
**AN EVALUATION OF THE
NSW CHILD SEXUAL ASSAULT
SPECIALIST JURISDICTION PILOT**

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The challenges faced by child sexual assault complainants include lengthy court delays, harsh and unfair cross-examination techniques, the prospect of coming into contact with the perpetrator, long waits in inhospitable witness waiting areas and language and court processes that are often incomprehensible to them. Given these difficulties, it is not surprising that participation in prosecutions is tremendously distressing for child complainants.

Ron Dyer (2002), Foreword to *Report on Child Sexual Assault Prosecutions*, NSW Legislative Council Standing Committee on Law and Justice, p. xi.

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EXECUTIVE SUMMARY

A specialist jurisdiction for child sexual assault matters was established as a pilot in the Sydney West District Court Registry in March 2003. It was based on the recommendation of the inquiry conducted by the NSW Legislative Council Standing Committee on Law and Justice in 2002 and the proposal of the Director of Public Prosecutions. The aim of the specialist jurisdiction was to address the difficulties in prosecuting child sexual assault matters and to improve the experience of child sexual assault complainants. This report outlines the results of the evaluation of this pilot.

The various features of the specialist jurisdiction fall into three main categories:

- trying to reduce delays;
- improving the physical environment of the court and using special innovative measures to assist children to give evidence; and
- increasing the skills of the legal professionals involved in the court process.

The main features of the specialist jurisdiction that were expected to reduce delays were case management procedures and pre-trial conferences designed to minimise adjournments and to ensure that the case was ready to proceed. While one of the courts in the specialist jurisdiction introduced some case management procedures and pre-trial mentions, these measures were limited by the failure to develop practice directions, the late appointment of crown prosecutors to specific cases, problems with the technology and the particular requirements of some judicial officers and professionals that child complainants/witnesses be at court ready to give evidence at the very beginning of the trial.

The main physical features of the court environment that were expected to improve the experience for child complainants/witnesses were the establishment of the remote child-friendly witness suite at Parramatta, an upgrading of the technology and a presumption in favour of using special measures such as closed-circuit television (CCTV) and admitting the child's pre-recorded investigative interview as the child's evidence-in-chief. Children, their parents and the professionals made positive comments about the remote witness suite and their responses indicated that the suite is perceived as a child-friendly and more appropriate environment than some of the other less specialised CCTV and waiting areas. Its use was, however, largely restricted to children whose cases were heard at Parramatta Court; it is rarely used to link children to other courts.

The use of the pre-recorded investigative interview as the child's evidence-in-chief and the use of CCTV also had positive benefits for children, but again particular aspects of court practice and problems with the technology inhibited the efficiency and effectiveness of these measures. These included delays caused by the late editing of the tapes (which often occurred after legal argument), a lack of familiarity with the legislative provisions by some judicial officers and crown prosecutors, technical difficulties with the equipment and court staff who were unable to operate the equipment.

The third key feature of the pilot specialist jurisdiction was that "cases would be heard by designated judicial officers specially trained in child development and the dynamics of child sexual assault" and that "prosecutors and court staff would also receive special training" (NSW Legislative Council Standing Committee on Law and Justice 2002, p. xviii). While some specialist education for judicial officers and prosecution lawyers

was delivered during the evaluation period, it is unclear what effect this has had on practice. Court observation and the interviews with children, parents and court professionals indicated that children are still subjected to overly long, complex questioning which is unlikely to produce the most reliable evidence. Judicial intervention, to clarify the questions or control accusatory questioning, varied across trials but appears to be unrelated to either the age or linguistic style of child complainants.

The limitations of the evaluation need, however, to be noted. These include the small number of trials that proceeded and were able to be observed during the evaluation period, the lack of consistency in practice across the three courts which comprised the specialist jurisdiction and the restriction of the pilot and the evaluation to the metropolitan area. There was little to distinguish the specialist jurisdiction from the comparison registry apart from the establishment of the remote witness suite at Parramatta. While the remote witness suite was well received and benefited those children who were able to use it, in practice there were few other real changes. The problems outlined by the parliamentary inquiry about delays, problems with the technology and the way children are treated in court (especially during cross-examination) continue.

1. INTRODUCTION

Since the mid-1980s, the difficulties that child witnesses face when testifying in court proceedings in an adversarial system have been the subject of considerable discussion and a cause for concern in a number of inquiries and studies across a range of jurisdictions in Australia and other common law countries (such as England, Scotland, Canada and the USA). In New South Wales and other states of Australia, various inquiries have made a number of recommendations concerning the experiences of child complainants and witnesses, especially in relation to the prosecution of child sexual assault matters.¹

Each of these inquiries has explored and attempted to address difficulties such as:

- long delays;
- a formal and intimidating court environment;
- concerns about coming face-to-face with the defendant and the defendant's family and friends;
- complex language and confronting questioning;
- child-unfriendly processes; and
- rules of evidence that children and non-lawyers find incomprehensible.

The recommendations arising from these inquiries have focused on the need for special measures (such as electronically recorded interviews, closed-circuit television and pre-recording the whole of the child's evidence); training for the judiciary and legal profession; the modification of both the court environment and waiting areas for children; changes in relation to the rules of evidence, judicial warnings and greater judicial control over cross-examination.

In addition to these recommendations, the principal recommendation of the most recent inquiry undertaken by the New South Wales Legislative Council Standing Committee on Law and Justice (2002) was the establishment of a specialist child sexual assault jurisdiction. This specialist jurisdiction is the focus of the current study.

CHILD SEXUAL ASSAULT SPECIALIST JURISDICTION

The *Report on Child Sexual Assault Prosecutions* prepared by the NSW Legislative Council Standing Committee on Law and Justice (Report 22, November 2002) recommended the establishment of a specialist jurisdiction for child sexual assault prosecutions, along the lines proposed by the NSW Director of Public Prosecutions in his submission to the Standing Committee. The proposal received general support from a number of stakeholders, including the NSW Department of Community Services, NSW Police Service and several advocates and researchers.

The Standing Committee proposed that the specialist jurisdiction be a pilot project with its purpose being:

to examine whether the measures suggested would improve the experiences of child sexual assault complainants and/or the success rates of prosecutions.

(*Report on Child Sexual Assault Prosecutions*, NSW Legislative Council Standing Committee on Law and Justice, Report 22, November 2002, p. 208)

FEATURES OF THE CHILD SEXUAL ASSAULT SPECIALIST JURISDICTION

The NSW Government announced the establishment of the specialist jurisdiction in late 2002 with the following features as recommended by the NSW Legislative Council Standing Committee on Law and Justice:

- specialist training in child development and child sexual assault issues for judicial officers and prosecutors;
- appropriate child-friendly facilities, furnishings and schedules to reduce fears caused by unfamiliar and formal environments;
- courts equipped with high standard electronic facilities for the use of special measures (that is, closed-circuit television) and proper training of staff in the use of the equipment;
- pre-trial hearings between judges and counsel to determine both the special needs of the child and readiness to proceed, thus reducing adjournments;
- a presumption that children will not be required to give evidence at committal hearings to avoid the need to give evidence more than once;
- a presumption in favour of using special measures under the *NSW Evidence (Children) Act 1997*, including the admission of pre-recorded evidence and the use of closed-circuit television and support persons while the child is giving evidence.² The Standing Committee noted (p. 243) that the admission of electronic pre-recorded testimony would:
 - allow the evidence to be given when the details are clearer in the complainant's memory avoiding the lengthy delays between charging and giving evidence;
 - reduce the number of times that the child is interviewed as the recording is admitted as evidence at the committal, trial and any subsequent trials; and
 - eliminate the need for the child to spend hours/days in the court waiting to appear to give evidence.³

ESTABLISHMENT OF THE SPECIALIST JURISDICTION

A specialist jurisdiction to prosecute child sexual assault cases was established on a pilot basis in the Sydney West District Court Registry in March 2003 with cases being heard initially only at Parramatta Court, but later also at Penrith and Campbelltown Courts.⁴ The aim of the specialist jurisdiction was to address many of the identified obstacles to the successful prosecution of child sexual assault offences and the problems that "cause distress and hardship to child sexual assault complainants" (NSW Legislative Council Standing Committee on Law and Justice 2002, p. 204).

A secure witness suite was established within easy access of the Parramatta Court complex. The suite comprised two rooms with video conferencing facilities, a reception area, waiting room, a private interview room and a playroom for children. The remote witness suite is linked to the courtroom at Parramatta Court and can be linked to courtrooms at Campbelltown and Penrith Courts allowing children to give evidence via closed-circuit television (CCTV) to any of these three courts. The remote witness suite is managed by two additional staff recruited by Parramatta Court and NSW Sheriff's Office.

Equipment was installed at each of the three courthouses at Parramatta, Campbelltown and Penrith. This equipment included dual plasma screens in the courtroom to enable split-screen viewing and document cameras to enable high quality transmission of exhibits between the remote witness suite and the courtroom.

A Child Sexual Assault Jurisdiction Project Team was established in late 2002 to implement the specialist jurisdiction, with representatives from the judiciary, magistracy and key stakeholder agencies (including Attorney-General's Department, the Office of the Director of Public Prosecutions, Local Courts, Legal Aid Commission, NSW Judicial Commission, NSW Police Service and Department of Community Services).

Following the Standing Committee's recommendation that the pilot be closely evaluated (Recommendation 44, p. 209), the NSW Bureau of Crime Statistics and Research was asked to conduct a comprehensive evaluation of the specialist jurisdiction. The primary focus of this evaluation was to determine whether the specialist jurisdiction improved the court experiences of the child complainants/witnesses involved in child sexual assault cases and to inform decisions about establishing the specialist jurisdiction on a permanent basis.

RESEARCH QUESTIONS

The research questions addressed by this evaluation are:

1. To what extent were the features of the specialist jurisdiction implemented? (See Chapter 3.)
 - a) Does the chosen venue for the specialist child sexual assault court have the appropriate facilities?
 - b) Has the appropriate technology been installed in the courtroom? Is it working properly?
 - c) Was the training given to relevant staff sufficient and appropriate?
2. Has the advent of the specialist child sexual assault jurisdiction had any effect on the conviction rate? (See Chapter 5.)
3. Has the advent of the specialist child sexual assault jurisdiction resulted in more expeditious handling of child sexual assault matters? For example, has it resulted in:
 - Fewer mentions?
 - Quicker disposition of the case?
 - Less time in court for witnesses?(See Chapter 6.)
4. Is the physical environment and the way in which evidence is given in child sexual assault prosecutions less intimidating for child witnesses since the advent of the specialist jurisdiction? To what extent has the use of special technological measures (such as CCTV and the electronic recording of the child's investigative interview) played a role in this? (See Chapter 7.)
5. To what extent has the specialist jurisdiction improved the way child witnesses are treated at court? Has it resulted in more sensitive handling by judges and others? (See Chapter 8.)

This report presents the results of the evaluation of specific aspects of the specialist jurisdiction. It outlines how child sexual assault matters are dealt with during the prosecution and court process in various courts within the specialist jurisdiction and in one other comparison registry.

Chapter 2 describes the study design and methods.

Chapter 3 outlines the extent to which the various features of the specialist jurisdiction were implemented.

Chapter 4 describes the characteristics of the cases involved in the specialist jurisdiction and comparison registry.

Chapter 5 focuses on the delays, some analysis of their various causes and their effects on the children involved.

Chapter 6 outlines the special measures including the use of pre-recorded interviews as part of the child's testimony, closed-circuit television to allow children to give evidence from outside the actual courtroom and the new remote witness suite.

Chapter 7 focuses on the various aspects of the interactions between the child and the key participants in the process – the judge, the prosecution lawyers, the Witness Assistance Service (WAS) officers and the defence lawyers.

The final chapter is a summary and discussion of the implementation and evaluation of the specialist jurisdiction.

2. METHOD

The evaluation design involved two samples of child sexual assault trials finalised by the courts comprising the two District Court Registries in the Sydney metropolitan area, namely:

- the courts involved in the Child Sexual Assault Specialist Jurisdiction – Campbelltown, Parramatta and Penrith Courts – which comprise the Sydney West District Court Registry; and
- the Downing Centre which comprises the Sydney District Court Registry and provides a comparison registry for the study.

This evaluation focuses on the specific aspects of the prosecution and court processes that were expected to improve the experiences of child complainants/witnesses at court, particularly in relation to the specific differences between the two registries (the specialist jurisdiction and the comparison registry).

DATA SOURCES

Data were collected from a number of sources:

- (i) observation of trials in court;
- (ii) court transcripts;
- (iii) interviews with child complainants;⁵
- (iv) interviews with the child's non-offending parents/guardians;
- (v) interviews with legal professionals and court staff; and
- (vi) juror surveys.⁶

ETHICS APPROVAL

Ethics approval was obtained in February 2004 from the Human Research Ethics Committee, University of New South Wales. The evaluation process was assisted by being endorsed by a number of key individuals and agencies within the criminal justice area, including the Chief Judge, District Court of NSW, and the Director of Public Prosecutions.

INFORMED CONSENT

The written consent of the child and his/her non-offending parent/guardian was required for both court observation and subsequent interviews. This consent was obtained via the Witness Assistance Service (WAS) Officers of the Office of the Director of Public Prosecutions as part of their court preparation with the child and the parent/guardian. Until the child and his/her parent/guardian gave consent to be involved in the research, no personal details regarding the child were disclosed to the researchers; the researchers were provided only with the name of the defendant, information which is publicly available.

COURT OBSERVATION

Court observations were undertaken only with the consent of the child complainant, his/her non-offending parents/guardians and the presiding judge/magistrate.

Attempts were made to observe each child sexual assault trial held between 15 March 2004 and 13 December 2004 in each of the four courthouses in the two registries.⁷ However, 20 (40%) of the 50 scheduled trials were not held (because of a guilty plea,

‘no bill’ or the defendant being unfit to be tried) and could not be observed. Where consent was given by the child complainant and his/her non-offending parent/guardian, formal leave was sought from the presiding judge/magistrate to remain in closed court and observe the child’s testimony.⁸ While some defence lawyers objected to the presence of the researchers in the courtroom, each presiding judge/magistrate gave formal consent for the researchers to observe the matters.

The focus of the court observation was the testimony of the child complainant. The stages of the court proceedings which were observed were:

- the child’s evidence-in-chief, including the child’s pre-recorded audio-taped or video-taped interview conducted by officers of the Joint Investigative Response Team (JIRT) who had investigated the matter;⁹
- the cross-examination by the defence counsel;
- the re-examination of the child’s evidence by the crown prosecutor; and, if possible,
- the closing submissions of their case by both the crown prosecutor and the defence counsel; and
- the judge’s address to the jury, particularly the directions and the warnings given to the jury.

For some matters, other aspects were also observed, namely, the empanelling of the jury, opening addresses by the crown prosecutor and the defence counsel and the legal arguments between the crown prosecutor and the defence counsel. Each trial was observed for a number of days and, throughout the data collection period, Bureau staff maintained regular contact with the WAS officers allocated to the specific cases.

For each matter which was observed, data were collected from three sources:

- the courtroom observation schedule which was specifically designed for this evaluation and on which researchers recorded their ratings;
- comprehensive notes taken by the researchers while observing each case; and
- where possible, transcripts of the court proceedings, including the summing-up by the presiding judge.

INTERVIEWS WITH CHILD COMPLAINANTS

The interviews with the child complainants were conducted at a time and location which was convenient to the children and their family; this was generally the family home. In the matters where the defendant was convicted, the interviews with the child complainants were conducted after sentencing.

Children were given the option of answering questions either in a face-to-face interview or via a specially designed computer-assisted program.¹⁰ This program was developed to allow children to have some control over the pace of the interview, using technology with which they are comfortable and which is interesting to them. Details of the program are included in Appendix A. The questions concerned the child’s perception of various aspects of the court experience, including the pre-recorded audio-taped or video-taped statement, the use of closed-circuit television, the remote witness suite, the difficulty of the questions they were asked and their perceptions about the way they were treated at court.

Each child who was interviewed received \$25 as an acknowledgement of his/her participation and contribution to the project.

INTERVIEWS WITH NON-OFFENDING PARENTS/GUARDIANS

Non-offending parents/guardians were interviewed, generally after their child had been interviewed and asked about various aspects of their child’s experience of giving evidence including delays, the use of CCTV, the preparation and support they received and the perceived effects of the process on their child and the family. Each parent/guardian who was interviewed also received a payment of \$25.

INTERVIEWS WITH LEGAL PROFESSIONALS

Interviews were conducted with crown prosecutors, instructing solicitors, defence lawyers and WAS officers involved in the trials which were observed. The interview questions focused on their perceptions of the special measures to accommodate the needs of child complainants/witnesses and about particular aspects of the case in which they were involved, including delays, any problems with the technology and their perceptions of the effectiveness of the child’s testimony.

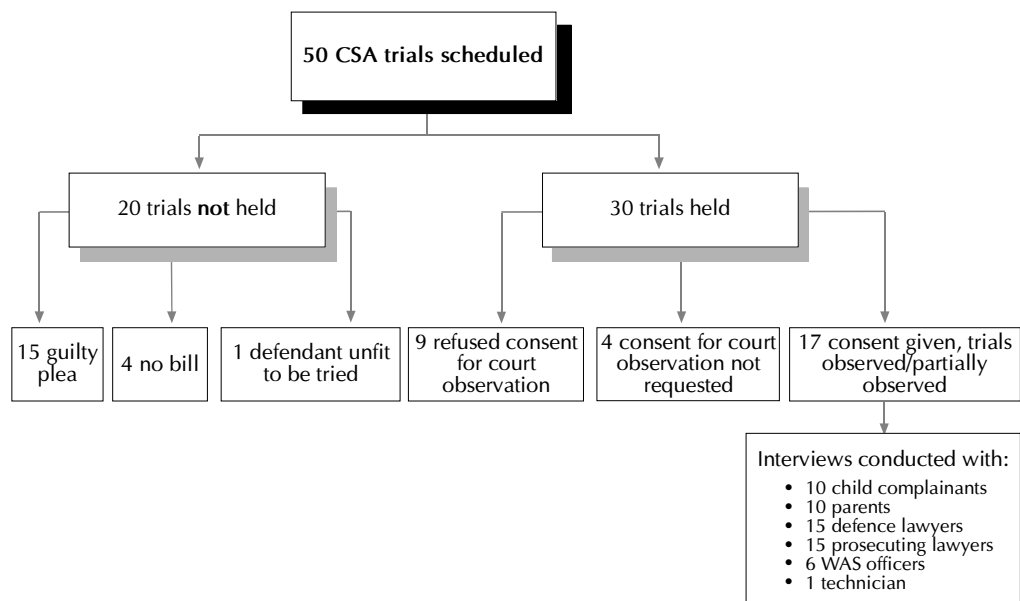
All interviews were tape-recorded with the consent of the interviewee, for later transcription.

RESPONSE RATE

Information was recorded regarding each child sexual assault trial scheduled for Parramatta, Penrith, Campbelltown and Sydney District Courts during the data collection period. In total, 50 child sexual assault cases were finalised, aborted or listed for trial across the four courts between March and December 2004.¹¹

Figure 1 provides information on the disposition of the 50 cases. As Figure 1 shows, consent for the researchers to observe the court proceedings was refused in nine cases and was not sought in a further four cases because the WAS officers were concerned that the children were distressed. It is possible therefore that the findings in relation to the children observed and interviewed may underestimate the difficulties which

Figure 1: Child Sexual Assault Trials
(Campbelltown, Parramatta, Penrith, Sydney District Courts, March – December 2004)



children experienced as a result of their court experience.¹² While the ‘observed’ and ‘non-observed’ trials were similar in terms of the age of the child complainants (see Table 1, Chapter 4), compared with the ‘non-observed’ trials, the ‘observed’ trials had fewer male complainants (see Table 2, Chapter 4) and more defendants under 30 years of age (see Table 3, Chapter 4).

Of the 17 trials that were observed:

- 11 were heard at courts in the Child Sexual Assault Specialist Jurisdiction:
 - 6 trials at Campbelltown Court (one was a summary matter);
 - 4 trials at Parramatta District Court; and
 - 1 trial at Penrith District Court.
- 6 trials were heard at the Sydney District Court (comparison registry).¹³

Of the 13 trials that were not able to be observed:

- 6 were heard at courts in the Child Sexual Assault Specialist Jurisdiction; and
- 7 were heard at the Sydney District Court (comparison registry).

3. RESULTS: EVIDENCE OF IMPLEMENTATION

To what extent were the features of the specialist jurisdiction implemented?

Before asking whether the specialist jurisdiction made any difference to the way child sexual assault matters and child complainants were handled, it is important to assess the extent to which the various features of the specialist jurisdiction were implemented. That is the focus of this section of the report.

As indicated earlier, the proposed specialist jurisdiction was to include the following features:

- appropriate child-friendly facilities and furnishings in a remote witness suite;
- courts equipped with high standard electronic facilities for the use of special measures (that is, closed-circuit television) and proper training of staff in the use of the equipment;
- specialist training in child development and child sexual assault issues for judicial officers and prosecutors;
- pre-trial hearings between judges and counsel to determine both the special needs of the child and readiness to proceed so as to minimise adjournments;
- a presumption that children will not be required to give evidence at committal hearings; and
- a presumption in favour of using special measures under the *NSW Evidence (Children) Act 1997*, including the admission of pre-recorded evidence and the use of closed-circuit television and the presence of support persons while the child is giving evidence (see Appendix B).

The following sections of the report deal with the extent to which each of these features was implemented.

APPROPRIATE CHILD-FRIENDLY FACILITIES

Does the chosen venue for the specialist child sexual assault court have appropriate facilities?

The remote witness suite was established in early 2003 to provide a child-friendly facility that was linked, by upgraded technology, to courtrooms at Parramatta, Campbelltown and Penrith District Courts (see Appendix C). As outlined in the background paper prepared for those involved in the implementation of the specialist jurisdiction (see Appendix D), the remote witness suite includes:

- two CCTV witness rooms which allows for double booking where there are multiple (child) sexual assault matters listed in the Sydney West registry;¹⁴
- a child-friendly waiting room with a play area, television, video and tea and coffee-making facilities, to accommodate children and their carers (see Appendix C);
- a separate room to conduct private interviews with child witnesses as required; and
- telephone and fax facilities to allow communication between court and the remote witness suite.

This aspect of the specialist jurisdiction has been fully implemented and is the main physical factor differentiating the specialist jurisdiction from the comparison registry.

Appendix C provides a series of photos which show the courtroom, CCTV room and waiting areas in the courts within the specialist jurisdiction and the comparison registry. The views of child complainants and their parents about the remote witness suite are outlined in Chapter 5.

APPROPRIATE TECHNOLOGY AND TRAINING

**Has the appropriate technology been installed in the courtroom?
Is it working properly?**

Was the training given to relevant staff sufficient and appropriate?

Upgraded technology was installed in several courtrooms at Parramatta, Campbelltown and Penrith Courts. This included dual 42-inch plasma screens to allow for split-screen capabilities and document cameras for high-quality transmission of exhibits between the courtrooms and the remote witness suite. These screens were used to both transmit the live image of the child via CCTV to the courtroom and to present to the court the pre-recorded investigative interview conducted by the Joint Investigative Response Team as part of the child's evidence-in-chief.

TECHNOLOGICAL DIFFICULTIES WITH THE TAPES

There were problems replaying the tapes in four of the 17 observed cases and the professionals interviewed referred to similar problems in other cases in which they had been involved. Transcripts or headphones were required for the jury in three trials to assist them to hear and understand the content of the interview. In addition, there were delays in four of the observed trials because the sound was inaudible in either the remote witness suite or the CCTV room. In several cases, various attempts were made to improve the sound by holding the tape-player close to the monitor or by moving the video-player from the courtroom to the CCTV room.¹⁵ In another case, the trial was moved from one courtroom to another and then back again to enable the trial to continue.

We had to go to another court with one case and then go back to the first court and then come back – and then that court wasn't available. *[Defence lawyer]*

There seem to be several reasons for these difficulties: the quality of the tapes, the quality of the 'capture' during the original recording, the number of times the tape has been copied, the quality of the equipment and the training of the staff who operate it. As one judge made clear in his comments to the court, some of these problems could be avoided by testing the JIRT tape and the equipment in the courtroom before the trial begins and particularly before the child's evidence begins.¹⁶ Some prosecutors noted that the tape may play-back properly at the DPP office but not on different equipment at court. Several lawyers expressed their frustration with the problems caused by equipment failure.

I thought it was quite poor. I thought with a transcript we might be able to muddle through it. But it wasn't very clear, not clear enough. It is important to hear her clearly as in her tone and the way she answers and everything like that. I don't know whether it was the technology in the court or the tape. *[Prosecution lawyer]*

There was a delay for a couple of hours. That delay might only seem a couple of hours, but when you have a young witness waiting in a closed circuit room, that's a bit much. *[Prosecution lawyer]*

TECHNOLOGICAL DIFFICULTIES WITH THE CCTV LINK

There were also some technological difficulties in communication and in the transmission of sound between the courtroom and the CCTV room. These problems

occurred during six of the 17 trials that were observed and at each of the courts across the two jurisdictions. There were, however, some particular problems arising from the configuration and architecture of two courts in the specialist jurisdiction and the placement of the cameras. These included difficulty seeing the television screen in the courtroom because the sun was reflecting on the screen at particular times of the day, not being able to hear in the courtroom when it was raining and the placement of the cameras so that children had side-on rather than front-on views of the judge or the lawyer asking the questions. In one case, the sheriff intervened to tell the judge that “we could not see the lawyer properly” but in another the child said:

Yes [I could see them], but with the judge, the camera was facing right down and he was like this [shows looking down] so we couldn't see his face. A few times I tapped on the screen and I told the judge that I couldn't see the defence lawyer. *[12-year-old complainant]*

Several children commented that they had problems hearing at times. For example:

Oh, the volume was bad! I kept going “Sorry, I can't hear, what was that?” and that made me so nervous because the judge's voice was very soft and the lawyers are looking up at the screen, but the microphone is down below; so the sound needs to be so much better, much more sensitive. *[15-year-old complainant]*

However, the majority of child complainants in both the specialist jurisdiction and the comparison registry were rated by the observers as being either ‘mostly audible’ or ‘always audible’ during both evidence-in-chief and cross-examination.

