is

easier for the complainant) and a reason not to videorecord (because the complainant may present poorly on video). When developing policy, police should use a strong evidence-based rationale indicating the benefits of videorecording – for example, for a vulnerable complainant or to capture details of a recent alleged offence while they are still fresh in the complainant’s mind.

Conclusion

Our review of police practice when interviewing sexual assault complainants in all eight Australian jurisdictions revealed that despite positive efforts, police officers’ ability to align with evidence-based practice is impaired by many factors. These impediments may account for the well-documented gap between recommended and actual police practice.⁸⁶ We identified a number of areas that these organisations can target to close this gap. These include use of up-to-date, evidence-based interview methods; learning regimes and methods to record the interview; and implementing a quality assurance regime to enable the continuous improvement in interviewing practice. Given the central role of complainant interviews in the criminal justice system’s response to sexual assault allegations, improvements in police practice are likely to yield better investigative and prosecutorial outcomes, and minimise trauma to complainants of sexual assault.⁸⁷

Table 2 Police training and policy by jurisdiction as at December 2014*

Key criteria of evidence-based practice	Complainant	NT	WA	SA	VIC	NSW	ACT	QLD	TAS
Are narrative based interview methods promoted?	Child	✓	✓	✓	✓	✓	✓	✓	✓
	Adult	✓	✓	✓	✓	✓	✓	✓	✓
Is instruction provided on how to apply different types of open questions to elicit narrative responses?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Are there guidelines for what questions are and are not evidentially relevant?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Is there specialised sexual assault complainant interview training?	Child	✓	✓	✓	✓	✓	✓	✓	✓
	Adult	x	x	x	x	x	x	x	x
Is completion of specialised interview training a pre-requisite for conducting interviews?	Child	✓	✓	✓	✓	✓	✓	✓	✓
	Adult	x	x	x	x	x	x	x	x
Is an incremental approach to learning spaced over time used to develop skills?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Do trainees receive expert feedback to promote on-going skill development post initial training?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Has training method adopted been shown to result in maintenance of best practice?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Is there quality assurance on individual adherence to best practice using objective measures?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Is there a system that allows the efficient tracking of case progress and outcomes?	Child	✓	✓	x	x	x	x	x	x
	Adult	x	x	x	x	x	x	x	x
Is video the primary method of recording?	Child	✓	✓	✓	✓	✓	✓	✓	✓
	Adult	✓	x	x	x	x	✓	x	x

* Jurisdiction policy and training may have changed since this date; the interviews evaluated in the main body of this report pre-date the information in this table.

Endnotes

- ¹ Fisher & Geiselman, 1992; Sternberg, Lamb, Orbach, Esplin, & Mitchell, 2001; Poole & Lamb, 1998.
- ² Powell, Fisher, & Wright, 2005; Poole & Lamb, 1998; Milne & Bull, 1999.
- ³ Powell & Snow, 2007.
- ⁴ Lipton, 1997; Agnew & Powell, 2004; Ceci & Bruck, 1993.
- ⁵ Sternberg et al., 1996.
- ⁶ Sternberg et al., 1996; Roberts, Lamb, & Sternberg, 2004.
- ⁷ Eastwood & Patton, 2002.
- ⁸ Feltis, Powell, Snow, & Hughes-Scholes, 2010.
- ⁹ Orbach & Lamb, 2007.
- ¹⁰ Powell, Hughes-Scholes, & Sharman, 2012.
- ¹¹ Vrij, Granhag, & Porter, 2010.
- ¹² Sharman & Powell, 2012.
- ¹³ Greenstock & Pipe, 1996; Roberts, Lamb, & Sternberg, 1999.
- ¹⁴ Powell & Guadagno, 2008.
- ¹⁵ Salmon, 2001.
- ¹⁶ Salmon, 2001.
- ¹⁷ Powell, Mattison, & McVilly, 2013.
- ¹⁸ Burrows & Powell, 2014b; Cashmore & Trimboli, 2006.
- ¹⁹ Burrows & Powell, 2014a.
- ²⁰ Westera, Kebbell, & Milne (2013b); Stern, 2010; Criminal Justice Joint Inspection, 2009.
- ²¹ Westera & Powell, 2005; Westera, Kebbell, & Milne (2013b); Stern, 2010; Criminal Justice Joint Inspection, 2009.
- ²² Burrows & Powell, 2014a.
- ²³ Orbach & Lamb, 2007.
- ²⁴ Burrows, Powell, & Anglim, 2013.
- ²⁵ One organisation uses drawing as a standard part of the interview protocol, a practice that unsupported by evidence-based guidelines.
- ²⁶ Powell, Hughes-Scholes, Smith, & Sharman, 2014.
- ²⁷ Lipton, 1977; Ceci & Bruck, 1993.
- ²⁸ Clarke & Milne, 2001; Clifford & George, 1996; Memon, Bull, & Smith, 1995.
- ²⁹ Mugford, Corey, & Bennell, 2013.
- ³⁰ Burrows, Powell, & Benson, 2015.
- ³¹ Powell, 2008.
- ³² Cederborg, Orbach, Sternberg, & Lamb, 2000; Myklebust & Alison, 2000; Fisher, Geiselman, & Raymond, 1987.
- ³³ Clarke & Milne, 2001; Clifford & George, 1996; Memon, Bull, & Smith, 1995.
- ³⁴ Burrows, Powell, & Benson, 2015.
- ³⁵ Clark, Kirschner, & Sweller, 2012; Hattie, Biggs, & Purdie, 1996.
- ³⁶ Yij, Powell, & Guadagno, 2014; Powell, Benson, Sharman, & Guadagno, 2013; Powell, Guadagno, & Benson, 2014.
- ³⁷ Yij, Powell, & Guadagno, 2014; Orbach et al., 2000.
- ³⁸ Benson & Powell, 2015.
- ³⁹ Burrows, Powell, & Anglim, 2013; Mugford, Corey, & Bennell, 2013.
- ⁴⁰ Clark, Kirschner, & Swellwe, 2012; Ericsson, Krampe, & Tesch-Römer, 1993.
- ⁴¹ Kluger & DeNisi, 1996.
- ⁴² Donovan & Radosevich, 1999.
- ⁴³ McGeoch, 1947.
- ⁴⁴ Hattie & Timperley, 2007.
- ⁴⁵ Powell, 2008.
- ⁴⁶ Kluger & DeNisi, 1996.
- ⁴⁷ Pompadda, Zappalà, & Santtila, 2015; Powell, Fisher, & Hughes-Scholes, 2008.
- ⁴⁸ Powell, Fisher, & Hughes-Scholes, 2008; Forgey, Badger, Gilbert, & Hansen, 2013.
- ⁴⁹ Clarke & Milne, 2001; Clifford & George, 1996; Smith, Powell, & Lum, 2009.
- ⁵⁰ Clark, Kirschner, & Sweller, 2012.
- ⁵¹ Ericsson, Krampe, & Tesch-Römer, 1993.
- ⁵² Powell, 2008.
- ⁵³ Powell, 2008.
- ⁵⁴ Powell & Barnett, 2015.
- ⁵⁵ Sharman & Powell, 2012.
- ⁵⁶ Benson & Powell, 2015.
- ⁵⁷ Benson & Powell, 2015.
- ⁵⁸ Hoyano & Keenan, 2007.
- ⁵⁹ Burrows, Powell, & Benson, 2015.
- ⁶⁰ Burrows, Powell, & Benson, 2015.
- ⁶¹ Warren et al., 1999; Wright, Powell, & Ridge, 2007.
- ⁶² Burrows, Powell, & Benson, 2015.
- ⁶³ Gregory, 2004.
- ⁶⁴ Orbach et al., 2000; Smith, Powell, & Lum, 2009.
- ⁶⁵ Burrows, Powell, & Benson, 2015.
- ⁶⁶ Brownell & Jutte, 2013.
- ⁶⁷ Brownell & Jutte, 2013.
- ⁶⁸ Leach, Gennady, & Powell, 2015.
- ⁶⁹ Leach, Gennady, & Powell, 2015.
- ⁷⁰ Leach, Gennady, & Powell, 2015.
- ⁷¹ Mace et al., in press.
- ⁷² Powell, 2008.

- ⁷³ Shepherd & Milne, 2006; Nickerson, 1998; Kohnken, 1995.
- ⁷⁴ Shepherd & Milne, 2006; Cauchi, Powell, & Hughes-Scholes, 2010
- ⁷⁵ Kohnken, 1995; Baddeley, Eysenck, & Anderson, 2009; Loftus & Palmer, 1974.
- ⁷⁶ Baldwin, 1993; Heaton-Armstrong & Wolchover, 1992.
- ⁷⁷ Vrij, Granhag, & Porter, 2010; Westera, Kebbell, & Milne, 2011.
- ⁷⁸ Shepherd & Milne, 2006; Vrij, Granhag, & Porter, 2010; Westera, Kebbell, & Milne, 2011.
- ⁷⁹ In Australia using the police interview as video-evidence is available to children and intellectually disabled adults in all jurisdictions, and, in Northern Territory, for all sexual assault complainants.
- ⁸⁰ Advisory Group on Video-Recorded Evidence, 1989; Read & Connolly, 2007; Westera, Kebbell, & Milne, 2013b; Deffenbacher, Bornstein, Penrod, & McGorty, 2004.
- ⁸¹ Davies, Wilson, Mitchell, & Milsom, 1995; Burton, Evans, & Sanders, 2006; Kebbell, O'Kelly, & Gilchrist, 2007
- ⁸² Westera, Kebbell, & Milne, 2013a.
- ⁸³ Ceci & Bruck, 1993; Poole & White, 1993; Leippe, Romanczyk, & Manion, 1991.
- ⁸⁴ Read & Connolly, 2007; Baddeley, Eysenck, & Anderson, 2009.
- ⁸⁵ Stern, 2010; Criminal Justice Joint Inspection, 2009; Westera & Powell, 2015.
- ⁸⁶ For example, Cederborg, Orbach, Sternberg, & Lamb, 2000; Clarke & Milne, 2001.
- ⁸⁷ Pipe, Orbach, Lamb, Abbott, & Stewart, 2008.

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Online supplementary materials

An evaluation of how evidence is elicited from
complainants of child sexual abuse

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August 2016

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Supplementary Material 1: Quotes from the interviews with criminal justice professionals

Preparation of the complainant to testify in court

Preparation improves the complainant’s ability to give quality testimony

Prosecutors	Defence	Judges	Witness advisors
<p>If the witness knows me, they are comfortable and they trust me, and I have taken the care and time to build rapport with them, then their evidence will be more detailed, more accurate, and more reliable, which is fairer to everybody.</p> <p>I just think it all makes them feel a bit better.</p> <p>Very, very useful in terms of explaining the court process, explaining CCTV and all of that.</p>		<p>Nothing is said to juries about the child having some court preparation. This does not do the child any favours, because the jury are seeing very young children being quite confident about things, like asking the judge for a break, saying “Yes, your Honour”, and using court terms. I often think they are probably thinking my kid at age eight would not be that confident, or know all of these court terms. This child has been put up to it or is being coached in some way. So it would be beneficial to say something about that.</p> <p>I think a level of trust shows in the evidence-in-chief if the prosecutor has done a good job at preparing the complainant for trial.</p> <p>Regardless of the age, a physical walk through is probably really helpful.</p> <p>It is of enormous assistance because it prepares them for the process, it is not something that is sprung on them on the day of the trial.</p>	

The quality of preparation is inconsistent

Prosecutors	Defence	Judges	Witness advisors
<p>The level of preparation really does depend on the individual prosecutor.</p> <p>I have had cases where briefed out counsel, who have no obligations, do not proof the complainant beforehand or do any preparation, and you will have assured the complainant that trial counsel will go through their statement with them and prepare them, and then they do not and will not even give them their statement or anything, and then they just go in the box.</p>	<p>My concern is when the investigator becomes involved in witness preparation, which is inappropriate. For example, proofing the witness, asking questions that they can expect to have asked at the trial. It is completely unfair to have the investigator pushing their views on to the child about what they should say, it is inappropriate, inadvertently, but it still happens.</p> <p>The complainant needs to be supported, for example familiarity with faces and protocols, but other than telling a complainant to familiarise themselves with their evidence, there should not be discussions around the evidence. It can backfire and it can also be improper.</p> <p>Prosecutors vary a lot in terms of the amount of time they invest in gaining rapport with the complainant and making the complainant feel supported.</p>	<p>A sensible and professional preparation is important so that they are competent, confident witnesses.</p> <p>The Victim Support people should be given some training or assistance in explaining to the children how the court system works, because what they do not quite understand is that we have an adversarial system, so the prosecution asks questions to support their case and bring the evidence out, and then the defence counsel will ask questions to try and detract from the credibility of it. I do not know to what extent that is explained to them.</p> <p>I am quite ignorant about that side of things, but sometimes I am very concerned about it, and I often feel as if the witness has not been properly prepared.</p>	<p>It does lack some of that personal quality.</p> <p>The preparation, for those that actually choose to take it up, is quite comprehensive and quite supportive.</p>

More resources are needed

Prosecutors	Defence	Judges	Witness advisors
<p>It is quite difficult to prepare adequately. Simply because the lack of resources means that the Crown prosecutors are briefed very late.</p> <p>Our Witness Assistant Service is fantastic, we just need more of them.</p> <p>I was not able to develop a relationship of trust with her in one meeting.</p> <p>They do the best they can under very stressful circumstances. Obviously you would like more resources and more support, but with the economic rationalisation and everything else, you have to draw the line somewhere.</p>	<p>The Crown prosecutors in particular are very busy in this state and they often do not have time to do it.</p>		<p>We do not have enough resources to do the best preparation that we could possibly do. We are more often than not being reactive, rather than proactive. We try our best to be proactive but we are running on very limited resources.</p>

A flexible approach is required

Prosecutors	Defence	Judges	Witness advisors
<p>Depending on the victim, if it is somebody who I think is particularly vulnerable and fragile, I will take them to court myself if I really need to build rapport, I think that is a great way of doing it. I will take them to the remote room, I will take them into a courtroom and I will sit next to them in my civvies and have a chat to them.</p> <p>It is a really hard one, because you want to spend time with the child so they can develop some rapport with you as a prosecutor but you have to be careful that you do not go too far and develop any kind of relationship, because then you can be criticised or they can say you have become too involved or you have coloured the child's view. Again, it is a constant balancing act.</p>	<p>They should be more amenable to speaking to defence lawyers. Quite often we can reduce the scariness at trial for a complainant. I cannot speak for all lawyers; some might like the idea that a complainant is scared of them. My particular view is that it is not helpful for anyone. They are more likely to agree to something if they get on with you and you are not seen as this ogre.</p> <p>There is some scope for meeting beforehand, especially kids, just to say "Hi, I'm going to be asking you some questions". But we do not otherwise play a role in preparing the complainant for trial.</p>		<p>If they are not worried about court I leave them alone. If they are, I bring them in and show them the courtroom and the CCTV room, and I do a bit of basic court preparation to ease their anxiety, because they always have preconceived ideas about what court is going to be like. You just base it on each individual's needs.</p>

Pre-recorded investigative interviews

Poor quality police interviews

Prosecutors	Defence	Judges	Witness advisors
<p>Sometimes police have missed crucial things relating to the elements of the offence and what has to be proved.</p> <p>Some of the questioning is not perfect, but it does not bother me very much.</p> <p>Sometimes the way the interviews are structured is almost setting the complainant up to give inconsistent evidence, particularly with younger children.</p> <p>I'll give you an example; a six-year-old girl was talking about her 13-year-old brother performing cunnilingus on her. She had said he was licking me down in my privates, and went into so much minute detail that was really unnecessary about how their bodies were positioned, where they were lying on the bed, what they were touching, what part of him was touching what part of her, when all that really matters was his mouth was on her vagina. And then the interviewer asked, "Well, where was his head?" And she said, "It was above my head," which made absolutely no sense. It was quite clear through the process that she said what had happened, and then she's being asked all this detail which clearly didn't mean anything to her and from a prosecutor's perspective was completely irrelevant.</p> <p>Maybe it is more to do with the interviewing techniques and the questions that are asked, but sometimes you do end up with situations where the child has given a reasonably good account of what has occurred, and then with further questioning it starts to fall apart.</p> <p>Another example I saw with a very young child; "What are you here to talk about?", "Oh, I'm here to talk about what uncle did to me...", "What did your uncle do to you?", "Well, we were in his bedroom and he put his hand in my pants and he touched me...", "Tell me all about...?" That child had just said everything. And that question just did not resonate with the child, because she said well I have just told you.</p> <p>The interviews often go for a really long time, and they are only discussing one incident. And if we were leading that evidence in court, we would ask more direct questions (depending on the responsiveness</p>	<p>The police interviews vary wildly.</p> <p>When the investigator has forensic capabilities and an interview plan, much like you would with interviewing an accused, the interviews are more successful.</p> <p>In one example, the child had to go through three lots of interviews, which was totally unnecessary, because it was quite apparent what the issues were from a very early stage. It had a detrimental impact on the complainant's reliability, which was an advantage for the defence, she was made to look incredibly unreliable, because the police had not done their work.</p> <p>There are many, many, many bad interviews.</p> <p>Oh my God, if I have to deal with what colour the lunchboxes were or what colour the underpants were again, I think I am going to die! It is not about the lunchbox or the colour of the underpants, it is about the charge. They need to focus on the elements of the charge, the reliability and consistency of the complainant, and things that would go directly to that, not lunchboxes.</p> <p>There is too much irrelevant detail. The moment that the interviewer starts to break it down they are opening up a chasm of potential cross-examination that results in the complainant being unreliable, because there is no way that two years down the track a child will remember what he or she recollected at the time and be able to effectively account back what they said, even if it is the truth.</p> <p>In this jurisdiction the investigator is not the one who actually sits in the interview room, which I think is silly. The investigator is sitting in a room, with a microphone, giving information to the interviewer, who is</p>	<p>Visually recorded interviews are still really, really long, and sometimes the questioning is inappropriate which does not do the child any favours. I do not mean inappropriate in the sexual way, I mean age and developmentally inappropriate.</p> <p>If questioning is annoying for the court it is likely to be annoying for the jury, which trivialises what has been said.</p> <p>There are a lot of questions in relation to precisely what the sexual act is. And that is great because obviously it needs to be clarified, but there are still some occasions when the child may say "He put his penis into my vagina" and then the questioner will ask, "Can you think of other words that mean the same as vagina?" They are the frustrating areas.</p> <p>The initial interviews are poorly conducted, and that creates considerable problems in court. In essence, they are too long and question the child about irrelevant material. The length of the interviews have been so long that it has created enormous problems at trial, both in terms of having to play long interviews to a jury, but also making it more difficult for the child who is exposed to cross-examination about a whole lot of irrelevant material that is included in the interview.</p> <p>It is really important that these child interviewers be given a lot of training and I am not sure that we have really reached the best level of conducting these interviews that one could reach, because they are often extremely long, which must be distressing for the child and makes the jury switch off, and they often go into a lot of very irrelevant detail as to who was wearing what and what the room looked like.</p>	<p>Child sexual assault interviews should be done better, there needs to be more training on the way the questions are asked because a lot of them are leading and then it gets thrown out at court.</p>

Prosecutors	Defence	Judges	Witness advisors
<p>of the child), so that evidence could be done in half an hour, be a lot more structured, and the child will often look a bit more certain about things.</p> <p>I know from speaking with my colleagues that none of us want that high level of detail because it just causes all sorts of problems. Questions like "Did his body change in any way?" Police are often trying to figure out whether or not the offender ejaculated, but you can ask questions about his penis or doodle or whatever they have described it as. I have just never seen a child respond to that question by saying "Yes, he became erect" or "Yes he ejaculated", they all look confused when they are asked that question.</p> <p>You do want to limit the amount of video evidence you are playing to a jury, because it is hard to watch something that has been recorded previously.</p> <p>Sometimes police are trained so well that they get used to asking certain questions and they ask them even when they do not need to. For example, a girl said vagina, and they said "Do you have any other words for vagina?" And the girl said cunt. Then a 15-year-old boy said something happened to his penis, and they said, "What do you use your penis for?" And he paused and said wanking. So you do not need to ask all the same questions all the time. That should be part of the training, if the child uses the right term, and they are old enough to know what that body part does, just leave it.</p> <p>For example, when police are recording the evidence, they might ask what colour underpants were you wearing? What colour was the blanket? Where was this? All of this really detailed information, to the point where I think oh, my god, you are asking someone this. Where was your foot? Where was your hand? Where was your arm? And then they get cross-examined about all those little things. It is just such minute detail that you would not expect even an adult to remember.</p> <p>With regards to the content of the visually-recorded interviews and how they are conducted, you have that problem of balancing the investigative role of the interviewer, and using it as evidence in the trial that they are going to be cross-examined on.</p> <p>Our interviews are not done as well as the ones they do in other states, for example the children are a mile away, sitting on a couch.</p> <p>The interviews do not seem to have improved in any way.</p>	<p>"experienced" in these matters. I just think they are hopeless, I really do.</p> <p>If the child interviews were conducted more like the adult interviews we would have less irrelevant information. I do not understand why that is not the case. There is a vast difference in the quality and nature of the statement given by an adult complainant versus that of a child, and that just does not make sense. Why on earth can the quality and accuracy not be similar?</p> <p>We are missing targeted, accurate, and effective interviewing of children.</p> <p>Lessons need to be learnt from the adult space, albeit by old-fashioned policing perhaps, just collect the relevant details of what occurred and when, and then translating that interview technique into the child space.</p> <p>Often you edit the interviews by agreement between the counsels, there are usually some obvious improper questions or irrelevant material.</p> <p>A poor interview is one that tells the witness what to say, or is too suggestive, or is too disorganised, or lacking detail in relevant areas, or not asking questions to elicit the extent of the evidence.</p> <p>From a defence perspective, a bad interview is a good thing, because you can get the prejudicial or inadmissible parts edited out, so the prosecution loses that evidence. You can request another interview and then you will get some inconsistencies, or if a witness says something for the first time that they did not say back in their original interview, then you can take advantage of that.</p> <p>The visually recorded interviews are often incredibly longwinded, certainly much longer than what they need to be and they are quite repetitive.</p> <p>Quite often the interviewers go back and forwards over the subjects and get the child to tell their story a number of times. And as with any story that has been told a number of times, small details will change. As defence lawyers, when small details change we tend to jump all</p>	<p>Sometimes it seems as though police have been told that they should clarify that if the child talks about his willie or something that they really mean the penis, but they go into enormous detail as to what was put exactly where, and it must be distressing for the child and it seems silly in a courtroom.</p> <p>Most of the time the interviews are far too long.</p> <p>It often goes into unnecessary detail.</p> <p>Sometimes the interviewers are not very good in making sure that a clear distinction is drawn between the various occasions that the child describes. Very often there are more accounts and more than one occasion, so it is very important to make sure that the interviewers make clear that they know which occasion is which and preferably in what sequence they occurred, although sometimes the child does not know.</p> <p>Those long interviews are very difficult for the child. The consequence for us is having to deal with a whole lot of irrelevant material, sometimes it is not cut out of the interview and you spend a lot of time in court hearing the child talk about things that really do not have much relevance to the issues at trial.</p> <p>During cross-examination the child is often confronted with "You said on the video X," and the child has not been paying attention, so the child is easily tripped up in cross-examination.</p> <p>On some occasions they miss quite obvious aspects that are relevant.</p> <p>Often the complainant will be sitting on a chair, and will be quite small in the picture, or will not be facing the camera. That needs to be improved in the police processes.</p> <p>Poor quality interviews perpetrate prior inconsistent statements because the children are confused and they give different answers to what might be regarded as the same question at different stages of</p>	

Prosecutors	Defence	Judges	Witness advisors
<p>The inadequacies of the interviews could be a whole topic in itself.</p> <p>If you get a bad interview that does not go through the dates, does not have detail on the offending itself, or there is too much emphasis on stuff that does not mean anything, like what colour the sheets or the blinds were, then your case is not as strong.</p> <p>Most of the interviews that I come across are not terribly good.</p> <p>A lot of the interviews go in to “Which hand did he use?”, or “What were you wearing?” The problem is that when a significant amount of time has passed, the child is cross-examined and they get confused, they cannot remember which hand the accused used, or whether he used two hands. And then defence closes by saying to the jury, “Well, she’s unreliable, she can’t remember which hand, she can’t remember whether it was two hands, she can’t remember what she was wearing” It undermines their credibility.</p> <p>Some of the police officers doing the visual recordings with child early in the piece are very good but some of them are terrible.</p> <p>Cross-examination of children flowing from these visual recordings is unfair. It does not produce justice, it allows defence to nit-pick every single detail, and confuse the child, and by the time the cross-examination is finished you are not always lucky enough that a jury sees through it.</p> <p>Sometimes the interviews are a bit longwinded and sometimes the interviewers need a lot more training. They have got training, but they need more ability to interact with the child and be able to extract the information.</p> <p>The interviewer just needs to get to the key points; who did it, what did they actually do, and how old were you? They are the three core elements that you need to establish.</p> <p>Children who have been sexually abused are not going to go into that kind of detail. If you have been sexually penetrated you are not going to remember that picture, the fabric, and how many pillows were on the bed. They are in to fight or flight mentality, so all this questioning that goes on and on, and the recapping of the evidence, is just so frustrating.</p> <p>Sometimes we get page on page of stuff that drives me personally up the wall.</p>	<p>over those.</p> <p>The interviewers, as well trained as they are, do not do the job that a lawyer would do.</p> <p>I do worry about those interviews, just the length of them sometimes is crazy.</p> <p>When they have the information, they need to stop asking questions about it.</p> <p>Sometimes less detail would help the child, and the prosecution case.</p> <p>Interviewers are normally terrible at being able to frame their questions in a non-leading fashion.</p> <p>One of my concerns about the way that evidence is led is the ability of the interviewer, because that interview then shapes the rest of the prosecution. So it needs to be done by somebody who is very skilled, rather than a police officer it should at least be a lawyer who has experience in the laws of evidence.</p> <p>In the main, my experience has been that the manner of interviewing has been less than ideal.</p> <p>Better training at an early stage is important to make sure that the interviews are done well, otherwise it causes problems downstream.</p> <p>The difficulty with police asking questions is that they already have a whole lot of information which can inform their questions, it can be helpful, but in other ways it can be terribly leading.</p> <p>There is a great variety of skill in the questioning, and some interviews end up leading witnesses.</p> <p>You sometimes have a situation where you see an interview and the child is clearly not giving what was expected, so at some point in the interview the officer, no matter how well trained they are, puts the relevant proposition in a leading form, and things develop. I strongly query whether that is appropriate.</p>	<p>the interview, just because they have not courtroom.</p> <p>The interviews are not always good. A lot of the investigators are not very good at following up about whether they child is talking about a course of conduct or a specific act, and whether they have precision in the details of what actually happened in the encounter, for example whether or not there was penetration. So the quality is a little patchy.</p> <p>The interview rooms are physically badly arranged in terms of the camera and the microphone. We often have technical trouble in court because the questioning police officer sits closest to the microphone and will have a louder voice anyway, and the child is sitting further away. It is often very hard to hear what the child is saying because they are often softly spoken and shy, and the camera angles and the room furniture is often bad. They might have the child sitting side-on to the camera, so you only ever see them in profile.</p> <p>Firstly, the pictorial image of a complainant is often diluted. On occasions you see relatively little of a head and much more of a knee, but it presents too much on occasions as if it were cinema verite TV. It would be much better if the quality of the image was better, people were placed in a seat or a comfortable position, and one could see their face, their expression, their emotional response.</p> <p>The quality of questioning varies significantly. Police in this jurisdiction have improved their approach, and the quality of adducing evidence-in-chief is better than it was, although it is still patchy and variable.</p> <p>Sometimes the interviewer can lose sight of what the law is and what they need to achieve in the interview.</p>	

More complete, reliable and credible testimony from a child

Prosecutors	Defence	Judges	Witness advisors
<p>Witnesses can refresh their memory from the video.</p> <p>You get the complainant's own words, in the way they want to say it.</p> <p>The child witness interviews are a great tool to have, because they give a child witness the opportunity to provide their evidence at a very early stage.</p> <p>I still play the pre-recorded interviews because the advantages are much greater than the disadvantages.</p> <p>The strength of the recording for children is you capture them close to the time, their memory is fresh.</p> <p>If you get a great interview, it is amazing.</p>	<p>The advantage of a pre-recording of a child interview is you capture the evidence quickly, which is very useful.</p> <p>From a prosecution point of view pre-recorded interviews are beneficial, because otherwise the child is terrified by the experience. Imagine being that young, having to sit in court, and then say everything. So you can understand why using the interview has raised the prosecution's ability to get convictions.</p> <p>From an evidentiary point of view, it is much better to have pre-recorded interviews because you are capturing the information at a much earlier stage.</p> <p>The pre-recorded interviews are very successful in terms of increasing the likelihood that reliable testimony will be placed before the court. It is a great innovation.</p>	<p>The pre-recorded interviews are good, particularly with a child, because they do not have the pressure of the jury.</p> <p>The advantage of these interviews is that the story is told and presented to the court. If you do not have the pre-recorded interview available you can get situations where the child will simply seize up in the witness box and you get nothing.</p> <p>It is good to have a record of what the child says at an early stage of disclosure.</p> <p>The great strength of pre-recorded interviews is that you are getting the evidence immediately, and you are not saying, "Tell me what happened 18 months ago," and the child becomes confused.</p> <p>The pre-recorded interview is a really good idea because it is while the incident is fresh in the child's mind. If you did it as a statement, the child would have to come and give evidence-in-chief. So they are invaluable in replacing evidence-in-chief.</p> <p>It is a better way of having an accurate record of the child's testimony.</p> <p>Using pre-recorded interviews with complainants as their evidence-in-chief has generally been very successful in capturing what they have to say at an early stage.</p> <p>It is terrific because you are getting the child at a very early stage, when events are fresh in their memory, and it is in a less threatening atmosphere at the police station.</p>	<p>The pre-recorded interview captures the complainant's evidence when it is really fresh, so the jury has the opportunity to see the evidence when the child first discloses, and that is a lot more powerful than when complainants are being asked questions and giving answers 12 months down the track. It also captures a lot of detail that possibly would not be captured later on.</p> <p>We see a real difference when a child has a pre-recorded interview compared to giving evidence-in-chief. We have seen a few children over the years that have to give evidence-in-chief, it is much more complex and difficult for them.</p>

Certainty about the evidence leads to better case preparation

Prosecutors	Defence	Judges	Witness advisors
<p>One of the main reasons pre-recorded police interviews are used is that you know what the evidence is going to be. You know that the elements of the offences are proven by that evidence. So choosing to abandon the interview and lead evidence-in-chief from the witness before the jury would be very foolhardy for the Crown in terms of proving its case, because things can always go wrong.</p> <p>There is no uncertainty about what the evidence will be, that is a great benefit of the recordings.</p> <p>When it comes to preparing for trial, it is great that you know exactly what your main witness is trying to say. So you can pitch your case very well in an opening address.</p> <p>Another benefit of interviews and pre-recorded evidence is that you can edit them.</p>	<p>I suppose the benefit of the police interview from a defence perspective is that you know exactly what the evidence is. You know what is going to be said in court, so you can plan your cross-examination, and what you are going to do.</p> <p>It is beneficial for the defence because we are able to analyse the evidence in advance and edit out the aspects that are not admissible.</p>	<p>The pre-recorded interview cannot be edited without an order of the court.</p> <p>The police interview has the advantage of being edited.</p>	

Credibility assessment is more difficult via video

Prosecutors	Defence	Judges	Witness advisors
<p>You cannot see the child and assess their credibility as well as you can when they are in court giving evidence.</p> <p>The interviewer is more prominent than necessary, and the complainant is often sitting on a couch surrounded by toys and books so they get readily distracted, and as a viewer you are not getting a very good image, you cannot really look at the child as they are answering the questions, which is obviously important.</p>	<p>The camera is so far away that you cannot see the child's expressions.</p> <p>There are significant limitations on the fairness to the accused with recorded evidence, the jury and defence cannot properly assess their evidence.</p>	<p>With all pre-recorded evidence, there is always the problem that the child is removed from reality, even more so these days when there is so much reality TV, because the jury can potentially only watch TV and see nothing live.</p> <p>It is very important that the interviewers make sure the child is large on the screen, not the whole room, and that you can hear what the child says.</p>	

Extending pre-recorded interviews to adults would raise similar but more complex issues

Prosecutors	Defence	Judges	Witness advisors
<p>At the moment, we do not record any adult complainants' statements, which is unfortunate, because often you have people who are very vulnerable, or who would greatly benefit from having their statements recorded.</p> <p>The initial video-recorded complaint can be incredibly compelling because of the way that it is said and the obvious distress. Initial recording of adult complaints, particularly where they are fresh, could capture potentially very compelling complaints because of the presentation of the complainant. This could be very important evidence because those trials always inevitably focus on the credibility of the complainant.</p> <p>Complainants of historical abuse should have their statements pre-recorded. But there is some caution needed there. Often for people who have been offended against over and over again, when they initially make a complaint the events are conflated, so if you immediately started filming them they might present as being vague, imprecise, and confused about the order of events.</p> <p>If you have an adult complainant who is reasonably clear with what they say happened, and there is not going to be any great loss of memory over the following 12 months, I do not see any advantage to having them interviewed when they can provide a really clear, comprehensive statement. They can review a statement leading up to trial, prepare with the prosecutor and refresh their memory as many times as they like from their statement and then give their evidence, so the jury never has to see any prevarication which you can get in an interview.</p> <p>Pre-recorded interviews are not necessary for adults, particularly adults who are discussing child sexual abuse, because memory is no longer an issue. And as adults they are in a strong position.</p> <p>In my view the process should be exactly the same with adults, they should be entitled to give their evidence by way of a recorded interview.</p> <p>There are two great advantages; one is that the evidence is there, so later down the track you do not have a problem if the complainant is frightened and decides they do not want to come and give evidence, and they are not so terrified in court that they do not give their evidence. The second is that the jury get to see the complainant's response when they first go to the police, instead of years down the</p>	<p>God! I dread the day that pre-recorded police interviews for adults would be inflicted upon us. It would not help anyone other than the defence. All those interviews do by drilling down into colours of lunchboxes is open up a dearth of detail that the defence can cross-examine on. I would be sad to see that happen.</p> <p>That would be a useful tool for police to have.</p> <p>It would be useful because the statement taking process does lack a certain spontaneity.</p> <p>I do not necessarily have a problem with evidence being taken in a recorded form, it is more efficient and you are more likely to get a reliable account without contamination by external influences.</p> <p>There is an inherent unfairness to the accused if a witness is able to rely on a video interview without actually having to recall the events and give evidence of them.</p> <p>From a logistical point of view, it would slow things down in terms of the practicalities of the trial.</p> <p>Currently, police are not sufficiently qualified to ask the right questions for the interview to be in a format that is capable of being used as evidence-in-chief in court.</p> <p>I do not necessarily see any reason for singling out adult complainants of sexual assault as compared to adult complainants of a physical assault or kidnapping or any other particular crime. The rationale for recorded interviews is not there as it is for children.</p> <p>The more accurately you can record a person's evidence the better. There is two aspects to that. The capture of the information; a recorded interview is much better for all concerned. Not only do I get to understand precisely what the complainant has said but there is no confusion about interpretation later on.</p>	<p>The benefits for adults depends on the competency of the interviewers.</p> <p>If adults gave their evidence by visually recorded interview a long time before trial, they would be cross-examined on any inconsistencies. That does not happen that much with children because it is just too hard, unless there is obvious material inconsistencies, but if you were dealing with adults that could occur more.</p> <p>Once you are an adult you have to be treated as an adult, and give evidence in court. They should have to elect to give evidence, and by all means use a remote witness room, but they need to be dealt with like any other witness in any other court case.</p> <p>I would not advocate using the recorded police interview for adults, because there is this tension between the investigative and evidence producing process. If they are able to give an account in court, which is focused on the issues, so it is evidence producing questioning rather than investigative questioning, then it is likely to be more condensed and generally more impressive before the jury. The preliminary interviews are an advantage for children, but I am not convinced we ought to adopt the process for adults.</p> <p>I have not considered whether that should be supported or not. In general terms, it would be helpful for</p>	<p>Having video recorded interviews for adults would be amazing. It would reduce a lot of the anxiety that adult victims have because quite often people will say "I'm trying not to forget, I'm trying to think about it, I'm trying to re-read my statement" When they do that for 12 months to two years, then they are actually worrying about the fact that they may forget something, which is just an additional anxiety that they are facing.</p> <p>Using police interviews as evidence-in-chief would be good, for the same reasons it would be used for a child. We are talking about adults that have been extremely vulnerable because of the crime that has been committed against them.</p> <p>It would be fantastic. Adults are not that different from children, they are still feeling the same things, the anxiousness, the nerves, and the length of time between the report and trial obviously affects their memory as well. Then being up there and then getting asked all those intimate details.</p>

Prosecutors	Defence	Judges	Witness advisors
<p>track, and their first disclosure can be very compelling in how they answer questions, it is much more artificial in court.</p> <p>We would be assisted by adult complainants having pre-recorded interviews played as children do.</p> <p>I am in favour of police statements for adults. Child witness interviews currently are lengthy. It is better for adults to talk to a police officer and reflect on everything that happened, and then record everything that needs to be said, and nothing that does not, in a fairly concise statement.</p> <p>Why can't all vulnerable witnesses give their evidence by a recorded interview? With the definition of vulnerable being one of the prescribed sexual offences.</p> <p>In reality, I do not know how useful recorded interviews would be with adults talking about offences from a long time ago, it depends on the case.</p> <p>For cases where the offences occurred 30/40 years ago, it would not really help doing an interview and recording that as opposed to giving evidence at trial, there is no forensic advantage or personal advantage to the complainant because they still need to attend at the trial to be cross-examined and re-examined.</p> <p>I personally would prefer the witness statement than the audio recording. A witness statement is generally quite succinct, whereas sometimes the visual audio recording can go on a bit with irrelevant stuff.</p> <p>Pre-recorded interviews do not have an immediacy and live aspect.</p> <p>Sometimes when an adult complainant is alleging a recently occurred rape, rather than a historical matter, the first account that they give can be quite powerful if it is taken in the right way, so it is a very good tool from our perspective. It is very useful.</p> <p>The interviewing officer needs to be very good at what they do, you do not want a lot of extraneous material that is irrelevant in the interview, because that can cast a shadow over the really good evidence.</p>	<p>We can all agree that children have to have special rules that apply to them, but it is fair to expect that adults should be required to deal with the stress of examination-in-chief, as well as cross-examination.</p>	<p>complainants of serious sexual assault charges to be able to deal with their evidence-in-chief as quickly as possible.</p> <p>It would be less traumatic if they only report once and if it was closer to the event so they will remember better.</p> <p>I have some concerns, the advances in recording have been good, but it would be fantastic if we pre-recorded the evidence of all adult complainants of child sexual offending.</p>	

1.

Pre-recording the complainant's entire testimony

Overcomes problems faced by complainants due to trial delays

Prosecutors	Defence	Judges	Witness advisors
<p>My vast preference would be for a model similar to a previous jurisdiction I worked in, where pre-recorded evidence is played to the jury, and the judge has control over it, but there are some limitations on how long it takes and when it is done, although the interview is done much earlier.</p> <p>I am a huge believer in recording the whole of the evidence early, it would encourage more guilty pleas, and result in many more trials resolving before victims are asked to wait for years on end.</p> <p>For the child complainants, it is more of a timing aspect, because by the time matters got to court, which was about two years previously (they have improved a lot on that), it was just too long a period for young children. So that is why the visually-recorded interview process was adopted.</p> <p>The biggest advantage is that cross-examination and re-examination are conducted sooner. So the process of the child giving evidence is completed earlier.</p> <p>What has happened is fresh in the child's mind. There is less opportunity for the child to discuss their evidence with mum or dad, and less chance of the child becoming more and more anxious, knowing that this is coming up in the distant future; they want to get it over and done with.</p> <p>The advantage is that if something is delayed for some length of time you have the child giving evidence when it is fairly fresh, but you cannot do that until all the evidence is available because the defence counsel has to know what our case is before they cross-examine.</p> <p>The major advantage is that if there is going to be a delay, the child will still give their evidence when it is relatively fresh in their memories.</p>	<p>Pre-recording. Fabulous! Why don't we do it? What is the problem? It goes back to case management. The best jurisdiction I worked in everything got done properly, quickly and efficiently. The delays dropped around the system, accused got trials quicker so they are in custody for a shorter period of time, which is a massive change for the mental health of people who are charged with these offences. I do not see why we cannot pre-record.</p> <p>I would much rather be cross-examining, especially a child, closer to the incident. From a defence perspective, if we are going to think about this carefully, any concession I get from a child five years after the event automatically is discounted because (a) they are a child, and (b) five years has passed. So it is in my clients' interests to be able to test the evidence approximate to the time the allegation is made.</p>	<p>I always prefer a pre-record with a young child rather than have it as part of the trial process because there is always the chance that will have to be editing because the child will blurt out something that would otherwise abort the trial. So by doing it as a prerecording, rather than as part of the evidence, you save time.</p> <p>I think it is a good idea. It also means that the whole process can occur in a day or so, much more efficiently. I like that, it appeals to me.</p> <p>One advantage is that you can get an earlier listing, so you do not have the same delay. The shorter the delay, the better chance you have of the witness recalling detail. The second advantage is that the child is not exposed to a long period of trauma while waiting and worrying about giving evidence. I had a case recently where the child had become so traumatised by the prospect of having to give evidence that the child ran away from home. So the longer you have got a delay the longer that trauma can build up to the point where the child just cannot cope.</p> <p>If it is going to take a long time to get to trial then you do not want the child to have to wait a long time to record their evidence.</p> <p>Particularly with a young child, there is an undesirability in keeping complainants waiting for a lengthy time before they give their evidence; I mean on the day. Children that have limited concentration span and limited capacity to wait, get very frustrated, very quickly. That is just the nature of being a child.</p>	<p>For older children we often recommend that they give evidence by pre-recording so that they can get their evidence over and done with as quickly as possible, because of issues of self-harm and suicidal ideation.</p> <p>The process for children is really much better because they go in to give their evidence when they are fresh, when their anxiety is at the lowest, and they can get it done in the minimum amount of time, whereas at a trial they are subjected to delays in the court process, and their anxiety increases.</p> <p>There is more possibility of increased guilty pleas if you have a prerecording. And that can save court time.</p>

Facilitation of trial preparation

Prosecutors	Defence	Judges	Witness advisors
<p>I like the idea because it can be a bit smoother if there is anything that is required to be edited out.</p> <p>Forensically, it helps both sides prepare better for trial, but that includes the accused. They are more prepared for what the child is going to say, from the interview but also from the pre-recording.</p> <p>If there is anything that is said by the child that is offensive insofar as it is detrimental to the accused, or anything asked by a prosecutor in a way that is leading that should not be in the evidence, then can apply to the court to have those sections edited out, so the jury gets a clean set of evidence that does not contain any prejudicial material.</p> <p>The strength is that you know exactly the evidence that you can open up on, and you know that under cross-examination, sometimes extensively, they have held their ground, and so you know that you have got a case to answer, you can speak confidently in your opening.</p>	<p>Pre-recording would hopefully result in things being solved earlier. For example, we have the ability to nut out charges with the prosecution, "You can't make this charge out. You can make this one. Let's go to that one, let's pull all of them."</p> <p>I think the main benefit of the special hearing procedures, seem to be the ability to edit the evidence, and also to give children lots of breaks rather than keeping the jury waiting.</p> <p>If you do have an unpredictable or young complainant, defence might want to know that if they something that is inadmissible it can just be edited out rather than blowing a jury or causing a jury to be prejudiced. So defence would probably want the pre-recording if they thought that was a danger in that particular case.</p> <p>There is a potential advantage of the judge feeling freer to intervene if cross-examination is improper. A lot of people suggest that judges are loathe to intervene because they do not want to appear to the jury that they are curtailing the defence counsel's cross-examination. So if there is no jury there, maybe the judge would feel freer to intervene and alter the mode of cross-examination. I think that could be an advantage of pre-recording.</p>	<p>One advantage of pre-recording is that the child can have a break and you can have all sorts of discussions about things if required, and of course there can be editing.</p> <p>There might be a bit more flexibility and fewer interruptions if the evidence taking drifts into inadmissibility, it can always be edited and played in front of the jury.</p> <p>The advantage is to both sides, both the state and the defence, the main witnesses' evidence is in the can, so everyone knows what the main evidence is, and that often shortens the trial, it becomes more focused upon what the issues are, and it can lead to a more positive presentation of the case.</p>	<p>The child's evidence can be heard more quickly because it can be edited and issues of inadmissibility can be resolved before the trial, rather than at the trial.</p>

Unforeseen legal and logistical problems

Prosecutors	Defence	Judges	Witness advisors
<p>I am not sure how you would do the logistics of it, but I could imagine defence saying that they would not cross-examine the complainant until they knew all the evidence, because how could they do effective cross-examination if they did not know that their dates are wrong. I just cannot see how it would work practically.</p> <p>I have found that the court seem hesitant about giving pre-recordings. There seems to be this competing interest of saving the court time because if it is pre-recorded and then played at trial, that is wasting twice the amount of court time.</p> <p>Obviously, from the court's perspective there is a disadvantage because it takes up time; they have to dedicate a day to the pre-recording and then it is doubled up when they have to play the recording at the trial, so it is a drain on the resources of the court.</p> <p>There seems to be a movement towards the reduction of pre-recording evidence of children, simply because it is time consuming, costly, and there is an inherent duplication of resources.</p>	<p>There are many practical problems with the way it is executed.</p> <p>Pre-recording of cross-examination raises a number of different issues. The main one is a resource issue, it is difficult to understand how it could be resourced to be done quickly. It would be highly undesirable get to a situation where one counsel is briefed and prepares the cross-examination in advance to enable a recording to be made, yet when the allocation of a trial date is being set down, list judges say we cannot cater to counsel's availability, brief someone else.</p> <p>The difficulty is that what the cross-examiner might want to challenge the complainant about may not be known until such time as the matter has been fully investigated, and all of the evidence about surrounding facts and circumstances is available for the cross-examiner to work with.</p> <p>Without having all of the relevant information at the time of the cross-examination, you are then deprived of the opportunity to speak to the witness about it.</p>	<p>I cannot imagine a case where you could cross-examine someone as effectively at a preliminary hearing as you could after more preparation. You just find out so much more as time goes on.</p> <p>It duplicates resources.</p>	

Increased flexibility of proceeding in the absence of a jury

Prosecutors	Defence	Judges	Witness advisors
<p>One advantage is that the child has a fixed time for the pre-recording, whereas with a trial you often have legal argument, the panelling of a jury, opening addresses, and if the child is the first witness, they do not get started until about 12 o'clock, if they are lucky. So there is obviously a lot of waiting around. And, obviously, with children you do not want them waiting around or the anxiety that comes with it. And afternoons is not the best time for a kid, it is best to get them when they are bright and sparky at 10 o'clock. So the fixed start time has a big advantage.</p>		<p>On a prerecording there is a definite start time. The pre-recording is listed at 10 am and it starts at 10 am. If the child's evidence is being presented as part of the trial, then determining when the child is actually going to be called to give evidence is somewhat problematic, because you have the jury empanelment, the openings of counsel, and sometimes a late legal argument is raised, so the child's evidence may be postponed until later in the day. Of course that adds to the trauma of it.</p>	<p>Prosecution can withdraw, reduce or change the charges, or they can discontinue. That means the jury's time is not wasted and cases can be exited from the justice system more speedily.</p>

Diminished impact compared to live testimony at trial

Prosecutors	Defence	Judges	Witness advisors
<p>Pre-recording is like watching a not always very interesting TV show. It becomes a bit more artificial and bit more removed. There is less to engage them because when it is live the lawyer is standing in front of them, so they are moving and changing their view between the lawyer and the screen, whereas when it is pre-recorded they are just looking at the screen.</p> <p>I had a case where we lost the impact of the evidence, which was so compelling, it was a terrible shame. The evidence was still there, he is obviously still saying the same things, but you just get that distance of it being played on screen.</p> <p>You can become desensitised when the witness just becomes a head on a screen, you do not seem to have that live connection.</p> <p>The weakness is that you are showing it to the jury and you do not have that live interaction. It is sort of like who is this person, we have just seen them on video.</p>		<p>Another issue is that children do look much older on screen than they do in person. And there can be some difficulties with camera angles.</p> <p>In the days before any form of visually recorded material the impact of seeing a very small child giving evidence was really profound on a jury, just seeing a little one come into court and go up the stairs and sit there.</p> <p>It gives a slightly unreal spin to the evidence as far as the jury is concerned. Seeing another human being sitting in front of you and explaining what has happened to them is much more impressive than seeing a pre-recording or even evidence from a remote witness room.</p>	

Closed circuit television (CCTV)

CCTV reduces the stress of giving testimony

Prosecutors	Defence	Judges	Witness advisors
<p>Most witnesses give their evidence remotely, they are not going to come into the courtroom, so the jury are not going to have them right there in front of them, only a few metres away. Some people think that is a disadvantage. That is not always the case though, if they are going to come into the courtroom and not be able to give their evidence, then there is no point.</p> <p>The biggest benefit of using CCTV is the fact that the complainants do not have to sit there and face the person in court while they are trying to concentrate on their evidence, which can be really upsetting for them.</p> <p>Giving evidence by way of CCTV, is the manner in which the children feel most comfortable. That is the most important thing as far as I am concerned as a prosecutor, is where they are going to be less anxious and give their evidence in the best way.</p> <p>If a victim of a sexual assault matter is too anxious about the court proceedings, which most of them are, then it is more appropriate that they are in the remote rooms.</p> <p>CCTV is definitely beneficial because they can have breaks if they need to, they do not need to look at the accused, and they do not need to give this very, very personal evidence whilst they are looking at 14/15 members of the jury and all the lawyers and anyone else sitting in court. It is a lot less traumatic for them.</p> <p>The remote room is fantastic. You have people who do not want to come into the court and see the accused, they are too traumatised by what has occurred, so by allowing them to give their evidence remotely they do not have to look at the accused and they feel safe.</p> <p>Most of the children want it, we are talking 99%, because they do not want to see the offender. Even adult victims, they do not want to be in the room where their alleged rapist has been.</p> <p>They are going to do a better job in the remote witness room.</p>	<p>What we do now with child interviews and CCTV is much better than closed in court.</p> <p>The impact of any distress caused by counsel in cross-examination is minimised by them being on video, because the child can just say "Your Honour, I need a break" and the judge will give it to them.</p> <p>It makes it easier for complainants to give their evidence not being in the court environment. Courts are a stressful place, for whatever witness, especially with child sexual assault cases.</p> <p>CCTV minimises the trauma of the process.</p>	<p>If the witness is going to be really upset, or if it is a matter relating to violent or sexual allegations, then they are in a position to give evidence using CCTV, whereas if they were brought into court it may well be that the matter would not proceed.</p> <p>With most of the trials in fairly remote locations, if we did not use CCTV then the reality is that the complaint would not feel confident about giving evidence and the trial simply would not proceed.</p> <p>They will perform better if they are not in court.</p> <p>I am very relaxed about CCTV, it is generally much better for the child to be out of the courtroom.</p>	<p>Particularly for younger people, CCTV does make it easier.</p> <p>One of children's biggest fears is facing the accused, hearing the accused, and being intimidated by the accused in the court. Obviously with CCTV they will not see or hear the accused, so that fear is removed and they can be much more comfortable in giving evidence.</p> <p>A lot of children do not have well-developed public speaking skills, which is what you need to be able to give your evidence in an open forum like that. Whereas when they are in the CCTV room it is a lot more intimate, they are only talking to one person and they do not have to worry about what is happening around them.</p> <p>It is much better than a child going into court.</p> <p>They do not get watched by the jury, so they do not have all these faces looking at them. Admittedly, they can still see the Bar table and the judge, but I think it is less intimidating for them.</p>

Some complainants want to testify in person at trial

Prosecutors	Defence	Judges	Witness advisors
<p>In recent years, I have had one victim who insisted on coming into court to confront her offender, because she really, really wanted to, and I was not able to persuade her not to.</p> <p>I have had a few complainants who really want to face the accused, and that is a big thing for them. So having the option to give evidence in court is a good thing.</p> <p>I will have the odd one who says, "I want to give evidence in court".</p> <p>Some people want to go into the courtroom and give their evidence there, because it is important to them to tell their story in the same room as the person who they say did these things to them.</p> <p>There are some people that would like to come in to court because they want to demonstrate to the accused 'I'm here in court; I'm not scared of you; I want to say it'.</p> <p>I had one who wanted to be in court recently. She said I want to look him in the eye.</p> <p>I had a 14-year-old girl recently who was adamant that she wanted to come into court, eyeball him, and give evidence in court, so she did.</p> <p>Some adult witnesses just could not bear the thought to go in court, but for others that is what they actually want to do.</p>	<p>They just want to be there, not as a revenge thing or any weird agenda, when they get told they can have video they say "I don't want to do that; I want to tell my story. And I want to tell my story to these 12 people."</p>	<p>Some witnesses absolutely want to be in court, and even younger teenage witnesses. It might be part of their healing process, or they want to face the offender, or want to be in court, and give their evidence from the court.</p> <p>Some complainants want to give evidence in court.</p> <p>I have seen them turn around and look at the accused in a defiant way. It is not necessarily desirable for that to occur, but it does happen. Some witnesses are quite strong and almost relish the opportunity of not showing fear and of giving evidence in the presence of the perpetrator.</p>	<p>Sometimes adults or even young people say "No, I actually want to go to court and give evidence from court". Prosecutors are getting their head around the fact that this child actually wants to go to court and not use CCTV.</p> <p>We cannot have assumptions; it is their right, so it is important that they are given all the options and choose what is right for them, because it is about going through the process and they need to feel most comfortable, including small children going to court if they choose to go to court. It is important that either way is not assumed to be better, the witness needs to be given those choices, and they are.</p>

Improvements can be made in the use of technology

Prosecutors	Defence	Judges	Witness advisors
<p>In the regional centres, sometimes people have to travel quite some distance to get to a witness suite that has all the facilities, so that can be a problem.</p> <p>The remote rooms are not particularly beautiful.</p> <p>I would be happier with the CCTV if we had better facilities. The main trouble that we have is delays; the CCTV connection never works properly with the courtroom, there are court reporters that are not trained in giving the exhibits, the technology is slow and outdated, and the videos on a TV screen up on the wall are not big compared if we saw the child.</p> <p>When there is documentary evidence it can make it a little harder, but there are ways to get around that now, like walking the exhibits backwards and forwards.</p> <p>The rooms need an update, and perhaps have one screen that reflects the questioner and a screen that reflects the courtroom.</p> <p>Courts are incredibly ill-designed and even getting people into the remote witness room without them encountering supporters of the accused is nigh on impossible.</p> <p>Sometimes, the recordings lack quality, but that issue has fallen by the wayside. There used to be a problem with the microphones but that has also been rectified. So, generally speaking, the quality of the recording is not a weakness anymore, it has been remedied in the last five years.</p> <p>It is great, I really like it. The technology now is clear.</p>	<p>In my most recent matter the complainant's head was disarmingly large, her forehead was almost pressed up right against the camera. It is not an effective way of communicating, it does not really present the complainant well, for things like size, body composition, and how they use their hands, all of which come into play during cross-examination.</p> <p>Sound is the biggest issue, making sure everyone can hear one another and it is not too loud or too soft.</p> <p>There are some mechanical issues in terms of showing exhibits to complainants, but they are overcome with a bit of flexibility.</p> <p>It is a nightmare. Quite often it does not work, or it does not record properly, it is messy.</p> <p>I did a sexual assault matter in a remote town, the complainant indicated that she wanted to use CCTV and they had to fly it in. They actually did not even have the equipment. Now that is rare but it is totally unsatisfactory.</p> <p>The remote room is within the courthouse, so we are all wandering around the same courthouse, and that can be a bit awkward, especially if the accused is on bail and if there are family members present.</p> <p>When it is an adult giving that evidence I would prefer them in a remote room, it takes some of the emotion out of it.</p> <p>When I was using CCTV a lot, it was rare to have a day when you did not have a problem with the technology.</p> <p>Sometimes there are issues with getting it on but once it is on it is good.</p>	<p>It is different and awkward, but it is well down the track now, so it is far less awkward and far more manageable.</p> <p>As a child I would find it strange and frustrating. When things do not work well, for example when there are sound problems, some judges simply switch off the video link without telling the child what is happening.</p> <p>One of the problems that we have is that some of the technology in our court is not good, and sometimes the screens that they are seeing are not big enough.</p> <p>We need to improve the technology, particularly to make the screens bigger and easier to look at.</p> <p>What does create a disadvantage is poor quality recording or replaying, for example not getting the best head shot, having crackly sound, having a signal that fades in and out so you suddenly get the frozen hand movements and the chopping of the voice, or you hear the voice but the lips are not moving because the image is frozen.</p>	<p>There are always technological problems with CCTV, and making sure that the court and the person in the room sees it at the same time.</p> <p>The positioning of the CCTV rooms can be a problem. Sometimes the location of the room makes it unavoidable that they would see the accused, or be seen entering the room by the accused person, which is supposed to be in a location unknown to them. At one court, the CCTV room is right next to jury room, so we have issues with jury members needing to come out first and us having to wait in the CCTV room so the victim does not walk out or walk in at the same time as the jury.</p> <p>The pre-recorded interviews do not get tested at court until we have the child ready in the CCTV room and the jury and judge sitting in court. Sometimes it works and sometimes it does not. So sometimes it gets played to the court but it does not play at the same time in the room. Recently the sound was not working in the CCTV room but it was working in court.</p> <p>Sometimes the lack of training is an issue for the sheriffs to know how to use the equipment.</p> <p>We might have a four-year-old waiting all day long, only to be told that we cannot start today, and they have to come back tomorrow. That is just not okay when we are dealing with people that are highly traumatised and very prepared to go.</p> <p>There are still some technological challenges in terms of how it works, so it is still being developed.</p>

CCTV diminishes the impact of the complainant's testimony

Prosecutors	Defence	Judges	Witness advisors
<p>Some Crown prosecutors will still try and convince victims to come into court because it is better that the jury see them in person, instead of utilising the CCTV rooms.</p> <p>I would always prefer to have some live evidence.</p> <p>Even though they are giving evidence live from another room, it does seem to lose its impact once it is on the video screen for some reason. A bit of that human factor is lost, I am not sure why. But when you can see someone in there you seem to get a lot more feeling from them than you do off a video camera.</p> <p>Having a real person in front of you seems more real than having someone away in another room.</p> <p>If someone has not got great vision they cannot see the nuances of the child and the way they answered the questions as well as they would in court.</p> <p>It is not as real as having someone in the room.</p> <p>It can come across a little bit like they are watching someone on TV. The jury have the accused in the room for the whole trial, so there is some sort of commitment to the accused, whereas they do not see the complainants in the flesh, they just see them like watching somebody on TV.</p>	<p>The current process, based on all the proposed reforms in the past, is so focused on eliminating any impact on the child that it has the impact of diluting the evidence of the child, from both the prosecution and defence perspective.</p> <p>Adult complainants can come into the courtroom if they want to. I have had a couple of adult complainants volunteer to give evidence in person, and by far their evidence is more powerful and vivid than someone giving evidence via remote link.</p> <p>There is a need for the remote link, we need to protect victims of crime, but regardless of what the experts say, it does start to lose the potency of the evidence.</p> <p>Nothing can be as good as in-person communication, and that is both sides of the bar table, whether you are prosecuting or defending.</p> <p>It might be more powerful at times having complainants in court.</p> <p>There is nothing worse from a defence perspective than having a witness in court who is just so gut wrenchingly emotional, and sitting so close to the jury. You know yourself if someone is really sobbing it is very hard to control your own emotions. So when they are on a screen I think that really does remove it, because everyone is doing things on screens all the time these days.</p> <p>I think prosecutors suggest to the complaint that they should come into court if they want to win the case, because they know the juries are more likely to convict if the witness is actually in the court.</p> <p>When it is an adult giving that evidence I would prefer them in a remote room, because it takes some of the emotion out of it.</p>	<p>The use of CCTV probably favours the accused because the child is removed, so the emotions and the reality of the child are also removed.</p> <p>Often, an application for CCTV for an adult complainant is not opposed by defence counsel because, strategically, they do not want someone who is looking vulnerable and who is very upset in court.</p> <p>There is a potential weakness in the jury's ability to assess the witness's credibility, because they are on a screen, so the impact is not as great as if the person was live.</p> <p>With CCTV and pre-recorded matters, one of the difficulties that we find is that if the witness is a really dark skinned person it is difficult to assess demeanour because you cannot see their face clearly, thus there is that extra difficulty sometimes.</p> <p>There are concerns that the child is presented in a somewhat sanitised way, because they are appearing on a screen and not in court.</p> <p>The effect of the complainant's evidence is diminished.</p> <p>The juries thought it was just like watching TV, so they would not take it seriously, or they might think that if they were 'real' they would come into court. They are invalid assumptions, but there is still a bit of that out there.</p> <p>If the complainant is able, in the presence of the accused, to say in a reasonably calm, rational fashion what was done to them, it can be devastating in terms of the accused, and utterly convincing, better than CCTV.</p> <p>It would be much better if adults gave evidence in the court. I always find it more impressive and juries are also more impressed seeing that person on the other side of the court.</p> <p>In my view, the prospect of a conviction is lessened by evidence from a remote facility, it appears more like a TV than direct live evidence in a courtroom.</p> <p>Evidence given from a witness box is mostly far more compelling than something which is done remotely.</p>	