TRAINING AND EQUIPMENT

Technicians were called in to assist in four of the trials after court staff were unable to fix the problems associated with replaying the tape or having audible communication between the courtroom and the CCTV room. These problems occurred both in the specialist jurisdiction with the new upgraded equipment and in the comparison registry. A number of the professionals interviewed were frustrated by the lack of trained and skilled operators:¹⁷

No one has any training. The government legislates all this so they can do it, but then they don't provide the funds to have the proper facilities there or the skilled operators to do it.

It really, really annoys me that there are always technical problems. It really annoys me that there aren't enough courts with facilities and it just seems ridiculous to give people all these rights without funding them adequately. There are so many delays and so much hold up because of the technology.

AG's have been really fantastic, I think, at providing extra assistance but often it's a very reactive system, the court system and I suppose that is one of the challenges – trying to get people to do things early, but that is not how the whole system is set up. Hopefully, some of those things will change, but there hasn't been that testing. In one case, they realised on the day that they couldn't hear it in the other room and then everyone sort of came in, but there wasn't time to put it onto a CD and that is what should have happened really. So we had to abort and start again. *[Prosecution lawyer]*

In one case, a clearly exasperated judge in the specialist jurisdiction summoned the senior court staff member to explain the problem and to indicate what could and would be done to avoid further problems.

The legal professionals' perceptions of the quality of the equipment (in terms of both the audio and visual quality) are outlined in Chapter 6 of this report.

SPECIALIST TRAINING FOR JUDICIAL OFFICERS AND PROSECUTORS

An education committee was established as one of the working parties associated with the New South Wales Attorney General's Child Sexual Assault Jurisdiction Project Team. This committee, in conjunction with the NSW Judicial Commission, prepared a

folder of relevant publications for judicial officers involved in the specialist jurisdiction and for others who were interested. Several seminars for judicial officers on child sexual assault matters were organised.¹⁸

The Office of the Director of Public Prosecutions also developed a learning curriculum in early 2004 to improve the skills and knowledge of staff and crown prosecutors involved in the prosecution of both child and adult sexual assault matters.¹⁹

There was strong support among the legal and other professionals for further judicial education. The topics which were specifically mentioned by those who were interviewed as part of the evaluation included legislative requirements, the dynamics of child sexual assault, child development and what can be expected of children, given their circumstances and development. Further education is also seen as necessary in the area of how to treat children to reduce their stress and increase the likelihood that they can give reliable evidence.

The judicial education and participation by ODPP staff and crown prosecutors in the learning modules is voluntary. Based on the comments of the professionals involved, there is some doubt about the effectiveness of this arrangement. Some professionals expressed doubt about the effectiveness of “simply giving judges and magistrates a bench book or a folder of articles”. Some also indicated that they did not know about, or had not been able to participate in, the training that was available within the ODPP.

Whether they read them [the folder of readings] is another thing. Certainly some of the bench haven't. I can tell you that the first judge in X trial had not heard of it and that is not the first judge that had not heard of the ability to play a child's video as evidence-in-chief. OK, I'm sure now they are starting to understand you can do that, but there's much more to it than that. They also need to be sensitive in the way they manage the case and the witness.
[Prosecution lawyer]

I have no specific training on this and I would love to have it. I would love to know how to better interview children, better understand their development. I have had no formal training. I think it is the unfortunate fact that a lot of the Crowns have no understanding of child development and consequently we then can't pass that onto the jury so that they can understand that this is the evidence of a nine-year-old child in these circumstances and this is what you can expect. [Prosecution lawyer]

PRE-TRIAL HEARINGS AND CASE MANAGEMENT

As the government background paper (May 2003) points out, one of the targets of the specialist jurisdiction was the “early identification of child sexual assault matters and an increased level of case management”. Although the general listing procedures were not altered, the cases in the specialist jurisdiction were to be identified and listed for pre-trial mention. The objective was to allow trial management in order to avoid trial dates being vacated, to minimise delays and also to ensure that the options available under the *NSW Evidence (Children) Act 1997* were considered.

Practice directions were being drafted early in the implementation period, but it appears that they were not finalised and distributed. As Judge Tupman stated, “on the whole they mirror the sorts of directions that would be given by List Judges in the District Courts setting matters down for trial generally. Of particular interest however is the need for early editing of the evidence-in-chief videotape of the child complainant.”²⁰ Where the editing of the tape is done by consent, this is not a problem. However, when there is no agreement between the parties, judicial determination is necessary. Judge Tupman specifically referred to the need for additional pre-trial hearings to determine the admissibility of particular parts of the interview to allow the “trial to start on time”. The obstacle to settling this issue prior to the trial is that the pre-trial directions of one judge are not binding in the event of a change of judge. While the legal principle of judicial comity means that a trial judge will “usually follow

the decision of another judge of first instance in the same jurisdiction, unless convinced that the judgment was wrong",²¹ the lack of any practice directions or legislative change were perceived to be impediments by a number of the lawyers interviewed during this evaluation.

For example:

What is your view of having pre-hearing conferences where you sort out a lot of those matters before trial? Well, the law in the matter is that, with discretionary matters, any pre-trial discretionary rulings aren't binding on the trial judge.

What would you think of a change to that? I think it would be ineffective because what would happen is this – as barristers and solicitors get busy, matters get juggled around, so you would have different people having different takes on things. It probably would create more work than you would solve. I think the trial judge should do it all. Generally, what most trial judges do is just work without a jury. [Defence lawyer]

The other impediments are outlined in Chapter 6 in relation to delays and adjournments.

The court observation and other data from the evaluation process confirmed that late editing of the tapes – after the trials had commenced – resulted in delays in several cases in both the specialist jurisdiction and the comparison registry. In several cases in the specialist jurisdiction, the editing of the tape was not undertaken until after considerable legal argument, which led to delays and the trials running much longer than scheduled. In most cases, however, the tape was edited by agreement between the prosecution and the defence before the trial commenced. This appeared to have been done with little dispute about what should be removed, with prosecutors willing to 'lose' what they generally saw as irrelevant material in the rapport-building stage between the child and the investigative interviewer. Several defence lawyers specifically mentioned wanting to remove 'cute' background toys and 'humanising' material about the children's normal activities and any evidence of a change in demeanour when they talked about the allegations.

PRESUMPTION THAT CHILDREN NOT REQUIRED TO GIVE EVIDENCE AT COMMITTAL HEARING

Of the 17 trials which were observed, only one child complainant was required to give evidence at the committal hearing. This committal hearing was held at the comparison registry (the Downing Centre) but the case had been transferred from Penrith Court before the specialist jurisdiction was established.

PRESUMPTION IN FAVOUR OF USING SPECIAL MEASURES

The use of video-technology in NSW courts²² allows the pre-recorded video-tape or audio-tape of the child's investigative interview to be presented as all or part of the child's evidence-in-chief. It also allows children to testify from other linked facilities via closed-circuit television (CCTV) or 'live link'.

Both forms of technology were available in both the specialist jurisdiction and the comparison registry and, in fact, according to the legal professionals and WAS officers who were interviewed, pre-recorded tapes and CCTV were the presumed means by which children testify, at least in metropolitan Sydney. In all the trials which were observed in both the specialist jurisdiction and comparison registry, children gave evidence via CCTV and the pre-recorded investigative interview was tendered as all or part of the child's evidence-in-chief.²³ There was therefore no difference between the two registries in this regard. The main difference was where the children were located when they gave evidence. Children in the comparison registry did not have the option of using the remote witness suite, whereas seven of the 11 children whose cases were heard in the specialist jurisdiction used this facility.

SUMMARY

An overall assessment of the extent to which the key features of the specialist jurisdiction were implemented indicates 'a mixed bag'. Clearly, the upgraded technology was installed in at least one courtroom at each of the three courts in the specialist jurisdiction. There were, however, a number of technical problems. Some of which were at least partly related to the training of staff in the use of the upgraded equipment. In the 17 trials which were observed, two special measures were used universally in both the specialist jurisdiction and the comparison registry, namely, the tendering of the child's pre-recorded investigative interview as their evidence-in-chief and the use of CCTV.²⁴ The delivery of specialist education to judicial officers and prosecution lawyers appears to have been limited and the practice directions were not in force.

The main physical difference between the specialist jurisdiction and the comparison registry was the option for children whose cases were heard in the specialist jurisdiction to use and give evidence from the remote witness suite. However, this facility was not used by all children in the specialist jurisdiction.

Given both the small number of trials which were held during the evaluation period and the limited differences between the two registries, the results section will focus on the features of the prosecution process where some improvements could be made.

4. RESULTS: CHARACTERISTICS OF 50 CASES

This chapter describes the characteristics of the child complainants, the defendants and the charges laid in the 50 child sexual assault cases held during the data collection period.

CHARACTERISTICS OF CHILD COMPLAINANTS

Table 1 shows the age of the child complainants at the time of the trial; data are presented for both the 17 observed trials and the remaining 33 trials scheduled during the data collection period.

Table 1: Age of the child complainants at the time of the trial
(50 child sexual assault trials, March – December 2004)

Child's age (years)	Trials observed	Remaining trials		Total	
		Not held ^a	Held, not observed ^b	N	%
7 – 9	3	4	1	8	14.8
10 – 12	6	10	5	21	38.9
13 – 15	6	6	4	16	29.6
16 – 17	2	3	4	9	16.7
Total	17	23	14	54^c	100.0
Mean	12.0	12.1	13.2	12.4	
Standard deviation	3.0	2.7	2.7	2.8	

a. These trials were not held either because the defendant entered a guilty plea, the trial was 'no billed' or the defendant was deemed unfit to be tried. In two matters, there was more than one child complainant.

b. These trials were not observed either because consent was not granted or consent was not requested (because the child was too distressed or suicidal). In one matter, there were two child complainants.

c. Three trials involved more than one child complainant.

As Table 1 shows, at the time of the trial, the child complainants ranged in age from seven to 17 years, with just over half (29, 54%) aged 12 years or less. The overall average age of the children was 12.4 years (standard deviation = 2.8 years).

Table 2 shows the gender of the child complainants in the 50 trials scheduled during the data collection period.

Table 2: Gender of the child complainants
(50 child sexual assault trials, March – December 2004)

	Trials observed		Trials not held		Trials held, not observed		Total	
	N	%	N	%	N	%	N	%
Male	3	17.6	4	17.4	5	35.7	12	22.2
Female	14	82.4	19	82.6	9	64.3	42	77.8
Total	17	100.0	23	100.0	14	100.0	54	100.0

As Table 2 shows, across the 50 trials, more than three in four (77.8%) of the child complainants were female. For the 17 trials which were observed, 14 (82%) of the 17 complainants were female; less than one in five was male. The proportion of boys was, however, higher in the 14 trials which were held but not observed; one in three (5/14) of the child complainants in these matters was male.

CHARACTERISTICS OF DEFENDANTS

In each of the 50 trials, the defendant was male. With one exception, each trial involved one defendant; the exception involved two defendants (each with separate legal representation) and the same child complainant. Two of the trials which were observed involved the same defendant. In this case, the two child complainants were siblings and their father was the defendant.

Table 3 shows the age of the defendants for both the 17 trials observed and the remaining 33 trials which were scheduled during the data collection period. The defendant's age is calculated at the time of the 'outcome of the charge(s)', that is, either at the time of the trial or when he entered a guilty plea or when the matter was 'no billed'.

As Table 3 shows, of the 50 defendants whose age was known, just over half (28, 56%) were aged between 30 and 49 years at the time of the outcome of the charge(s). Four (8%) were aged 19 years or less and five (10%) were aged 60 years or more.

**Table 3: Age of defendants at the time of the outcome of the charge(s)
(50 child sexual assault trials, March – December 2004)**

Defendant's age (years)	Trials observed	Remaining trials		Total	
		Not held	Held, not observed	N	%
16 – 19	3	1	–	4	8.0
20 – 29	5	3	–	8	16.0
30 – 39	2	9	5	16	32.0
40 – 49	6	2	4	12	24.0
50 – 59	1	2	2	5	10.0
60+	1	3	1	5	10.0
Unknown		–	1	1	–
Total	18	20	13	51*	100.0
Mean	35	39.2	45.3	39.2	
Standard deviation	12.4	15.3	10.2	13.5	

* Excludes 1 defendant whose age was not known, so percentages are based on 50 defendants.

Table 4 shows the relationship of the defendant to the child complainants for the 50 scheduled trials.

**Table 4: Relationship of the defendant to the child complainant
(50 child sexual assault trials, March – December 2004)**

Relationship of defendant to child complainant	Trials observed	Remaining trials	Total	
			N	%
Natural father	2	4	6	12.0
Step-father/former step-father	6	4	10	20.0
Natural or step-grandfather, other relative	3	3	6	12.0
Family friend/acquaintance *	5	20	25	50.0
Person in authority	1	–	1	2.0
Stranger	–	2	2	4.0
Total	17	33	50	100.0

* Acquaintance includes friend's father, neighbour.

As Table 4 shows, in half (50%) of the 50 cases, the defendant was a family friend or an acquaintance. However, in almost one-third (32%) of the 50 cases, the defendant was the child's father figure, being the child's natural father, step-father or former step-father. In only two cases (4%) was the defendant not known to the child.

TYPES OF SEXUAL OFFENCES

Table 5 shows the types of offences on which the defendants were indicted for the 50 trials scheduled over the data collection period.

Table 5: Types of sexual offences in 50 child sexual assault trials (March – December 2004)

Type of sexual offence *	Trials observed		Trials not held		Trials held, not observed		Total	
	N	%	N	%	N	%	N	%
Indecent assault	1	1.3	4	4.4	–	–	5	2.0
Aggravated indecent assault (s. 61 M(1))	15	19.0	42	46.2	34	43.6	91	36.7
Commit act of indecency upon person aged <10 years (s. 61 M(2))	15	19.0	6	6.6	4	5.1	25	10.1
Commit act of indecency upon person aged <16 years (s. 61 N(1))	2	2.5	4	4.4	4	5.1	10	4.0
Incite a person aged <10 years to commit an act of indecency (s. 61 O(2))	–	–	2	2.2	2	2.6	4	1.6
Incite a person aged <16 years to commit an act of indecency (s. 61 N(1))	–	–	–	–	7	9.0	7	2.8
Incite a person aged <16 years to commit an aggravated act of indecency (s. 61 O(1))	–	–	5	5.5	–	–	5	2.0
Assault with act of indecency (s. 61 L)	–	–	–	–	4	5.1	4	1.6
Aggravated act of indecency upon person aged <16 years and under authority (s. 61 O(1))	7	8.9	–	–	–	–	7	2.8
Attempted aggravated sexual assault (s. 61 J(1) & 61P)	–	–	2	2.2	–	–	2	0.8
Aggravated sexual assault (s. 61 J(1))	10	12.7	14	15.4	15	19.2	39	15.7
Aggravated sexual assault, offender in company (s. 61 J(1))	2	2.5	–	–	–	–	2	0.8
Attempted sexual intercourse with child aged <10 years (s. 66 B)	3	3.8	1	1.1	–	–	4	1.6
Attempted sexual intercourse with child between 10 and 16 years (s. 66 D)	1	1.3	1	1.1	–	–	2	0.8
Sexual intercourse with child <10 years (s. 66 A)	15	19.0	10	11.0	2	2.6	27	10.9
Sexual intercourse with child between 10 and 16 years (s. 66 C)	–	–	–	–	6	7.7	6	2.4
Aggravated sexual intercourse with child between 10 and 16 years, person in authority (s. 61 C)	8	10.1	–	–	–	–	8	3.2
Total number of offences	79	100.0	91	100.0	78	100.0	248	100.0

* Based on information recorded on Courtnet, or the indictment or as provided by WAS officers.

As Table 5 shows, the defendants in the 50 child sexual assault trials scheduled during the evaluation period were indicted on a total of 248 child sexual offences. The largest category of offences was aggravated indecent assault (36.7% of all offences); the second largest was aggravated sexual assault (15.7%). (See Appendix E.)

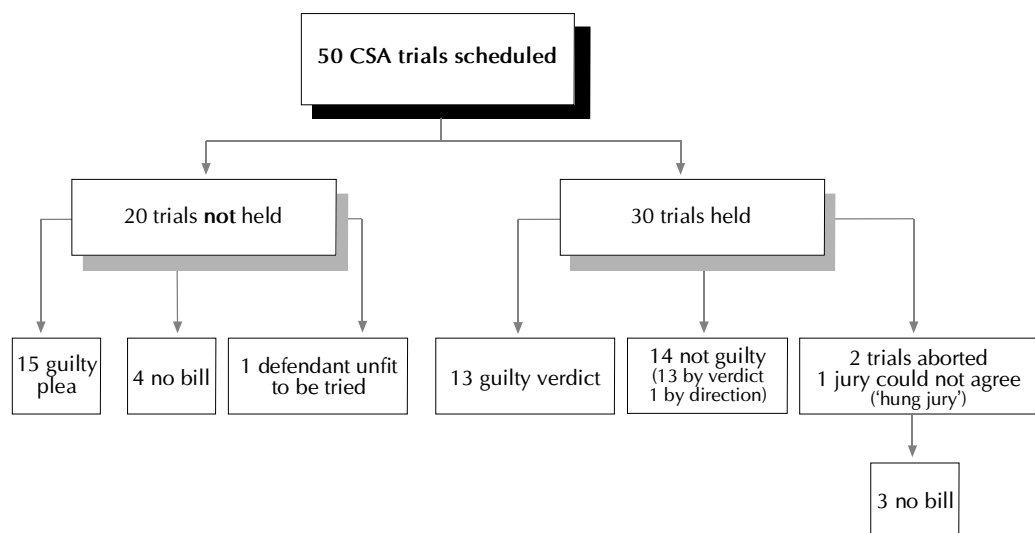
One in ten (5, 10%) of the 50 matters involved summary offences (and were therefore dealt with by a magistrate in a Local Court without a jury); the remaining 45 matters involved indictable offences (and were therefore dealt with by a judge and, in most cases, by a jury.)

5. OUTCOMES OF 50 CASES

Is there any evidence that the child sexual assault specialist jurisdiction has had any effect on the conviction rate?

Figure 2 presents the outcomes for the 50 cases which were scheduled to be heard during the evaluation period in the specialist jurisdiction and in the comparison registry.

Figure 2: Outcomes of Child Sexual Assault Trials
(Specialist jurisdiction and comparison court, March – December 2004)



As Figure 2 shows:

- 28 of the finalised matters (56%) resulted in a conviction either by plea (n = 15) or verdict (n = 13);
- 14 (28%) resulted in a 'not guilty' verdict;
- 4 (8%) were 'no billed' on, or immediately before, the scheduled date of the trial;²⁵
- 3 (6%) trials were held or begun but were later 'no billed': in two of these cases, the trial was aborted; and, in the third case, the jury failed to agree;²⁶ and
- in 1 case (2%), the defendant was deemed unfit to be tried.

The overall conviction rate²⁷ for these 50 cases was 56 per cent. This includes both those who pleaded guilty and those who were found guilty at trial. Although the numbers are too small for any reliable conclusions, the conviction rate in the specialist jurisdiction was 52 per cent (14 out of 27 matters guilty by plea or verdict) compared with 44 per cent (8 out of 18 matters guilty by verdict or plea) for the comparison registry.

The overall figure (56%) is comparable with the overall conviction rate for child sexual assault matters²⁸ finalised in NSW higher courts over the last decade (see Figure 3). In 2003 and 2004, the overall conviction rate was 57.8 per cent and 57.7 per cent, respectively.

Figure 3: Persons with at least one charge of sexual offences against children in trial and sentence cases finalised, 1995–2004: Proportion pleading guilty or found guilty

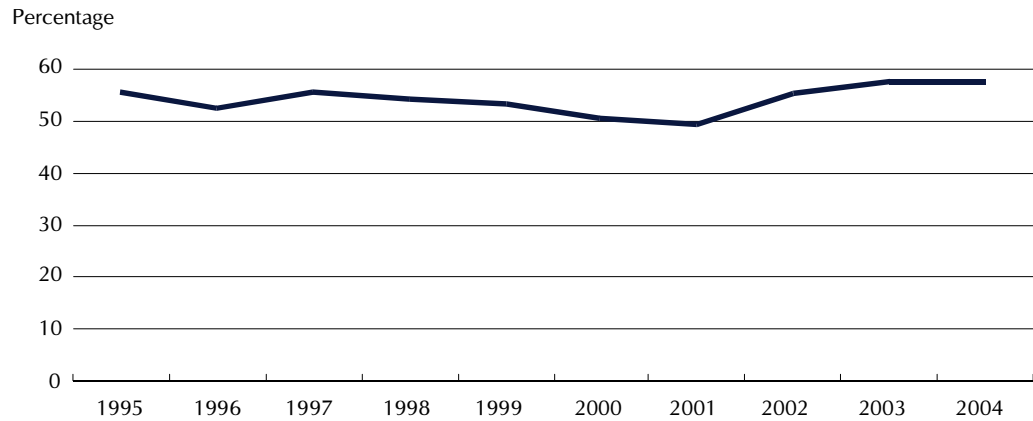
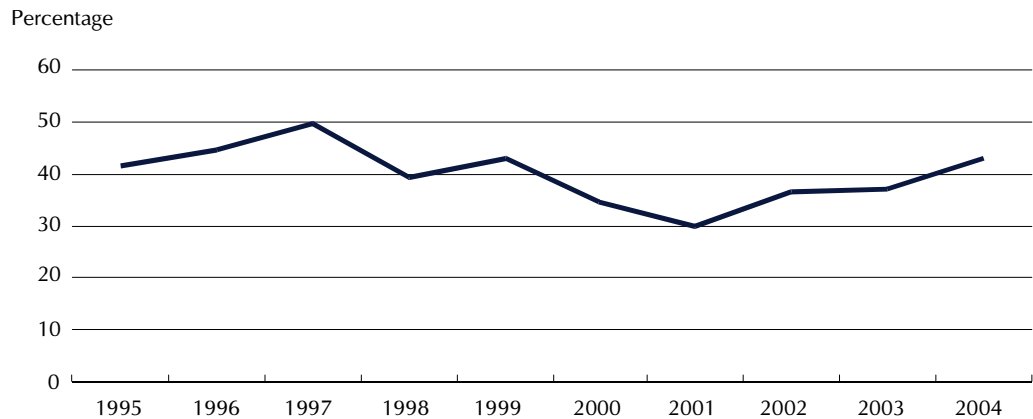


Figure 4 shows the proportion of persons with at least one charge of sexual offences against children who were found guilty in trial and sentence cases finalised between 1995 and 2004.

Figure 4: Persons with at least one charge of sexual offences against children in trial and sentence cases finalised, 1995–2004: Proportion guilty following trial



As Figure 4 shows, the conviction rate following trial ranged from 34.7 per cent in 2000 to 49.7 per cent in 1997. By comparison, of the 30 cases that proceeded to trial during the period of this study, the conviction rate was 43 per cent (13 cases). The number of trials in the evaluation period is too small to draw any reliable conclusions about the effect of the specialist jurisdiction on the conviction rate (7/17 in the specialist jurisdiction and 6/13 in the comparison registry).

6. DELAYS AND WAITING

Has the specialist jurisdiction resulted in more expeditious handling of child sexual assault matters? Fewer mentions? Quicker disposition of the case? Less time in court for witnesses?

Delays in the prosecution and court process are an acknowledged stressor for child complainants and witnesses and may affect the reliability of their evidence (Spencer & Flin 1990; Goodman, Taub, Jones, England, Port & Prado 1992; Jones & Pipe 2002). These were also issues of concern to both the recent 2002 inquiry and the earlier Wood Royal Commission (1996).²⁹ For example, the *Report on Child Sexual Assault Prosecutions* (2002, paragraph 5.15, p. 147) stated that:

... there is general agreement that pre-trial delays for child sexual assault trials are excessive and are exceptionally detrimental to the well-being of child complainants and the effectiveness of their testimony. The Committee believes that the delays being experienced by child sexual assault complainants are entirely unacceptable. It has been identified by children themselves as a key stressor and experts have identified delay as having a significant and detrimental impact on the complainant's memory of the details of the abuse that are necessary for successful prosecution.

One of the stated aims of the specialist jurisdiction was to reduce the delays in the prosecution process and the associated stress for child complainants/witnesses in child sexual assault matters. This section of the report deals with four main aspects of delays affecting children in these matters:

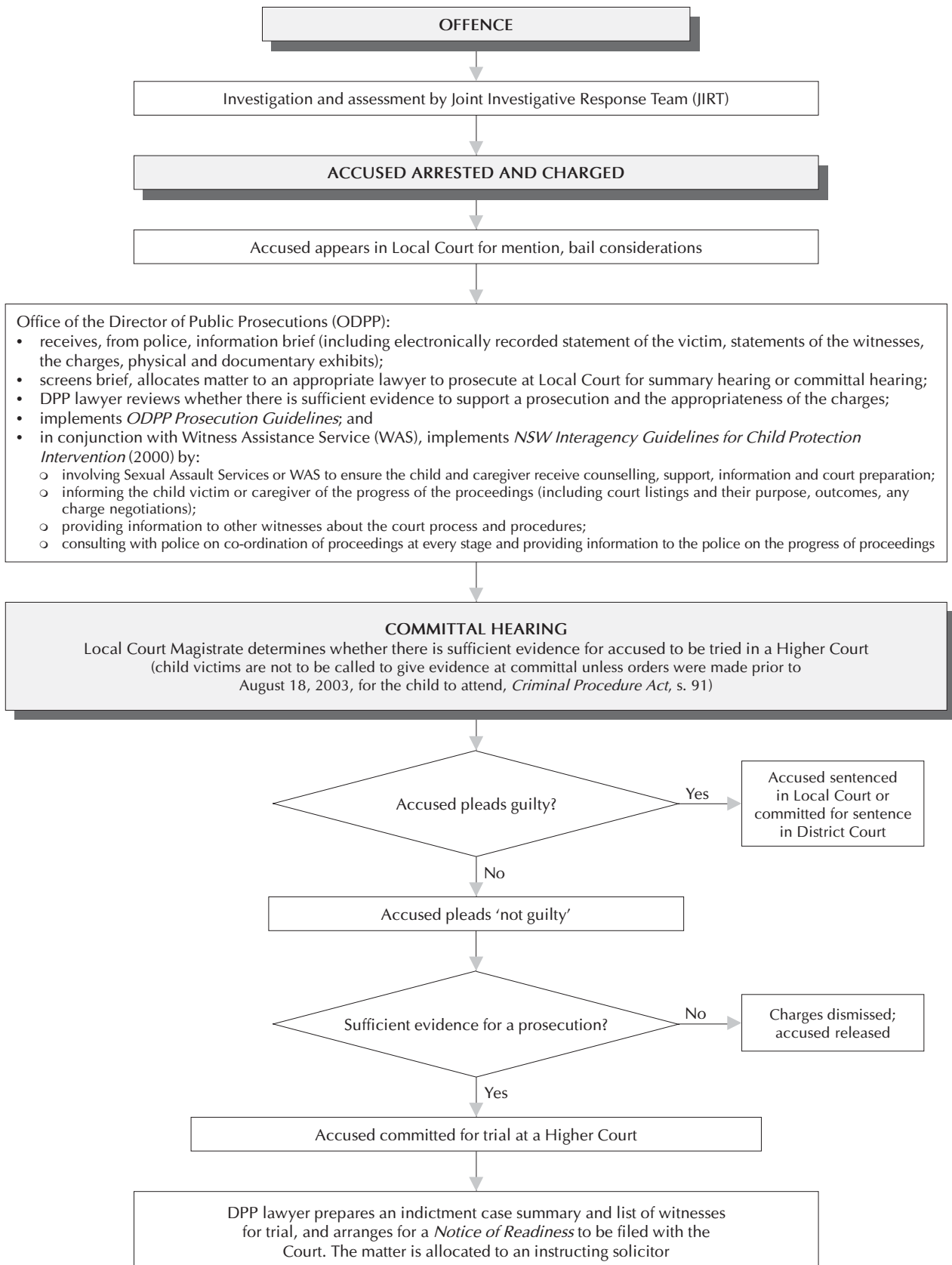
1. the time that the matter takes to get to trial and to finalisation, including the time from arrest to committal hearing and from committal hearing to outcome;
2. the number of mentions and adjournments and in particular, the number of times children are required to come to court before giving evidence;
3. the time children have to wait at court before they give evidence; and
4. the amount of time they spend at court giving evidence.

Figure 5 outlines the prosecution and court process and highlights the key stages in the process which are used to calculate delays in the following analysis. Delays occur at various stages of the investigation and prosecution process and include the time taken to progress the matter:

- from complaint to investigation by the police or the Joint Investigative Response Team;
- from investigation to committal hearing;
- from committal hearing to trial; and
- from outcome to sentence.

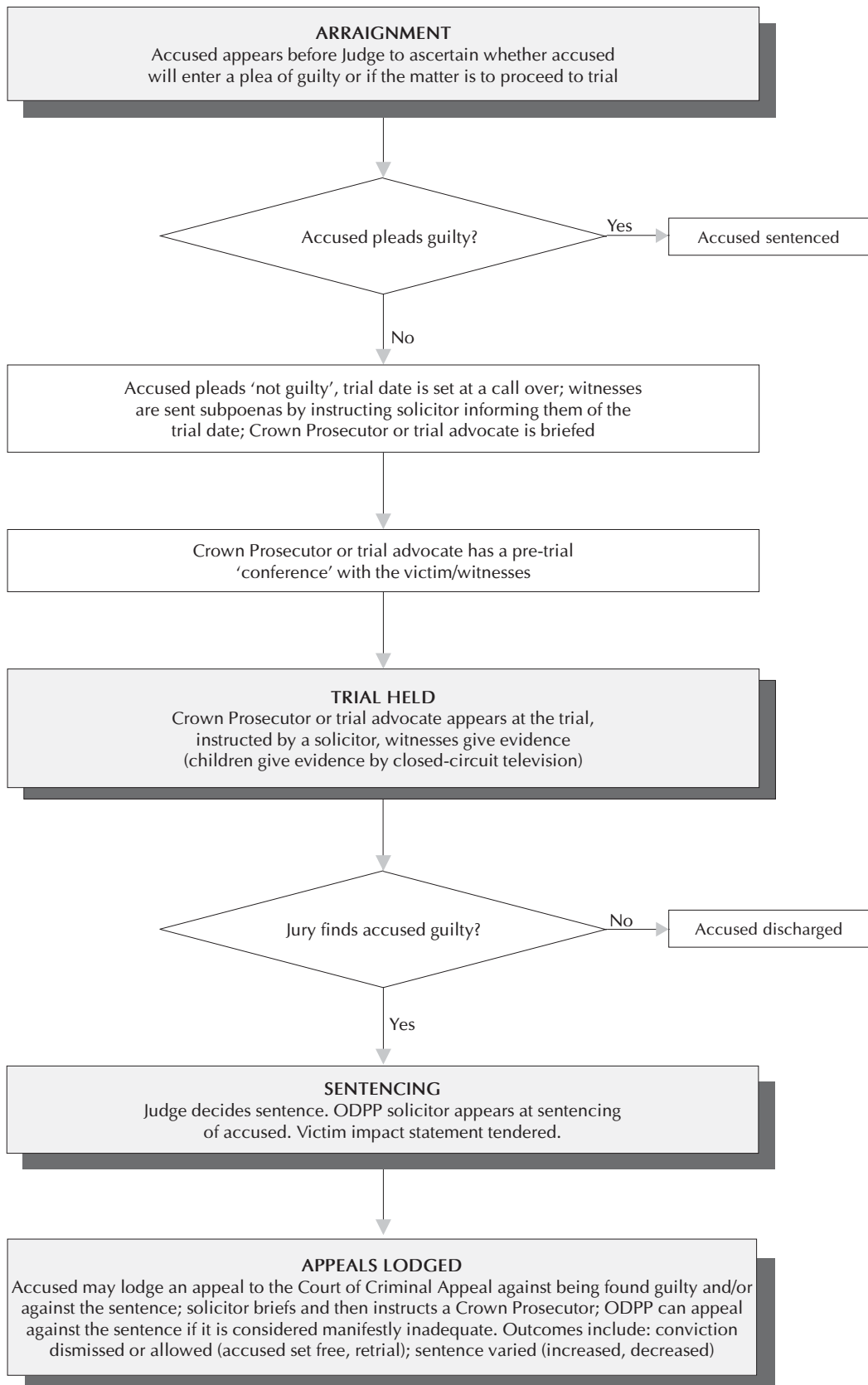
As outlined earlier, the listing procedures at Campbelltown, Parramatta and Penrith District Courts were, in general, not changed to accommodate the pilot project. The only proposed modification was to list cases within the pilot project “for pre-trial mention once or twice between arraignment and trial date to allow trial management and check compliance with directions in an attempt to avoid vacated trials and delays”.³⁰ Any effect of the implementation of the specialist jurisdiction would therefore be expected only in the pre-trial management process and in a possible reduction in the number of vacated trial dates and delays, especially where children are required to come to court but the trial does not proceed.

Figure 5: Prosecution and court process



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OVERALL TIME FROM ARREST TO OUTCOME

Table 6 shows the time taken between key stages in the proceedings for the 50 child sexual assault matters scheduled during the study period in both the specialist jurisdiction and comparison registry.

Table 6: Delay between key stages of the court process for indictable child sexual assault matters finalised in District Court (45 cases)

Key stages	Median number of days ^c (Range: minimum – maximum)	
	Specialist Jurisdiction (n = 27)	Comparison registry (n = 18)
Arrest to committal hearing ^a	182.0 (90 – 760)	187.0 (62 – 481)
Committal hearing to outcome ^b	210.0 (42 – 763)	208.5 (72 – 448)
Total: Arrest to outcome	400.0 (166 – 1,523)	411.0 (198 – 715)

* While the trials were scheduled during the evaluation period, the arrest and committal processes occurred before the evaluation commenced.

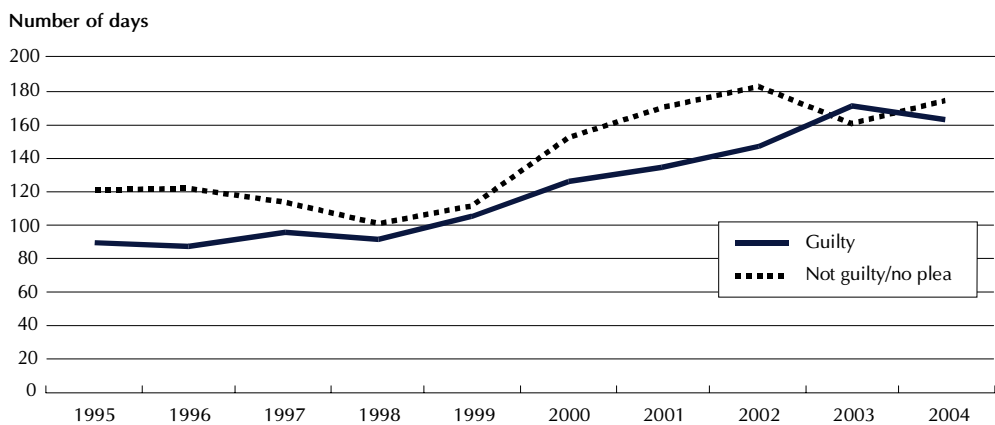
- a. This is the time from the date of the arrest to the date the matter is committed to the District Court.
- b. This is the time from the date the matter is committed to the District Court to the latest date of the determination of charges (e.g., verdict, no bill, guilty plea).
- c. The definition of median is that half the cases had duration times less than the median duration time and the other half of the cases had longer duration times (Source: NSW Bureau of Crime Statistics and Research 2004, *New South Wales Criminal Courts Statistics 2003*, p.131).

As Table 6 shows, the median number of days between key stages in the disposition of indictable child sexual assault matters is very similar for the specialist jurisdiction and for the comparison registry. The figures for the delay from arrest to committal hearing were similar, but the reasons for the differences in the ranges are not clear. In any case, the implementation of the specialist jurisdiction would not be expected to have any effect on the delays that occurred between arrest and committal hearing because these events occurred before the specialist jurisdiction was implemented. However, they are important in terms of the overall context of the delays that child complainants face in proceeding with a child sexual assault prosecution.

The delays between committal hearing and outcome were also very similar for both the specialist jurisdiction and comparison registry, although the upper end of the range of delays was more extreme in the specialist jurisdiction than in the comparison registry. For example, the longest delay between committal hearing and outcome in the specialist jurisdiction was 763 days compared with 448 days in the comparison registry. Again, it is not clear why the specialist jurisdiction included cases which took such long times to finalise but two relevant factors in the longest-running matters were the number of complainants and the transfer of cases between courts. It should be noted, however, that all the cases which were finalised during the evaluation period had already been in the system for some time before the start of the implementation of the specialist jurisdiction and therefore prior to any changes to the case management processes. It will be some time before reliable conclusions can be drawn regarding the impact on delay of case management processes in the specialist jurisdiction.

How do the delays in the 50 matters that fall within the evaluation period compare with the overall trends? It is useful to place these 50 matters in the context of the trends over the last decade and in particular during the last few years. Figure 6a shows the median delay between arrest and committal hearing for persons with at least one charge of sexual offences against children in trial and sentence cases finalised between 1995 and 2004.

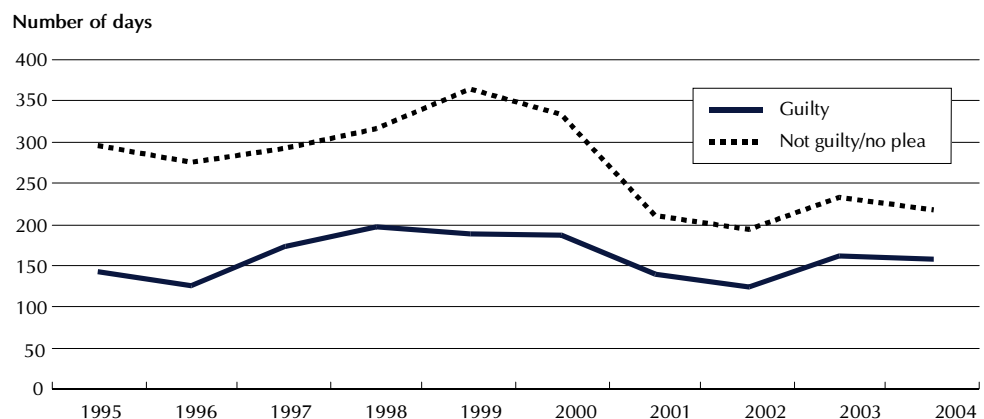
Figure 6a: Median delay between arrest and committal hearing for persons with at least one charge of sexual offences against children in trial and sentence cases finalised, 1995–2004



As Figure 6a shows, the median time from arrest to committal hearing has increased steadily since 1998, both for matters in which a plea was entered and for those in which no plea or a 'not guilty' plea was entered. Over the ten-year period, the median time for all matters has increased from 104 days in 1995 to 165 days in 2003. The median time of around 180 days from arrest to committal hearing in the 50 cases finalised during the evaluation period is therefore similar to the overall times for cases of this type during the last few years.

The median time of around 210 days for these 50 cases is also similar to the time taken from committal hearing to outcome³¹ for child sexual assault cases finalised in the higher courts during the last few years (see Figure 6b).

Figure 6b: Median delay between committal hearing and outcome for persons with at least one charge of sexual offences against children in trial and sentence cases finalised, 1995–2004



This suggests that the cases finalised during the evaluation period are fairly representative of the cases heard in the last year or so in terms of delay.

What was the effect of such long delays on children and their families?

As Table 6 indicates, the median time from arrest to outcome for the 50 scheduled cases was around 400 days, or over a year, for both the specialist jurisdiction and the comparison registry. Some matters, however, took much longer. In the specialist jurisdiction, the longest period between arrest and outcome was over four years (1,523 days); while in the comparison registry, it was almost two years (715 days). In another case, a parent commented on the time taken to get to trial [from the time of complaint].

It took three, nearly four years before it got to court. *Why so long?* Because at the start, there were several children involved. They were going to put one of the younger ones on the stand but she didn't, or couldn't, give a straight story. She was so traumatised she kept going into fantasy land – that was her way out.

Several other parents commented on the effect on the children and the family of having to wait so long to get to court.

It meant we really had to put our lives on hold for nearly two years.

18 months is too long to wait and she really did lose two years at school.

Getting it adjourned all the time was really hard. It just dragged on for so long – but then when she knew he was guilty after the trial, it put her mind at ease.

The next section outlines the type of delay and reasons for some of the delays in the 50 cases scheduled during the data collection period. Comments from both the child complainants and their parents are also included.

NUMBER OF MENTIONS, ADJOURNMENTS AND TIMES CHILD HAS TO COME TO COURT

Table 7 shows the average number of mentions at the District Court and the average number of dates listed for arraignment and trial before the trial was held or the defendant pleaded guilty. Information is provided for 28 trials scheduled in the four courthouses during the evaluation period for which data were available.

Table 7: Number of mentions and times matters were listed for arraignment and trial before finalisation (28 matters)

	Mean	SD	Range
Number of mentions (District Court level only)	4.5	1.0	0 – 16
Number of dates listed for arraignment and trial prior to trial being held/defendant pleading guilty	5.1	0.9	1 – 12
Total number of mentions, arraignment, trial dates	9.5	1.4	2 – 20

Source: Courtnet

As Table 7 shows, these matters had, on average, almost 10 mentions, and listings for arraignment and trial, ranging from two to 20 (standard deviation = 1.4).

There appear to be three main reasons for adjournments and delays, and for children having to come to court unnecessarily. The first relates to listing or over-listing (to

compensate for cases that drop out), where more cases are listed than can be accommodated in the available courtrooms. This practice was more common in some courts than others and resulted in some cases being transferred to other courts or matters having to be re-listed. Several cases were transferred from one court to another because of listing problems that occurred when trials extended beyond the expected time or more cases were listed than could be accommodated. In one court, where cases are listed on the Monday morning, at least one case had been “listed three times and hadn’t started yet and we are now back to mentions”.³² This can be very frustrating for the professionals involved and can impact adversely on children.

It is really quite hit and miss. This is pretty unsatisfactory for the kids because I don’t want to lead them up the garden path and say it is definitely going to run when it is not going to run. Casey, for example, he was in that category where it just started and stopped, start, stop. He was getting really frustrated by the process. *[Prosecution lawyer]*

The second reason for adjournments was that the matter was not ready to proceed. Both the prosecution and the defence were responsible for these adjournments. In several cases, the defence sought adjournments to verify further evidence, including alibis and the pre-recorded tapes of the child’s evidence. In one case, the defendant appeared unrepresented so the trial date was vacated, and re-listed twice: first, six weeks later, and then on that date, for another week. In two cases, children had unexpectedly made further allegations of other offences just before the trial so further investigation and preparation of the case was necessary. In another complex matter, the Crown was not prepared because of the large number of charges on the indictment and late allocation of the matter.

The late appointment of crown prosecutors and the slowness to prepare were also identified by prosecuting and defence lawyers as common reasons for late guilty pleas.³³

Yes, it is pretty common for someone to plead guilty to an alternative count once it gets to the District Court. *On the day of trial?* Yes. *Why do you think that happens?* Personally, I think it is because their lawyers don’t get themselves organised in the Local Court and when it actually gets to the District Court and they have counsel briefed and they are actually looked at properly, they are probably more amenable to thinking about taking a plea. I think also by the time it is listed for trial, the Crown brief has gone to a crown prosecutor who has the delegation and authority and experience to offer an alternative charge. *[Prosecution lawyer]*

I do have some concern about the lateness of guilty pleas. It relates back again to crown prosecutors not being briefed until the last minute, so there is no one realistically who knows the case who can make a decision. Often late pleas are to a slightly lesser charge but there is no one who is able to make a decision in relation to that. *[Defence lawyer]*

The third reason for adjournments was that the matter was unable to proceed because the defendant was ill or needed to provide medical reports, or, in one case, failed to appear and could not be found for some months.

In their interviews, children and parents commented on the number of times that their cases were adjourned even though children had been expecting to give evidence, were prepared to do so, and in some cases, had come to court and waited. One mother commented that they came to court three times before the child gave evidence:

I think it was because their lawyer asked for an adjournment so I think we turned up twice and then on the third time, it actually went ahead and Kelly gave evidence.

In another case, a mother said that their matter had not been reached on several occasions. On the last occasion she said this was “because another case was booked at the same time and our case was going to take longer than two weeks. So it seems to have taken forever.” It is not surprising then that some children and parents commented that “the worst part of it all”, from their point of view, was “the waiting”. Some expressed their frustration with a system that appeared to them to allow the rights of the defendant to override their own rights.

There were a lot of delays, and to me, it seems like the defendants have all the rights, not the victims, and that was really hard for Amanda, especially when you get geared up and ready for trial and then it is put off again. The defence side seemed to have all the control over the timing. I remember one time when we were ready to go, and the support person was organised, and it all fell through. One of the delays was that they had chosen, deliberately chosen, not to see the video-tape until very late, and the judge was very angry with the defence side. That happened a couple of times, and the judge warned them. *[Mother]*

TIME WAITING AT COURT

Once the trial is scheduled and actually starts, child complainants/witnesses can still find themselves waiting at court for some time to give their evidence. The initial parts of the proceedings in a jury trial consist of the empanelling of the jury and generally some legal argument. Empanelling the jury usually takes an hour or so, but legal argument in the cases that were observed varied from minutes to 10 days or longer. Where, as a result of legal argument, the video-tape of the child's interview and associated transcript has to be edited, this may take several hours to a day. Several lawyers expressed their frustration with the time it takes to edit analogue tapes:

Since editing of tapes has to be done in 'real time'³⁴ and most of the tapes are at least two to three hours long, it takes that long to edit. *[Prosecution lawyer]*

I don't understand why when we can put men on the moon, we can't edit a tape. I'm sure Hollywood don't have to edit their things in real time. I'm sure they can fast forward to the bit that has to be edited and then cut it. *[Prosecution lawyer]*

When children are told to be at court before 10 am on the first day of trial, and sometimes considerably earlier than that to avoid the risk of them 'running into' the accused or members of the defendant's family, they often have to wait until after lunch on the first day, and in a number of cases that were observed, for several days. In three cases, for example, the children waited at court from early on the first day until after lunch on the third day of trial.³⁵

I was at court on Monday, but there was a whole lot of legal argument first and I didn't get to give evidence until Wednesday. But I didn't finish on Wednesday, so I had to come back on Thursday which I really didn't want to do. I just wanted to get out of there.
[15-year-old complainant]

We didn't start on the first day because we had to wait for another trial to finish using the CCTV, and then there was legal argument all the first day when we did start, so Tracey came to court three days before it started, and then it was the weekend so she had to wait all weekend until Monday. *[Mother]*

Were you at court waiting to give evidence on the days when there was legal argument? Yes, they didn't tell us anything so we were just sitting, waiting. The defence side was sick one day and no one told us before we got there, and we sat there till they came and told us. [Mother]

Some of the professionals who were interviewed stated that practice varies considerably, with some crown prosecutors and some judges requiring children to be at court so that they and the judge are assured that the prosecution is ready to proceed. In other cases, there was more flexibility and communication between the prosecution, WAS officer and the child's family to let them know when the child was likely to be called so that they did not need to wait for so long at court or in the remote witness suite. In some cases, more effective case management by the court reduced the time children had to wait at court. This was particularly the case with one judge in one of the courts comprising the specialist jurisdiction. Overall, there was general support from the legal professionals, the WAS officers, parents and children for the identification and elimination of the causes of delay and of children having to wait at court.

TIME IN COURT

Table 8 shows the length of time children were in court (either in the CCTV room or in the remote witness suite) giving evidence for the 17 matters that were observed in both the specialist jurisdiction and the comparison registry.

Table 8: Length of child's testimony in 17 observed child sexual assault trials (March – December 2004)

Length of child's evidence:	Specialist Jurisdiction			Comparison Registry		
	Average length in minutes (range)	SD	Median	Average length in minutes (range)	SD	Median
Evidence-in-chief	67 (31 – 114)	27.8	59.0	99 (20 – 177)	60.9	119.0
Tape	54 (27 – 96)	25.2	45.0	96 (27 – 162)	48.2	95.0
Cross-examination	82 (37 – 187)	50.5	66.5	119 (28 – 75)	62.2	140.0
Total time	153 (77 – 263)	70.1	128.0	212 (146 – 288)	55.7	206.0

As Table 8 shows, on average, both the evidence-in-chief (that is, the presentation of the pre-recorded interview and the subsequent examination of the child complainant by the crown prosecutor) and the cross-examination by the defence counsel lasted longer in the comparison registry than in the specialist jurisdiction. It is not clear why the pre-recorded interviews were shorter in the specialist jurisdiction than in the comparison registry.

The major component of the child's evidence-in-chief comprised the pre-recorded interview conducted with the child by officers of the Joint Investigative Response Teams. The pre-recorded interview accounted for between 53 per cent and 94 per cent of the court time spent on evidence-in-chief, with an average of 82 per cent (standard deviation = 10.4%). The recorded interview was presented to the court before the child was questioned further by the crown prosecutor (see Chapter 7 for more detail on the use of the pre-recorded interviews).

Table 8 shows that, overall, child complainants in the specialist jurisdiction were in court testifying for a shorter time than those in the comparison registry. On average, they were there for just over 2.5 hours (153 minutes) in the specialist jurisdiction compared with just over 3.5 hours (212 minutes) in the comparison registry. On the basis of the small number of cases, these data need to be treated with some caution.³⁶

SUMMARY: REDUCING DELAY

As indicated earlier, at this stage, the impact of the specialist jurisdiction is likely to be limited to the better pre-trial management processes, to a possible reduction in the number of vacated trial dates and delays and to less waiting at court. There is little evidence, to date, that the specialist jurisdiction has reduced the time that cases take to get to court or the number of mentions and adjournments. There is, however, some suggestion that children giving evidence in the specialist jurisdiction spent less time in court testifying than children in cases heard at the comparison registry, although the reason for this is not clear.

Whether the professionals perceived the specialist jurisdiction as having made any difference in expediting the process or in reducing the time that child complainants/witnesses have to wait, seems to depend on the courts in which they work.

Do you think that the specialist jurisdiction has made any difference in how long children have to wait to get to court or how long they have to wait when they get there?

No. I don't think it has at all. The only difference it has made is the experience of not having to go to the actual courthouse. As far as the rest of the processes go, I think it still operates in a very similar way. *[Prosecution lawyer]*

Others (lawyers and WAS officers) made positive comments about the case management and pre-hearing processes established at Parramatta Court. These processes attempt to identify the issues which could be dealt with and agreed upon prior to the trial. These include the use of CCTV, the presence of a support person, the admissibility of the electronic recording of the child's investigative interview and the editing of that recording.

Generally, those interviewed identified two key barriers to effective case management and delay reductions – the late allocation of crown prosecutors and the non-binding nature of decisions and directions made before the trial judge is determined. As one defence lawyer commented:

The biggest problem here is the prosecution because prosecutors aren't appointed until the last minute. You might have prepared a detailed letter saying this shouldn't go in for this and this reason, and it sits on a file and there is no one to read it because a prosecutor hasn't been appointed until the week before.