CCTV does not diminish the impact of the complainant's testimony

Prosecutors	Defence	Judges	Witness advisors
<p>We have big televisions and I really like the big face on the screen. I think it is very effective in giving evidence.</p> <p>I have never really thought that they are engaging less with the witness because they are on CCTV rather than in person.</p>	<p>Some of the old school prosecutors would like the witness to actually come into court, perhaps because you can see the trembling leg or something like that, and that may well be perceived as adding to their credibility, but CCTV is just a more appropriate and humane way of doing it, and it makes no difference to the jury.</p> <p>In this day and age people are not too freaked out when they see someone on the television, it is not artificial anymore.</p> <p>They still have a very immediate presence in the courtroom, it is not as if they become abstracted by the use of the technology such that a jury may have less empathy for them.</p>	<p>Some of my colleagues would say if you do not have the person in the witness box close to the jury they cannot see them, that is true but, on the other hand a child witness is often being questioned for some hours and occasionally it will spread over into another day, and when the child witness is so often the first or second witness, the jury has not seen anybody else in the witness box, so that is all they know.</p> <p>The jury gets used to the idea of the witness being remote and they are told by the judge that they are not to make any different assessments from the fact that they are in the remote witness room, so that they make their assessments based on demeanour and inconsistencies as usual.</p> <p>I do not think that the jury is missing all that much when they only see the person's face and not the body.</p> <p>I have been a judge for 14 years and I have done a lot of those trials. When this procedure was introduced there was concern that jurors would not be able to assess credibility, I do not hold that view.</p> <p>There is not really a sense that it is less real if it is pre-recorded or given evidence by video link.</p> <p>I have not really experienced a great differentiation in terms of a case you think should result in a conviction and did not because of CCTV.</p>	<p>Children that have gone in to court have often come across as cold when they are not, because it has been their strategy to manage their reactions and so it has not led to a guilty verdict.</p>

CCTV is not unfair to the accused

Prosecutors	Defence	Judges	Witness advisors
<p>I have been doing sexual assault cases for about five years and I have not noticed any appreciable difference in the outcomes, depending on whether it is open court or CCTV.</p> <p>I do not think the jury has an issue with the CCTV.</p>	<p>I do not think CCTV would bias the outcome either way.</p> <p>There is not necessarily any prejudice to defendants by complainants not being in court.</p> <p>As a defence practitioner, the general view is there is no harm to defence by having complaints use remote facilities. In fact, most people would agree it is more powerful when someone comes into court.</p> <p>I have had clients say “I want her to come into the court and say it to my face”. And I say you do not get that right. You get the right to have somebody question her, but you do not have a right to have her come into the court and face you, and I try to explain to them why that is the case.</p> <p>One concern that accused people normally have with the remote location is that somehow it is a bit unfair to the accused. But the opposite has been our experience, because having a witness in the remote room removes them from the jury.</p> <p>I do not see it as a big disadvantage to an accused person.</p> <p>Juries do not appear to think that the complainant is giving evidence in that way because the accused is a danger to them and they cannot have them in the courtroom.</p> <p>I think it works very much to the accused person’s advantage.</p>		

Screens

Unfair to the accused

Prosecutors	Defence	Judges	Witness advisors
<p>One big argument against the screen is that the accused is entitled to see the person giving evidence against them.</p> <p>I thought having a screen blocking the victim can be a bit adverse to the accused.</p>	<p>Screens are available within the legislation, but I have a real problem with them because they have the express impact of telling the jury that the person on the other side of the screen, which is the accused, is guilty. The only person that is being screened is the accused and that is totally unfair in the process and, to a degree, subverts the whole principle of innocent until proven guilty.</p> <p>The screen is a very unattractive way of dealing with the concerns. It has a prejudicial feel about it; the reason it is there, so the complainant cannot see the accused, is just so obvious, because it is not there for the rest of the trial.</p> <p>I do not think the screens work, it is a bad look.</p> <p>The screen is very prejudicial, it is telling the jury there is a very bad guy there, that the complainant cannot be made to look at. You can see her and we can see her but he cannot. That is not good for the accused.</p>	<p>I do not like screens, they are really crude.</p> <p>It is like the accused is some monster, he is already at the back of the court in the dock, with a guard in front of him, and then you put the screen up.</p> <p>Screens just create the impression that the accused is guilty. You cannot get around that.</p>	

Ineffective at reducing stress

Prosecutors	Defence	Judges	Witness advisors
<p>Screens are pretty useless, in my view. You need to get it into a position where it blocks the accused from the complainant's sight, but the accused can move around or pop in, if they want to be seen, they will be seen.</p> <p>If the complainant is too nervous to give evidence seeing the accused or knowing that they are right next to the accused, being behind a board does not seem to make them feel any different.</p> <p>In one a pre-historic court in this jurisdiction, they have big projector screens or big whiteboards which just look ridiculous.</p>	<p>I do not think they work. It is a bad look. I could not imagine giving evidence from behind a screen. I think it would be quite a negative experience for a witness.</p> <p>It is quite unnatural to be asked questions from behind a screen. So you are adding another layer of complication to an already fairly confronting environment.</p> <p>I have never been a big believer in it as an accused representative, it does the witness a disservice.</p>	<p>Even with the use of screens, the child still has to walk into the courtroom and that is going to be traumatic. It is more difficult to have a court person closer, it is more difficult to have breaks, and it is a more stressful environment, even if they are not in a position where they are going to see the jury and the accused.</p> <p>No-one designed courtrooms that I am aware of with a view to where a screen would be most effective, or most appropriately put, so that it does not dominate the courtroom and only blocks what it is supposed to block. So it is very difficult to achieve.</p>	<p>The courts are not really sure how to use the screen. I have had situations where they did not even know what sort of screens we use. For example, we have had a whiteboard being used as a screen, but the problem is that when the victim walks into the court they can still see the accused person. The screen only stops them having direct eye contact once they sit down in the witness box.</p> <p>I have had situations where judges were reluctant to use the screen because they felt that it covered the accused person and the jury are supposed to see the accused person. So that is one measure that is not working very well.</p>

Enables the complainant to give live evidence

Prosecutors	Defence	Judges	Witness advisors
<p>That is actually the second best option from my point of view. I like them in court. The screen is a great idea, if it is unobtrusive and not distracting, and from a practical perspective you can show exhibits easier, but that is not really related to the comfort of the complainant.</p> <p>It only blocks their vision of the accused, so if that is what makes them feel better it is great.</p> <p>The advantage of the screens is that they are in court, so the jury do get to see them live, but they do not have to see the accused.</p>	<p>I have used the screen as well, it is a bit backwards but it seems to work when there is a need for it.</p>		

Support person for complainant

The presence of the support person reduces complainants' stress in testifying

Prosecutors	Defence	Judges	Witness advisors
<p>It is nice that there is somebody supportive there. It increases the complainant's sense of comfort. The more comfortable you are in your environment, the more reliable they are as witnesses, and the better witnesses they make.</p> <p>I think if you are with a support person, and that relaxes you and makes you feel better, and it is somebody there for when you get distressed it is really good. It is normal during a trial that the victim, when they are giving evidence in remembering really traumatic events, or being pressed in cross-examination, will become distressed, so it is somebody that they can turn to, and who can support them through it. Even just to be with them during adjournments and provide emotional support.</p> <p>I have had many trials where, even if you do not have CCTV available, you can have the support person in the witness box with the complainant, which can be supportive and helpful.</p> <p>Some complainants form good relationships with the Victim Support Services workers, and find them quite a support.</p> <p>The support persons are fine, they play an important role in providing support to people going through this process.</p>	<p>The idea of support people being objective and away from the evidence is good.</p> <p>The support person should be trained in dealing with victims of sexual abuse, because that person will be able to properly reassure them. Whether it is a counsellor or a person trained in dealing with those sorts of things, because it is an emotionally vulnerable, difficult time for those complainants.</p> <p>As a father I entirely endorse the notion of there being a support person present because it is an intimidating process. Sometimes they just need somebody that they can trust to communicate with. I do not have a problem with it.</p>	<p>Support people are fine. Often, they are out of sight so you do not know. The alternative is a five-year-old or a 10-year-old with nobody there except a stranger who is in uniform, a court officer or a sheriff's officer. Really, as a human society you have got to have that kind of provision.</p> <p>The children seem to look to the support person if they are bothered by something or not secure. We do our best to establish rapport with the child, so that the child feels confident talking to the judge on screen, but having the support person there with them is very important. It works well.</p> <p>They are the people present. They are very impressive, in my experience. They are helpful, and they know the limitations of their role. I have high regard for their competence.</p> <p>From what I can see the support people are terrific and do provide support without weighing in to a case.</p>	

Effectiveness depends on the appropriateness of the support person

Prosecutors	Defence	Judges	Witness advisors
<p>Sometimes they choose an inappropriate support person, for example a witness in the case, so you have to say she cannot be in there. It might be someone that comes to the conference and has an agenda, you can tell if she is interrupting me all the time, or trying to put words in the victim's mouth, then we suggest to the victim on the side we would prefer you not to choose that person, and get someone that is just going to sit there and listen and just be there for your support.</p>	<p>I think it would be counterproductive to have a support person who was a family member, even one who was unconnected to the evidence, defending or to be nuclear family of the complainant. Any family member is a bad idea.</p> <p>It depends on the appropriateness of the support person.</p> <p>The support person should be somebody other than a family member or somebody other than a potential witness. I also think they need some degree of professional training.</p> <p>I had a recent trial where I only found out halfway through the evidence that the support person was actually the father, which was very inappropriate, because they are witnesses, or they should have been witnesses.</p> <p>I am personally quite concerned about the role of support persons and counsellors. Those people are very important, I just do not know if their role has been defined to them and the parameters of what they should and should not be doing. I have experienced cases where a support person or counsellor has moved beyond that role and has either attempted to coach evidence or to fix errors that he or she can see during cross-examination. That is no good.</p> <p>I have had some very foolish court officers interfere occasionally, for example with an adult complainant, the court officer leant over and started patting her when she was crying. It is just inexperience though, people do not know.</p> <p>I am concerned about support people who move from the role of a professional to being like a cheerleader or a coach, which really should not be happening.</p> <p>The only problem is that children obviously want someone close to them as their support person, particularly their parents, and often a parent will be involved in the case, even in an indirect sense as a witness who gives evidence about the complaint, or even some surrounding facts and circumstances that might be relevant to the alleged offence. So sometimes there can be an issue there as to whether or not it is appropriate to have that potential witness as a support person.</p>	<p>I have had the problem where a support person was saying things to the complainant during the break that are inappropriate, for example "You're doing okay, don't worry, people will believe you." The support person could see nothing wrong with that. I wonder how often things like that are said and we just do not hear about it.</p> <p>I have got absolutely no problem with the professional witness support people, but I have some problems with sloppy support people who are not trained and who take a partisan position.</p>	<p>The support person should be someone the child has met before the day and got to know, but I do not think they should be an intimate family member.</p>

Testing of child competence to testify and taking the oath

Some judges are better at testing competency to testify than others

Prosecutors	Defence	Judges	Witness advisors
<p>Some judges are appalling at it.</p> <p>The judges try their best, and they do a reasonably good job of it.</p> <p>Some of the examples that the judges use are really difficult, inappropriate and bizarre. There is room for standardising that enquiry with children.</p> <p>Some judges have a good spiel that they use, but some others are so bad that it makes you wonder if they have had any interaction with children over the last century.</p> <p>The judges are not very good at it, because they do not do it a lot and it is tricky. They are not very good at asking children questions and they are not sure what to do at the end of it.</p> <p>Some judges are better than others. Sometimes the questions can be a little bit drawn out but they get there in the end, either way.</p> <p>Some judges do a far better job than others that do not ask such compounded, tricky questions to the child.</p> <p>Some judges are very good at it and some judges are reasonably ordinary at it.</p>	<p>Some of the questions, are just philosophically very difficult for an adult, let alone a child. Things like “Why is it important to tell the truth?”, “Do you know what the truth is?”, or “What is the concept of ‘the truth’?” it all gets fairly hysteric at times.</p> <p>In a recent case I was so thoroughly impressed with how extensive His Honour was in doing the competency. In another case, I remember thinking “ugh, that was a bit brief” and it was almost like you are not entirely sure of what you want to do or how you want to do it. Whereas this judge did such a great job, he knew exactly what he was doing.</p>	<p>I find it very difficult to examine a child as to their competency to take an oath or an affirmation. Most judges agree with me. We have in the past sought assistance from psychologists as to how to frame the questions but I do not think anyone has come up with a particularly helpful formula.</p> <p>I have never done that, because witnesses are presumed to be competent. Other judges, as soon as they see a child they think oh I better test competency. They ask terrible questions; they have double negatives, they have got Latin, often the word ‘prior’ will be used. It is bizarre the way that some judges approach these questions.</p> <p>Sometimes judges end up asking questions of children that philosophers would have trouble answering.</p> <p>It is an area which is badly handled by many judges, both in addressing a question that does not need to be addressed in the first place, and then once they do decide to enter into that enquiry, doing it badly.</p>	<p>Some judges will ask a 10-year-old to take an oath and it makes no sense to the child. They just say yes without any explanation. Some judges will ask questions or give the child examples, which is great, rather than very open questions like “Tell me what a lie is?” or “What is the truth?”</p> <p>Each judicial officer is different, some are very good at doing it and others are appalling. For example, “If you didn’t tell the truth what would God do?”</p>

Asking a child about truth and lies does not test what it is supposed to test

Prosecutors	Defence	Judges	Witness advisors
<p>Nobody is really quite sure what the procedure for ascertaining what the court requires to ascertain about the potential lack of capacity should be, given the age of a child.</p> <p>I hate those silly questions, “If someone told you that you came to the interview in a car, but you came in a bus, would that be a truth or a lie?” I think that is just so ridiculous because it is not the concept of a lie or a truth.</p>	<p>Many children who correctly answer the standard truth/lie questions would still not understand truth and lies. It is not that telling, it does not really get to the heart of the issue.</p> <p>It is a fact from fiction exercise rather than a truth from lies test.</p> <p>Does it make much difference? No. Because most children, for example my three-year-old, could tell you the difference between a truth and lie, it does not mean they will tell the truth straight after that.</p> <p>They used to use what I called the pink elephant test, which was just farcical, “If there was a pink elephant in the room, is that a truth or a lie?” It is not actually testing much conceptually at all, because it is an impractical and very clear test of what the difference is. Obviously you want to understand if the children more subtly understand the distinction between a truth and a lie.</p> <p>Asking a 13-year-old kid whether I am wearing a tie is not the best way to gauge whether they are going to be able to tell the truth or take an oath.</p>	<p>Our sworn evidence requirement, that it be an intelligible account and that they recognise it is a serious matter, is quite enough. The whole obligation to tell the truth is a difficult concept, because they will say that they know they have to tell the truth and what do you do, that is the answer.</p> <p>I do not know whether this is a very good system to ask children questions, because we have standard questioning and the questions we ask are such obvious yes or no answers. So I am not actually sure that it is doing much, but that is the procedure that we have to employ in our court.</p>	

A child’s taking of the oath does not matter to a jury

Prosecutors	Defence	Judges	Witness advisors
<p>It does not appear to matter to a jury whether the child’s evidence is sworn or not. They make the same assessment of a child’s credibility, whether or not the child is put through the rigours of swearing in front of them.</p> <p>I do not have a concern when a judge decides that a child cannot take the oath, or cannot give sworn evidence. I do not think that it has much of an impact on the jury, because I think they realise that people lie under oath because ultimately when a complainant and an accused are giving evidence, one of them is lying.</p> <p>Whether that results in a decision that they can or cannot take the oath is largely irrelevant.</p> <p>From a jury’s perspective, I would think nothing of whether or not a child gives sworn or unsworn evidence.</p> <p>It does have an impact in terms of the law. Whether the evidence is classified as sworn or unsworn will affect what the judge says about it in his summing up to the jury. It is just technical, legal stuff really.</p> <p>I do not think the whole oath/affirmation process assumes the importance that it once did. I honestly do not think it matters to the jurors whether a child under 12 gives an oath or an affirmation or just gives evidence.</p> <p>That practice is adopted well by most judges in my experience.</p>	<p>There are no real issues.</p> <p>It is a strange process. It is necessary, but it sometimes seems almost redundant.</p> <p>The judge is not going to say right, we will not hear from the child, the judge is always going to take the evidence.</p> <p>We would always jump up in defence and say the child does not understand, the child has to be unsworn, but in the end it does not make a huge difference, the evidence still gets taken, people can still get convicted on the unsworn evidence of a child.</p> <p>I do not think it matters a lot in the eyes of a jury whether a complainant’s evidence is sworn or unsworn.</p>	<p>I think the jury apply their common experience. They understand these issues.</p> <p>I do not have a problem with it and none of my colleagues speak of having problems with that. Generally speaking we allow the evidence, either sworn or unsworn, because we have that option.</p> <p>I do not think with young children a jury place much weight on them taking an oath or making an affirmation. It is different with older kids.</p>	

Questioning of the complainant at trial

The suitability of questioning depends on the lawyer or judge

Prosecutors	Defence	Judges	Witness advisors
<p>Legislation banning unfair questioning in the Evidence Act is very inconsistently applied in my experience. Some judges are fantastic and will stop defence when they keep asking the same question, or they have been at cross examination for days on end. The same can be said for prosecutors; some of the evidence-in-chief performances that I have seen go on ad nauseam, are highly unnecessary and very distressing to victims.</p> <p>There are still some older-style barristers whose tone is belittling and humiliating, and often victims say to me at the end of it, "Why are they allowed to just call me a liar?" "Why am I on trial; I didn't do the wrong thing?" Overwhelmingly, victims feel quite horrified by the ordeal that they have been put through in cross-examination. I often think there must be a better way of doing this. And the better way is not the adversarial system.</p> <p>There are some really rude judges who are horrible to victims. Some of them are divine, they put the victims at their ease, they understand the legislation and the procedures that need to be applied, and they make what is always a horrible process as best as it can be. Other judges can be rude and dismissive, and do nothing to put the children at ease, or communicate with them in a way that children can understand.</p> <p>There is still far too much lengthy and unnecessary cross-examination.</p> <p>The vast majority of defence lawyers cross-examine properly, and not because of the practice direction, but they realise that it is the way they should be doing things. But there are those others that you need to keep an eye on.</p> <p>Taking into account the particular vulnerability of</p>	<p>Much like the police interview, cross examination varies so wildly depending on the capability of the person asking the question.</p> <p>There are ways of calling a complainant a liar without being the barking dog.</p> <p>Prosecutor questioning is wildly varying. I have sat through many re-examinations not really knowing why they bothered re-examining the child.</p> <p>I think there is a wide understanding amongst defence counsel that you do not win any points with the jury by speaking rudely to a child, trying to confuse them, or being unduly nasty. That sort of hostility in cross-examination is on the decline. But there are different people with different styles. My experience of watching defence counsel cross-examine children is that generally they do it quite well, in a way that would not leave them feeling too attacked.</p> <p>There are lawyers who are antagonistic and aggressive in these cross-examinations and there are some that are not. It is not my style to be aggressive with witnesses. But I have seen defence counsel be aggressive with child witnesses, and sometimes it appears that they are deliberately trying to cause distress.</p> <p>If you take the view that defence</p>	<p>Everyone needs more education on the appropriateness of the language used.</p> <p>Some lawyers will still ask "I put it to you..." and then speak in double negatives.</p> <p>Some lawyers have a lot to learn, others are doing it very well. Some lawyers still do not understand that they have learnt this specialised language at law school and other people, particularly children, do not understand it. You just cannot talk like that, people do not understand it. But they still ask long, convoluted questions.</p> <p>Women in particular are much better at talking to children, perhaps mothers. Male lawyers who are fathers are not to be excluded. But my experience is that female lawyers are very good at examining and cross-examining child witnesses, and establishing at developing a rapport with the child.</p> <p>The main area of improvement for some lawyers is just recognising that they are talking to a child.</p> <p>Lawyers do need to put their case forward, but it is important that they render it into language that the child will understand.</p> <p>It is not a good idea to ask overly long questions in any case, because you will lose any witness, adult or child, and particularly the jury.</p> <p>Not everyone can naturally and competently talk to a child, so that is a problem that has to be acknowledged. Some of the female judges are very good at it. Some of the male judges are less capable.</p> <p>Many counsel are unable to frame questions in a simple and understandable way for the witness.</p>	<p>The only area that needs improving is questioning by defence, they still tend to be repetitive. Victims do need to be cross-examined, but they should not have to be asked to retell the story over and over again because that defeats the purpose of the pre-recorded police interview.</p> <p>Recently I supported an 11-year-old girl and the defence cross-examined her for two days, asking her to repeat each incident multiple times, and by the second or third time she just kept saying "I do not know, I cannot remember." She was over it, and you could see that. So cross-examination definitely needs to be worked on.</p> <p>Defence often use the tactic of being passive aggressive with children during cross-examination.</p> <p>Defence use closed-ended questions with children. Even the way that they cross-examine, "I suggest to you" or "I put it to you", it just makes no sense to children.</p> <p>The way that questions are asked during cross-examination could be simplified. They need to take away the "I put it to you" and "I suggest to you", and just say "maybe it did not happen that way".</p> <p>The other problem with cross-examination is using inappropriate terminology. For example, with a child who was describing having a finger</p>

Prosecutors	Defence	Judges	Witness advisors
<p>children, we should be able to test their evidence by asking open questions, which would lead to the same conclusion, rather than suggesting what you want them to agree or disagree with.</p> <p>The main problems I see are: double-barrelled questions, multiple questions rolled up into one, confusing topics making the questions confusing, the use of legal terminology as opposed to simple plain English, and changing topics.</p> <p>Defence lawyers will frequently jump between talking about allegations A, B and C, and not make it clear that they have moved from A to C and then back to B, and then back to A. It is confusing for a lawyer trying to follow what the questions and answers are, let alone a child witness.</p> <p>We constantly need to be mindful of making our questions simple. Short simple questions, and taking it slowly.</p> <p>Some of the judges can be real arseholes, and they speak to these people as though they are dirt, it just compounds on the difficulty.</p> <p>Defence can be pretty hopeless at cross-examination, while it is a difficult process, when you are with a child you have to make sure your questions are appropriate. For example, I object a lot on questions where there are two issues in within it, and there will be an assumption, so you can only answer the question by agreeing with the assumption that you have not agreed with.</p> <p>Cross-examination is easier than evidence-in-chief, but they just do not train themselves.</p> <p>Some counsel are really good at cross-examination, they are more sympathetic, they speak better to the child, give the child dignity and they do their questioning.</p> <p>I have had a couple of times where the cross-examination has been shocking. For example, I had a case where the defence counsel questioned so inappropriately that she aborted the trial. The victim</p>	<p>counsel's entitled to a wide ranging and robust cross-examination, that is all well and good, but this is still a child who needs some protection in the court to be able to give the best evidence that they can.</p> <p>I have been annoyed observing defence counsel who was reasonably experienced, who knew how to cross-examine children, but just chose in a particular case to do it in such a way that was aggressive enough to cause the children to give up.</p> <p>I do not deliberately set out to upset anybody, but you have to put to people fairly directly that they are lying about things. It is the adversarial process, and you cannot get around it. It is never going to be a round table discussion, it is always going to be two sides of the story, otherwise it would be a guilty plea. There is no easy fix for that.</p> <p>The questioning that takes place is individual to the defence lawyer.</p> <p>I have seen some horrific cross-examinations when I was a solicitor and my practice is very different. I try and keep things as short as possible, keep things polite. I do not think you need to be a nasty defence lawyer in asking witnesses questions.</p> <p>Our profession has a range of people with a range of skills. Some people should not be running trials at all, let alone something as difficult as a sexual assault trial or even more difficult as a child sexual assault trial. They are about the hardest thing you can do.</p> <p>You do get into a very complicated way</p>	<p>Some counsel are pretty good, they keep their tone of voice normal, they ask the relevant question but in a neutral way, and they do not get too repetitive that it becomes oppressive. You just have to watch out for those that still employ a more aggressive style, the voice goes up, the questions are fired more quickly, and often they make comments in between asking questions, like, "oh, really" and "that is what you say".</p> <p>I have found that some prosecution beat around the bush and really struggle to get the evidence out.</p> <p>Practice varies. Lawyers use the word 'prior', when everyone outside of courtroom uses 'before'. That is just one example of the inability of lawyers to speak like human beings.</p> <p>The language is bad. The questions are too long. They have double negatives, for example "You would not say that you went to the beach, would you?" which are harder to understand.</p> <p>I do my best to intervene. "Mr X, do you think we could use simpler language?" And it will work for two questions but they are just so set in their ways, they revert to speaking like a lawyer within seconds.</p> <p>Questioning is an insurmountable problem. I would love someone to come up with a solution. I just cannot see what it is.</p> <p>Questioning varies enormously from barrister to barrister.</p> <p>There are some people who will never change and all you can do is wait for them to retire.</p> <p>Occasionally you still get barristers who cannot get out of the old style and badger witnesses, and we stop them.</p> <p>Questioning will vary a good deal depending on the competency of the individual questioner and their sensitivity, be they barristers or judges. I have not seen a major problem other than some do it really well, some do it okay, and some do it pretty badly.</p> <p>Some barristers are incapable of asking a simple question or using simple terms. For example, there is a complex question</p>	<p>inserted in her vagina, the defence barrister in cross-examination said, "When he fingered you..." and I thought, "You know what, she's actually not said that," and she is 11, so it is totally inappropriate to even use that term.</p> <p>Our prosecutors do an amazing job, in fact most victims will say the first half, being the evidence-in-chief with the prosecutor, was easy, and the second half, being cross-examined, they hated.</p> <p>Most prosecutors are really good advocates and will intervene when they need it.</p> <p>It is very stressful for young people and there are times when some of the questioning from defence counsel is entirely inappropriate.</p> <p>Some children are cross-examined very appropriately by defence but others are not.</p> <p>We do not normally have a problem with aggressive questioning. The lawyers in this jurisdiction are generally quite good, and from what I hear are better than some other states. But we do have a lot of problems with confusing questions.</p> <p>Defence lawyers are not trained to talk to children in a developmentally appropriate way, their advocacy skills are around being forceful, being leading, and shutting off avenues of response.</p> <p>Some prosecutors are better than others in terms of asking appropriate developmental questions.</p> <p>Questions are never age specific or age appropriate, for example questions that</p>

Prosecutors	Defence	Judges	Witness advisors
<p>ended up in hospital that night. It was a very, very bad situation that this particular question had been put to him.</p> <p>Sometimes the questioning can be really inappropriate.</p> <p>Some defence counsel are superb in cross-examination, others are disastrous.</p> <p>Sometimes they go on like a dog to the bone.</p> <p>Cross-examination should all be done within an hour, but sometimes it can go on for hours or a couple of days.</p> <p>If you are raising your voice or asking lots of compound or multiple questions, judges will move in reasonably quickly, but some defence lawyers just do not get it. Some of them do, and some are really brilliant, they are short, succinct, they get to the point, and they get the desired result. Others just go off on a tangent and around in circles.</p> <p>The process of cross-examination is not meant for children of an age that are not capable of defending their position or truthfully answering questions because they think that they are supposed to agree with whatever the cross-examiners put to them.</p>	<p>of speaking, so it is incumbent on all of us to make our questions simple. That is the area we could be criticised the most for, being complicated in our questions.</p> <p>Lawyers vary a lot in terms of their capacity to understand the cognitive limitations of children. Some of them talk to children as if they are adults, and some of them talk to them as if they are babies. Trying to pitch their questions in terms that are appropriate to the child's level of language ability is a difficult thing. I have seen very ineffective cross-examination because the defence counsel gets that wrong.</p> <p>There are still dinosaurs out there and that need to be stopped.</p> <p>Sometimes you see some horrible questions being asked, just in terms of their structure etc.</p>	<p>being thrown at a child, or an intellectually disabled witness, or a person who is not particularly well educated, and it makes it very difficult for them to focus on the answer that is really being sought. So then the witness becomes confused or loses competence and the storytelling gets blurred and disjointed.</p> <p>The defence are either cross-examining for far too long and not focusing on the issues at hand, or are asking questions in such a way as to confuse the witness.</p> <p>There are still far too many defence counsel who seem unable to use appropriate language for children.</p> <p>I have seen prosecutors and defence counsel who should not be allowed near a complainant, especially vulnerable complainants in sex cases.</p>	<p>are misleading or suggestive.</p> <p>The questions are always complex and ambiguous, and children do not understand so they just agree.</p> <p>No age appropriate language is used. Suggestive questions are used.</p> <p>It has to be fair on the accused but it should also be fair on the victim, and it is not. I cringe in every trial I have seen because of unfair questions, some of which even I do not understand.</p> <p>Cross-examination is just ridiculous.</p>

Specific to adults

Prosecutors	Defence	Judges	Witness advisors
<p>All victims of sexual abuse are vulnerable in the witness box. They are vulnerable to suggestion, to being insulted, humiliated, and worn down, All of the comments regarding cross-examination of children apply equally to adults.</p> <p>I have seen adult complainants cross-examined in terrible ways. You need to keep an eye on things to make sure that the defence are asking relevant questions and are not breaching the Evidence Act in terms of asking repetitive and harassing questions. But they have a lot of leeway, and it can be quite awful to watch.</p> <p>The sensitivities of the subject matter could be taken into account a bit more.</p> <p>Adults who have alleged child sexual offences get fairly insulted and upset with the type of questioning they get from the defence, which invariably suggests that they are making all of it up for whatever reason. There are checks and measures in place but it is not fool proof.</p> <p>Cross-examination can be very aggressive with complainants.</p> <p>The rules of evidence are there to stop counsel haranguing witnesses, and they do, but there are experienced counsel that can work within those rules in a way that works for them.</p> <p>Some defence lawyers are excellent, they cut straight to the chase, and others just go off on tangents, and have no case theory, and do not really put the questions to the alleged victim.</p> <p>When it comes to adult witnesses defence counsel can go too far, or become too oppressive.</p> <p>They are rude, hectoring, aggressive, belittling and sarcastic.</p>	<p>I certainly would not want to be a complainant. It is a strange situation to be in because victims also have the presumption of innocence during the trial, and if these victims are genuine victims, then they are spoken to in a way that they should not be spoken to.</p> <p>The behaviour I would be concerned about on behalf of a victim would be being called a liar, being told that they are making it up, that they are motivated by this and that. They have all their dirty laundry aired. They are stuck in a witness box for a long amount of time. They are spoken to as though they were making it up from start to finish.</p> <p>There are barristers that cross-examine for very long periods of time, and that could be their technique. There are barristers who are very aggressive and belittling. Those techniques are all well and truly alive. But then there is also another style of advocacy, which is getting what you need effectively without being nasty or unfair.</p> <p>Quite often in historical sexual abuse cases you will see defence lawyers rip into complainants in a difficult manner. They should be treated no differently to child complainants.</p>	<p>We still need to protect adults from inappropriate cross-examination.</p>	<p>Defence are a lot more aggressive with adults, for example they will raise the tone of the voice, look make facial expressions at the jury depending on how the victim answers the question.</p> <p>Probably 10 out of 10 victims will say "I just hate him," and that is not even directed at the accused, it is directed at the defence barrister. Part of our preparation is to say that it is their job to ask questions, do not take it personally, but without fail everyone will walk out and say "I hate his barrister." Cross-examination is still really, really tough for victims.</p> <p>Cross-examination re-traumatizes complainants. Some people get quite angry. Some people get highly distressed. We actually have vomit bags because people get so distressed that they vomit. So that vigorous, relentless sort of cross-examination causes a lot of distress.</p> <p>It does actually appear that the victim is the one on trial.</p>

Aggressive questioning of a child is counter-productive to the defence

Prosecutors	Defence	Judges	Witness advisors
<p>There has certainly been an improvement in the last 10 years.</p> <p>It is generally a lot better than it used to be.</p> <p>Defence counsel are pretty good with children now, and part of that knowing the jury will not take the bullying of a child during questioning lightly.</p> <p>I think it works. Most counsel in this jurisdiction are very careful with child complainants, they cross-examine them but not in an aggressive way.</p> <p>Defence counsel are much better with children than they are with adults.</p> <p>They are far less aggressive with children because they know it will completely turn off the jury. So they are much more careful about their questions because they know the child has to understand it, and the judge will jump on them if they are using complex or multi-barrel questions.</p>	<p>With the younger profession coming through and the chain of communication styles, the days of the old barking dog barrister are gone, so you are not going to get the sort of grumbling and mumbling at a child these days, or being aggressive with the child.</p> <p>We do make sure that we look after witnesses because we know that a jury are not going to be happy otherwise, so we do not ask questions that are harassing or repetitive. And it does not assist with clarity of communication anyway.</p> <p>It is counterproductive to be aggressive with child witnesses.</p> <p>Generally, my experience is that questioning is pretty good. Crowns are generally quite practiced in this sort of thing.</p> <p>On the whole, the questioning is not too bad. Most of the people who have children ask pretty reasonable questions.</p> <p>It is moving a lot smoother than it has in the past.</p>	<p>Compared to how it was 20-30 years ago questioning is not too bad. We are good at getting rid of the legalese.</p> <p>The problem with aggressive cross-examination or aggressive questioning has not been a problem in this jurisdiction to the extent it was in the past, because there is a culture here now that aggressive questioning is counterproductive and leads to intervention from the judge.</p> <p>Sensible counsel have taken the view that extremely aggressive questioning of a child witness or even an adult complainant in a sexual matter can often be counterproductive.</p> <p>Generally speaking, people are fairly respectful now, much more respectful than they used to be.</p> <p>There has been great improvement in the quality of the questioning.</p> <p>Barristers now, compared to 10 years ago, are much better at understanding the way in which to question children and to keep it relatively brief. Generally speaking they do that.</p> <p>The sort of aggressive, offensive, hectoring of child witnesses has ceased. It is no longer acceptable and I see very few cases now in which barristers cross the line.</p>	

Adults should be tested more robustly

Prosecutors	Defence	Judges	Witness advisors
<p>I do not see the need of having to use open-ended questions in cross-examination for adults, and even older children, because they are capable linguistically of knowing the difference, and during the preparation for court, the support services and prosecutor can tell them they have to pay attention and be careful about how they answer questions.</p> <p>If it is historical sexual abuse you need more protection the other way. The evidence needs to be fully and rigorously tested.</p> <p>Mostly cross-examination is done in a fair manner with adults because they understand what they can and cannot say, and that they do not have to agree.</p> <p>You need to let it flow a bit more with adults. As a Crown, you cannot look like you are protecting your complainant all the time. You do protect them, especially if defence get nasty. But there is a fine line between protecting your client but also letting them deal with it. That is what the adversarial system's about.</p> <p>I have seen some who are aggressive with adults but that is a style.</p>	<p>You have a bit more latitude in what you can ask and the approach you can take when you are dealing with an adult. They are assumed to have a higher degree of emotional robustness and maturity. So you do treat them in a different way.</p> <p>Adults are easier to cross-examine, they need less protection and are more confident, so it is an easier exercise.</p> <p>In certain circumstances, adults are more robust, they have better memories, they have life experience, so you can ask them frank questions and you can be blunt with them, without being rude.</p> <p>As a general proposition, an adult witness is going to be in a better position to withstand the aggressive or belittling questioning than a child witness, because they are less likely to be awed by the figure in apparent authority putting these things to them, being the defence lawyer.</p>	<p>Adults are obviously going to be subject to more vigorous cross-examination. But it has to be a discretionary matter, because the case may require it, so cross-examination is appropriate. It could lead to unfair trials if there was some blanket statement or legislation prohibiting vigorous cross-examination.</p> <p>It is a bit different with adult complainants compared to a child, because you have an adult cross-examining another adult, putting their client's case forward. So there is room for a bit more appropriate aggression or frankness.</p> <p>Defence counsel ought to be given greater scope and less interference when they are cross-examining an adult witness.</p> <p>It is a very fine line in allowing defence counsel to put their client's case and properly test the evidence of the complainant, whilst understanding that it is extremely distressing for a complainant.</p> <p>Cross-examination is not as a big an issue with adults as it is with children.</p> <p>The days are long gone when we thought that destroying the witness meant they had done the best they could for the defence. That just does not happen anymore, certainly not in my court.</p> <p>While the tenure of cross-examination can be more forceful with adults, it has changed dramatically in the past decade.</p>	

Current questioning guidelines are sufficient, but poorly enforced

Prosecutors	Defence	Judges	Witness advisors
<p>We have a practice direction about the way children are meant to be cross-examined. Generally, defence lawyers are pretty good with child witnesses. The reality is they know that it does not look good to be ripping into a child, so they do tend to be softer with the younger children.</p> <p>In terms of cross-examination, there is a practice direction there, they are told what they can and cannot do. If they choose not to follow that then you have to deal with it.</p> <p>With adults, there are some good protections in place, that you cannot cross-examine them about prior sexual complaints or prior sexual experience.</p> <p>In this jurisdiction we have a practice direction on the examination of child witnesses. It is a one and a half page guide, it is pretty good. But most defence lawyers have never read it.</p> <p>There is this brilliant practice direction but defence lawyers have not read it and judges do not enforce it, so it is basically useless.</p> <p>I cannot remember the exact wording, but the provisions are there, they just need to add an interpretation to say when you have a child under 14 or under 16, you need extra emphasis on making sure the questions are age appropriate, something like that would be good.</p> <p>There has been a practice direction in place for two or three years, regarding the questioning and cross-examining of children, things like keeping your voice at a steady pace, speaking clearly, and using simple language, which has provided some assistance. They are a good general guideline.</p> <p>The provisions are adequate, but some judges are stricter than others.</p>	<p>The bar practice courses in certain jurisdictions have a positive impact on communication styles for criminal lawyers.</p> <p>The rules we have currently are sufficient, and the judge's ability to handle questions allowed in the Evidence Act permits them to do that. I do not think it needs to be further limited.</p> <p>On a practical level I do not think that there needs to be any change of rules or procedure, it is all there, the projections, the improper questions, and the prohibitions.</p> <p>There are significant protections and judges are very conscious to protect the parameters of where you can properly go.</p> <p>It is always a matter of touch and feel. It is very hard to set down absolute rules. But we are getting it.</p>	<p>Most of our lawyers are fairly good, we do not have sort of Nazi attack questions of children as a rule. We have protection in the Evidence Act. Obviously, the questions asked are tough, for example the questions that you are lying, which of course is really stressful.</p> <p>We have published guidelines to cross-examining child witnesses and witnesses with mental disabilities. The guidelines assist both the judge and counsel to understand what the expectations are. But sometimes it does not matter how many guidelines you have, some counsel are just incapable of framing a question in a simple way.</p> <p>Defence lawyers tend to go on a bit, but we have those guidelines which give us some support.</p> <p>I do not think there is any necessity for adjustment to the legislation, there is adequate basis through the Evidence Act for the judge to exercise those powers. Judges have got quite sufficient powers.</p>	<p>One of our judges has drawn up some guidelines, which guide defence and prosecution about how they need to be talking to children. The problem is that it depends on the judge actually managing that process.</p>

Lawyers and judges need more professional development in this area

Prosecutors	Defence	Judges	Witness advisors
<p>Judges can ruin a trial and make it ridiculous. Some judicial officers have very outdated views of counterintuitive behaviours, for example about victims who stay in the home with their stepfather who has been sexually abusing them for years. You need judges who understand and who are trained in the psychology of victims, and about how complaining occurs.</p> <p>I have been in a briefing with a judge who said, "We all know that children make these things up," speaking about child sexual assault victims.</p> <p>There are many really well trained young people who absolutely do the right thing, but there are a couple of old dinosaurs still hanging around who have got outdated notions and views.</p> <p>There can be some outdated thinking about victims and methods of giving evidence, for example that victims need to come into court. The days of those sort of practices are passing with the new and the younger Crown Prosecutors coming through. Generally speaking, our training is good.</p> <p>We are doing a pretty good job at professional development, but it comes down to the individual and how much they take on board. For those people who really believe in the work we do, it's great. Other people will just do it to get the professional development points. In terms of what is being offered by our office as an organisation, I think we are doing pretty well.</p> <p>Judges should receive more training in terms of cases involving victims of child sexual abuse.</p> <p>I do not know how much schooling judges actually get in regards to dealing with complainants. Some of them just come straight from wherever they are, land on the bench and</p>	<p>There was a program that had really interesting workshops run by very experienced people. It had an online Dummies Guide to Sex Offences Manual, which was really good. It also gave advocates the opportunity to be filmed and get judicial feedback and peer review. So that was great.</p> <p>For defence, you get known as someone who has experience in the field. There is not any real development on offer, other than lectures and things like that, if you choose to go to them.</p> <p>I think magistrates, although they only deal with child witnesses rather than child complainants on CCTV, need a little bit of help in how to deal with children, particularly the fact that children need more protection than adult witnesses.</p> <p>We do not get a lot of professional development in dealing with child sexual complainants, and it is quite a big chunk of work in the District Court.</p> <p>We have continuing professional development every year about various strands of our practice. In criminal law, a lot of us do child sex or sexual type matters. But I think the development in this area is something that you learn from experience, rather than being told.</p> <p>Training could be couched in a non-judgemental way, for example let's talk about child development, or child comprehension, or a child's understanding of various things. It would get the point across, without asking them along to get an earbashing about how much children get hurt by sexual abuse, because that is the story we know, it is the story that the Royal Commission is telling. I think people understand that.</p> <p>If you want to practice in this area, particularly sexual assault and child sexual assault trials, you need to keep up-to-date.</p> <p>The only thing we really lack is feedback, because no one</p>	<p>In this jurisdiction the legal profession is trained, so it is now the norm to deal with vulnerable witness applications.</p> <p>Lawyers have to do continuing professional development points, but there is no requirement that they do it in a specific area of practice. So there is no guarantee that even if there was a program being offered on planning cross-examination for children that defence counsel would do it.</p> <p>In this state we do not have the luxury of any judicial education body, so our education comes from the National Judicial College of Australia.</p> <p>Currently, professional development is not adequate. There is sadly very much a lack of commitment by governments, particularly in this jurisdiction, to provide adequate funding for judicial education.</p> <p>Generally we have no evidence-based practice. We are full of mythology about what juries think, and how adults and children react. Legal training generally is very limited. There is a lot of misplaced intellectual snobbery about learning from social science disciplines. A lot of research about juries, child development, and children's disclosure in sexual offence cases, is being done but is not actually known and is not easily accessible to practicing lawyers and judges. There is a real risk that unfounded belief and mythologies continue to be perpetuated.</p> <p>Education is needed for lawyers and judges regarding the appropriateness of the language used with children. We have had a little bit, but we need a lot more.</p> <p>I would like more information about how a child thinks. In this state, we have a problem with Aboriginal people when you use concepts of time and place, which can be taken literally by a child in a way that we have not understood.</p> <p>I would really like more hands-on training, where we do</p>	<p>Having specialist courts and training for everyone involved in the system is necessary. Prosecutors are very in tune with victims' needs because they work with victims. Some judges have experience working with victims and are much better in those proceedings as well, but defence barristers need a lot more training, particularly about what is appropriate and not appropriate, about the impact of being abused, the trauma, the emotional presentation, and also how that affects memory.</p> <p>There needs to be more multidisciplinary education.</p> <p>There is a myth or preconception about what you would do if you were abused or sexually assaulted. If people are not fitting the norms of what people expect then there is a question mark around their credibility. There should be education around the fact that not all victims will respond the same way, that there is a lot of variance around why people do what they do, and examples of what that may be, so that there are no expectations that everyone will fit the same box, and if you do not then you must be lying.</p> <p>More training for judges in child development.</p>

Prosecutors	Defence	Judges	Witness advisors
<p>get a rape trial.</p> <p>It would be helpful to train interviewers from child protection on the elements of the offence for indecent dealings and sexual penetration. Because I want the bare minimum of detail, so tick off the elements of the offence and get out of there.</p> <p>We do training on how to question children, but we could do with more training, particularly about the differences in ages, for example what you can expect from someone at a particular age, because currently it is left to your own experience and judgement.</p> <p>Some professionals may not be aware of the impact that certain types of questioning can have on complainants, especially children and vulnerable witnesses. There is a need to continue legal education on victims' perspectives and their vulnerabilities, and the law that relates to questioning.</p> <p>Legal education could include practical advocacy workshops, which involve an opportunity to see experienced defence counsel, as an example.</p> <p>Education on sexual assault victims, historical sex offences, and child victims would be very useful, especially what to expect of children of different ages.</p> <p>More training by lawyers, specifically on how to cross-examine children in sex matters.</p>	<p>really gives you any feedback.</p> <p>It is hard to get professional development. I did a course where you were videoed, and there were actual Supreme and District Court judges giving you feedback. That is really the only way you are going to develop, by watching yourself and hearing criticism. But that can be a bit difficult.</p> <p>The practical stuff is the hardest to get.</p> <p>There is a real need for professional development, especially in understanding expert evidence in child sexual assault cases, because there is now the ability in child sexual assault cases to call expert evidence to explain what might otherwise appear to be counterintuitive behaviour, or something missing or worrying about a child's evidence.</p> <p>There is continuing professional development but lawyers talk to lawyers. We do not have a child psychologist coming in and saying this is how children think.</p> <p>There is a need for experts in child psychology to speak to lawyers.</p> <p>There is still plenty of scope for educating lawyers about how they examine witnesses, and in particular child witnesses.</p> <p>I am interested in learning more about a victim's perspective of certain things. Because I practice from an accused's perspective, I am limited in that area of learning.</p> <p>Defence lawyers need specialised training in cross-examining children witnesses.</p>	<p>some role playing and video.</p> <p>The Bar Associations could include in their continuing legal education strands to do with child witnesses.</p> <p>We are limited in our capacity to bring in outside speakers because the budgeting is not there. The problem is that you are not exposed to fresh ideas. The opportunity to have people from New Zealand or the UK come to us and say this is what we are doing with child witnesses, might lead us to reassess what we are doing and perhaps come up with better ideas.</p> <p>We could have programs run for defence counsel who are likely to cross-examine child witnesses. It might be helpful for prosecutors to get some training as well, regarding the best way to ask a child a non-leading question and to get them to talk about certain events.</p> <p>We would like more resources to continue professional development of judges, but there are always resource issues in every body.</p> <p>Evidence-based practice is an excellent idea. Lawyers are terrible at times, they have very strongly held views based on no evidence at all.</p> <p>There is room for training of lawyers, both prosecution and defence, in effective questioning of sexual assault victims.</p> <p>The more professional development, the more we base things on evidence, the better. Tell our politicians that.</p>	

Judicial interventions

Some judges are better at intervening than others

Prosecutors	Defence	Judges	Witness advisors
<p>Some judges are just naturally better at intervening than others.</p> <p>Some judges are very good at intervening and some are terrible.</p> <p>Whether they intervene or not depends on the judge. Some judges are pretty good at it, but a lot of judges will let things go.</p> <p>Some judges are fantastic and will stop defence when they keep asking the same question, or they have been at cross examination for days on end. But there are judges who just allow things to go on ad nauseum. So it is a personality choice as well when you are choosing the judicial officers. Some of them are divine, they put victims at their ease. Other judges, usually the old blokes, can be rude and dismissive.</p> <p>It depends on the judge. Some judges are pretty good at it, but a lot of judges will sort of let things go.</p> <p>It depends on the particular view of the judge and their attitude toward whether their role is to intervene, or be a more traditional judge who should leave it between the parties and intervene as little as possible.</p> <p>Every judge is different.</p> <p>The success and failure of a case can depend on which judge you get. It affects everything. It affects the interventions that they make and how they speak to the complainant. It affects when you object to a cross-examination which is unfair, convoluted, or confusing to a child, whether they allow the objection or not.</p> <p>It comes down to different judges. Some judges are clearly more pro prosecution, some judges are clearly more pro defence.</p> <p>Generally, if defence counsel are getting out of line the judge will come down on them very hard.</p> <p>The judges are very switched on in terms of the needs of the</p>	<p>There are so many different judges. I had one judge who was very defence leaning and although no one was being nasty, there were lengthy cross-examinations, without due regard for the needs of the children. But you also get the other extreme of that.</p> <p>There is of course a variation in judges and their approach to child witnesses. It would be nice to say that there is complete consistency in the approach and ability of judges, but there is not.</p> <p>It depends on the judge, there are good judges and bad judges. There are judges that are experienced in running criminal trials and sexual assault trials, and there are judges that are not.</p> <p>On the whole, I find judges do not intervene too much in cross-examination. There are particular judges that do, but in my experience most of the time they do not really interrupt or intervene that much.</p> <p>Judges are as variable as complainants, some are particularly protective, and some are not so protective.</p> <p>Some judges are more inclined to let the cross-examiner do as he or she wishes, subject to some extremes, because they feel that only that approach is consistent with the accused having a fair trial. Others are much more inclined, or much more proactive, in ensuring that those kinds of cross-examination are shut down. So there is a big difference in terms of the way judges will restrict unfair cross-examination.</p> <p>If you are going to be unduly harassing, the bench can intervene. But I have not seen benches intervene for that reason, I think we are seeing the end of those days.</p> <p>Most judges are alive to being the referee during cross-examination, making sure the questions are well understood, age appropriate, and not too confusing.</p>	<p>The process of cross-examination is necessarily one that is meant to test the evidence and the question is when does it reach the point of being too testing because it becomes too traumatic for the witness or too aggressive. The dividing line is a matter of judgement, and judgement can vary from judge to judge.</p> <p>Judges' interventions vary from judge to judge.</p> <p>There is a marked variance between the way different judges perceive their role and function.</p> <p>If there is robust questioning simply to intimidate or upset the child, judges will definitely intervene now.</p> <p>Some lawyers will still ask "I put it to you..." and then speak in double negatives. Most of the judges in this court would just pull them up and say could you ask that another way or will take over.</p> <p>If the questioning was inappropriate I would step in. You would step in if it was distressing the child, just as you would step in with an adult if they were being treated unfairly or inappropriately.</p>	<p>Some judges are really good in making sure that the victim understands the questions and they do intervene if the questions are too long or confusing. But, at the same time, some judges will not say one word to the victim during the whole of the evidence and cross-examination.</p> <p>It is very much dependent on the judge actually managing that process. They need to manage the questions in cross-examination, and some judges are much more aware of that than others.</p> <p>Some judges are fantastic in intervening. But they also need training and support to identify when a question is inappropriate.</p> <p>Sometimes cross-examination just goes on and on, and there appears to be a concern from judges that if they are not seen to be allowing vigorous cross-examination that it could lead to an appeal.</p> <p>We have judges that will not say one word to the victim during the whole of the evidence and cross-examination. Even when the victim is obviously confused, or distressed, or needs a break. In those cases we rely on the prosecutors to stand up and object, or to propose a break.</p>

Prosecutors	Defence	Judges	Witness advisors
<p>complainants.</p> <p>Most judges are pretty good.</p> <p>The judges generally do not intervene too much with questioning, and when they do it is reasonable, they usually ask one or two questions that they just want clarified for themselves, and that is fine.</p> <p>We need an active interventionist judiciary that is not going to put up with badgering, or hectoring, or inappropriate behaviour, it is definitely changing.</p> <p>I have seen a judge kick the jury out and give an absolute dressing down.</p> <p>There has been a gradual change in attitudes from the bench and their keenness to be more proactive in interrupting if the need arises. So the judiciary are conscious of it and are actively invoking those provisions to maintain control and decorum in the courtroom.</p> <p>Judges seem to intervene more with children, if the questions are particularly repetitive, but not a lot with adults.</p> <p>I have hardly ever seen them intervene. If they do it is at the behest of the prosecutor saying, "Oh, come on, this is a bit unfair."</p> <p>Some judges treat children like adults, they are not patient with them, and they probably do not intervene when they should.</p>	<p>There are so many different judges, but in my experience most judges are appropriate with children.</p> <p>I have not to date found a judge that has ever unduly restricted my cross-examination.</p> <p>In my experience it was rare that judges would intervene. But generally when they did intervene it was be done properly.</p> <p>I have not seen judges intervening as a problem. I cannot think of any case where I have had any judge sticking their beak in when they should not have.</p> <p>Individual judges need to pay attention to the style of some defence lawyers, in terms of their level of aggressiveness.</p> <p>Some judges can be a little bit more interventionist than they need to be, but that is not just in a child sexual assault trial, in some instances that is the judge's personality, it is the human dynamics that come into a trial. They may have a perception that the defence counsel is a goose and they need to intervene because they think all the questions are poor.</p> <p>Judges' interventions more often than not are frustrating, especially if they see that you have chipped a bit and they are trying to patch it up.</p>		<p>Some judges are more aware of children's cognitive abilities at different stages, but some judges are not. Some are not aware that when a defence lawyer says, "I put it to you that such and such happened", the child actually has not got a clue what they are talking about. But because the judge thinks that way as well, he thinks it is okay.</p>

Intervening regularly is detrimental to a fair hearing

Prosecutors	Defence	Judges	Witness advisors
<p>Some judges intervene too much and make things more difficult.</p> <p>There is a particular judge who is very interventionist and will ask questions and it is always a bad thing. It is not always a bad thing for prosecution. In one particular trial the defence lawyer agreed that we both just wanted the judge to stop, but he does not have to, and he did not.</p> <p>You see defence go a little bit too far in their questioning with adults all the time, to the point where they are insulting, twisting their words and the tone of voice is even objectionable. It does surprise me that it still happens in this day and age.</p> <p>Some judges are so interventionist that they keep interrupting and try to run the trial themselves. You might be asking a line of questioning when they cut you off and ask a series of questions, so when they tell you to continue it has completely stuffed up your line of questioning.</p> <p>The prosecutor does not necessarily mind that the defence counsel are asking inappropriate questions to a point, because it does not go down well with the jury, so it may actually advance your case.</p> <p>As a prosecutor you have got to wear a fine line between protecting your witness and advancing your case.</p>	<p>Judges need to be less interventionist than they are.</p> <p>Judges are intervening for everything you can imagine, it is really completely unnecessary. They just need to sit back, and if there is anything detrimentally wrong then by all means they should intervene, but unless they are called upon they should just adjudicate. They are there as the judge's law, they need to make sure the law is in force in their courtroom.</p> <p>It is just generating a whole different culture, and it is taking away from the adversarial aspect of our system because counsel are not interacting in an adversarial space, it is an inquisitorial space.</p> <p>The more the judges butt out and leave it between the parties running the case the better. Judges batting for either side is dangerous, and it can backfire if it becomes too obvious.</p> <p>The judge has a lot of power and they should be very careful about using it.</p> <p>Sometimes judges do not need to and should not intervene, and sometimes when they do intervene not only does it disrupt the questioner, whether it be the crown or the accused counsel, it can also be disruptive to the relevant witness.</p>	<p>I avoid intervening during counsels questioning because it is not a good look. I am not running the trial, the advocates are running the trial. Their job is to represent their respective clients, the prosecutor and the accused. My job is to keep my head down.</p> <p>Some judges will be more interventionist than others, and I think it is best to let the advocates run the case.</p> <p>You got to be careful because you think you know where they are going but, no, you are not running the case.</p> <p>The more interventions you get from the judge the more disruptive the process becomes.</p> <p>The judge should not interfere with the adversarial process, and it is for counsel, being conscious of their obligations, to decide what questions are going to be asked and what questions are not going to be asked. That has led judges to be reluctant to intervene in cross-examination.</p> <p>I do not ask questions, because that is not part of the way our system works, judges should not elicit information, it is really up to the prosecution and the defence counsel to see what sort of information they want to elicit.</p> <p>You have to remember that if a judge interferes too much then there is very easily a ground of appeal for the offender.</p> <p>I have intervened once or twice, but I cannot really correct every question asked by a lawyer. I would like to be able to, and often I will say "Let me ask the question a better way," and I will ask the question, but there is a risk that every time you do that you are key partisan and there is a risk that the child gets an extra level of confusion because of all these interruptions to the child being asked questions.</p> <p>If a judge intervenes too much it is highly likely the Court of Appeal will uphold an appeal by the defence.</p> <p>There are times when a judge will intervene, certainly I do, but I try and avoid it as much as I can because it can have a prejudicial effect.</p> <p>Judges have to be reasonably restrained and intervene only when it really is necessary and not be overly protective of a witness</p> <p>I have read too much transcript in which, in my view, judges are correcting barristers, rephrasing questions, interfering endlessly. I think that is bad practice, it undermines a fair trial.</p> <p>There is, in my view, great wisdom in aspiring to silence when on the bench.</p>	<p>There is also a dilemma for judges in terms of the flow of cross-examination and giving it a fair run.</p> <p>A lot of judges stay out of it to a certain degree because if they do intervene it could be an appeal point.</p>

Other areas of reform

Prosecutors	Defence	Judges	Witness advisors
<p>I am a huge believer in a specialist jurisdiction. There should be a pilot for a specialist jurisdiction that knows how to case manage these cases, how to get them on quickly, how to deal with the witnesses, and pre-record the evidence. There is no doubt in my mind, after having done these matters for 20 years, that unless you commit to a properly staffed specialist jurisdiction, you will not overcome the problems.</p> <p>In the High Court of Australia, when you make a special leave application, you are only given 20 minutes. These are the most complex questions of law that occur in the highest court of our land, and they shut you off after 20 minutes. Time limits should be applied on a discretionary basis, given the issues in the case, and what is required. If you know you have only got an hour to accomplish your cross-examination, you will get straight to the point and ask all the questions that need to be asked.</p> <p>There are certain personalities of barrister that should not be near vulnerable witnesses, and child witnesses. There could be court-appointed defence barristers who are deemed suitable, who are respectful, competent, and do a great job for their clients, without re-traumatising victims. The same should apply to prosecutors, they should be selected and trained.</p> <p>Judges who are trained in relation to competency testing of a child, and communicating effectively with children, would be very advantageous.</p> <p>If Crown prosecutors were briefed very early in the process, they could develop rapport, assess the adequacy of the evidence, and if needed collect additional material early in the process. It might encourage more guilty pleas if the deficiencies were attended to, if extra evidence was forthcoming, if complainants were prepared earlier, and if we had communication with defence about their readiness to give evidence. All of that in combination would be great for everybody.</p> <p>There should be a reassessment of the briefing practices. We have had the same briefing practices for many years. It is hard where the courts are radically over listing. For example, there are eight courts available, they will list 20 trials, because a few of them won't start. So it is a chicken and egg-type situation, the trials do not start, so they list more, but then we have to prepare more, and there is not enough people for them all.</p> <p>The legislation could be structured so that if the complaint was made when you are a child, then pre-recorded evidence is still an option when you are over 18.</p> <p>A judge may do something that is completely inappropriate, it may not be an appeal point, but a judicial complaint. So having some sort of judicial review body would help.</p> <p>Child sexual assault allegations should be dealt with more expeditiously, ideally within a</p>	<p>The fact that there are no pre-trial directions, my blood boils. We should be able to resolve things like tendency and coincidence evidence in a directions hearing months before the trial. That single change would dramatically reduce delays. There also needs to be more aggressive case management. In other jurisdictions, the case management, the listing certificate, is done by way of a practice note and then from that you spawn a very important directions hearing to resolve legal issues. Those two changes would fundamentally reduce delays.</p> <p>From time to time I mull over how restorative justice could work. The current system is not a good one for historical complaints. The necessary standard of proof is difficult to meet when the case is word on word from so long ago. So in restorative justice there could be partnership with the criminal justice system and some sort of immunity. A lot of complainants want acknowledgement and an apology, and to protect other victims. You could have all of those things with immunity from the criminal justice system, and with mandated treatment in place. It would take some of those cases away from the need to be in the current system.</p> <p>I am a big believer in expert evidence. There is not enough of it and I think we have all just ignored it. But there is a general tendency to have more expert evidence, so legal professionals should get some assistance in understanding that.</p>	<p>There should be an accreditation process for lawyers who want to do child sex cases to undertake, where they get training about questioning children. That may then lead to more appropriate questions being asked.</p> <p>There needs to be consideration as to whether sexual allegations can be dealt with by a process other than court proceedings. For many child witnesses and adult complainants the process is just as traumatic, if not more traumatic, than the actual offending.</p> <p>I would like to see model questions developed for testing the competency of children because some judges get into terrible problems with it.</p> <p>I would fundamentally encourage research that would provide evidence about the topics we have been discussing.</p> <p>Children are easily confused, and if they are not prepared to admit they are confused then they say things which are unbelievable and probably not true. One of the most important reforms we could achieve is to improve the requirement of effective communication with children witnesses.</p> <p>The straight-forward criminal trial is not the best way of resolving sexual matters while there are such severe penalties if someone is convicted. We could have a system that is not as</p>	<p>It would be great if the screens were specially designed because currently the court does not know what to use as a screen, or where it should be positioned. So there needs to be guidelines around what screen to use and where it is allowed to be positioned, so there are no issues around being seen by the accused person or the jury. They could design a screen that ensures the victim does not see the accused, but allows the jury to see the accused's reactions, because ultimately they need to be able to see the accused in the dock.</p> <p>I would get rid of the oath and the affirmation and just have a child-friendly promise.</p> <p>It would be beneficial to have specialist courts with specialist trained barristers, solicitors, and judges.</p> <p>I think in Norway they have specialists that interview the child on behalf of the crown and the defence, at an age appropriate level to elicit all the information. The defence can put questions to them, by writing down what they want asked, and then the professional interviewer asks the questions, so it's a friendlier environment. I think something like that would be great. Or defence counsel could write their questions and</p>

Prosecutors	Defence	Judges	Witness advisors
<p>month of the disclosure being taken. When the complainant makes a disclosure, the accused should get advice from defence counsel within a month, so that the child's evidence should be completed prior to the trial, and then used in full at the trial. That would be useful.</p> <p>At the moment the court has a guideline policy about questioning children, but it relies on all of the judges actually applying it vigorously. It outlines that children should not be asked double-barrelled or leading questions, even in cross-examination. It should actually be legislated and made consistent.</p> <p>If I had my way, sexual matters would not even be in a court.</p> <p>It would be better to deal with child sexual assault cases in a Family Court setting, where it involves looking at everything, exploring everything about the whole environment and what has been going on, and then looking at what is in the best interest of the child. It would be a more amenable and more realistic environment, where you would get a true picture of what is going on, rather than it being limited by all the rules of evidence.</p> <p>To improve the system the main thing would be more uniform and good quality training on conducting the visually-recorded interviews. The form needs to be agreed to between all the stakeholders, including prosecutors.</p> <p>I think having an intermediary conduct cross examination would be good, so it is not someone who is asking questions designed to trick the witness, but it is someone who is trying to fairly test the evidence.</p> <p>There should be specialist sexual assault courts with judges who have an interest in hearing or presiding over sexual assault trials, so they are more patient and deal more fairly with children.</p> <p>If an event happens the complainant should be interviewed immediately, either that day or the next day.</p> <p>The committal period should be abridged for child sexual abuse cases, like a fast track system.</p> <p>There should be a statutory presumption in favour of pre-recordings for child witnesses.</p> <p>We have a practice direction on the examination of child witnesses. In cases involving child sexual abuse and child witnesses, both prosecution and defence counsel should have to give an undertaking that they have read and understood the practice direction. That would bring it into the forefront of the minds of the judges too.</p> <p>We do not do enough training around dealing with children and witnesses who have experienced child sexual abuse.</p>		<p>punitive and more remedial, that doesn't mean without punishment but just more encouraging of people to come forward and make admissions with a view to preventing further abuse. If we were more interested in resolution, personal vindication of the victim and prevention of future harm we would probably have a better system with less punishment, and less need for this sort of rigorous proof testing.</p> <p>We need much better work, and perhaps even certification for defence counsel, after they have done a course in child development and child appropriate language.</p> <p>An accreditation system is warranted to minimise the negative impact to complainants and maximise the potential for them to give their evidence in the best way they can.</p>	<p>have someone in child development tell them the way to ask them properly.</p>

Prosecutors	Defence	Judges	Witness advisors
<p>When there is a complainant, for example aged 13 or 14 when she gives an interview with the police, by the time she gets to court she might be 16, there is no provision for her to give evidence by playing that video. That needs to be fixed.</p> <p>There are massive issues with cross-examination. An intermediary would be great, to have a person sit with a child and say “No, she can’t answer that question, it’s too difficult, the concepts are too mature, break it down”. An objective person would be a godsend.</p> <p>There is a need for more specialised police, and an enlargement of the sex crime squad.</p> <p>There is a need for more training for the police in gathering evidence, and train-the-trainer regarding understanding the development of sexual assaults.</p>			

Supplementary Material 2

S2.1: Survey of Court Support Officers' Experiences with Alternate Measures in Practice in Queensland, Australia.