Similarly,

One thing that gets in the way is that crown prosecutors often aren't briefed until just before trial so there is just no one to discuss it with. Or it's difficult to organise having access to the recording or we are not served until the last minute with notice that they are going to be relying on a recording instead of calling the oral evidence – that is one potential barrier. That is a barrier that occurs in relation to edits of videos. Sometimes even if you do work it all out with the Crown, there won't be an agreement as to what needs to be edited so the judge then needs to decide on it. That is something that realistically can't be done before the trial starts. It is only once a judge has been allocated to hear a trial that they are able to be in a position where they could decide these things. ... the law in the matter is that with discretionary matters, any pre-trial discretionary rulings aren't binding on the trial judge.

7. SPECIAL MEASURES AND TECHNOLOGICAL ASPECTS

Is the physical environment and the way in which evidence is given in child sexual assault prosecutions less intimidating for child witnesses since the advent of the child sexual assault specialist jurisdiction?

To what extent has the use of special technological measures (such as CCTV and the electronic recording of the child's investigative interview) played a role in this?

The specialist jurisdiction involved changes to three physical aspects of the court environment: the establishment of the child-friendly remote witness suite, the installation of new technology, and a presumption that children would use CCTV and that their recorded investigative interview would be played as the main part of their evidence-in-chief. The aim of these changes was to reduce the stress on the child and to improve and preserve the quality and completeness of the child's evidence.

This section of the report focuses on the effect of these three changes on child complainants and their families.

Is the remote witness suite less intimidating for child complainants?

CHILD'S LOCATION WHEN GIVING EVIDENCE

The court environment is an additional cause of anxiety to child complainants. When waiting to give evidence during the trial, a witness can sometimes be required to wait hours or days in a waiting area outside of the courtroom. In many instances, the waiting area is entirely inappropriate for children and has been identified as a source of additional stress. In particular, children become especially fearful and anxious when required to wait in view of the accused or the accused's family.

(Report on Child Sexual Assault Prosecutions 2002, p. xvii)

In all the cases observed during this evaluation, the child complainants/witnesses gave evidence via CCTV, not in the witness box in the courtroom. The difference for children in the specialist jurisdiction was the option to give evidence from the remote witness suite, a new facility which is separate from the courthouse. Of the 11 matters heard by the courts within the specialist jurisdiction and observed by the researchers, seven child complainants gave evidence from the remote witness suite located outside the Parramatta Court complex; the remaining four children gave evidence from the CCTV room within the court complex where their case was being tried.

ADVANTAGES OF THE REMOTE WITNESS SUITE

SEPARATION FROM THE COURT AND FROM THE ACCUSED

One of the main advantages of the remote witness suite is its distance from the court, which means that there is little or no risk that the child can 'run into' the defendant or his supporters. The value of this arrangement is apparent from the comments made by children and others about this facility. Several children who either gave evidence in the comparison registry, or who did not use the remote witness suite, commented on the discomfort and distress they experienced when they came face-to-face with the accused in the court precinct.

I might as well have just been in the courtroom because I kept running into him and his supporters outside all the time anyway. They were always sitting outside the court and when I went to the toilet, they were there. Every day was a game to him. *[16-year-old complainant]*

In contrast, children, parents and WAS officers commented positively on the remote witness suite.

And you were in the remote witness suite? How did you find that? Fine, better – I was more comfortable because it was away from the court and there was no risk of running into anyone. [15-year-old complainant]

It makes such a huge difference to the children in the sense that there is an additional feeling of safety in that they are not worried about running into the accused. There is no chance of seeing any of the supporters for the accused or any of the accused's family members. *[WAS officer]*

The only difficulty several parents had (with the separation of the remote witness suite from the court) was when the child was at Parramatta and the parents were witnesses at the linked court at Campbelltown. In one case, the only parent who could drive was required to be at Campbelltown Court so other means had to be found to transport the child to Parramatta. The practical problem was not the only issue; being physically distant also meant that the parent was unable to be with and comfort the child during the waiting period and the breaks.

COMFORT OF THE ROOMS

The advantage for child complainants/witnesses giving evidence via CCTV is that they generally have the use of a separate waiting area. Compared with the CCTV rooms in the other courts, the remote witness suite is larger, has more space, a private toilet, tea-making facilities, and a separate waiting area (see Appendix C). The CCTV areas located within the court complexes are smaller (see Appendix C, Figures 2 and 4), and closer to other court function areas (for example, the jury deliberation room) or have dual functions as jury deliberation rooms or tea-room for court staff (see Appendix C, Figures 3a and 3b).³⁷

When asked about the comfort and appropriateness of the areas in which they waited, children, their parents and the WAS officers commented on the space and separate facilities in the remote witness suite, and the capacity to get away from others. As one WAS officer said:

It is good in the sense that it is an out-of-the-way place for them to wait and it's good that their family can be there and wait with them. There is a considerable amount of waiting that they have to do. *[WAS officer]*

One child said:

I liked that there was a spare room, it was great in terms of size. There were a few things to do, but not enough for older kids, and we didn't expect to have to wait so long. *[15-year-old complainant]*

One parent said:

I think the remote room is the most wonderful idea because families can just be families there and we had tea and coffee, and we could play games while we waited. And the kids could go downstairs and have some freedom, and be a bit relaxed together.

Anything that could have improved it? ... Maybe a fridge would have been helpful to put cold drinks in, refreshments for the kids; and games for older kids. There was plenty of tea and coffee which was good for the adults but not so good for kids. The only negative aspect of the remote room was having to wait for the room to be free because it is only linked up to one of the court rooms. They had to finish another case before we could start, and there was the question of whether we would have to go to X court instead.

In contrast, several children and parents involved in cases at other courts commented on the intrusion and disturbance caused by other people they did not know being around in their area while they were waiting, especially when a witness in another unrelated case was very distressed and angry and 'acting out'.

It was very quiet, except that there were other lawyers who came and went, and other people who had nothing to do with us, which I didn't really like. We thought it was going to be more private, and I really didn't like having other people around at that stage. It was also really cold – we had to bring a blanket on the second day to keep warm because the air-conditioning was so cold. *[15-year-old complainant]*

Children, parents and WAS officers commented on the value of games and activities to distract children from their nervousness while waiting. However, a common theme was the need for a greater range of activities for older children in all the waiting areas. For example:

In one matter, the girl, I think she was only eight years old, and she and I were playing the play station before she had to give her evidence. She just turned to me and said "Kerry, I'm really scared and nervous about this, but playing the play station really helps me to take my mind off it". [WAS officer]

It was boring – there were only games for little kids. [10-year-old complainant]

Other negative comments about the CCTV areas concerned their lack of cleanliness (mentioned by several children and parents) and the lack of sound-proofing at the remote witness suite which allowed family members in the waiting area, or those associated with other cases, to hear what the child was saying in the CCTV room.

Is the way in which evidence is given in child sexual assault prosecutions less intimidating for child witnesses since the advent of the child sexual assault specialist jurisdiction?

To what extent has the use of special technological measures (such as CCTV and the electronic recording of the child's investigative interview) played a role in this?

USE OF PRE-RECORDED STATEMENTS IN EVIDENCE-IN-CHIEF

Since the proclamation of the *NSW Evidence (Children) Act 1997* on August 1, 1999, audio-taped or video-taped interviews with children that are conducted as part of the investigation process can be tendered as all or part of the child's evidence-in-chief. These provisions are restricted to children who were the victims of sexual assault or severe physical abuse and neglect.³⁸

There are several reasons for audio-recording or video-recording the interviews that the police/JIRT conduct with children during the investigation. The main reason is to preserve the child's early report of events after disclosure and to increase the accuracy and completeness of the child's statement. A recording of the interview provides a verbatim account of both the questions and the answers, and a video-recording also allows the fact-finder to see how the child presented at the time.³⁹ This may help to overcome some of the difficulties associated with the long delays between complaint and determination. Long delays make it difficult for children to remember the details of events on which they may be questioned.⁴⁰ Children may develop in the intervening period, so that they may look and sound quite different from the way they did at the time of the alleged offence and complaint.⁴¹ Second, where the tape is presented in court as the child's evidence-in-chief, it avoids the need for the child to recount viva voce what happened and may help to reduce the stress of testifying.

In 16 (94%) of the 17 observed matters, the JIRT interview with the child was presented to the court. For 14 (82%) of the 17 observed matters, the recorded interview was in the form of a video-recording. For a further two matters, the interviews were audio-recordings. In three matters, due to difficulties in replaying the tape in court, the members of the jury were given a copy of the transcript of the video-recording to assist them in understanding what was said at the time the tape was played in court. In one matter, the transcript replaced the video-tape because the tape could not be played at court, due to technical difficulties.

LEGAL ISSUES

In two matters which were observed, the child was visible to the court while the recorded interview was presented. This contravenes recent amendments to s. 11 of the *NSW Evidence (Children) Act 1997* which commenced 8 July 2003.⁴² One of these two matters was aborted following advice from the Director of Public Prosecutions. This was the second occasion on which the child had given evidence following a hung jury. There were also several other occasions on which a trial date was vacated. The second matter proceeded by direction of the presiding judge.

There was also some confusion and disagreement among legal professionals and WAS officers about whether the child is required to watch the video-tape as it is being played in court. Where children have watched the tape several times before, or shortly before trial, watching a long interview again may be counter-productive.⁴³ Several professionals commented on the confusion. For example:

It is my experience that there is some confusion about that. There is confusion in our office [DPP], the defence, the judiciary that they don't actually understand that. We certainly try to let them know that the children do not have to watch it, even those who are going into the CCTV room.

This indicates the need for clear practice directions.

QUALITY AND SIZE OF THE PICTURE

Most lawyers were satisfied with the quality and size of the child's image while the child was 'live' via CCTV and seated immediately before the camera and the TV screen. Using this arrangement, the whole of the child's upper body and face are clearly visible on screen.⁴⁴ Some lawyers, however, were concerned about the quality of the recording and the size of the child's face on the pre-recorded video-tape, given the distance between the jurors and the television screens in the courtroom (see Appendix C, Figures 8 and 11). The tape generally shows the child seated on a couch on the other side of the interview room.⁴⁵

It [the TV screen] was right over the other side of the courtroom and you have to take into account the camera distance from the child on the tape, and the prospect of there being a juror with not very good eyesight. I think that it's very important that the jury is able to see very precisely what's going on with the child during the child's evidence, I mean other than what she's saying, like facial expressions, because you know that's how people judge each other all the time. [Defence lawyer]

If you look at any court, the screen is over the other side of the court from where the jury are, so it's like looking at a 6-inch screen almost. You certainly can't see facial expressions. Sometimes they are really important. In the X trial, for example, the child at one point moved away from the microphone on the coffee table and lay down on the lounge to physically describe what this bloke did and she described how he did it over her body. Now that was fantastic evidence, very graphic and it really did add some weight to her evidence, yet it was hard to pick up when looking at a screen completely on the other side of the courtroom. I think we could look at doing better than that, really the screens are not very big. [Prosecution lawyer]

Could you see and hear the child clearly? On the tape – not really. On the CCTV, we could see her, live from the room. On the tape, it was too far out. It should be a bit closer. I don't know what sort of camera they use. [Defence lawyer]

Technological difficulties, in terms of sound, replay, and the concerns about the size of the image of the child on video-tape were not restricted to any one location but occurred in all the courts in both the specialist jurisdiction and the comparison registry.

VALUE OF PRE-RECORDED EVIDENCE

An earlier specific evaluation of the use of pre-recorded interviews of children's evidence found widespread support for this provision among the majority of the respondents (JIRT officers, prosecutors, defence lawyers, judges, magistrates, WAS

officers, child sexual assault counsellors and some parents and children). However, a limitation of that evaluation was the small number of cases (16) that had been finalised at court by the time the evaluation concluded (McConachy 2002).⁴⁶

The professionals interviewed in the current study were also generally positive about the child's interview being recorded and presented as their evidence-in-chief at trial. In contrast with McConachy's findings, however, many professionals in this study focused their responses rather more on the evidentiary value of the pre-recorded evidence than on the benefits for the child. The prosecution generally preferred to use the tape than 'go back' to children giving their evidence-in-chief 'live' because they believed the pre-recorded interview adduced the evidence more clearly. The defence preferred it because it enabled them to know the substance of the main evidence before reaching trial. There was, however, little support for the hypothesis that viewing the tape would encourage the defendant to plead guilty. A number of the defence lawyers believed that the stigma attached to child sexual assault offences means that defendants are reluctant to plead guilty.

I think it would be hopeless without an interview because the officers that do the interview are experienced with dealing with children and the lawyers who prosecute the matters are not as used to dealing with children and getting the right information out of them.

[Prosecution lawyer]

I think it is good from a prosecution point of view – when you have a nine-year-old child, for example, trying to relay her evidence twelve months after the event. If I was trying to get her to recount 11 counts, I guarantee she would only get five or six out. She would just forget the others. Yes, they might come apart in cross-examination but not often. I think the biggest problem is just getting the evidence out to begin with. *[Prosecution lawyer]*

When someone is giving evidence from memory, it can often help you because it is unlikely it is going to be word for word just in their statement. But equally they might add details which you weren't expecting to hear which might in some way not assist. Whereas if you have seen the tape and you have done the edits and you know that is basically the evidence-in-chief, then you know the full parameters of what the evidence is going to be, so it can actually assist the preparation of your cross more. *[Defence lawyer]*

The negative comments about the tapes generally concerned their length, the variable quality of the interviewing and their poor technical quality.

CHILDREN'S COMMENTS ABOUT VIEWING THE TAPE

To date, there has been little indication of how children feel about viewing the tape both before and at court, or whether being cross-examined 'cold' was more difficult than having some 'warm-up' by answering questions during evidence-in-chief. An English study of 50 young witnesses reported that those who had seen it before trial found it helpful because "seeing the videotaped statement for the first time was often distressing" (Plotnikoff & Woolfson 2004, p. 3). The children who were interviewed in the current study found that having the tape played at court was generally better for them and made it easier for the people in court to know what had happened. Some, however, were uncomfortable that others would be watching it.

The good thing about showing the tape was that I had been expecting a lot of detailed questions about exactly what happened but his defence steered clear of that, and because they had shown the tape, I didn't have to give all the graphic details and say it in court. And I was so relieved because I was trying to figure out how I would say some of it. *[15-year-old complainant]*

It was a bit stressful knowing that people were going to watch this, the things that were done. It did make me feel uncomfortable but I thought that it would be a bigger impact to know how it was said by me then, than just telling it in the courtroom later. I thought it was better than retelling the story in court because it was a lot of time since, and it is a lot of pressure in court. *[14-year-old complainant]*

The emotional impact of watching the video-tape varied across children according to how many times they had already seen it, and how they later viewed the court experience.⁴⁷ With one exception, all children were expecting the tape to be played in court. Most had seen the tape several times and found it boring to watch it all over again at court. One child complainant had seen the tape about three or four times – prior to every trial including those that did not proceed.

It was quite hard. A bit of me felt embarrassed, just ashamed of myself. By the end, I had got past what had happened to me, I learned to face what happened and tried to move on, and watching the tape was like hanging on to that. *[14-year-old complainant]*

I watched it a few times, but it got quite boring after a while. It's like a 2 hour tape. *[11-year-old complainant]*

How did it feel watching it again? Well, I was only 13 or 14 then, and I'm 16 now and I was thinking, "Look how little I was, and he was doing it to me then – what a sicko he was!" I could see by my mannerisms that showed that I was a bit uncomfortable. *[16-year-old complainant]*

That was really, really hard – it was really emotional, hearing what and how I said it then. But it was better that I heard it because it helped me to remember exactly what had happened and to go through it because it was some time ago. *[14-year-old complainant]*

In summary, the use of pre-recorded interviews was generally well supported by the lawyers, WAS officers, the children and their parents. The main problems identified were technical and legal difficulties and the variable quality of both interviewing and tapes.

USE OF CLOSED-CIRCUIT TELEVISION

The *NSW Evidence (Children) Act 1997* makes provision for children to give evidence by CCTV.⁴⁸ This allows child complainants/witnesses to testify from a separate room or remote location. This means that they do not need to be either in the formal environment of the courtroom or in the presence of the accused, thereby, accommodating two of their main concerns about testifying (Cashmore with de Haas 1992; Goodman, Tobey, Batterman-Faunce, Orcutt, Thomas, Shapiro & Sachsenmaier 1998; Sas, Austin, Hurley & Wolfe 1991; Spencer & Flin 1993).

In each matter which was observed in both the specialist jurisdiction and the comparison registry, the child complainants gave evidence via CCTV. According to the legal professionals and WAS officers, it is generally presumed and accepted that children will use CCTV. There were some technological difficulties in both jurisdictions, as outlined in Chapter 3, and similar views about the benefits and some disadvantages of using CCTV for child complainants/witnesses.

PERCEIVED VALUE OF CCTV

While WAS officers were very positive about children using CCTV, lawyers were more varied in their views. Most senior prosecutors and defence lawyers expressed the belief that a good child witness had greater impact in court than via a television screen, but not surprisingly, their preferences tended to differ according to their role.⁴⁹ Some prosecutors would prefer to have the child in court but also recognised the problems. Some defence lawyers said that the reduced impact of CCTV made their job easier because there was less chance that children would "choke on their evidence" due to the greater comfort and distance the CCTV room provided.

I guess it is a two-edged sword in a way. It's probably comfortable for the victims; it means they are not sitting in there being grilled. I can understand that. But, on the other hand, people don't see them. Sometimes when you can see someone in the witness box, the look on their faces, the way they handle questioning can be a great help to a prosecution. They are going to lose that over a TV. At the end of the day, it has probably got more pluses than minuses. *[Prosecution lawyer]*

I'm happy with the concept of children using CCTV but there are some crown and defence lawyers who think we lose the human impact when you have a child on the TV. I don't necessarily agree with that ... I think the benefits of not having a child in the room far outweigh those that might be there if the child is in the room. Getting all the evidence out to begin with. *[Prosecution lawyer]*

Well, I don't see it as a disadvantage to me, quite frankly. I think probably more prosecutors see it as a disadvantage for them. *Why do you think that?* Because it is distant and it doesn't show the full demeanour and impact of the person giving evidence. *[Defence lawyer]*

CHILDREN'S AND PARENTS' COMMENTS ABOUT USING CCTV

Most of the children who were interviewed indicated that the reason for choosing to give evidence via CCTV rather than in the courtroom was to avoid seeing the defendant and to avoid everyone looking at them. Most had seen both the CCTV room⁵⁰ and the courtroom before the trial and generally said that this helped them to know what to expect. Several children referred to television programs as giving them some idea of what they could expect at court, though these were not necessarily accurate or helpful.

Well, I did not want to see him, and I did not want to be in there because I sort of thought with everyone in court they might get up, bang the hammer or throw a chair or something. Do you watch 'Law and Order'? or 'Judge Judy'? I do, and that's why I wanted to be in the other [CCTV] room. *[11-year-old complainant]*

Parents were very positive about the availability of CCTV and in several cases indicated that they did not think the child could have managed without it.

8. THE INTERPERSONAL ASPECTS OF THE COURT ENVIRONMENT

To what extent has the specialist jurisdiction improved the way child witnesses are treated at court?

Has it resulted in more sensitive handling by judges and others?

One of the main features of the specialist jurisdiction, as proposed by the NSW Director of Public Prosecutions, and recommended by the NSW Legislative Council Standing Committee on Law and Justice, was specialist training or education for judicial officers, prosecutors and court staff.⁵¹ The aim was two-fold: first, to increase professional understanding of the “dynamics of child sexual assault, child development (including linguistics) and children’s particular needs” (NSW Legislative Council Standing Committee on Law and Justice 2002, *Report on Child Sexual Assault Prosecutions*, p. 195). The second was to improve professional understanding of “the relevant legislative provisions” (Ibid, p.195). This, in turn, was expected to increase the sensitivity of those involved with child complainants/witnesses and thereby make the court experience less stressful and intimidating for them.

This section of the report focuses on the extent to which the interpersonal aspects of children’s interactions with the court system, including their handling by judges and others, may have affected their experience at court, and whether there was any difference between the specialist jurisdiction and the comparison registry. The focus is on how cases are managed in court, how children were treated in court, and how children view their treatment at court. This section reports the number of breaks children were given, the way in which they were questioned (especially during cross-examination), the presence and role of support persons, and the extent to which judges managed the cases and intervened to control or clarify the process.

The importance of some of the changes that were proposed by the Law and Justice Standing Committee but not implemented (for example, disrobing of judges and lawyers, and the continuity of ODPP staff) were also explored in the interviews with both the child complainants and the professionals.

COURT PREPARATION AND CONTACT WITH THE PROSECUTOR

Research has shown that being familiar with the court environment, the people involved and their roles, including their own role as a witness, can help to reduce the stress associated with testifying for child witnesses (Goodman et al. 1992; Sas, Austin, Wolfe & Hurley 1991; Sas, Hurley, Hatch, Malla & Dick 1993; Saywitz, Jaenicke & Camparo 1990).

As the *Report on Child Sexual Assault Prosecutions* (paragraph 2.56, p. 41) points out:

The *NSW Interagency Guidelines for Child Protection Intervention 2000* noted the importance of child witnesses being supported and prepared for their role in the prosecution:

A child or young person who is required to give evidence in criminal proceedings must be offered information to assist their understanding of court processes and procedures...It is the responsibility of the Office of the Director of Public Prosecutions to ensure that a child is appropriately prepared to appear as a witness. (p. 144)

Much of the court preparation and in-court support is carried out by the Witness Assistance Service (WAS) in the Office of the Director of Public Prosecutions and by

sexual assault counsellors.⁵² Part of the preparation process involves a pre-trial meeting with the prosecution lawyers. Again, the *Interagency Guidelines* and the DPP guidelines emphasise the importance of this meeting so that children can become acquainted with the prosecutor and the prosecutor becomes aware of the child's particular needs and familiar with the evidence.

CONTINUITY OF PROSECUTORS

One aspect of the model of the specialist jurisdiction proposed by the Director of Public Prosecutions was that "prosecutors would be specifically trained in child sexual assault issues and children's development issues and would meet with the child and carer at an early stage of the pre-trial period", and that "there would be a focus on maintaining continuity of prosecutors" (*Report on Child Sexual Assault Prosecutions* 2002, p. 195).

Information from the professionals and the children in this study indicates, however, that not all pre-trial meetings are occurring with the same instructing solicitor and the same crown prosecutor. This is particularly the case when there is a late transfer of the case to another court. Three of the ten children interviewed in this study had a late change in court and therefore in crown prosecutors. These cases were quite complex and the children found the change unsettling.

The Friday before the trial was due to start on Monday, Y was called off the case on Friday afternoon, and I thought how is the new person that we have never met going to pick up all the information and get up to speed on the case in time? But to his credit, he did a really good job and picked it up very quickly. That was something that was quite weird because we had met with Y several times, and all the lead-up had been with him, and then to have to face this new person we have never seen before, and then to have another change when we got to sentencing. [Parent]

In this case, the child met the crown prosecutor for the first time via CCTV. In another case, the transfer to another court was more problematic because it also involved a loss of evidence and an associated loss of confidence in the prosecution.

We were trying to tell X [the first instructing solicitor] a whole lot of things at the beginning but she kept telling us that they were irrelevant, and then we came to trial, and the new instructing solicitor said "Why didn't you tell us all that before?" So it was double handling, and inefficient, and we could easily have lost the case. I know they're busy, but this just needed more work. [Parent]

As one of the legal professionals explained:

No – the way it works here is that when a matter moves from the Local Court to District Court, there is a change of solicitor. There is usually a crown in between at arraignment, who may or may not talk to the parents but they usually do not talk to the child. And then there is the crown at trial. And there is still late allocation of the crown in child matters in this office. [Prosecution lawyer]

One parent expressed another concern about the way they were treated by the DPP solicitor:

I didn't like the way we were left waiting around outside – like when we went in to see the video, and she [the solicitor] walked straight past us, saw us sitting there, and left us there for a whole hour, and then came down and said they could not find the tape, and we could go home. But we were out the front of the DPP building. Another time we were left standing outside in this glass area by ourselves and Sally gets quite agitated. I just thought that was unfair because we were just treated like 'nobodies'.

CHILDREN'S VIEWS ON CONTINUITY AND COURT PREPARATION

All of the children interviewed in this study indicated that they preferred to have the same solicitor and crown prosecutor throughout the process. The reasons they cited were that they wanted to get to know the prosecution lawyers involved in their case⁵³

and to feel comfortable with them, and they did not like talking to different people about the allegations.

The majority of children and parents interviewed in the current study were satisfied with the court preparation they received, and were particularly satisfied with the support provided by the Witness Assistance Service. Several children and parents, however, commented on inadequate preparation on some issues and insufficient information on the progress of the matter:

With our court prep, they just explained who would be sitting where. But I would like them to have told me that they asked questions by saying things like "I put it to you that ..". I understand they can't say they will ask this question or that question, but I had no idea what to expect to be asked about. When the defence lawyer said that to Caitlin [another witness], she just sat there and he said "I have asked you a question" and she said "I don't understand the question", and he said "I am putting it to you that" and she said "I still don't understand the question". The judge said "put it to her as a question". It's funny, because when you're not prepared, you do think about what they might turn around on you. [16-year-old complainant]

We didn't know anything about court process at all, and we had no idea how long it would take. So I guess we thought, when we did not hear [from the DPP], that nothing was happening so I ended up ringing the DPP quite a lot, rather than them ringing me, and that was a bit disappointing. Kelly needed to know things and I couldn't tell her. And it seemed like a very long time from January one year to June the next, and there's a lot of apprehension, and waiting, waiting, waiting. [Parent]

COURT PREPARATION MATERIALS

A continuing concern about court preparation is the lack of up-to-date materials. In its report, the Law and Justice Standing Committee recommended that funding be provided to the Witness Assistance Service to update its court preparation resources (Recommendation 8, p. 45).⁵⁴ Although one often-used resource (*Nothing but the Truth*) was updated in late 2002, the video material is clearly out-of-date as it makes no reference to either the availability of CCTV or the use of pre-recorded interviews as the evidence-in-chief.

PRESENCE OF SUPPORT PERSON

In each of the 17 matters which were observed, the child complainant was accompanied by a support person while giving evidence. In seven of the 11 matters observed in the specialist jurisdiction, the child's support person was either a WAS officer or the child's counsellor; in the remaining matters, the support person was either the child's mother or another family member. Similarly, in four of the six matters observed in the comparison registry, the child's support person was a WAS officer; in the remaining two matters, the support person was a family friend.

Consistent with the generally positive comments made in the *Report on Child Sexual Assault Prosecutions*⁵⁵ about the Witness Assistance Service, the children and parents interviewed in the current study were very satisfied with the support they received from the WAS officers. In several cases, they commented that it was very helpful to have the WAS officer as their support person.

Christine [WAS officer] is wonderful. She just kept in touch with me, she is just one of those people who has a really lovely nature and the way that she spoke with Alex was great. Everything was thoroughly explained to him. Never once did she make us feel uncomfortable. She is just very, very good at her job. [Parent]

I remember Kelly, she helped me get through all the trials. I think she was a counsellor. It was very helpful – she did guide me and tell me what was going to happen, so she was a very big help. [12-year-old complainant]

I felt quite comfortable being with Amy the most, because it was not so comfortable with my family around, it was really embarrassing the things that were said and stuff. It was helpful to have that bit of support. [15-year-old complainant]

A number of the children and parents also commented positively on the support they received from the Sheriff's Officers. For example:

The sheriff was lovely, really friendly, and remembered us from the last time we were there.

There is, however, some confusion about the role of the support person, and the extent to which a professional support person can intervene to communicate difficulties in the CCTV room of which the court may not be aware.⁵⁶ This issue is discussed in relation to breaks in the next section.

BREAKS GRANTED TO CHILD COMPLAINANTS

On average, in the matters that were observed, child complainants/witnesses testified for approximately three hours (about 2.5 hours in the specialist jurisdiction and 3.5 hours in the comparison registry); this includes the presentation of their pre-recorded interview conducted by JIRT officers. While the scheduled breaks for the short morning recess (generally, at 11.30a.m.) and for lunch (generally, between 1 and 2p.m.) provide some respite for children from the questioning and being 'on show', this may not be sufficient for some children, especially those who are younger. Court sessions that extend beyond 1.5 hours are well beyond the attention span of many children, particularly when they are under stress. Mathews & Saywitz (1992) suggested that 20 minutes is probably the length of children's attention span under these stressful circumstances although this may vary with age, temperament and the circumstances under which they are giving evidence.

For each matter observed, the researchers recorded the number of breaks requested by the child complainant or offered by the judge/magistrate and granted or not granted during their evidence-in-chief and cross-examination. While the number of cases is very small, there was some indication that children in the comparison registry were given more breaks than those in the specialist jurisdiction. During cross-examination, for example, three in ten of the child complainants in the specialist jurisdiction received at least one break compared with five of the six child complainants in the comparison registry. In the comparison registry, the number of breaks ranged from one to eight; the child who received eight breaks requested five of these.⁵⁷ In another matter, also in the comparison registry, an older child was given scheduled breaks every 15 minutes during cross-examination after she became visibly distressed. As a result of her distress, the judge adjourned early, and the next morning he advised the court that regular breaks would be taken to allow her to give her evidence.⁵⁸

In none of the matters were child complainants denied a break if they requested one and most of the children who were interviewed said they had sufficient breaks. One child, however, said she found it "very hard to keep concentrating" and would have liked more breaks but felt that she could not ask. Several children said they had been told by the judge that they could ask for a break if they needed one.

That was OK. The judge said I could have a break, and I did a couple of times, to go to the toilet. *[12-year-old complainant]*

Those children who were told by the judge that they could have breaks and were sufficiently confident to ask for them, appreciated the judge's consideration; this was one aspect children mentioned in their assessments of the fairness of the way they were treated in court.

The interviews with the legal and court professionals indicate that there are several reasons that children may not receive or be offered breaks. Firstly, those in court may not notice or recognise the need. For example, one senior lawyer commented, in response to a question asking whether children usually get the number of breaks that they need:

No. *Why do you think that doesn't happen?* Probably because we're all too stupid to think about asking for it, and the judges don't notice. I mean, usually a break will occur when they get upset but the judge was very wise in this situation to have seen that this child was liable to be upset and to deal with it in the way that he has. It's the first time I've seen that happen. *[Prosecution lawyer]*

Secondly, even if the support person and the Sheriff's Officer in the CCTV room notice that the child needs a break, they may not know how to communicate this to the court. There appears to be some confusion among WAS officers and other people who act as support persons as to their capacity to intervene and ask for a break on behalf of a child they can see becoming agitated or distressed. Some stated unequivocally that they could not intervene and had been clearly instructed not to do so, while others said they could intervene or that it would depend on the presiding judge and their previous experience in this regard. For example, a prosecution lawyer commented:

I'm a little concerned about how we organise breaks if the child just wants a break because they are tired or want to go to the toilet – just how we can convey that. There are some good court officers over at Parramatta who are actually confident enough to speak up and say "Excuse me, Judge, the child wants to go to the toilet" and that is good. I'm just concerned that there are others who are perhaps not as confident, and so the child who needs a break is not getting it. *[Prosecution lawyer]*

Some legal professionals suggested a third reason why child complainants may not receive or be offered breaks. Some believe that it is better not to break, either because they think it is better to 'push on' so that the 'child can get it over and done with' or because they are suspicious of the child's motives for wanting a break. One defence lawyer, for example, commented that a child in another case asked for a break "whenever things got difficult for her when she was being cross-examined as to the incredulity of what she was saying":

She just turned and said "Can I have a break now?" – and invariably the court would accede to the young girl's requests rather than forcing her on, although I think eventually in that trial the judge did say "Can you just try, keep going for a little bit longer and then we'll see how we go". *[Defence lawyer]*

CLOTHING WORN BY LAWYERS AND JUDGES

Both the Royal Commission into the NSW Police Service⁵⁹ and the inquiry by the NSW Legislative Council Standing Committee on Law and Justice⁶⁰ recommended the removal of wigs and gowns by judges and counsel during the examination of child complainants/witnesses in sexual assault trials.

While this was a proposed feature of the pilot specialist jurisdiction, in the trials which were observed in both the specialist jurisdiction and the comparison registry, most of the judges and lawyers wore both a formal robe and a wig; only one female crown prosecutor in the comparison registry wore a suit rather than a wig and robe.

Disrobing was not strongly supported by the lawyers, the WAS officers or the children who were interviewed. Children were generally unconcerned or bemused by what the judges and lawyers wore.⁶¹ Similarly, WAS officers believed that the clothing was not important, especially for children who were prepared for court and had met the prosecutor beforehand. For example:

I don't think it matters all that much, and one of the reasons for that is that kids quite like them. It has been my practice, and it was easier at Parramatta where we were all on the same floor, to arrange for the crown to meet the child. Part of that process was for the crown to understand the needs of the child, and often they would show the child their wig and gown and sometimes asked if they wanted to put them on, and that appeared to work very well. It was part of the rapport-building process, but it also made it clear that this was part of a special process, and that this was somebody important, and children understand that. But I'm not saying that there are not those children who did not have the experience of meeting the crown and being introduced to them and their clothing, and they might be quite frightened by the wig and gown.

Lawyers' views about disrobing were divided.⁶² Some were opposed to disrobing, some were in favour and others believed that it would make little or no difference. Those who were opposed to disrobing generally argued that formal court wear underlines the authority of the court and the solemnity of the occasion and provides protection

through anonymity. Several prosecutors agreed with the WAS officers that explaining to children that the wig and gown is a uniform, and that showing it to them and allowing them to try it on was a way of building rapport.

What our WAS officers do when they are ‘prepping’ a child for court, they normally ask if they can borrow my wig or I can come and wear my wig and they can see this ‘funny hat’ I wear. We talk about it, and a lot of WAS officers talk about it like it is a uniform – like they wear a school uniform or you wear a uniform when you play rugby, and this is the uniform we wear.

PROFESSIONALS’ INTERACTION WITH CHILD COMPLAINANTS

A number of features of the interaction between professionals and child complainants were observed at court and questions concerning these aspects were included in the interviews with children, their parents and the professionals involved. The features investigated were:

- the manner and type of questioning;
- the extent to which children were challenged by lawyers in relation to lying and not remembering; and
- the extent to which judges explained the process and intervened to manage the lawyers’ questioning.

The following discussion regarding questioning style relates to cross-examination. This is because the pre-recorded tape of the interview conducted by the JIRT officers comprised most of the evidence-in-chief. The crown prosecutors asked relatively few questions at the end of the tape replay and in re-examination.

LINGUISTIC STYLE

There is considerable international, and some Australian, research that provides convincing evidence of the difficulties that children, and some adults, have in understanding the ‘strange’ language that lawyers use (Brennan & Brennan 1986; Perry, McAuliff, Tam, Claycomb, Dostal & Flanagan 1995; Walker 1993, 1999). The main problems relate to long, multi-faceted and complex questions; specific and difficult vocabulary; use of the negative; and unclear or changing references to time, place and other details. These various forms of questioning diminish the capacity of children, adolescents and adults to understand what is being asked and reduce the accuracy of their responses (Kebbell & Johnson 2000; Perry et al. 1995).

Based on court observation and the court transcripts, the extent to which the professionals’ linguistic style matched the child’s linguistic style in this study was rated on a four-point Likert scale (ranging from ‘not at all’ to ‘a great deal’); this was based on the length and the structure of the questions. Table 9 shows the ratings for the JIRT interviewer on the pre-recorded tape, the crown prosecutor and the defence lawyer.

Table 9: Extent to which professionals’ linguistic style matched child’s linguistic style

Matching linguistic style	JIRT officer	Crown prosecutor	Defence lawyer
Not at all	–	–	3
A little	1	3	10
A fair amount	4	4	1
A great deal	11	8	2
Total	16	15	16

As Table 9 shows, in the majority of matters, the linguistic style used by both the crown prosecutors and the JIRT officers was rated as matching the child complainants' linguistic style 'a great deal' or 'a fair amount'. In contrast, defence lawyers were rated poorly in terms of adapting their questions to the child's use of terms and sentence length, instead using difficult vocabulary and complex sentence structure. In the majority of matters that were observed, there was little or no match at all between the linguistic style of the defence lawyers and the style of the child complainants. Two defence lawyers (one involved in matters in the specialist jurisdiction, the other in the comparison registry) were noteworthy for their simple and effective style of questioning. Their cross-examination was also the shortest, lasting only about half an hour each. These defence lawyers did not interrupt the child's response at any time, did not use multi-faceted questions which might require different responses within the one question and did not ask difficult questions such as "I put to you that ..".

Too few trials were observed to draw any reliable conclusions about the differences between the specialist jurisdiction and the comparison registry.

CHILDREN'S REQUESTS FOR CLARIFICATION OF QUESTIONS

The number of times that each child complainant asked that a question be clarified was recorded for the JIRT interview, the evidence-in-chief and the cross-examination. During the JIRT interview and the examination by the crown prosecutor, child complainants in both the specialist jurisdiction and the comparison registry made few requests for questions to be clarified. During cross-examination, however, most child complainants for whom information was available (14/16) made a number of requests that questions asked by the defence lawyers be clarified; the median number of requests was six, but one child asked for clarification on 34 occasions. Their queries were both general ("I don't understand the question") or related to particular words or references ("What do you mean by 'carefully'?" and "[Do you mean] when he was at our house?"). The two children who were cross-examined by the two defence lawyers whose linguistic style matched that of the child asked for few clarifications: none and three, respectively.

It is also clear, however, that children do not always ask for clarification when they do not understand the question (Matthews & Saywitz 1992). In several trials in this study, children failed to respond to the challenge "I put it to you that ..." and, did not, in fact, recognise that it was a question.

CHILDREN'S PERCEPTIONS OF THE DIFFICULTY OF THE QUESTIONS

During their interviews, children were asked to rate how hard they found the questions; these ratings were on a 4-point scale, ranging from 'not at all hard' to 'very hard'. Consistent with the court observation ratings, children rated the defence lawyers' questions as harder than those of the prosecution.⁶³ Several children commented that the prosecution lawyer asked them only a few questions but one child said the prosecution lawyer's questions were difficult to understand.

Several children said the prosecutor used words they could not understand but they felt comfortable saying so.

It was quite hard ... and a bit annoying. They were speaking mumbo jumbo. Words I could not understand. But I said so. *[15-year-old complainant]*

In contrast, there were several features of the defence lawyer's questions which most children found 'hard': the number of questions, the repetition of questions, the details concerning dates and 'distant' events, what they perceived as attempts to trick them and being accused of lying.⁶⁴ For example:

There were so many questions that you cannot possibly remember the details over two years. He asked questions about things that were really irrelevant, like how long did Petra stay for, so he got me saying a number of times "I don't really remember". And it worked; so then he could say to the jury that she doesn't remember. I really listened to what he said because I think there were times he did try to trick me by using different days, but I corrected him on that. *[16-year-old complainant]*

Very hard – he took like 50 hours! Like you can't remember the dates, and you might be like a day off, and he comes back and says "he was working that day", and then he starts yelling at you, and you get really scared. *[11-year-old complainant]*

Well, he'd always want to try and get me in different ways, you know, and get me wrong and I sort of had to think before I answered quickly because he would try to trick me a lot of the time. He'd put sentences to me like I should answer "no" and if I didn't really think about what he was asking and how he said it, I could have answered quickly and said "yes". They were just really confusing questions so you had to think a bit. So they were hard. And it made me feel bad too, because he was saying he didn't believe me. *[14-year-old complainant]*

PROFESSIONALS' OVERALL MANNER AND STYLE OF QUESTIONING

Several aspects of the professionals' questioning style were observed and rated. These included the extent to which they:

- allowed the child time to respond to a question before asking the next question;
- interrupted while the child was responding; and
- used leading questions.

In addition, the overall manner of the lawyers in addressing the child was noted in relation to their use of sarcasm, an accusatory tone, neutrality or encouragement.

Seven of the 16 defence lawyers observed throughout cross-examination 'sometimes' (that is, on less than 40% of occasions) interrupted while the child was responding or did not allow the child time to respond before asking the next question. By contrast, only two JIRT officers and one crown prosecutor was rated as doing so. There was little difference between those in the specialist jurisdiction and the comparison registry in this regard.

Defence lawyers were also more likely to ask leading questions than prosecutors or JIRT officers. The majority of the crown prosecutors and JIRT officers, in both the specialist jurisdiction and the comparison registry either did not use leading questions at all or used such questions only sometimes. This is not surprising, given their respective tasks and the restrictions and likely objections from defence lawyers if prosecutors use leading questions.

In terms of their overall style, the researchers noted particular aspects of the interactions between the child complainant and those who questioned them (the JIRT officers, the prosecuting and defence lawyers). These included badgering, sarcastic or condescending comments, accusations of lying or other motives for the child making the allegation, using supportive language and appropriately clarifying questions as requested by the child.

Table 10 presents the results for the professionals’ overall manner towards the child complainants in both the specialist jurisdiction and the comparison registry.

Table 10: Professionals’ overall manner toward the child complainants

Overall manner ^a	Specialist Jurisdiction			Comparison Registry		
	JIRT officer	Crown prosecutor	Defence lawyer	JIRT officer	Crown prosecutor	Defence lawyer
Aggressive	–	–	5	–	–	4
Sarcastic/condescending	–	–	5	–	–	2
Accusatory	–	–	8	–	–	4
Neutral	7	8	4	3	5	2
Supportive	10	5	–	4	3	–
Total number of trials	11	10	10	5	5	6

a. More than one category was applicable for some professionals.

As Table 10 shows, the overall tone of at least four in five of the crown prosecutors and three in five of the JIRT officers was neutral. This applied to the matters heard in both the specialist jurisdiction and the comparison registry. The tone of the remaining crown prosecutors and JIRT officers in both registries was rated as ‘supportive’ (showing some encouragement, smiling at the child, or displaying supportive language and behaviour).

In contrast, the overall tone of about half the defence lawyers in both registries was seen to be either aggressive or sarcastic/condescending or both. Observation and analysis of the transcripts indicated that these lawyers badgered the child, interrupted and did not allow the child time to respond or subjected the child to rapid fire questioning. For example, one defence lawyer asked one child complainant repeatedly and with some sarcasm “... is that correct? / is that right?”. This was repeated 42 times in 41 minutes during one session of cross-examination and on 47 occasions in a period of 39 minutes during another session of cross-examination of the same child. Similarly, the same lawyer asked the same child complainant “... what do you say about that?” on 11 occasions in a period of nine minutes. Another defence lawyer used a superficially friendly approach, repeatedly asking the child, and getting her agreement on at least five occasions, in quick succession that “It’s really hard to remember, isn’t it, when things happen so long ago” and suggesting that she could not have remembered without seeing her video-taped interview several times.

ACCUSATIONS OF CHILD LYING DURING CROSS-EXAMINATION

One particular aspect of cross-examination that children report finding very difficult is being accused of lying and making things up. While challenging the reliability and veracity of the evidence is part of the defence lawyer’s job, especially in “word against word” allegations, directly and repeatedly accusing the child of lying or misrepresenting the child’s response or insinuating that the child was at fault is very stressful for children⁶⁵ and arguably goes beyond testing their evidence.

Every child complainant observed in each of the two registries was asked in some way whether their answers were truthful but there was considerable variation among defence lawyers in the extent to which they used this particularly challenging form of questioning.⁶⁶ Overall, defence lawyers challenged children’s veracity, on average,

16 times during cross-examination; this ranged from one accusation for one child complainant to 28 accusations for another child complainant (standard deviation = 11). The style also ranged from a relatively civil query, such as, “Jenny, is what you’ve told this jury, this court, the truth?” to a less respectful and repeated challenge, such as, “Danni, is it simply the case that you can’t remember the lies that you’ve told?” followed by “was it the case that you told a lie to X and couldn’t remember the lie you’d told when you spoke to [JIRT officer]?”

Children’s comments in the interviews show that being accused of lying made them angry and uncomfortable.

But what I found really hard were the questions where he accused me of lying, when he said that it didn’t happen; that made me really, really angry. And that’s probably another reason it was better that I wasn’t in court, because I would have found it really hard not to go off at him if I was in court when he said that. *[15-year-old complainant]*

He called me a liar. He made me really angry because he’s an adult and he did not have respect. *[11-year-old complainant]*

That was hard. It made me feel bad because he was saying he didn’t believe me. And it took a long time to tell anyone because I didn’t know anything about sexual assault and I didn’t know whether I would be in trouble. *[16-year-old complainant]*

On the other hand, several children were reasonably positive about the defence lawyer, recognising that “he had a job to do”. They had been challenged by the defence lawyers in relation to their veracity but not repeatedly, and not in a way that they considered disrespectful. Several defence lawyers also indicated in their interviews that they do not like having to cross-examine children. For example:

I don’t like it because you’re cross-examining kids. I’ve got children of my own. I don’t find it more difficult, but I don’t try to heavy-hand them or try to trip them up. I try to be as fair as I can. One thing is they have to understand the question. I don’t want it to be suggested that we tried to trick them into anything. The only thing I can say in relation to questioning, just making it simpler for them and being constantly aware that that is what you have to do.

CHILDREN’S PERCEPTIONS OF THEIR CHANCE TO HAVE THEIR SAY

Being subjected to a series of questions in an adversarial process which is governed by complex legal rules is likely to lead to witnesses feeling frustrated that they were not given the opportunity to say, in their own words, what happened. With one exception, all the children who were interviewed in this study expressed their dissatisfaction and frustration at not being able to say what happened, in their own words. There were three main reasons for this:

- being cut off or interrupted by the lawyer;
- being told, by either the judge or the lawyer, to “just answer the question asked”; and,
- not being able to mention certain aspects of the offences because of admissibility issues.

It was very hard because he [lawyer] would not let me speak. He would ask me a question and he would not let me respond to it. He’d just cut me off. *[15-year-old complainant]*

Like I’d go to tell him what happened and he’d just say “No, just answer the question”. Like, you want to tell them the whole story, and they say, “No, you can’t say that”. “If you don’t say it this way, you can’t say it at all”. *Who was saying that? The other guy, the defence guy. [11-year-old complainant]*

Several children and parents referred to the difficulties they experienced in answering questions when they had been told that they could not mention other children or other defendants. For example:

Did you have a chance to say what you wanted to say about what happened? No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, "Am I going to look like I am lying because I am hesitating?" but I didn't know how to answer. [16-year-old complainant]

Really hard – because I wasn't allowed to say what I wanted to say. And every time you go to say something, they cut you off, and then you don't know ... or you didn't know how to answer it properly because if you said one thing wrong then it got wiped from the books. Sometimes I didn't know how to answer because I didn't know if I was allowed to say it or not, so you look as though you don't want to answer the question. [Parent]

JUDICIAL INTERVENTION

Judges and magistrates play a crucial role in the trial process, exercising considerable discretion in the use of special measures, the admissibility of evidence, controlling questioning, "modelling child conscious court practice",⁶⁷ and giving directions and warnings to the jury (Hunter & Cronin 1995). Also children perceive the judge to be the most important 'player' in court (Cashmore & Bussey 1989; Flin, Stevenson & Davies 1989; Sas 2002).⁶⁸ Several studies, however, have found that judges show a marked reluctance to intervene or simply do not intervene to assist or protect vulnerable witnesses during cross-examination (Cashmore & Bussey 1996; O'Kelly, Kebbell, Hatton & Johnson 2003). Several inquiries have also commented on the reluctance of judges to intervene in these circumstances (Royal Commission into NSW Police Service 1996; Victorian Law Reform Commission 2004). The NSW Royal Commission noted, for example, that:

Our adversary system has not encouraged judges to intervene in the conduct of the examination of witnesses unless objection is taken, or the advocate has plainly exceeded the bounds of proper questioning. Some judges fear that undue intervention, even if justified, will excite concern as to prejudice, or cause the jury to be sympathetic to the accused. (Royal Commission into the New South Wales Police Service 1996, Vol. 5, p. 1110).

In this study, during court observation, the researchers recorded each judicial intervention during the child's testimony; where possible, these were later confirmed by reference to the transcripts of the court proceedings. Each instance was categorised according to the reason that the judge/magistrate intervened.⁶⁹

Across the 16 trials which were fully observed, only 16 judicial interventions occurred during evidence-in-chief: 12 (average of 0.8 per trial) were to clarify the child's response, and four (average of 0.3 per trial) to encourage or support the child. However, this low level of judicial intervention during evidence-in-chief is not surprising, since the child's pre-recorded interview comprised most of the child's evidence-in-chief and crown prosecutors asked few questions.

Table 11 shows the four main reasons for judicial intervention during cross-examination.

Table 11: Number of judicial interventions during cross-examination and average number per trial

Reason for Judicial Interventions	Specialist Jurisdiction (n = 10)			Comparison Registry (n = 6)			Total (n = 16)		
	N	\bar{X}	SD	N	\bar{X}	SD	N	\bar{X}	SD
To clarify lawyers' question/line of questioning	74	7.4	7.6	81	13.5	10.5	155	9.7	9.0
To clarify child's response/evidence	73	7.3	9.2	44	7.3	9.9	117	7.3	9.1
To protect child from badgering	20	2.0	3.1	40	6.7	6.4	60	3.8	4.9
To support and encourage child witness	4	0.4	0.5	46	7.7	11.6	50	3.1	7.6
Total number of occasions of interventions*	142	14.2	14.7	149	24.3	20.9	291	18.2	17.4

* The total number of occasions of judicial intervention does not equal the total of the four categories of reasons because some occasions served several purposes.

As Table 11 shows, there were 291 occasions of judicial interventions across the 16 trials. The most common reason for judicial intervention was to clarify the lawyers' questions or line of questioning, and the next most common was to clarify the child's response. Less common were interventions to protect the child witness from badgering or oppressive questioning, and to support and encourage the child.

As the size of the standard deviations in Table 11 indicates, there was considerable variability across the trials in the level of judicial intervention.⁷⁰ In three trials, each heard by a different judge, there was no judicial intervention. By contrast, several trials in the comparison registry which were heard by the same judge attracted a high level of intervention. This was particularly the case in one trial involving a young complainant who had difficulty with the questions asked by the defence lawyer. In this trial, the judge intervened on 60 occasions and the crown prosecutor objected on 33 occasions over the three hours of cross-examination. One trial in the specialist jurisdiction also occasioned a high level of judicial intervention (46 occasions) during cross-examination which also lasted three hours, but there were only two objections by the crown prosecutor.⁷¹ Overall, the number of judicial interventions was correlated with the number of objections by the prosecution lawyer during cross-examination ($r = 0.68, p = 0.004$).⁷² It was not related to the age of the child ($r = -0.09, n = 17, p = 0.75$); nor was it associated with the defence lawyers' linguistic and questioning style, as rated by the researchers.⁷³ Indeed, these very low correlations indicate that judges were no more likely to intervene to clarify or require the question to be clarified for younger children than older children or when the defence lawyer adopted a more difficult questioning style (for example, multi-faceted and complex questions) than when their questioning style was closer to the child's level of language.

These results are similar to those reported by O'Kelly et al. (2003) for both witnesses from the general population and witnesses with learning disabilities. In their study, the most frequent interventions were those directed to the witness to clarify an issue and those directed to the lawyer to clarify the lawyers' questioning. On average, there was

less than one intervention per trial in order to protect the witness from badgering or oppressive questioning (0.8 for general witnesses and 0.3 for witnesses with a learning disability). Somewhat surprisingly, O’Kelly et al. found that judges were no more likely to intervene for witnesses who had a learning disability than for witnesses in the general population; in fact, the trend was in the opposite direction.⁷⁴

CLARIFYING THE QUESTIONS AND RESPONSES

In the current study, judges intervened most frequently **to clarify the defence lawyer’s question or line of questioning**. They did so by:

- questioning the defence lawyer in order to clarify his/her question, for example:
 - Mr X [name of defence lawyer], I know you have to put this to Alex in a particular way but I think we might all be getting lost at this stage. I’m getting lost and I’m pretty certain Alex is.
 - You’ve got a double negative there, Mr Y. You’d better work that one out.
 - Is this relevant in any way?
 - I don’t understand the question. Did she say those words when she disclosed?
- pointing out an inaccuracy in the question posed by the defence lawyer, for example:
 - Well, he didn’t say ‘three men’, he said ‘one visitor’.
 - She didn’t say that; she said she didn’t know.
- directing the lawyer to rephrase the question to the child or to respond to the child’s request for the question to be clarified, for example:
 - Well, I think you might use words that this witness is likely to understand better.
 - Mr X [name of defence lawyer], I think you should put with precision what it is you suggest was said because it’s capable of meaning one or other of two things.
 - Perhaps you could explain to [name of child] what you mean by ‘real’; it’s something he might be having trouble with.