1. Introduction

This supplementary material presents the result of a survey administered to a group of Court Support officers working on child sexual abuse cases in Queensland, Australia. As only one professional group of participants in Queensland responded to the survey, these results are reported separately from other responses gathered from five professional groups in each of three states.

2. Method

The same method as was described in Study 2 applied: An invitation to participate in the survey was issued to Court Network, a court support service operating in Victoria and Queensland, by the Royal Commission. Participants received no financial incentive for their participation. Using a convenience sampling method, the online survey was administered to volunteers who responded.¹

2.1 Participant demographics

There were 25 respondents from QLD. The majority were women (92%, $n = 23$), two participants were men (8%). All QLD participants worked as witness support officers in the criminal justice system.

2.2 Training and experience in child sexual abuse cases

On average, participant had 6.04 years ($SD = 4.4$) working on child sexual abuse cases, with a range from 0 years to 15 years. A total of 96% of the participants reported that they had received training in child sexual abuse cases ($n = 24$). The mean number of child sexual abuse cases that they reported working on was 164 (range, 0 – 700; $SD = 189$) with a mean of 0.84 historical cases (range 0-10 cases, $SD = 2.32$). Participants reported an average of 56.2 hours of training, with the duration of training hours ranging between 0 and 300 hours. On average, participants rated their training as useful (6.09 on a scale from 1 to 7; $SD = 1.716$).

3 Results

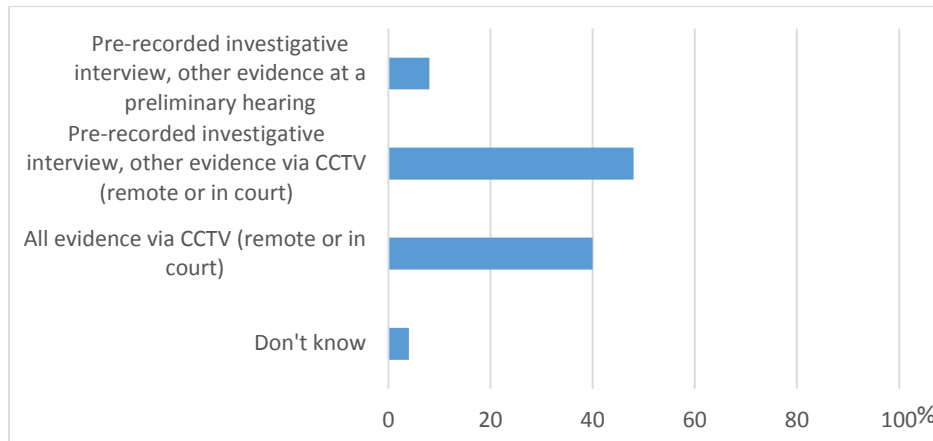
3.1.1 Current practice for taking evidence from child complainants

Participants were asked to indicate their observations of the most frequently used current practice for taking evidence in child sexual abuse trials from child complainants. A pre-recorded interview, with supplementary evidence given via CCTV, was the most highly cited current practice (48%, $n = 12$), followed by all evidence given by CCTV (40%, $n = 10$), either from a remote location or a room on the court premise. These results are depicted in Figure S2.1.1

¹ The survey was accessed via the software Unipark which randomly allocated experimental materials to participants.

Participants further indicated whether current practice conformed with policy in their jurisdiction. Most participants (72%; $n = 18$) indicated that practice and policy were aligned in QLD, whilst the remaining 28% ($n = 7$) did not know if practice and policy were aligned. Notably, no participant responded that policy and practice did not align in their jurisdiction.

Figure S2.1.1 Prevalent current practice in child sexual abuse cases for child complainants (percent).



3.1.2 Duration of waiting period before complainants give evidence at court

Across QLD participants, within the past 24 months, participants reported that complainants waited for an average of two to five hours (71.4%, $n = 15$) before giving evidence at a hearing or trial. The remaining 28.6% of respondents indicated that average wait times were under 2 hours ($n = 6$).²

3.2 Current practice for taking evidence from adult child sexual abuse complainants

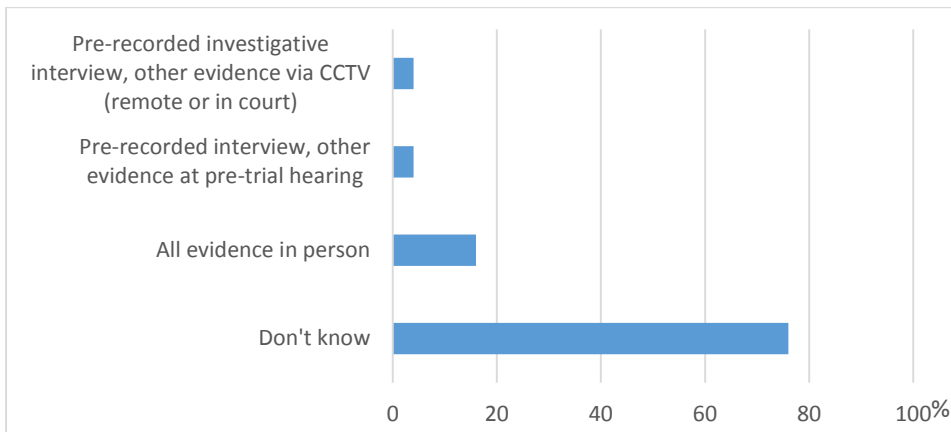
3.2.1 Prevalence of observed use of alternate measures

Regarding the most frequent current practice in child sexual abuse trials with adult complainants, more than three-quarters of the participants (76%, $n = 19$) responded that they did not know what the current practice was for taking evidence from adult child sexual abuse complainants. A few participants (16%, $n = 4$) reported that all evidence was given in person in court. These results are shown in Figure S2.1.2.

Participants further indicated whether current practice was in line with policy in their jurisdiction. A substantial majority of the 24 participants who responded did not know whether practice and policy were aligned (87.5% ($n = 21$); 8.3% ($n = 2$) answered affirmatively, and one participant indicated a disparity existed between practice and policy.

² Note: 21 participants gave an indication of the duration of average waiting times, 4 did not reply.

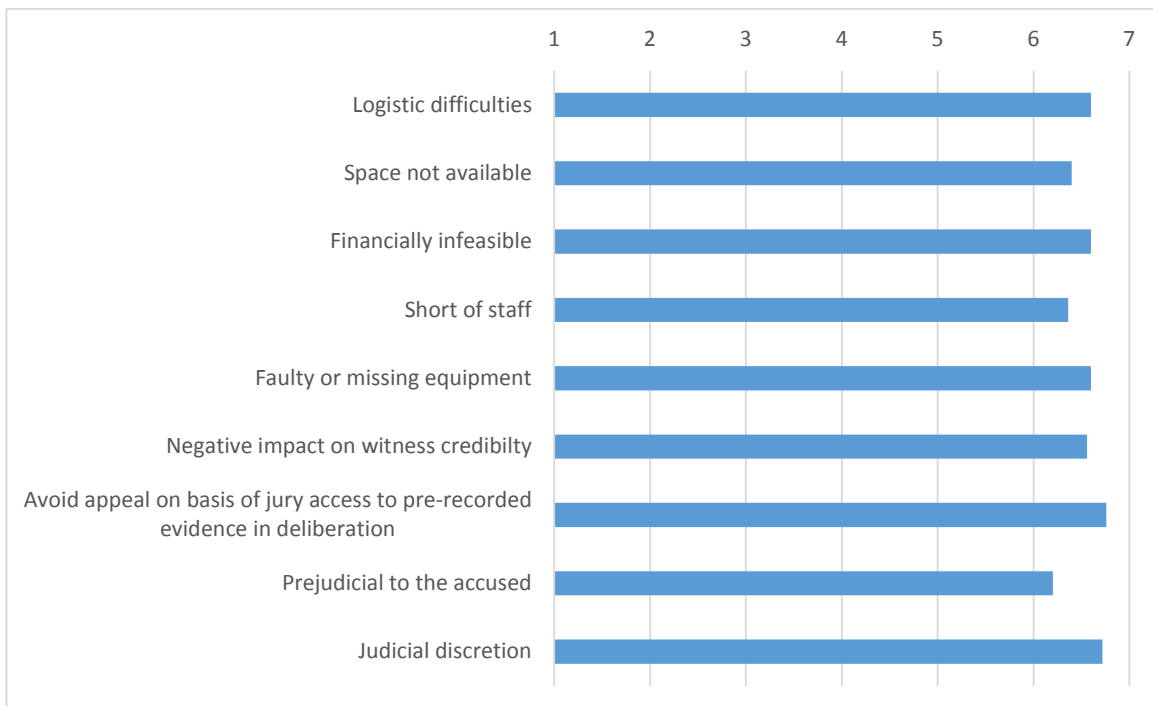
Figure S2.1.2. Prevalence of current practice in child sexual abuse cases with adult complainants (percent).



3.3 Reasons for non-use of alternate measures with child and adult child sexual abuse complainants

Participants responded to a questions as to why alternate measures might not be used in child sexual abuse cases, using a scale to reflect agreement from 1 (strongly disagree) to 7 (strongly agree). All reasons were strongly endorsed, with mean responses in the range of 6.2 - 6.76. The highest mean response (6.76, SD = 2.19) was that alternate measures might not be used to avoid potential appeals on the basis of the jury having access to pre-recorded evidence during deliberation. These results are presented in Figure S2.1.3.

Figure S2.1.3. Mean agreement on reasons alternate measures might not be used in child sexual abuse trials

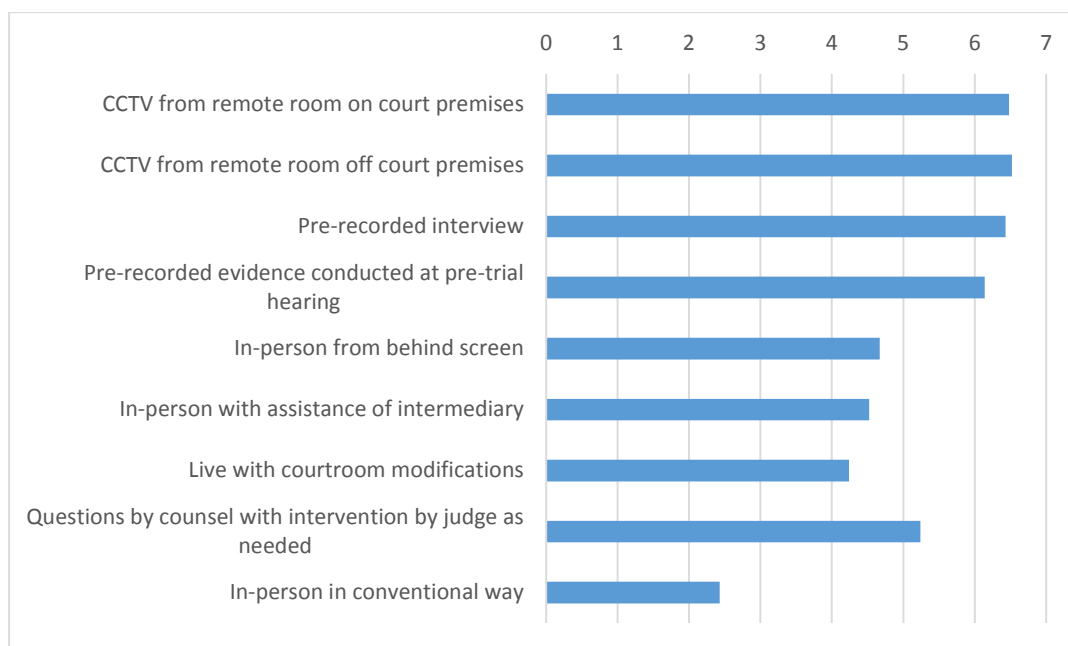


3.4 The Influence of Alternate Measure on Complainants' Credibility and Reliability

3.4.1 The perceived impact of alternate measures on the credibility of evidence-in-chief of a child child sexual abuse complainant.

Participants rated the perceived impact of 9 different alternate measures on the credibility of a child complainants' evidence-in-chief (1= low impact to 7 = high impact). Use of CCTV from a remote room off the court premises was perceived to have the greatest impact on the credibility of a child complainant's evidence-in-chief (M = 6.52, SD = 0.87). The second most highly rated alternate measure was CCTV from a remote from on the court premise (M = 6.48, SD = 0.75). These results are presented in Figure S2.1.4.

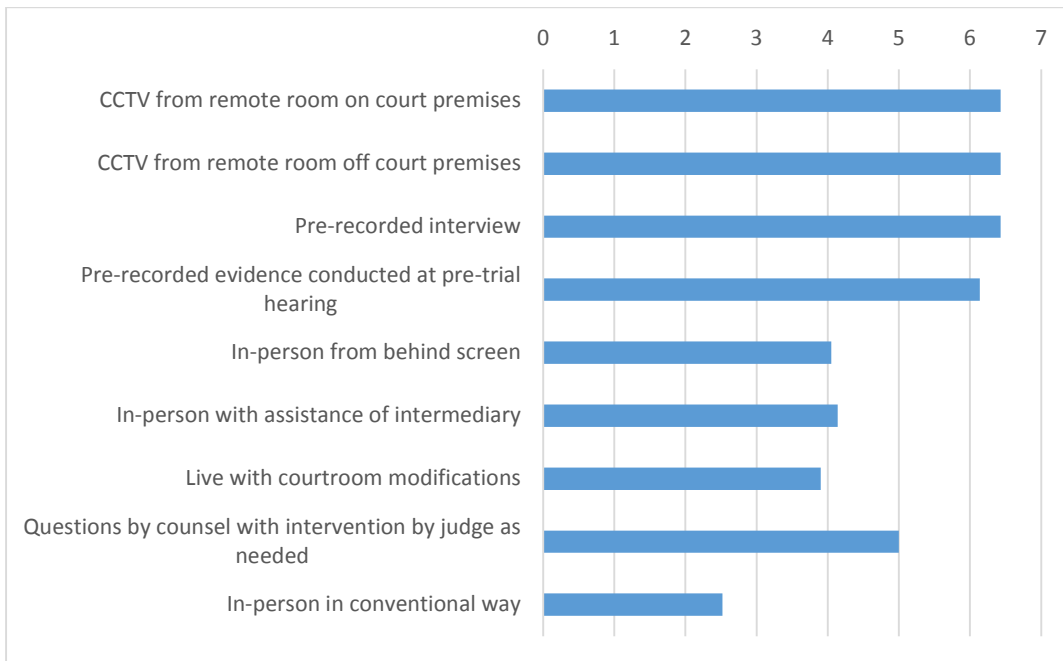
Figure S2.1.4. Mean perceived impact of alternate measures on the credibility of child complainants' evidence-in-chief



3.4.2 The perceived impact of alternate measures on the credibility of responses of a child complainant on cross-examination

Participants rated the perceived impact of the same 9 alternate measures on the credibility of a child complainant's cross-examination. The use of pre-recorded interviews, along with CCTV from a remote room on court premises, and off court premises were equally rated as having the greatest impact on the credibility of a child complainant on cross-examination (M = 6.43, SDs = 0.98; 0.87; 0.75). In contrast, being cross-examined in person in court, in the conventional way, was rated as having the least impact on the credibility of a child complainant's responses during cross-examination (M=2.52, SD = 2.02). These results are presented in Figure S2.1.5.

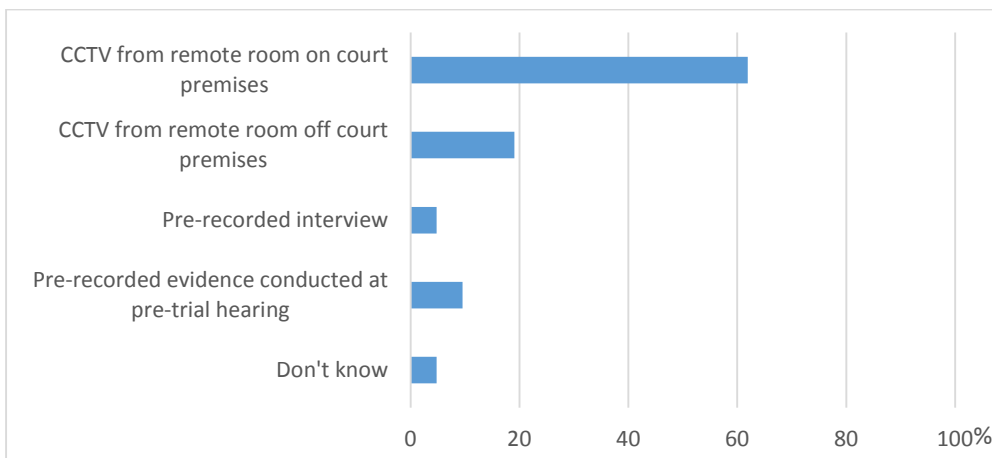
Figure S2.1.5. Mean perceived impact of alternate measures on the credibility of child complainant on cross-examination



3.4.3 Best procedure overall for the credibility of the child complainants' evidence

Of the nine possible options to present a child complainant's evidence at trial, participants selected the one that they viewed as the best procedure overall for the credibility of the complainant. Overall, QLD participants distributed their ratings across four different response options. The most highly favoured procedure for the credibility of a child complainant was CCTV from a remote room on court premises (61.9%, $n = 13$), followed by CCTV from a remote room off court premises (19.05%, $n = 4$), pre-recorded evidence taken at a pre-trial hearing (9.52%, $n = 2$) and finally, a pre-recorded police interview (4.76%, $n = 1$). Figure S2.1.6 displays these findings. One participant indicated no knowledge of the best procedure.³

Figure S2.1.6. Best procedure for the credibility of a child complainant, QLD respondents (percent)



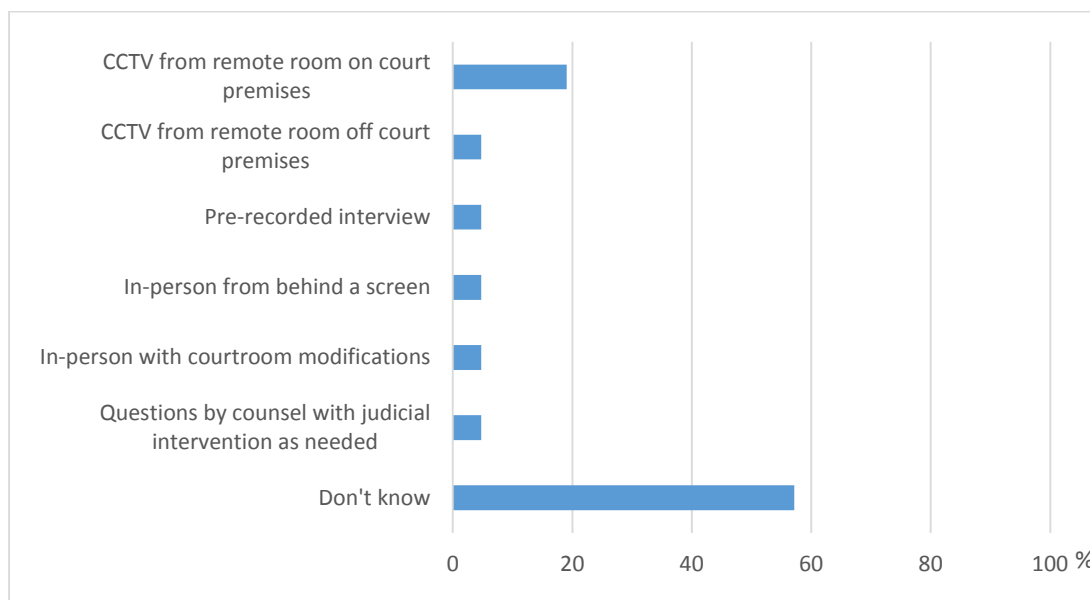
³ 21 participants responded to this question.

Participants were also invited to rate the same 9 items in terms of the second-best procedure for the credibility of a child complainant. The most highly cited second-best procedure for the credibility of a child complainant was CCTV from a remote room on court premises (42.86%, $n = 9$), followed by CCTV from a remote room off court premises (33.33%, $n = 7$), pre-recorded evidence conducted at a pre-trial hearing (9.52%, $n = 2$), questions from counsel with judicial intervention when needed (4.76%, $n = 1$) and pre-recorded investigative interview (4.76%, $n = 1$). One participant indicated that they did not know what the second-best procedure was.

3.4.4 Best procedure for the credibility of an adult complainant

Of the nine possible options to present an adult complainant’s evidence at trial, participants selected the one that they viewed as the best procedure overall for the credibility of the complainant. Overall, QLD participants distributed their ratings across six different response options. The majority of participants, more than half, responded that they did not know what the best procedure was for the credibility of an adult complainant (57.14%, $n = 12$). The most highly cited best procedure for the credibility of a child complainant was CCTV from a remote room on court premises (19.05%, $n = 4$), with all other response options chosen by 1 respondent each (4.76%).⁴ These results are visualised in Figure S2.1.7.

Figure S2.1.7. Mean rating of the best procedure for the credibility of an adult complainant (percent)

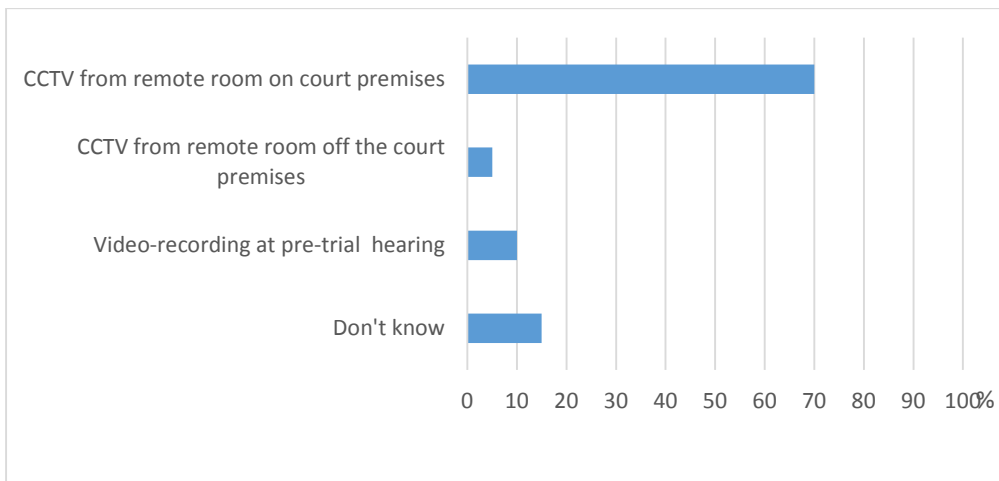


3.4.5 Reliability of evidence from child and adult complainants using alternate measures

A substantial majority (70%, $n = 14$) of the 20 responses from QLD participants indicated that CCTV from a remote room on the court premises was the most reliable alternate measure to gather evidence from complainants in child sexual abuse cases. A total of three participants (15%) said they did not know what the most reliable measure was. These findings are presented in Figure S2.1.8.

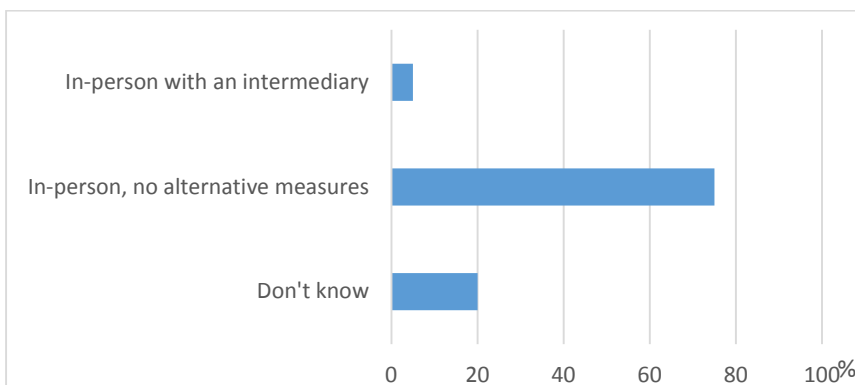
⁴ 21 participants responded to this question.

Figure S2.1.8. Most reliable alternate measures for complainants' evidence (percent).



In terms of the least reliable alternate measure, a substantial proportion (75%, $n = 15$) of the 20 responses from QLD participants indicated that in-person evidence, with no alternative measure was the least reliable method to take evidence from complainants in child sexual abuse cases. One fifth said they did not know what the most reliable measure was ($n = 4$), and one participant (5%) indicated that in person with an intermediary was the least reliable alternate measure. These findings are presented in Figure S2.1.9.

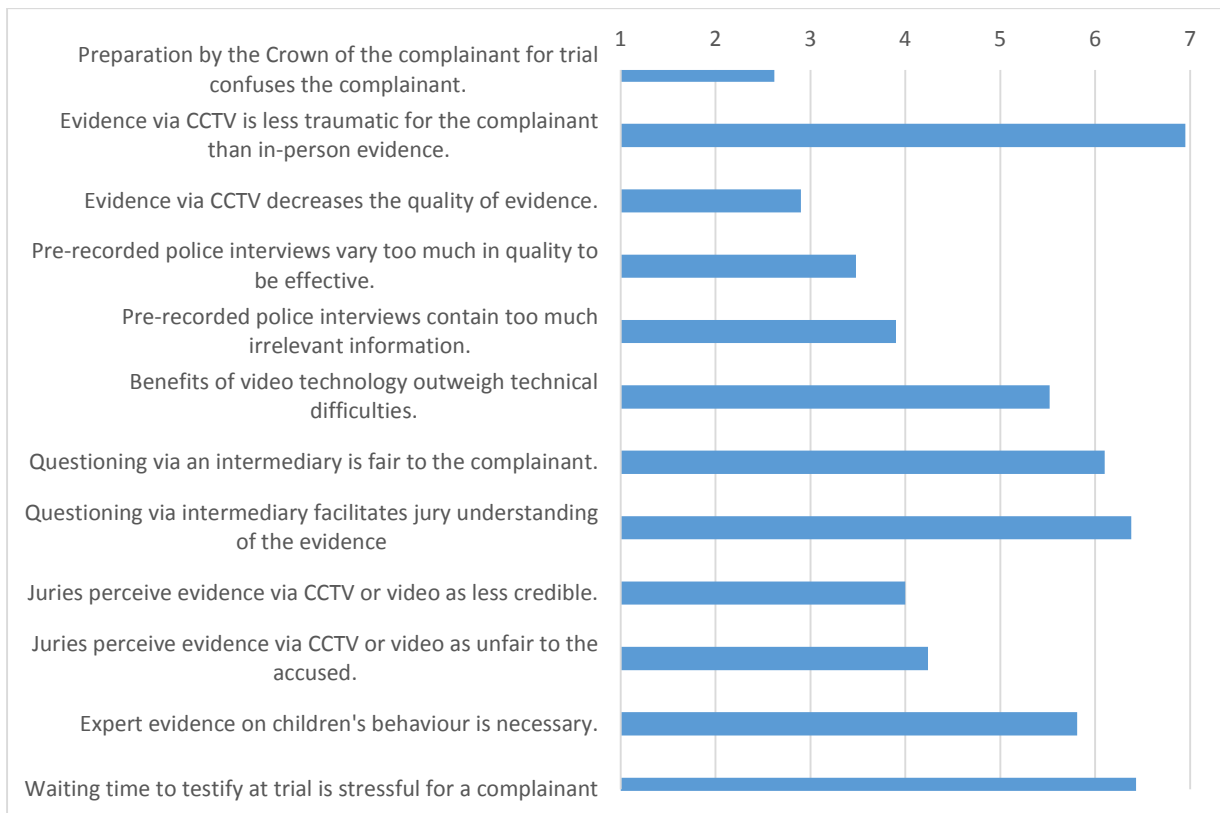
Figure S2.1.9. Least reliable alternate measures, QLD respondents (percent).



3.5 Participants' views of legal procedures used in child sexual abuse trials

Participants gave their views of several legal procedures applied in child sexual abuse trials by rating their agreement with 12 statements about them. Overall, participants expressed a high degree of consensus ($M = 6.95$ on a 7 point scale, $SD = 2.44$) that evidence taken via CCTV video link was less traumatic for the complainant than giving evidence in-person, that questioning via an intermediary facilitated jury understanding of the evidence ($M = 6.38$, $SD = 2.25$), and that questioning via an intermediary was fair to the complainant ($M = 6.1$, $SD = 2.28$). The participants disagreed that evidence given via CCTV diminished the quality of the evidence ($M = 2.9$, $SD = 2.7$), that preparation of the complainant by the Crown confused complainants ($M = 2.62$, $SD = 2.44$), and that police interviews varied too much in quality to be effective ($M = 3.48$, $SD = 2.23$). Rates of mean agreement for these 12 statements are presented in Figure S2.1.10.

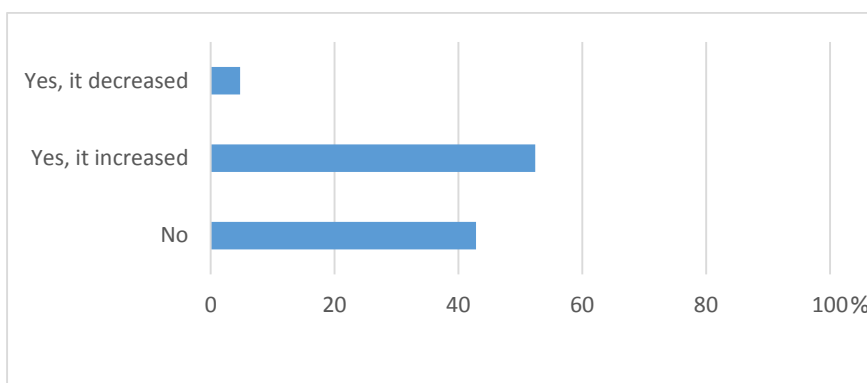
Figure S2.1.10. Mean agreement on legal procedures used in child sexual abuse trials.



3.6 The perceived influence of alternate measures on conviction rates in child sexual abuse trials

Out of 21 participants who responded to the question of conviction rates and alternate measures in child sexual abuse trials, 52% ($n = 11$) indicated that conviction rates had increased with the use of alternate measures, whilst 43% ($n = 9$) indicated that conviction rates had not changed. Only 5% ($n = 1$) of participants reported a perceived decrease in conviction rates using alternate measures (see Figure S2.1.11).

Figure S2.1.11. Perceived influence of alternate measures on conviction rates in child sexual abuse trials (percent)



3.7 Use of expert evidence on the behaviour of sexually abused children in child sexual abuse trials

Across all QLD respondents, only 1 participant (4%) reported observing expert evidence in child sexual abuse trials in the past two years on the topic of the behaviour of sexually abused children. Additionally, when asked whether they believed expert evidence on children's behaviour in child sexual assault cases had been helpful to a jury, this participant indicated that it had been helpful, whilst the other 24 QLD participants did not provide any response.

4. Conclusions

Although the analysis of survey responses was limited by the small sample size, several noteworthy participant perspectives were identified.

Participants identified pre-recorded interviews, with supplementary evidence via CCTV, as the most common practice in child child sexual abuse cases in Queensland. Most participants indicated that this practice was in line with jurisdiction policy for child complainants in child sexual abuse cases. Participants also emphasised that using CCTV from a remote location, either on court premises or off, was a good procedure for the credibility of child complainants overall, and specifically in both evidence-in-chief and cross-examination. Alternate measures involving CCTV were also emphasised as yielding more reliable evidence from both child and adult complainants, whereas in-person evidence was perceived to yield the least reliable evidence from complainants. In terms of trial outcomes, a majority of the participants believed that the conviction rate in child sexual abuse cases had increased with the use of alternate measures in their jurisdiction. Many participants declined to answer questions about adult child sexual abuse complainants, possibly because most of their practice was with child complainants.

S2.2: Online Survey Items

- What is your current role in the criminal justice system? (*dropdown menu*)
 - a. Judge
 - b. Magistrate
 - c. Prosecutor
 - d. Defence lawyer
 - e. Police Officer
 - f. Witness assistance service
 - g. Court support worker
 - h. Other
 - i. Prosecutor and defence lawyer

- In which state do you primarily work? (*dropdown menu*)
 - a. NSW
 - b. VIC
 - c. WA
 - d. QLD
 - e. Other

- Where do you work? _____

- How many years experience do you have with child sexual abuse cases in your current position?
_____ years.

- Approximately how many child sexual abuse cases have you worked on?
_____ cases.

Of this group, how many were historical cases, i.e. cases where the alleged offences occurred five or more years prior to the report.

_____ cases.

- What is your gender?
 - a. Male
 - b. Female

- Have you had training to work with child sexual abuse cases?
 - a. No
 - b. Yes, please describe
 - i. Approximate total number of hours _____
 - ii. Briefly describe the training _____
 - iii. Date of last training _____
 - iv. How useful was your training for your practice?
1 (not useful) - 7 (very useful)
 - v. What additional training would be useful?

Case 1

Suppose that Amy, who is 10 years old, has given evidence-in-chief in the criminal trial against the accused, Mr Cormac, her schoolteacher, alleging that Mr Cormac sexually abused her in the classroom when she was 9 years old.

Please read the following excerpt from the cross-examination of the complainant conducted via CCTV.

Press CONTINUE.

Judge: Amy, the lawyer for Mr Cormac is going to ask you some questions. Is the witness ready to answer the questions?

Sheriff: Yes, your Honour.

Defence: Now Amy, you told the court earlier today that the first incident was in September 2013.

Amy: Just before the school holidays. It must have been in September.

Defence: Do you accept Amy that you told the police during your first interview with them that the first incident with my client happened in August?

Amy: Possibly. It is –

Defence: Now just stop there. When you were interviewed by the police you said “In August 2013, Mr Cormac pulled my shorts down and started touching me on my private parts. I was crying and asking him to stop but he didn’t.” Did you not?

Amy: I think so.

Defence: Wasn’t it that my client was helping you change your clothes, which you mistook for touching your private parts?

Amy: He asked me to pull my pants down.

Defence: The reason you were crying because you had wet yourself, hadn’t you?

Amy: I...um

Defence: You’re confused about what happened and when it happened. Are you not?

Amy: It did happen.

Defence: You never told your parents anything about what you say my client was doing about the touching matter, is that not correct?

Amy: No, I didn’t.

Defence: I put it to you that you didn’t say anything because you were embarrassed to speak about wetting yourself.

Amy: No... no that’s not right.

Defence: You can’t guarantee that you are not confused about the incident.

Amy: Um... I don’t -

Judge: Excuse me, counsel, but that question has been asked and answered. Kindly treat the witness with more respect. Please move on to another topic.

Defence: Yes, Your Honour

Please indicate your agreement:

1=strongly disagree; 7=strongly agree; 8=don’t know

The cross-examination...

- was age-appropriate.
- confused the complainant.
- was unfair to the complainant.
- was too aggressive.
- weakened the account.
- strengthened the defence.
- was in the best interest of the accused.
- reduced the credibility of the complainant.
- reduced the certainty of the complainant.
- was considerate of the complainant.
- reduced the reliability of the complainant

Should the prosecutor have intervened?

- a. No
- b. Yes

i. If yes, at what line? (*dropdown menu*)

Why?

Please indicate your agreement:

1=strongly disagree; 7=strongly agree; 8=don’t know

The judge was...

- considerate of the complainant.
- considerate of the accused.
- Should the judge have intervened?
 - a. No
 - b. Yes

ii. If yes, at what line? (*dropdown menu*)

Why?

The jury will perceive the judge as favouring the... (*dropdown menu*)

- complainant.
- accused.
- neither.

Case 2

Suppose that Mark, who is 16 years old, has given evidence-in-chief in the criminal trial against the accused, Mr Dodson his priest, alleging that Mr Dodson sexually abused him in the church when he was 9 years old.

Please read the following excerpt of cross-examination of the complainant conducted via CCTV.

Press CONTINUE

Judge: Now Mark, the lawyer for Mr Dodson will ask you some questions. You may proceed counsel.

Defence: Mark, I heard that after church on Sundays, Mr Dodson would take you into the storage room, unzip his pants and push your head down to his crotch. Is that true?

Mark: Um... Yes.

Defence: Do you remember talking to the police at the police station?

Mark: Yes.

Defence: You told the police that Mr Dodson opened his pants. Is that true?

Mark: Maybe. He did –

Defence: And you told the police that he put your hand on his penis?

Mark: I think so...

Defence: Did you ask him to stop?

Mark: He told me that God teaches us to love each other and he loved me and this was how you showed love.

Defence: You never told your parents what Mr Dodson was doing. Is that true?

Mark: He said it was our secret.

Defence: Nothing happened with Mr Dodson. Is that correct?

Mark: It did happen.

Defence: Did he push your mouth over his penis?

Mark: Um...I.

Defence: Do you like Mr Dodson, Mark?

Mark: Not really. He was never very nice to me.

Defence: So you made up this story about him?

Mark: No... no that's not right.

Defence: Were other children at summer school when you went to the storage room with Mr Dodson?

Mark: Yes.

Please indicate your agreement:

1=strongly disagree; 7=strongly agree; 8=don't know

The cross-examination...

- was age-appropriate.
- confused the complainant.
- was unfair to the complainant.
- was too aggressive.
- weakened the account.
- strengthened the defence.
- was in the best interest of the accused.
- reduced the credibility of the complainant.
- reduced the certainty of the complainant.
- was considerate of the complainant.
- reduced the reliability of the complainant

Should the prosecutor have intervened?

c. No

- d. Yes
 - i. If yes, at what line? (*dropdown menu*)

Why?

Please indicate your agreement:

1=strongly disagree; 7=strongly agree; 8=don't know

The judge was...

- considerate of the complainant.
- considerate of the accused.
- Should the judge have intervened?
 - c. No
 - d. Yes
 - ii. If yes, at what line? (*dropdown menu*)

Why?

The jury will perceive the judge as favouring the... (*dropdown menu*)

- complainant.
- accused.
- neither.
- The most frequent current practice in my jurisdiction for **child complainants** of sexual abuse is: (*dropdown menu*)
 - a. Pre-recorded investigative interview, other evidence via CCTV (remote or in courthouse)
 - b. Pre-recorded investigative interview, other evidence at a preliminary hearing
 - c. All evidence via CCTV (remote or in courthouse)
 - d. All evidence at a preliminary hearing
 - e. All evidence live in court from behind screen
 - f. All evidence live in court
 - g. Don't know
- This practice is the same as current policy in my jurisdiction.
 - a. Yes
 - b. No
 - c. Don't know
- The most frequent current practice in my jurisdiction for **adult complainants** of childhood sexual abuse is: (*dropdown menu*)
 - a. Pre-recorded investigative interview, other evidence via CCTV (remote or in courthouse)
 - b. Pre-recorded investigative interview, other evidence at a preliminary hearing
 - c. All evidence via CCTV (remote or in courthouse)
 - d. All evidence at a preliminary hearing
 - e. All evidence live in court from behind screen
 - f. All evidence live in court
 - g. Don't know
- This practice is the same as current policy in my jurisdiction.
 - a. Yes
 - b. No
 - c. Don't know
- Reasons alternative measures may not be used: (1=strongly disagree; 7=strongly agree; 8=don't know)
 - a. Logistic difficulties
 - b. Space not available
 - c. Financially infeasible
 - d. Short of staff
 - e. Faulty or missing technology
 - f. Negative impact on witness credibility

- g. Avoid appeal on basis of jury access to pre-recorded evidence in deliberation
- h. Prejudicial to the accused
- i. Judicial discretion
- j. Other reasons (*fill in*)

- What do you see as the advantages of the current practice, if any:
(*open-ended question*)
- What do you see as the limitations of the current practice, if any:
(*open-ended question*)
- Do you have any recommendations to improve procedures for evidence by complainants in child sexual abuse cases?
(*open-ended*)

Rate the impact of the following procedures on the veracity of a child complainant's evidence-in-chief:

1=least credible; 7=most credible; 8=don't know

Rate the impact of the following procedures on the veracity of a child complainant's **evidence-in-chief**:

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Rate the impact of the following procedures on the veracity of a child complainant's cross-examination:

1=least credible; 7=most credible; 8=don't know

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way
-

Best procedure for the veracity of a child complainant (*dropdown menu*)

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Next best procedure for the veracity of a child complainant: (*dropdown menu*)

- CCTV from a remote room **on** the court premises
- CCTV from a remote room **off** the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Best procedure for the veracity of an adult complainant: (*dropdown menu*)

- CCTV from a remote room **on** the court premises
- CCTV from a remote room **off** the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Next best procedure for the veracity of an adult complainant: (*dropdown menu*)

- CCTV from a remote room **on** the court premises
- CCTV from a remote room **off** the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Indicate your agreement with the following statements (even if not available in your jurisdiction):

(1=strongly disagree; 7=strongly agree; 8=don't know)

- Preparation by the Crown of the complainant for trial confuses the complainant.
- Evidence via CCTV is less traumatic for the complainant than in-person evidence.
- Evidence via CCTV decreases the quality of evidence.
- Pre-recorded police interviews vary too much in quality to be effective.
- Pre-recorded police interviews contain too much irrelevant information.
- Benefits of video technology outweigh technical difficulties.
- Questioning via intermediary is fair to the complainant.
- Questioning via intermediary facilitates jury understanding of the evidence
- Juries perceive evidence via CCTV or video as less credible.
- Juries perceive evidence via CCTV or video as unfair to the accused.
- Expert evidence on children's counterintuitive behaviour is effective.
- Waiting time to testify at trial is stressful for a complainant.

The complainants' **reliability** at trial is

strongest via (*dropdown menu*)

- a. Via CCTV from a remote room **on** court premises.
- b. Via CCTV from a remote room **off** court premises.
- c. Video-recorded police interview.
- d. Video-recording at preliminary hearing.
- e. In person behind a screen.

- f. In person with an intermediary
- g. In person, no alternative measures.

weakest via (*dropdown menu*).

- a. Via CCTV from a remote room **on** court premises.
- b. Via CCTV from a remote room **off** court premises.
- c. Video-recorded police interview.
- d. Video-recording at preliminary hearing.
- e. In person behind a screen.
- f. In person with an intermediary
- g. In person, no alternative measures.

- Do you think that the use of alternative measures has changed the conviction rate?
 - a. No
 - b. Yes, it increased.
 - c. Yes, it decreased.
- In the past year the average waiting time for a complainant before testifying at court was
 - a. Under 2 hours.
 - b. 2 to 5 hours
 - c. Over 5 hours.
 - d. more than a day
- Have you observed expert evidence on children's behaviour in child sexual abuse cases in past two years?
 - a. No
 - b. Yes
 - How many times? (*open-ended*)
 - In your opinion, was it helpful to the jury?
 - c. No
 - d. Yes
 - Explain why (*open-ended*)
- The prosecution of child sexual abuse cases can be improved by: (*open-ended*)
- The defence of child sexual abuse cases can be improved by: (*open-ended*)
- The high rate of acquittal in child sexual abuse cases can be improved by: (*open-ended*)

S2.3: Tables

Table S2.3.1. Prevalence of observed use of alternate measures for child complainants.

State	Professional Group	Count / %	Pre-recorded interview, other evidence CCTV (remote or in court)	Pre-recorded interview, other evidence at pre-trial hearing	All evidence via CCTV (remote or in court)	All evidence at pre-trial hearing	Don't know	Total
NSW	Judge	Count	32	0	4	0	0	36
		%	88.9	0.0	11.1	0.0	0.0	100.0
	Prosecutor	Count	19	0	0	0	0	19
		%	100.0	0.0	0.0	0.0	0.0	100.0
	Defence lawyer	Count	19	1	6	0	1	27
		%	70.4	3.7	22.2	0.0	3.7	100.0
	Police officer	Count	38	3	4	0	0	45
		%	84.4	6.7	8.9	0.0	0.0	100.0
	Support officer	Count	12	0	4	0	0	16
		%	75.0	0.0	25.0	0.0	0.0	100.0
	Total	Count	120	4	18	0	1	143
		%	83.9	2.8	12.6	0.0	.7	100.0
VIC	Judge	Count	13	2	0	0	0	15
		%	86.7	13.3	0.0	0.0	0.0	100.0
	Prosecutor	Count	19	3	0	0	0	22
		%	86.4	13.6	0.0	0.0	0.0	100.0
	Defence lawyer	Count	11	4	1	1	0	17
		%	64.7	23.5	5.9	5.9	0.0	100.0
	Police officer	Count	12	5	0	0	1	18
		%	66.7	27.8	0.0	0.0	5.6	100.0
	Support officer	Count	9	3	6	0	2	20
		%	45.0	15.0	30.0	0.0	10.0	100.0
	Total	Count	64	17	7	1	3	92
		%	69.6	18.5	7.6	1.1	3.3	100.0
WA	Judge	Count	11	2	1	0	0	14
		%	78.6	14.3	7.1	0.0	0.0	100.0
	Prosecutor	Count	16	6	1	0	0	23
		%	69.6	26.1	4.3	0.0	0.0	100.0
	Defence lawyer	Count	7	4	2	0	0	13
		%	53.8	30.8	15.4	0.0	0.0	100.0
	Police officer	Count	16	7	3	1	4	31
		%	51.6	22.6	9.7	3.2	12.9	100.0
	Support officer	Count	9	0	0	0	2	11
		%	81.8	0.0	0.0	0.0	18.2	100.0

State	Professional Group	Count / %	Pre-recorded interview, other evidence CCTV (remote or in court)	Pre-recorded interview, other evidence at pre-trial hearing	All evidence via CCTV (remote or in court)	All evidence at pre-trial hearing	Don't know	Total
	Total	Count	59	19	7	1	6	92
		%	64.1	20.7	7.6	1.1	6.5	100.0
Total	Judge	Count	56	4	5	0	0	65
		%	86.2	6.2	7.7	0.0	0.0	100.0
	Prosecutor	Count	54	9	1	0	0	64
		%	84.4	14.1	1.6	0.0	0.0	100.0
	Defence lawyer	Count	37	9	9	1	1	57
		%	64.9	15.8	15.8	1.8	1.8	100.0
	Police officer	Count	66	15	7	1	5	94
		%	70.2	16.0	7.4	1.1	5.3	100.0
	Support officer	Count	30	3	10	0	4	47
		%	63.8	6.4	21.3	0.0	8.5	100.0
	Total	Count	243	40	32	2	10	327
		%	74.3	12.2	9.8	.6	3.1	100.0

Table S2.3.2. Prevalence of observed use of alternate measures for adult complainants.

State	Professional Group	Count / %	Pre-recorded interview, other evidence CCTV (remote or in court)	Pre-recorded interview, other evidenc pre-trial hearing	All evidence via CCTV (remote or in court)	All evidence at pre-trial hearing	All evidence in-person from behind screen	All evidence in-person	Total	
NSW	Judge	Count	3	0	18	1	0	6	28	
		%	10.7	0.0	64.3	3.6	0.0	21.4	100.0	
	Prosecutor	Count	0	0	17	0	0	2	19	
		%	0.0	0.0	89.5	0.0	0.0	10.5	100.0	
	Defence lawyer	Count	4	1	14	0	0	4	23	
		%	17.4	4.3	60.9	0.0	0.0	17.4	100.0	
	Police officer	Count	2	1	13	1	2	22	41	
		%	4.9	2.4	31.7	2.4	4.9	53.7	100.0	
	Support officer	Count	1	0	14	0	0	0	15	
		%	6.7	0.0	93.3	0.0	0.0	0.0	100.0	
	Total	Count	10	2	76	2	2	34	126	
		%	7.9	1.6	60.3	1.6	1.6	27.0	100.0	
	VIC	Judge	Count	0	0	11	0	0	4	15
			%	0.0	0.0	73.3	0.0	0.0	26.7	100.0

State	Professional Group	Count / %	Pre-recorded interview, other evidence CCTV (remote or in court)	Pre-recorded interview, other evidenc pre-trial hearing	All evidence via CCTV (remote or in court)	All evidence at pre-trial hearing	All evidence in-person from behind screen	All evidence in-person	Total
	Prosecutor	Count	0	0	19	1	0	2	22
		%	0.0	0.0	86.4	4.5	0.0	9.1	100.0
	Defence lawyer	Count	1	0	15	1	0	0	17
		%	5.9	0.0	88.2	5.9	0.0	0.0	100.0
	Police officer	Count	0	0	9	0	0	8	17
		%	0.0	0.0	52.9	0.0	0.0	47.1	100.0
	Support officer	Count	1	1	14	0	2	0	18
		%	5.6	5.6	77.8	0.0	11.1	0.0	100.0
	Total	Count	2	1	68	2	2	14	89
		%	2.2	1.1	76.4	2.2	2.2	15.7	100.0
WA	Judge	Count	2	0	12	0	0	0	14
		%	14.3	0.0	85.7	0.0	0.0	0.0	100.0
	Prosecutor	Count	2	0	20	0	0	1	23
		%	8.7	0.0	87.0	0.0	0.0	4.3	100.0
	Defence lawyer	Count	2	0	5	0	1	2	10
		%	20.0	0.0	50.0	0.0	10.0	20.0	100.0
	Police officer	Count	1	1	1	0	1	18	22
		%	4.5	4.5	4.5	0.0	4.5	81.8	100.0
	Support officer	Count	1	0	4	0	0	0	5
		%	20.0	0.0	80.0	0.0	0.0	0.0	100.0
Total	Count	8	1	42	0	2	21	74	
	%	10.8	1.4	56.8	0.0	2.7	28.4	100.0	
Total	Judge	Count	5	0	41	1	0	10	57
		%	8.8	0.0	71.9	1.8	0.0	17.5	100.0
	Prosecutor	Count	2	0	56	1	0	5	64
		%	3.1	0.0	87.5	1.6	0.0	7.8	100.0
	Defence lawyer	Count	7	1	34	1	1	6	50
		%	14.0	2.0	68.0	2.0	2.0	12.0	100.0
	Police officer	Count	3	2	23	1	3	48	80
		%	3.8	2.5	28.8	1.3	3.8	60.0	100.0
	Support officer	Count	3	1	32	0	2	0	38
		%	7.9	2.6	84.2	0.0	5.3	0.0	100.0
Total	Count	20	4	186	4	6	69	289	
	%	6.9	1.4	64.4	1.4	2.1	23.9	100.0	

Table 2.3.3. Perceived consistency of practice and policy for child complainants.

State	Professional Group	Count / %	Yes	No	Don't know	Total	
NSW	Judge	Count	35	0	1	36	
		%	97.2	0.0	2.8	100.0	
	Prosecutor	Count	18	1	0	19	
		%	94.7	5.3	0.0	100.0	
	Defence lawyer	Count	21	1	5	27	
		%	77.8	3.7	18.5	100.0	
	Police officer	Count	41	0	4	45	
		%	91.1	0.0	8.9	100.0	
	Support officer	Count	15	0	1	16	
		%	93.8	0.0	6.3	100.0	
	Total	Count	130	2	11	143	
		%	90.9	1.4	7.7	100.0	
	VIC	Judge	Count	14	0	1	15
			%	93.3	0.0	6.7	100.0
Prosecutor		Count	21	0	1	22	
		%	95.5	0.0	4.5	100.0	
Defence lawyer		Count	16	0	1	17	
		%	94.1	0.0	5.9	100.0	
Police officer		Count	17	0	1	18	
		%	94.4	0.0	5.6	100.0	
Support officer		Count	16	0	4	20	
		%	80.0	0.0	20.0	100.0	
Total		Count	84	0	8	92	
		%	91.3	0.0	8.7	100.0	
WA		Judge	Count	14	0	0	14
			%	100.0	0.0	0.0	100.0
	Prosecutor	Count	22	1	0	23	
		%	95.7	4.3	0.0	100.0	
	Defence lawyer	Count	8	0	5	13	
		%	61.5	0.0	38.5	100.0	
	Police officer	Count	23	0	8	31	
		%	74.2	0.0	25.8	100.0	
	Support officer	Count	9	0	2	11	
		%	81.8	0.0	18.2	100.0	
	Total	Count	76	1	15	92	
		%	82.6	1.1	16.3	100.0	
	Total	Count	63	0	2	65	
		%	96.9	0.0	3.1	100.0	

State	Professional Group	Count / %	Yes	No	Don't know	Total
	Prosecutor	Count	61	2	1	64
		%	95.3	3.1	1.6	100.0
	Defence lawyer	Count	45	1	11	57
		%	78.9	1.8	19.3	100.0
	Police officer	Count	81	0	13	94
		%	86.2	0.0	13.8	100.0
	Support officer	Count	40	0	7	47
		%	85.1	0.0	14.9	100.0
	Total	Count	290	3	34	327
		%	88.7	.9	10.4	100.0

Table S2.3.4. Perceived consistency of practice and policy for adult complainants.

State	Professional Group	Count/%	Yes	No	Don't know	Total	
NSW	Judge	Count	24	1	11	36	
		%	66.7	2.8	30.6	100.0	
	Prosecutor	Count	17	1	1	19	
		%	89.5	5.3	5.3	100.0	
	Defence lawyer	Count	19	0	8	27	
		%	70.4	0.0	29.6	100.0	
	Police officer	Count	37	0	8	45	
		%	82.2	0.0	17.8	100.0	
	Support officer	Count	14	0	2	16	
		%	87.5	0.0	12.5	100.0	
	Total	Count	111	2	30	143	
		%	77.6	1.4	21.0	100.0	
	VIC	Judge	Count	12	0	3	15
			%	80.0	0.0	20.0	100.0
Prosecutor		Count	21	0	1	22	
		%	95.5	0.0	4.5	100.0	
Defence lawyer		Count	13	0	4	17	
		%	76.5	0.0	23.5	100.0	
Police officer		Count	16	1	1	18	
		%	88.9	5.6	5.6	100.0	
Support officer		Count	15	1	4	20	
		%	75.0	5.0	20.0	100.0	
Total		Count	77	2	13	92	
		%	83.7	2.2	14.1	100.0	
WA		Judge	Count	14		0	14
			%	100.0		0.0	100.0

State	Professional Group	Count/%	Yes	No	Don't know	Total
	Prosecutor	Count	22		1	23
		%	95.7		4.3	100.0
	Defence lawyer	Count	6		7	13
		%	46.2		53.8	100.0
	Police officer	Count	19		12	31
		%	61.3		38.7	100.0
	Support officer	Count	5		6	11
		%	45.5		54.5	100.0
Total	Count	66		26	92	
	%	71.7		28.3	100.0	
Total	Judge	Count	50	1	14	65
		%	76.9	1.5	21.5	100.0
	Prosecutor	Count	60	1	3	64
		%	93.8	1.6	4.7	100.0
	Defence lawyer	Count	38	0	19	57
		%	66.7	0.0	33.3	100.0
	Police officer	Count	72	1	21	94
		%	76.6	1.1	22.3	100.0
	Support officer	Count	34	1	12	47
		%	72.3	2.1	25.5	100.0
	Total	Count	254	4	69	327
		%	77.7	1.2	21.1	100.0

Table S2.3.5. Reasons for non-use of alternate measures.

Reason	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
Logistic difficulties	3.34	2.056	3.53	1.808	3.58	1.923	4.05	1.731	3.53	2.124	3.64	1.912
Space not available	2.75	1.777	3.00	1.761	3.33	1.840	3.64	1.591	3.13	1.951	3.20	1.779
Financially infeasible	2.95	1.839	3.07	1.788	3.48	1.930	3.80	1.592	3.16	2.047	3.33	1.827
Short of staff	2.88	1.858	3.02	1.839	3.40	1.807	4.05	1.731	3.48	2.172	3.41	1.899
Faulty or missing equipment	3.82	2.277	3.80	2.136	3.85	2.023	4.19	1.656	3.72	2.102	3.91	2.013
Negative impact on witness credibility	2.92	1.782	3.25	1.795	3.56	1.742	3.64	1.305	3.10	2.075	3.32	1.716
Avoid appeal on basis of jury access to pre-recorded evidence in deliberation	2.14	1.381	2.20	1.276	3.02	1.571	3.66	1.264	2.61	1.609	2.78	1.517
Prejudicial to the accused	2.36	1.423	2.44	1.544	3.27	1.845	3.74	1.836	2.68	1.716	2.96	1.769
Judicial discretion	2.70	1.564	2.89	1.496	3.35	1.598	4.34	1.458	3.54	1.958	3.41	1.698

Table S2.3.6. Impact of alternate measures on credibility of child complainants' evidence-in-chief.

Alternate Measure	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
CCTV from remote room on court premises	4.76	1.318	4.6	1	4	1.3	5.3	1.3	5.4	1.3	4.8	1.33
CCTV from remote room off court premises	4.62	1.412	4.5	1	3.9	1.3	5.2	1.5	5.5	1.5	4.7	1.45
Pre-recorded interview	5.31	1.6	5.3	1	3.9	1.6	6.1	1.2	5.7	1.5	5.3	1.59
Pre-recorded evidence at pre-trial hearing	4.56	1.324	5.1	1	3.8	1.5	5.6	1.4	5.6	1.5	5	1.52
In-Person from behind a screen	3.92	1.541	4.1	1	4.2	1.7	3.8	1.9	3.9	1.9	4	1.7
In-person with assistance of intermediary	3.77	1.815	4	2	3.6	1.7	3.7	1.9	4.9	1.7	3.9	1.81
In-person with courtroom modifications*	4.47	1.502	4.7	1	5	1.4	3.9	1.7	4.8	1.8	4.5	1.62
Questions by counsel, judicial intervention as needed	5.36	1.654	4.8	1	5.3	1.3	4.9	1.9	5.5	1.4	5.1	1.58
In-person, conventional way	3.9	1.664	3.9	2	5.1	1.6	3.3	2	3.6	2.1	3.9	1.95

Table S2.3.7. Impact of alternate measures on credibility of child complainants' cross-examination.

Alternate Measure	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	Mean/SD	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
CCTV from remote room on court premises	4.8	4.8	1.4	1.1	4	1.3	5.18	1.4	5.4	1.48	4.82	1.4
CCTV from remote room off court premises	4.7	4.8	1.4	1.1	3.9	1.3	5.17	1.5	5.8	1.36	4.83	1.45
Pre-recorded interview	4.5	5.3	1.6	1.3	3.6	1.4	5.6	1.4	5.8	1.49	5	1.61
Pre-recorded evidence at pre-trial hearing	4.5	5	1.3	1.3	3.9	1.4	5.4	1.3	5.7	1.54	4.92	1.48
In-Person from behind a screen	3.7	4	1.5	1.3	4.1	1.7	3.53	1.8	3.7	2.08	3.79	1.67

Alternate Measure	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	Mean	SD	Mean	SD	Mean	SD	Mean	SD	Mean	SD	Mean	SD
In-person with assistance of intermediary	3.7	1.5	3.9	1.6	3.9	1.7	3.64	1.8	4.9	1.86	3.91	1.74
In-person with courtroom modifications	4	1.4	4.5	1.5	4.9	1.2	3.77	1.8	4.2	2.04	4.21	1.67
Questions by counsel, judicial intervention as needed	5	1.5	5	1.4	5.3	1.3	4.82	1.9	5.6	1.4	5.08	1.59
In-person in conventional way	3.7	1.8	3.7	1.8	5.1	1.5	3.3	2	3.2	2.03	3.8	1.94

Table S2.3.8. Best procedure for credibility of child complainants' evidence.