Judges also intervened to **clarify the child complainant’s response or evidence** by:

- questioning the child in order to obtain additional information, for example:
 - Where was X [name of the defendant] when that was happening?
 - Can you tell me this? Did any of the children go to school that week?
- questioning the child in order to clarify the response which the child had just given, for example:
 - Are you saying that you agree with that or not?
- repeating the child’s response so as to clarify it for the lawyers and jury, for example:
 - She said ‘last month’.

In some cases, however, the judge’s clarification or rephrasing of the question did not necessarily make it any easier for the child because the re-phrasing was also long and quite complex. For example:

Perhaps I should explain to James the rules that we have in court, Mr X [name of defence lawyer]. If Mr X is going to ask the jury to believe something that’s different from what you’ve just said he has to give you a chance to agree or disagree with that version. So what he’s going to do now, I think, is to suggest or “put something to you” which is different from what you’ve said and he’s going to ask you whether you agree with it or not, so you can say that you agree with it or you don’t agree with it.

The following intervention directed to the child was given in a terse and somewhat berating manner:

You're not being asked what happened. You are asked what you said. What you said is recorded on page 9 and counsel is asking you to agree that certain matters there are what you said and that you were referring to ...

Most of the children who were interviewed recognised that the judge had intervened to rephrase the question or to ask the defence lawyer to rephrase the question. With one exception, all children interviewed said that this helped. For example:

The judge was helping me out with the big words she used. [11-year-old complainant]

One child, however, said the judge's questions were more confusing than the lawyer's and commented, in particular, on the difficulty of the judge's questions during competence testing.

No, he made me confused. At first, he asked me what the truth was, and I was thinking about it and he said "Did you listen to me, young man?" He just kept asking the same thing. [14-year-old complainant]

As his support person explained:

His speech goes when he is really nervous, and he was struggling to talk. That was hard for him because the judge did not give him time to answer. He said "Are you listening, can you understand what I'm saying" and that just flustered him more and he could not get his answers out. And when that happens, he just clams up, and he just says "yep", "nup". I think it would be helpful if the judge knew how to deal with children, and especially children like Robert.

JUDICIAL INTERVENTIONS TO CONTROL CROSS-EXAMINATION

Several provisions of the *Evidence Act 1995* enable a judicial officer to prevent inappropriate cross-examination of a witness by disallowing improper or leading questions. For example, under Section 41, the court may disallow questions in cross-examination that are misleading, or "unduly annoying, harassing, intimidating, offensive, oppressive or repetitive". In fact, as Table 11 shows, about one-fifth (60/291, 20.6%) of all judicial interventions were interventions to control cross-examination and to protect the child complainant from questions which were deemed unreasonable, intimidating or harassing. Most of these interventions (43/60, 72%) occurred in four trials, two each in the specialist jurisdiction and the comparison registry.

Some examples of protecting the child from badgering or inappropriate questioning include the following comments made to the defence lawyers:

- 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.
- 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?
- Just a minute, let him finish please.
- Perhaps we should move on.

JUDICIAL EXPLANATION AND ENCOURAGEMENT

In terms of how child complainants were treated in court, one marked difference between trials was the extent to which the judge and legal professionals communicated with the child and explained both the court procedures and what was happening or was about to happen.

As Table 11 shows, judges intervened on 50 occasions, mostly in the comparison registry, to provide the child complainant with an explanation and to support the child; these forms of intervention accounted for 18 per cent of interventions. For example:

- The officer is going to bring two more things in to you, Amy, but we might have to do a few things in court before you tell us about them.
- Okay, Samantha, the jury are just looking at those photos that you've seen now. We have just got to wait for a minute while they all see them.

Several judges also made various reassuring and encouraging statements to the child, such as:

- Kelly, when you answer these questions about dates, if you're not sure, it's perfectly okay to say so. We know it's a long time ago.
- At any time, if you don't understand the question, you just say so, because sometimes we use big words and it's hard for you to understand.
- It's okay to say if you don't know. You're doing well so far.

These examples stand in stark contrast to trials where there was little or no introduction given to the child when the CCTV screen was switched on, and where children were left in silence without explanation for quite long periods while the jury looked at exhibits. In some cases, children were startled by the loud noise as the system was switched on. In other cases, they could be seen on screen in the courtroom without being told that they were visible. In one case, the CCTV was switched off for the judge to hear an objection and legal argument; and immediately following this, the court took a recess. However, the child and the support person were not informed and were left sitting in the CCTV room during this period. In another case, the judge was perceived to be rude and dismissive because he was not looking at the child, and had his back turned to the child during most of the child's evidence. In several other cases, children were also reported by their support persons as saying that "they couldn't focus because they could see the judge on the screen drawing, or yawning and looking bored while they were talking about one of the most sensitive things that had ever happened to them".

Comments from children and some parents indicate that they were aware of, and appreciated, the judge's efforts to clarify the questions, to control the type of questioning, to explain what was happening and to treat them 'nicely'.

He was straightforward and he was nice and he explained things to me. He did have a glum look, but he was okay. *[14-year-old complainant]*

... the judge was really helpful, and when I said the barrister was yelling, and the judge had a little hammer, he went bang, bang, "don't yell", and he gave me a break for 20 minutes. *[11-year-old complainant]*

The judge was amazingly thoughtful and insightful; he just kept redirecting and bringing it back and supporting the kids without being on their side. He was fair and firm. *[Parent]*

PROFESSIONALS' VIEWS ON JUDICIAL INTERVENTION, WARNINGS AND EDUCATION

A number of the lawyers and WAS officers who were interviewed commented on the considerable variation they have observed in the extent to which judges intervened to clarify, explain and support child witnesses, and deliver the formal warnings to the jury. While they held positive views about judges explaining the process to children, neither prosecution nor defence lawyers were supportive of 'overly intrusive' judges, especially if they are seen to take on the role of the crown prosecutor or defence lawyer.

In terms of judicial intervention, do you think that judges usually intervene sufficiently? Sometimes too often, but yes I think so. When you say 'too often', do you mean unnecessarily? Yes, it varies a lot. Some judges are prepared to sit back and let a case run; other judges will start cross-examining, start asking questions which can be very detrimental to the Crown case, and it can be very detrimental to the defence case. That's not the judge's role and I think it's a pity when it does happen. [Prosecution lawyer]

Other lawyers were in favour of greater control over questioning and cross-examination.

I'd like to see more effort in some areas ... in making sure the questioning and the cross-examination's fair. Not restricting what defence can ask because you can't do that. But just making sure they don't confuse the witness on purpose and things like that. I thought that was handled quite well this time, but I have seen where they have been given a free reign. I find that a bit unfair. It doesn't necessarily put their case, it's just attacking the witness. That side of things could do with a bit more monitoring. [Prosecution lawyer]

Some lawyers and WAS officers were also critical of judges whose re-phrasing of the question was no clearer or simpler than the original question or whose manner was very formal and distant. For example:

Some have no idea what they are asking. This judge said to a young child "Could I just ask you something hypothetically?" Using 'hypothetically' to a child under ten?

Our judge had a formal, very distant sort of air, you know, which can be translated as "I don't believe a word this kid is saying". There are some very good judges, and at least this one wasn't a grouch but just more than a bit distant and formal.

As indicated in Chapter 3, there was strong support among the legal and other professionals for further judicial education in relation to the legislative requirements, the dynamics of child sexual assault, child development and how to manage the process to assist children.

CHILDREN'S PERCEPTIONS OF THE FAIRNESS OF THE PROCESS

As part of the interview, children were asked to rate the fairness of the trial outcome, the fairness of their treatment by the court, and the fairness of the main participants – the judge, the prosecution and the defence lawyers; these ratings were made on a six-point scale, ranging from 'very unfair' to 'very fair'. Although the number of children interviewed in this study was very small, the pattern of their ratings is very consistent with that reported in an earlier questionnaire study involving 43 child complainants of sexual assault and their parents (Cashmore 1995).

Not surprisingly, as in the earlier study, the perceived fairness of the outcome was strongly related to the result – whether or not the defendant was convicted, and whether children felt vindicated or distressed about not being believed.

The best part was that I got him found guilty. [11-year-old complainant]

And that you told the truth and you were believed – I told her that the truth will always out in the end. [Mother]

However, several children and parents were not satisfied with the outcome (even though the defendant was found guilty) because they believed that the sentence was too lenient and should not be concurrent for the various offences.

As in the earlier study, children in this study rated the judge as the person who was most fair in the trial process, the prosecution lawyer almost as highly, and the defence lawyer as the least fair of the participants. When the outcome was a conviction, both judges and defence lawyers were rated as fairer, but outcome did not affect the perceived fairness of the prosecution lawyer. The children's comments regarding crown prosecutors were mostly positive, but not always.

How fairly do you think you were treated by the crown prosecutor? Everything he [crown prosecutor] did was excellent. I felt comfortable with every decision he made. I liked the fact that he came and told me everything that was happening and summed it all up at the end of every court session, and told us how far it would go. But it's a hard question because I haven't been through something like that before so I'm not sure what could have made it better. But what he did was good. [15-year-old complainant]

She never really talked to us. She was nice but she was distant, but she did her job. [15-year-old complainant]

The DPP solicitor was quite cold, I think she tried to be nice, but she just did not have the manner or personality to work with kids. When you're working with kids, and on stressful things like this, you need someone who has a soothing voice and will treat you well. [Parent]

Children's ratings of how difficult they found the defence lawyer's questions were quite strongly associated with the perceived fairness of the defence lawyer and their treatment in court.⁷⁵ Children's comments about how fairly they were treated in court and the fairness of the defence lawyer are consistent with their comments (reported earlier) about the way they were cross-examined, and their chance to say what they wanted to say. For example:

I feel negative about the court experience now because there are just so many things you can't say which makes it very hard for the jury to understand a lot of other things you know are connected to them. [15-year-old complainant]

In addition, some children commented on the way they were spoken to, particularly by the defence lawyer.⁷⁶

He was very unfair because he yelled at me. They should treat us nicer and not as bad as they treated me. *In what way, nicer?* Well, they shouldn't yell at us; and not yell, "Is it true or isn't it true?" [11-year-old complainant]

I really think they could ask the questions in a fairer way and treat you with more respect, and then not try to smile at you after they've been mean in court. [11-year-old complainant]

What do you think was unfair about the way you were treated at court? Just the way he spoke to me, and acted like I was a little kid and tried to put words in my mouth. [15-year-old complainant]

He kept saying, "I put it to you that this happened", and you say "No", and he just says "Well I don't think so". So you just look like a smart-arse. [16-year-old complainant]

CHILDREN'S COMMENTS ON THEIR EXPERIENCE

Comments from children and their parents about the best and worst aspects of their court experience provide some insight into the areas where some improvements could be made. The most common comments about the worst aspects about going to court were having to wait so long, being treated badly in court ("being yelled at" and being accused of lying), and then the defendant being found not guilty. Reducing delays and improving how children are treated in court are both areas where improvements are possible.

Comments about what was helpful or positive about going to court were very similar to those made by parents and children in the earlier study (Cashmore 1995, p. 40). Again, the three main perceived benefits of going to court were:

- a feeling of vindication and a belief that justice had been done;
- some satisfaction in being heard; and
- a cathartic effect from being able to put the pain and stress of the events behind them.

For example, some comments from the current study include:

I have gone through all the process, I've given my evidence, and done all that I can do, and now I just want to put it all behind me. *[14-year-old complainant]*

It's given me an experience, something that I will never forget in my life. And I know that it is not worth throwing my life away for, because it is just something that I will learn from, not a mistake but an experience. I am learning to get over it because I want my life to be normal. And it's a good feeling to know that it's all over and done with and that I'm not in any trouble, that it went my way and that I won. *[16-year-old complainant]*

PROFESSIONALS' VIEWS OF THE SPECIALIST JURISDICTION AND REQUIRED CHANGES

The lawyers and WAS officers who were interviewed were asked what differences they had noticed as a result of the pilot specialist jurisdiction, and the changes they would like to see. The general view was that, beyond the improvement in facilities in the remote witness suite at Parramatta and some case management practices at Parramatta Court, the specialist jurisdiction had made little, if any, difference. Some commented on the educative effect of the pilot, noting the increased awareness among those involved of the changes that are required. Four comments exemplify these views:

Do you think that the specialist jurisdiction has made any difference to the way child sexual assault prosecutions are dealt with?

My understanding at the beginning was that the inquiry and the pilot was really meant to try and fundamentally change the way child sexual assault trials are run. I understand the accused absolutely needs to have a fair trial – I have no issue with that. But trying to make it better through the system, not things running along the way they always have. I don't think it has happened.

The remote room is fantastic; it is a great alternative to CCTV, but unless all the other things are addressed, it is not really all that effective. It has made a nice CCTV room that is not attached to the court. That is very nice, but it is not exactly a major change. I think there are things that need to change – you do need to have a judge that knows how to talk to children and is aware of child development issues, who understands the dynamics of child sexual assault, who is open, friendly, able to talk to kids, able to run the courtroom in a fair way but also putting the child right at the centre and making it better for them. Prosecutors need to be experienced in running child sexual assault matters; to be prepared to do extra – it is extra, rather than waiting until a week or two before the trial to make contact with the defence to talk about the tapes, and making sure the defence has seen the tapes, talking about the edits. I suppose it is case management, but they are not being case managed and they should. It absolutely has to happen, otherwise it is not going to be very different.

I didn't know a lot about the pilot program. We were told very little about it. I found out we were supposed to have specialist training and there would be certain crowns put aside for these sorts of matters and there would be certain members of the bench put aside to do those kinds of trials, and there would be case management – but none of that happened. In fact, we had a judge who had no idea about the way things work, had never heard of the CCTV system, the remote room and the ability of a child to play their interview as evidence.

What it boils down to – if you have a competent crown and a competent judge, they run fine.

9. CONCLUSIONS

The aim of the specialist court was to overcome “many of the identified problems experienced by child witnesses in the criminal justice system through the specialisation of the judicial and court officers and the development of child-focused procedures and environment.”⁷⁷ The problems that the specialist jurisdiction was expected to overcome, or at least improve, included:

- long delays;
- a formal and intimidating court environment;
- concerns about coming face-to-face with the defendant and the defendant’s family and friends;
- language that is complex and questioning that is unnecessarily confronting and not curbed by judicial intervention; and
- child-unfriendly processes.

The key features of the specialist court as proposed by the NSW Legislative Council Standing Committee on Law and Justice were described in the report of their inquiry in the following terms:

Cases would be heard by designated judicial officers specially trained in child development and the dynamics of child sexual assault. Prosecutors and court staff would also receive special training. There would be a presumption in favour of the use of special measures, including pre-trial recording of evidence and electronic equipment would be of the highest standard. The court environment, including the room used for pre-trial recording of evidence, would be appropriately child-friendly and informal. The pilot project should be the subject of comprehensive evaluation after a trial period to assess its success in alleviating the distress of children without unfairly disadvantaging the accused.

(NSW Legislative Council Standing Committee on Law and Justice 2002, p. xviii).

The aim of the evaluation was to assess whether the stated objectives of the specialist child sexual assault jurisdiction have been achieved.

The various features of the specialist jurisdiction fall into three main categories. These relate to:

- trying to reduce delays;
- improving the physical environment of the court and using special innovative measures to assist children to give evidence; and
- increasing the skills of the legal professionals involved in the court process.

The following discussion will summarise the findings and address the following questions in relation to the three main groups of features of the specialist jurisdiction.

- To what extent were the particular features of the child sexual assault specialist jurisdiction implemented?
- What difference, if any, did this bring about for child complainants/witnesses?
- What other improvements might benefit children and their families involved in these matters?

LIMITATIONS OF THE STUDY

The limitations of this evaluation study also need to be noted. This study had three significant limitations. The first was the small number of trials that proceeded and were able to be observed during the evaluation period. The delays and adjournments and associated problems that reduced the pool of cases are, however, part of the reality of the process. Second, there was little consistency in practice across the three courts which comprised the specialist jurisdiction. Indeed, there was as much variation in practice between these three courts as between the specialist jurisdiction and the comparison registry. Third, the pilot and the evaluation were restricted for cost and practical reasons to the metropolitan area, so there are additional issues to consider in any extension to rural and regional courts.

REDUCING DELAYS

Long delays and the uncertainty of timing that is associated with adjournments and listing problems are significant stressors for child witnesses. These factors reduce children's willingness to give evidence and the reliability of that evidence.

The main features of the specialist jurisdiction that were expected to reduce delays were case management procedures to minimise adjournments and to ensure that the case was ready to proceed. While there was evidence of some case management procedures and pre-trial mentions at one of the courts in the specialist jurisdiction, delays were a major problem for child complainants/witnesses in both jurisdictions. These delays occurred both before matters reached trial and also once the trial was scheduled and caused children, their family members and other witnesses to attend court unnecessarily and to wait for long periods of time before giving evidence.

This study identified a number of 'causes' of delay. While some delays are difficult to avoid (for example, defendants becoming ill), others could be prevented or, at least, reduced by better case management practices on the part of both the prosecution and the court. Several factors limited any effect on delays. These included the failure to develop practice directions, the late appointment of crown prosecutors to specific cases, problems with the technology and the requirement by some judicial officers and professionals that child complainants/witnesses be at court ready to give evidence at the very beginning of the trial.

IMPROVING THE COURT ENVIRONMENT AND USING SPECIAL MEASURES

The main physical features of the court environment that were expected to improve the experience for child complainants/witnesses were the establishment of the remote child-friendly witness suite at Parramatta, an upgrading of the technology, and a presumption in favour of using CCTV and admitting the child's pre-recorded investigative interview as the child's evidence-in-chief.

There was considerable confirmation from the children, their parents and the professionals (who have used or are familiar with the remote witness suite) that the suite is perceived as a child-friendly and more appropriate environment than some of the other less specialised CCTV and waiting areas. The use of the remote witness suite was, however, restricted (with one exception) to children whose cases were heard at Parramatta Court. There appear to be practical disincentives to families using the facility where the case is heard at courtrooms other than those at Parramatta. There are two reasons for this: firstly, the practical difficulties for families in transporting the child to Parramatta from courts some distance away (there are no direct public transport

connections between Parramatta and Penrith or Campbelltown); and, secondly, the physical and emotional separation of children from parents in the cases where the parents are witnesses and are therefore required at the main courthouse.

The presumption in favour of children using CCTV and having their pre-recorded interview admitted as their evidence-in-chief appears to be operating not just in the specialist jurisdiction but also in the comparison registry. All the children in the specialist jurisdiction and the comparison registry whose cases were observed as part of the evaluation used CCTV. Moreover, while there was legal argument in some cases about the admissibility of parts of the tape-recorded interviews, their use was generally accepted.

Children and their families clearly appreciated not having to see the defendant or be in the courtroom while he/she gave evidence. They indicated that CCTV and the use of the pre-recorded interview made testifying easier than it would have been without these measures. The advantages for child witnesses were also acknowledged by most legal professionals and by all WAS officers. There were few strong objections to their use. This is consistent with the findings of a recent evaluation of the use of electronic recordings of children's evidence (McConachy 2002).

There were, however, some aspects of the court process and practice which inhibited the efficiency and effectiveness of these special measures. These included: delays caused by the late editing of the tapes which often followed legal argument; a lack of familiarity with the legislative provisions by some judicial officers and crown prosecutors; technical difficulties with the equipment; and court staff who were unable to operate the equipment. As the report of the NSW Royal Commission into the Police Service noted, high quality equipment is necessary to provide "high resolution display on large screens within close proximity of the jury" so that the impact of the evidence is not reduced by "poor resolution, defective audio, or reduced images".⁷⁸ At this stage, it appears that even the upgraded equipment in the specialist jurisdiction may not meet the requirements in relation to the size and proximity of the image, particularly in the replay of the pre-recorded investigative interview but also in relation to the training of the staff who operate it.⁷⁹

INCREASING THE SKILLS OF THE LEGAL PROFESSIONALS

The knowledge, understanding and sensitivity of those involved with child complainants/witnesses are important factors because they affect the way children are treated during the prosecution and court processes and may be instrumental in enhancing children's capacity to provide reliable evidence.

One of the key features of the proposed trial specialist court was that "cases would be heard by designated judicial officers specially trained in child development and the dynamics of child sexual assault" and that "prosecutors and court staff would also receive special training" (NSW Legislative Council Standing Committee on Law and Justice 2002, p. xviii). The assumption was that prosecutors and judicial officers dealing with these matters would then have the understanding and skill to maximise the accuracy and reliability of children's evidence and minimise the stress for children.

While some specialist education for judicial officers and prosecution lawyers was delivered during the evaluation period, it is unclear what effect this has had on practice. Court observation, and the interviews with children, parents and court professionals, indicated that there are some areas where court preparation and support for children and their families through the court process is having a positive impact. However, there are still a number of areas where practice can and should be improved.

COURT PREPARATION AND SUPPORT

Court preparation and meeting the prosecution lawyers beforehand can help children to understand who the main players are, what their respective roles are and what is likely to happen. The presence of an appropriate support person can also provide some comfort (Saywitz & Nathanson 1993). The Witness Assistance Service has made a positive difference to the support the child and the family receive. However, it would be helpful to have updated court preparation materials and guidelines which clarify the role of support persons and court staff and provide for greater consistency. These guidelines need to take into account the fact that those in the courtroom may not be aware of the circumstances for the child in the CCTV room and how the child is faring.⁸⁰

THE INTERPERSONAL ASPECTS OF THE COURT EXPERIENCE

Another crucial issue is the way the child is treated by the judge, the prosecution lawyer and the defence lawyer – the extent to which they are introduced to the court, the way they are questioned and the control the judicial officer exercises over these processes. It is often difficult for those who are very familiar and comfortable with legal proceedings to realise that they are foreign to non-lawyers, let alone children. As the report of the Layton review in South Australia pointed out:

Sensitivity as to the particular difficulties of children in court is not one which can rely solely on common sense, or whether a person has had experience of children by having had his/her own. It requires specialist information. The system to date has relied far too heavily on an approach based on the view that lawyers who are appointed to courts have picked up all the necessary skills through their extensive legal and life experiences prior to appointment. Whilst no doubt some have, it is not true of all and some further information and educational process is required. (Layton 2003, p. 15.14)

CONTROL OVER CROSS-EXAMINATION

The effect of the questioning style during cross-examination on children's capacity to provide reliable evidence is a persistent concern in the research literature and in several of the inquiries into children's evidence (Carter, Bottoms & Levine 1996; Davies, Henderson & Seymour 1997; NSW Legislative Council Standing Committee on Law and Justice 2002; Queensland Law Reform Commission 1998, 2000; Victorian Law Reform Commission 2004; Walker 1993, 1999). Research has consistently shown that many of the strategies which lawyers use to cross-examine children are stress-inducing, developmentally inappropriate, "suggestive and evidentially unsafe". However, it is clear from both this study and from other research, that such strategies are widely used and generally acceptable to lawyers and judicial officers.⁸¹

One of the assumptions that underpins the adversarial process is that 'persistent questioning' and challenging of a witness's account of events during cross-examination "will expose the fact that a witness is lying or does not remember events accurately" (Victorian Law Reform Commission 2004, p. 295). In the case of children, this assumption is unwarranted. Moreover, the confrontational, accusatory and, at times, intimidating process of cross-examination does not recognise the imbalance of power, language, skills, and familiarity with the court process, that exists between the adult questioner and the child witness. Lawyers who are skilled at discrediting child witnesses in the courtroom, through the use of conventional strategies, can "intimidate them into silence, lead to contradictions in their responses and produce emotional disorganization and distress" (Sas 2002). As Carter, Bottoms and Levine (1996) conclude from their study of the impact of certain questioning tactics on the reliability of children's testimony, this does not serve the interests of justice.

While non-lawyers, and especially child complainants and their families, expect trials to be a truth-seeking process, lawyers have a different view of the adversarial process, and see their questioning as generally comprehensible and as legally and ethically acceptable (Henderson 2002). As Henderson points out, the primary focus of lawyers, especially defence lawyers during cross-examination, is to control the witness's account and persuade the fact-finder (the jury). The defence lawyer's focus is to discredit the testimony of prosecution witnesses, not to elicit the most reliable evidence (Henderson 2002, p. 280).⁸² In a guide to court advocacy for lawyers, for example, Evans (1995, p.150) states that cross-examination "is not a procedure which is aiming to find out the truth but [one which] aims to discredit the evidence".

The role of the judge is therefore crucial in ensuring that the court process is fair and that justice is seen to be done. There is, however, considerable variability in the approach taken by defence lawyers to cross-examination and in the control exercised by judges and magistrates; a problem which has been noted by various inquiries and research studies (Cashmore & Bussey 1996; Davies et al. 1995; Davies & Seymour 1998).⁸³ This evaluation, and research by O'Kelly et al. (2000), found that the extent to which judges intervene to clarify the questions or control accusatory questioning was not related to the age or linguistic style of younger children or witnesses with a disability. The need for greater judicial intervention and control over cross-examination that is "unduly aggressive, humiliating, confusing or intimidating" was highlighted by Wood J. (2003, paragraph 101) in the following terms:

Perhaps regrettably, this [s. 41 of the *Evidence Act*] is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a "fair run". In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.

To provide a 'more level playing field' for child witnesses in the 'contest' against adult lawyers, it is necessary to re-evaluate the role of cross-examination where children are involved and to encourage greater judicial understanding and judicious intervention.

THE WESTERN AUSTRALIAN APPROACH

Another approach which deserves serious consideration is the implementation of the Western Australian practice of allowing a child's entire testimony (evidence-in-chief, cross-examination and re-examination) to be electronically recorded prior to the trial and admitted into evidence.⁸⁴ This practice has been operating successfully in Western Australia for some time⁸⁵ and is generally well accepted by the legal profession, the judiciary and by the children and families involved.⁸⁶ Judge Jackson (2003, p. 210), for example, commented that:

There is no basis for the suggestion that the legislative, administrative and judicial steps taken in Western Australia have impacted adversely on the rights of the accused to a fair trial. They have, however, reduced the unfairness to children and other vulnerable witnesses. The two are not in competition.

A number of government inquiries have now examined this approach and recommended its implementation beyond Western Australia.⁸⁷ In particular, the NSW Legislative Council Standing Committee on Law and Justice considered the advantages and disadvantages of this approach and recommended that changes to the *Evidence (Children) Act 1997* "should create a presumption that a child witness will have his or her entire evidence pre-recorded and admitted into trial" (Recommendation 38, p. 191).⁸⁸

Given the lack of evidence of any real benefits produced by the specialist jurisdiction beyond the use of the remote witness suite, this and the related recommendations (Recommendations 34–38) deserve further consideration. The remote witness suite was the main feature of the specialist jurisdiction that delivered some improvements for children. It did this by separating them from the courtroom and from the defendant in a more comfortable and child-friendly environment. The question is whether such facilities can be duplicated at other courts (particularly those outside the metropolitan area) and whether other approaches, including the Western Australian approach would be more effective and have benefits (such as reducing delay) beyond the improvement of the immediate environment at court.

In summary, there was little to distinguish the specialist jurisdiction from the comparison registry apart from the establishment of the remote witness suite at Parramatta. In fact, there is little evidence that the specialist jurisdiction was implemented as proposed or that the courts at Parramatta, Penrith and Campbelltown actually constituted a specialist jurisdiction in any real sense. While the remote witness suite was well received and benefited those children who were able to use it, in practice there were few other real changes. The concerns about delays, problems with the technology and the way children are treated in court, especially during cross-examination, remain valid. An earlier conclusion about the crucial changes that are needed is still apposite:

What is needed as long as children are required to testify in adversarial court proceedings is not just a 'technological fix' but a change in the way children are treated in the court process. They need to be asked questions they can understand and to be treated with respect [because] ...children's emotional state and the consistency and completeness of their testimony are affected by the way they are questioned. ... While training for interviewers and court preparation for child witnesses are both useful and necessary, such approaches need to be supplemented by education for the legal professionals in court so that they can recognise linguistic and power differences regarding child witnesses and thereby enhance the fact-finding function of the court. (Cashmore 2002, p. 215)

NOTES

- 1 These include the Wood Royal Commission in New South Wales (1996), the joint inquiry by the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997), the Queensland Law Reform Commission inquiry into the evidence of children (1998), the New South Wales Legislative Council's Law and Justice Standing Committee inquiry into child sexual assault prosecutions (2002), the Layton child protection review in South Australia (2003) and the Victorian Law Reform Commission inquiry into sexual offences (2004).
- 2 Appendix B provides an overview of the *NSW Evidence (Children) Act 1997*.
- 3 The Standing Committee recommended some additional features which were not implemented by the State Government, including:
 - the selection of interested judicial officers, prosecutors and court staff with specialised training in issues of child development and child sexual assault;
 - specially trained prosecutors; and
 - disrobing of judicial officers and counsel.
- 4 The specialist jurisdiction was also later extended to include some changes at Dubbo Court but this did not form part of the evaluation reported here.
- 5 In this research, the term 'child complainant' is used rather than 'child witness'. This is because only the child who complained of the alleged offences was the focus of the court observations and subsequent interviews.
- 6 The results of the juror survey study will be published in a separate report; data collection is still proceeding.
- 7 Ethics approval was necessary before the evaluation could begin and it was also considered useful to allow the implementation to 'settle down' rather than collect data during the early 'establishment' phase.
- 8 Prior to the commencement of the study, the Bureau of Crime Statistics and Research sent a letter to every District Court judge, introducing the study, explaining the role of the researchers, and seeking formal consent for the researchers to observe any child sexual assault trial which the judge may hear in the coming months. For each scheduled trial for which the researchers had received consent from the child and his/her non-offending parent/guardian, formal permission was sought from the presiding judge/magistrate at the beginning of the trial. Where possible, the researchers met with the allocated Witness Assistance Service (WAS) officer, who generally introduced the researchers to the child complainant, his/her non-offending parent/guardian and the crown prosecutor or the instructing solicitor. Once the trial began, the crown prosecutor formally advised the presiding judge/magistrate of the presence of the researchers in the courtroom, explaining their role and seeking formal consent for the researchers to observe the trial.
- 9 JIRT staff are specially trained Police Officers (NSW Police Service) and Child Protection Caseworkers (Department of Community Services). JIRT officers investigate reports of child sexual abuse, physical abuse or neglect of a child or young person when there is a possibility that the abuse/neglect constitutes a criminal offence. They undertake interviews with the relevant children. These interviews are recorded either by video-recording, audio-recording or as a written statement in the Joint Investigation Recording Book. In suites with video-recording equipment, only the primary interviewer is in the suite with the child; the secondary interviewer is in the control room and can communicate with the primary interviewer by way of an ear-piece. The child is informed of the presence of the secondary interviewer in the control room. If the child's interview is recorded by audio-cassette only, both officers are in the room with the child.

- 10 Two children were interviewed by phone by choice or necessity: in one case, the child was leaving the country within the next few days. Attempts to contact two families after the case was finalised were unsuccessful.
- 11 Information regarding the cases which were listed during this period was provided by the WAS officers dealing with matters in these four courthouses and Criminal Listing staff of the Sydney District Court.
- 12 On the other hand, the charges in relation to the observed trials were more serious than in the non-observed group (see Table 5, Chapter 4); just over half the charges in the observed trials involved sexual intercourse or aggravated sexual assault (41, 52%) compared with the non-observed group (23, 29.5%).
- 13 Of these six trials, one was only partially observed because the researcher was ill during the trial.
- 14 During the evaluation period, changes in legislation allowed adult witnesses in sexual assault matters to use CCTV and thus the remote witness suite as well.
- 15 The notes which are prepared by the managing lawyers and tabled at the meetings of the Sexual Assault Review Committee (Office of the Director of Public Prosecutions) indicate that similar problems have occurred in other cases and comparable attempts to deal with them are made in other courts and jurisdictions. In one case, for example, the tape was played in the remote room and relayed to the courtroom, and the magistrate had a portable television balanced on the bar table, turned away from the camera, to allow the tape to be seen and heard simultaneously.
- 16 One judge expressed his frustration and concern about the effects of the delays on the child after several attempts to play the tape failed in this and a previous trial.
- 17 Inadequate training of personnel who operate the equipment was identified by the Director of Public Prosecutions in his evidence before the Inquiry:

Where equipment is installed it should be accompanied by appropriate training regimes for the court staff who will be required to use it. (*Report on Child Sexual Assault Prosecutions*, paragraph 6.61, p. 171).
- 18 A series of seminars on child sexual assault were organised for judicial officers beginning in the second half of 2003. The first two seminars were given by Justice James Wood on *The Admissibility of Evidence in Sexual Assault Cases* and by Dr Jean Edwards on *The Role of Medical Evidence in Child Sexual Assault Cases*. Video-tapes and audio-tapes of these sessions were made available to judicial officers unable to attend the live seminars – 32 judicial officers obtained copies of one or more of these tapes. In a session of the Annual District Court Judges' Conference held in 2003, Judge Tupman also outlined the role of the Child Sexual Assault pilot programme. Further seminars are scheduled during 2005 for Local Court magistrates and District Court judges. (Personal communication with Ruth Windeler, Education Director, NSW Judicial Commission).
- 19 There are nine curriculum modules. The content of the curriculum was drawn from various sources, including the Sexual Assault Review Committee, *Heroines of Fortitude* reports (NSW Department for Women 1996), the ODPP Sexual Assault Liaison officer, the ODPP Witness Assistance Service officers, various crown prosecutors and trial advocates and a general training needs' analysis of the ODPP solicitors. One module, held in March and July 2004 and attended by 42 and 25 participants, respectively, focused on the legal issues, screening and indictment in sexual assault matters. Another module, held in March 2004 and attended by 19 participants, dealt with psychological issues; this was conducted by Carolyn Quadrio. A further module, held in August 2004 and attended by 20 participants, dealt with interviewing children and was conducted by Professor Martine Powell, Deakin University. (Personal communication with the ODPP)
- 20 Judge Robyn Tupman (2003) *Some Brief Observations on the Child Sexual Assault Jurisdiction Pilot Project* for the 2003 Annual District Court Judges' Conference, p. 4.

- 21 Pearlman (2004) cites this passage from the judgment of Holland J. in *Michael Realty Pty Ltd vs Carr* and defines “the legal use of the expression ‘judicial comity’ as the requirement that judges of courts of equal rank or co-ordinate jurisdiction should, as a general rule, follow the decisions of other judges of equal rank” (p. 28).
- 22 In Western Australia, all of the child’s evidence – the cross-examination as well as the evidence-in-chief – can be video-recorded and presented at trial (see the *WA Acts Amendment (Evidence of Children and Others) Act 1992*). The joint Australian Law Reform Commission and Human Rights and Equal Opportunity report *Seen and Heard* (1997) recommended that other states enact similar legislation.
- 23 The video-recording was, however, unable to be played in one trial due to technical difficulties with the tape.
- 24 Support persons were also present for all children.
- 25 ‘No bill’ refers to a matter in which the Director of Public Prosecutions directs that there be no further proceedings. This may occur for a variety of reasons; for example, the child or his/her parent/guardian may not wish to pursue the matter, or the evidence may be considered insufficient.
- 26 Two separate matters in the specialist jurisdiction were both aborted on two occasions, and then the decision was made not to proceed. In one case, this followed a further statement by the child to the police, in which she revoked her earlier allegation.
- 27 As Parkinson, Shrimpton, Swanston, O’Toole & Oates (2002, p. 349) point out:
 the conviction rates in cases that proceed to trial or to a guilty plea may give a misleading impression of the level of convictions for child sexual assault as a proportion of all cases considered to be substantiated by professionals working in child protection.
- 28 Child sexual assault matters include an unknown number of cases in which the complainant was no longer a child at the time the matter was finalised. Child sexual assault matters are identified by the charges (see Table 5) and the court statistics do not include information on the age of the complainant at finalisation.
- 29 The Wood Royal Commission (1996) states:
 It is plainly unsatisfactory for a young child to have the prospect of a court attendance hanging over his or her head for a period as much as 12 to 18 months after the suspected offender is charged. It is understandable that health professionals should have identified the criminal justice system as itself a contributor to the abuse of children in these cases, since it is important that they be allowed to resume their lives, and try to get over the event, as quickly as possible.
 Moreover, there is a real risk that justice will not be done to the child, where there is a substantial delay between the complaint and trial, because:
- of the risk of distortion or loss of memory over the intervening period, which may lead to an apparent inconsistency between the earlier disclosures and the evidence;
 - the child giving evidence will have developed, become more knowledgeable and may have a totally different appearance and manner to that at the time of the abuse;
 - gathering stress and anger over the intervening period may cause the child to give a most unfavourable impression in the witness box, particularly if there has been an acrimonious family break up and loss of support; and
 - accumulating pressure from other members of the family, associated with the matter last mentioned, may bring about a retraction of the complaint, even though it is true.
- (Royal Commission into the New South Wales Police Service, vol. 5, p. 1100)
- 30 Judge Robyn Tupman (2003), *Some Brief Observations on the Child Sexual Assault Jurisdiction Pilot Project* for the 2003 Annual District Court Judges’ Conference, p. 1
- 31 This is the time from the date the matter is committed to the District Court to the final date of the determination of charges (for example, verdict, no bill, guilty plea).

- 32 Analysis of the reports prepared by the managing lawyers for the ODPD Sexual Assault Review Committee over the last few years confirms the concerns about the “over-listing” of child sexual assault matters. Over-listing also occurs in jurisdictions outside those involved in this evaluation. The availability of CCTV for other matters, including adult complainants in sexual assault matters, also seems to be exacerbating this difficulty.
- 33 On the other hand, others also commented on the way that some defence lawyers might operate under the legal aid scheduled fees system to maximise their payment. For example:
- I’m not going to pretend there are not lawyers rorting the legal aid system, there are. But I’m not sure that if you plead on the first day of trial that you get any more or any less [fees].
- Several of the cases scheduled during the evaluation period resulted in a late plea on the day of trial. A study cited in the recent discussion paper, *Indictable Crime Cost Issues Proposals for Change* and “undertaken by Legal Aid NSW of all matters listed for trial in NSW in the District and Supreme Courts in August 2003 indicated that 87% of legally aided trials assigned to private practitioners resulted in a plea of guilty on the first day of trial. ... Legal Aid NSW acknowledges there are other factors relevant to this statistic. A primary factor is that trials are not allocated to a Crown Prosecutor in sufficient time for there to be meaningful negotiations before the trial. However, there are cases where a plea is negotiated before the trial but not entered until the day the matter is listed for trial.” (p. 11)
- 34 Editing in ‘real time’ means that a two-hour tape will take at least two hours to be edited because it is necessary to make a new copy (that takes two hours to play) and a copy. Digital copies can be made much more quickly.
- 35 In some ways, little has changed since Cashmore (1995, p. 39) reported that:
- ... it is common for children to be told to be at court between 9 and 10 a.m. although in a trial, the empanelment of the jury, opening addresses and legal argument often takes several hours. This means that children may have to wait up to five hours or more (e.g. after the lunch break) before giving evidence. In the words of one parent, “Why can’t they sort out all those preliminary matters before the case starts or before the child is called? We couldn’t even go anywhere more pleasant to wait because we didn’t know when she would be called.”
- 36 One child in a case heard in the comparison registry but transferred from one of the courts in the specialist jurisdiction also gave evidence at committal. The presumption was that children in the specialist jurisdiction will not be required to give evidence at committal hearings.
- 37 In one case heard within the specialist jurisdiction, where the CCTV room was part of another room which included tea-making facilities, a child complainant burnt her arm on the urn and the judge aborted the case after talking with the child in the absence of the crown prosecutor and the defence lawyer.
- 38 Until the Act was amended in December 2001, these provisions were restricted to children under the age of 16 at the time the statement was recorded and under the age of 18 when they gave evidence. The amendment provides that a child, who is over the age of 16 but under the age of 18 years at the time the evidence is given, is entitled to give, and may give, evidence-in-chief wholly or partly in the form of a recording which was made by the child when he/she was less than 16 years of age.
- 39 It can also avoid the need for children to be interviewed again for other purposes such as child protection intervention.
- 40 The tape can be used to ‘refresh’ the child’s memory for events that occurred some time earlier. Because there is some evidence that children forget more quickly than adults (Brainerd, Reyna, Howe & Kingma 1990; Flin, Boon, Knox & Bull 1992), a visual record may be useful, especially when children are too young to read their statement.
- 41 Audio-tapes are also used to record the interview with children where video-tape equipment is not available but audio-recording does not provide the visual information of the child’s appearance at the time.

- 42 The amendments stipulate that the child must not be present in the court (unless the child so chooses) or be visible or audible to the court, whether by means of closed-circuit television or any other similar technology while the recording is being viewed or heard.
- 43 For children who have shorter attention spans, it may not be helpful for them to view the tape again before they are cross-examined on it.
- 44 At the AIJA conference held in July 2004, several judges from Western Australia also commented unfavourably on the size of the screen in court and its distance from the jury, indicating that, in the courts in Perth, a large screen is lowered from the ceiling directly in front of the jury.
- 45 Children and WAS officers were generally satisfied with the image on the television screen in the CCTV room but as one WAS officer commented, “that is OK because the TV is immediately in front of the child”.
- 46 Of the 345 tapes that were recorded by JIRT in 2000, only 69 cases resulted in an arrest, 61 were finalised by March 2002 and only 15 complainants gave evidence in 16 matters (McConachy 2002, p. 56).
- 47 The reported reactions of six children whose tape was played in court in the evaluation by McConachy were very similar – two made no comment, “two young children found the experience long and boring and were easily distracted”, and two found it “difficult and expressed concern about others seeing the tape because the contents were humiliating and embarrassing” (McConachy 2002, p. 37).
- 48 Section 18 gives a child the right to give evidence by means of closed-circuit television facilities or similar technology. This right also applies to a child who is aged 16 years or more but less than 18 years when the evidence is given if the child was aged less than 16 years when the charge was laid (Section 18 (1, 1A)). However, the right to give evidence by closed-circuit television is at the discretion of the court (Section 18 (3, 4)).
- 49 Their views were similar to those expressed by the lawyers interviewed in the earlier evaluation of the use of CCTV in the ACT (Cashmore with de Haas 1992); but, in this study, lawyers were perhaps more accepting of the value of CCTV.
- 50 Where children did not see the court and the CCTV room beforehand, this was because their matter had been transferred from another court or because there had not been time to show them.
- 51 The need for professional education for judges, magistrates and legal professionals dealing with child witnesses has been recommended by a number of other inquiries, including the joint Australian Law Reform Commission and Human Rights and Equal Opportunity inquiry (1997) into children and the legal system, the Layton review in South Australia (2003), and the Queensland (1998) and Victorian (2004) inquiries.
- 52 The *Report on Child Sexual Assault Prosecutions* recommended that “the Attorney General review the available witness preparation services, with a view to identifying and rationalising any duplication of services, as well as determining and funding future resource needs” (Recommendation 9, p. 46).
- 53 Indeed, several children referred to the crown prosecutor as ‘our barrister’.
- 54 The Committee recommends that “New South Wales Treasury provide funding to the Witness Assistance Service to oversee the development of updated court preparation resources” (p. 45).
- 55 *Report on Child Sexual Assault Prosecutions*, pp 41-42.
- 56 Both the court observations and the interviews with WAS officers confirm the issue raised by the Manager of the Witness Assistance Service during her evidence to the inquiry:
Witness Assistance Officers who are present in the remote witness room while the child is giving evidence by CCTV often have a sense of great frustration because they can see problems that are not necessarily being picked up in court.
(*Report on Child Sexual Assault Prosecutions*, paragraph 3.23, p. 64)

- 57 For example, one child in the comparison registry said to the defence lawyer:
- “Mr X, could I please have a break?” and “Could I please have a break because I’m starting to feel a bit sick?”
- On another occasion, she said “Yes, but you’re confusing me” and the judge said “Let’s take a break now’.
- 58 This particular judge stated he had implemented this ‘regular break’ routine in other matters and that it worked quite well. Scheduling regular breaks in this way is, however, apparently quite unusual, based on the experience of those interviewed and the examples given of children becoming very distressed, with some refusing to continue their testimony. These cases were referred to in the interviews and in communications in the ODP’s Sexual Assault Review Committee.
- 59 Royal Commission into the New South Wales Police Service (1996), vol. 5, p. 1112.
- 60 NSW Legislative Council Law and Justice Committee inquiry report, Paragraph 7.38, and Recommendation 43.
- 61 Children in the current study all said that the gowns and wigs made no difference. For example, one child commented:
- They look funny. *Is it better or doesn’t it make any difference?* Doesn’t make any difference. *Why do you think they wear them?* Well, people don’t like to see them in normal clothes.
- 62 “I wouldn’t take my wig off unless the judge gave me leave to do that. But none of that is happening – everyone’s wearing wigs and gowns.” [*Prosecution lawyer*]
- 63 There were significant differences in children’s mean ratings of the difficulty of the questions (3.3 compared with 1.9 on a 4-point rating scale, $t = 4.2$, 9 df, $p = 0.003$) but the numbers are very small ($n = 10$), and evidence-in-chief mostly comprised the pre-recorded video-taped JIRT interview.
- 64 Only one child stated that the defence lawyer’s questions were no more difficult than those asked by the prosecutor. However, this child had been cross-examined by one of the two lawyers who had been rated as adapting his linguistic style to that of the child.
- 65 As Davies & Seymour (1997, p. 227) point out, children who have been sexually abused “often have poor self-esteem, blame themselves, feel guilty and ashamed of the abuse” so accusations that they are lying may undermine their confidence and “fragment an already fragile self-image” to such a degree that it diminishes their ability to testify clearly and fully.
- 66 Similarly, Davies & Seymour (1997, p. 226) found that, in 19 (73%) of the 26 transcripts which they analysed of child sexual assault trials held in New Zealand, defence “lawyers accused the child witnesses of lying, either directly or in more subtle ways”.
- 67 Cashmore & Bussey (1995, p. 4)
- 68 For example, Sas (2002) states that:
- Children’s feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as some one who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses.
- 69 The types of interventions were very similar to those devised by O’Kelly, Kebbell, Hatton & Johnson (2003). For some interventions, more than one category applied because the judge/magistrate had more than one reason to intervene.
- 70 The number of judicial interventions for each of the categories were significantly inter-correlated (at $p < 0.01$) and also with the number of crown objections during cross-examination.

- 71 As a result of the small number of trials in the two jurisdictions and the high level of variability, any conclusions about differences between the specialist jurisdiction and the comparison registry are not reliable.
- 72 The association between the number of times judges intervened (especially to clarify the line of questioning) and the number of objections by the crown is not surprising given the judgement in an appeal case judgement in several English and Australian appeal cases (Jones v. National Coal Board (1957) 2 WLR 760; R. vs Lars; R. vs RPS NSWCCA 13/8/97) in which Hunt J. at CL stated in his judgement:
- There is, of course, nothing wrong with an intervention by the judge in order to clarify some ambiguity in the question or the answer. Otherwise, the judge is treading on dangerous ground if it is counsel for the accused who is being challenged and **if there has been no objection by the crown prosecutor** [emphasis added]. Where the problem arises in relation to a perceived misquotation of the evidence, the same danger arises. ... Whenever the judge interrupts counsel for the accused **in the absence of an objection**, the impression may be conveyed that the judge was on the side of the prosecution and did not think that the accused had any defence.
- 73 The number of times judges intervened to clarify the line of questioning was not associated with the ratings of the extent to which the defence lawyers matched the linguistic style of the child, as rated by the researchers ($r = 0.20$, $n = 17$, $p = 0.45$). Neither was it associated with the number of times the child asked for the question to be clarified ($r = 0.14$, $p = 0.61$) but this was strongly correlated with the ratings of the extent to which the defence lawyer adopted the linguistic style of the child ($r = 0.93$, $p = 0.000$).
- 74 For example, in terms of judicial interventions in order to clarify issues with the witnesses, there were, on average 10.7 interventions (standard deviation = 13.5) per trial for witnesses from the general population and 7.4 interventions (standard deviation = 7.1) for witnesses with learning disabilities. The respective figures for interventions directed to the lawyer were 4.3 (standard deviation = 4.7) and 2.9 (standard deviation = 3.4).
- 75 The correlation between the perceived difficulty of the defence lawyer's questions and the perceived fairness of their treatment in court by the judge was -0.79 ($n = 10$, $p = 0.006$) and the perceived fairness of their treatment by the defence lawyer was -0.74 ($n = 10$, $p = 0.015$). Given the small number of cases, these figures should be treated with caution but the size of the correlations is notable.
- 76 Children's comments in this study are very similar to those made in other studies conducted both in Australia and in other jurisdictions. For example, in relation to a well-respected three-year follow-up study of child witnesses in Canada, Sas (2002) reported: "One adolescent child made the following statement when asked to describe the cross-examination: 'It was all misleading questions and trickery'" (p. 113). Another younger child referred to their memory of the cross-examination in this way: "The only thing I remember is how the defense lawyer grilled me, twisted everything I said, made me feel like a criminal and my step father the victim" (Sas et al. 1993, p. 114).
- 77 Other problems identified by the inquiry but not dealt with by the specialist jurisdiction included concerns about tendency and relationship evidence, separate trials, judicial warnings and the need for expert evidence to be admissible. However, the jury study, which is still underway, deals with judicial warnings.
- 78 Royal Commission into the New South Wales Police Service (1996), vol. 5, p. 1092.
- 79 An audit of the equipment in courts across the State and increased funding to rectify the deficiencies were recommended by the Law and Justice Standing Committee (2002, Recommendation 30).
- 80 One option may be for the support person to have some means of signalling to the judge that the child needs a break, allowing the judge to ask the child. This would not remove control from the judge and would remove the onus on the child to ask for a break.