State	Professional group	Count /%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind a screen	In-person with assistance of intermediary	In-person with courtroom modifications*	Questions by counsel, judicial intervention as needed	In-person in conventional way	Don't know	
NSW	Judge	Count	15	2	11	1	0	1	1	0	1	3	
		%	42.9	5.7	31.4	2.9	0.0	2.9	2.9	0.0	2.9	8.6	
	Prosecutor	Count	0	0	9	4	0	2	0	0	0	2	1
		%	0.0	0.0	50.0	22.2	0.0	11.1	0.0	0.0	0.0	11.1	5.6
	Defence lawyer	Count	1	0	4	3	1	1	3	3	3	8	2
		%	3.8	0.0	15.4	11.5	3.8	3.8	11.5	11.5	11.5	30.8	7.7
	Police officer	Count	6	4	22	3	0	2	1	0	0	0	1
		%	15.4	10.3	56.4	7.7	0.0	5.1	2.6	0.0	0.0	0.0	2.6
	Support officer	Count	2	2	4	5	0	0	0	0	0	0	0
		%	15.4	15.4	30.8	38.5	0.0	0.0	0.0	0.0	0.0	0.0	0.0
	Total	Count	24	8	50	16	1	6	5	3	11	7	
		%	18.3	6.1	38.2	12.2	.8	4.6	3.8	2.3	8.4	5.3	
VIC	Judge	Count	0	3	4	2	0	2	0	1	1	1	
		%	0.0	21.4	28.6	14.3	0.0	14.3	0.0	7.1	7.1	7.1	
	Prosecutor	Count	1	6	6	3	0	1	2	1	0	1	

State	Professional group	Count /%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind a screen	In-person with assistance of intermediary	In-person with courtroom modifications*	Questions by counsel, judicial interventions needed	In-person in conventional way	Don't know	
		%	4.8	28.6	28.6	14.3	0.0	4.8	9.5	4.8	0.0	4.8	
	Defence lawyer	Count	5	2	1	0	0	0	1	6	1	1	
		%	29.4	11.8	5.9	0.0	0.0	0.0	5.9	35.3	5.9	5.9	
	Police officer	Count	3	0	10	4	0	1	0	0	0	0	
		%	16.7	0.0	55.6	22.2	0.0	5.6	0.0	0.0	0.0	0.0	
	Support officer	Count	1	6	3	1	2	0	0	0	0	3	
		%	5.9	35.3	17.6	5.9	11.8	0.0	0.0	0.0	0.0	17.6	
	Total	Count	10	17	24	10	2	4	3	8	2	6	
		%	11.5	19.5	27.6	11.5	2.3	4.6	3.4	9.2	2.3	6.9	
WA	Judge	Count	2	0	6	1	1	0	0	0	2	2	
		%	14.3	0.0	42.9	7.1	7.1	0.0	0.0	0.0	14.3	14.3	
	Prosecutor	Count	5	0	6	6	0	0	2	0	1	2	
		%	22.7	0.0	27.3	27.3	0.0	0.0	9.1	0.0	4.5	9.1	
	Defence lawyer	Count	1	1	1	3	2	0	0	0	2	1	
		%	9.1	9.1	9.1	27.3	18.2	0.0	0.0	0.0	18.2	9.1	
	Police officer	Count	4	2	17	2	0	1	0	1	0	4	
		%	12.9	6.5	54.8	6.5	0.0	3.2	0.0	3.2	0.0	12.9	
	Support officer	Count	2	1	3	3	0	0	0	0	1	1	
		%	18.2	9.1	27.3	27.3	0.0	0.0	0.0	0.0	9.1	9.1	
	Total	Count	14	4	33	15	3	1	2	1	6	10	
		%	15.7	4.5	37.1	16.9	3.4	1.1	2.2	1.1	6.7	11.2	
	Total	Judge	Count	17	5	21	4	1	3	1	1	4	6
			%	27.0	7.9	33.3	6.3	1.6	4.8	1.6	1.6	6.3	9.5
Prosecutor		Count	6	6	21	13	0	3	4	1	3	4	
		%	9.8	9.8	34.4	21.3	0.0	4.9	6.6	1.6	4.9	6.6	
Defence		Count	7	3	6	6	3	1	4	9	11	4	
		%	11.5	4.7	9.3	9.3	4.3	1.6	5.7	11.5	14.3	6.3	

State	Professional group	Count /%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind a screen	In-person with assistance of intermediary	In-person with courtroom modifications*	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
	lawyer	%	13.0	5.6	11.1	11.1	5.6	1.9	7.4	16.7	20.4	7.4
	Police officer	Count	13	6	49	9	0	4	1	1	0	5
		%	14.8	6.8	55.7	10.2	0.0	4.5	1.1	1.1	0.0	5.7
	Support officer	Count	5	9	10	9	2	0	0	0	1	4
		%	12.2	22.0	24.4	22.0	4.9	0.0	0.0	0.0	2.4	9.8
	Total	Count	48	29	107	41	6	11	10	12	19	23
		%	15.6	9.4	34.9	13.4	2.0	3.6	3.3	3.9	6.2	7.5

Table S2.3.9. Second best procedure for credibility of child complainants' evidence.

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
NSW	Judge	Count	10	11	4	4	0	0	1	2	0	3
		%	28.6	31.4	11.4	11.4	0.0	0.0	2.9	5.7	0.0	8.6
	Prosecutor	Count	9	0	3	3	0	1	1	0	0	1
		%	50.0	0.0	16.7	16.7	0.0	5.6	5.6	0.0	0.0	5.6
	Defence lawyer	Count	4	2	3	2	2	2	1	6	2	2
		%	15.4	7.7	11.5	7.7	7.7	7.7	3.8	23.1	7.7	7.7
	Police officer	Count	6	15	0	12	0	1	1	1	0	3
		%	15.4	38.5	0.0	30.8	0.0	2.6	2.6	2.6	0.0	7.7
	Support officer	Count	3	4	3	1	0	2	0	0	0	0
		%	23.1	30.8	23.1	7.7	0.0	15.4	0.0	0.0	0.0	0.0
	Total	Count	32	32	13	22	2	6	4	9	2	9
		%	24.4	24.4	9.9	16.8	1.5	4.6	3.1	6.9	1.5	6.9

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
VIC	Judge	Count	1	3	2	1	0	1	2	2	1	1
		%	7.1	21.4	14.3	7.1	0.0	7.1	14.3	14.3	7.1	7.1
	Prosecutor	Count	7	2	4	4	0	0	0	2	0	2
		%	33.3	9.5	19.0	19.0	0.0	0.0	0.0	9.5	0.0	9.5
	Defence lawyer	Count	1	3	0	2	0	0	3	5	2	1
		%	5.9	17.6	0.0	11.8	0.0	0.0	17.6	29.4	11.8	5.9
	Police officer	Count	1	10	1	6	0	0	0	0	0	0
		%	5.6	55.6	5.6	33.3	0.0	0.0	0.0	0.0	0.0	0.0
	Support officer	Count	5	3	0	1	1	2	1	1	0	3
		%	29.4	17.6	0.0	5.9	5.9	11.8	5.9	5.9	0.0	17.6
Total	Count	15	21	7	14	1	3	6	10	3	7	
	%	17.2	24.1	8.0	16.1	1.1	3.4	6.9	11.5	3.4	8.0	
WA	Judge	Count	6	1	0	1	0	0	3	1		2
		%	42.9	7.1	0.0	7.1	0.0	0.0	21.4	7.1		14.3
	Prosecutor	Count	8	3	3	4	1	0	1	0		2
		%	36.4	13.6	13.6	18.2	4.5	0.0	4.5	0.0		9.1
	Defence lawyer	Count	4	1	1	0	0	0	2	2		1
		%	36.4	9.1	9.1	0.0	0.0	0.0	18.2	18.2		9.1
	Police officer	Count	10	6	5	5	0	0	1	0		4
		%	32.3	19.4	16.1	16.1	0.0	0.0	3.2	0.0		12.9
	Support officer	Count	4	3	2	1	0	0	0	0		1
		%	36.4	27.3	18.2	9.1	0.0	0.0	0.0	0.0		9.1
Total	Count	32	14	11	11	1	0	7	3		10	
	%	36.0	15.7	12.4	12.4	1.1	0.0	7.9	3.4		11.2	
Total	Judge	Count	17	15	6	6	0	1	6	5	1	6
		%	27.0	23.8	9.5	9.5	0.0	1.6	9.5	7.9	1.6	9.5
	Prosecutor	Count	24	5	10	11	1	1	2	2	0	5

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
		%	39.3	8.2	16.4	18.0	1.6	1.6	3.3	3.3	0.0	8.2
	Defence lawyer	Count	9	6	4	4	2	2	6	13	4	4
		%	16.7	11.1	7.4	7.4	3.7	3.7	11.1	24.1	7.4	7.4
	Police officer	Count	17	31	6	23	0	1	2	1	0	7
		%	19.3	35.2	6.8	26.1	0.0	1.1	2.3	1.1	0.0	8.0
	Support officer	Count	12	10	5	3	1	4	1	1	0	4
		%	29.3	24.4	12.2	7.3	2.4	9.8	2.4	2.4	0.0	9.8
	Total	Count	79	67	31	47	4	9	17	22	5	26
		%	25.7	21.8	10.1	15.3	1.3	2.9	5.5	7.2	1.6	8.5

Table S2.3.10. Best procedure for credibility of adult complainants' evidence.

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person, courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
NSW	Judge	Count	14	1	2	0	1	1	4	4	6	2
		%	40.0	2.9	5.7	0.0	2.9	2.9	11.4	11.4	17.1	5.7
	Prosecutor	Count	2	0	4	2	0	2	4	0	3	1
		%	11.1	0.0	22.2	11.1	0.0	11.1	22.2	0.0	16.7	5.6
	Defence lawyer	Count	2	0	0	2	0	0	1	1	18	2
		%	7.7	0.0	0.0	7.7	0.0	0.0	3.8	3.8	69.2	7.7
	Police officer	Count	7	6	11	1	2	1	4	1	5	1
		%	17.9	15.4	28.2	2.6	5.1	2.6	10.3	2.6	12.8	2.6
	Support officer	Count	0	4	4	3	0	0	0	2	0	0
		%	0.0	30.8	30.8	23.1	0.0	0.0	0.0	15.4	0.0	0.0

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person, courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
	Total	Count	25	11	21	8	3	4	13	8	32	6
		%	19.1	8.4	16.0	6.1	2.3	3.1	9.9	6.1	24.4	4.6
VIC	Judge	Count	0	3	4	0	1	0	2	1	2	1
		%	0.0	21.4	28.6	0.0	7.1	0.0	14.3	7.1	14.3	7.1
	Prosecutor	Count	3	1	1	0	2	0	2	2	7	3
		%	14.3	4.8	4.8	0.0	9.5	0.0	9.5	9.5	33.3	14.3
	Defence lawyer	Count	5	0	0	0	1	0	1	4	5	1
		%	29.4	0.0	0.0	0.0	5.9	0.0	5.9	23.5	29.4	5.9
	Police officer	Count	3	2	5	1	1	1	0	1	4	0
		%	16.7	11.1	27.8	5.6	5.6	5.6	0.0	5.6	22.2	0.0
	Support officer	Count	1	3	1	2	2	1	3	0	0	4
		%	5.9	17.6	5.9	11.8	11.8	5.9	17.6	0.0	0.0	23.5
	Total	Count	12	9	11	3	7	2	8	8	18	9
		%	13.8	10.3	12.6	3.4	8.0	2.3	9.2	9.2	20.7	10.3
WA	Judge	Count	4	0	1	0	1	0	0	1	6	1
		%	28.6	0.0	7.1	0.0	7.1	0.0	0.0	7.1	42.9	7.1
	Prosecutor	Count	9	0	2	2	0	0	1	1	5	2
		%	40.9	0.0	9.1	9.1	0.0	0.0	4.5	4.5	22.7	9.1
	Defence lawyer	Count	2	0	0	0	3	0	0	1	4	1
		%	18.2	0.0	0.0	0.0	27.3	0.0	0.0	9.1	36.4	9.1
	Police officer	Count	3	3	7	0	2	0	1	1	10	4
		%	9.7	9.7	22.6	0.0	6.5	0.0	3.2	3.2	32.3	12.9
	Support officer	Count	6	1	2	0	0	0	0	0	1	1
		%	54.5	9.1	18.2	0.0	0.0	0.0	0.0	0.0	9.1	9.1
	Total	Count	24	4	12	2	6	0	2	4	26	9
		%	27.0	4.5	13.5	2.2	6.7	0.0	2.2	4.5	29.2	10.1

State	Prof. Group	Count/%	CCTV from remote room on court premise	CCTV from remote room off court premise	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person, courtroom modifications	Questions by counsel, judicial intervention as needed	In-Person in conventional way	Don't know
Total	Judge	Count	18	4	7	0	3	1	6	6	14	4
		%	28.6	6.3	11.1	0.0	4.8	1.6	9.5	9.5	22.2	6.3
	Prosecutor	Count	14	1	7	4	2	2	7	3	15	6
		%	23.0	1.6	11.5	6.6	3.3	3.3	11.5	4.9	24.6	9.8
	Defence lawyer	Count	9	0	0	2	4	0	2	6	27	4
		%	16.7	0.0	0.0	3.7	7.4	0.0	3.7	11.1	50.0	7.4
	Police officer	Count	13	11	23	2	5	2	5	3	19	5
		%	14.8	12.5	26.1	2.3	5.7	2.3	5.7	3.4	21.6	5.7
	Support officer	Count	7	8	7	5	2	1	3	2	1	5
		%	17.1	19.5	17.1	12.2	4.9	2.4	7.3	4.9	2.4	12.2
	Total	Count	61	24	44	13	16	6	23	20	76	24
		%	19.9	7.8	14.3	4.2	5.2	2.0	7.5	6.5	24.8	7.8

Table S2.3.11. Second best procedure for credibility of adult complainants' evidence.

State	Prof. Group	Count/%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel/judicial intervention as needed	In-Person in conventional way	Don't know
NSW	Judge	Count	6	10	2	0	2	2	5	4	1	3
		%	17.1	28.6	5.7	0.0	5.7	5.7	14.3	11.4	2.9	8.6
	Prosecutor	Count	8	0	1	0	0	0	4	2	2	1
		%	44.4	0.0	5.6	0.0	0.0	0.0	22.2	11.1	11.1	5.6
	Defence	Count	4	3	1	0	3	0	5	6	2	2

State	Prof. Group	Count/%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel/judicial intervention as needed	In-Person in conventional way	Don't know	
	lawyer	%	15.4	11.5	3.8	0.0	11.5	0.0	19.2	23.1	7.7	7.7	
	Police officer	Count	9	4	2	11	0	2	4	4	1	2	
		%	23.1	10.3	5.1	28.2	0.0	5.1	10.3	10.3	2.6	5.1	
	Support officer	Count	6	3	1	1	0	0	0	2	0	0	
		%	46.2	23.1	7.7	7.7	0.0	0.0	0.0	15.4	0.0	0.0	
	Total	Count	33	20	7	12	5	4	18	18	6	8	
		%	25.2	15.3	5.3	9.2	3.8	3.1	13.7	13.7	4.6	6.1	
	VIC	Judge	Count	3	5	0	0	0	1	0	2	2	1
			%	21.4	35.7	0.0	0.0	0.0	7.1	0.0	14.3	14.3	7.1
		Prosecutor	Count	5	3	0	2	4	0	1	2	0	4
%			23.8	14.3	0.0	9.5	19.0	0.0	4.8	9.5	0.0	19.0	
Defence lawyer		Count	1	3	0	0	0	0	3	5	4	1	
		%	5.9	17.6	0.0	0.0	0.0	0.0	17.6	29.4	23.5	5.9	
Police officer		Count	5	4	1	4	0	0	1	2	1	0	
		%	27.8	22.2	5.6	22.2	0.0	0.0	5.6	11.1	5.6	0.0	
Support officer		Count	4	2	0	0	2	0	0	3	1	4	
		%	23.5	11.8	0.0	0.0	11.8	0.0	0.0	17.6	5.9	23.5	
Total		Count	18	17	1	6	6	1	5	14	8	10	
		%	20.7	19.5	1.1	6.9	6.9	1.1	5.7	16.1	9.2	11.5	
WA		Judge	Count	6	1	0	0	0	0	3	1	1	2
			%	42.9	7.1	0.0	0.0	0.0	0.0	21.4	7.1	7.1	14.3
	Prosecutor	Count	5	5	1	3	2	0	2	1	1	2	
		%	22.7	22.7	4.5	13.6	9.1	0.0	9.1	4.5	4.5	9.1	
	Defence	Count	2	1	0	0	0	0	2	3	2	1	

State	Prof. Group	Count/%	CCTV from remote room on court premises	CCTV from remote room off court premises	Pre-recorded interview	Pre-recorded evidence at pre-trial hearing	In-Person from behind screen	In-Person with assistance of intermediary	In-Person with courtroom modifications	Questions by counsel/judicial intervention as needed	In-Person in conventional way	Don't know	
	lawyer	%	18.2	9.1	0.0	0.0	0.0	0.0	18.2	27.3	18.2	9.1	
	Police officer	Count	7	2	2	2	1	0	4	3	6	4	
		%	22.6	6.5	6.5	6.5	3.2	0.0	12.9	9.7	19.4	12.9	
	Support officer	Count	3	5	1	0	0	0	0	0	0	0	2
		%	27.3	45.5	9.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	18.2
	Total	Count	23	14	4	5	3	0	11	8	10	11	
		%	25.8	15.7	4.5	5.6	3.4	0.0	12.4	9.0	11.2	12.4	
	Total	Judge	Count	15	16	2	0	2	3	8	7	4	6
%			23.8	25.4	3.2	0.0	3.2	4.8	12.7	11.1	6.3	9.5	
Prosecutor		Count	18	8	2	5	6	0	7	5	3	7	
		%	29.5	13.1	3.3	8.2	9.8	0.0	11.5	8.2	4.9	11.5	
Defence lawyer		Count	7	7	1	0	3	0	10	14	8	4	
		%	13.0	13.0	1.9	0.0	5.6	0.0	18.5	25.9	14.8	7.4	
Police officer		Count	21	10	5	17	1	2	9	9	8	6	
		%	23.9	11.4	5.7	19.3	1.1	2.3	10.2	10.2	9.1	6.8	
Support officer		Count	13	10	2	1	2	0	0	5	1	6	
		%	31.7	24.4	4.9	2.4	4.9	0.0	0.0	12.2	2.4	14.6	
Total		Count	74	51	12	23	14	5	34	40	24	29	
		%	24.1	16.6	3.9	7.5	4.6	1.6	11.1	13.0	7.8	9.4	

Table S2.3.12. Alternate measures yielding the most reliable evidence.

State		Count/%	CCTV from remote room on court premises	CCTV from remote room off court premises	Video-recorded police interview	Video-recording at pre-trial hearing	In-person behind a screen	In-person with an intermediary	In-person, no alternative measures	Don't know
NSW	Judge	Count	17	2	8	0	0	1	5	2
		%	48.6	5.7	22.9	0.0	0.0	2.9	14.3	5.7
	Prosecutor	Count	4	0	7	3	0	1	2	1
		%	22.2	0.0	38.9	16.7	0.0	5.6	11.1	5.6
	Defence lawyer	Count	1	0	4	1	0	1	16	3
		%	3.8	0.0	15.4	3.8	0.0	3.8	61.5	11.5
	Police officer	Count	6	7	19	0	1	2	1	3
		%	15.4	17.9	48.7	0.0	2.6	5.1	2.6	7.7
	Support officer	Count	0	3	6	1	0	1	0	2
		%	0.0	23.1	46.2	7.7	0.0	7.7	0.0	15.4
Total	Count	28	12	44	5	1	6	24	11	
	%	21.4	9.2	33.6	3.8	.8	4.6	18.3	8.4	
VIC	Judge	Count	1	5	3	1	0	1	2	1
		%	7.1	35.7	21.4	7.1	0.0	7.1	14.3	7.1
	Prosecutor	Count	1	2	3	1	1	2	6	5
		%	4.8	9.5	14.3	4.8	4.8	9.5	28.6	23.8
	Defence lawyer	Count	5	0	1	0	0	0	10	1
		%	29.4	0.0	5.9	0.0	0.0	0.0	58.8	5.9
	Police officer	Count	3	0	6	2	1	1	3	2
		%	16.7	0.0	33.3	11.1	5.6	5.6	16.7	11.1
	Support officer	Count	1	4	0	2	2	1	3	3
		%	6.3	25.0	0.0	12.5	12.5	6.3	18.8	18.8
Total	Count	11	11	13	6	4	5	24	12	
	%	12.8	12.8	15.1	7.0	4.7	5.8	27.9	14.0	
WA	Judge	Count	3	0	6	0	1	1	2	1
		%	21.4	0.0	42.9	0.0	7.1	7.1	14.3	7.1
	Prosecutor	Count	12	0	3	4	0	0	2	1
		%	54.5	0.0	13.6	18.2	0.0	0.0	9.1	4.5
	Defence lawyer	Count	1	0	1	2	2	0	5	0
		%	9.1	0.0	9.1	18.2	18.2	0.0	45.5	0.0
	Police officer	Count	5	3	11	0	2	1	6	2
		%	16.7	10.0	36.7	0.0	6.7	3.3	20.0	6.7
	Support officer	Count	5	1	4	0	0	0	1	0
		%	45.5	9.1	36.4	0.0	0.0	0.0	9.1	0.0
Total	Count	26	4	25	6	5	2	16	4	
	%	29.5	4.5	28.4	6.8	5.7	2.3	18.2	4.5	
Total	Judge	Count	21	7	17	1	1	3	9	4
		%	33.3	11.1	27.0	1.6	1.6	4.8	14.3	6.3
	Prosecutor	Count	17	2	13	8	1	3	10	7
		%	27.9	3.3	21.3	13.1	1.6	4.9	16.4	11.5
	Defence lawyer	Count	7	0	6	3	2	1	31	4
		%	13.0	0.0	11.1	5.6	3.7	1.9	57.4	7.4
	Police officer	Count	14	10	36	2	4	4	10	7
		%	16.1	11.5	41.4	2.3	4.6	4.6	11.5	8.0
	Support officer	Count	6	8	10	3	2	2	4	5
		%	15.0	20.0	25.0	7.5	5.0	5.0	10.0	12.5
Total	Count	65	27	82	17	10	13	64	27	
	%	21.3	8.9	26.9	5.6	3.3	4.3	21.0	8.9	

Table S2.3.13. Alternate measures yielding the least reliable evidence.

State	Prof. Group	CCTV from a remote room on court premises	CCTV from a remote room off court premises	Video-recorded police interview	Video-recording at pre-trial hearing	In-person behind a screen	In-person with an intermediary	In-person, no alternative measures	Don't know
NSW	Judge	0.0	2.9	11.4	0.0	8.6	14.3	42.9	20.0
	Prosecutor	5.6	5.6	0.0	0.0	11.1	16.7	38.9	22.2
	Defence lawyer	0.0	3.8	34.6	3.8	15.4	15.4	7.7	19.2
	Police officer	7.7	2.6	2.6	0.0	10.3	2.6	51.3	23.1
	Support officer	0.0	0.0	7.7	0.0	0.0	0.0	69.2	23.1
	Total	3.1	3.1	11.5	.8	9.9	9.9	40.5	21.4
VIC	Judge	0.0	0.0	14.3	14.3	0.0	0.0	57.1	14.3
	Prosecutor	0.0	0.0	14.3	4.8	0.0	4.8	33.3	42.9
	Defence lawyer	11.8	5.9	35.3	5.9	5.9	23.5	0.0	11.8
	Police officer	0.0	5.6	5.6	0.0	16.7	5.6	55.6	11.1
	Support officer	0.0	0.0	0.0	12.5	6.3	6.3	31.3	43.8
	Total	2.3	2.3	14.0	7.0	5.8	8.1	34.9	25.6
WA	Judge	7.1	21.4	0.0	0.0	7.1	7.1	7.1	50.0
	Prosecutor	0.0	0.0	13.6	4.5	4.5	13.6	54.5	9.1
	Defence lawyer	0.0	27.3	27.3	0.0	9.1	9.1	27.3	0.0
	Police officer	0.0	6.7	10.0	3.3	10.0	3.3	46.7	20.0
	Support officer	0.0	0.0	9.1	0.0	0.0	0.0	72.7	18.2
	Total	1.1	9.1	11.4	2.3	6.8	6.8	43.2	19.3
Total	Judge	1.6	6.3	9.5	3.2	6.3	9.5	38.1	25.4
	Prosecutor	1.6	1.6	9.8	3.3	4.9	11.5	42.6	24.6
	Defence lawyer	3.7	9.3	33.3	3.7	11.1	16.7	9.3	13.0
	Police officer	3.4	4.6	5.7	1.1	11.5	3.4	50.6	19.5
	Support officer	0.0	0.0	5.0	5.0	2.5	2.5	55.0	30.0
	Total	2.3	4.6	12.1	3.0	7.9	8.5	39.7	22.0

Table S2.3.14. Participants' views of legal procedures used in child sexual abuse trials.

Alternate Measure	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
Preparation by Crown of complainant for trial confuses complainant.	2.3	1.36	1.77	1.2	3.27	1.7	3.1	1.62	1.8	1.8	2.52	1.64
Evidence via CCTV less traumatic for complainant than in-person evidence.	6	1.5	6.3	1	5.4	1.5	6.3	1.3	5.9	1.9	6.03	1.44
Evidence via CCTV decreases quality of evidence.	3.2	1.92	3.61	1.8	4.57	1.9	3	1.72	2.1	1.5	3.31	1.92
Pre-recorded police interviews vary too much in quality to be effective.	3.9	1.9	3.79	1.7	4.81	1.5	2.9	1.53	3.1	1.9	3.67	1.8
Pre-recorded police	4.4	1.94	4.46	1.5	5.34	1.6	3.7	1.95	4	1.9	4.34	1.87

Alternate Measure	Judge		Prosecutor		Defence lawyer		Police officer		Support officer		Total	
	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD
interviews contain too much irrelevant information.												
Benefits of video technology outweigh technical difficulties.	5.7	1.75	5.5	1.8	5.25	1.4	5.7	1.44	5.7	1.9	5.56	1.62
Questioning via an intermediary is fair to the complainant.	4.3	1.87	4.97	1.4	3.47	1.6	4.5	1.52	5.7	1.7	4.5	1.74
Questioning via intermediary facilitates jury understanding of the evidence	3.8	1.74	4.66	1.5	2.64	1.4	4.5	1.34	5.7	1.6	4.2	1.76
Juries perceive evidence via CCTV or video as less credible.	3.4	1.76	3.56	1.5	4.2	1.8	3.3	1.56	3	1.8	3.52	1.68
Juries perceive evidence via CCTV or video as unfair to the accused.	3	1.49	3.15	1.3	3.33	1.4	3	1.48	2.5	1.6	3.04	1.46
Expert evidence on children's behaviour is necessary	4.2	1.95	5.26	1.6	3.51	1.9	5.1	1.87	5.5	2.3	4.71	2.01
Waiting time to testify at trial is stressful for a complainant	6.3	1.43	6.5	1.3	5.98	1.4	6.4	1.34	6.5	1.6	6.35	1.4

Table S2.3.15. Helpfulness of expert evidence on behaviour of children in child sexual abuse trials.

State	Helpful to Jury?	Count %	Judge	Prosecutor	Defence lawyer	Police officer	Support officer	Total
NSW	No	Count	1	1	7	3	0	12
		%	20.0	16.7	100.0	50.0	0.0	46.0
	Yes	Count	4	5	0	3	2	14
		%	80.0	83.3	0.0	50.0	100.0	54.0
VIC	No	Count	1	1	4	0	0	6
		%	25.0	11.1	100.0	0.0	0.0	25.0
	Yes	Count	3	8	0	4	3	18
		%	75.0	88.9	0.0	100.0	100.0	75.0
WA	No	Count	1	0	1	1	1	4
		%	100.0	0.0	25.0	33.3	100.0	44.0
	Yes	Count	0	0	3	2	0	5
		%	0.0	0.0	75.0	66.7	0.0	56.0
Total	No	Count	3	2	12	4	1	22
		%	30.0	13.3	80.0	30.8	16.7	37.29
	Yes	Count	7	13	3	9	5	37
		%	70.0	86.7	20.0	69.2	83.3	62.71

Table S2.3.16. Participant recommendations for additional training, respondent demographics.

Group	% Participants
<i>State</i>	
NSW	43.26
VIC	28.53
WA	28.21
<i>Gender</i>	
Female	39.18
Male	21.63
<i>Professional Group</i>	
Judge	12.23
Prosecutor	21.00
Defence lawyer	6.27
Police officer	11.91
Support officer	9.09

Table S2.3.17. Participant suggestions for improvements to child sexual abuse trials, respondent demographics.

Group	% Participants
<i>State</i>	
NSW	43.30
VIC	28.87
WA	27.84
<i>Gender</i>	
Female	52.92
Male	46.74
<i>Professional Group</i>	
Judge	20.62
Prosecutor	20.96
Defence lawyer	17.87
Police officer	26.46
Support officer	13.40

Table S2.3.18. Participant perspectives on current practice and procedures in child sexual abuse cases, respondent demographics.

Group	% Participants
<i>State</i>	
NSW	43.26
VIC	28.53
WA	28.21
<i>Gender</i>	
Female	45.77
Male	53.92
Unstated	0.31
<i>Professional Group</i>	
Judge	20.06
Prosecutor	20.06
Defence lawyer	17.55
Police officer	28.53
Support officer	13.79

Supplementary Materials 3

S3.1 Figures and Results

Figure S3.1 Professional's agreement with the statement "The cross-examination was age-appropriate," by complainant age.

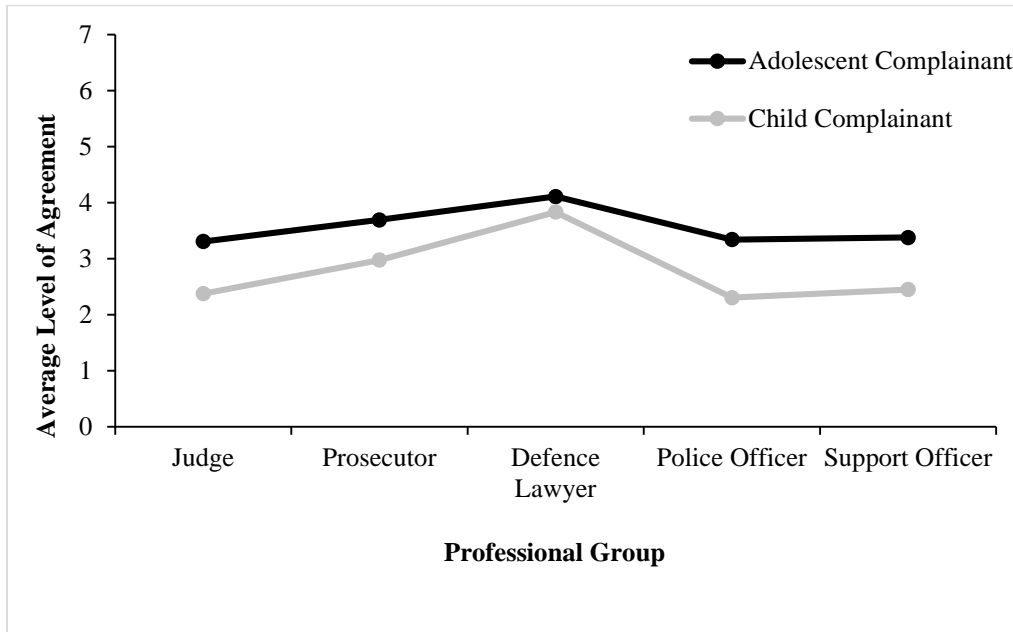


Figure S3.2. Professional's agreement with the statement "The cross-examination was age-appropriate," by question type.

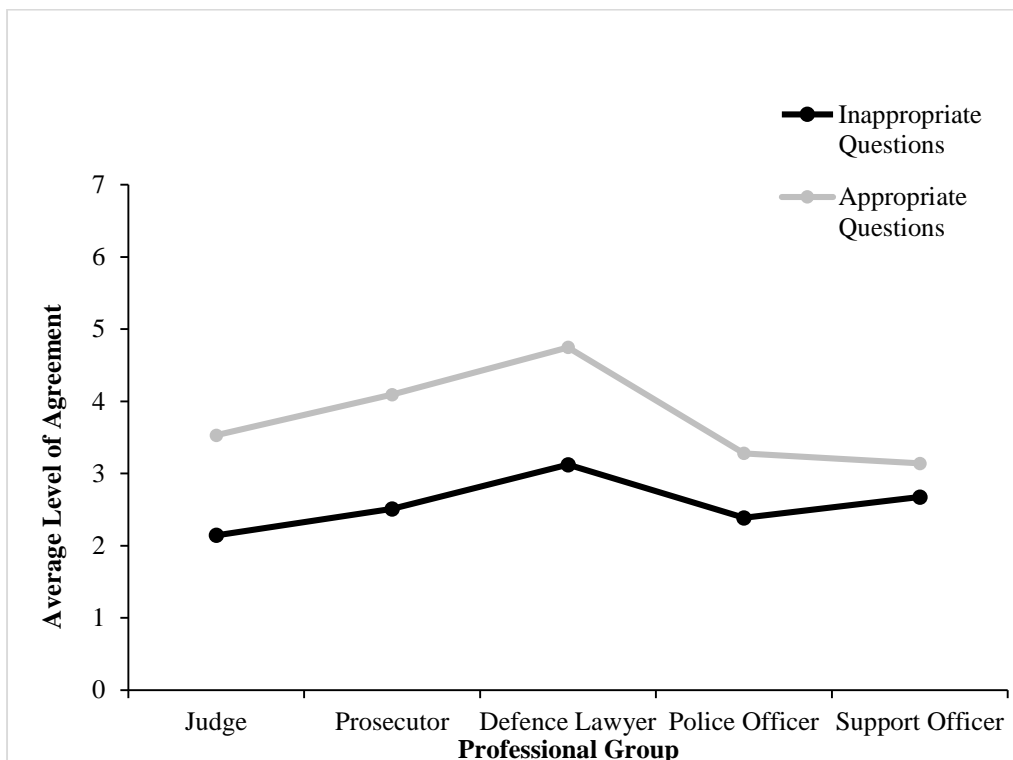


Figure S3.3. Professional’s overall agreement with the statement “The cross-examination was age-appropriate.”

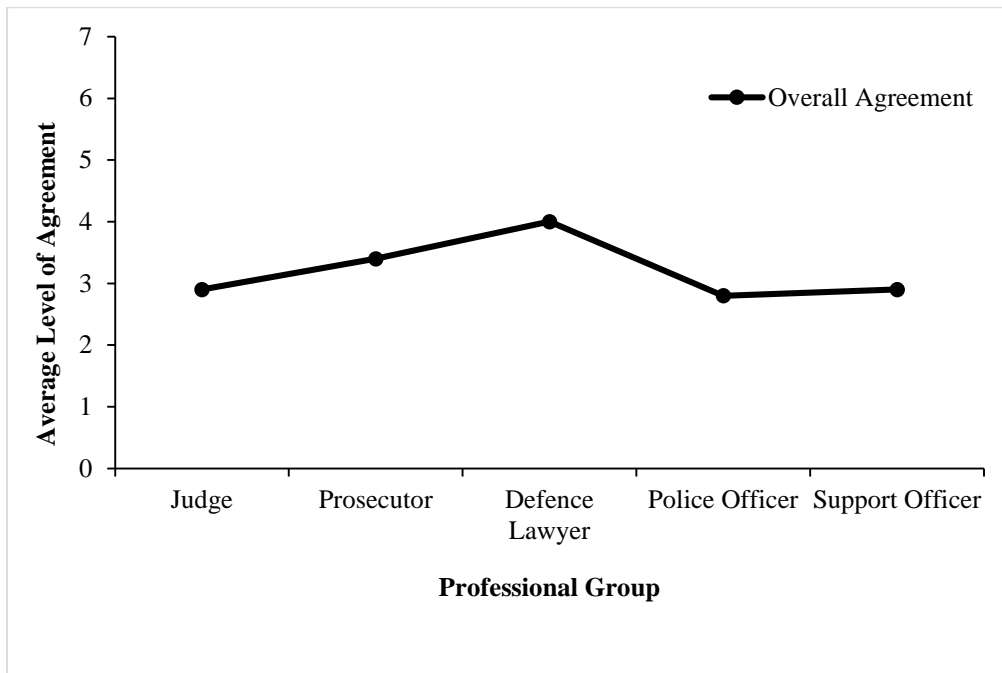


Figure S3.4. Professional’s agreement with the statement “The cross-examination was confusing to the complainant,” by complainant age

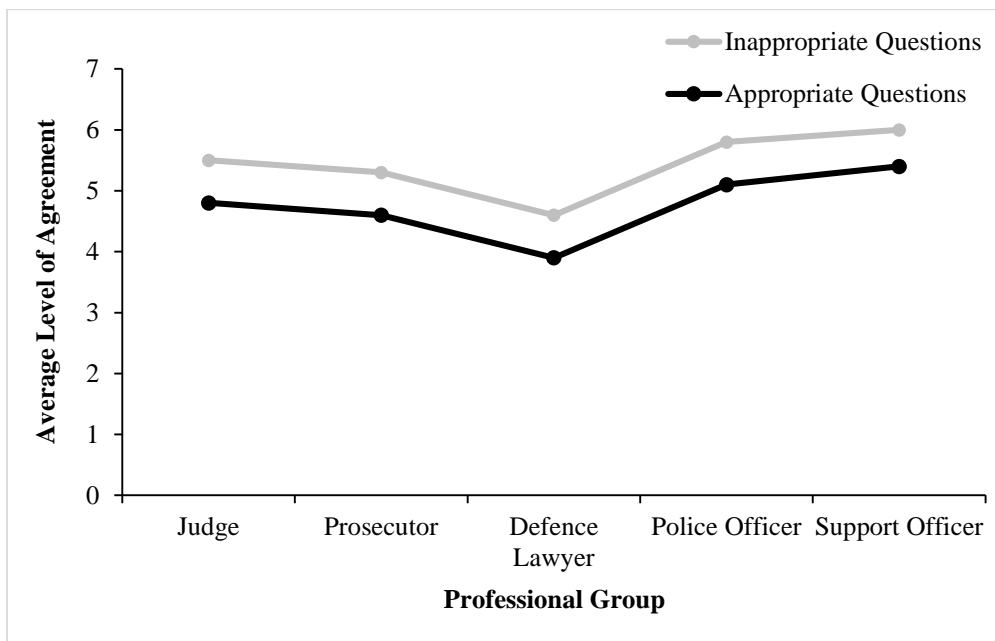


Figure S3.5. Professional’s agreement with the statement “The cross-examination was confusing to the complainant,” by question-type.

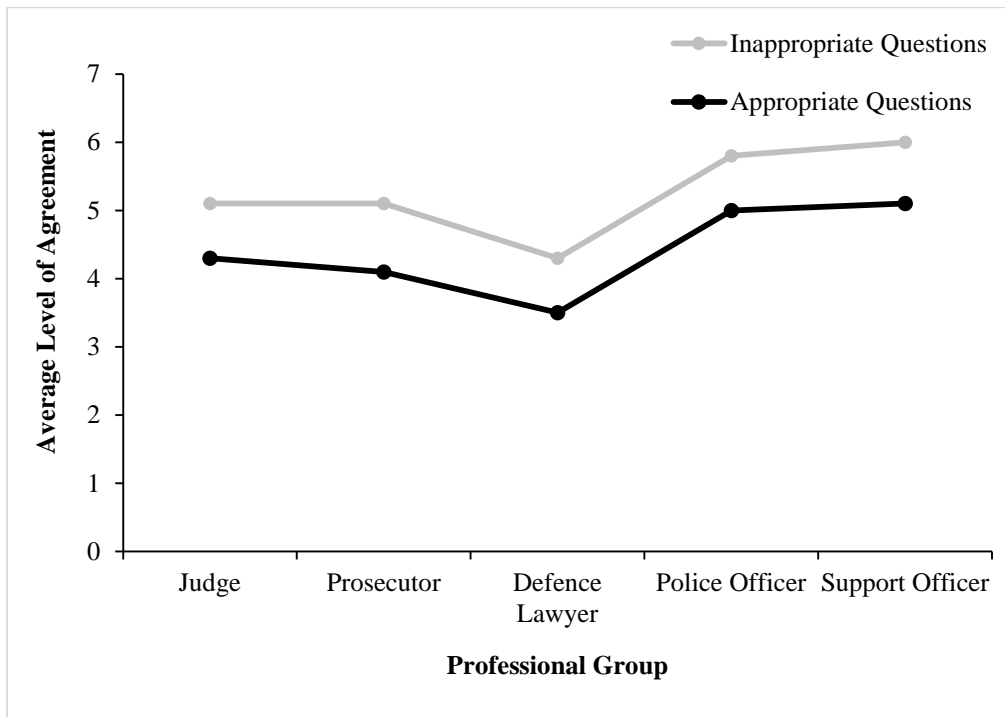


Figure S3.6. Professional’s overall agreement with the statement “The cross-examination was confusing to the complainant.”

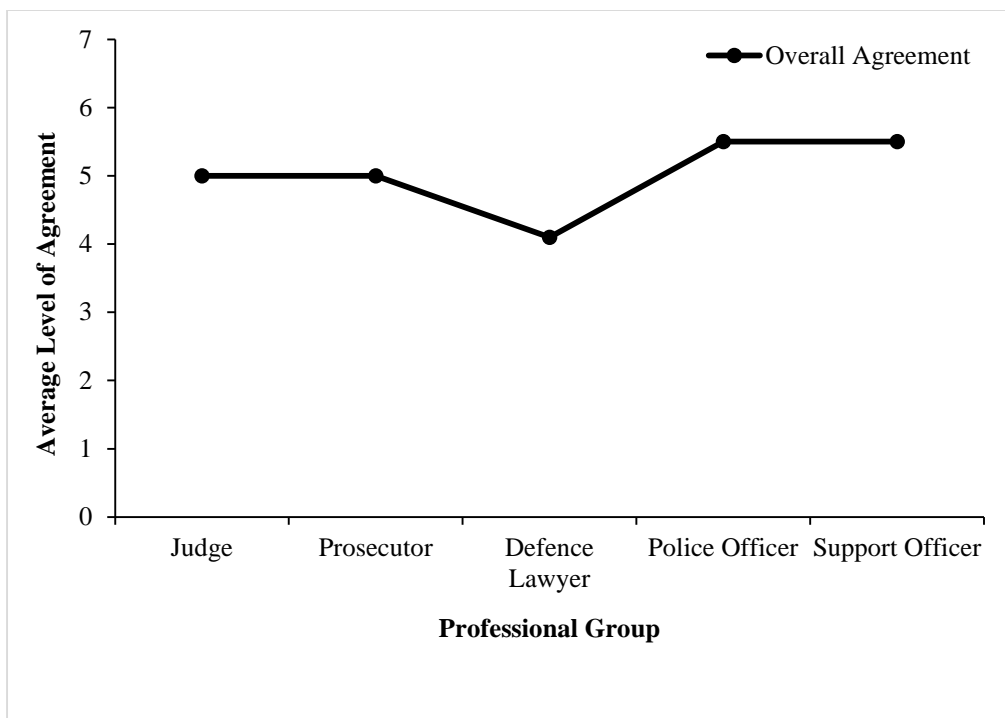


Figure S3.7. Professional’s agreement with the statement “The cross-examination was unfair to the complainant,” by question type.

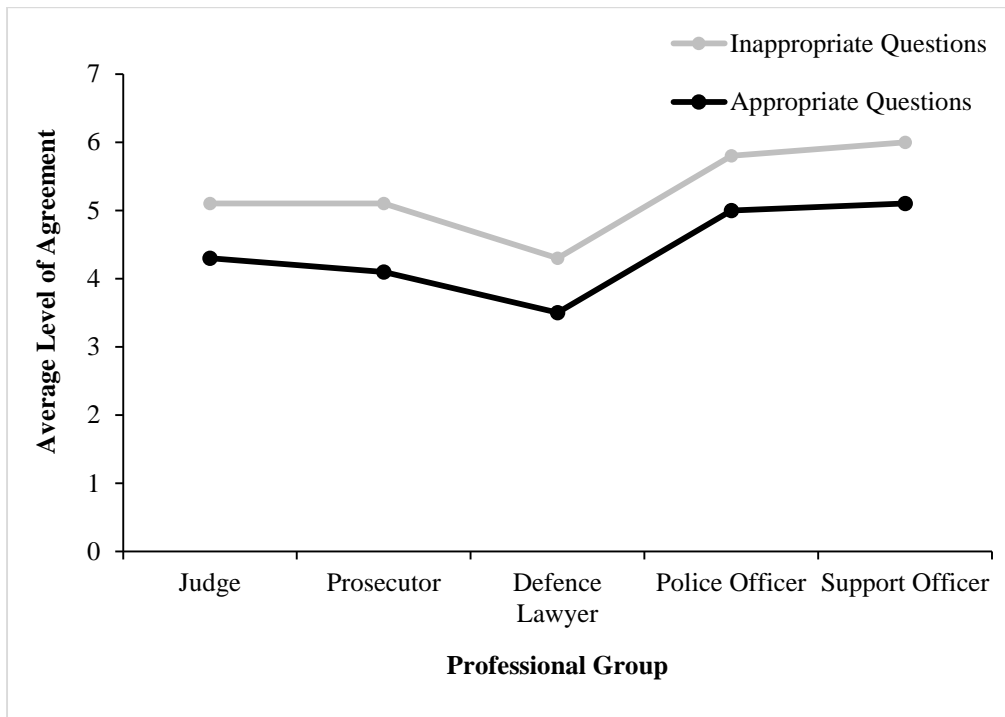


Figure S3.8. Professional’s agreement with the statement “The cross-examination was too aggressive,” by question type.

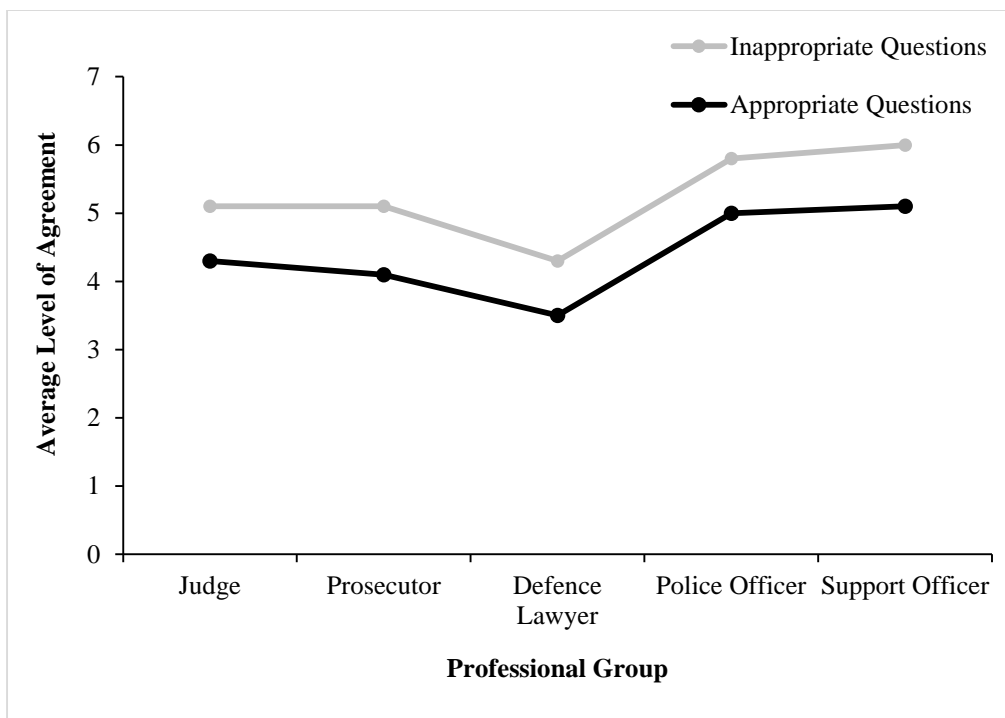


Figure S3.9. Professional’s agreement with the statement “The cross-examination was considerate of the complainant,” by complainant age.

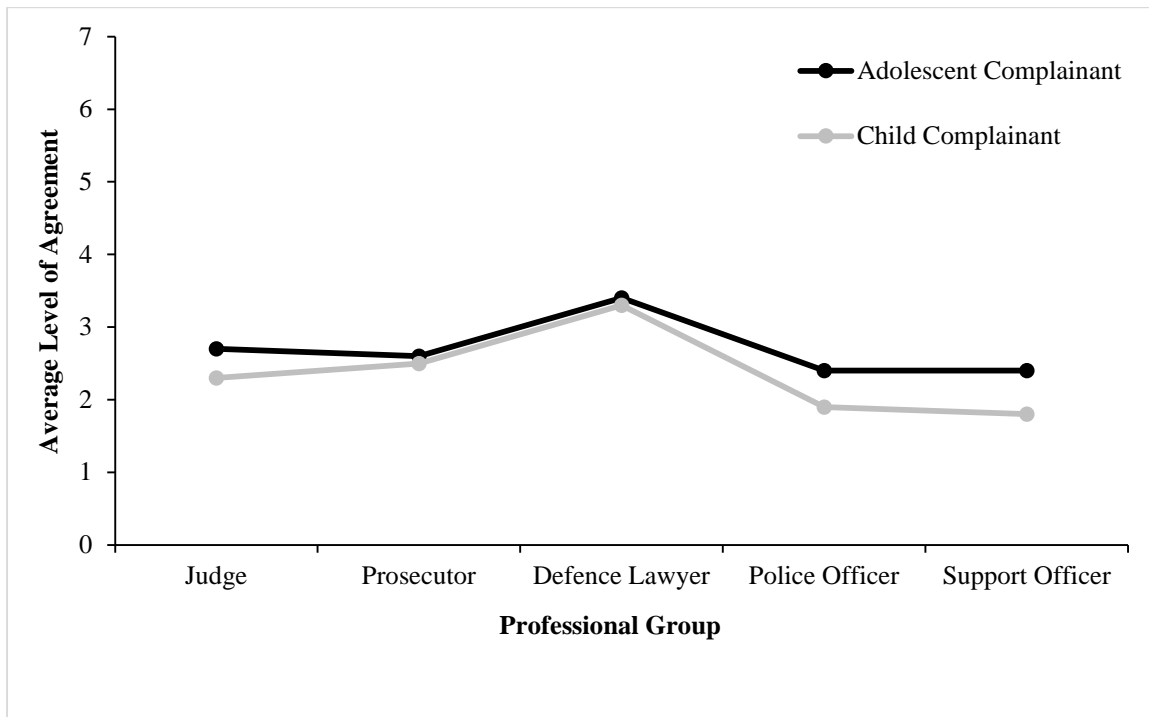


Figure S3.10. Professional’s agreement with the statement “The cross-examination was considerate of the complainant,” by question type.

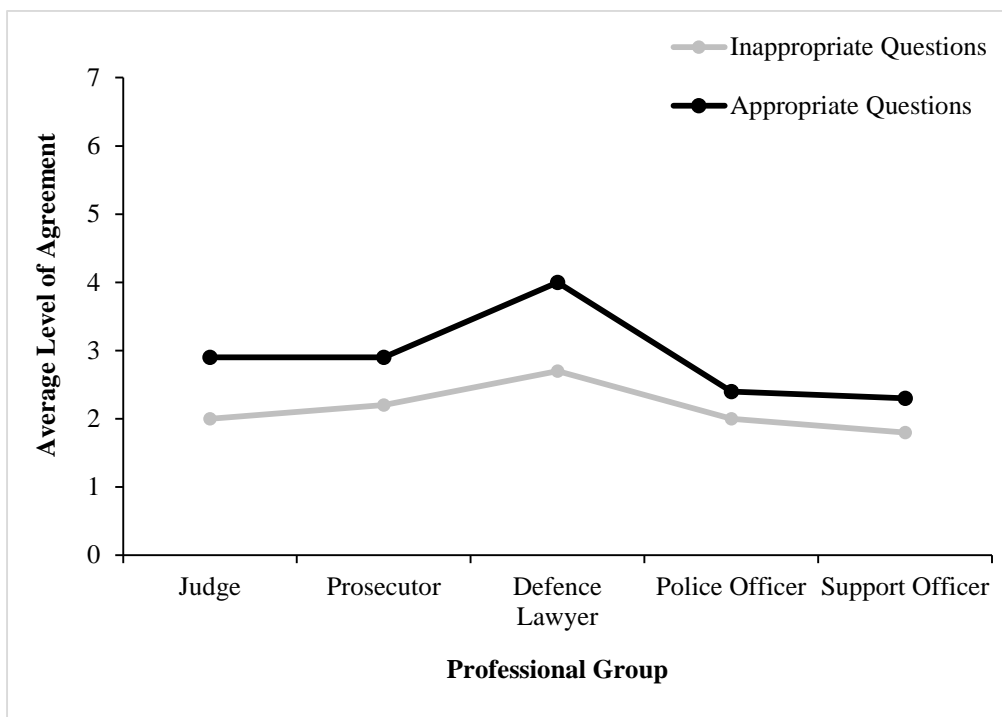


Figure S3.11. Professional’s agreement with the statement “The cross-examination was in the best interest of the defendant,” by complainant age.

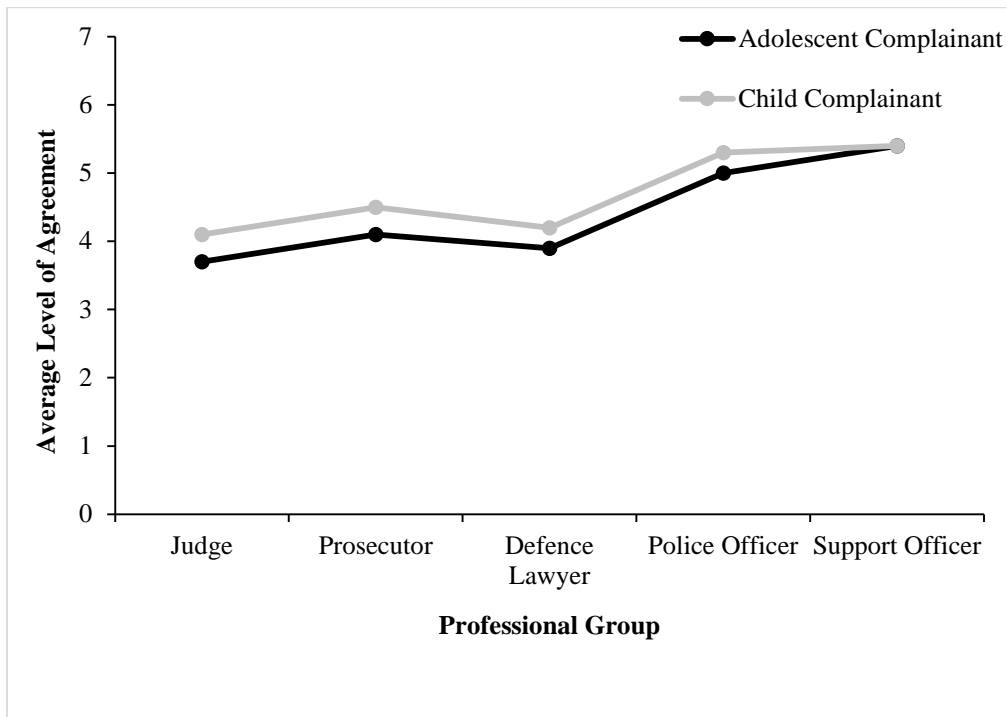


Figure S3.12. Professional’s agreement with the statement “The cross-examination was in the best interest of the defendant,” by question type.

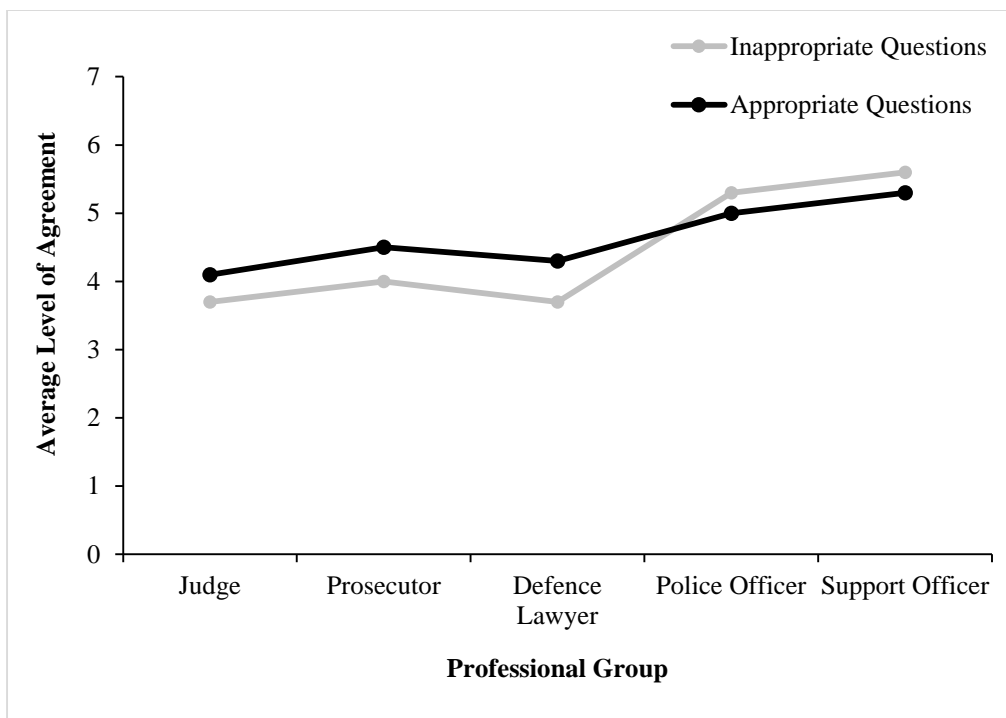


Figure S3.13. Professional’s agreement with the statement “The cross-examination was in the best interest of the defendant,” by judicial intervention condition.

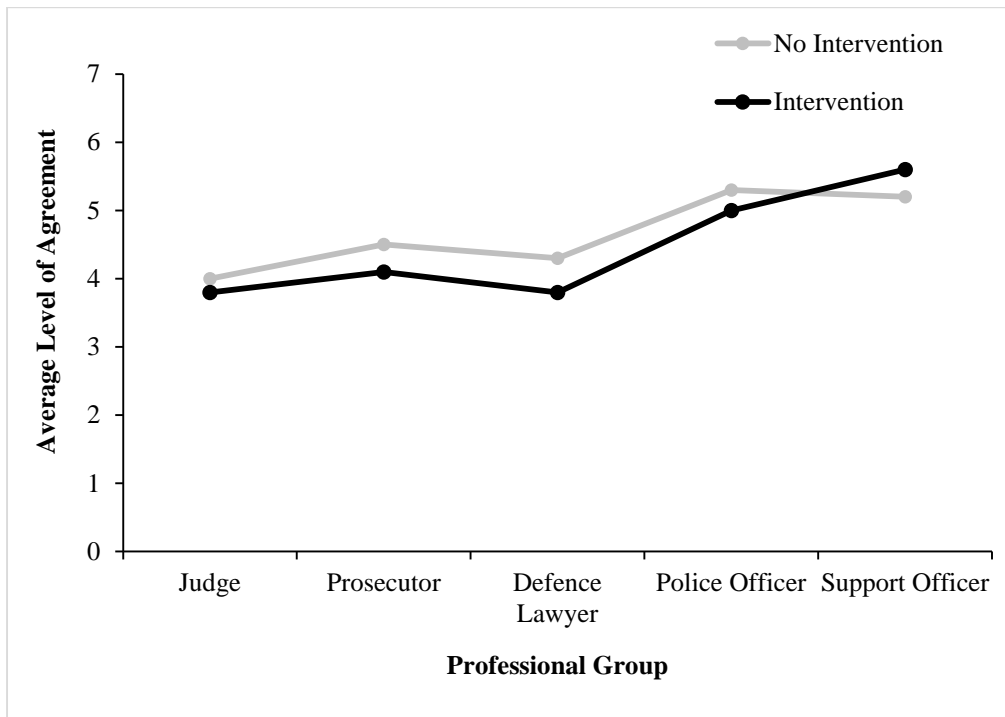


Figure S3.14. Professional’s agreement with the statement “The cross-examination reduced the credibility of the witness,” by complainant age.