- 81 Henderson (2002) suggests that the strategies used by defence lawyers in cross-examining children are designed, both intentionally and through ignorance, to confuse and produce unreliable evidence that discredits the witness. Kebbell (unpublished) outlines the various techniques used to confuse and discredit witnesses. These include quick changes of subject, frequent interruptions, ‘jumping around’ in relation to the chronological order of events, focusing on peripheral aspects of the events, and various ‘trick’ and leading questions.
- 82 Lord Denning, for example, in a well-known case (*Jones v. National Coal Board* (1957) 2 WLR 760) stated in his judgement that:
- It is only by cross-examination that a witness’s evidence can be properly tested, and it loses much of its effectiveness in counsel’s hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer... Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy sometimes to return.
- 83 The Layton report (2003, p. 15.14), for example, commented that:
- In the end, much depended on the sensitivity of the Judge to the effect of the process of cross-examination on the child as to whether an inappropriate approach was permitted to continue.
- 84 Section 106I (1)(b) of the *Evidence Act 1906 (WA)* allows children in sexual offences cases to give the whole of their evidence at a hearing held before the trial. The hearing is conducted according to the rules of evidence with examination, cross-examination and re-examination all conducted by counsel, subject to judicial control. The video-recording of the hearing is then presented at the trial instead of the child giving evidence orally. In Western Australia, where the bar is seen to be more accommodating than in New South Wales, the child has rarely been called to give evidence in person at trial on the grounds that the defence needs to test the evidence further.
- 85 According to the Victorian Law Reform Commission (2004, p. 281, citing Corns 2001), “approximately 580 of the 1200 children who have given evidence in specified sexual offence cases in Western Australia since 1995 have given pre-recorded evidence in accordance with section 106I(b) of the *Evidence Act 1906 (WA)*”.
- 86 Eastwood & Patton (2002); NSW Legislative Council Standing Committee on Law and Justice (2002); Victorian Law Reform Commission (2004).
- 87 These include the reports by the Royal Commission into the NSW Police Service (1997), the joint report by the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997), the Queensland Law Reform Commission (2000), the NSW Legislative Council Standing Committee on Law and Justice (2002), and the Victorian Law Reform Commission (2004).
- 88 The NSW Commissioner for Children and Young People has also examined and argued in favour of pre-recording the whole of the children’s evidence (NSW Legislative Council Standing Committee on Law and Justice 2002, pp. 181, 183, 187).
- 89 Legislative Standing Committee on Law and Justice 2002, *Report on Child Sexual Assault Prosecutions*, Report 22, Recommendation 43, paragraph 7.38.
- 90 *Report on Child Sexual Assault Prosecutions* (2002) paragraphs 7.1–7.8.
- 91 *Report on Child Sexual Assault Prosecutions* (2002) paragraph 7.39.
- 92 *Report on Child Sexual Assault Prosecutions* (2002) paragraphs 5.18–5.32.
- 93 Section 6 *Evidence (Children) Act 1997* – sections 11 and 18 also provide for children aged over 16 but under 18 to use special measures under the Act in certain circumstances.
- 94 Section 17(a) *Evidence (Children) Act 1997*.
- 95 Section 3(1) *Evidence (Children) Act 1997*.

- 96 Section 11 *Evidence (Children) Act 1997*.
- 97 Section 18 *Evidence (Children) Act 1997*.
- 98 Section 24 *Evidence (Children) Act 1997*.
- 99 Section 27 *Evidence (Children) Act 1997*.
- 100 Section 28 *Evidence (Children) Act 1997*.

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APPENDIX A – DETAILS OF THE INTERVIEW PROGRAM FOR CHILDREN

A purpose-specific computer-assisted interview program for child complainants was developed in conjunction with Associate Professor Jeanette Lawrence, University of Melbourne; and Andrew Vincent and Hugh Campbell, Highbrow Interactive. The aim of the program was to offer children an alternative that they might find more engaging and less intimidating than a face-to-face interview. Computer-assisted interviewing has several advantages:

- It is preferred by some children and adolescents when answering questions about sensitive areas such as sexual and drug-related activities and has been found to encourage greater 'honesty' or disclosure (Paperny et al. 1990).
- It allows respondents greater confidentiality because their answers cannot be overheard.
- It can allow children to hear as well as see the questions and therefore overcomes some problems with reading skills.
- With interesting icons and self-paced presentation, it presents the questions in a systematic but less boring manner than face-to-face interviewing.
- It records the responses with less chance of error in transposing data from one form to another (Black & Ponirakis 2000).

The program developed for the current study comprised a series of screens which presented questions about:

- the rooms where children waited and where they gave evidence (in the CCTV room or the remote witness suite) [see Figure 1];
- their choice about the use of CCTV [See Figure 2];
- the pre-recorded interview and whether it was played at court, and how they felt about that;
- the way they were treated at court;
- the questions they were asked; and
- the perceived fairness of the outcome, the judge and the lawyers [See Figure 3].

The program could also be adapted as an aid in preparing children for court or debriefing them afterwards.

Figure 1: Question about the rooms where children waited and where they gave evidence

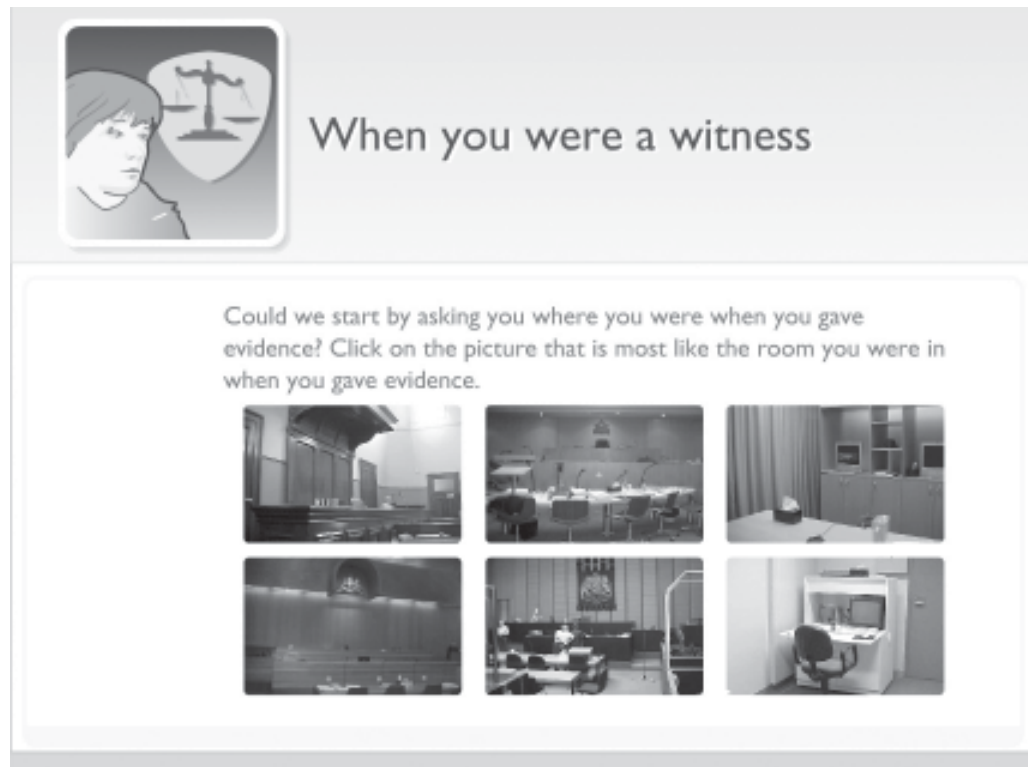


Figure 2: Questions regarding their choice about the use of CCTV

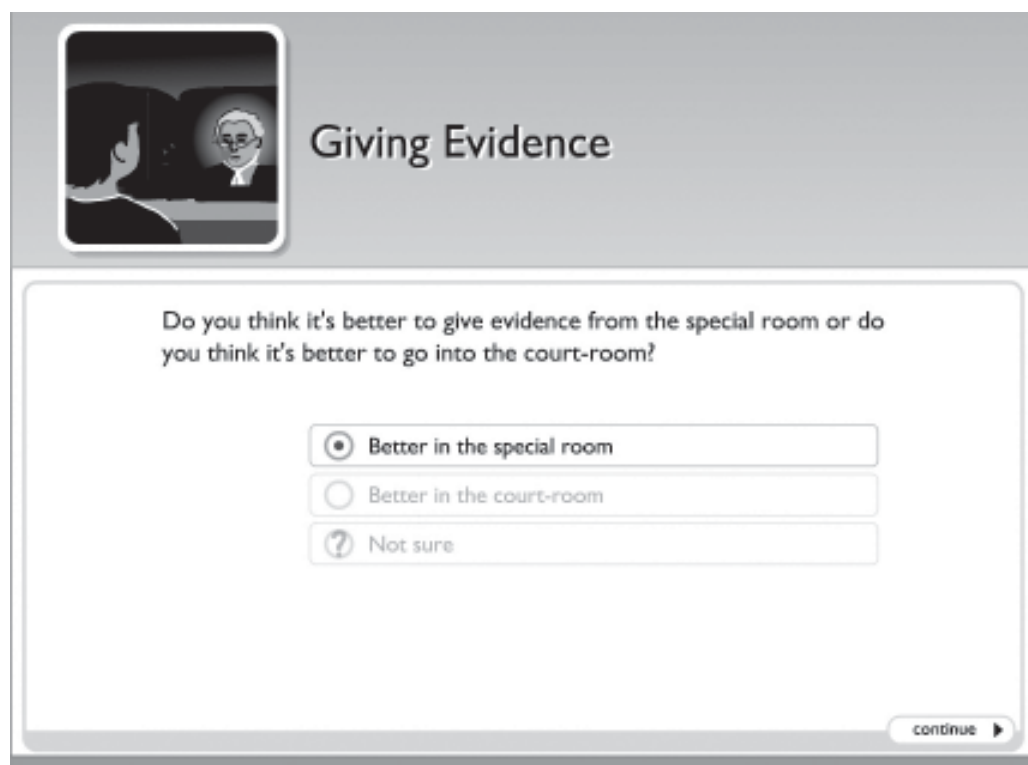
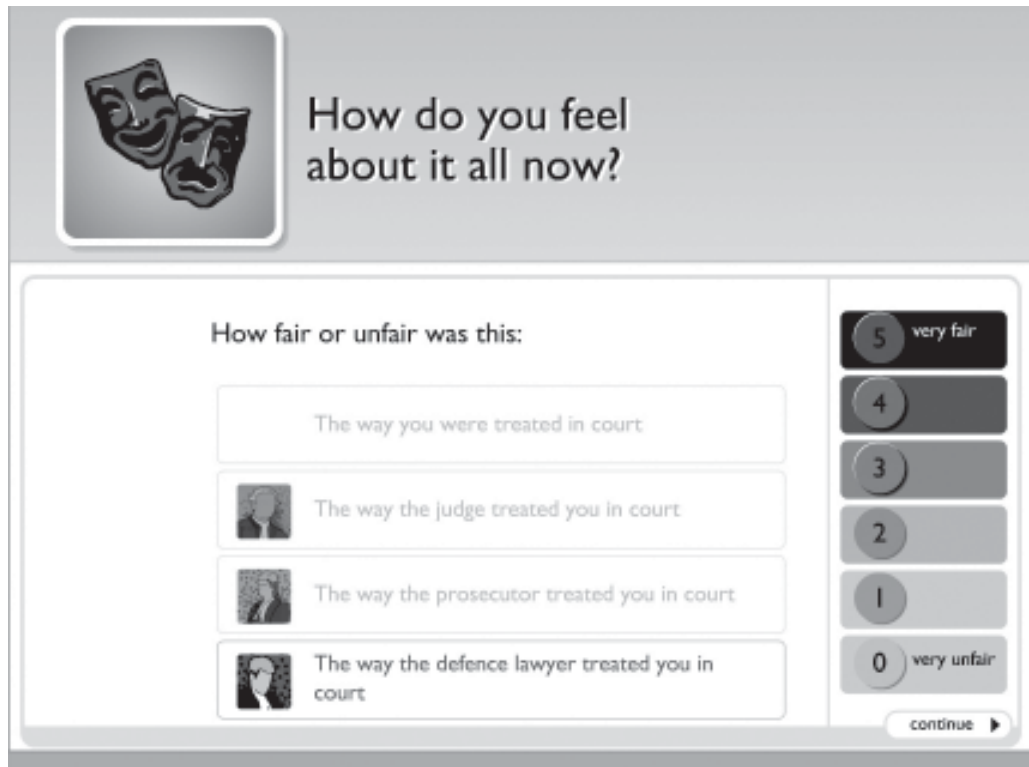


Figure 3: Series of questions on fairness of the court process and main players



The screenshot shows a survey interface. At the top left is an icon of two theatrical masks (one smiling, one frowning). To the right of the icon is the text "How do you feel about it all now?". Below this is a section titled "How fair or unfair was this:" followed by four questions, each with a small icon of a person. To the right of the questions is a vertical rating scale from 5 to 0. The scale is labeled "5 very fair" at the top and "0 very unfair" at the bottom. A "continue" button with a right-pointing arrow is at the bottom right of the scale.

How do you feel about it all now?

How fair or unfair was this:

- The way you were treated in court
- The way the judge treated you in court
- The way the prosecutor treated you in court
- The way the defence lawyer treated you in court

5 very fair

4

3

2

1

0 very unfair

continue ▶

APPENDIX B – *NSW EVIDENCE (CHILDREN) ACT 1997*

The *Evidence (Children) Act 1997* entitles a child to give evidence in different ways (Section 9):

1. “in the form of a recording ... that is viewed or heard, or both, by the court”. This recording could be (Section 3, Definitions):
 - a) an audio recording, or
 - b) a video recording or a video, or
 - c) a video recording accompanied by a separately but contemporaneously recorded audio recording;
2. orally in the courtroom;
3. by alternative arrangements, namely, screens, planned seating arrangements, or the adjournment to other premises (Section 24 (3));
4. by means of a written statement.

A child is entitled to give evidence-in-chief “either wholly or partly in the form of a recording made by an investigating official of the interview” (Section 11 (1)). While Section 10 allows the child’s wishes to be taken into account in relation to how he/she will give evidence, Section 11 (2) requires the child to be available for cross-examination and re-examination either orally in the courtroom or by alternative arrangements. Thus there is no legislative presumption that the child’s entire evidence (consisting of evidence-in-chief, cross-examination and re-examination) be pre-recorded and admitted.

Furthermore, the legislation places a number of conditions on the recording and admission of a child’s evidence. For example, the recorded evidence (Section 12 (2))

is not to be admitted unless it is proved that the accused person and his or her lawyer (if any) were given ... a reasonable opportunity to listen to and, in the case of a video recording, view the recording.

The court may rule either all or part of the recording inadmissible (Section 12 (3)) and the judge must warn the jury (Section 14)

not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

More generally, giving evidence by way of a recording is at the discretion of the court (Section 15 (1, 2)):

a child must not give evidence by means of recording made by an investigating official ... if the court orders that such means not be used ...if it is satisfied that it is not in the interests of justice.

Section 18 gives a child the right to give evidence by means of closed-circuit television facilities or similar technology. This right also applies to a child who is aged 16 years or more but less than 18 years when the evidence is given if the child was aged less than 16 years when the charge was laid (Section 18 (1, 1A)).

However, as for giving evidence by way of recording, the right to give evidence by closed-circuit television is at the discretion of the court (Section 18 (3, 4)).

If a child is entitled or permitted to give evidence either by closed-circuit television or similar technology from a location outside the court, but the court is not equipped with these facilities, then the court may adjourn to another court or location which is equipped with the facilities (Section 22 (2)). In addition, the court can order (Section 20 (2)):

- a) that a court officer be present at that other location, and
- b) that any other person be present with the child as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support.

However, the legislation requires that the facilities be operated in such a way that (Section 23)

the persons who have an interest in the proceeding are able to see the child (and any person present with the child) on the same or another television monitor.

The child cannot give identification evidence by means of closed-circuit television (Section 21 (1)) and the judge must (Section 25 (1)):

- a) inform the jury that it is standard procedure,
- b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those facilities or that technology.

The judge must give similar warnings to the jury when the child is giving evidence by means of the alternative arrangements or in the presence of a supportive person.

In addition to the child having the right to a supportive person when giving evidence by closed-circuit television (Section 20), Section 27 of the legislation entitles a child to have one or more supportive person(s) near him/her when giving evidence in other circumstances. The child is permitted to choose that person and to have that person within his/her sight (Section 27 (3)).

While in NSW, the *Evidence (Children) Act 1997* gives children the statutory right to give evidence by closed-circuit television, in Western Australia use of closed-circuit television is mandatory and thus standard practice where these facilities are available. The court in Western Australia has no discretion – if there is no pre-recorded video-tape of the child's evidence, it is mandatory for the court to make arrangements for the child to give evidence by closed-circuit television, if these facilities are available and unless the child chooses otherwise, or with the use of screens. As noted earlier, in NSW, the availability of these facilities is at the discretion of the court.

Many of the features of the Sydney West Child Sexual Assault Specialist Jurisdiction have been in operation in Western Australia for more than a decade. This resulted from the introduction in November 1992 of vulnerable witness legislation, specifically amendments to *Western Australia's Evidence Act 1906*, and associated procedural reforms.

APPENDIX C – COURT AND CCTV ROOM FACILITIES

Remote Witness Suite, Parramatta



Figure 1a: Reception area



Figure 1b: CCTV room



Figure 1c: TV/Video room



Figure 1d: Interview room



Figure 1e: Play area

APPENDIX C – COURT AND CCTV ROOM FACILITIES (continued)

CCTV rooms at other courts



Figure 2: Penrith Court



Figure 3a: CCTV room 1, Campbelltown Court

Figure 3b: CCTV room 2, Campbelltown Court



Figure 4a: CCTV room 1, Downing Centre

Figure 4b: CCTV room 2, Downing Centre

APPENDIX C – COURT AND CCTV ROOM FACILITIES (continued)

Waiting rooms and play areas



Figure 5: Campbelltown Court



Figure 6: Penrith Court



Figure 7: Downing Centre

APPENDIX C – COURT AND CCTV ROOM FACILITIES (continued)

Courtrooms



Figure 8: Cambelltown Court



Figure 9: Parramatta Court



Figure 10: Penrith Court



Figure 11: Downing Centre (comparison registry)

APPENDIX D – *PILOT CHILD SEXUAL ASSAULT JURISDICTION: BACKGROUND PAPER*

Background to Pilot

In November 2002 the Legislative Council Standing Committee on Law and Justice released its *Report on Child Sexual Assault Prosecutions* (“the Standing Committee Report”). The principal recommendation of the Standing Committee Report was that the Attorney General establish a pilot project to trial a specialist jurisdiction for child sexual assault prosecutions.⁸⁹ This recommendation was modelled upon a proposal by the Director of Public Prosecutions to the Committee to pilot a specialist child sexual assault court.⁹⁰

The pilot recommended by the Committee had the following key features:

- selection of interested judicial officers, prosecutors and court staff with specialised training in child development and child sexual assault issues;
- courts equipped with high standard electronic facilities for the use of special measures (i.e., CCTV), and proper training of staff in the use of the equipment;
- pre-trial hearings to determine the special needs of the child and readiness to proceed;
- a presumption in favour of using special measures, including admission of pre-recorded evidence and support persons;
- a presumption that children will not be required to give evidence at committal hearings; and
- appropriate child-friendly facilities, furnishings and schedules.

The Standing Committee Report emphasised that one of the purposes of the pilot project would be to examine whether the recommended features would improve the experience of child sexual assault complainants to inform any decision about whether to establish the specialist jurisdiction on a permanent basis. The Standing Committee Report therefore recommended that an extensive evaluation of the pilot project be conducted.⁹¹

In December 2002, the Attorney announced the establishment of a specialist child sexual assault jurisdiction to be trialed initially in Sydney West at Courts in Parramatta, Penrith and Campbelltown. The pilot commenced at the end of March 2003 at Parramatta and was rolled out to courts at Penrith and Campbelltown during October 2003. More recently, the pilot has been extended to the District and Local Courts at Dubbo where it commenced operation in late February.

Aims of Pilot

The pilot is primarily an operational policy initiative involving the implementation and evaluation of improved procedure in sexual assault proceedings. The main aims of the pilot are to:

- improve the experience of coming to court for child victims of sexual assault; and
- address difficulties with successfully prosecuting child sexual assault cases.

Features of Pilot

Key features of the jurisdiction as implemented by the Attorney General's Department include:

- upgraded state-of-the-art technology in courtrooms and remote witness suites;
- ongoing training for court staff in the use of new technology;
- ongoing technical support from head office in the use of new technology;
- dedicated child-friendly waiting areas catering for witnesses and carers;
- increased use of alternative measures for giving evidence such as CCTV and pre-recorded police video/audio evidence;
- early identification and case management of child sexual assault matters; and
- specialist training resources for judicial officers and prosecutors.

In particular, the Standing Committee Report identified the following as significant problems with existing court facilities:

- the absence of child-appropriate furniture;
- the lack of appropriate waiting areas to accommodate children and their carers during lengthy trials; and
- the ongoing potential for child complainants who give evidence at a court complex to come into contact with the accused and his or her family.⁹²

To address these concerns, a remote witness facility has been set up a few blocks from the Parramatta Court House, using excess floor space in existing Departmental offices. The remote witness facility is close to the train and bus stations at Parramatta for ease of access, and is capable of servicing courts at Parramatta, Penrith and Campbelltown. It is staffed by court staff and Sheriff's officers from Parramatta on an as-needed basis.

The remote witness facility includes:

- two CCTV witness rooms to allow for a double booking of the facility where there are multiple child sexual assault matters listed in Sydney West;
- a child-friendly waiting room with tea and coffee facilities and a play area to accommodate children and their carers during lengthy trials;
- a separate room to conduct private interviews with child witnesses as necessary; and
- telephone and fax facilities to allow for communication between the court and the remote witness facility.

Access to the remote witness facility, including access by court support services for the purposes of witness preparation, is arranged through an electronic booking system. The electronic booking system is managed by court staff at Parramatta courthouse but is accessible to, and may be edited by, judicial officers and court staff at all courts involved in the Sydney West pilot.

Scope of the Pilot

It is considered that a significant issue for the pilot and the success of the jurisdiction is judicial leadership. The Standing Committee Report recommended the selection of interested judicial officers to participate in the pilot. While this aspect of the recommendation has been explored, the Government has not adopted it as policy because it was considered to be inappropriate and unworkable. It is worth noting that neither Western Australia nor specialist family violence jurisdictions in Canada, such as Manitoba, utilise specialist judges. The focus in Manitoba, for instance, is on specialist

prosecutors who take on the role of educating the court in the course of conducting sexual assault matters.

Judicial education and involvement has been, and continues to be, an integral part of the pilot. A Judicial Education Working Group chaired by Ruth Windeler, Director of Education, NSW Judicial Commission, undertook a number of initiatives during 2003 aimed at improving judicial education in the area of child sexual assault including:

- sessions on the pilot jurisdiction at the Annual Courts Conferences;
- provision of a package of research materials on child sexual assault and childhood development issues to all judicial officers statewide; and
- seminars for judicial officers on child sexual assault related matters.

Under the pilot, it is intended that child sexual assault matters be identified at an early stage to ensure that the options available under the *Evidence (Children) Act 1997* are considered. It is hoped that a draft Practice Note recently prepared for consideration by the Chief Judge will highlight issues for pre-trial consideration once published.

The *Evidence (Children) Act 1997* is used as the legislative basis to determine which matters come within the scope of the pilot. Most trials and defended hearings involving offences of a sexual nature, where the complainant is under the age of 18 years at the time of giving evidence will come within the scope of the pilot.

While the *Evidence (Children) Act* applies generally in relation to evidence given by children under the age of 16 years,⁹³ certain provisions also apply particularly to matters involving a “personal assault offence”.⁹⁴ A personal assault offence is defined as including any:

...offence under Part 3 (Offences against the person) of the *Crimes Act 1900* and an offence under section 227 (Child and young person abuse) of the *Children and Young Persons (Care and Protection) Act 1998*...

Special measures which may be used in presenting children’s evidence in proceedings involving an alleged personal assault offence include:

- admission of any electronic recording of an investigative interview as all or part of a child’s evidence-in-chief;⁹⁶
- the transmission of a child’s evidence by means of closed-circuit television or any other similar technology;⁹⁷
- the use of alternative arrangements such as screens and planned seating arrangements where closed-circuit television facilities are not available;⁹⁸
- the presence of a supportive person while a child is giving evidence;⁹⁹ and
- protection from cross-examination by unrepresented accused.¹⁰⁰

Ongoing legislative reform

To date, the pilot has mainly relied on existing legislative provisions, such as those found in the *Evidence (Children) Act 1997*. However, an additional benefit of the project has been its function as a basis from which to explore and promote further legislative reform. With the focus on improving the position of child witnesses, there is likely to be ongoing legislative reform.

Since the commencement of the pilot, the *Criminal Procedure Act 1986* has been amended to exempt child complainants in sexual assault proceedings from being required to attend committal proceedings to give oral evidence under any circumstances. Child complainants in sexual assault proceedings have also been

exempted from being subjected to cross-examination by unrepresented accused persons under any circumstances.

Furthermore, there have been technical amendments to the *Evidence (Children) Act 1997*. Section 11 of that Act currently provides for a recording of a child's initial investigative interview with the police to be admitted as that child's evidence-in-chief. Recent amendments make it clear that when such a recording is being played to the court as evidence-in-chief, the child concerned is not to be present in the court, or audible or visible to the court, by way of closed-circuit television or similar technology, unless the child specifically chooses to be present in court. A further amendment to that Act clarifies the role of transcripts in the evidentiary process by making it clear that the court may exercise its discretion to permit a transcript of the recorded police interview to be used to assist the jury in understanding the child's evidence.

Oversight of the Pilot

Since the commencement of the pilot, an interagency Project Team made up of representatives from a wide range of stakeholder agencies including the Judiciary, the Magistracy, the Legal Aid Commission, the Department of Health, the NSW Sheriff's Office, the Judicial Commission, NSW Police Service, DPP, Victims Services, Department of Community Services, the Bar Association, the Law Society and Courts Administration, has been working on advancing the necessary capital works, technology, training and procedural issues to implement the pilot at an operational level. The pilot is being monitored on an ongoing basis by the Project Team to ensure any deficiencies are identified and remedied at an early stage.

Evaluation

A formal evaluation of the pilot has been commissioned through the Bureau of Crime Statistics and Research and will consider the impact of the pilot on the expeditious handling of child sexual assault matters, the environment in which evidence is given, the use of technology, the quality of information and support given to witnesses as well as the impact, if any, on rates of successful prosecutions.

APPENDIX E – SEXUAL ASSAULT OFFENCES

Aggravated sexual assault is defined in the following manner (*Crimes Act 1900 No. 40, 61*):

- 1) ... sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse...
- 2) In this section, *circumstances of aggravation* means circumstances in which:
 - a) at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
 - b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
 - c) the alleged offender is in the company of another person or persons, or
 - d) the alleged victim is under the age of 16 years, or
 - e) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
 - f) the alleged victim has a serious physical disability, or
 - g) the alleged victim has a serious intellectual disability.