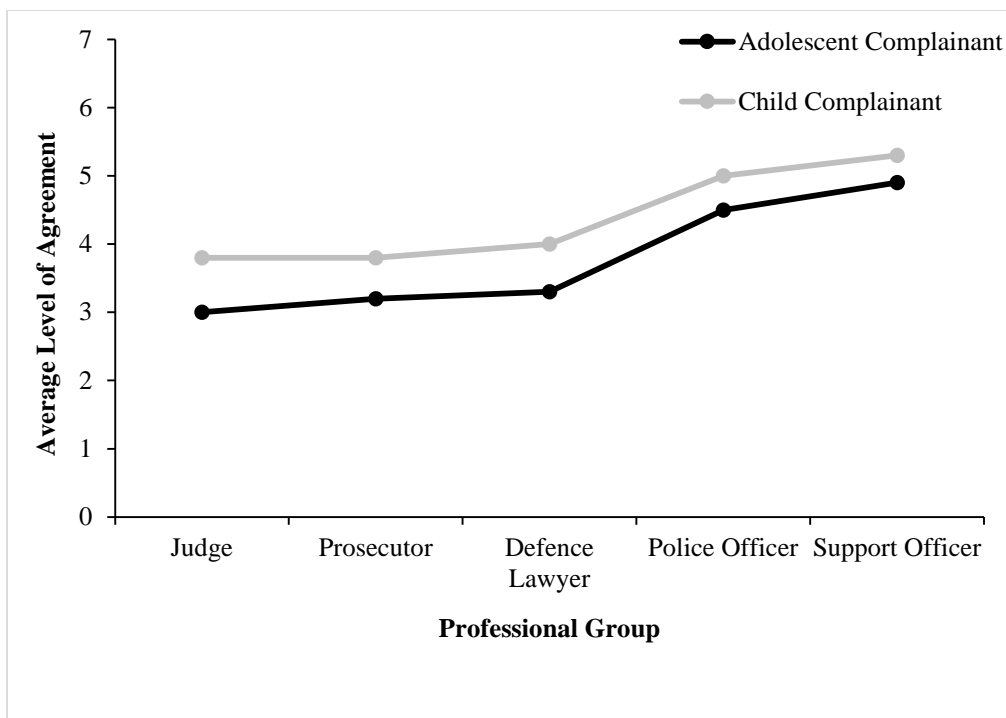


Figure S3.15. Professional’s agreement with the statement “The cross-examination reduced the credibility of the witness,” by question type.

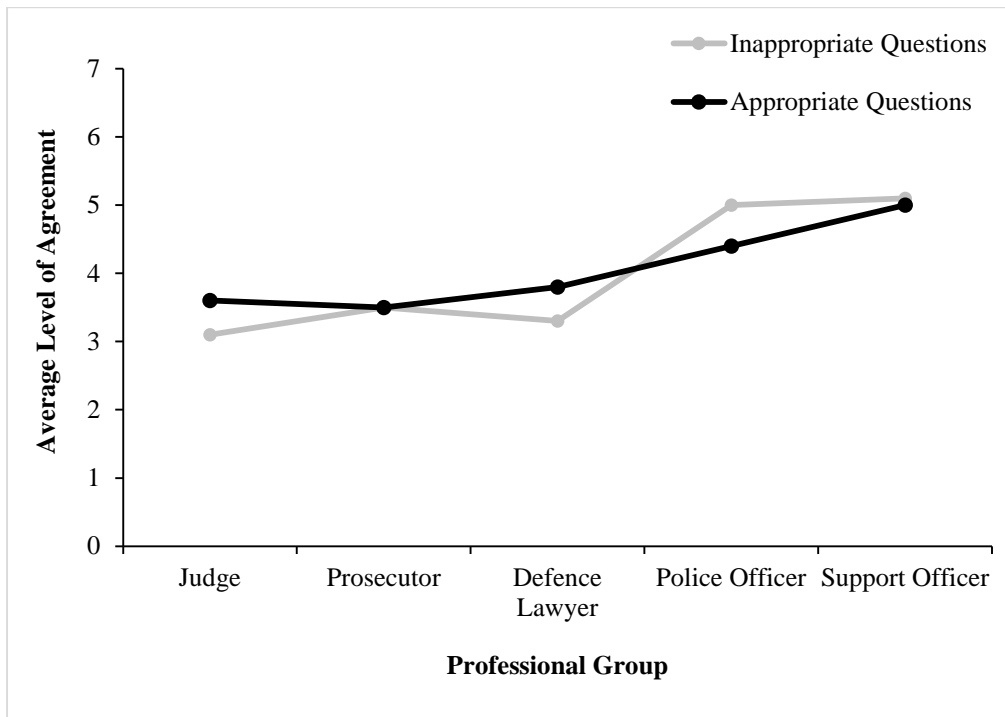


Figure S3.16. Professional’s agreement with the statement “The cross-examination reduced the credibility of the witness,” by judicial intervention condition.

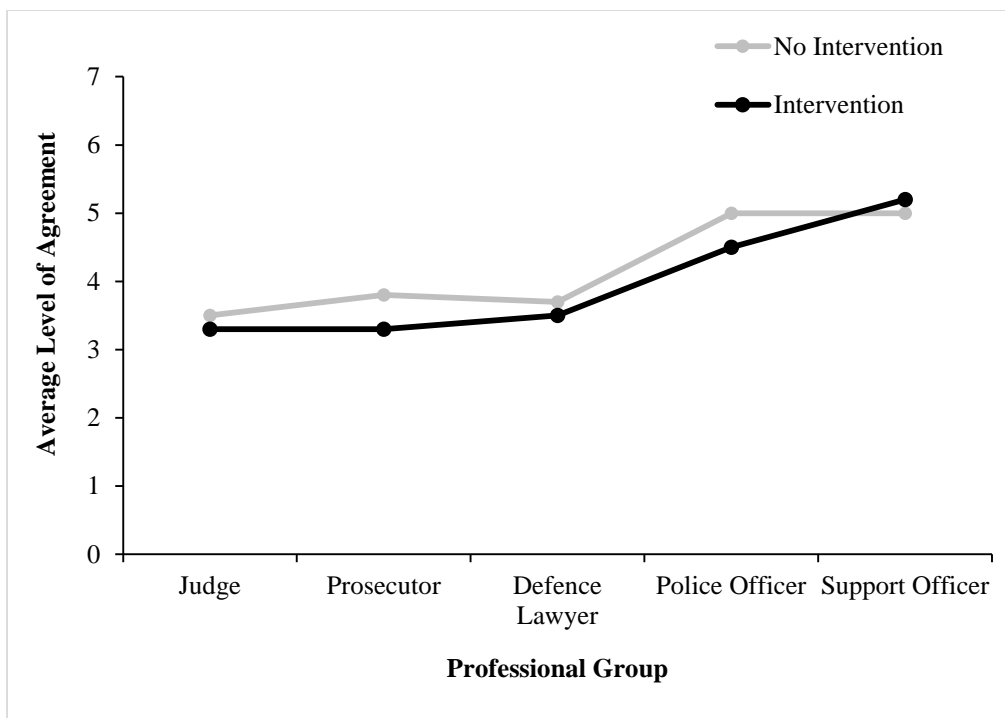


Figure S3.17. Professional’s agreement with the statement “The cross-examination reduced the certainty of the witness,” by complainant age.

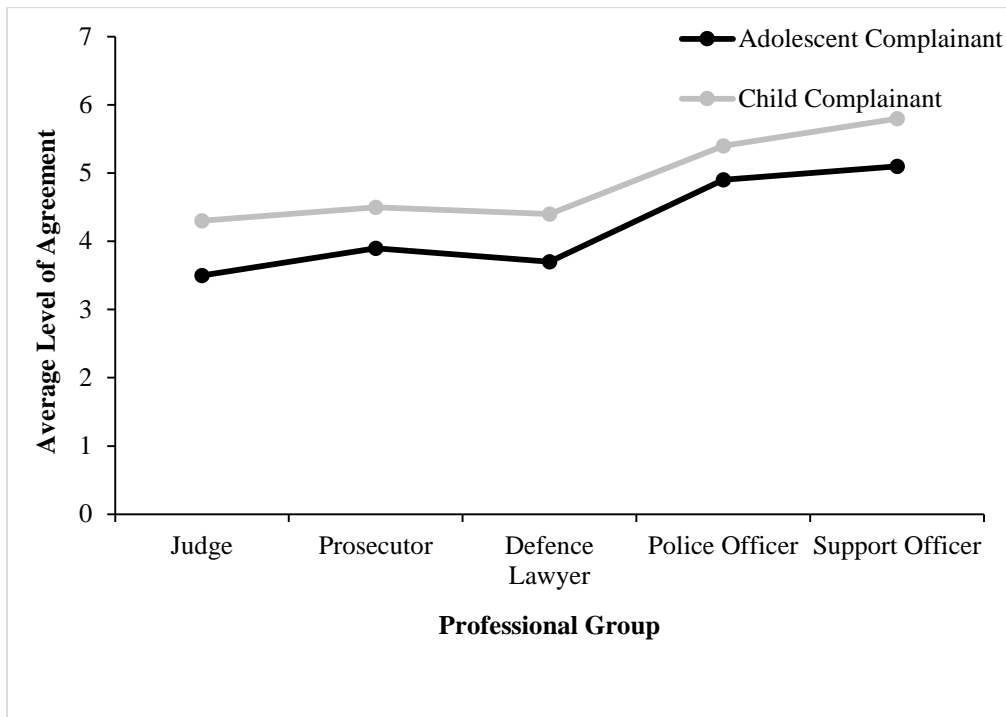


Figure S3.18. Professional’s agreement with the statement “The cross-examination reduced the reliability of the witness,” by complainant age.

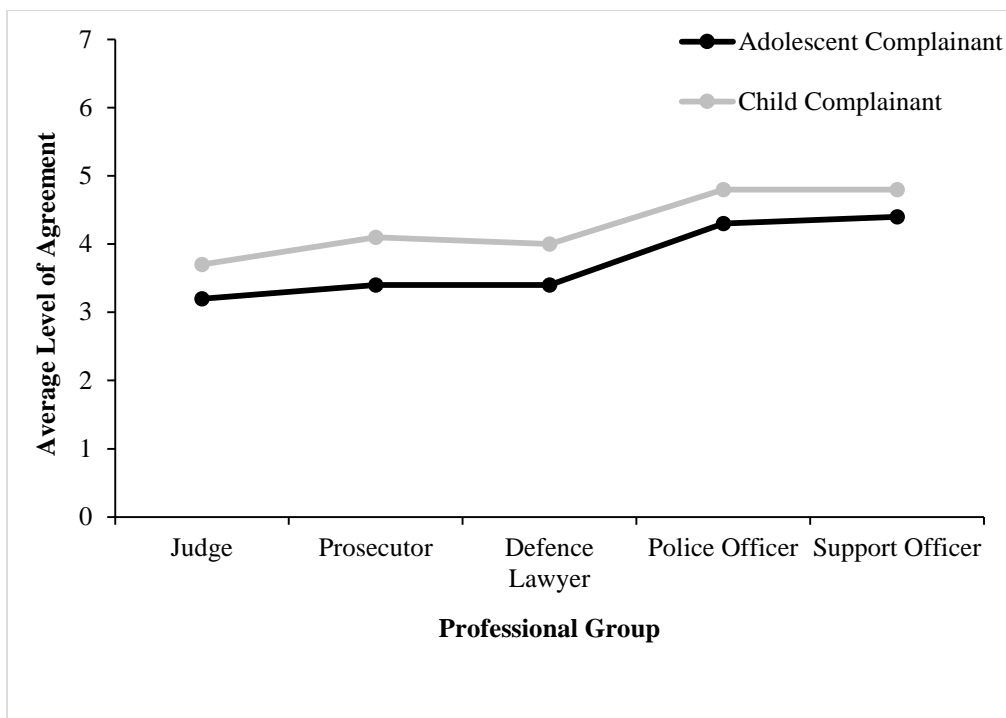


Figure S3.18. Professional’s agreement with the statement “The cross-examination reduced the reliability of the witness,” by complainant age.

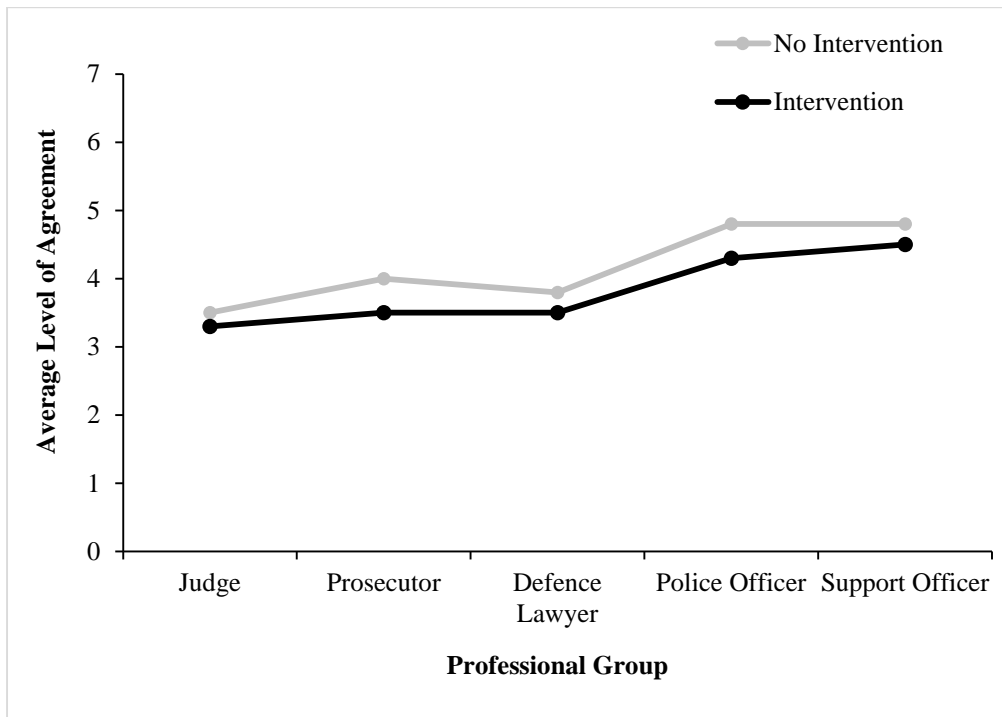


Figure S3.20. Professional’s agreement with the statement “The cross-examination weakened the account,” by complainant age.

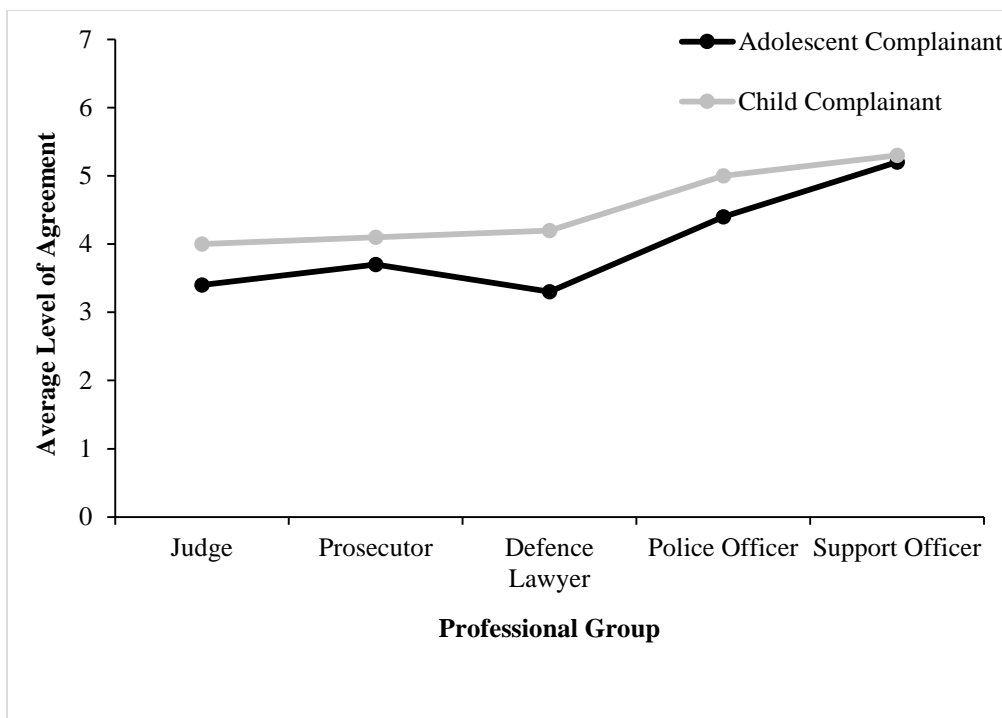


Figure S3.21. Professional’s agreement with the statement “The cross-examination weakened the account,” by judicial intervention condition.

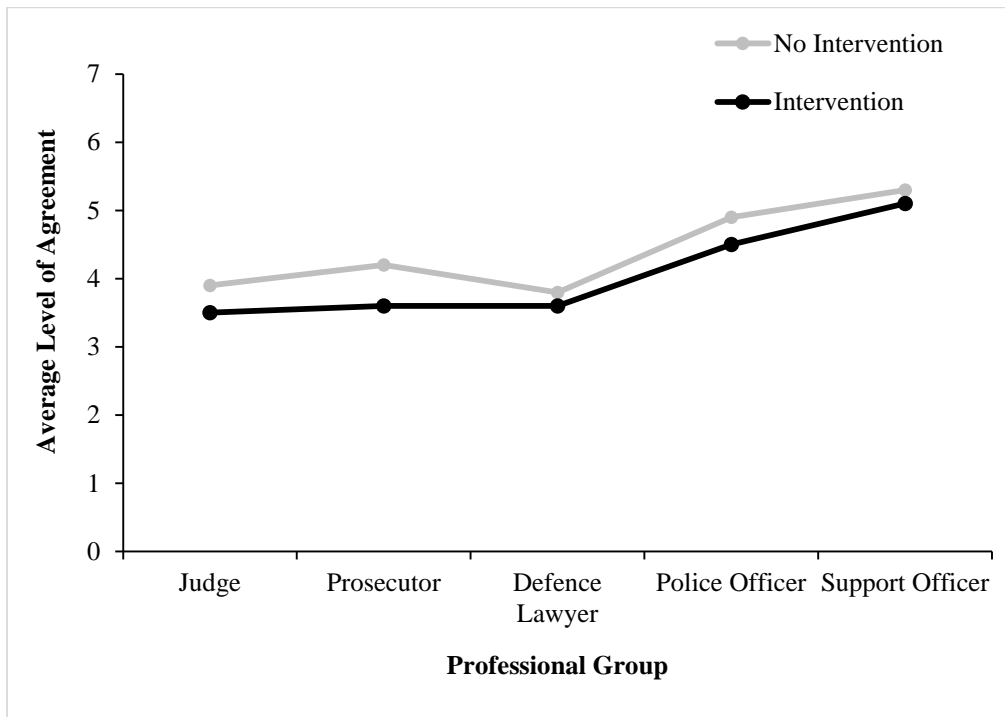


Figure S3.22. Professional’s agreement with the statement “The cross-examination strengthened the defence,” by complainant age.

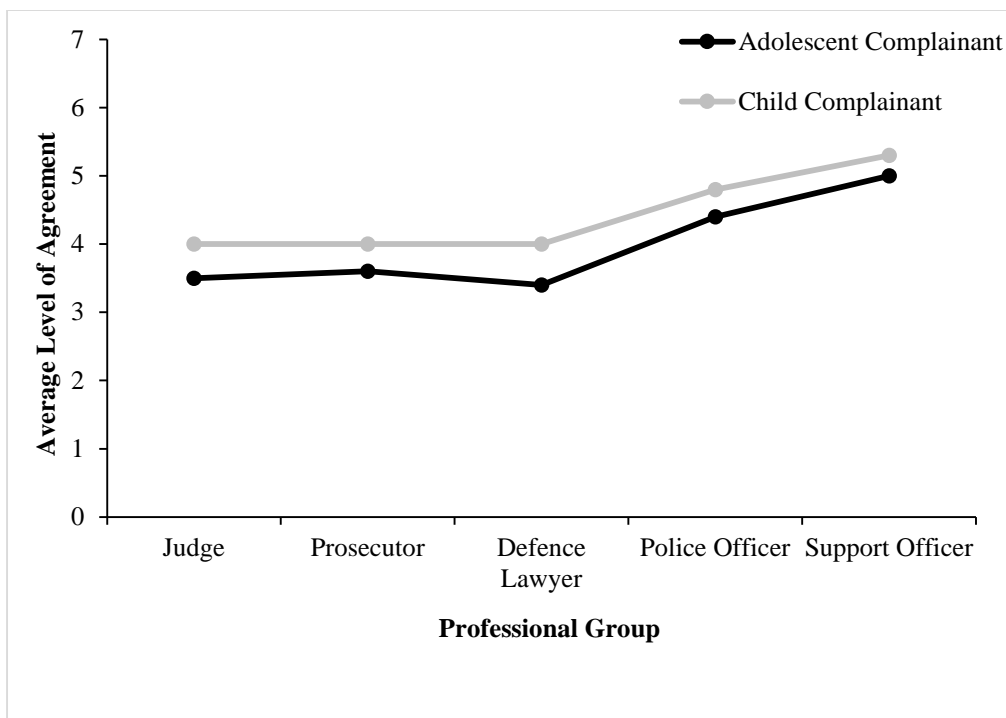


Figure S3.23 The CCTV cross-examination strengthened the defence. Estimated agreement means (averages) by judicial intervention and professional role

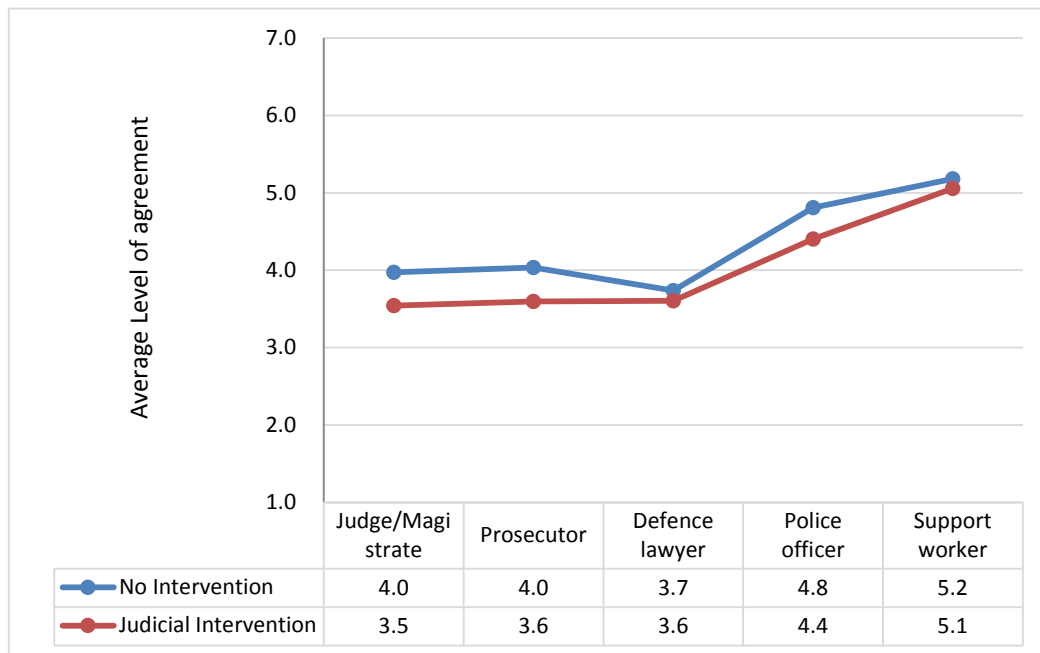


Figure S3.24. Professional’s agreement with the statement “The judge was considerate of the complainant,” by complainant age.

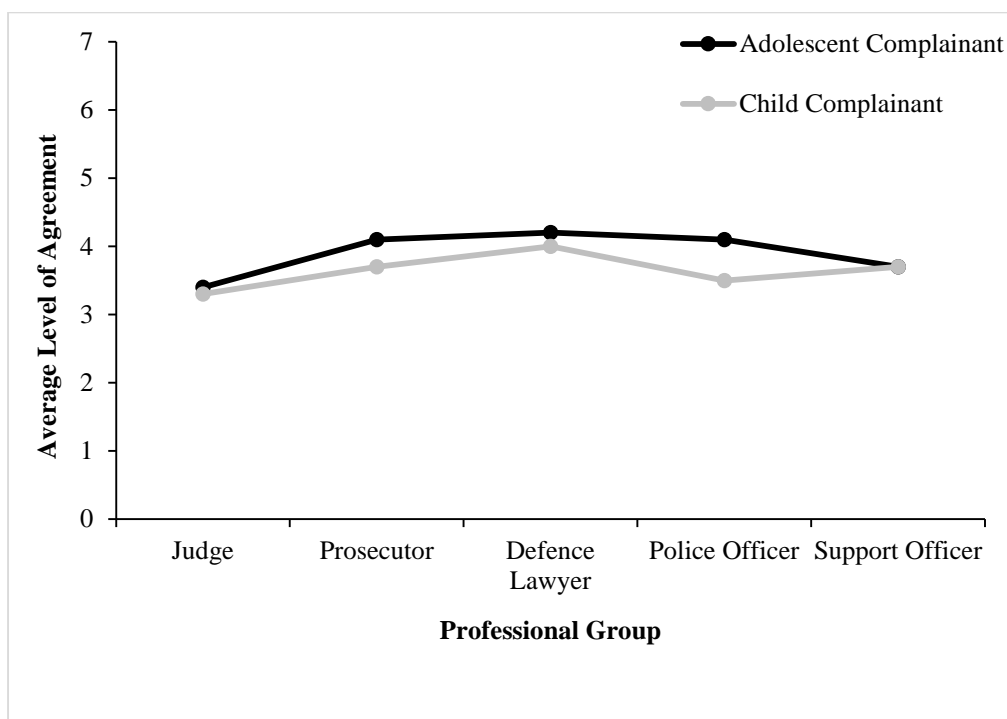


Figure S3.25. Professional’s agreement with the statement “The judge was considerate of the complainant,” by question type.

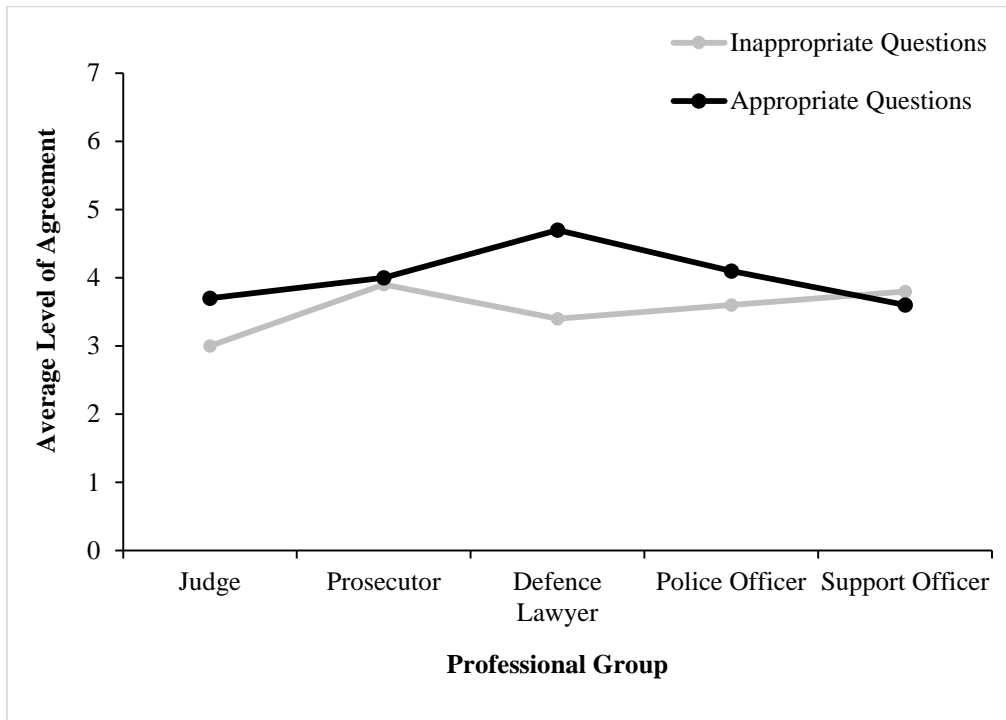


Figure S3.26. Professional’s agreement with the statement “The judge was considerate of the complainant,” by judicial intervention condition.

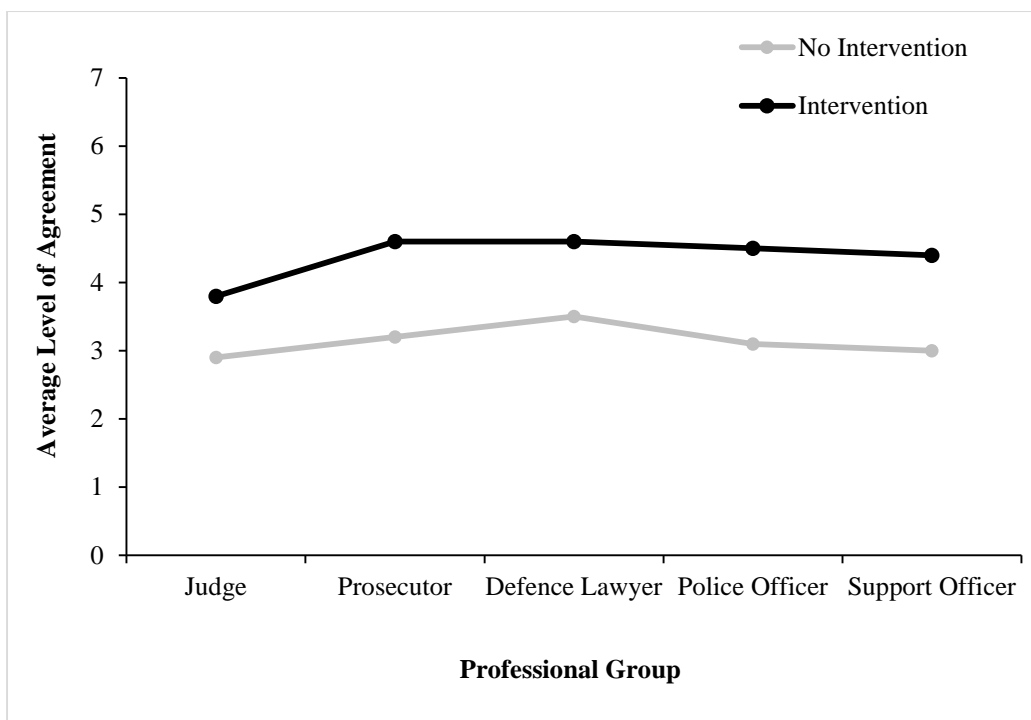


Figure S3.27. Professional's agreement with the statement "The judge was considerate of the defendant," by judicial intervention condition.

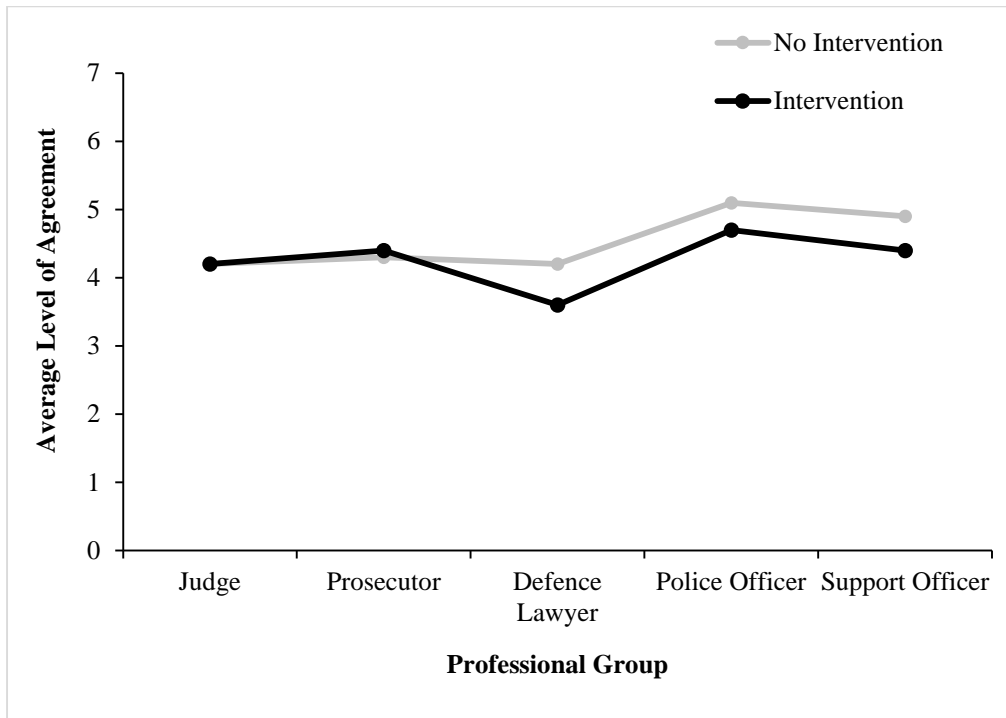


Figure S3.28. Frequency of professional's opinion of judicial partiality.

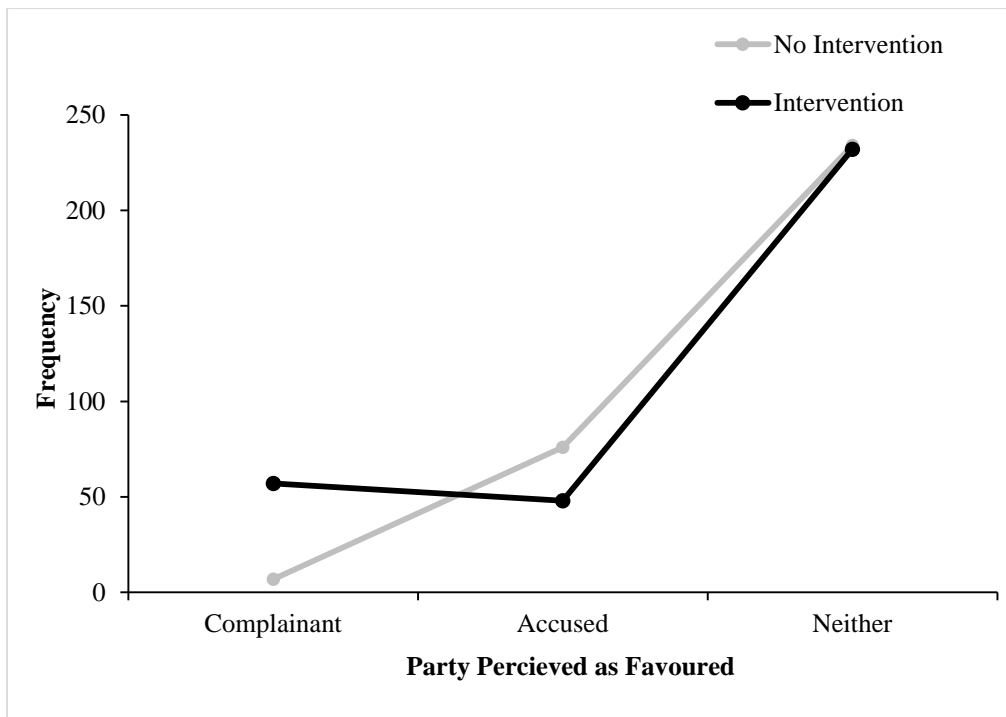
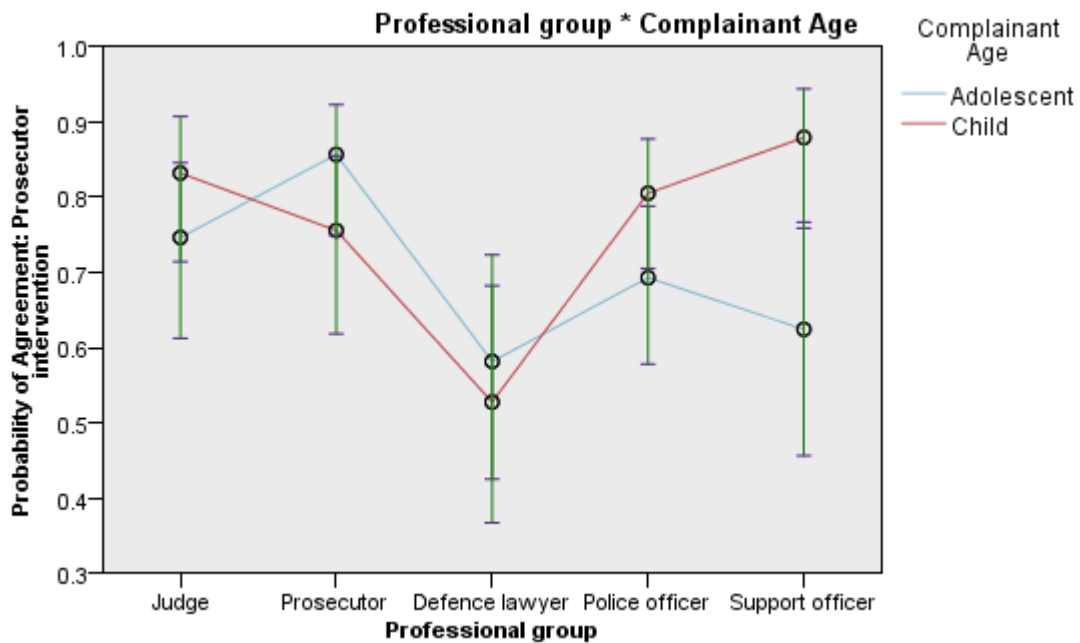


Figure S3.29. The probability of professionals agreeing that the prosecutor should have intervened, by complainant age.



Figure S3.30. The probability of professionals agreeing that the prosecutor should have intervened, by complainant age.



Supplementary Materials 3.2

Experimental Vignettes

Case 1

Suppose that Amy, who is 10 years old, has given evidence-in-chief in the criminal trial against the accused, Mr Cormac, her schoolteacher, alleging that Mr Cormac sexually abused her in the classroom when she was 9 years old.

Please read the following excerpt from the cross-examination of the complainant conducted via CCTV.

Press CONTINUE.

Judge: Amy, the lawyer for Mr Cormac is going to ask you some questions. Is the witness ready to answer the questions?

Sheriff: Yes, your Honour.

Defence: Now Amy, you told the court earlier today that the first incident was in September 2013.

Amy: Just before the school holidays. It must have been in September.

Defence: Do you accept Amy that you told the police during your first interview with them that the first incident with my client happened in August?

Amy: Possibly. It is –

Defence: Now just stop there. When you were interviewed by the police you said “In August 2013, Mr Cormac pulled my shorts down and started touching me on my private parts. I was crying and asking him to stop but he didn’t.” Did you not?

Amy: I think so.

Defence: Wasn’t it that my client was helping you change your clothes, which you mistook for touching your private parts?

Amy: He asked me to pull my pants down.

Defence: The reason you were crying because you had wet yourself, hadn’t you?

Amy: I....um

Defence: You’re confused about what happened and when it happened. Are you not?

Amy: It did happen.

Defence: You never told your parents anything about what you say my client was doing about the touching matter, is that not correct?

Amy: No, I didn’t.

Defence: I put it to you that you didn’t say anything because you were embarrassed to speak about wetting yourself.

Amy: No... no that’s not right.

Defence: You can’t guarantee that you are not confused about the incident.

Amy: Um... I don’t -

Judge: Excuse me, counsel, but that question has been asked and answered. Kindly treat the witness with more respect. Please move on to another topic.

Defence: Yes, Your Honour

Case 2

Suppose that Mark, who is 16 years old, has given evidence-in-chief in the criminal trial against the accused, Mr Dodson his priest, alleging that Mr Dodson sexually abused him in the church when he was 9 years old.

Please read the following excerpt of cross-examination of the complainant conducted via CCTV.

Press CONTINUE

Judge: Now Mark, the lawyer for Mr Dodson will ask you some questions. You may proceed counsel.

Defence: Mark, I heard that after church on Sundays, Mr Dodson would take you into the storage room, unzip his pants and push your head down to his crotch. Is that true?

Mark: Um... Yes.

Defence: Do you remember talking to the police at the police station?

Mark: Yes.

Defence: You told the police that Mr Dodson opened his pants. Is that true?

Mark: Maybe. He did –

Defence: And you told the police that he put your hand on his penis?

Mark: I think so...

Defence: Did you ask him to stop?

Mark: He told me that God teaches us to love each other and he loved me and this was how you showed love.

Defence: You never told your parents what Mr Dodson was doing. Is that true?

Mark: He said it was our secret.

Defence: Nothing happened with Mr Dodson. Is that correct?

Mark: It did happen.

Defence: Did he push your mouth over his penis?

Mark: Um...I.

Defence: Do you like Mr Dodson, Mark?

Mark: Not really. He was never very nice to me.

Defence: So you made up this story about him?

Mark: No... no that's not right.

Defence: Were other children at summer school when you went to the storage room with Mr Dodson?

Mark: Yes.

Scenarios:

Scenario A: male, historical (attempted penile-oral penetration), appropriate, no judicial intervention

Scenario B: female, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention

Scenario C: male, contemporary (non-penetrative physical contact), appropriate, no judicial intervention

Scenario D: female, historical (attempted penile-oral penetration), inappropriate, no judicial intervention

Scenario E: male, historical (attempted penile-oral penetration), inappropriate, no judicial intervention

Scenario F: female, contemporary (non-penetrative physical contact), appropriate, no judicial intervention

Scenario G: male, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention

Scenario H: female, historical (attempted penile-oral penetration), appropriate, no judicial intervention

Scenario I: male, historical (attempted penile-oral penetration), appropriate, judicial intervention

Scenario J: female, contemporary (non-penetrative physical contact), inappropriate, judicial intervention

Scenario K: male, contemporary (non-penetrative physical contact), appropriate, judicial intervention

Scenario L: female, historical (attempted penile-oral penetration), inappropriate, judicial intervention

Scenario M: male, historical (attempted penile-oral penetration), inappropriate, judicial intervention

Scenario N: female, contemporary (non-penetrative physical contact), appropriate, judicial intervention

Scenario O: male, contemporary (non-penetrative physical contact), inappropriate, judicial intervention

Scenario P: female, historical (attempted penile-oral penetration), appropriate, judicial intervention

How scenarios were presented:

1. male, historical (attempted penile-oral penetration), appropriate, no judicial intervention; female, contemporary (non-penetrative physical contact), inappropriate judicial intervention (A;J)
2. male, contemporary (non-penetrative physical contact), appropriate, no judicial intervention; female, historical (attempted penile-oral penetration), inappropriate judicial intervention (C;L)
3. male, historical (attempted penile-oral penetration), inappropriate, no judicial intervention; female, contemporary (non-penetrative physical contact), appropriate, judicial intervention (E;N)
4. male, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention; female, historical (attempted penile-oral penetration), appropriate, judicial intervention (G;P)
5. female, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention; male, historical (attempted penile-oral penetration), appropriate, judicial intervention (B;I)
6. female, historical (attempted penile-oral penetration), inappropriate, no judicial intervention; male, contemporary (non-penetrative physical contact), appropriate, judicial intervention (D;K)
7. female, contemporary (non-penetrative physical contact), appropriate, no judicial intervention; male, historical (attempted penile-oral penetration), inappropriate, judicial intervention (F;M)
8. female, historical (attempted penile-oral penetration), appropriate, no judicial intervention; male, contemporary (non-penetrative physical contact), inappropriate, judicial intervention (H;O)

9. male, historical (attempted penile-oral penetration), appropriate, judicial intervention; female, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention (I;B)
10. male, contemporary (non-penetrative physical contact), appropriate, judicial intervention; female, historical (attempted penile-oral penetration), inappropriate, no judicial intervention (K;D)
11. male, historical (attempted penile-oral penetration), inappropriate, judicial intervention; female, contemporary (non-penetrative physical contact), appropriate, no judicial intervention (M;F)
12. male, contemporary (non-penetrative physical contact), inappropriate, judicial intervention; female, historical (attempted penile-oral penetration), appropriate, no judicial intervention (O;H)
13. female, contemporary (non-penetrative physical contact), inappropriate, judicial intervention; male, historical (attempted penile-oral penetration), appropriate, no judicial intervention (J;A)
14. female, historical (attempted penile-oral penetration), inappropriate, judicial intervention; male, contemporary (non-penetrative physical contact), appropriate, no judicial intervention (L;C)
15. female, contemporary (non-penetrative physical contact), appropriate, judicial intervention; male, historical (attempted penile-oral penetration), inappropriate, no judicial intervention (N;E)
16. female, historical (attempted penile-oral penetration), appropriate, judicial intervention; male, contemporary (non-penetrative physical contact), inappropriate, no judicial intervention (P;G)

Supplementary Materials 4.1 – 4.9

Supplementary Material 4.1: File-Keeping Practices across Jurisdictions (NSW, VIC, WA)

4.1 Introduction

a. New South Wales

In NSW, CSA cases are allocated to any DPP lawyer, along with a Witness Assistance Service (WAS) professional. At first instance, depending on the nature of the case, either a DPP lawyer or staff member from the WAS may communicate the complainant. Both the DPP and WAS work as a team to guide child complainants through the pre-trial and trial processes. Although it is best practice for a senior lawyer to initiate contact with the complainant, this does not always happen for various reasons. Typically, a DPP lawyer or Trial Advocate will brief a complainant on legal issues and expectations, as well as “proof” them to give evidence. Most children’s evidence is video- and audio-recorded by the police as evidence-in-chief, and this pre-recorded evidence is then played in court. Cross-examination and re-examination of child complainants is usually conducted live in court via CCTV from either a remote witness facility or a remote room on court premises.

Witness Assistance Service

Witness Assistance Service officers are social workers, psychologists or counsellors who provide a range of services to complainants and witnesses. They prepare children to testify in court, facilitate conferences between complainants and their lawyers, offer support through the trial process and ensure complainants are prepared to give evidence. The WAS officers consult with complainants about whether they wish to give evidence in court in person or via CCTV from a remote facility. Historically, the DPP lawyers have not always been satisfied with this arrangement.

b. Victoria

In VIC, after cases are committed for trial at a County Court, a Special Hearing is conducted attended by counsel for the prosecution and the defence to pre-record the evidence of a child complainant (under the age of 14 years), either on a date before trial or at the outset of the trial during the period while a jury is empanelled. The pre-recorded evidence is played at trial. The Victorian DPP have a Director’s Policy on Visual Audio-Recorded Evidence (VARE). A VARE is used to tape statements made by a child complainant, which become the evidence-in-chief of that witness. A Remote Witness Facility (RWF) is the default location for recording

of evidence. Complainants can, however, choose to attend court in person if they wish. The team of Child Witness Service (CWS), Prosecution and Special Sex Offender Unit (SSOU) personnel discuss circumstances in which a complainant does not want to give evidence from a RWF. Children aged 14 years and over give their evidence live via CCTV from a RWF, typically one based at the CWS facility, or the Melbourne DPP premises that are located some distance away from the courts.

Prosecution team: Special Sex Offenders Unit (SSOU)

A Managing or Deputy Special Sex Offender Unit lawyer assesses all CSA cases. Complainants/witnesses are referred to the Child Witness Service and an SSOU solicitor. The SSOU, a police informant and a representative from CWS have primary contact with child complainants/witnesses. The prosecutor does not have contact with the child complainant(s) until the trial, and usually takes charge of the case briefs 4-6 weeks before the scheduled trial date.

Child Witness Support (CWS)

The Child Witness Support staff sometimes become involved in CSA matters before they are referred to the DPP, however all matters related to offences against children are referred to CWS as soon as they are transmitted to the DPP by the police. Within the CWS, a Child Complainant Support worker obtains consent from the child complainant's parents/guardians to communicate with the complainant. The CWS provide court orientation visits, explain court procedures and the arrangements for giving evidence, and provide support staff to work with children who will give evidence. The CWS service is not an evidentiary service, and does not proof witnesses, but provides practical support and age-appropriate guidance to complainants (such as how to ask for a break when providing a statement). Their duties include preparing complainant/witnesses psychologically and emotionally to give evidence, and providing self-awareness and anger management training. In addition, they explain proceedings, offer post-trial debriefing, and support complainants when they attend meetings with DPP lawyers.

c. Western Australia

In WA, under the WA Evidence Act, complainants and witnesses are declared 'special witnesses' after application by the DPP. All 'special witnesses' give evidence via CCTV from a remote location. In WA, 90% of sexual abuse complainants receive 'special witness' status, however complainants can choose to give evidence in person in open court if they wish. The DPP applies for the pre-recording of evidence in the case of child witnesses and complainants. Video recordings and transcripts of child complainants' statement(s) to police are provided to the DPP. No such recordings or transcripts need to be provided for persons over 18 years of age. WA legislative reform is likely to specify that video- and audio recorded evidence is admissible as evidence-in-chief in all cases, not only cases of sexual abuse. Forensic

interviews of child complainants of sexual abuse have been pre-recorded since 1992, although these were not admissible in court until 2004.

Prosecution team

Cases of CSA can be allocated to any prosecutor at the WA DPP. The prosecutor is chosen based on seniority and the severity of the case, i.e., senior prosecutors work on the most serious cases. The DPP team that works on a case includes several individuals each with different roles and responsibilities. The managing prosecutor assesses the case based on its complexities, and in some instances, takes the case to trial. The practice manager of the team that takes the case to trial is responsible for assessing the availability of prosecutors and witnesses. File managers (a prosecutor and a paralegal) brief trial counsel for the trial. In-house trial counsel take the case to court, proof witnesses for cross-examination and re-examine witnesses. A law clerk is responsible for summons and witness liaison. Cases may be 'briefed-out' to an external barrister in regional areas. There is no separate witness support unit within the DPP, so this team is responsible for all contact with the complainant(s) and witness(es).

Complainant Support Service/Child Witness Service – Attorney General's Department

Depending on the age of a complainant, the complainant support or child witness service will make contact with the witness/complainant to provide assistance with court processes and preparation, as well as provide a support person for the complainant when giving evidence. This unit also helps complainants to prepare their (voluntary) complainant impact statement.

4.1.2 Qualitative Analyses of File-Keeping Practices across Jurisdictions

4.1.2.1 Record-keeping practices across jurisdictions

a. New South Wales

Most files in the study sample from New South Wales were rated as adequately organised (57.9 per cent, $n = 11$), close to one third were rated as well organised (31.6 per cent, $n = 6$), and approximately one in every ten files were disorganised (10.5 per cent, $n = 2$). The majority of files were of a medium size, that is, containing multiple files or bundles of documentary materials (68.4 per cent, $n = 13$). A smaller proportion of files were large, containing multiple folders or bundles that together filled a desk or multiple boxes (21.1 per cent, $n = 4$). One file was small, containing a single folder containing a small bundle of documents.¹

¹ File size was not recorded for one NSW case (5.3 per cent).

Most files (57.9 per cent, $n = 11$) were rated as moderate in quality in terms of the accessibility of the materials. Three files (15.8 per cent) were rated as high in quality, due to factors such as superior organisation across multiple bundles of documents (NSW 1106), which were neatly labelled and taped, with clear discrete types of documents within a large set of materials (NSW 1201). One file was rated as poor in quality (5.3 per cent), as the documents were unorganised, and materials were inconsistently tabbed across multiple bundles of documents (NSW 1104). Inconsistencies in document organisation and the overall quality and accessibility of case file materials may be attributable to the lack of adherence to any set of guidelines regarding a specified record keeping system.

b. Victoria

Of the twenty files reviewed in VIC, the majority were rated as adequately organised (60 per cent, $n = 12$), while one quarter were rated as well organised (25.0 per cent, $n = 5$), and fewer as disorganised (15.0 per cent, $n = 3$). Most files were of a moderate size (45.0 per cent, $n = 9$). Somewhat fewer files were large in volume (40.0 per cent, $n = 8$), while a minority were small (15.0 per cent, $n = 3$). Most files (65.0 per cent, $n = 7$) were of a moderate quality in terms of the accessibility of the materials. Four files (20.0 per cent) rated as of high quality included factors such as a chronological 'map' that summarised important dates and events in the case (VIC 2003), and placement of key prosecution documents at the top of the file providing a clear overview the case status (VIC 2016). The presence of an OPP completion report at the top of the file allowed the researchers to quickly synthesis important case information. Three files were rated as poor in quality due to muddled materials (VIC 2007) and illegible handwritten notes (VIC 2012; VIC 2013).

c. Western Australia

Of the twenty files reviewed in Western Australia, the majority were rated as adequately organised (85 per cent, $n = 17$), while fewer were rated as disorganised (10.0 per cent, $n = 2$), or well organised (5.0 per cent, $n = 1$). A relatively equal proportion of files were moderate in size (45.0 per cent, $n = 9$) or large (35.0 per cent, $n = 7$), while a minority were small (15.0 per cent, $n = 3$) in volume. Western Australian ODPP files were the most predictable in terms of quality, and no files were distinguished for their particular high or low quality. This feature may have been attributable to Western Australian ODPP record- keeping practices, including a requirement in every case to specify how a complainant chose to give evidence.

Supplementary Material 4.2: Coding Protocol for Manual File Reviews across Three Jurisdictions

Table 4.2 Coding protocol for manual file review

Variable name	Description and coding details
FileNo	File ID
Bundle_Mat	Major bundles or groups of materials; 1=Trials transcript; 2=Materials produced under subpoena; 3=Exhibits from trials; 4=Police brief; 5=Prosecutor's file; 6=Court documents; 7=Other
eTranscript	Electronic transcript of complainant's testimony on direct and cross-exam; 0=none; 1=victim; 2=defendant; 3=transcript of the trial; 4=transcript of the trial complete including opening statements and legal arguments, voir dire (specify)
VideoTestVic	Electronic videofiles of the complainant's testimony cases (disk)
ExpertTrans	Transcripts of psychologist's expert testimony and expert written report 0=none; 1=testimony; 2=report; 3=both
ExpertOther	Medical practitioner, DNA & other experts
PreTrialTrans	Transcripts of evidence by pre-trial interviewers of complainant; 0=none, 1=notes; 2=verbatim transcript; 3=audio file; 4=video file
Coder	Initials
State	1=NSW; 2=VIC; 3=WA
Type	1=contemporary; 2=historical
Institution	1=non-institutional; 2=institutional (specify type)
FileAppear	Describe what the file looks like
Defence	1=public defender/legal aid; 2=private; 3=unclear
PreTrialDPP	Handover in managing lawyer. 0= no change; 1 = 1-2 changes; 2= 3-4 changes; 3 = 5 or more changes.
TrialAdvNo	Number of different advocates briefed for trial/hearing? 0= same Crown prosecutor throughout ; 1 – 4; 5+
TrialAdvTyp	Type of lawyer at trial or hearing. 1=police prosecutor; 2=solicitor; 3=barrister; 4=trial advocate
DateChange	
ChangeComments	
VicNo	Number of victims
VicGender	1=male; 2=female; 3=both
VicDOB	Year of birth
VicAgeOff	
VicAgeTrial	
DefGender	1=male; 2=female
DefDOB	Year of birth
DefAgeOff	
DefAgeTrial	
DefTest	Did the defendant testify at trial? 0=no; 1=yes; 2=records unclear.
DefTestComments	Notes about defendant's testimony.
OffenceNo	Number of charges (counts) at trial
Offence	Offence at trial: 0=grooming; 1=exposure to pornography/peeping; 2=attempted exposure; 3=noncontact exposure (exhibiting, masturbating); 4=attempted physical contact; 5=nonpenetrative physical (touching, kissing, forcing to touch him); 6=attempted non-penile penetration; 7=non-penile penetration (oral abuse by offender, digital-vaginal/penile/anal penetration); 8=attempted penile penetration; 9=penile penetration (penile-oral/vaginal/anal); 10=possession of child porn; 11=production of child porn; 12=recording of assault

OffenceDes	Complainant's statement to police
OffenceLoc	Where did the offence take place?
ListDates	Was a list of critical dates provided by ODPP? 0=no;1=partial (specify); 2=all
ListDatesComm	
OffenceDate	Date, write each date
TrialDateStart	
TrialDuration	Number of days
TrialLoc	Location & specific court - incl. change of location
Type	1=LC, 2=DC, 3=SC, 4=CC, 5=MC
LocComm	Comments on location change, reasons, etc
CoOffenders	Number
PoliceReport	Victim disclosure to the police
DisclComments	
DelayComments	
Relationship	1=stranger; 2=acquaintance; 3=former boyfriend; 4=family friend/neighbour; 5=cousin; 6=sibling (step included); 7=teacher/childcare worker/carer; 8=guardian; 9=uncle/aunt; 10=grandparent (step included); 11=stepparent or de facto of mother; 12=parent
ChargeDate	Date when the defendant was charged
VicMemory	complainant memory
VicInconsist	complainant inconsistency
VicCred	complainant credibility
VicConfusion	complainant confusion
VicCogn	cognitive capacity
ConfRec	0=no; 1=yes
ConfRecComm	Conference records for complainant
AlternProced	Consideration of alternative procedures by prosecution 0=no; 1=yes
AlternProcedNotes	Prosecution notes
AlternProcedResp	Write comments, responses by judge, defence, etc
AltMeasuresCourt	1=testimony via CCTV from a remote room on the court premises; 2=testimony via CCTV from a remote room off the court premises; 3=pre-recorded investigative interview. 4=pre-recorded evidence conducted at a preliminary hearing. 5=live testimony from behind a screen. 6=live testimony with the assistance of an intermediary. 7=live testimony with courtroom modifications. 8=questions asked by counsel with intervention by the judge on the appropriateness of the questions as needed; 9=live testimony in the traditional way.
AltMeasuresComments	
VicTestEv	Victim testimony evidence in chief in court? 0=no; 1=yes; 2= unclear
VicTestCross	Victim cross-examination in court; 0=no; 1=yes; 2= unclear
Plea	0=not guilty; 1=guilty; 2=guilty to some counts, NG to others
CaseDisp	0=not proceeded; 1=guilty plea; 2=trial by jury; 3=trial by judge
Verdict	Verdict on all charges 0=not guilty; 1=guilty; 2=guilty to some, NG to others
Appeal	0=no appeal; 1=appeal during trial by defence; 2=appeal during trial by prosecution; 3= appeal posttrial
AppealPretrialComm	Description of the issue (qualitative) and outcome (successful or not)
AppealPosttrial	Appeal: 0=no appeal; 1=appeal during trial by defence; 2=appeal during trial by prosecution; 3=appeal posttrial
AppealOutc	0=not guilty; 1=guilty (posttrial)/outcome
Summary	Description of case allegations, age, disposition, time of assault, etc.

Supplementary Material 4.3: Inter-rater Reliability

Manual coding of the prosecutors' files was conducted by four trained research assistants. To assess inter-rater reliability, a random sample of two contemporary and two historical cases were dual-coded in each jurisdiction. Krippendorff's alpha was used to calculate the inter-rater reliability of the categorical variables. Inter-rater reliability ranged between $\alpha = .59$ and $\alpha = .91$ (Agreement rate: .73-.94) for the categorical variables. The intra-class correlation (ICC) applied to continuous variables ranged from .91 to 1.0. Problematic variables were redefined before coding proceeded. Discrepancies were discussed among the coders until agreement was achieved.

Supplementary Material 4.4: Quantitative Analyses of Non-Institutional Case Files

Four main features of the cases in the study sample were described (a) complainant characteristics; (b) the period of time that lapsed between the alleged offences and the date they were reported to police; (c) the nature of the offences prosecuted; and (d) case dispositions: pleas and verdicts. For these case features, institutional cases were separated from non-institutional cases

4.4.1 Complainant Characteristics

a. New South Wales

Case files pertained to the allegations of 24 complainants. The majority of complainants were female (83.3 per cent, $n = 20$), a minority were male (16.7 per cent, $n = 4$). The complainants' age at the onset of alleged offending ranged from four to 14 years ($M = 10.0$, $SD = 3.3$). Nine (37.5 per cent) complainants alleged that sexual abuse offences persisted for one year or more. The complainants' age at the start of the special hearing or trial ranged from 5 to 59 years ($M = 21.5$, $SD = 13.6$). More than one half of the complainants were children (54.2 per cent, $n = 13$); the remainder were adults (45.8 per cent, $n = 11$).

b. Victoria

Case files pertained to the allegations of 22 complainants. Most complainants were female (90.9 per cent, $n = 20$), two were male (9.1 per cent, $n = 2$). The age of the child complainants at the start of the alleged offences ranged from 7 to 17 years ($M = 12.1$, $SD = 3.1$). Thirteen complainants (59.1 per cent) alleged sexual abuse offences that persisted for one year or

more. The complainants' age at the start of the special hearing or trial ranged from 9 to 40 years ($M = 18.5$, $SD = 6.5$). More than two-thirds of the complainants were children (68.2 per cent $n = 15$), approximately one third were adults (31.8 per cent $n = 7$).

c. Western Australia

Case files pertained to the allegations of 30 complainants, more than in New South Wales and Victoria. The majority of the complainants were female (83.3 per cent, $n = 25$), while fewer were male (16.7 per cent, $n = 5$). The complainants' age at the onset of the alleged offences ranged from 4 to 15 years ($M = 8.8$, $SD = 3.1$). Thirteen complainants (59.1 per cent) alleged that sexual abuse offences persisted for one year or more. The complainants' age at the start of the special hearing or trial ranged from 6 to 31 years ($M = 15.7$, $SD = 6.0$). Approximately two-thirds of the complainants were children (63.3 per cent $n = 19$); one third were adults (33.3 per cent $n = 10$).²

4.4.2 Time Lapse between Alleged Offences and Report to the Police

The time between the date of the alleged first offence and the report of the offending by the complainant to the police was calculated in years. Report to police was operationalised as the date when a complainant first disclosed events to police, and the police report was related to the ODPP case file under review. This strategy was used as in some cases, the complainants reported events to police, but the police reports were not directly relevant to the prosecution. For instance, one complainant (NSW 1206) reported sexual abuse by a family member in 1969, which was litigated and resulted in a wrongful conviction. The complainant came forward in 2004 to clarify the matter, which was litigated a second time by the NSW ODPP. At this stage, the complainant was re-interviewed and police investigations were conducted by a different team of officers. Other cases were reported to police many years before the current prosecution, however, (a) the complainant retracted the initial statements (VIC 2008); (b) the police record could not be located (WA 3004.1); and (c) there was insufficient evidence and the matter was discontinued, only to be re-investigated a decade later (WA 3004.3).

Across states, the time lapse between the alleged first offence and an official report to the police ranged from immediate disclosure to 36 years ($M = 6.6$, $SD = 7.9$). The lapse of time between the first incident and a report to police was used to classify cases as either contemporary or historical cases. Contemporary cases were defined as those where the lapse of time between the alleged events and police disclosure was less than five years. Historical cases were defined as those where an official report to police was provided five years or more after the alleged offence events. Using these definitions, for non-institutional cases, the proportion of contemporary cases exceeded that of historical cases, i.e., two thirds of the

² The age of one complainant (WA 3003.2) at the start of the special hearing or trial was excluded from these analyses as the accused admitted guilt early in the case.

cases (57.9 per cent; $n = 44$) were contemporary, and one third (42.1 per cent; $n = 32$) were historical in nature.

a. New South Wales

The non-institutional cases in the New South Wales sample consisted of nine contemporary and nine historical case files. A total of 13 complainants' reports were contemporary (54.2 per cent), while 11 were historical (45.8 per cent). All contemporaneous reports ($n = 13$) were made by complainants under the age of 18 years (child complainants). On average, contemporary reports were made 1.2 years ($SD = 0.7$), after the alleged offence events, with the lapse between these events and the official police report ranging from immediate disclosure to two years. All historical reports ($n = 11$) were made by complainants over the age of 18 (adult complainants). On average, historical complaints were made 19.6 years ($SD = 8.9$) after the alleged offence events. The lapse of time between these events and the official report to police ranged from seven to 36 years.

b. Victoria

Eleven contemporary and six historical cases comprised the Victorian sample of non-institutional cases. Fourteen complainants' reports were contemporary (63.3 per cent), while eight were historical (57.1 per cent). Most contemporaneous reports were made by child complainants (78.6 per cent, $n = 11$); approximately one fifth were made by adults (21.4 per cent, $n = 3$). Contemporary reports were made, on average, 1.6 years ($SD = 1.3$) after the first alleged offence event, with a lapse of time between that event and the official report to police of ranging from immediate disclosure to four years. Exactly one half of historical reports were made by child complainants ($n = 4$), and the other half by adults ($n = 4$). On average, historical complaints to the police were made 8.8 years ($SD = 3.0$) after the first incident of sexual abuse, with a range from six to 13 years to lodge an official report with the police.

c. Western Australia

Seven contemporary and 11 historical non-institutional case files comprised the study sample in WA. Seventeen complainants' reports were contemporary (56.7 per cent), while 13 were historical (43.3 per cent). Most contemporaneous reports were made by child complainants (94.1 per cent, $n = 16$), while one complainant was an adult (5.9 per cent). On average, contemporary reports were made 1.4 years ($SD = 1.0$) after the alleged offence events, with a lapse of time to report ranging from immediate disclosure to three years. Most historical reports (69.2 per cent, $n = 9$) were made by adults, while a smaller proportion were made by child complainants (30.8 per cent, $n = 4$). On average, historical complaints were reported to the police 11.5 years ($SD = 5.4$) after the offence events, with a range of five to 21 years.

4.4.3 Nature of the Offences Prosecuted

Across states, the number of prosecuted offences against the defendant ranged from one to eight ($M = 2.5$, $SD = 1.4$) in non-institutional cases. Most offences entailed non-penetrative physical contact, such as touching, kissing, or forcing the complainant to touch (76.3 per cent, $n = 58$), followed by non-penile penetration, that is, oral and digital penetration (60.5 per cent, $n = 46$). Vaginal-penile/anal-penile penetration (32.9 per cent, $n = 25$) was charged in almost one third of the claims.

a. New South Wales

The number of prosecuted offences against defendants in NSW ranged from one to five ($M = 2.6$, $SD = 1.2$). Most offences entailed non-penetrative physical contact (79.2 per cent, $n = 19$). The next most common type of offences were non-penile penetration, and penile penetration in equal proportion (58.3 per cent, $n = 14$). Chi-square tests for independence examined the relationship between prosecuted offences and state. The NSW ODPP charged a significantly higher proportion of non-contact exposure offences, such as exhibiting and masturbating than did their counterparts in VIC and WA.³ Further, NSW prosecutors charged a significantly greater proportion of penile penetration offences than did prosecutors in VIC and WA.⁴

b. Victoria

The number of prosecuted offences against defendants in VIC ranged from one to eight ($M = 2.9$, $SD = 1.6$). Most offences entailed non-penile penetration, (68.2 per cent, $n = 15$), followed by non-penetrative physical contact (63.6 per cent, $n = 14$) and penile penetration (27.3 per cent, $n = 6$). VIC was the only State that prosecuted possession and production of child pornography.

c. Western Australia

The number of prosecuted offences against defendants in WA ranged from one to eight ($M = 2.1$, $SD = 1.5$). Most offences entailed non-penetrative physical contact, (83.3 per cent, $n = 25$), followed by non-penile penetration (56.7 per cent, $n = 17$) and exposure of the complainant to child pornography (26.7 per cent, $n = 8$).

Figure 4.3.3.1 provides an overview of prosecuted offences by State for non-institutional cases of child sexual abuse.

³ $\chi^2(2, n = 76) = 6.2, p = .05, V = .28$.

⁴ $\chi^2(2, n = 76) = 10.9, p < .05, V = .38$.

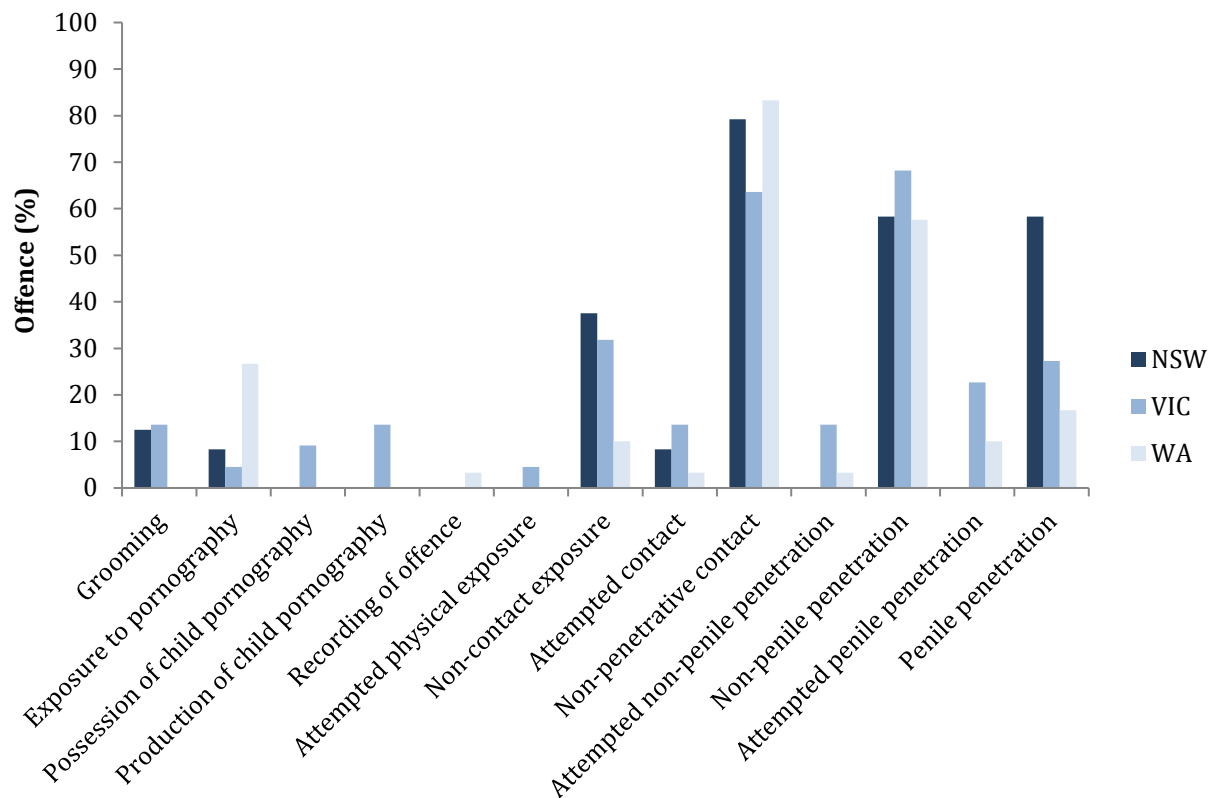


Figure 4.3.1. Non-institutional child sexual abuse offences prosecuted in NSW, VIC, and WA.

Overall, the number of offences prosecuted in each trial against an individual defendant ranged from one to four for claims brought on behalf of complainants who were children at the time of trial ($M = 2.1, SD = 1.0$), and from one to eight for claims brought on behalf of complainants who were adults at the time of trial ($M = 3.2, SD = 1.8$).⁵

A one-way between subjects ANOVA revealed that significantly more offences were prosecuted on behalf of complainants who were adults than children at the time of trial.⁶ Chi-square tests for independence⁷ were performed to examine the relationship between the type of prosecuted offences and the age group of the complainants. The proportions of non-penile penetrative offences⁸ and of penile penetrative⁹ offences were significantly greater for complainants who were adult than children. Figure 4.3.3.2 provides an overview of the types

⁵ One complainant was excluded from the analyses as the defendant admitted guilt prior to the time that police concluded the investigation, WA 3002.2.

⁶ $F(1, 73) = 12.9, p < .05$.

⁷ Conducted with Yates Continuity Correction necessary for 2x2 tables.

⁸ $\chi^2(1, n = 75) = 8.7, p < .05, V = .37$.

⁹ $\chi^2(1, n = 75) = 5.1, p < .05, V = .29$.

of offences prosecuted in non-institutional cases on behalf of complainants who were children versus adults at the time of trial.

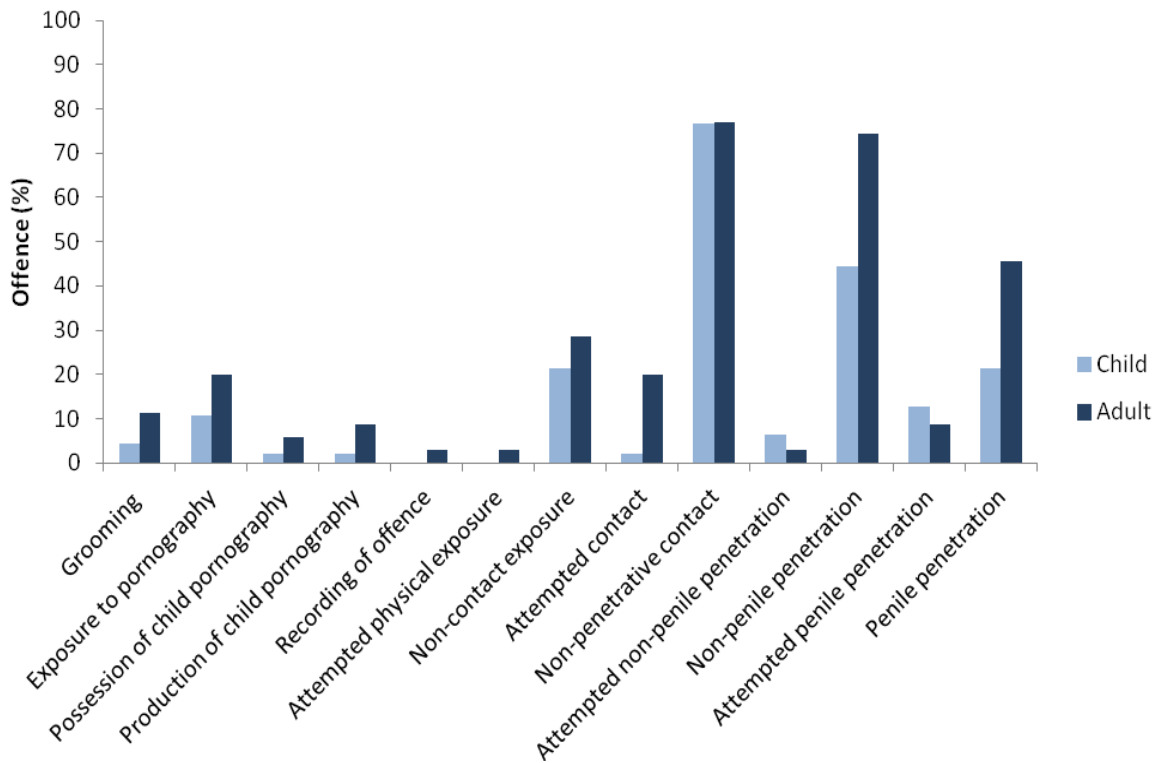


Figure 4.3.3.2. Non-institutional child sexual abuse offences prosecuted on behalf of complainants who were children versus adults at the time of trial.

Table 4.3.3.1 below provides a detailed overview of the types of child sexual abuse offences prosecuted on behalf of complainants who were children versus adults at the time of trial, by State.

Table 4.3.3.1. Non-institutional child sexual abuse offences prosecuted on behalf of complainants who were children versus adults at the time of trial in New South Wales, Victoria, and Western Australia (%).

Offence (%)	NSW		VIC		WA	
	Child	Adult	Child	Adult	Child	Adult
Grooming		27.3	15.4	11.1		
Exposure to pornography	15.4		7.7		10.0	50.0
Possession of child pornography			7.7	11.1		
Production of child pornography			7.7	22.2		
Recording of offence						10.0
Attempted physical exposure				11.1		
Non-contact exposure	38.5	36.4	30.8	33.3	5.3	20.0
Attempted contact		18.2	7.7	22.2		10.0
Non-penetrative contact	69.2	90.9	69.2	55.6	84.2	80.0
Attempted non-penile penetration			23.1			10.0
Non-penile penetration	38.5	81.8	61.5	77.8	42.1	90.0
Attempted penile penetration			30.8	11.1	5.3	20.0
Penile penetration	38.5	81.8	23.1	33.3	10.5	30.0

Note: Blank cells indicate that no charges were prosecuted for the age group in that State.

4.4.4 Pleas, Method of Case Disposition, and Trial Verdicts

In non-institutional cases of child sexual abuse, most defendants entered a plea of not guilty (89.2 per cent, $n = 68$). A minority of defendants entered a guilty plea (3.9 per cent, $n = 3$), or plead guilty to some charges but not others (2.6 per cent, $n = 2$).¹⁰

Across States, most cases culminated in a trial by jury (81.6 per cent, $n = 62$), followed by judge alone trials (9.7 per cent, $n = 7$), discontinued charges (6.6 per cent, $n = 5$), or the guilty plea of the defendant (2.6 per cent, $n = 2$). Of the cases that went to trial, most resulted in acquittals (a verdict that the defendant was not guilty was recorded in 38.2 per cent, $n = 29$), followed by verdicts of guilty with respect to some charges and not guilty with respect to other charges (30.3 per cent, $n = 23$).

Overall, the conviction rate by defendant in the sample was just under one fifth (19.7 per cent, $n = 15$). Trial verdicts were unavailable for charges relating to the cases of nine

¹⁰ In one case (VIC 2017) in which charges were brought against three defendants, two defendants pleaded guilty to all charges, while the third defendant was found not guilty. The data for two defendants were excluded from analyses, as those charges were discontinued (VIC 2011.2). One case in New South Wales was excluded as it was on appeal at the time of data collection (NSW 1109).

complainants (11.8 per cent), due to: (a) a pending appeal; (b) the defendant entered a guilty plea after the trial commenced; or (c) no record of the verdict was available in the file. Table 4.4.4.1 provides a comparison of rates of pleas, overall methods of case disposition, and verdicts for non-institutional cases across States for adult and child complainants.

Table 4.4.4.1. Pleas, method of disposition of cases, and trial verdicts in non-institutional cases of child sexual abuse in NSW, VIC, and WA for child versus adult complainants (%).

	NSW		VIC		WA	
	Child	Adult	Child	Adult	Child	Adult
Plea						
Guilty		9.1				10.0
Not guilty	92.3	90.9	86.7	85.7	100	80.0
Guilty of some charges, not guilty of others			13.3			10.0
Missing	7.7			14.3		
Case disposition						
Jury verdict	61.5	90.9	73.3	85.7	89.5	100
Judge alone trial	38.5		6.7		5.3	
Guilty plea		9.1				
Discontinued			20.0	14.3	5.3	
Missing						
Verdict at trial						
Guilty		27.3	6.7		31.6	50.0
Not guilty	61.5	27.3	26.7	57.1	52.6	
Guilty of some charges, not guilty of others	30.8	18.2	46.7	28.6	15.8	50.0
Missing	7.7	27.2	19.9	14.3		

Note: Blank cells indicate that no charges were prosecuted in that age group and State.

4.4.5 Trial by Jury versus Judge Alone

Of the non-institutional cases of child sexual abuse that proceeded to trial, most cases were resolved by means of a jury trial (89.6 per cent, $n = 60$), while a small proportion, fewer than one in every ten cases, were tried by a judge alone (9.0 per cent, $n = 6$). Notably, only cases involving complainants who were children at the time of trial proceeded to a trial by judge alone.

The incidence of guilty pleas by defendants after the commencement of the trial was very low, i.e., one case in the study sample (1.4 per cent; NSW 1206).

Figure 4.5.1 provides a comparison the method of disposition at trial of non-institutional cases of child sexual abuse for complainants who were children versus adults at the time of trial, across States.

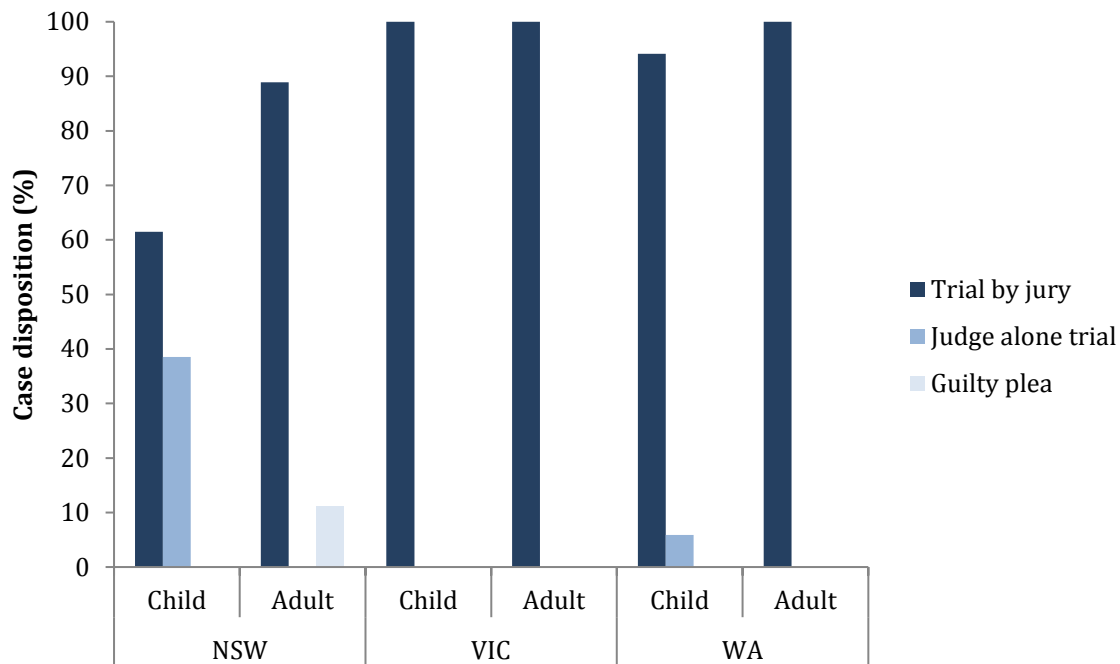


Figure 4.5.1. Method of case disposition at trial for complainants who were children versus adults at the time of trial, in NSW, VIC, and WA (%).

a. New South Wales

Most complainants' cases were tried by a jury, (72.7 per cent, $n = 16$), followed by judge alone (22.7 per cent, $n = 5$). In one case, the defendant entered a guilty plea after the trial commenced (4.5 per cent, $n = 1$). Approximately three-fifths of the cases brought on behalf of child complainants were tried by a jury (61.5 per cent, $n = 8$); close to two-fifths of cases on behalf of child complainants were tried by a judge alone (38.5 per cent, $n = 5$). In all but one case on behalf of adult complainants, a jury trial was held (88.9 per cent, $n = 8$). In the case tried by a judge alone, the defendant pled guilty during the trial (11.1 per cent).

No records reflecting the consideration of alternate measures for the evidence of the complainant were found in files pertaining to one child complainant (NSW 1109; 12.5 per cent) and one adult complainant (NSW 1210; 12.5 per cent) in cases that proceeded to a trial by jury.

Due to the small proportion of judge alone trials in New South Wales, consideration afforded to uses of alternate measures for the evidence of the complainants in all of those cases is described below.

- NSW case 1101 involved an exceptionally vulnerable female child complainant who had alleged that her father exposed himself, inappropriately touched her breasts, and committed digital-penile and oral-penile penetration several times per week when she was in his care. The complainant was suicidal, had been placed in a youth mental health facility, and placed in foster care on multiple occasions. Concerns by the trial advocate about the complainant's psychological well-being referred to psychological reports detailing the complainant's severe anxiety when discussing the critical events in the case. The WAS officer believed that that the trial process would be traumatic in light of the complainant's existing stress response, and genuine fear that the accused would kill her. The trial was continued three times at the request of the complainant, and the case proceeded to conclusion on the prosecutor's fourth attempt. The complainant initially sought to give evidence in person in court, but was too traumatised to watch her own video-recorded police interviews. The trial advocate noted that this would have made it harder for her to give evidence. The complainant ran away from the witness room, stating that she had nowhere to go once her evidence was presented. At trial, four pre-recorded videotaped police interviews of the complainant were played, and she gave further evidence-in-chief and was cross-examined via CCTV. In light of the multiple pre-recorded interviews and the large volume of subpoenaed material about which further questioning was sought, the complainant's appearance via CCTV was discontinued, and the complainant was called to provide further evidence-in-chief and cross examination in person in court (NSW 1101).
- Case NSW 1102 involved the alleged sexual assault of a female complainant by a member of a biker gang. The complainant expressed concern for her own safety and that of her family. The prosecutor submitted that the matter could be prosecuted only in a secure location where the accused would not be recognised. As a consequence, the trial venue was changed multiple times, and ultimately the case was tried by a judge alone. Conference notes reflected that the prosecutor discussed alternate measures with the complainant and whether she preferred to give evidence via CCTV or in person. At the scheduled time of the trial, the CCTV facilities were unavailable as they were booked for another matter. The case was continued until the next day when the complainant returned to give her evidence via CCTV (NSW 1104.2).
- In a joint trial, a male child (Complainant 1) and female child (Complainant 2) alleged a range of sexual abuse offences against their father. Complainant 1 had a mild intellectual disability and cerebral palsy, Complainant 2 had a slight intellectual delay. Conference records in the case files indicated that CCTV was needed for the evidence of both complainants (NSW 1104.1; NSW 1104.2).

- Case NSW 1107 involved allegations of oral-penile penetration on behalf of a female complainant who was five-years-old at the start of the trial. The accused had prior convictions for sexual offences. Conference records indicated that alternate measures and the role of the support person were explained to complainant's mother prior to the trial. At trial, the complainant's pre-recorded police interviews were played, and she gave sworn and unsworn evidence via CCTV (NSW 1107).

b. Victoria

All non-institutional cases that proceeded to trial were heard by a jury (child complainants, $n = 12$; adult complainants, $n = 6$). The files reflected that alternate measures were considered in all cases.

c. Western Australia

Most cases were heard by a jury, (96.3 per cent, $n = 27$); one case was tried by a judge alone (3.7 per cent). All but one case involving a complainant who was a child at the time of trial (94.1 per cent $n = 27$) were tried by a jury. All cases on behalf of complainant who were adults at the time of trial were tried by a jury ($n = 10$). Alternate measures were considered all of these matters.

The judge alone trial involved a female complainant who alleged that her step-grandfather committed penetrative offences on multiple occasions. Alternate measures were considered and the complainant participated in a videotaped pre-recorded interview, which was submitted as her evidence-in-chief. The complainant's cross-examination was also pre-recorded. File notes by the state Prosecutor anticipated that any further evidence-in-chief or cross-examination would have to be conducted by pre-recording so that the complainant did not have to attend any part of the trial in person (WA 3014).

4.4.6 Cases with One versus Multiple Complainants (Separate versus Joint Trials).

Overall, of the non-institutional cases that proceeded to trial, there was a relatively even split between the proportion that involved a sole complainant (52.2 per cent, $n = 35$) and multiple complainants (47.8 per cent, $n = 32$). Figure 4.4.6.1 compares cases involving one versus multiple complainants based on whether the complainants were children or adults at the time of trial.

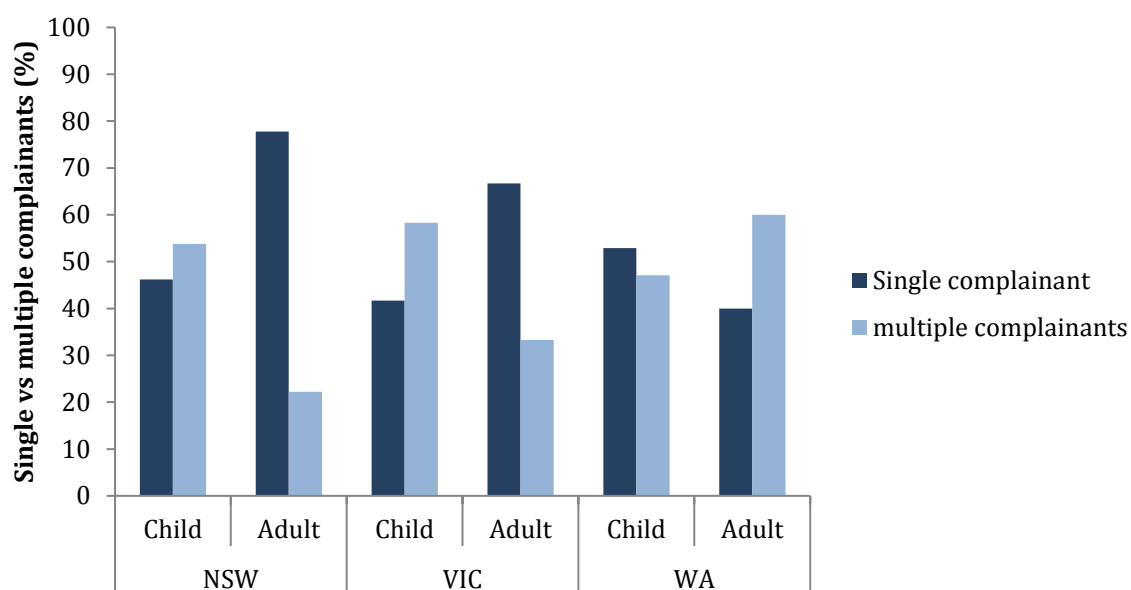


Figure 4.4.6.1 Non-institutional cases with one or multiple complainants across States by the age of the complainants at the time of trial (children versus adults) (%).

a. New South Wales

Three-fifths of the cases of non-institutional child sexual abuse in New South Wales involved a sole complainant (59.1 per cent, $n = 13$), while two-fifths involved multiple complainants (40.9 per cent, $n = 9$). There were relatively even proportions of sole (46.2 per cent, $n = 6$) and joint cases (53.8 per cent, $n = 7$) on behalf of complainants who were children at the time of trial. Most cases on behalf of complainants who were adults at the time of trial were sole complainant cases (77.8 per cent, $n = 7$); just over one fifth of the cases involving adult complainants at the time of trial were joint trials (22.2 per cent, $n = 2$). The maximum number of complainants abused by the same defendant in this sample was three.

b. Victoria

Cases of non-institutional child sexual abuse in the sample from Victoria reflected an even ratio of cases brought on behalf of a sole ($n = 9$) and on behalf of multiple or joint complainants ($n = 9$). Slightly more complainants who were children at the time of trial participated in joint (58.3 per cent, $n = 7$), than separate trials (41.7 per cent, $n = 5$). Most cases on behalf of complainants who were adults at the time of trial were tried separately (66.7 per cent, $n = 4$), while one third of these cases resulted in a joint trial (33.3 per cent, $n = 2$). The maximum number of complainants abused by the same defendant in this sample was two.

c. Western Australia

The proportion of separate (48.1 per cent, $n = 13$) versus joint trials (51.9 per cent, $n = 14$) in the sample of child sexual abuse cases from WA was relatively even. This trend was maintained in cases brought on behalf of complainants who were children at the time of trial, with nine separate trials (52.9 per cent), and eight joint trials (47.1 per cent). Proportionally more cases brought on behalf of complainants who were adults at the time of trial were tried jointly (60.0 per cent, $n = 6$), than separately (40.0 per cent, $n = 4$). The maximum number of complainants abused by the same defendant in this sample was four.

Across states, alternate measures were considered for complainants in all joint trials ($n = 32$). In cases with multiple complainants, the admissibility of each complainant's evidence was a paramount concern for the prosecution, as the quality of one complainant's evidence had the potential to bolster or undermine the credibility of fellow complainants. Consideration of relative the impact of the evidence of one complainant on claims of another was evident in the records (NSW 1106.1; NSW 1106.2) of the investigating police officer who advised the instructing solicitor that Complainant 2 (NSW 1106.2) was a better "historian" of events, and that the defence would likely target the credibility of Complainant 1 (NSW 1106.1) to undermine the allegations of both complainants.

Many non-institutional joint trials involved particularly vulnerable complainants. For instance, almost one third of the complaints in joint trials entailed allegations of intra-familial child sexual abuse (31.3 per cent, $n = 10$), indicating that a high proportion of these complainants were from a context where family support and stability was lacking. Complainants who appeared in joint trials were noted by the prosecution to have (a) intellectual and/or physical disabilities (NSW 1104.1; NSW 1104.2); (b) suicidal tendencies and other mental health concerns (NSW 1205.1; NSW 1205.2; NSW 2010.2; WA 3001.1; WA 3001.2); and (c) a history of substance dependence (NSW 2010.1).

The files in most cases tried separately (94.3 per cent, $n = 33$) reflected consideration of alternate measures. In three of the cases tried separately (NSW 1109; NSW 1210; 5.7 per cent), however, no records of these considerations were found in the case files.

Supplementary Material 4.5: Descriptions of Institutional Cases of Child Sexual Abuse

A small proportion of complainants in the study sample (8.5 per cent, $n = 7$) alleged that sexual abuse had occurred in institutional settings. Details of the complainant characteristics, time lapse between alleged offences and the official report made to the police, the type of prosecuted offences, and case dispositions are elaborated below for each of the seven cases.

a. New South Wales

A six-year-old male complainant alleged that from time he was five years of age, the deacon of his church touched him inappropriately on church grounds every Sunday and over school holidays. The complainant first reported these events to police one year after the initial incident. During the defendant's evidence-in-chief, the judge determined that evidence admitted as context evidence, was in fact tendency evidence, and that no consideration had been given to those matters. Upon re-trial, the jury acquitted the defendant of all charges (NSW 1105).

b. Victoria

A male complainant 19 years of age at the time of trial alleged a range of offences against his employer including (a) exposure to pornography; (b) inappropriate touching; and (c) sharing sexual images with the complainant. The complainant disclosed the matter to police one year after the events, at 17 years of age. The accused entered a plea of guilty to some charges, but not others. The jury convicted the defendant on those matters (VIC 2014).

A male complainant 46 years of age alleged that his female teacher had attempted to engage in a sexual relationship with him when he was 12 years-old. Allegations included kissing and inappropriate sexual touching. At the time of the offence, a male teacher reported that he observed the accused kissing the complainant at school, and the complainant also reported these events to a nun at the school, but no report to the police was made. The complainant discussed the matter with police while still a child, but no official record was made until 33 years after the alleged events. A jury acquitted the defendant of all charges (VIC 2015).

A 19-year-old female complainant alleged that when she was nine years old, the family priest had attended her home while her parents were out, and touched her inappropriately. The complainant made a police report eight years after the alleged events. A jury acquitted the defendant of all charges (VIC 2018).

c. Western Australia

One case of institutional child sexual abuse in WA involved three female complainants who gave evidence in a joint trial. The complainants alleged a range of offences against an Anglican priest. Complainant 1 was 18 years old at the time of trial (WA 3011.1) and alleged that the accused touched her inappropriately when she was 10 years of age. She reported the matter to the police five years later. Complainant 2 was 19 years of age at the time of trial (3011.2). She alleged that the accused kissed her and touched her inappropriately when she was 11 years of age. She reported the events to the police seven years later. Complainant 3 (WA 3011.3) alleged that the accused kissed and touched her inappropriately when she was 8 years of age. The matter was officially reported to police four years after the alleged events. Charges relating to allegations by Complainant 3 were withdrawn by the prosecution due to inconsistencies in statements to police and reports by her family that she was a “pathological liar.” A jury acquitted the defendant of all charges (WA 3011.1; WA 3011.2; WA 3011.3).

Supplementary Material 4.6: Analysis of Procedural Factors in Institutional and Non-Institutional Cases

Non-institutional and institutional cases were combined for the following analyses.

4.6.1 Substitution of Legal Counsel

Of the 83 complainants’ case files reviewed in the course of this study, the majority of complainants experienced at least one change or substitution of legal counsel, i.e., the lead prosecuting lawyer changed (69.1 per cent, $n = 58$).¹¹ For approximately one quarter of the complainants, the same lawyer managed the case from the start of legal action until the time of trial (25.3 per cent, $n = 21$). Other complainants had contact with up to six different legal practitioners from the start of legal proceedings to time of the trial (e.g., NSW 1203).

Of the seven complainants who alleged sexual abuse in an institutional setting, four complainants experienced no change in lead legal counsel (VIC 2015; VIC 2018; WA 3011.1; WA 3011.2). The remaining two institutional complainants experienced one or two changes (NSW 1105; VIC 2014) in lead counsel for the prosecution.

¹¹ Change in lead counsel for the prosecution could not be determined for a small proportion of complainants (4.8 per cent $n = 4$). This was due to removal of the case files when the matter was pending appeal (NSW 1109), or the absence of any records in the file permitting the coding of this variable (NSW 1107; NSW 1206; VIC 2008).

Table 4.6.1 provides an overview of the frequency of substitutions in legal counsel managing the cases in which the complainant was a child versus an adult after the trial proceedings commenced.

Table 4.6.1 Proportion of substitutions in legal counsel managing the prosecution of cases of complainants who were children versus adults at the time of trial across New South Wales, Victoria, and Western Australia (%).

Substitution of legal counsel (%)	NSW		VIC		WA	
	Child	Adult	Child	Adult	Child	Adult
No change	7.1		13.3	20.0	35.0	66.7
One to two changes	57.1	81.8	40.0	30.0	65.0	25.0
Three to four changes	14.3	9.1	20.0	20.0		8.3
Five or more changes	7.1		20.0	30.0		
Missing	14.3	9.1	6.7			

Note: Blank cells indicate no change in legal counsel in charge of prosecuting the case in the corresponding state and age group.

Different reasons were documented for substitution of lead prosecutors. Among these reasons were conflicts in the prosecutors' schedules that required a substitution of legal counsel. Delays in legal proceedings also required some prosecutors to be reassigned. Changes in the trial venue and court, such as a shift from the Magistrates' Court to the County Court, resulted in further changes in legal counsel in charge of the prosecution. Repeated litigation and appeals by the prosecution or the defence at times resulted in substitution of legal counsel for the prosecution.

4.6.1.1 Schedule conflicts for prosecuting legal counsel

Prosecutors' conflicting schedules required practitioners to be reallocated across cases. Conflicting schedule demands arose when prosecutors (a) were booked to attend more than one trial on the same day (NSW 1104.1; NSW 1104.2; NSW 1207; VIC 2005; VIC 2011.1; VIC 2011.2); (b) initiated leave entitlements (NSW 1206; NSW 1207; VIC 2002; VIC 2003; VIC 2007; VIC 2014; VIC 2015; VIC 2019.1; VIC 2019.2; WA 3018); (c) were seconded to another agency (VIC 2005); or (d) became unavailable on the required day for other reasons (VIC 2011.1; VIC 2011.2; WA 3017).

4.6.1.2 Delays in legal proceedings

Prosecutors were reassigned due to delays such as multiple adjournments of the trial that made it impossible for some lawyers to continue to manage the same case at a later date (VIC 2002; VIC 2007). Conversely, in other cases, prosecutors were reassigned to avoid delays. In New South Wales, one prosecutor serving as lead legal counsel on a case was substituted

when the trial venue was changed to speed up the trial date (NSW 1201). This decision may have been prompted because the events in issue that were the subject of the charges occurred approximately 20 years prior to the report by the complainant to the police (NSW 1201).

4.6.1.3 Change in trial venue and type of court

A change in the trial venue and court was often accompanied by a change of legal counsel for the prosecution in charge of the case. For example, some changes of venue from rural to urban districts resulted in the transfer of the cases to practitioners who were unfamiliar with the case (NSW 1102; NSW 1204). In other instances, changes from the Local Court to District Court, or from the Magistrates' Court to the County Court, were accompanied by changes in legal counsel for the Crown (NSW 1202; VIC 2017). At times, legal counsel managing a case changed as the case progressed through the criminal justice system. A special hearing or committal might be attended by the police officer in charge of the investigation and a prosecuting barrister. Subsequent proceedings might be attended by the lead prosecutor, whereas barristers attended only the trial, and the number of barristers attending a trial changed from one date to another (VIC 2010.1; VIC 2010.2; VIC 2011.1; VIC 2011.2; VIC 201-; WA 3003; WA 3006).

4.6.1.4 Re-trial of cases

Cases that went to trial on more than one occasion often required a complainant to become acquainted with a new group of legal practitioners for the re-trial. In one case that went to trial four separate times in New South Wales, the investigating officer advised the trial advocate that the complainant had met "a whole new prosecution team for the third time" (Police Officer, NSW 1101). Similarly, in Victoria, instructing solicitors, managing lawyers, and barristers were changed up to four times in three trials of one matter in that jurisdiction (VIC 2009; VIC 2011.1; VIC 2011.2; VIC 2019.1; VIC 2019.2). In one institutional case, legal counsel leading the prosecution of a trial involving a male child complainant changed when the matter advanced from the pre-trial to the trial phase (NSW 1105).

4.6.1.5 Case appeals

Lawyers from the prosecution Appeal Unit were assigned to manage cases that were appealed by either the prosecution and/or defence (VIC 2019.1; VIC 2019.2; WA 3008.1; WA 3008.2). Multiple appeals were associated with more frequent changes in the managing lawyers, particularly if an appeal led to a re-trial (VIC 2019.1; VIC 2019.2).

4.6.1.6 Effects of changes in legal counsel on the complainants

These foregoing circumstances resulting in one or more changes to prosecutors serving as lead legal counsel in a particular case had diverse effects on the complainants.

A change in lead legal counsel was beneficial to a complainant when conducted in a purposeful and well-informed manner. For instance, a particular prosecution team consisting of lead legal counsel and a paralegal were specifically reassigned to manage one case, as these practitioners had previously worked with the complainant and were familiar with the witnesses and issues in the case (WA 3003). Multiple or frequent changes to the lead prosecutors or the prosecution team members was generally acknowledged to be undesirable. For instance, after three or four changes of legal counsel prosecuting a Victorian case, the instructing solicitor was requested to justify why so many different people had worked on the case (VIC 2002).

Changes in the legal counsel responsible for a case and the need for a complainant to communicate with multiple personnel may lead to frustration and diminish the rapport between complainants and legal practitioners. Numerous changes in lead legal counsel may also cause delays due to the time required for a new team of practitioners to become familiar with the case facts and with the complainant's circumstances. For instance, after a joint trial of two complainants that were ultimately heard again in separate trials, the investigating officer advocated for retention of the same prosecutor to ensure adequate rapport and an understanding of the complexity of tendency and coincidence evidence in the two separate cases (VIC 2010.1; VIC 2010.2).

4.6.2 Changes in the Trial Venue

The non-institutional and institutional cases were combined to explore the extent of changes made in the trial venue before and during the trial process.¹²

4.6.2.1 Prevalence of and reasons for a change of trial venue

Of the 83 complainants' cases reviewed in the course of this study, data on trial venue were available for 80 complainants.¹³ Of this group, no changes in the court venue or location were made for the majority of complainants (60.0 per cent, n = 48) during the pre-trial and trial

¹² These analyses did not distinguish cases by the age of the complainant at the time of trial.

¹³ Changes to the trial venue could not be determined for a small proportion of complainants (3.6 per cent, n = 3) because the case was discontinued before trial (WA 3011.3), or because the file was removed while the appeal was pending (NSW 1109), or in one case, because the available file documents were unclear on this issue (NSW 1206).

process. The remainder of complainants experienced at least one change in trial venue during this period (40.0 per cent, n = 32).

Of the seven complainants who alleged sexual abuse in an institutional setting, four complainants experienced no change in court location (NSW 1105; VIC 2018; WA 3011.1; WA 3011.2). Two complainants experienced trial venue changes (VIC 2014; VIC 2015). One institutional case was discontinued before trial (WA 3011.1).

Table 4.6.2.1 provides an overview of changes in trial venue for complainants who were children and adults at the time of trial, by state. A relatively high proportion complainants who were children at the time of trial in New South Wales and WA experienced trial venue changes (64.3 per cent and 45 per cent, respectively).

Table 4.6.2.1 Changes in trial venue for complainants who were children and adults across New South Wales, Victoria, and Western Australia (%).

Change in Court location (%)	NSW		VIC		WA	
	Child	Adult	Child	Adult	Child	Adult
No change	28.6	63.6	86.7	50.0	50.0	66.7
1–2 changes	64.3	27.3	13.3	40.0	40.0	33.3
3–4 changes				10.0	5.0	
Missing	7.1	9.1			5.0	

Note: Blank cells indicate zero trial venue changes for the corresponding state and age groups.

Changes in the trial venue were made for a series of different reasons. These included consideration of the complainants and the defendants, particularly persons residing in rural communities, as well as other recommendations by prosecutors to facilitate the trial which were documented in the files reflecting requests for a change of trial venue.

4.6.2.2 The impact of the trial venue on the complainant and defendant

In certain cases, consideration of the complainant and of the defendant was a critical factor in the determination of the venue for a special hearing or trial. This was particularly common when the witnesses and parties resided in rural and remote communities. Close proximity to the court was desirable for the convenience and comfort of the complainant. For example, a venue change was made in a case with an adult female complainant at the time of trial for the convenience of the complainant who resided in regional New South Wales (NSW 1207). In a joint trial in Western Australia, it was acknowledged that the complainants resided in a rural area, and that the youngest complainant should be afforded the opportunity to pre-record his evidence at the location where he felt most comfortable (Perth or Albany; WA 3005.1; WA 3005.2; WA 3005.3; WA 3005.4; WA 3005.5). In another Western Australian case, the matter

was initially progressed by videolink to Meekarathatta from Perth, however the trial venue was ultimately moved to Geraldton, as this court was closer to the remote community where the young female complainant resided (WA 3021). In Western Australia, an application was made by defence counsel to change the trial venue as the accused and the complainant were both “well known within in the Esperance community and it may be difficult for the jury to be empanelled who has not had contact with either of the parties or their extended families.” In addition, counsel submitted that “the circumstances may well influence the jury and make it more unlikely that our client could be fairly tried in that jurisdiction,” (Defence counsel, WA 3015). The application was denied so that the trial could proceed where the child complainant resided.

Relocation of the trial venue was at times less convenient for the complainants. In one institutional case in which the complainant was an adult male, the trial venue switched from regional Victoria where he resided to Melbourne, and then back to two separate courts in another regional location. The complainant travelled from South Australia to attend trial proceedings in Victoria at each stage of the proceedings (VIC 2014). A joint trial involving two adult male complainants was moved to the Sydney District Court in order to progress charges based on events that transpired approximately 20 years prior to the official report to the police (NSW 1205.1; NSW 1205.2).

4.6.2.3 Prosecutors’ recommendations regarding changes in the trial venue

Prosecutors initiated other trial venue changes that were documented in the case files. For example, in one New South Wales case involving the indecent assault of two female complainants under the age of 16 years, court attendance notices that were issued reflected changes in the trial venue from the Bankstown Local Court to the Burwood Local Court and ultimately to the Sydney District Court. Thereafter, the directing solicitor recommended that the matter be continued at the Local Court level, on grounds that there was greater sentencing scope in relation to the alleged offences in that court than at the District Court level (NSW 1106.1; NSW 1106.2).

In another case in New South Wales, the trial venue was moved to a secure facility in Sydney “where adequate and appropriate security arrangements can be implemented” (Prosecutor, NSW 1102), and the accused could not be recognised. This change was made because the accused was a member of a biker gang with distinctive facial tattoos. In a case in Western Australia, the prosecution recommended a transfer from the Magistrates’ Court to the District Court (WA 3013) because the complainant was 10 years old. A similar change of venue request was made to transfer a case from the County Court to the Magistrates’ Court in regional Victoria (VIC 2015) where the complainant was an adult male.

4.6.3 Re-Trials in Non-Institutional and Institutional Cases of Child Sexual Abuse

4.6.3.1 Prevalence and causes of repeated trials of the same matter

Of the 83 complainants' cases reviewed, 12.0 per cent (n = 10) went to trial more than once in the relevant study period. Of these, four cases were separate trials based on allegations brought by sole complainants (NSW 1105, VIC 2001, VIC 2009, VIC 2013), one of which was a case of institutional child sexual abuse (NSW 1105); the remainder were joint trials based on allegations brought by two complainants (VIC 2006.1; VIC 2006.2; VIC 2010.1; VIC 2010.2; VIC 2019). Some cases with allegations from multiple complainants against the same defendant that were initially tried jointly were retried with separate trials for each complainant following a successful appeal by defence counsel (VIC 2010.1; VIC 2010.2, VIC 2019.1; VIC 2019.2).

Disparities emerged in the study sample regarding the frequency of practices in the different states with respect to re-trials of cases of child sexual abuse. In WA, there were no instances of any cases that went to trial more than once; in New South Wales, one case was re-tried, and in Victoria, a total of nine cases proceeded to trial more than once.

This analysis focused on the manner in which the complainant's evidence was presented when this evidence was required in more than one trial, and whether efficient means were adopted to reduce the burden on complainants of repeating their evidence on multiple occasions in different legal proceedings. Most of the complainants whose cases were re-tried were children at the time of trial (n = 6), four complainants were adults at the time of the first trial.

Different circumstances led to the re-trial of specific cases. These included: (a) a mistrial following jury exposure to inadmissible tendency evidence (NSW 1105); (b) miscarriages of justice due to joint rather than separate trials of multiple complainants (VIC 2010.1; VIC 2010.2; VIC 2019.1; VIC 2019.2); (c) a hung jury on one or more counts (VIC 2006.1; VIC 2006.2; VIC 2009; VIC 2013); and (d) the necessity of a separate trial for a nonsexual offence (VIC 2001).

At times, a complainant's evidence was required in a re-trial of the same matter, for instance, following an appeal in that case. At other times, the complainant's evidence was required in a related trial because it was deemed relevant to a separate proceeding on another matter, such as a trial against the same defendant on a nonsexual offence, or a trial of another complainant against the same defendant, when the matters had not been joined.

4.6.3.2 Re-trial following jury exposure to inadmissible tendency evidence

One case involved a male complainant who was six years of age at the time of the first trial, and eight years of age at the time of the second trial (NSW 1105). A WAS officer assisted in preparing the complainant to give evidence in court in the first trial. The complainant's pre-recorded investigative interview was played as evidence-in-chief at both trials and he was cross-examined via CCTV in both trials, i.e., no recording of the cross-examination was used in the second trial. Evidence of both the complainant and the defendant was provided with the assistance of an interpreter as neither spoke English.

An expert report proffered by the Crown on the dynamics of sexual abuse when the perpetrator is in position of trust and grooms the victim, the victim's behavioural responses to sexual assault, and sexualised behaviour of child complainants was excluded from evidence in the first trial. During the evidence-in-chief of the defendant, the judge discharged the jury because evidence that had been admitted as context evidence was found to be inadmissible tendency evidence. In the second trial before a different judge, the prosecution relied on a different section of the law and the expert report was admitted. Counsel for the defence called a rebuttal expert to comment on the first report and on the suggestibility of young children.

4.6.3.3 Miscarriages of justice

One case that resulted in four trials entailed allegations of parental child sexual abuse by the father of two of his biological daughters (VIC 2019.1; VIC 2019.2). Complainant 1 alleged ongoing abuse for a period of approximately six years; Complainant 2 alleged less frequent and less severe abuse. The credibility of Complainant 2 was questioned.

At the first joint trial, the defendant was found guilty of 11 charges and not guilty of one charge. However, the complainants' younger sister admitted perjury stating that she had been pressured by her parents to give evidence against her sisters. This provided a basis for the defence to bring a successful motion to overturn the conviction. The joint re-trial resulted in convictions on all charges. The defence appealed successfully against the convictions on grounds of unfair prejudice arising from tendency evidence in the joint trial.

Pre-recorded police interviews were played as evidence-in-chief, and the complainants testified in person at a special hearing in Trial 1. A special hearing was also conducted in advance of Trial 2 so that counsel for the defence could cross-examine the complainants in person. In advance of the third and fourth trials, the instructing solicitor and Crown prosecutor changed and separate trials were conducted on the allegations of Complainant 1 and Complainant 2. At these trials, an application by the prosecutor to play the recorded evidence of the complainants was made to avoid requiring the complainants to give evidence again. The juries convicted the defendant on all charges brought on behalf of Complainant 1, and on one out of three charges brought on behalf of Complainant 2.

A second case involving two female complainants entailed a total of three trials after the joint trial resulted in a successful claim of a miscarriage of justice when inconsistencies in the evidence of one complainant were alleged to be prejudicial to the defendant (VIC 2010.1; VIC 2010.2). At the committal hearing, that complainant was unsure of the context in which certain abusive events occurred, but at trial on cross-examination she stated that she recalled some but not all details of the incident.

In her victim impact statement, Complainant 1 wrote about her experience at trial, stating that:

Nothing in this life can honestly prepare you to get up in court, in front of a bunch of people whom you have never met, to defend and dissect traumatic events in your childhood that you cannot even comprehend yourself, the weight that each event carries is honestly immeasurable. Reliving those events, and being questioned in that manner was and still is incredibly painful, it will stay with me for a very long time (Complainant, VIC 2010.1)

At the joint trial, both complainants testified via CCTV and their evidence was recorded. Before the second trial on the four allegations brought by Complainant 1, she stated that she was satisfied to have her recorded evidence from trial 1 presented. Pre-recorded evidence from Complainant 2 was also presented in further support of those allegations. The defendant was convicted of all charges. The third trial, a separate trial on the single charge of indecency based on allegations by Complainant 2, ended in acquittal.

4.6.3.4 Hung juries on one or more counts

Three examples are provided of cases in which juries were unable to agree on a verdict, and the prosecutors proceeded to re-try the matters. In some instances, a total of three trials were required to reach a resolution.

For example, one case in Victoria was tried a total of three times following a hung jury on one or more counts. This case was based on allegations by two female complainants (VIC 2006.1; VIC 2006.2) both of whom were children at the time of the trial. In the first trial, a joint trial, both complainants presented their evidence at a special pre-trial hearing where it was pre-recorded, so it could be played at trial. The jury found the defendant guilty on all three charges pertaining to Complainant 2, not guilty on one count pertaining to Complainant 1, and were hung on the remaining 13 counts pertaining to Complainant 1. The second trial proceeded within a month. In that instance the jury was discharged without reaching a verdict. Eleven months later, the case went to trial a third time. Complainant 1 testified via CCTV from a remote room on the court premises. The prosecution sought a jury direction on why a complainant may have difficulty recalling the specific details of a particular occasion when she was subjected to abusive behaviour. The defendant was convicted on ten of 13 charges.

A second case in Victoria was re-tried after the jury in the first trial acquitted the defendant on one charge and was hung on a second charge. This case was based on allegations of sexual assault by a female complainant, who had a mild intellectual disability and was 18 years of age at the time of trial (VIC 2009). No pre-recorded police interview was obtained as the complainant provided a written statement. At the second trial, the defence obtained a permanent stay on grounds that the defendant's right to a fair trial was compromised by evidence of the sexual assault that was resolved in the first trial.

A third case in the study sample was tried a total of three times following a hung jury involved a female complainant who was abused by a family friend (VIC 2013). She was a child at the time of trial.

At the first trial, expert evidence on grooming behaviours was excluded as inadmissible. The prosecutor contended that the complainant described "textbook" grooming and was too young to invent an account of this type of behaviour. The jury was discharged after six hours of deliberation on an act of attempted indecency, when the trial judge determined that they were intractably deadlocked. At the second trial on this matter, recorded evidence given in the first trial was presented for all witnesses with the exception of the police investigator. When the complainant was cross-examined in the second trial, her responses were inconsistent with statements in the pre-recorded police interview. Once again, the jury was discharged after six hours of deliberation without reaching a verdict.

A third trial was scheduled with support from a SSOU solicitor who again argued that the grooming allegations were not something a young child would invent, such as the isolation by the accused of the complainant from her family and statement to her that he wished she was his daughter. However, the case was characterised by the Crown Prosecutor as one based on the unsworn evidence of a young complainant without any supporting features. Accordingly, the prosecution successfully applied to discontinue the trial on grounds that the charges were at the "low end of the spectrum", that two juries had been unable to reach a majority verdict based on evidence that could not get better since it would consist of playing pre-recorded evidence. In addition, arguments were submitted that recalling the complainant and supporting witnesses posed a risk of introducing inconsistent statements into evidence.

4.6.3.5 Separate trial for non-sexual offence

In a case involving allegations by a female complainant who was a child at the time of trial, the defendant was a family friend and her babysitter (VIC 2001). The defendant allegedly provided the complainant with illegal drugs in the context of sexually abusive conduct. In a trial about the sexual offences, the complainant gave evidence via CCTV from a remote room at the CWS, but found the process very traumatic. The defendant was acquitted on all six counts. A second trial was scheduled to address the drug offences. However, the complainant struggled when speaking about the drug offences to avoid any reference to the sexual offences. The prosecution concluded there was "no reasonable prospect of a conviction" and discontinued the trial.

4.6.4 Police Practices in Non-Institutional and Institutional Cases

4.6.4.1 Multiple investigative interviews

Our review of materials in the prosecutors' files revealed a number of instances where multiple interviews of the same complainant in the same matter were conducted by police interviewers to remedy technical difficulties and recording failures encountered in the course of the initial pre-recorded police interviews.

In a joint trial that involved the evidence of four female complainants, Complainant 4, six years of age, had to be interviewed a second time after the audio in her first police interview failed (WA 3004.4). During her second police interview, the complainant disclosed the same offences as well as additional complainants. However, these allegations were not fully explored as the complainant was frustrated by having to repeat the interview, and stated that she did not want to talk any further. Faced with uncertainties and inconsistencies between the first investigative interviews and the pre-recorded evidence, the prosecution excluded the complainant from the joint case.

In another case, the recording device malfunctioned on two separate police interviews with a female child complainant (WA 3012). A third interview was conducted eight months after the initial interviews. At trial, the presiding judge declared that multiple interviews to remedy technical malfunction were not uncommon. In regards to the quality of the police interviews, the judge commented that "an adult would have been confused by the form of questioning, never mind an 8-year old child" (Trial judge, WA 3012).

Multiple interviews were also required to remedy unanticipated interruptions in the initial pre-recorded interviews. For example one female child complainant was interviewed three separate times because she repeatedly became distressed when viewing photographic evidence about which she was questioned (VIC 2007). The third interview was conducted after the committal. On that occasion, the complainant disclosed additional offences that had to be added to the charges at trial.

4.6.4.2 Use of recorded conversations and phone records as evidence

Across all three states, in a small proportion of the cases, recorded conversations and phone records of calls made by the complainants to the defendants were submitted as evidence in support of child sexual abuse allegations (NSW $n = 4$; VIC $n = 1$; WA $n = 1$). Admissions of guilt recorded via covert methods, such as phone conversations or meetings between these parties, were stressful for the complainants and rarely effective for the prosecution.

The practice of recording conversations between the accused and the complainant to elicit admissions of guilt was most prevalent in the NSW study sample. In NSW, all cases that

included recorded conversations involved female complainants who were adults at the time of trial. In only one case in NSW was this evidence successfully admitted at trial. This was a case in which the complainant alleged ongoing sexual abuse by her cousin starting when she was seven years old (NSW 1207). Verbatim transcripts and audio recordings of telephone conversations between the complainant and the defendant comprised some of the evidence presented at trial. However, recorded conversations were not successfully admitted into evidence in three other NSW cases (NSW 1101; NSW 1202; NSW 1203).

In one case, the complainant was asked to record a conversation with her father, the defendant (NSW, 1101). The defendant did not admit to any abuse, and the complaint confused early childhood events which ultimately diminished her credibility.

In another case, the complainant alleged that her stepfather had sexually abused her over a number of years (NSW 1202) by grooming her and increasing the nature of the offending behaviours. Police surveillance to record telephone and in-person conversations between the complainant and the defendant. Although the defendant admitted to sexual intercourse with the complainant in these conversations, at trial, he asserted that his statements had been misconstrued and that since he relied on a hearing aid, he had misheard the statements by the complainant. As a consequence, the recordings were excluded from evidence. Moreover, the judge was critical of the complainant acting as an “agent of the state” and engaging in entrapment of the defendant (Trial judge, NSW 1202).

In another case, the complainant alleged that a family friend had sexually abused her when starting when she was seven years of age (NSW 1203). Telephone conversations between the complainant and the defendant were covertly recorded more than ten years after the alleged abusive events. A general admission by the defendant to sexual misconduct was deemed unfair and excluded from evidence at trial, and became the subject of media scrutiny, which distressed the complainant and caused her to “break down” (Prosecutor, NSW 1203). As a result, the trial was delayed. Subsequently, the prosecution lodged an appeal, further delaying the proceedings.

In a Victorian case, a female child complainant alleged abuse by a family member on a number of occasions (VIC 2012). Partial admissions were made by the defendant in the course of a telephone conversation with the complainant’s mother. Ultimately, the prosecution discontinued the case based on inconsistencies between the complainant’s pre-recorded police interviews and her evidence on cross-examination.

In a case in Western Australia, a female complainant who was a child at the time of trial, had alleged sexual abuse by a family friend (WA 3006). A senior state prosecutor questioned why the police had not obtained telephone or text message records between the complainant’s mother and the defendant. The investigating officer responded that these records were unavailable as they used a pre-paid mobile phone service.

4.6.5 Misinformation about the use of alternate measures

In certain cases, police officers misinformed complainants regarding the availability of alternate measures or the nature of the police interview (VIC 2005; WA 3017). In a minority of cases, police officers attempted to influence the manner in which a complainant gave evidence at trial, and in some instances, interfered with the evidence (NSW 1101; VIC 2008; VIC 2015).

One example was a case in which a female complainant was 17 years old at the time she alleged that she was sexually abused by a stranger whom she met at a party (VIC 2005). The investigating officers did not inform her of the option to give her evidence via CCTV. Believing that she had to give evidence in person at the trial, the complainant did not want to proceed with the charges, as appearing in court would make her “upset and angry” (Complainant, VIC 2005). The prosecutor clarified the misinformation provided by the police.

In another case, the police misinformed the complainant’s mother that the complainant’s evidence was complete after the complainant gave her first statement to police (WA 3017). The prosecutor later explained that the complainant had to be cross-examined by the defence, and to give evidence at a pre-trial hearing where her evidence-in-chief would be pre-recorded. By that time, the complainant and her mother had relocated to Ireland, and provisions had to be made for the complainant to give evidence across international jurisdictions.

4.6.5.1 Influences on the complainant’s decision on how to give evidence

An example of a case in which a police officer exerted a strong influence on a vulnerable adult female complainant arose in New South Wales. The investigating officer informed the prosecutor that despite that fact that the complainant was hospitalised, had suicidal thoughts, and had been diagnosed with bipolar disorder, she was intent on progressing the allegations for a fourth time (NSW 1101). The trial advocate concluded that the complainant was “quite suggestible depending on who she is talking to” and should make up her own mind about how to give her evidence at trial. Psychological reports and counselling records on file indicated giving evidence would be traumatic for the complainant and that she would have difficulty answering questions as required. The investigating police officer disagreed. After a discussion with the investigating officer, the complainant advised the prosecutor that she had reconsidered her decision about giving evidence against the defendant at trial, and wished to do so “because she did not want to regret not giving evidence” (Complainant, NSW 1101).

4.6.5.2 Inappropriate closure of a case during the police investigation.

In two cases, the police investigator appeared to have inappropriately diverted the progression of the cases reported by child complainants. In one case, a male complainant who was a child at the time, alleged that his stepfather had abused him sexually (VIC 2008).

After the first police interview, he retracted the allegations, and stated that he had “lied about everything ... I hated (accused) and I wanted to get back at him.” The defendant was not charged, and the file was closed. Two years later, the complainant disclosed additional details about the abuse to his school counsellor. The complainant stated that he had made a truthful report to the police but had been pressured by the police interviewer to retract the allegations. Another two years passed before these fresh allegations came to the attention of the police. The complainant was then interviewed a second time and repeated the allegations of sexual abuse that he had previously made.

In another case, an adult male complainant alleged that his female school teacher had initiated a sexual relationship with him when he was 12 years old (VIC 2015). Another teacher had witnessed the defendant kissing the complainant and made an official report of the abuse. The complainant stated that the parish priest and a police officer were informed of the alleged offence at that time but the matter was not progressed as his parents were advised to “drop it.” Almost 30 years later, the complainant renewed his case by lodging an official statement with the police.

Supplementary Material 4.7: Proportion of cases where alternate measures were considered

4.7.1 A comparison of considerations of alternate measures for contemporary versus historical complaints of child sexual abuse

Alternate measures were considered for all but three complainants who made contemporaneous reports of child sexual abuse (93.2 per cent, $n = 42$), and all but five complainants who made historical reports of child sexual abuse (86 per cent, $n = 32$).

In NSW, alternate measures were considered for most complainants who made contemporaneous (92.3 per cent, $n = 12$) and historical (75 per cent, $n = 9$) reports of sexual abuse. Alternate measures were, however, not considered for one complainant who made a contemporaneous report (7.7 per cent), and three complainants who provided historical reports (25 per cent). In VIC, records confirming that alternate measures were considered were found for all but one complainant who provided a contemporaneous report (93.3 per cent, $n = 14$) and all but one complainant who provided an historical report (90 per cent, $n = 9$).

4.7.1.1 Consideration of alternate measures by the age of the complainant at the time of trial

Alternate measures were considered for most child complainants (93.3 per cent, $n = 48$) and for the majority of adult complainants (84.2 per cent, $n = 33$). In NSW, alternate measures

were considered for most child (92.3, per cent, $n = 13$) and adult (72.7 per cent, $n = 9$) complainants. Of the cases where alternate measures were not considered, one complainant was a child (7.7 per cent), and three (27.3 per cent) were adults. In VIC, alternate measures were considered for all child complainants ($n = 15$), and all but one adult complainant (80 per cent, $n = 10$). Alternate measures were considered for all child ($n = 20$) and all adult complainants ($n = 12$) in WA.

Supplementary Material 4.8: Overall frequency of main considerations of alternate measures, by case

A further perspective on the extent of consideration of each of the main themes on the uses of alternate measures at trial was gained by examining the overall proportion of mentions by case, rather than by individual complainant. Results of these analysis of the thematic content is depicted in Figure 4.8.1.

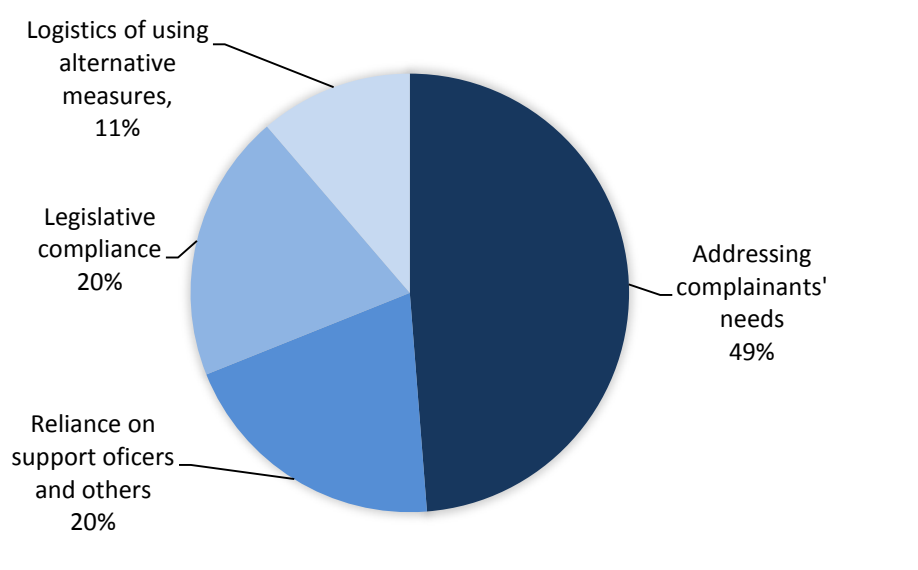


Figure 4.8.1 Proportion of mentions of each theme on uses of alternate measures by case (%).

These analyses confirmed the primacy of addressing the complainants' needs as the main motivator of the considerations by prosecutors with respect to the use of alternate measures to present the complainant's evidence at trial.

Supplementary Material 4.9: Qualitative analyses of cases terminated before trial

Of the 83 complainants whose allegations were incorporated within the study sample, 12.0 per cent ($n = 10$) did not proceed to trial in the study period (NSW $n = 2$; VIC $n = 4$; WA $n = 4$).¹⁴ Of these, three cases involved a sole complainant (VIC 2004, VIC 2012; VIC 2013), while four cases each involved two complainants (NSW 1208.1; NSW 1208.2; VIC 2011.2; WA 3002.2), and the remaining cases involved three or four complainants (WA 3005.3; WA 3011.3; WA 3004.4). One of the latter cases was an institutional case (WA 3011.3). Most of the complainants were children at the time of trial ($n = 7$), three were adults.

The case of one female complainant in WA was discontinued when the accused entered a guilty plea (WA 3002.2). Another case with two complainants was discontinued when the defendant passed away prior to completion of the trial (NSW 1208.1; NSW 1208.2). Analysis of the seven remaining WA cases revealed that three factors were associated with prosecutorial decisions to terminate legal proceedings: (a) the complainants' mental wellbeing and capacity, (b) the availability of support services for the complainant(s), and (c) police practices.

4.9.1 Discontinued cases based on the complainant's vulnerability.

The predominant issue in all cases that did not proceed to trial was the mental capacity of the complainant due to the presence of either psychological or intellectual disabilities ($n = 12$). This theme encompassed two interrelated components: (a) the psychological health of the complainant; and (b) inconsistencies in the memories of complainants. The use of alternate measures and ordinary levels of witness support were seldom sufficient to adequately address the needs of these vulnerable complainants. For example, one complainant was engaging in self-harm as a coping strategy (WA 3011.3). Where an intellectual impairment was present, implementation of alternate measures should have been considered as a means to facilitate and enhance the complainant's ability to provide evidence, but these were not considered (NSW 1208.1, NSW 1208.2), for example, because of the young age of the complainant (NSW 1208). In another case, police recommended that the prosecution be terminated on grounds that cross-examination would be detrimental to the emotional welfare of the complainant (VIC 2011.2).

In certain cases, the manner in which evidence was collected changed as the matter proceeded through the criminal justice process, and the repeated questioning generated inconsistencies in the accounts provided by the complainants on different occasions (VIC 2012; VIC 2013). Repeated questioning was stressful and frustrated the complainants who became reluctant to provide further evidence (WA 3004.4; WA 3005.1). When inconsistencies emerged, this reduced the credibility of the complainants and led to the dismissal of the case or of certain charges (VIC 2011.2; VIC 2012; WA 3005.3; WA 3005.4; WA

¹⁴ Detailed descriptions of the cases are provided in Supplementary Materials 4.7.

3011.3) even though it was the psychological vulnerability and mental capacity of the complainants that led to the inconsistencies. Provision of additional support and more consistency in the methods of taking evidence from these vulnerable complainants would have mitigated these issues.

4.9.2 Police practices and procedures.

Shortcomings in the procedures implemented by police officers were apparent in a number of cases that were dismissed prior to trial (50 per cent of cases that did not go to trial, $n = 5$).

Foremost among these was the consequence of what appeared to be a lack of any clear set of guidelines to be followed when gathering evidence from complainants via pre-recorded police interviews. For instance, police interviewers who conducted multiple interviews due to faulty technical equipment or a complainant's mental state, often produced inconsistencies in the evidence (WA 3004.4; VIC 2011.2). Second, consideration of alternate measures by police officers appeared driven more by the complainant's age than by the complainant's needs (NSW 1208; VIC 2011.2). Further, communication failures between CWS, VIC Police and the ODPP at times led to inadequate arrangements for CCTV facilities (VIC 2013). In one case, evidence from an historical complainant was lost (WA 3005). These factors appeared avoidable. Had the cases been handled differently by the police interviewers, prosecution of these cases might have proceeded.

4.9.2 Interaction between criminal justice professionals.

The support received by complainants from their caregivers, prosecution and witness support officers was a key factor influencing the decision to terminate the prosecution of a case. Complainants with vulnerabilities tended to have the least supportive caregivers. Their caregivers themselves often had unstable domestic arrangements, complex family dynamics, and, at times, severe mental or general health problems. For example, some complainants lived with multiple caregivers, some of whom had serious physical ailments (Vic 2013); or mental health issues, such as bipolar disorder with comorbid trauma (WA 3005). As a consequence, these caregivers were too vulnerable to provide adequate support to the complainants. One complainant was physically ill, and suffered from neglect as her mother was a drug addict (WA 3004.4). Her caregiver was difficult to contact and provided unreliable evidence. Eventually, the Department of Child Protection undertook the management of the complainant's wellbeing, because pre-trial logistics, such as flying the complainant interstate and the vetting of witnesses, were too demanding for her caregiver (WA 3004.4).

In cases of intrafamilial abuse or parental abuse, the caregivers' support of complainants was influenced by complex family dynamics. Caregivers were often protective of the defendant, blamed the complainant for the abuse, and were reluctant to report issues to police (VIC 2011.2). In other cases, family dynamics led to the dismissal of a caregiver's evidence, as it was considered prejudicial to the accused (VIC 2012) or hearsay (VIC 2013). The complainants in these cases would have benefited from ongoing support officers throughout their interactions with the criminal justice process. Identification of wider support needs and the

need for policy guidelines to implement these supports, were key factors emerging from the file reviews of cases that terminated before or during trial.

The lack of rapport between prosecutors and complainants contributed to decisions to discontinue a case before or during a trial. Changes to legal counsel for the prosecution and late introductions did not facilitate rapport between the prosecutors and the complainants. These factors might have influenced the complainants' willingness to give evidence at trial and minimised changes in their evidence when cross-examined (VIC 2012). The lack of rapport between prosecutors and complainants was exacerbated when a potential complainant or witness was mismanaged (WA 3011.3). Familiarity with the complainants and consistency in the prosecution process were desirable to adequately support the complainants' needs.

Supplementary Material 5: Use of alternate measures

Table S5.1 Descriptions of problems associated with alternate measures

Type of Alternate Measure	Type of Problem	Examples of problems
Playing Police Interviews	Overall problems	The presence of one or more of the specific problems with playing police interviews that are described below:
	Problems with technology	Inadequate volume of the complainant’s or interviewer’s voice; difficulties obtaining a clear view of the complainant and/or interviewer on the screen/s; issues operating the DVD player or associated equipment; the DVD freezing or skipping; difficulties playing the DVD from the desired start position; jurors being unable to clearly view the screen/s; disruptive changes of DVDs; and the complainant being unable to view the interview from the remote room.
	Problems with editing	Mistakes made during the editing process (either mistakenly deleting content from the DVD or mistakenly leaving content on the DVD) or practical/logistical/technical issues with preparing the edited DVD for trial.
CCTV/AV Links	Overall problems	The presence of one or more of the specific problems with CCTV/AV Links that are described below:
	Problems with technology	Difficulties establishing or maintaining the CCTV/AV Link connection; inadequate volume of voices coming from the remote room and/or those coming from the court; issues with those in the remote room obtaining a clear view of those in the court and vice versa; difficulties syncing the audio and visual content; and jurors being unable to clearly view the screen/s.
	Problems with presenting exhibits	Difficulties operating the document camera; losing sight of the complainant while documents were shown on the document camera; unscheduled delays while documents were ushered to and from the remote room; complications—for those in the remote room—in selecting the correct documents to view; difficulties—for those displaying the documents—with showing the correct part of the document; and issues with complainants viewing documents in the remote room without approval.
	Problems with recording	Difficulties operating the recording equipment; malfunctions with the recording equipment; and/or disruptions caused by changing DVDs.
	Inappropriate communication	Inappropriate communication between the complainant and either a court staffer or an unidentified person in the remote room. The unidentified person may have been a court staffer or support person. (Inappropriate communication in the remote room that involved identified support persons was coded in the ‘Improper Use of Support Persons’ variable described below.)
	Complainant Distractibility	Complainant being distractible in the remote room to the extent that it disrupted proceedings. Distractible complainants may have played with props or toys inappropriately, had trouble staying in their seat, or had difficulty sitting in their seat properly.
	Problems with location	Concern raised about the remote room’s proximity to other areas, such as the defendant’s waiting area or noisy parts of the courthouse.
	Insufficient availability	Proceedings delayed due to the unavailability of remote room/s.
Other problems	Any issues associated with CCTV or the use of the remote room that were not captured by the above variables.	

Type of Alternate Measure	Type of Problem	Examples of problems
Playing evidence recorded via CCTV/AV Link	Overall problems	The presence of one or more of the specific problems with playing evidence recorded via CCTV/AV Link that are described below:
	Problems with technology	Inadequate volume of the complainant's, lawyer's, or judge's voice; difficulties obtaining a clear view of the complainant, lawyers, or judge on the screen/s; issues operating the DVD player or associated equipment; the DVD freezing or skipping; difficulties playing the DVD from the desired start position; jurors being unable to clearly view the screen/s; disruptive changes of DVDs; and the complainant being unable to view the evidence from the remote room.
	Problems with editing	Mistakes made during the editing process (either mistakenly deleting content from the DVD or mistakenly leaving content on the DVD) or practical/logistical/technical issues with preparing the edited DVD for trial.
Alternate measures during the provision of live evidence	Problems with using screens	Concerns raised regarding the appropriateness of the screen or issues setting up the screen.
	Problems with recording	Difficulties operating the recording equipment; malfunctions with the recording equipment; and/or disruptions caused by changing DVDs.
	Problems with the identity of the proposed support persons	Concerns raised regarding the suitability of the proposed support persons.
	Improper use of support persons	Inappropriate communication between the complainant and a support person or inappropriate behaviour by the support person. As instances of inappropriate communication between the complainant and unidentified persons in the remote room were accounted for in the 'CCTV/AV Link: Inappropriate Communication' variable, the present variable may underestimate the improper use of support persons to the extent that the unidentified persons in the remote room were in fact support persons.

Table S5.2 Proportion (and percentage) of complainants who used each alternate measure at first and subsequent trials, by age group and jurisdiction.

Alternate measure	Children			Adolescents			Adults		
	NSW	VIC	WA	NSW	VIC	WA	NSW	VIC	WA
Evidence-in-chief at first trial									
Police interview	11/11 (100%)	4/4 (100%)	16/16 (100%)	12/12 (100%)	21/21 (100%)	23/26 (88%)	1/24 (4%)	8/25 (32%)	2/30 (7%)
CCTV/AV Link at trial						3/26 (12%)	7/24 (29%)	8/25 (32%)	20/30 (67%)
CCTV/AV Link pre-recorded at special hearing								1/25 (4%)	
Live with screen								4/25 (16%)	
Live without screen							16/24 (67%)	4/25 (16%)	8/30 (27%)
Police interview									
Evidence-in-chief at second and third trials									
Police interview	2/2 (100%)	1/1 (100%)	2/2 (100%)	1/1 (100%)		1/1 (100%)		1/2 (50%)	
Recording from previous trial/s							3/3 (100%)	1/2 (50%)	
Cross-examination at first trial									
CCTV/AV Link at trial	10/11 (91%)		5/16 (31%)	11/12 (92%)	3/21 (14%)	22/26 (85%)	8/24 (33%)	11/25 (44%)	22/30 (73%)
CCTV/AV Link pre-recorded at special hearing		4/4 (100%)	10/16 (63%)		18/21 (86%)	3/26 (12%)		6/25 (24%)	
CCTV/AV Link at trial + Live without screen	1/11 (9%)								
CCTV/AV Link pre-recorded + CCTV/AV Link at trial			1/16 (6%)						
Live with screen								4/25 (16%)	
Live without screen				1/12 (8%)		1/26 (4%)	16/24 (67%)	4/25 (16%)	8/30 (27%)
Cross-examination at second trial									
CCTV/AV Link at trial				1/1 (100%)					

Alternate measure	Children			Adolescents			Adults		
	NSW	VIC	WA	NSW	VIC	WA	NSW	VIC	WA
CCTV/AV Link pre-recorded at special hearing		1/1 (100%)							
Recording from previous trial	1/2 (100%)		2/2 (100%)				3/3 (100%)	1/2 (50%)	
Recording from previous trial + CCTV/AV Link at trial	1/2 (100%)					1/1 (100%)		1/2 (50%)	
Cross-examination at third trial									
Recording from previous trial/s				1/1 (100%)			1/1 (100%)	1/1 (100%)	
Support persons at first trial									
Support person/s present	9/11 (81%)	4/4 (100%)	14/16 (88%)	8/12 (67%)	19/21 (90%)	14/26 (54%)	12/24 (50%)	21/25 (84%)	15/30 (50%)
No support person/s present						7/26 (27%)		1/25 (4%)	4/30 (13%)
Unknown	2/11 (18%)		2/16 (13%)	4/12 (33%)	2/21 (10%)	5/26 (19%)	12/24 (50%)	3/25 (12%)	11/30 (37%)
Identity of support person/s at first trial									
Support agency	6/9 (67%)	3/4 (75%)	11/14 (79%)	2/8 (25%)	10/19 (53%)	12/14 (86%)	2/12 (17%)	13/21 (62%)	8/15 (53%)
Family/friend			1/14 (7%)			1/14 (7%)	2/12 (17%)		2/15 (13%)
Counsellor/welfare/community services								1/21 (5%)	1/15 (7%)
Support agency + family/friend				1/8 (13%)			1/12 (8%)	1/21 (5%)	
Support agency + counsellor/welfare/community services					1/19 (5%)				
Counsellor/welfare/community services + family/friend				1/8 (13%)					
Unknown	3/9 (33%)	1/4 (25%)	2/14 (14%)	4/8 (50%)	8/19 (42%)	1/14 (7%)	7/12 (58%)	6/21 (29%)	4/15 (27%)
Support persons at second trial									
Support person/s present	1/1 (100%)			1/1 (100%)		1/1 (100%)		1/1 (100%)	
Identity of support person/s at first trial									
Support agency	1/1 (100%)			1/1 (100%)		1/1 (100%)		1/1 (100%)	

Alternate measure	Children			Adolescents			Adults		
	NSW	VIC	WA	NSW	VIC	WA	NSW	VIC	WA
Clearing the public gallery at first trial									
Gallery cleared	10/11 (91%)	3/4 (75%)		12/12 (100%)	17/21 (81%)		24/24 (100%)	22/25 (88%)	
Gallery not cleared									5/30 (17%)
Unknown	1/11 (9%)	1/4 (25%)	15/16 (94%)		4/21 (19%)	26/26 (100%)		3/25 (12%)	25/30 (83%)
Clearing the public gallery at second trial									
Gallery cleared	1/1 (100%)			1/1 (100%)				1/1 (100%)	
Unknown						1/1 (100%)			
Judges' and lawyers' removal of wigs at first trial									
Removed wigs	2/11 (18%)	1/4 (25%)		1/12 (8%)	2/21 (10%)				
Wore wigs	3/11 (27%)	2/4 (50%)	3/16 (19%)		1/21 (5%)			2/25 (8%)	
Unknown	6/11 (55%)	1/4 (25%)	13/16 (81%)	11/12 (92%)	18/21 (86%)	26/26 (100%)	24/24 (100%)	23/25 (92%)	30/30 (100%)
Judges' and lawyers' removal of wigs at second trial									
Wore wigs				1/1 (100%)					
Unknown	1/1 (100%)					1/1 (100%)		1/1 (100%)	
Judges' and lawyers' removal of gowns at first trial									
Wore gowns	4/11 (37%)	2/4 (50%)	3/16 (19%)		4/21 (19%)				
Unknown	7/11 (63%)	2/4 (50%)	13/16 (81%)	12/12 (100%)	17/21 (81%)	26/26 (100%)	24/24 (100%)	25/25 (100%)	30/30 (100%)
Judges' and lawyers' removal of gowns at second trial									
Wore gowns				1/1 (100%)					
Unknown	1/1 (100%)					1/1 (100%)		1/1 (100%)	

Table S5.3 Proportions (and percentages) of complainants who experienced each type of problem, by jurisdiction

Type of Problem	NSW	VIC	WA
Playing police interviews			
Overall problems	13/24 (54%)	15/33 (45%)	17/41 (41%)
Problems with technology	13/24 (54%)	11/33 (33%)	16/41 (39%)
Problems with editing	1/24 (4%)	6/33 (18%)	2/41 (5%)
CCTV/AV Links			
Overall problems	26/30 (87%)	39/42 (93%)	58/63 (92%)
Problems with technology	24/30 (80%)	37/42 (88%)	52/63 (83%)
Problems with presenting exhibits	14/30 (47%)	16/42 (38%)	41/63 (65%)
Problems with recording	5/30 (17%)	7/42 (17%)	11/63 (17%)
Inappropriate communication	2/30 (7%)	0/42 (0%)	2/63 (3%)
Complainant distractibility	2/30 (7%)	0/42 (0%)	2/63 (3%)
Problems with location	0/30 (0%)	3/42 (7%)	0/63 (0%)
Insufficient availability	3/30 (10%)	3/42 (7%)	0/63 (0%)
Other problems	2/3 (7%)	0/42 (0%)	0/63 (0%)
Playing evidence recorded via CCTV/AV Link			
Overall problems	NA	16/28 (57%)	4/14 (29%)
Problems with technology	NA	13/28 (46%)	3/14 (21%)
Problems with editing	NA	9/28 (32%)	1/14 (7%)
Alternate measures during the provision of live evidence			
Problems with recording	0/18 (0%)	1/8 (3%)	0/9 (0%)
Problems with using screens	NA	4/4 (100%)	NA
Problems with support persons			
Problems with the identity of the proposed support persons	1/47 (2%)	0/50 (0%)	3/72 (4%)
Improper use of support persons	4/29 (14%)	1/44 (2%)	1/43 (2%)

Supplementary Material 6: NSW Sexual Assault Review Committee meeting minutes

Table S6.1

Categories	Date of minutes	Number of meetings
Technical Difficulties	25/11/14, 17/06/14, 27/08/13, 05/03/13, 22/02/11, 01/06/10, 17/02/09, 25/11/08, 26/02/08, 27/11/07, 28/08/07, 27/02/07, 30/05/06, 28/02/06, 07/06/05, 01/03/05, 24/08/04, 11/05/04, 29/10/03, 19/08/03, 04/08/03, 03/06/03, 18/03/03, 24/02/03, 24/09/02, 21/05/02, 04/12/01, 07/12/99, 21/09/99, 24/11/98, 14/11/95	31
Police Recordings	27/08/13, 17/02/09, 07/06/05, 01/03/05, 24/08/04, 04/08/03, 03/06/03, 24/09/02, 20/07/02, 21/05/02, 21/05/02, 04/12/01, 18/09/01, 03/07/01, 28/11/00, 3/02/98, 14/11/95	17
Video	24/09/02, 20/07/02, 21/05/02, 18/09/01, 03/07/01, 28/11/00	6
Audio	17/02/09, 24/08/04, 03/06/03, 21/05/02, 14/11/95	5
Prejudice/ Interview Techniques	21/05/02, 04/12/01, 3/02/98	3
JIRT Tapes (specifically)	07/06/05, 04/08/03	2
Switch from analogue to digital	01/03/05	1
CCTV	22/02/11, 01/06/10, 17/02/09, 26/02/08, 28/08/07, 27/11/07, 28/08/07, 30/05/06, 28/02/06, 07/06/05, 01/03/05, 24/08/04, 19/08/03, 04/08/03, 18/03/03, 21/05/02, 04/12/01, 07/12/99, 21/09/99, 24/11/98, 14/11/95	21
Multiple Image Displays	24/08/04, 07/12/99, 18/03/03, 14/11/95	4
Screen Size	22/07/99; 24/11/98	2
Audio	14/11/95	1
Unsuitability of Facilities	22/02/11, 17/02/09, 28/08/07, 24/08/04, 04/08/03, 21/05/02, 21/09/99	7
Staff/ Resource Shortages	01/06/10, 27/11/07, 01/03/05, 04/08/03, 07/12/99	5
Staff Training	22/02/11, 17/02/09, 26/02/08, 27/11/07, 04/08/03, 21/05/02, 07/12/99	7
Court Closure	17/06/14, 27/02/07, 11/05/04, 24/08/04, 11/05/04, 29/10/03, 19/08/03, 03/06/03, 18/03/03, 04/12/01, 07/12/99	11
School Children in Hearings	17/06/14, 11/05/04, 29/10/03, 19/08/03, 03/06/03, 18/03/03, 04/12/01, 07/12/99	8
General (not specified)	25/11/14, 05/03/13, 22/02/11, 07/12/99	4
Delay	30/05/06, 19/08/03, 24/09/02, 28/11/00, 04/12/01, 22/07/99, 14/11/95	7

Categories	Date of minutes	Number of meetings
<u>Practices</u>	17/06/14, 18/03/14, 27/08/13, 28/05/13, 28/08/12, 28/02/12, 22/02/11, 24/05/11, 23/11/10, 17/02/09, 26/08/08, 26/02/08, 28/08/07, 27/02/07, 28/02/06, 29/11/05, 2/03/04, 24/08/04 19/08/03, 18/03/03, 24/02/03, 04/12/01, 18/09/01, 28/11/00, 07/12/99, 24/11/98, 30/06/98, 28/04/98, 3/02/98, 9/09/97, 22/10/96, 13/08/96, 27/03/96, 7/04/95	34
Judges (Magistrates)	18/03/14, 27/02/07, 24/08/04, 04/12/01	4
Courts/ Court Officers	28/05/13, 28/08/12, 28/08/12, 28/02/12, 28/08/07, 2/03/04, 24/02/03, 04/12/01, 28/11/00, 9/09/97, 13/08/96, 07/12/99, 09/09/97	13
Crown Prosecutors	27/08/13, 22/02/11, 23/11/10, 26/02/08, 28/08/07, 29/11/05, 24/11/98, 24/02/03, 22/10/96	9
Managing Lawyers	29/11/05, 04/12/01, 24/11/98	2
Defence	28/08/07, 04/12/01	1
Police	17/02/09, 28/02/06, 3/02/98	3
Criminal Justice Agencies	28/08/12, 19/08/03, 18/03/03	3
WAS	28/02/06, 04/12/01, 22/10/96	3
ODPP	24/11/98	1
Families	17/06/14, 19/08/03, 24/02/03	3
<u>Law Reform</u>	26/11/13, 22/02/11, 18/08/09, 01/03/05, 06/09/05, 24/08/04, 19/08/03, 18/11/03, 19/11/03, 19/03/02 27/03/01, 20/07/02, 04/12/01, 03/07/01, 04/12/01, 18/09/01, 27/03/01, 09/03/99, 07/12/99, 3/02/98, 25/02/97, 17/06/97, 10/02/95, 23/02/95, 1/05/95, 12/9/95, 18/11/94, 23/9/94, 22/07/94, 20/05/94, 8/10/93	31
Act or Bill (legislation)	01/03/05, 24/08/04, 04/12/01, 20/05/94	4
Regulations	25/02/97	1
Charter	18/08/09	1
Guidelines	22/02/11, 18/08/09, 22/07/94	3
Research Reports	26/11/13, 19/08/03, 18/11/03, 20/07/02, 04/12/01, 03/07/01, 18/09/01, 27/03/01, 07/12/99, 3/02/98, 1/05/95, 10/02/95, 23/02/95, 23/9/94, 8/10/93	15
	19/08/03, 18/11/03, 03/07/01, 18/09/01, 07/12/99, 3/02/98, 1/05/95, 23/9/94, 8/10/93	9
Legal Feedback	17/06/97, 09/03/99, 27/03/01, 19/03/02, 06/09/05, 19/11/03	5
Survey	27/03/01, 12/9/95, 18/11/94	3
Other	19/11/03, 04/08/03, 28/11/00, 22/07/99, 25/08/98, 17/04/97, 25/02/97, 27/6/95, 18/03/94, 21/01/94, 18/03/94	11

Table S6.2

No	Date	Categories	Discussion of Alternative Measures
1.	25/11/14	Technical Difficulties (CCTV)	DPP reported that issues with remote facilities were being fixed. Technical difficulties were being fixed and court staff training was ongoing. One member noted that CSA cases should be given priority.
2.	17/06/14	Closed Courts (School Children)	SARC noted that school children were still attending sexual abuse hearings. They discussed the problems of reading indictments in open court in front of a complainant's school peers.
		Practices (Families)	CASAC noted that the Royal Commission was having an impact on victims/families seeking support and information. CASAC noted that many families and victims did not want to proceed with matters.
3.	18/03/14	Practices (Judges/Magistrates)	SARC noted that rates at which Crown requests for pre-trial hearings were knocked back was the same as before the relevant legislative reforms. Noted that protocols for CCTV in courts has been removed from the Judicial Commission website. Noted the need to fix this. Acknowledged that s 61 will be included in the next Crimes (Miscellaneous) Act as a priority.
4.	26/11/13	Law Reform (Research Report)	A PowerPoint presentation given on a report about Child Witness Intermediaries was to be forwarded to SARC.
5.	27/08/13	Delay	SARC discussed the need for pre-recording of children's evidence to overcome chronic delays in the courts. They observed that 'case management is not happening'
		Practice (ODPP)	The DPP reports noted a court request that the DPP be more diligent in booking CCTV rooms.
6.	28/05/13	Law Reform (guideline)	Discussed court protocol for unrepresented accused. Noted that the DPP revised prosecution guidelines to state that a victim can nominate the person who can read out the victim impact statement. The revised definition encompasses prosecutors.
7.	05/03/13	Technical Difficulties (CCTV)	CCTV issues were being raised at the Remote Witness Room Working Party chaired by Victims Services. DPP reports indicated that there was an issue of whether DPP Lawyers or the Crown prosecutor could read out victim impact statement because the person chosen by the victim is unable to attend in certain instances.
8.	28/08/12	Practices (Criminal Justice Agencies)	Noted various criminal justice agencies' criticisms that the rapport-building segment of the electronically recorded statement for children was not recorded.
		Practices (Court Officers)	Noted that children in the Family Court were not receiving counselling for traumatic events, which goes against the Family Courts Best Practice Principles and the recommendation in ALRC Report Into Family Violence 2010.
9.	29/05/12		
10.	28/02/12	Practices (Court Officers)	Noted a lack of consistency in courtroom procedures for CCTV.
11.	24/05/11	Other	DPP had been making on the ground contact with services in Wilcannia regarding examples of CCTV usage. SARC decided to collate material for submission to courts in relation to the CCTV facilities in Dubbo.
12.	22/02/11	Technical Difficulties (Training)	Noted that training was to be provided for all Crown prosecutors on the benefits of the use of CCTV.

No	Date	Categories	Discussion of Alternative Measures
		Technical Difficulties (Training, General, Access, Sound Proofing, Facilities)	Discussion about CCTV issues: lack of court staff trained to use equipment, Technical problems, access for court preparation, position of support, lack of sound-proofing in some rooms, unsuitability of CCTV rooms (some used for storage).
		Law Reform (Guideline)	DPP to amend Research Flyer 2 The Indictment: A Practical Guide
13.	23/11/10	Practices (Prosecutors)	Noted that one member was to raise the issue of private Crown trying to talk the complainant out of using CCTV, with the Head of Chambers of Crown Prosecutors.
14.	01/06/10	Technical Difficulties (Staff Shortages)	ODPP reported a lack of resources: in Newcastle and some areas, the DPP was to write to the Sheriffs to tell them that they would be required for CCTV assistance (giving 3 weeks notice). In Sydney and Sydney West, ODPP was told there were insufficient resources to have sheriffs allocated for CCTV.
15.	18/08/09	Law Reform (Guidelines, Charter)	Prosecution Guidelines 34 given to SARC members. Charter of Victim Rights
16.	26/05/09	N/A	No reports mentioned.
17.	17/02/09	Technical Difficulties (Seating Arrangements)	Managing lawyers in Gosford noted that it was not always possible for the next support person to sit in sight of the complainant in a CCTV room as the bench have to be able to see the support person.
		Technical Difficulties (Audio)	Managing lawyers in Newcastle indicated that JITRT police did not like using lapel microphones, as children tended to fiddle with them.
		Practices (Police)	Managing lawyers in Wagga Wagga noted that a police officer was not aware of the possibility of CCTV in an AVO Hearing.
		Technical Difficulties (Training)	Managing lawyers in Newcastle reported that staff at Newcastle District Court did not know how to use CCTV equipment.
18.	25/11/08		
19.	26/08/08	Practices (General)	A managing lawyer in Gosford gave details concerning children giving evidence in AVO matters without the use of closed-circuit evidence.
20.	27/05/08	N/A	No reports mentioned.
21.	26/02/08	Technical Difficulties (Training)	CCTV complaints were catalogued. Noted that there were often long periods of time between the use of the equipment, and staff had forgotten how to operate the system. Another point made was that operating technology was never part of the court officer's job description (now changed).
		Practices (Prosecutors)	WAS reported that Crown prosecutors and lawyers were talking complainants out of using CCTV, numerous times. WAS officers were finding it difficult in that they were presenting the options to complainants as an entitlement under the legislation. WAS reported that many Crown prosecutors still adhered to the belief that it was better for a complainant to give their evidence in court, in spite of research that had been conducted by the Australian Institute of Criminology. SARC noted that Crown prosecutors in the regional areas appeared to be more amenable to the use of CCTV than were Sydney prosecutors.
22.	27/11/07	Technical Difficulties (Training)	SARC agreed that CCTV equipment should be simplified so that non-technically trained staff could operate the equipment.

No	Date	Categories	Discussion of Alternative Measures
		Technical Difficulties (Staff Shortages)	SARC also discussed difficulties in Parramatta concerning the lack of court officers in CCTV rooms.
23.	28/08/07	Technical Difficulties (Access)	Discussed access for families of victims to sentencing proceedings.
		Technical Difficulties (CCTV: Facilities)	WAS reported a problem in relation to a 13 year old complainant and the use of the old CCTV room in the Downing Centre. There were access difficulties to the CCTV room and when the sheriff officer was made aware of the problem, her response was 'this room has been used for the last 20 years'.
		Practices (Prosecution, Defence)	WAS also noted a matter in which there were 3 accused, with the complainant 15 years old at the time of the offence. The victim was 16 years old and 6 months pregnant at the time of the trial. When the Crown gave evidence by CCTV, the defence made an application that the court be able to see a waist up view of the complainant. The defence argued that the CCTV arrangements that transmit a headshot of the complainant were inadequate. The judge asked the Crown to make enquiries about whether this was possible. The cameras could not be moved. While it was never actually mentioned, it was assumed that the defence were seeking a waist up view so that the jury could see that the complainant was pregnant. The trial was eventually aborted. A further issue was that the defence was given a copy of the electronic statements by order of the judge (for the duration of the trial).
24.	29/05/07		
25.	27/02/07	Closed Court	Discussed Local Court instruction to court officers regarding closed courts, contained in Local Court Policy and Procedure Guideline, Chapter 7.
		Practices (Judges/Magistrates)	WAS reported that 2 judges in Campbelltown would not use Court 1 where recording equipment is situated because of OH&S issues, resulting in many sexual abuse matters not being addressed.
26.	28/11/06		
27.	30/05/06	Technical Difficulties (CCTV)	WAS reported technical problems in child sexual abuse case. The complainant was a 7 year-old boy and the first time he was asked to presented evidence he could not because the CCTV equipment was not working. The second time, the giving of evidence was delayed for 2 hours, again because of technical problems with CCTV equipment.
		Delay	
28.	28/02/06	Practices (WAS)	WAS officers noted an increase in demand for their services with the increase in number of total adult complainants using CCTV.
		Technical Difficulties (CCTV)	WAS officers in Campbelltown noted a child sexual abuse matter (R v M) where there was repeated poor communication between the CCTV facility and the court. No breaks were provided for the child and most of the time the judge was not in view of the child. The consequences and impact for child complainant were discussed.
		Practices (Judges/Magistrates)	
		Practices (Police Officers)	The ODPP noted that police have queried the use of children's electronic statements in AVO applications. The ODPP responded that this was a matter entirely for police prosecutors.

No	Date	Categories	Discussion of Alternative Measures
29.	29/11/05	Practices (Prosecution)	WAS officers in Wagga Wagga reported that child complainants in child sexual abuse matters were able to give evidence by CCTV but other child witnesses (not the primary complainant in the matter, but giving tendency evidence and often quite traumatised) were not permitted to give evidence by CCTV. WAS officers felt Crown Prosecutors were hesitant to push for CCTV in these instances.
		Practices (Prosecution)	WAS officers in Campbelltown noted the following matters: <i>R v M</i> : matter where the prosecutor who was then running the trial had not met with 2/3 child complainants. The solicitor changed on the day of the trial, as the previous solicitor was sent for Cases Training by management for that week. The new solicitor had not met with any of the children, and had not had any contact with the three families. <i>R v B</i> : a historical child sexual abuse matter involving three men had 3 different solicitors and 3 different Crown prosecutors so far.
30.	06/09/05	Law Reform	Noted that courts had contacted the ODPP in relation to the establishment of a working group to recommend priorities for the establishment of Vulnerable Witness Courts across the State.
31.	07/06/05	Technical Difficulties (CCTV)	Discussion concerning Criminal Procedure Further Amendment (Evidence) Bill 2005. The Bill made it clear that a complainant in a sexual offence proceeding was entitled to give evidence by use of arrangements to restrict contact between the complainant and the accused, instead of by the use of CCTV, whether or not closed-circuit television facilities were available in the proceedings.
		Delay	WAS officers reported that children had to wait for lengthy periods in CCTV remote witness rooms. In one case, a child was asked to wait all afternoon while equipment was fixed and was then asked to return the next day.
		Technical Difficulties (CCTV)	WAS reported an instance where the accused was visible to the children at the time the CCTV was turned on. WAS reiterated the need for pre-trial testing of equipment and set up before the child was placed in this position. Noted the expansion of the CSA Jurisdiction Pilot to the Downing Centre because of the lack of matters that had been dealt with in the Sydney West pilot.
		Technical Difficulties (Police Interview)	Raised issue of poor quality of JIRT tapes.
32.	01/03/05	Law Reform (Act, CCTV, screens)	An anomaly was identified in s 294B Criminal Procedure Act in that an adult does not have a choice between using CCTV or a screen. A screen could only be used if CCTV was unavailable. A letter was written to CLRD to that effect and the legislation was subsequently amended.
		Technical Difficulties (Police Resources)	The ODPP noted concerns about JIRT's move to the use of digital recorders and the ODPP's and courts' ability to play the digital recordings.
		Technical Difficulties (CCTV)	Noted that the CCTV was poor and out-dated in Gosford.
33.	24/08/04	Closed Court	Noted that legislation enabling mandatory court closure was to be introduced in the next sitting.
		Law Reform (Legislation)	Noted that the new <i>Criminal Procedure Act 1985 s 294B</i> created a presumption that victims were entitled to access alternate arrangements for giving evidence in sexual abuse proceedings, including CCTV, screens, alternative seating arrangements and presence of support persons. Certain historical offences were excluded from this amendment.

No	Date	Categories	Discussion of Alternative Measures
		Technical Difficulties (CCTV: Split Screen) Practices (Magistrate)	Noted a Campbelltown Local Court child sexual abuse matter where the magistrate did not allow a child's video evidence to be admitted. Noted a Penrith District Court child sexual abuse matter where there was a 'split screen issue'. Noted that a few children aged 12 and 13 had been reluctant to view their video pre court or at court.
		Technical Difficulties (Police Interview: Audio quality) Practices (Magistrate)	Dubbo managing lawyers reported two cases with Technical issues. One was an audio interview of poor quality (audio enhancement and special headphones did not fix the problem). The complainant then had to give evidence orally. In the second, a magistrate did not permit two 11-year old complainants to hear their interview when it was played to the court. Prior to commencing the matter the DPP lawyer and defence counsel saw the magistrate in chambers. The purpose of the visit was to advise the magistrate that tapes were to be played in evidence. There was no CCTV link at the time the interview tape was played so the court could not look at the child at the same time (despite legislation allowing them to do so). The magistrate considered it totally inappropriate for the complainants to refresh their memory before giving evidence, and he was not aware of 'any provision in any Act' that permitted the child to give evidence after re-watching their pre-recorded interview.
34.	11/05/04	Technical Difficulties (Audio) Closed Court	Noted that use of headphones for the jury where electronic statements are inaudible had been successful in the Child Sexual Assault Jurisdiction Pilot. Noted that in Gosford, it was common for the court not to be closed while a child was giving evidence. The argument was that the child is giving evidence via CCTV, and therefore cannot see the people in the court. SARC expressed concern that judicial officers were losing sight of why courts are closed.
35.	2/03/04	Practices (Court)	Discussion of the expansion of the Child Sexual Assault Jurisdiction Pilot to Dubbo. Unlike in Parramatta, the remote witness box was not to be located away from the courthouse. All child sexual abuse matters to be dealt with in Campbelltown, Penrith, Parramatta and Dubbo would be included in the pilot.
36.	18/11/03	Law Reform (Report)	SARC decided to seek information in relation to the rollout of CCTV and/or an audit of CCTV facilities as recommended in the Child Sexual Assault Report. Noted that WAS developed a database for recording precedents for vulnerable adult victims who had been granted alternative provisions such as CCTV.
37.	19/11/03	Law Reform (Legal Feedback) Closed Court	Noted that the DPP was writing to the Attorney-General (AG), again regarding the difficulties associated with prosecuting matters involving child witnesses who wished to utilise the provisions of the Evidence (Children) Act 1997. Discussed the difficulties for lawyers getting closed courts in some areas.
38.	29/10/03	Closed Courts Practices (Judges/Magistrates)	Discussed Guideline 19 of the Prosecution Guidelines, and the issues of 'vulnerable witnesses', particularly where the terminology of 'special needs' may be more representative of this group. Noted that the ordering of closed courts was an ongoing problem, as it was at the discretion of the judiciary and was not often exercised for adults in sexual abuse and child sexual abuse matters. Noted that school students in court were a continuing problem.
39.	19/08/03	Law Reform (Report)	Discussed Child Sexual Assault Jurisdiction Pilot Progress Report (see below).

No	Date	Categories	Discussion of Alternative Measures
		Practices (Families, Judges/Magistrates)	Noted two occasions where a child was denied access to parent and siblings during the period of giving evidence. Noted a summary matter at Downing Centre Local Court, where the matter was allocated to a court not connected to CCTV, despite the fact that the solicitor had informed the court in advance about the need for CCTV. This caused a delay in proceedings.
		Technical Difficulties (CCTV, Delay)	
		Closed Court	Noted that school students' presence in historical and adult SA matters continued to be a problem. SARC expressed concerns that legislative amendments would not address closed courts in sexual abuse matters, especially historical child sexual abuse matters.
40.	04/08/03	Discussion (Funding)	Noted commencement of the Sydney West Pilot Specialist Child Sexual Assault jurisdiction on 24 March 2003. Noted that future funding of \$390,000 had been allocated to extend the pilot to two further sites during the 2003/2004 financial year. State of the art technology had been installed in District Court 3 and Local Court 7 at Parramatta, including dual 42 Inch plasma screens (to allow for split screen capabilities).
		Technical Difficulties (Police Recordings, CCTV: Soundproofing)	Noted a difficulty with the admission of pre-recorded tapes as evidence-in-chief under Evidence (Children) Act 1997 because of the quality of original recordings made by police. The Crimes Legislation Amendment Bill 2003 inserted a new 15A into the Evidence (Children) Act 1997 clarifying the power of the Court to exercise its discretion to permit a transcript, or an edited version of that transcript, of the pre-recorded interview with the Police, to be supplied to the jury to assist in understanding the recorded evidence. Another issue raised by the legislative amendments was the need to reconfigure CCTV/Video Conferencing systems to ensure compliance with the new requirement not to show an image of the child in RWS on screen in court while the JIRT's tape is played. SARC agreed that the Video Conferencing team at the Legal Aid Commission would ensure that the necessary programming changes were made. Noted lack of confidence on the part of staff in Parramatta because of inexperience in using the pilot equipment. Around 6 Sherriff's Offices and 6 Local Courts' staff were trained in the use of the court-based equipment at Parramatta. Problems with operating the document cameras had arisen in nearly every trial conducted under the Pilot to date. Key issues identified: the soundproofing at the Parramatta RWS had proved problematic, which could potentially have resulted in a mistrial.
41.	03/06/03	Technical Difficulties (Police Interviews: Audio)	Managing lawyers (Newcastle) reported that child interviews were conducted at school with a hand-held recorder. A lapel microphone was not used and strategies had been put in place to avoid the problem in the future.
42.	18/03/03	Technical Difficulties (CCTV)	DPP wrote to AG outlining problems with CCTV equipment.
		Closed Courts (General)	One member reported having drafted a letter to the AG in relation to issues raised about school students at the last meeting

No	Date	Categories	Discussion of Alternative Measures
		Technical Difficulties (CCTV: Split Screens)	NSW Health noted its disappointment with 2 elements of the Child Sexual Assault Jurisdiction, one of which was the use of split screens. Split screens were requested so that the jury could see a view of the child while they are watching their video evidence, as well as view of the actual evidence. NSW Health was concerned about the impact on the child of being scrutinised to that degree, and was concerned that this would not assist in making things better for children. Another member added that it was also likely that juries would be distracted from watching actual video evidence when focusing on the child. SARC recommended that split screens be legislated out, and that the WA model with pre-recorded evidence and cross-examination would address a number of concerns.
		Technical Difficulties (CCTV)	Managing lawyers reported instances where a child had to remain in the CCTV remote witness room for a long period during legal argument, with no toilet break etc. Discussed the impact for the child, who was expected to resume cross-examination after a lengthy period of waiting and anticipation.
43.	24/02/03	Practices (WAS, court, families, evidence)	Child Sexual Assault Jurisdiction Working Group on Witness Support Services was convened. Its role was to provide witness preparation, court support, support for child sexual abuse victims and their families, and use of special measures for giving evidence such as pre-recorded video evidence and CCTV.
		Practices (WAS officers, Prosecutors)	Noted that WAS officers, DPP prosecutors and support persons from other agencies will need access to the remote witness suite relatively frequently to familiarise child witnesses with the facilities. The development of an electronic booking system and an interagency communications protocol were keys factors in ensuring the suite was accessible.
		Practices (Courts)	Noted that useful toys in the play room and waiting areas of the remote witness suite could include games such as Connect 4/Trouble, colouring materials, small sets of toys (zoo/farm animals, dinosaurs, cars etc.), Lego and Fuzzy Felts. Noted that the toys should not require too much concentration because children are likely to be in a highly stressed state of mind.
		Practices (Courts)	Video conferencing suites would be painted duck egg blue to comply with technical requirements for optimum clarity in the picture transmitted to the courtroom. Colours in the remainder of the suite would be chosen with a view to creating a calming, welcoming environment for both the child and his or her family.
44.	24/09/02	Technical Difficulties (Police Interview, Delay, Audio/Video Quality)	WAS reported that the DPP failed to serve notice for video evidence within the 14 day timeframe (it was a few days out). The defence argued that they had not been given adequate notice, and the trial was delayed 2 days. Managing lawyers in Gosford raised past concerns regarding quality of electronic recordings, but another managing lawyer reported that there had been two recent videos where the Crown had been very happy with the quality of the interviews.

No	Date	Categories	Discussion of Alternative Measures
45.	20/07/02	Law Reform (Research Report)	<p>A study on the Evaluation of the Electronic Recording of Children's Evidence was discussed. Key findings included: General support and confidence in the provisions; electronic recording of statements reduces stress for children; a majority of those interviewed saw the benefits for children in the recording of children's statements; positive impact of the provision on the quality and completeness of children's evidence.</p> <p>Managing lawyers reported that electronic statements (editing of tapes, length of tapes, necessity of training) had implications for lengthy interviews and the court process. One member asked about the assessment process of the interviewers. The current training was 5 days, 2 field assessments and practical experience using children. The member advocated further training of 12 months after this round of training.</p> <p>CASAC reported that 3 child witnesses had been prepared for court in the last 3 months in Lismore. One interview was taped at fast speed, so the child could not understand the interview. However, the quality of interviewing was reportedly 'very good'. In Bathurst, the court was awaiting the Nothing But the Truth revised court preparation package because there was a need for more resources for young people. CASAC reported a lack of knowledge on the part of court officers on how to operate the CCTV, and children had been able to see the accused on TV in Bathurst</p>
46.	21/05/02	Technical Difficulties (Facilities, quality, resources, staff)	<p>Incongruence noted between s 27 of the Evidence (Children) Act 1997 and the Attorney General's 'NSW Courts Remote Witness Video Facilities Operational Guidelines for Support Persons attending the Witness Room'.</p> <p>Managing lawyers noted concerns about the facilities located in corridors in the Orange Local Court and the lack of court officers' knowledge in the use of the facilities.</p> <p>Further concerns were raised about the need for dual tapes so that the child could hear or see the tape at the same time it was played in court. This was common to most courts.</p> <p>Managing lawyers reported that videos were of poor quality, children were sometimes inaudible, and, in Gosford Local Court, difficulties arose when the interviewer repeated what a child said. The DPP experienced electronic interviews being rejected, partly because of this style of questioning.</p>
47.	19/03/02	Law Reform (Legal feedback, limitations of court resources for CCTV)	<p>A member of the Education Centre Against Violence, NSW Health, was concerned to get legal feedback on the Nothing But the Truth Court Preparation Manual. She acknowledged the need for a video about the use of CCTV and electronic statements but resources were limited.</p> <p>AG was to write to the Judicial Commission's Education Committee about the lack of legislation about electronic recorded statements.</p>

No	Date	Categories	Discussion of Alternative Measures
48.	04/12/01	Law Reform (Legislation) Practice (Police) Technical Difficulties (Police Interview: Prejudice)	Evidence (Legislation Amendment) Bill 2001 was introduced, enacting changes requested by SARC about children over 16 giving evidence via electronic statements, and the use of CCTV beyond 16 years but under 18 years. The Judicial Commission had not conducted training on the legislation. SARC questioned what could be done in this regard. A memorandum from a managing lawyer regarding a matter in Campbelltown Local Court was tabled. In this matter, the judge did not allow the videotape to be played as evidence-in-chief, because it was prejudicial to the defendant. Sources of prejudice listed were: (a) The circumstances in which the interview was conducted, with the complainant placed in a colourfully decorated room and given toys to play with. The judge felt that the picture of an attractive girl playing with toys as she described gross crimes would cause prejudice to the accused which could not be remedied by any judicial direction; (b) The way in which questions were recorded. The officer frequently repeated the complainant's assertions. The judge thought that the assertions were constantly underlined as if they were fact. (c) The difficulty in getting a chronological story. The investigator had to keep the child on topic, and the interview was interspersed with light-hearted conversation. More than half the interview was about irrelevant matters. Those questions would need to be exercised from the record of interview and ultimately were thought to cause confusion. The irrelevant matters referred to related to rapport-building.
		Practices (Magistrate)	A matter was also heard in Taree Local Court where the magistrate indicated that he had never heard of the legislation before. The magistrate argued that the legislation provided no assistance as to the procedures to be followed. The defence objected to the witness listening to her evidence in the courtroom on the basis that the child was being allowed to refresh her memory. The solicitor said that there was a great deal of legal argument about this, which resulted in a delay in the victim being able to give her evidence via tape-recording with the result that the victim was only part way through her evidence and required to return in January for the conclusion of the hearing.
		Law Reform (Research Report)	A report was discussed on the effect of court preparation for children. The relevant researcher was working on a Research Honours thesis that would survey the effects of court preparation on children, with the primary aim of reducing the anxiety of children about to give evidence in court.

No	Date	Categories	Discussion of Alternative Measures
		Practices (Judicial Officer, Prosecution, Judge/Magistrate) Technical Difficulties (CCTV, Police Recordings)	<p>Sydney WAS Group reported that the Crown was reluctant to make applications in response to requests by child sexual abuse victims, particularly adolescents, for closed courts and screens. Some courts were also reportedly reluctant to grant these applications. In one case, a closed court was granted, but a support person was denied.</p> <p>The group also reported that court proceedings in sensitive sexual abuse and child sexual abuse matters were disrupted by groups of school students and ‘a busload of Japanese tourists’. They also expressed concern over the content of the evidence and whether parents of school students were aware of what they were hearing in court.</p> <p>Sydney West WAS Group reported that, in one matter, the presiding judge ruled video evidence inadmissible because it was prejudicial to the defendant.</p> <ul style="list-style-type: none"> • The CCTV room was inadequate • Court preparation for children put a lot of responsibility on the child to intervene to ask for a break. They observed that often the child was reluctant to speak up • A best practical protocol needed to be develop, for respective roles of participants in remote witness rooms when children are given evidence • Clarification was needed about the role of a court support person. <p>A Managing Lawyer from the Dubbo Office, discussed technical difficulties with electronic statements and the technology associated with CCTV. He also discussed another example of a judicial officer’s view of the legislation for the recording of police interviews.</p>
49.	18/09/01	Practices (Doctors) Practices (Defence) Law Reform (Report)	<p>SARC was informed that a number of different committees had been established in relation to videoconferencing (in which complainants and doctors gave evidence) and advances in technology that were allowing and will allow witnesses to give evidence from remote locations.</p> <p>A Sexual Assault Forum was organised by police to look at intelligence, and at how data could be collected and shared.</p> <p>Managing lawyers reported that objections to CCTV were unusual, and perhaps exclusive to Wollongong.</p> <p>In some matters, the child witness did not see the video in court. Sometimes the child had viewed it during the week, and a decision was taken for the child not to see it again—making it difficult for the child in cross-examination. In other matters there were no facilities for the playing of the video.</p> <p>WAS reported that several factors such as electronically recorded evidence, reduction in court delays, and pre-trial disclosure, had led to WAS Officers recognising the need for early referral and early conferencing, regarding electronically recorded evidence. Time was a major consideration in conferencing because of the necessity of the child witness viewing their electronic statement with the DPP lawyer, which may have occasionally been a 2-hour video.</p>

No	Date	Categories	Discussion of Alternative Measures
50.	03/07/01	<p>Law Reform (Report Review)</p> <p>Practices (Managing Lawyers)</p>	<p>A Report on CCTV Equipment and Video Conferencing was discussed. \$4 million had been allocated from the NSW state budget for the 2000/2001 financial year to extend video conferencing capability. This would enhance the CCTV equipment available at some courthouses. Video conferencing facilities had already been installed at six courts (Central Local Court, Campbelltown Children's Court, and Parramatta, Lismore and Liverpool Local Courts). Facilities were being installed at Newcastle, Penrith, Woy Woy and Bankstown courts, as well as Bidura and Lidcombe Children's Courts. There were approximately 96 CCTV systems in 63 courts across the state. Local courts had developed a strategy to address the listing of matters requiring CCTV facilities and the training of staff to use CCTV equipment, which was being implemented. Data from the AGs Department sample survey from September to December 2000 at 10 courts had been coded. The survey gained feedback on the remote witness CCTV facilities in a number of key courts.</p> <p>SARC was to make formal recommendations to the AGs department that legislation be amended in relation to the age of complainants for use of electronic statements and CCTV.</p> <p>WAS reported that solicitors were becoming more familiar with CCTV, and there was now a general assumption that children would use the facility.</p> <p>Electronic statements were usually lengthy, making it difficult to estimate timeframes for conferences and court preparation. There was a lack of clarity regarding playing the statements, and some lawyers were requesting that WAS be responsible for the playing of the videos.</p> <p>Some children were placed in the courtroom to view the video due to inadequacy of the facilities.</p>
51.	27/03/01	Law Reform (Survey)	Results of the AGs Remote Witness CCTV, Video and Audio Play Back Equipment Survey noted, but not discussed.
		Law Reform (Legal Feedback)	SARC recognised a need to change the Children's Evidence Act to cover circumstances where young people were under 16 years when they reported to the police but were over 15 years by the time the matter went to hearing or a trial. Once 16 years, the young person was no longer entitled to have their evidence heard by way of electronically recorded evidence and did not have rights in terms of giving evidence by way of CCTV. A suggestion was made that such a change to the legislation would be in keeping with the <i>Children and Young Persons (Care and Protection) Act 1998</i> .
		Law Reform (Research Report)	<p>A researcher discussed her study titled 'Evaluation of Electronically Recorded Evidence for Children'. The evaluation aims were to investigate whether the electronic recording of children's evidence made the experience of being interviewed and appearing at court less stressful for children; to assess whether electronic recording increased the quality and completeness of children's evidence; to ascertain how frequently electronically recorded evidence was submitted as children's evidence-in-chief and to identify the factors that influenced and impeded its use; to identify the strengths and limitations of interviewer training; and to identify any areas which required improvement.</p> <p>The researcher's methodology involved a review of background information; case tracking (2 sets of cases, pre and post electronic recording); 4 JITS; observation of an audio-video training course; and interviews with a sample of key informants, joint investigation teams, prosecutors, members of the judiciary, defence lawyers, WAS and SAS counsellors, technical staff, and children and their carers.</p>

No	Date	Categories	Discussion of Alternative Measures
52.	28/11/00	Discussion (Electronic Evidence, Video-Linking)	<p>A memo about the Cross Justice Agency Video Conferencing process was discussed. A steering committee had been formed. The project appeared to focus on linking correctional institutions and detention centres to the courts to address some of the problems faced by defendants.</p> <p>The technology being developed and installed may have had implication for the PRC recommendations for the video-linking expert evidence in child sexual assault matters. It was suggested that the equipment being installed in various locations might facilitate and improve access to courts, particularly for doctors providing forensic evidence of child and adult sexual abuse.</p> <p>The DPP encouraged lawyers and WAS officers to complete the AG's Remote Witness CCTV, Video and Audio Play Back Equipment Survey. The fact that there are no CCTV facilities at Bidura Children's Court was noted. SARC acknowledged that this could cause delays in the legal process where there are children who are witnesses in matters, as the matters need to be reallocated to courts where CCTV facilities are available.</p> <p>Further discussion took place about the current situation at court for matters involving electronically recorded evidence. SARC reported that there were only a few cases to go to court to date, with 'about 3 or 4 matters' where electronic recordings had been played as evidence-in-chief. There appeared to have been no major problems to date. For the WAS officers involved it had been a learning process, and each situation was different. Some court equipment would not allow the showing of the video in both the court and remote witness room at the same time. Hence, 2 copies of the video had to be tendered to allow simultaneous showing of the video to the court and to the child in the remote CCTV witness room.</p> <p>A Senior Research Officer at the NSW Police Service indicated her willingness to either write something for SARC or attend the next meeting to inform the committee of the evaluation process and progress. SARC agreed that it would be beneficial to have her attend the next meeting to inform the committee of the evaluation process.</p>
		Practices (Courts)	<p>A DPP case study was presented to SARC. The case study involved concerns raised by a counsellor about system abuse for a number of young complainants, which occurred during the court process in a particular matter. Of particular concern was the fact that there was an oversight and neglect to swear in three child witnesses before giving evidence. The situation for the young people was exacerbated by subsequent delays in the matter proceeding through the legal process. Issues surrounding the situation were discussed including the complexity of getting proceedings started in matters for which a child was giving evidence via CCTV, and the way some of the technical aspects serve as a distraction to the legal process. SARC also discussed whose responsibility it was to ensure that either a child is sworn in or the test of truth.</p>
53.	02/05/00		
54.	18/07/00		
55.	05/09/00		
56.	07/11/00		
57.	07/12/99	Law Reform (Research Report)	<p>BOCSAR notified SARC that they would not be conducting research on the topics discussed at the previous meeting. This was for a number of reasons: they would have to rely on lawyers outlining difficulties; research was already being conducted on CCTV; and they lacked resources.</p>

No	Date	Categories	Discussion of Alternative Measures
		Practice (Judge/Magistrate)	<p>A report from the Dubbo Office stated that child sexual abuse matters were usually listed as back up and they were usually not reached. Competition regarding the use of CCTV was also observed.</p> <p>A transcript from a Newcastle proceeding noted a judge complaining about children requesting breaks. A letter from the judge indicated ignorance about the Pre-Trial Diversion of Offenders Program. The transcript also revealed the judge queried the need for support people.</p>
		Law Reform (Report review, SARC) Technical Difficulties (General, CCTV, staff) Closed Courts (Adult)	<p>SARC recommended that the judicial commission provide education on the following topics in 2000:</p> <ul style="list-style-type: none"> • Judicial training in court preparation for children’s requests for breaks, support persons etc., as offered by Sexual Assault Services and WAS; • Operation of Pre-Trial Diversion of Offenders • Evidence (Children) Act – regarding videotaping of children • Criminal Procedure (Amendment Sexual Assault Communications) Act • Closed courts. <p>A number of CCTV issues were noted. In one case, a complainant could not see the magistrate on screen; WAS asked if the accused could be seen. Concerns were also expressed regarding video conferencing equipment with split screen, and the compartmentalised display of the barrister and judge.</p> <p>No response was received from AGs regarding the letter about CCTV issues.</p> <p>In a Wagga Wagga Local Court case, the wrong lens was used and the accused could be seen throughout the hearing. A sexual abuse counsellor was present as a support person but was unable to intervene to let the magistrate know that the defendant was visible. When the break concluded, the child refused to return to finish giving evidence. The Sheriff’s Officer noted that the wrong lens had been installed.</p> <p>In the Penrith Local Court, a judge refused a request for a closed court while the child was giving evidence, and allowed school students to sit in and watch.</p> <p>One member queried whether judicial officers should have a standing item on their Annual Conference or a package available to explain the child protection needs of children.</p> <p>Regarding her audio/videotaping project, a member noted that the process of installation was underway in Newcastle, Liverpool and Wollongong. Training in court no 9 was currently being conducted with two more for February. Supervisors would provide feedback on taped interviews (two from CPEA; DoCS would use people from ECAV). Videotaping was in use but no briefs had been handed up yet. Tapes were handed up in the Children’s Court, and the magistrates wanted copies for all. DoCS legal officers and magistrates reportedly did not understand the legislation. Arrangements were being made for local area commands to allow accused people to view the videotaped interview.</p> <p>Noted that school students were present at court in sexual abuse and historical child sexual abuse trials.</p> <p>The ODPP noted that the matter had already been taken up with the Victims Advisory Board and they had taken the matter up with the Sheriff.</p> <p>Concerns were expressed for young people over the age of 16 who would be greatly assisted if they had access to CCTV facilities to give evidence.</p>

No	Date	Categories	Discussion of Alternative Measures
		Technical Difficulties (CCTV)	DPP had written to AG regarding CCTV deficiencies. The letter discussed what BOCSAR could do to compare conviction rates in courts with CCTV facilities and those that did not have CCTV facilities, and any information that could emerge about minimising trauma to children, health workers and WAS. Noted a memo regarding the need for policies and procedures for the set-up of CCTV. The matter had been addressed in a letter to the Director General of the AGs department
58.	21/09/99		
59.	22/07/99	Technical Difficulties (Screen Size)	One member outlined problems with AVOs (magistrates getting children to give evidence in contested hearings), when videos could be used for those hearings. Videos would appear in courts once interviews were taken and charges laid. Police could not be more specific as to when they would first appear in court. Another member had been asked by the Judicial Commission to prepare an article on the legislation for judicial officers. DPP was also asking for bigger screens. One member also noted that there were a number of issues in relation to CCTV, namely delays caused by multiple listing, location of facilities, and the size of screens. A fundamental difficulty was accessing information about where child sexual abuse matters were predominantly being heard. Police had asked AGs to do an audit of the facilities A member suggested there be some follow-up research on use of CCTV. Another member argued not only the size of the screen, but sound was important as well. A member noted that responsibility for maintenance of equipment, placement of cameras, and availability of court staff to operate equipment in Wagga had to be discussed. BOCSAR wanted to look at conviction rates, particularly CCTV convictions rates against a control group. Noted that a group of cases and a time frame was needed to identify good facilities/ bad facilities.
60.	25/05/99		
61.	09/03/99	Law Reform (Legal Feedback) Practices (Prosecution)	A letter was received from the Central West Women's Health Centre about Crown prosecutors use of CCTV. A draft response was read to the SARC and discussions held about some Crown prosecutors reluctance to use CCTV.

No	Date	Categories	Discussion of Alternative Measures
62.	24/11/98	Practices (ODPP, Managing Lawyers) Technical Difficulty (Screen size, audio, lawyer training) Attitudes (Crown Prosecutors) Law Reform (Research Report)	<p>JIT noted that training in relation to the videotaping of children’s evidence was soon to commence. 2 staff from each JIT were to look at the quality of briefs from each team. JIT was also to look at a policy rewrite for an evaluation due on 1/12/98.</p> <p>ODPP was seeking assistance from other relevant agencies with regard to the training needs of ODPP lawyers for videotaping children’s evidence.</p> <p>The videotaping would be confined to JIT, and the first videotapes should start to come through the system by July 1. The training would have to be ‘quite general’. Noted that the delay factor should have been a crucial element of the training. Noted that children would have to be prepared for the fact that they may see themselves on the video as much younger and, possibly, distressed.</p> <p>A member suggested “A Case for Balance”, an English video on child witnesses aimed at English judicial officers and lawyers. There is a segment on the videotaped police interview. All DPP offices had a copy of the video.</p> <p>Noted that the Training Unit was to follow up on appropriate training needs.</p> <p>A Masters in Forensic Psychology student noted that she was following up on the finding that CCTV is not used as often as it should be. This appeared to be a result of Crown prosecutors’ attitudes, ‘for varying reasons’.</p> <p>One issue raised by various Crown prosecutors was that the technology in use was inadequate. Specifically, the TVs in the courtrooms were too small and placed too far from the jury for them to get a clear view of the witness.</p> <p>The research would be conducted in two phases: 1) questionnaire on solicitors and Crown prosecutors’ attitudes to CCTV; 2) TV screens with an actress playing the role of an abuse victim. One screen would be larger, the other smaller. A study would then be conducted on viewers’ perceptions of believability.</p> <p>Other factors such as sound and lighting would also be discussed.</p> <p>SARC thought the study was an excellent idea.</p>
63.	25/08/98	Technical Difficulties (CCTV, Closed Courts)	<p>DPP memos (dated 26.6.98 ad 1.7.98) were discussed. One member expressed a concern about the small number of cases the DPP was taking to court, and about anecdotal evidence that all sexual abuse matters ‘may as well be excluded’. The memo was also found to be in conflict with the requirements of the <i>Children’s (Care and Protection) Act 1987</i>.</p> <p>A member noted that the matters referred to in this memo—generally a combination of matters rather than the problem of delay alone—were being rejected by CCA.</p> <p>He added that for a matter to be discontinued it had to be assessed by two senior solicitors with the final decision being made by the Director or a Crown prosecutor with the Director’s delegation.</p> <p>Noted that in Gosford court closures were not being ordered in CSA cases and that this was ‘almost accepted practice’.</p> <p>A member reviewed a case where CCA reported that a CCTV monitor displayed the support person and witness in the remote room to all present in the court.</p>
64.	30/06/98	Practices (Courts, CCTV)	<p>Bi-monthly Sexual Assault Prosecution Reports.</p> <p>Campbelltown: CCTV being used, with positive feedback received from witnesses re facility.</p> <p>Gosford: CCTV well supported.</p> <p>Wagga Wagga: CCTV made available in</p> <p>Sydney: CCTV was being used, with positive feedback received from witnesses.</p>

No	Date	Categories	Discussion of Alternative Measures
65.	28/04/98	Practices (Courts, CCTV usage) Technical Difficulties (Camera)	Bi-monthly Sexual Assault Prosecution Reports. Campbelltown reported that CCTV was used in all appropriate matters, but facilities were not always adequate. Campbelltown CCTV used in 100% of child sexual abuse cases, including with child witnesses. Wagga reported that CCTV was installed and working well, although a complaint was made about the way the camera was installed (it was very intrusive and distracting to the witnesses). CCTV was used in Gosford.
66.	3/02/98	Law Reform (Report Review); Technical Difficulties (Police) Practices (Police) Law Reform (Research report, Interviewing children, lawyers)	Report from Wollongong office expressing concerns about standard of interviewing children and use of leading questions. Police response to reports of sexual abuse, detailing how police were responding to adults reporting incidents of sexual abuse—excluding historical and paedophilia abuses. NSW Child protection council project looking at interviewing guidelines for lawyers working with children in criminal matters.
67.	4/11/97	Law Reform (Guidelines)	Interagency Guidelines for Adult Victims of Sexual Assault.
68.	9/09/97	Practices (WAS) Practices (WAS, Court, judicial officers, children) Technical Difficulties (CCTV: Facilities)	Noted that the Police Royal Commission recommended that WAS be involved in all child sexual abuse matters. Use of CCTV was acknowledged as 'increasing dramatically'. SARC commented that the Court Preparation Booklet needed more information on the availability and use of CCTV. Problems with the commencement date of CCTV were acknowledged. The ODPP was issued a clarification. Some CCTV facilities were located away from the court, causing difficulties in showing exhibits to witnesses. In one location CCTV had been installed in a police station in a room where suspects are interviewed. With this particular case, the equipment had been disconnected and no one could work out how to reconnect it. A query was raised about the age of children entitled to use the facilities. Any child under the age of 16 at the time of giving evidence had the right to use CCTV.
69.	17/06/97	Law Reform (Legal Feedback)	Police Royal Commission: resource implications. Recommendation WAS be involved.
70.	17/04/97	Other	Referred to Criminal Justice Seminar: relevant issues included investigation of child sexual abuse and recommendations that a child complainant's evidence be videotaped, and that a joint investigation be conducted with DCS and the Police who should be provided with adequate training in interviewing techniques.

No	Date	Categories	Discussion of Alternative Measures
71.	25/02/97	Other Law Reform (Regulations)	<p>A guest emphasised the importance of communication and the need for child sexual abuse survivors to be kept informed throughout the criminal justice process.</p> <p>VIS Draft Regulations were discussed. There was a potential for victims to be cross-examined. The VIS could only be presented in the Supreme and District Courts. There were also concerns that offenders could keep the VIS after sentencing: offenders were thought to receive pleasure from having continued access to such reports.</p> <p>A member discussed the use of cognitive interviewing (CI). While this interviewing may be useful for ascertaining peripheral information, it would appear unsuitable for use with child sexual abuse complainants. Another member noted that CI does not increase accuracy of detail. A third member argued that while CI may have its uses, the aspect of changing a witness's perspective on an offence is dangerous in that one is changing the threshold for what they can tell you and what they cannot tell you. Research is currently being done on what parts of the interview you can use usefully and what parts you cannot.</p>
72.	22/10/96	Practices (Prosecutors, WAS)	DPP Protocol for Conferring with Sexual Assault Victims had been issued and distributed. Its purpose was to establish effective communication with victims, and make the timely arrangement of conferences. WAS to make initial contact with every victim in a sexual abuse case, under the new protocol.
73.	13/08/96	Practices (ODPP)	Criminal Justice Responses to Sexual Assault Victims – NSW BOCSAR DPP Protocol discussed. Criticism directed to ODPP as a result of survey showing that 13.8% had never met with DPP Solicitor before court case; 37.9% had not received adequate information about the roles of people in court; 27.8% did not understand all or most of what happened in court; and 85.25% regarded seeing the offender as one of the 'worst features' of their experience in court. Respondents indicated that a WAS officer in each office would alleviate many of these concerns.
74.	27/03/96	Other	SARC noted that taping interviews for recording and transcription purposes could be used in court proceedings. Children's Evidence Taskforce had recommended taping of evidence.

No	Date	Categories	Discussion of Alternative Measures
75.	14/11/95	Technical Difficulties (CCTV:, Split Screens, Audio, Delay)	<p>SARC decided that two groups should develop their own Court Preparation Booklets. <i>R v V</i> considered. Facts: 5 year old in child sexual abuse matter. Several problems arose in the trial concerning legal professional privilege, use of CCTV and equipment, defence tactics, and delay.</p> <p>1) The whole prosecution team was taken off the matter the day before the trial was to commence. The ODPP had legal professional privilege that it would waive if there was a legitimate forensic purpose. The Director decided the purpose existed in this case.</p> <p>2) The trial judge permitted CCTV to be used in an inappropriate manner (i.e., using the wide-angled lens so only the top of the child's head could be seen). Committee members said that this could have been avoided if the judge had used his own second screen if he wished to see what the other people in the remote witness room were doing. There was a discussion concerning the use of split screens. The other problem was that it was hard to hear the child; because he was so small, he either leant over the microphone or sat too far back away from and could not be heard.</p> <p>3) Other difficulties included avoiding contact with the accused, and delays where child was waiting from 9:30am – 2:30pm to give his evidence. This had happened on a number of occasions. Constant interruption of the child's evidence for legal argument made it difficult for the child to maintain concentration.</p> <p>SACS recommended that the AG informed that CCTV can be utilised in a number of ways, including split screens, and extra monitors for the defendant.</p> <p>SACS recommended that the ODPP keep notes in relation to these problems, recording how often this occurred, arguments used, how CCTV is used etc.</p> <p>SACS noted a rural matter where a requisition was made, the police did nothing for a year and then said they could not find relevant witnesses. A member asked for papers so that a written complaint could be made to the station concerned. A change to CCTV policy meant that families were informed immediately of CCTV availability.</p>
76.	12/9/95	Law Reform (Survey)	<p>BOSCAR survey responses: "Would you advise someone in a similar situation to take the matter to court?" 60% yes. One complainant for historical child sexual abuse said services were not provided for their needs. In one case no interpreter was provided, (this complainant was not a witness; the relevant proceedings was a sentence matter).</p> <p>90% of respondents said that police were sympathetic. The majority of respondents emphasised the information about the progress of the case needed to be given to complainants.</p> <p>Of those who had counselling (27/31), all indicated that counselling had been helpful.</p> <p>21/22 said court preparation was helpful.</p> <p>19/22 said that court support was helpful.</p> <p>Commonly noted problems were that it was not a 'WIDE' service; there was difficulty getting help; there were also requests for same-gender doctors.</p> <p>21/28 said meeting with a prosecutor was helpful.</p> <p>16/28 indicated adequate consultation with the ODPP.</p> <p>SAC suggested that the response rate (20% 'at best') would have been better if face-to-face interviews were conducted.</p> <p>Police had been receiving instructions to not charge under s 78 unless the offender was homosexual.</p>

No	Date	Categories	Discussion of Alternative Measures
77.	7/04/95	Other	The historically poor attendance of NSW Health and DCS representatives at SARC meeting was noted by members.
78.	27/6/95	Other	A member stated that if the trials could be moved from Western Sydney to Downing Centre then these matters could be dealt with more quickly.
79.	1/05/95	Law Reform (Research Report)	Noted circulation of the Report of the Children's Evidence Taskforce to Government and Non-Government Offices and to those in the Child Protection Area. The Taskforce was to consider whether the making of video statements and presentation in court should extent to other vulnerable witnesses. Summarised the matter of R v MJK. Noted that it had positive implications in relation to videotaping of evidence. Noted that a working party was being set up to prepare a video and accompanying booklet for witnesses. Suggested the need for a booklet for children to be prepared, with the inclusion of CCTV.
80.	23/02/95	Law Reform (Research Report)	EMDR expert Report (CSA reports) Notes that the CPC Legal Committee were looking at coverage of CCTV.
81.	10/02/95	Law Reform (Research Report)	Using Roseanne Bonney's 1985 project comparing pre and post 1981 sexual assault trials. Noted the Judicial Commission Education Branch's role in enhancing skills, especially in assessment, credibility and courtroom communication.
82.	18/11/94	Law Reform (Survey, Research Report)	Noted that the 'Gender Bias and the Law Project' had identified that access to the legal system and understanding court processes were problems for the majority of women. Two members of BOCSAR updated SARC on sexual abuse complainants' experience of the courts. The DPP was charged with the responsibility to hand the envelopes with the survey, and instructions enclosed, to complainants. The Bureau requested that the DPP not comment on the survey or advise the complainants how to respond. Once the complainants had filled the survey it was returned in the supplied paid envelope. By that point solicitors had handed over 45 surveys out of approximately 100 finalised cases. Fourteen surveys had been completed, a couple of which could not be used. Members noted that the emphasis on minimal contact with the respondents may have given complainants a sense that the survey was not important. One member explained it was possible to extend the deadline; however, it was not just a large sample that the Bureau was after a representative one. A second member recommended that the survey be handed to the victim when she had finished giving her evidence rather than weeks later when the verdict was handed down, as many women do not attend this hearing.
83.	23/9/94	Law Reform (Research Report)	Report on the DPP Sexual Assault Review Committee. Might include information on complainants giving evidence at medical tribunals and VCT amendments.
84.	22/07/94	Law Reform (Guidelines)	DCS training manual: Understanding Sexual Assault: A training Program for Staff Working with Adults & Children with a Developmental Disability
85.	20/05/94	Law Reform (Act)	SAC was advised that the <i>Crimes Legislation (Unsworn Evidence) Amendment Act 1994</i> was passed by Parliament on 11 May 1994. Under the act, the accused could either choose to decline to say anything at his or her trial or to give sworn evidence.

No	Date	Categories	Discussion of Alternative Measures
86.	18/03/94	Other	Discussed a complaint concerning the counselling services of a sexual abuse service. The complaint was in regard to the referral of families to family counselling in cases of child abuse; lack of appropriate knowledge about the family court and its counselling service; inappropriate canvassing of unsupervised access by the counsellor; criticisms of parents for focusing on the abuse of the child and not other problems (i.e., current living arrangements); and giving incorrect information on victims' compensation applications.
87.	21/01/94	Other	One member reported that the legal sub-committee had met twice in the past two months to discuss a number of issues including use of closed circuit TV; concealing a serious offence; unsworn statements; police sexual abuse guidelines; VIS; and community conferencing.
88.	8/10/93	Law Reform (Research Report)	Discussed interagency guidelines, which did not focus on child complainants, and the complainant's right to an interpreter (particularly female interpreters) who is not also the defendant's interpreter. Perpetrators' interpreters.

Supplementary Material 7: Best Practice Guidelines

Recorded police interview:	Pre-trial recorded evidence:	CCTV from a remote witness facility:	Guidelines in all categories
<ul style="list-style-type: none"> • A central registry of facilities; • The remote witness should be given advance notice of what they need to bring to the facilities and appropriate clothing choices. • The video link must be tested • The entrance to the room must display a sign preventing others from entering or disrupting proceedings. • Tailor the configuration of the video link for each individual case • True to life • The sound must be produced realistically • Establish pre-set camera configurations for different types of remote participants • Provide capacity to display documents and exhibits. • Provide a capacity to 	<ul style="list-style-type: none"> • A central registry of facilities • The remote witness should be given advance notice of what they need to bring to facilities; in this case the complainant • The video link must be tested (in this case the video footage/method for recording) • Provide the remote witness with an orientation of the court • The entrance to the room must display a sign preventing others from entering or disrupting proceedings. • Provide information for remote participant as to approximate duration of waiting time. • Provide appropriate reading material of remote participant in waiting area (Age and gender appropriate) 	<ul style="list-style-type: none"> • A central registry of facilities • The process for video link approval should be readily accessible, on the court website and in pamphlets provided to witnesses. • The remote witness should be given advance notice of what they need to bring to the facilities • The video link must be tested • Provide the remote witness with an orientation of the court • The remote witness room should be cleared of any extraneous objects that would be incongruous to a courtroom. • The entrance to the room must display a sign preventing others from entering or disrupting proceedings when the video link is established to the courtroom • Provide information for remote participant as to approximate duration of waiting time. • Provide appropriate reading material of remote participant in waiting area (Age and gender appropriate) • Tailor the configuration of the 	<ul style="list-style-type: none"> • A central registry of facilities • The remote witness should be given advance notice of what they need to bring to the facilities • The video link must be tested • The entrance to the room must display a sign preventing others from entering or disrupting proceedings. • Tailor the configuration of the video link for each individual case • True to life. • The sound must be reproduced realistically • Establish pre-set camera configurations for different types of remote participants • Provide capacity to display documents and exhibits • Provide capacity to display a wide variety of

<p>display a wide variety of interview room views (courtroom views)</p> <ul style="list-style-type: none"> • Safeguard against loss or any unlawful form of processing • The persons concerned can exchange documents • Camera image mapping • Processor • Sound • Microphones • Speakers • Exchange of documents 	<ul style="list-style-type: none"> • Tailor the configuration of the video link for each individual case. • True to life • The sound must be reproduced realistically • Establish pre-set camera configurations for different types of remote participants. • Provide capacity to display documents and exhibits. • Provide capacity for self views • Safeguard against loss or any unlawful form of processing. • The persons concerned can consult with one another without third parties overhearing. • The person concerned can exchange documents • Camera image mapping on screen. • Processor • Sound • Microphones • Speakers • Exchange of documents 	<p>video link for each individual case</p> <ul style="list-style-type: none"> • True to life • The sound must be reproduced realistically • Does/should the remote participant be able to see and hear the judge/jury/lawyers/defendant/the public gallery • Establish pre-set camera configurations for different types of remote participants • Provide capacity to display documents and exhibits • Provide capacity to display a wide variety of courtroom views • Provide capacity for self views • Safeguard against loss or any unlawful form of processing • The persons concerned can consult with one another without third parties overhearing • The persons concerned can exchange documents • Camera Image mapping • Processor • Sound • Microphones • Speakers • Exchange of documents 	<p>courtroom views</p> <ul style="list-style-type: none"> • Safeguard against loss or any unlawful form of processing • The persons concerned can exchange documents • Camera image mapping on screen. • Processor • Sound • Microphones • Speakers • Exchange of documents
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Supplementary Material 10: Information used by different people to label particularised occurrences in child sexual abuse trials

What type of information was used to label?

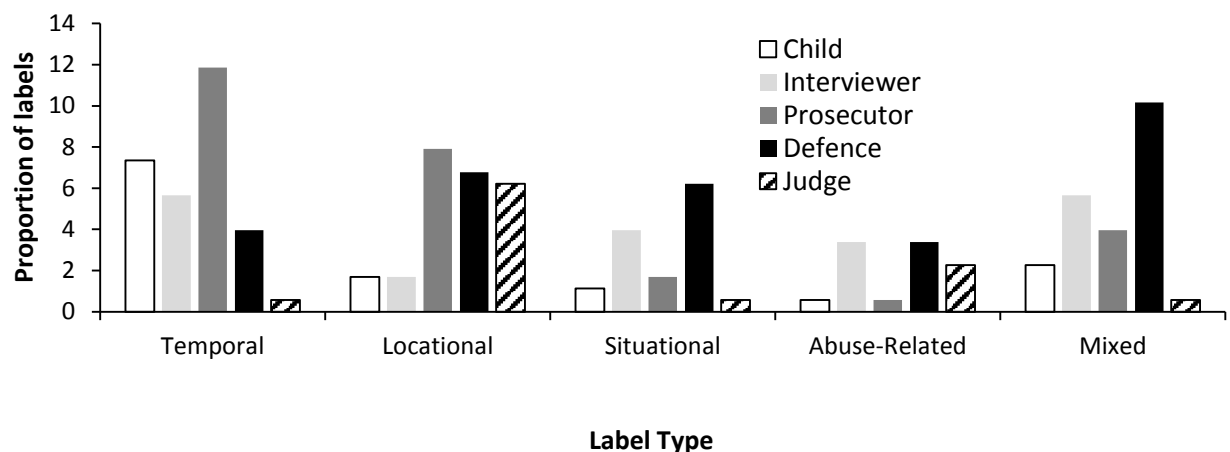
The majority of labels utilised information that was temporal, locational, or mixed different types of information (see Table S10.1). Abuse-related labels and situational labels occurred less frequently.

Table S10.1 Frequency of labels of each type

Type	Total labels	
	Freq.	%
Temporal	52	29.38
Locational	43	24.29
Situational	24	13.56
Abuse - related	18	10.17
Mixed	40	22.60
Total	177	100.00

The researchers next explored who created each type of label. Considering all 177 labels, a 5 (type of label: temporal, locational, abuse-related, situational, mixed) x 5 (creator: child, interviewer, prosecutor, defence lawyer, judge) chi square found the type of label created was significantly associated with who created it, $\chi^2(16) = 54.55, p < .001$. Both child complainants and prosecutors were more likely than expected to create temporal labels, whereas defence lawyers and judges were less likely than expected to create these types of labels. Instead, defence lawyers were more likely to use mixed labels, and judges were more likely to use locational or abuse-related labels than expected. Prosecutors were less likely than expected to use abuse-related labels, while police interviewers were less likely to use locational labels. Figure 1 shows the proportion of each type of label created by each player.

Figure S10.1 Types of labels created by each person



Supplementary Material 15

Cross-examination strategies: Evaluation of the inter-relationship between variables

Additional analyses were conducted to obtain a better understanding of how case factors were related to the strategies and tactics used by defence lawyers.

Method

The cross-examination was further explored by considering associations between each strategy and tactic with age category and case characteristics. Chi-square test of significant difference was used to identify any difference between the proportion of cases where a tactic was used across age category, complainant gender, complainant-defendant relationship and abuse type. T-tests were used to assess differences in the number of tactic questions asked between gender, relationship and abuse type.

A series of logistic regressions were used to model the association between complainant age and the cross-examination tactics that were found to have a relationship with age category. Complainant age was considered across five time points including age at first offence, age at second offence, age at first police interview, age at last police interview and age at trial. Complainant age was also modeled as continuous, rather than categorical, variable and linear, quadratic and cubic associations were modeled in order to identify both linear and curvilinear effects. Finally, significant bivariate relationships (identified above) between other case characteristics and cross-examination tactics were controlled for. This combination of factors led to the exploration of 75 different models, however only the model with the most explanatory power (based on the Chi-square value, the Cox&Snell R^2 and Nagelkerke R^2) for each cross-examination tactic is reported. The results of these models are presented in Table S15.5.

Results

How do the strategies used in cross-examination relate to case characteristics?

The proportion of complainants for whom a strategy was used and the mean number of strategies used was also explored across gender, complainant-defendant relationship and abuse type. As Table S15.1 shows, reliability was found to have a significant association with the complainant's gender. Defence lawyers were more likely to raise reliability with female than male complainants.

Credibility was associated with both complainant-offender relationship and the abuse type. Complainants of intra-family abuse were more likely to have credibility raised during the cross-examination than complainants of extra-familial abuse. Defence lawyers also used more lines of questioning when targeting the credibility of complainants of penetrative abuse than non-penetrative abuse.

There was one association with plausibility — defence lawyers used more lines of questioning that targeted plausibility with complainants of penetrative abuse than non-penetrative abuse.

Table S15.1. Rate of cross-examination strategies across case characteristics

	Gender		Test (df)	p value	Relationship		Test (df)	p value	Abuse Type		Test (df)	p value
	Male	Female			Intra-family	Extra-family			Penetrate	Non-Penetrate		
Reliability %	78.6	93.5	$\chi^2 = 5.30^a$	.021	90.5	89.5	$\chi^2 = 0.03$	.855	87.1	94.0	$\chi^2 = 1.52$	.217
Reliability <i>M</i>	10.57	12.48	$t(116) = 0.54$	.588	13.92	9.85	$t(116) = 1.37$	.175	13.56	9.88	$t(116) = 1.22$	.226
Reliability <i>SD</i>	15.60	16.42			19.38	11.30			18.64	11.76		
Credibility %	82.1	87.0	$\chi^2 = 0.409$	.522	92.1	78.9	$\chi^2 = 4.23$	.040	91.4	78.0	$\chi^2 = 4.33$	.038
Reliability <i>M</i>	8.00	9.90	$t(116) = 0.69$	.493	10.57	8.16	$t(116) = 1.02$	.308	10.25	8.33	$t(116) = 0.81$	.423
Reliability <i>SD</i>	(2.92)	12.74			12.01	13.54			8.33	13.71		
Plausibility %	96.4	94.6	$\chi^2 = 0.157^a$	.692	96.8	93.0	$\chi^2 = 0.93^a$	.335	92.0	97.1	$\chi^2 = 1.62^a$	.203
Plausibility <i>M</i>	11.79	13.32	$t(116) = 0.59$	.557	14.71	10.95	$t(116) = 1.71$	.090	15.65	9.16	$t(109.32) = 3.28$	.001
Plausibility <i>SD</i>	10.12	12.59			13.10	10.43			13.84	7.50		
Consistency %	100.0	96.7	$\chi^2 = 0.936^a$	.333	98.4	96.5	$\chi^2 = 0.45^a$	.501	96.0	98.6	$\chi^2 = 0.79$	.374
Consistency <i>M</i>	24.68	28.50	$t(116) = 0.73$	.467	26.49	28.86	$t(116) = -0.53$	.598	28.17	26.78	$t(116) = 0.31$	.758
Consistency <i>SD</i>	19.92	25.35			26.00	22.01			24.13	24.34		
Indiscriminate %	100.0	95.7	$\chi^2 = 1.26^a$	.262	98.4	94.7	$\chi^2 = 1.26^a$	.263	96.0	97.1	$\chi^2 = 0.12$	.731
Indiscriminate <i>M</i>	13.75	13.53	$t(116) = 0.08$	.935	13.17	14.05	$t(116) = 0.39$	.697	13.64	13.51	$t(116) = 0.06$	.956
Indiscriminate <i>SD</i>	14.83	11.30			11.93	12.51			11.36	13.32		

NB. Bold indicates significant difference found between variables,

^a Expected frequencies < 5

How do the tactics used in cross-examination relate to case characteristics?

Reliability tactics

As Table S15.2 shows there was one association between reliability tactics and case characteristics. Defence lawyers were more likely to raise memory errors with female complainants than male complainants.

Table S15.2. Rate of Reliability Tactics Across Age, Jurisdiction and Case Characteristics

	All cases	Age Category			Test (df)	Gender		Test (df)	Relationship		Test (df)	Abuse Type		Test (df)
		< 13 years	13-17 Years	Adult		M	F		Intra	Extra		Pen	No-Pen	
Memory Error %	90.0	87.5	95.0	87.5	$\chi^2(2)$ =1.67 ^a	78.6	93.5	$\chi^2(1)$ =5.30 ^a	90.5	89.5	$\chi^2(1)$ =0.03	87.1	94.0	$\chi^2(1)$ =1.52
Memory Error \bar{X}	11.24	9.92	13.10	10.64	$F(2)$ =0.45	9.96	11.63	$t(116)$ =0.49	13.02	9.20	$t(116)=1.33$	12.65	9.24	$t(112.65)$ =-1.27
SD	15.58	12.96	20.25	12.35		14.90	15.82		18.50	11.17		18.20	10.74	
Environment Error %	18.3	15.0	25.0	15.0	$\chi^2(2)$ =1.78	21.4	17.4	$\chi^2(1)$ =0.24	19.0	17.5	$\chi^2(1)$ =0.05	21.4	14.0	$\chi^2(1)$ =1.08
Environment Error \bar{X}	0.78	0.44	1.33	0.59	$F(2)$ =1.60	0.61	0.84	$t(116)$ =0.46	0.90	0.65	$t(116)$ =0.57	0.90	0.63	$F(116)$ =-0.60
SD	2.38	1.17	3.35	2.04		1.40	2.62		2.66	2.03		2.59	2.07	

NB. Bold indicates significant difference < .05

^a Expected frequencies < 5

Credibility tactics

As Table S15.3 shows there were two main associations with credibility tactics and case characteristics. First, defence lawyers used more lines of questioning about motivations to make a false allegation with complainants of intra-familial than extra-familial abuse. Second, defence lawyers were more likely to suggest complainants of intra-familial abuse were lying than extra-familial abuse.

Table S15.3. Rate of Credibility Tactics Across Age, Jurisdiction and Case Characteristics

	All cases	Age Category			Test (df)	Gender		Test (df)	Relationship		Test (df)	Abuse Type		Test (df)
		< 13 years	13-17 Years	Adult		M	F		Intra	Extra		Pen	No-Pen	
Lying %	60.8	55.0	72.5	55.0	$\chi^2(2)$ =3.43	46.4	65.2	$\chi^2(1)$ =3.181	65.1	56.1	$\chi^2(1)$ =1.00	67.1	52.0	$\chi^2(1)$ =2.81
Lying \bar{X}	3.46	2.92	4.25	3.21	$F(2)$ =0.60	2.75	3.69	$t(116)$ =0.77	4.41	2.38	$t(90.54)$ =2.06	4.03	2.67	$t(116)$ =-1.28
SD	5.66	4.37	7.68	4.25		4.84	5.90		7.01	3.29		6.58	3.96	
Motive %	70.8	67.5	72.5	72.5	$\chi^2(2)$ =0.323	75.0	69.6	$\chi^2(1)$ =0.307	81.0	59.6	$\chi^2(1)$ =6.57	72.9	68.0	$\chi^2(1)$ =0.33
Motive \bar{X}	3.64	2.90	3.85	4.15	$F(2)$ =0.62	2.96	3.84	$t(116)$ =0.78	4.22	2.96	$t(116)$ =1.32	3.53	3.78	$t(116)$ =0.25
SD	5.19	3.49	4.07	7.29		3.14	5.68		4.07	6.22		3.98	6.58	
Previous dishonesty %	37.5	32.5	42.5	37.5	$\chi^2(2)$ =0.85	25.0	41.3	$\chi^2(1)$ =2.44	38.1	36.8	$\chi^2(1)$ =0.02	41.4	32.0	$\chi^2(1)$ =1.11
Previous dishonesty \bar{X}	2.35	2.03	2.98	2.03	$F(2)$ =0.44	2.23	2.37	$t(116)$ =0.07	1.94	2.82	$t(116)$ =-0.92	2.68	1.88	$t(116)$ =-0.83
SD	5.18	5.36	5.47	4.76		6.24	4.85		3.85	6.39		5.18	5.21	

NB. Bold indicates significant difference < .05

^a Expected frequencies < 5

Plausibility tactics

As Table S15.4 shows there were several associations with the plausibility tactic of delayed reporting and case characteristics. Defence lawyers were more likely to raise delayed reporting (and on average raised it more often) with adolescents and adults than children. Delayed reporting was also raised more often on average with female complainants than male complainants, and with complainants of penetrative than non-penetrative abuse. Finally, defence lawyers raised delayed reporting (and on average raised it more often) with complainants of intra-familial abuse than extra-familial abuse.

Further analyses found that the age of the complainant at the first police interview predicted the average lines of questioning on delayed reporting. This remained a significant predictor even after controlling for the complainant-defendant relationship. As Figure S15.2 shows, this was a linear relationship—the lines of questioning on delayed reports increased with complainant age. Similarly, complainants of intra-familial abuse were more likely to be asked lines of questioning about delayed reports than complainants of extra-familial abuse.

Figure S15.2. Predicted probability that a complainant will be asked a question in relation to delayed report based on the age of the complainant at the first police interview, controlling for complainant-defendant relationship.

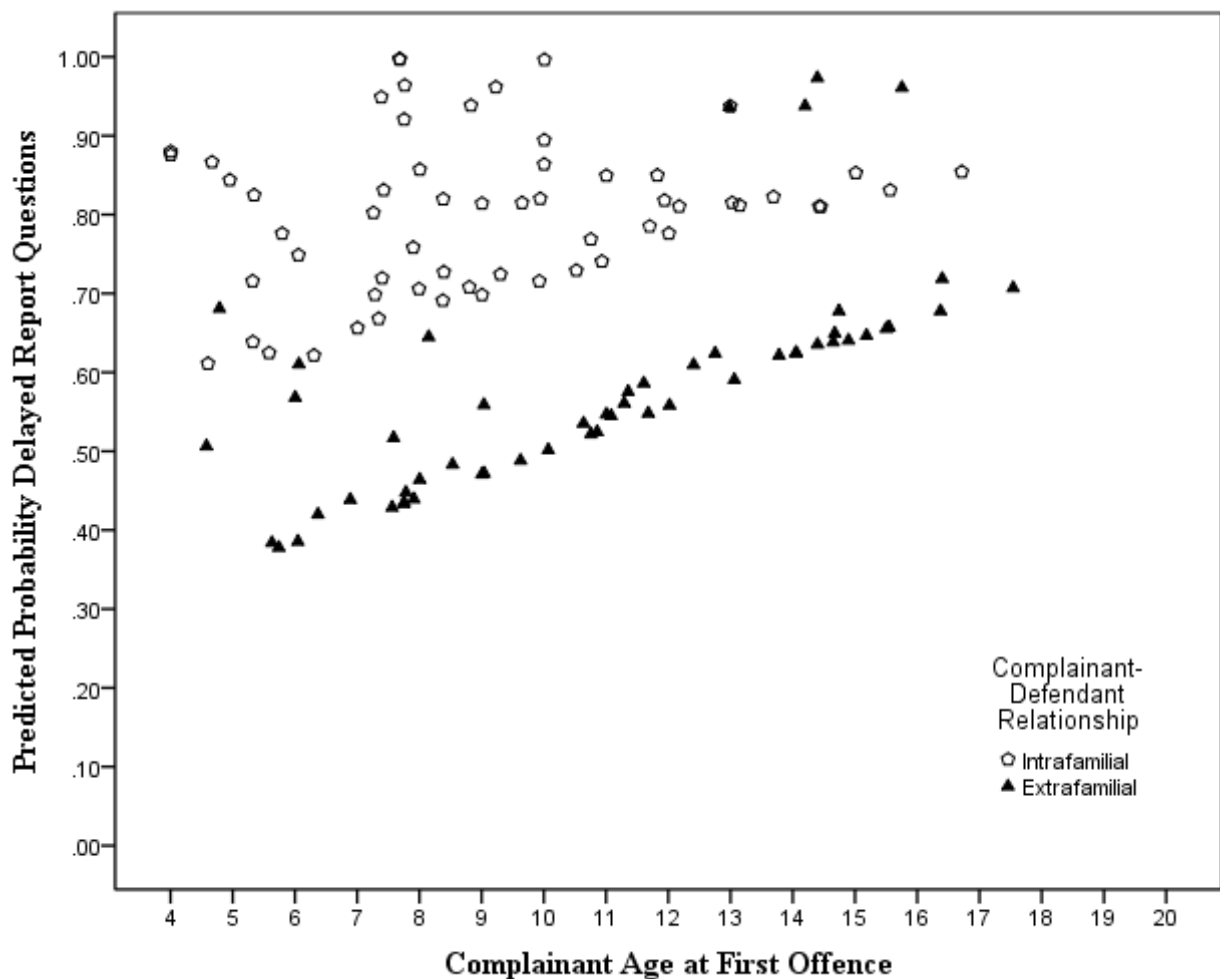


Table S15.4. Rate of Plausibility Tactics Across Age, Jurisdiction and Case Characteristics

	All cases	Age Category			Test	Gender		Test	Relationship		Test	Abuse Type		Test
		< 13 years	13-17 Years	Adult		M	F		Intra	Extra		Pen	No-Pen	
Resistance %	45.8	32.5	60.0	45.0	$\chi^2(2)$ = 6.11	50.0	44.6	$\chi^2(1)$ =0.26	50.8	40.4	$\chi^2(1)$ =1.31	52.9	36.0	$\chi^2(1)$ =3.34
Resistance \bar{X}	1.71	0.92	2.45	1.74	F(2) =2.52	1.36	1.82	t(116) =0.70	1.84	1.56	t(116) =.490	2.23	0.98	t(98.47) = -2.51
SD	3.06	1.70	4.08	2.77		2.06	3.31		3.37	2.69		3.70	1.59	
Emotionality %	31.7	27.5	27.5	40.0	$\chi^2(2)$ =1.93	25.0	33.7	$\chi^2(1)$ =0.75	28.6	35.1	$\chi^2(1)$ =0.59	32.9	30.0	$\chi^2(1)$ =0.11
Emotionality \bar{X}	0.63	0.62	0.38	0.90	F(2) =1.55	0.71	0.60	t(116) =-0.40	0.43	0.85	t(71.43) =-1.68	0.72	0.49	t(116) =-0.95
SD	1.33	1.18	0.70	1.83		2.06	1.04		0.76	1.75		1.56	0.89	
Delayed report %	70.0	47.5	82.5	80.0	$\chi^2(2)$ = 14.13	71.4	69.6	$\chi^2(1)$ =0.04	81.0	57.9	$\chi^2(1)$ = 7.58	75.7	62.0	$\chi^2(1)$ =2.61
Delayed report \bar{X}	3.39	1.69^{ab}	3.73^a	4.74^b	F(2) = 6.14	2.29	3.73	t(66.97) = 2.02	4.65	1.95	t(95.97) = 3.94	4.33	2.06	t(107.71) = -3.40
SD	4.08	2.61	4.36	4.48		2.93	4.34		4.76	2.48		4.72	2.46	
Continued Relationship %	44.2	35.0	57.5	40.0	$\chi^2(2)$ =4.53	53.6	41.3	$\chi^2(1)$ =1.31	42.9	45.6	$\chi^2(1)$ =0.09	44.3	44.0	$\chi^2(1)$ <0.01
Continued Relationship \bar{X}	2.24	1.46	2.38	2.87	F(2) =0.97	2.71	2.09	t(116) =-0.64	2.33	2.23	t(116) =0.25	2.68	1.61	t(103.51) =-1.41
SD	4.53	2.73	3.79	6.31		3.32	4.85		5.17	3.70		5.48	2.61	
Other %	84.2	82.5	90.0	80.0	$\chi^2(2)$ =1.63	85.7	83.7	$\chi^2(1)$ =0.07	84.1	84.2	$\chi^2(1)$ <.01	87.1	80.0	$\chi^2(1)$ =1.12
Other \bar{X}	4.99	3.21	6.23	5.51	F(2) = 2.24	4.71	5.10	t(116) =0.25	5.46	4.45	t(116) =0.81	5.68	4.02	t(116) =-1.33
SD	6.69	2.74	8.58	7.03		5.91	6.93		7.63	5.43		7.87	4.43	

NB Bold indicates significant difference < .05

^{a, b} Significant difference between means.

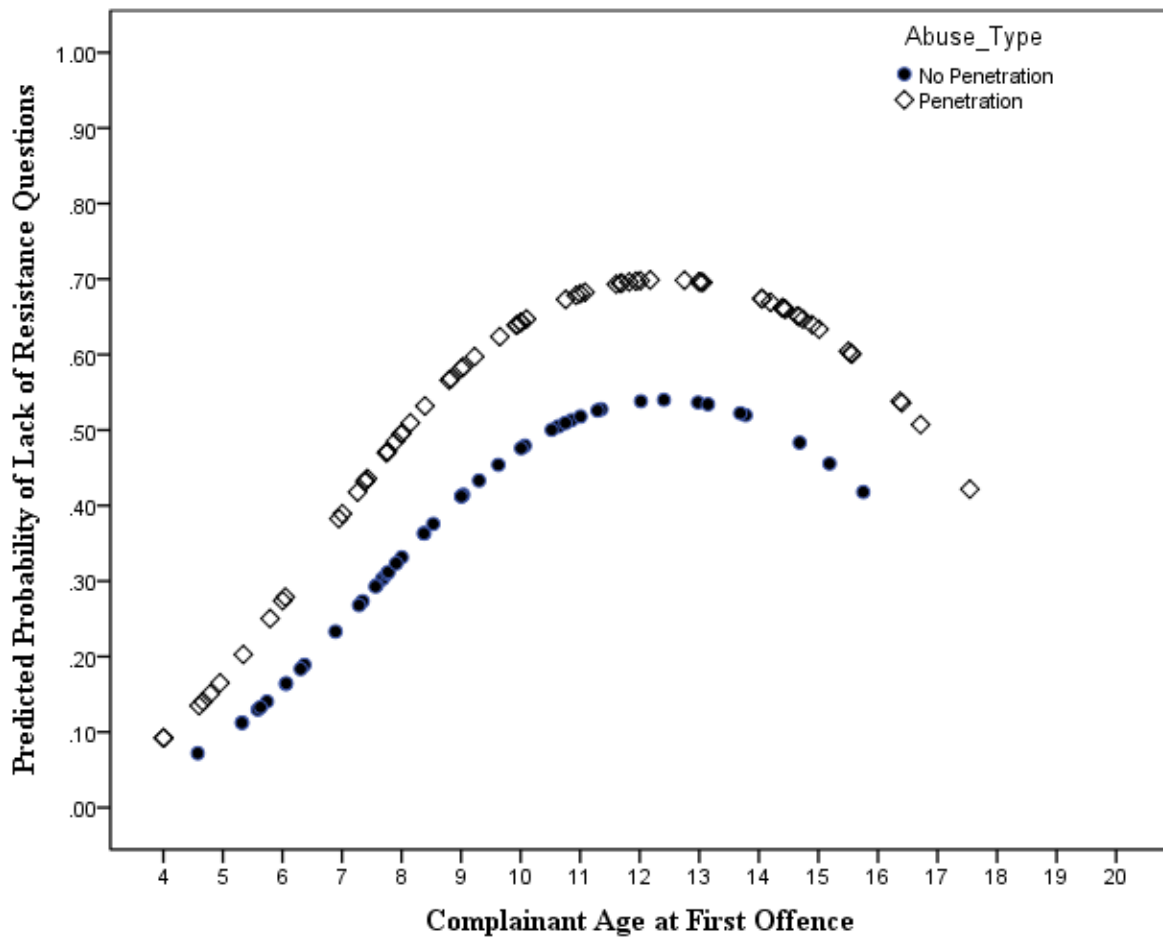
There were also associations between tactics relating to complainant resistance and case characteristics (see Table S15.4). Adults and adolescents were more likely to have resistance raised than children. Resistance was also raised on average raised more often with complainants of penetrative abuse than non-penetrative abuse.

Further analyses found that the age of the complainant at the time of the first offence significantly predicted whether cross-examination would include lines of questioning in relation to the complainant's lack of resistance. This remained significant after controlling for penetrative abuse. Further, penetrative abuse was no longer a significant predictor when age was included in the model, which suggests that age may mediate the association between penetrative abuse and lines of questioning about lack of resistance. As Table S15.5 shows, both the linear and quadratic age variables were significant. As Figure S15.1 shows, the likelihood of these lines of questioning being asked increases with the complainant's age up to 13 years and then reduces. This indicates that complainant's aged 10 to 16 years at the time of the abuse are most likely to be asked lines of questioning relating to their lack of resistance.

Table S15.5. Logistic Regressions, Best Predictors Models for Predicting Cross-examination Tactics Based on Complainant Age.

	Variable Statistics		Model Fit			
	B (S.E.)	p value	χ^2 (df)	p value	Cox & Snell R ²	Nagelkerke R ²
Penetrative Off	0.68 (0.42)	.103	19.14 (3)	< .001	.15	.20
Off Age (First)	1.10	.008				
Off Age (First) Sq	-0.04 (0.02)	.021				
Constant	-6.66 (2.16)	.002				
Extra-familial	-0.93 (0.44)	.033	15.75 (2)	<.001	.13	.18
Police Int Age (First)	0.12 (0.05)	.018				
Constant	-0.24 (0.71)	.734				
Police Int Age (Last)	0.28 (0.10)	.004	21.66 (2)	<.001	.17	.23
Police Int Age (Last) Sq	-0.004 (0.002)	.041				
Constant	-4.17 (1.09)	<.001				
Penetrative	1.08 (0.70)	.120				
Extra-familial	0.54 (0.62)	.386	23.18 (4)	<.001	.18	.30
Off Age (First)	-0.82 (0.34)	.015				
Off Age (First) Sq	0.05 (0.02)	.004				
Constant	-0.13 (1.63)	.937				

Figure S15.1. Predicted probability that a complainant will be asked a question about lack of resistance based on their age at the time of the offence, controlling for type of abuse.



Consistency tactics

As Table S15.6 shows there were two main associations with the consistency tactics and case characteristics. First, other evidence was more likely to be used to question consistency within adolescent and adult complainant evidence than within child complainant evidence. Adolescents were also asked more lines of questioning about this than children. Second, defence lawyers were more likely to raise consistency with other witnesses (and on average raised it more often) with complainants of extra-familial abuse than intra-familial abuse.

Table S15.6. Rate of Consistency Tactics Across Age, Jurisdiction and Case Characteristics.

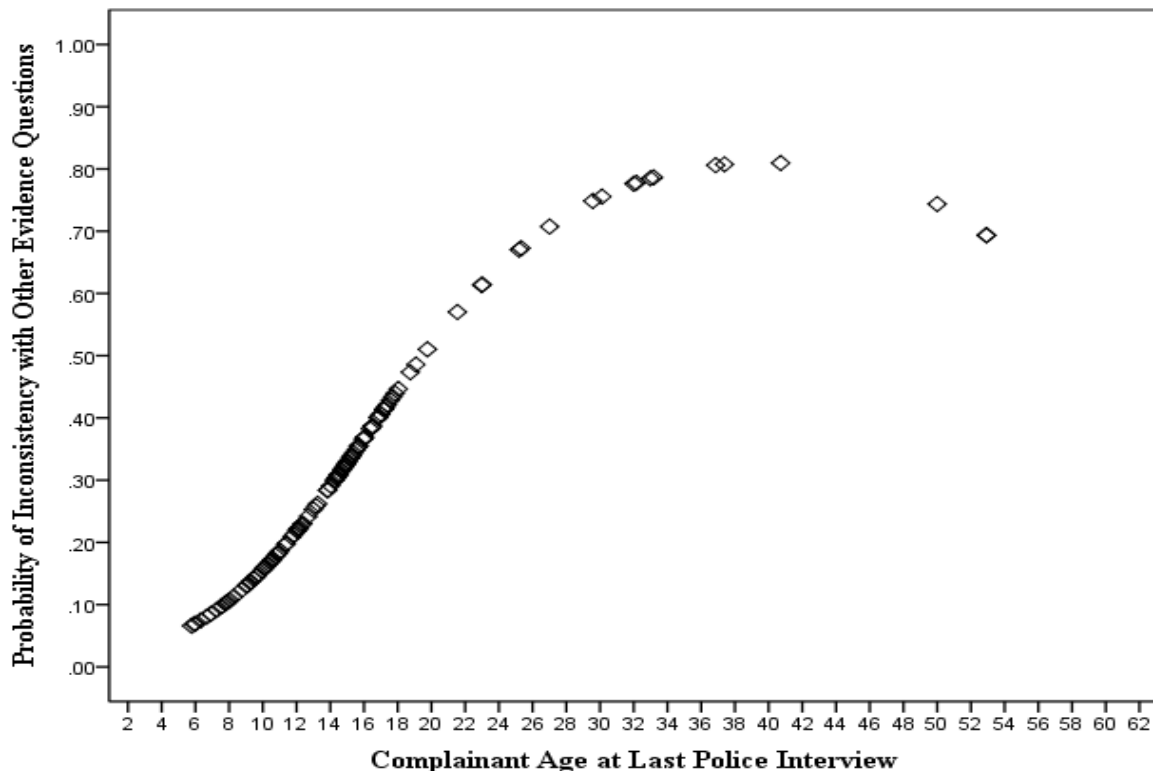
	All cases	Age Category			Test (df)	Gender		Test (df)	Relationship		Test (df)	Abuse Type		Test
		< 13 years	13-17 Years	Adult		M	F		Intra	Extra		Pen	No-Pen	
Complainant %	90.8	92.5	92.5	87.5	$\chi^2(2)$ =0.80	89.3	91.3	$\chi^2(1)$ =0.11	92.1	89.5	$\chi^2(1)$ =0.24	91.4	90.0	$\chi^2(1)$ =0.07
Comp \bar{X}	12.03	9.38	14.73	11.90	$F(2)$ =1.37	10.43	12.52	$t(116)$ =0.67	14.24	9.50	$t(98.32)$ =1.87	13.91	9.37	$t(109.33)$ =-1.87
SD	14.42	8.22	20.09	11.98		10.22	15.51		17.41	9.50		17.00	9.21	
Witness%	86.7	85.0	87.5	87.5	$\chi^2(2)$ =0.14	85.7	87.0	$\chi^2(1)$ =0.03	87.3	86.0	$\chi^2(1)$ =0.05	87.1	86.0	$\chi^2(1)$ =0.03
Witness \bar{X}	9.90	9.92	9.20	10.59	$F(2)$ =0.18	8.32	10.39	$t(116)$ =0.93	7.89	12.20	t(116) =-2.32	8.54	11.82	$t(72.45)$ =1.59
SD	10.26	12.99	8.06	9.37		9.26	10.57		8.48	11.65		7.74	12.87	
Accused %	47.5	40.0	40.0	62.5	$\chi^2(2)$ =5.41	53.6	45.7	$\chi^2(1)$ =0.54	44.4	50.9	$\chi^2(1)$ =0.50	48.6	46.0	$\chi^2(1)$ =0.08
Accused \bar{X}	3.95	2.95	3.05	5.87	$F(2)$ =2.71	4.14	3.89	$t(116)$ =-0.18	3.02	5.02	$t(104.15)$ =-1.69	3.72	4.27	$t(116)$ =0.45
SD	6.40	4.91	5.78	7.88		6.73	6.34		5.71	7.02		5.68	7.36	
Other evidence %	33.3	12.5	47.5	40.0	$\chi^2(2)$ =12.23	39.3	31.5	$\chi^2(1)$ =0.582	36.5	29.8	$\chi^2(1)$ =0.60	37.1	28.0	$\chi^2(1)$ =1.10
Other evidence \bar{X}	1.78	0.23^a	3.20^a	1.87	F(2) =7.00	1.79	1.78	$t(116)$ =-0.01	1.46	3.00	$t(93.62)$ =-0.98	2.10	1.33	$t(116)$ =-1.12
SD	3.71	0.84	5.15	3.16		3.12	3.89		2.15	4.39		4.16	2.95	

NB Bold indicates significant difference < .05

^{a, b} Significant difference between means.

Further analyses found the age of the complainant at the last police interview significantly predicted cross-examination raising consistency in the complainant’s testimony with other evidence in the case. This model also found that both linear and quadratic variables were significant. As Figure S15.3 shows, the likelihood of these lines of questioning increases up to the age of 40 years and then decreases or plateaus. Given the limited number of cases with complainant’s above the age of 40 years in the sample, it is likely that the quadratic variable was influenced by these few cases and the true relationship may simply be linear, whereby the likelihood of these lines of questioning increases with the age of the complainant.

Figure S15.3. Predicted probability that consistency with other evidence will be raised based on the complainant’s age at the time of the last police interview.



What types of tactics were indiscriminate in what defence lawyers were testing?

As Table S15.7 shows there were five main associations with the indiscriminate tactics and case characteristics. First, males were more likely than females to be asked about collusion or contamination. Second, custody disputes were more likely to be raised with complainants of intra-familial abuse than extra-familial abuse. Third, the complainant’s mental health was more likely to be raised in cases adolescents and adults, than children. Fourth, adults were asked on average more lines of questioning about use of psychotropic substances. The mean number of lines of questioning about psychotropic substances was also higher for complainants involved in cases with extra-familial abuse and penetrative abuse. Finally, defence lawyers asked female complainants on average more lines of questioning relating to mental health than male complainants.

The age of the complainant at the first offence was associated with whether defence lawyers used tactics targeting the use of psychotropic substances. This association remained significant after controlling for both type of abuse and the complainant defendant relationship. Further, age emerged as a better predictor than these variables, indicating that their relationship with psychotropic substance questions may be mediated by the age of the complainant. There was both a significant linear and quadratic age effect. As Figure S15.4 shows these effects indicated that in some cases with very young complainants, these lines of questioning were raised, however the likelihood of these lines of questioning increased dramatically as the complainant entered adolescence.

Figure S15.4. Predicted probability that a complainant will be asked lines of questioning about use of psychotropic substances based on their age at the time of the first offence, controlling for type of abuse and complainant-defendant relationship.

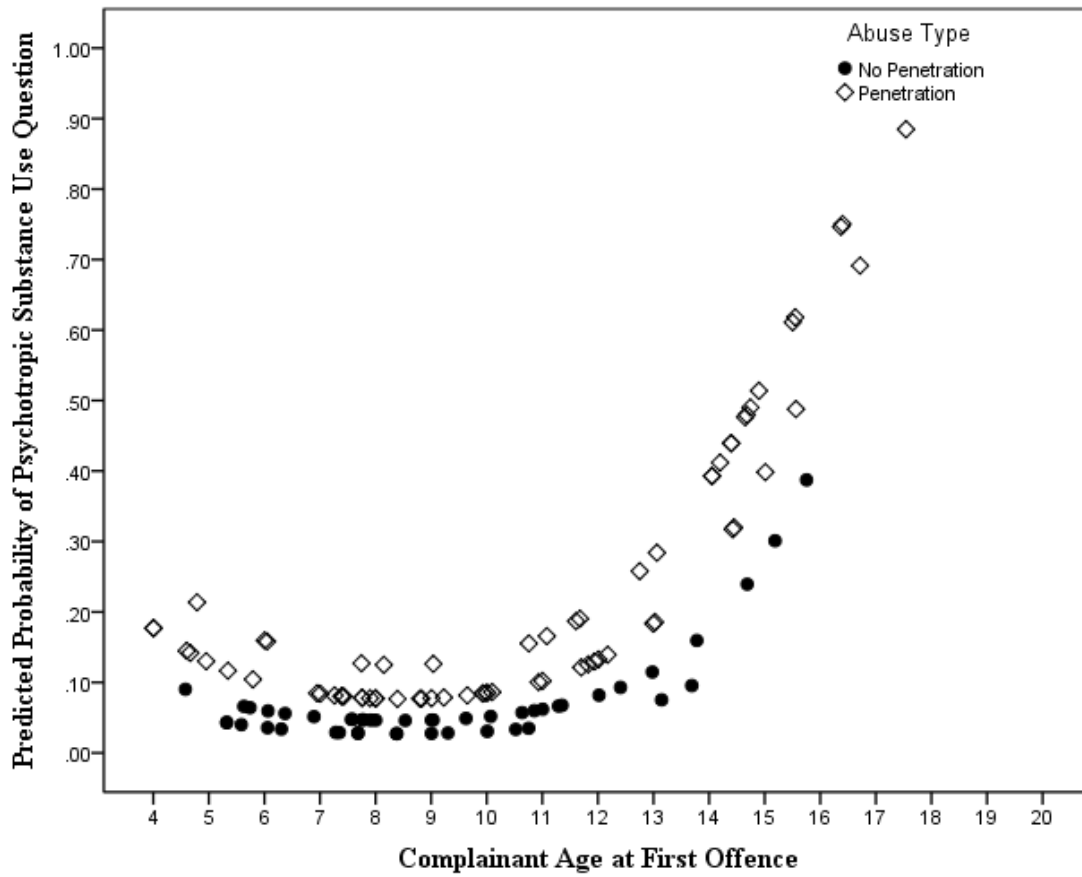


Table S15.7. Rate of Indiscriminant Tactics Across Age, Jurisdiction and Case Characteristics

	All cases	Age Category			Test (df)	Gender		Test (df)	Relationship		Test (df)	Abuse Type		Test (df)
		< 13 years	13-17 Years	Adult		M	F		Intra	Extra		Pen	No-Pen	
Collusion or contamination %	30.8	30.0	30.0	32.5	$\chi^2(2)$ =0.08	46.4	26.1	$\chi^2(1)$ = 4.17	25.4	36.8	$\chi^2(1)$ =1.84	25.7	38.0	$\chi^2(1)$ =2.06
Collusion or contamination \bar{X}	1.46	1.67	1.20	1.51	F(2) =0.19	1.04	1.59	t(116) =0.75	1.03	1.95	t(116) =-1.46	1.22	1.80	t(116) =0.91
SD	3.40	4.18	2.70	3.24		1.37	3.82		2.95	3.82		30.3	3.87	
Custody %	10.0	5.0	10.0	15.0	$\chi^2(2)$ =2.22 ^a	10.7	9.8	$\chi^2(1)$ =0.02 ^a	15.9	3.5	$\chi^2(1)$ = 5.08	10.0	10.0	$\chi^2(1)$ <0.01
Custody \bar{X}	0.24	0.10	0.18	0.44	F(2) =0.97	0.18	0.26	t(116) =0.32	0.38	0.07	t(71.21) =1.60	0.13	0.39	t(52.35) =1.06
SD	1.11	0.45	0.59	1.79		0.61	1.23		1.48	0.38		0.42	1.66	
Mental Health %	6.7	0.0	15.0	5.0	$\chi^2(2)$ = 7.50^a	3.6	7.6	$\chi^2(1)$ =0.56 ^a	7.9	5.3	$\chi^2(1)$ =0.34 ^a	8.6	4.0	$\chi^2(1)$ =0.98 ^a
Mental Health \bar{X}	0.27	<0.01	0.60	0.21	F(2) =2.35	0.04	0.34	t(98.15) = 1.98	0.17	0.38	t(116) =-0.89	0.31	0.22	t(116) =-0.34
SD	1.26	<0.01	1.84	1.13		0.19	1.44		0.68	1.71		1.14	1.43	
Psychotropic Substance %	16.7	2.5	20.0	27.5	$\chi^2(2)$ = 9.48	17.9	16.3	$\chi^2(1)$ =0.04 ^a	11.1	22.8	$\chi^2(1)$ =2.95	22.9	8.0	$\chi^2(1)$ = 4.64
Psychotropic Substance Sub \bar{X}	0.85	0.03	0.73	1.80	F(2) = 4.19	1.00	0.80	t(116) =-0.33	0.24	1.55	t(57.74) = -2.44	1.30	0.20	t(80.54) = -2.49
SD	2.79	0.16	1.65	4.42		3.98	2.33		0.78	3.91		3.51	0.91	
Sexual History %	12.5	10.0	12.5	15.0	$\chi^2(2)$ =0.46	3.6	15.2	$\chi^2(1)$ =2.66 ^a	20.6	3.5	$\chi^2(1)$ = 8.03	11.4	14.0	$\chi^2(1)$ =0.18
Sexual History \bar{X}	0.34	0.18	0.58	0.26	F(2) =0.68	0.57	0.27	t(28.07) =-0.53	0.56	0.10	t(71.60) =1.68	0.18	0.55	t(52.76) =1.05
SD	1.60	0.60	2.60	0.75		3.02	0.76		2.12	0.55		0.62	2.37	
Wrong %	94.2	95.0	92.5	95.0	0.303 ^a	96.4	93.5	$\chi^2(1)$ =0.34 ^a	95.2	93.0	$\chi^2(1)$ 0.28 ^a	95.7	92.0	$\chi^2(1)$ =0.73 ^a
Wrong \bar{X}	10.43	10.18	9.10	12.05	F(2) =0.80	10.93	10.28	t(116) =-0.29 (.776)	10.79	10.02	t(116) =0.40	10.49	1035	t(116) =-0.07
SD	10.49	11.66	9.14	10.60		13.02	9.65		10.81	10.19		10.23	10.96	

NB Bold indicates significant difference < .05

